

Discrimination – Key Concepts –

Directives 2000/43 and 2000/78

ERA Seminar for the Judiciary
Applying EU Anti-Discrimination Law
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1

Scope of the directives

Directive 2000/43 (race & ethnic origin)

Directive 2000/78 (age, religion, disability, sexual orientation)

- Both directives cover discrimination in the field of **employment**, but directive 2000/43 covers **more areas**
- Specific **exceptions** allowed for **age** and **disability**

2

Concepts covered:

Part I	Direct discrimination
Part II	Indirect discrimination
Part III	Harassment

Part I: Direct discrimination

Directive 2000/43: art 2.2(a)
Directive 2000/78: art 2.2(a)

Direct discrimination

- According to directives 2000/43 and 2000/78, direct discrimination shall be taken to occur where a person is
- (1) treated less favourably than another is, has been or would be treated
- (2) in a comparable situation
- (3) on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation

5

1. Less favourable treatment

Inequality by means of different treatment:

- No requirement that the treatment must be bad in absolute terms, just **worse** than the treatment **that others receive**, have received or would receive
- **N.B.** “Less favourable” must not be interpreted too narrowly. A treatment is less favourable if it deviates from an established norm or is less favourable to a person’s previous situation (e.g. dismissal, withdrawal of benefits)

6

1. Less favourable treatment

- **Actual** comparison with how someone who does not possess the protected characteristic is or has been treated
or
- **Hypothetical** comparison with how someone who does not possess the protected characteristic *would be* treated (deviation from an established norm)
- In cases of apparent mistreatment, inherently linked to a protected ground, the test is often superfluous (C-177/88, *Dekker*, p. 12 [*pregnancy*])

7

2. Comparable situation

- To be comparable, the situation does not have to be the same, **but similar enough** in order to identify whether the treatment of a person has been, or would be, less favourable than that of a **comparator**
- Operations of (sometimes very) complex analogical thinking which involve identifying **similarities** and **differences** and essentially deciding whether these are **relevant enough** to determine whether the situation is comparable or not

8

2. Comparable situation

The determination as to whether or not the situation is **comparable** is at the very core of the discrimination assessment as it fills a **double function** with respect to

- (i) the question as to whether a **less favourable treatment** is at all **discriminatory** (because a less favourable treatment in a non-comparable situation is not covered by the prohibition),
and if so
- (ii) the question as to whether the **treatment** can be **presumed** to be **causally linked** to the protected ground.

9

2. Comparable situation

If the situation **is not** comparable: => The plaintiff loses (no need to discuss whether or not there is causal link)

If the situation **is** comparable => The less favorable treatment thus established, either fully proves, or creates an evidentiary presumption of the existence of a causal link to the protected ground

10

2. Comparable situation?

Example 1:

- Ethnic majority person **allowed** entry in store at 17.45
- Visible minority person **refused** entry in store at 17.50

Example 2:

- Ethnic majority person **allowed** entry in store at 17.55
- Visible minority person **refused** entry in store at 17.59

In both examples the store closes at 18.00.

11

2. Comparable situation?

The determination as to whether someone is/has been in a comparable situation can be highly sensitive. For example:

- Is a nurse using a wheelchair in a comparable situation with a nurse without any movement disabilities?
- Is a job applicant who, for religious reasons, respectfully greets everyone by putting his/her hand on his/her chest in a recruitment situation comparable to an employee who greets everyone with a handshake?
- Is a minority person, with another hair type than the ethnic majority, in a comparable situation with a person belonging to the ethnic majority, for the purpose of getting a haircut by a hairdresser, only experienced in cutting the hair type of the ethnic majority?

12

3. On grounds of race or ethnic origin, religion, age etc.

If a less favourable treatment in a comparable situation is established => a causal link with the protected ground is **presumed**.

The presumption can be broken by evidence proving that the less favourable treatment was due to another cause, not connected to the protected ground.

Example: If it is proven that the reasons for a younger, less qualified job applicant being hired over an older job applicant, relate to the younger person's family ties with the manager, the older applicant is less favourably treated, but not on grounds of age.

Important: Not only members of protected groups can be less favourably treated for reasons pertaining to a protected ground. All persons who suffer less favourable treatment in a comparable situation on **such grounds** are protected (C-83/14, *Chez RB* p. 56) => also persons **wrongly presumed** to be of a particular religion, ethnicity, age etc. or because they are **associated with** a member of a protected group, can be subject to direct discrimination.

Part II: Indirect discrimination

Directive 2000/43: art 2.2(b)

Directive 2000/78: art 2.2(b)

Indirect discrimination

1. An apparently **neutral provision**, criterion or practice that
2. would put persons of a protected group (racial or ethnic origin, religion or belief, sexual orientation, disability or age) at a **particular disadvantage** compared with other persons; AND
3. the provision, criterion or practice does not fulfil a **legitimate aim**; OR
4. cannot be justified as an **appropriate** and **necessary** means to attain the legitimate aim.

Please note in certain cases, persons **not themselves** belonging to the protected group can also be victims of indirect discrimination if they suffer a particular disadvantage **together with the protected group** (C-83/14, *Chez RB* p. 56 and 60).

15

1. Apparently neutral provision, criterion or practice

Examples of apparently neutral measures:

- A restaurant dress code prohibiting waiters to wear anything on the head
- An employment policy demanding candidates to provide proof of physical fitness by exercises recorded in a training app
- An employment policy demanding job candidates to demonstrate a driving license issued by an EU MS

16

1. Apparently neutral provision, criterion or practice

In order to be considered an “apparently neutral” measure, it **must not specifically target** persons belonging to a protected group. This can be the case because of:

- (a) an **inextricable link** to a protected ground (“Old age pension”, C-499/98, *Ole Andersson* p. 23),
- (b) a **discriminatory purpose** (C-83/14, *CHEZ RB* p. 76 and 91)
- (c) a **discriminatory application** (C-83/14, *CHEZ RB* p. 109 the second indent)

17

2. Particular disadvantage for a protected group compared to another group

The neutral measure must entail a **particular disadvantage** for the protected group i.e. the measure should **negatively** affect a **far larger portion of members** of the protected group **compared to the portion** of members **negatively** affected in a group **not displaying** the protected characteristic. (C-83/14 *Chez RB* p. 100-101)

Example: Most of the men in religious group X are bearded as opposed to a minority of the men not belonging to religious group X. Thus, men in religious group X suffer a particular disadvantage by a “no beard policy”.

Important: in many cases the particular disadvantage need not be proven “in practice”. It’s enough that the measure *is liable* to have such a negative effect (C-237/94, *O’Flynn* p. 21). If the group definition is made narrow, this is far easier, e.g; “Men belonging to religious group X who wear a beard for religious reasons”

However: in situations where a particular disadvantage cannot readily be assumed by the court, statistical evidence may be required to prove it.

18

2. Particular disadvantage for a protected group (group comparison)

Which groups could be particularly negatively affected by the following “neutral rules”?

Would you need to provide statistical evidence to prove it?

- (a) A restaurant applies dress code prohibiting waiters to wear anything on the head
- (b) An employment policy for fashion salesclerks demands candidates to provide proof of physical fitness by running times recorded in an app

19

3. Objective justification – legitimate aim

If the applicant succeeds in convincing the court that the **neutral measure** would put members of a protected group at a **particular disadvantage**, there is a *prima facie* case of indirect discrimination. It is then for the actor that applies the neutral measure to **justify** it in the light of one or more **legitimate aims**. If several aims, each and everyone of them can be used separately to justify the measure.

No exhaustive list of possible legitimate aims, but the aim must objectively address a real need, which sometimes requires proof (C-83/14, *Chez RB* p. 116) and be unrelated to discrimination (Case 170/84, *Bilka* p. 30).

Important: If any of the actual aims behind the neutral measure is tainted by considerations related to a protected group – the application of the measure to persons belonging to that group will be directly discriminatory (C-83/14, *Chez RB* p. 91).

20

3. Objective justification – proportionality

The challenged neutral measure must be deemed **appropriate** and **necessary** to attain the **legitimate aim**. This is a proportionality assessment that is made in relation to each of the stated aims.

The test of whether the rule is **appropriate** is essentially a functional test – **can** the challenged rule **attain** the aim in question?

The test as to whether the rule is **necessary** is a test whether the aim could be attained **by less restrictive means** than the neutral rule.

Important: even if the measure in the abstract could be seen as the **most effective** to attain the aim, it could still be deemed **disproportionate** if the disadvantages to the persons affected are such that they outweigh the advantages. The legitimate interests of the persons affected cannot be excessively prejudiced.

(C-83/14 *Chez RB* p. 123 and 128)

Direct or indirect discrimination?

- (a) Dress code banning all religious symbols (applied to everyone)
- (b) Dress code banning all headgear (applied to everyone)
- (c) Dress code banning all headgear, but only applied to muslim women
- (d) Employment policy not allowing persons born in North Korea to be hired

Part III: Harassment

Directive 2000/43: art 2.3

Directive 2000/78: art 2.3

23

Harassment

An **unwanted conduct** that is **related to any of the protected grounds** of race, religion or belief, sexual orientation, disability or age.

That has the **purpose or effect** of **creating an intimidating, hostile, degrading, humiliating or offensive environment**.

No need for a comparator!

Examples: Name-calling, offensive jokes based on stereotypes, questioning of religious beliefs or practices, freezing out, unwarranted questioning of capacity to perform work, regular assignment of tasks clearly below qualifications/pay grade.

Note: Persons who are not members of a protected group can also be harassed on any of the protected grounds, e.g. by being **presumed** to belong to the protected group or by being **associated to someone** who is (see C-303/06, *Coleman* p. 38 and 50 in the light of C-83/14, *Chez RB* p. 56)

24

Harassment or direct discrimination?

- (a) A black couple is asked to move table five times at a restaurant during dinner
- (b) A Roma guest at a fancy restaurant is loudly asked to pay in advance
- (c) A Jewish nurse is always scheduled on Saturdays despite her protests
- (c) A policy requires all employees to wear badges displaying their ethnicity and religion

25

Summary

Direct discrimination: someone is subjected to *less favourable treatment* than another person is, has been or would be treated in a *comparable situation, on grounds* of a *protected characteristic* (racial or ethnic origin, religion or belief, sexual orientation, disability or age).

Indirect discrimination: an *apparently neutral provision*, criterion or practice that would put persons of a *protected group* (identified by racial or ethnic origin, religion or belief, sexual orientation, disability or age) at a *particular disadvantage* and the apparently neutral provision, criterion or practice cannot be objectively justified as an *appropriate* and *necessary means* to attain a *legitimate aim*.

Harassment: an *unwanted conduct*, linked to a *protected ground* (racial or ethnic origin, religion or belief, sexual orientation, disability or age), that has the *purpose* or *effect* of creating an intimidating, hostile, degrading, humiliating or offensive *environment*.

26