

EU anti-discrimination law: Definition of key concepts

Prof. Dr Christa Tobler, LL.M.
Europa Institutes of the Universities of Basel (Switzerland) and
Leiden (Netherlands)

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A note on material

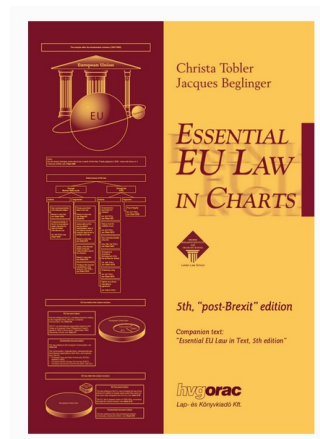
References to Charts in this presentation

- Such references refer to (partially updated) materials taken from:

Christa Tobler & Jacques Beglinger,
Essential EU Law in Charts, 5th, post-Brexit
edition, Budapest: HVG-Orac 2020,
www.eur-charts.eu

- (There is also a short supplementary text volume:
Christa Tobler & Jacques Beglinger,
Essential EU Law in Text, 5th, post-Brexit edition,
Budapest: HVG-Orac 2020; www.eur-charts.eu).

- Note: a new edition is in the making.



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Approaching the issue: what does a judge have to check?

Analysis of discrimination cases in EU law

- Preliminary step: identify the **potentially relevant EU legal instrument**.
- Analysis – is there discrimination in this legal framework?
 - Requires an analysis of all elements of the relevant provision(s).
 - Includes the concept of discrimination and thus the different **forms of discrimination = focus of this lecture**.
 - Further includes the issue of justification and procedural issues.
- Important for these questions:
 - Legal text *and* CJEU case law, the latter on **various discrimination grounds**; basically the same concepts in different areas of EU non-discrimination law.
 - For that reason, this presentation will also include some sex equality case law.

Approaching the issue: EU minimum rules

Freedom of action for the Member States

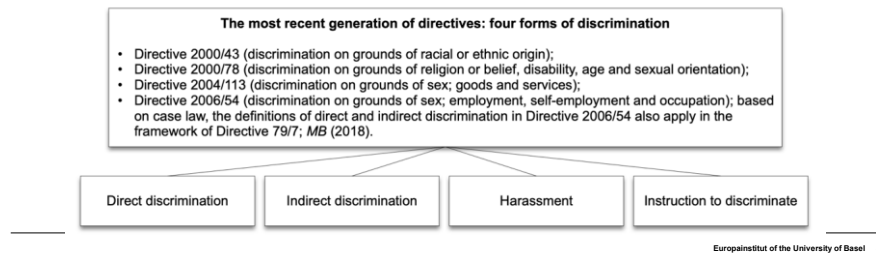
- Within the scope of EU law, the EU sets **only minimum requirements**.
- E.g. Art. 8(1) of Directive 2000/78, on religion or belief, disability, age and sexual orientation: «Member States may **introduce or maintain provisions which are more favourable** to the protection of the principle of equal treatment than those laid down in this Directive.»
- Meaning:
 - Member States may apply a higher standard of protection in their domestic law.
 - This concerns all aspects of EU anti-discrimination law, including also the definition of the different forms of discrimination.
- [Plus: outside the scope of EU law, the Member States can, of course, always go further.]

Approaching the issue: different forms of discrimination

Today: 4 explicitly mentioned forms of discrimination in modern EU law

- In modern EU law, there are 4 explicitly mentioned forms of discrimination:
 - **Direct discrimination**, *with* a legal definition.
 - **Indirect discrimination**, *with* a legal definition.
 - **Harassment and sexual harassment**, *with* a legal definition.
 - **Instruction to discriminate**, *without* a legal definition [not discussed further today as it is a simple concept].

- See for an overview **Chart 10/10**:



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Approaching the issue: different forms of discrimination

No such distinctions in the early times

- Equality and non-discrimination – a corner stone of integration from the very beginning. In the original EEC Treaty (now, after many amendments, the TFEU):
 - E.g. in the field of internal market law, Art. 48(2) EEC (now Art. 45 TFEU):
Freedom of movement for workers «shall entail the **abolition of discrimination based on nationality** between workers of the Member States as regards employment, remuneration and other conditions of work and employment.»
 - E.g. in the field of social law, first part of Art. 119 EEC (now Art. 157(1) TFEU):
«Each Member State shall [...] ensure and [...] maintain the application of the principle that **men and women should receive equal pay for equal work.**»
 - i.e. no discrimination on the basis of sex with respect to pay.
- **But note**: no mention of different forms of discrimination (plus a very limited number of discrimination grounds).

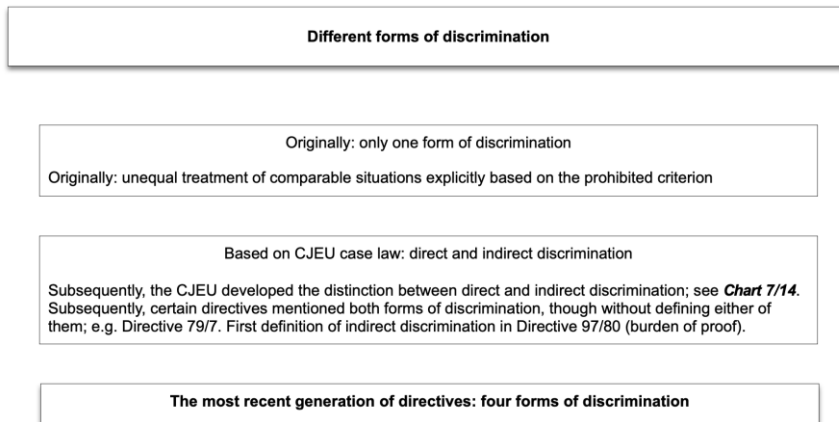
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Approaching the issue: different forms of discrimination

How did things develop?

– See again **Chart 10/10**:



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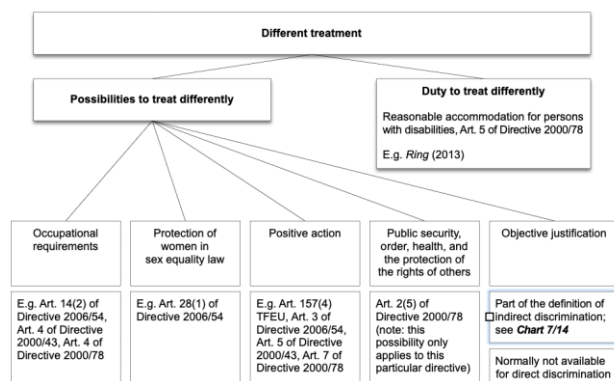
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Approaching the issue: a glimpse of justification

Different types of justification

– See **Chart 10/13**:

– The possibilities of justification may also depend on the type of discrimination (see under «objective justification»).



– From recent case law, the CJEU in Case C-38/24 (*Bervidi*):

An employer is required, in order to ensure compliance with the prohibition of (in this case: indirect) discrimination, to make reasonable accommodation even in cases of **discrimination by association**.

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Direct discrimination

Legal definition

– E.g. Art. 2(2)(a) of Directive 2000/43, on race and ethnic origin:

«direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin».

– Definition appears simple: focus on the use of the prohibited criterion. But: In more recent CJEU case law, it is less clear-cut ... (more on this later).

– Note:

The above leads to *prima facie* discrimination; there may be a possibility of justification.

Direct discrimination

Rather rare in CJEU case law today, except for age discrimination

– Can still often be found in the context of age discrimination, e.g. *Prigge* (see further below).

– For other grounds, direct discrimination concerns mostly specific cases such as *Feryn* (2008) regarding «speech acts» (public statements):

– Facts: director of a Belgian security installation company says publicly that he does not hire foreigners or Moroccan nationals. An interest group files a complaint.

– CJEU: «The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43.» (*Feryn*, para. 25) .

Direct discrimination

Age discrimination: e.g. *Prigge*

- Facts:
The German Lufthansa dismisses pilots when they reach the age of 60 (collective agreement). Three affected pilots file a complaint.
- CJEU:
 - This is **unequal treatment directly on the grounds of age**, para. 44: «Such a pilot is in a comparable situation to that of a younger pilot performing the same activity for the benefit of the same airline company and/or falling under the same collective agreement. The first pilot whose employment contract terminates automatically when he attains 60 years of age is treated in a less favourable manner, on grounds of his age, than the second.»
 - According to the CJEU, there is no justification (see below).

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Direct discrimination

Prigge (continued)

- Theoretically, three statutory grounds for justification could be considered (ground plus proportionality, i.e. suitable and necessary aim).
- However, none of them applied in the present case:
 - Neither Art. 2(5), **public safety**, here aviation safety: Prohibition of the activity is not necessary; at most, restriction of exercise would suffice.
 - Nor Art. 4(1), characteristic related to one of the grounds of discrimination referred to in Art. 1 of Directive 2000/78 and constituting a **genuine and determining occupational requirement**: disproportionate age limit.
 - And, finally, also not Art. 6(1), a **legitimate aim** to be understood as meaning in particular legitimate aims from the fields of employment policy, labour market and vocational training: only social policy aims, which is not the case here.

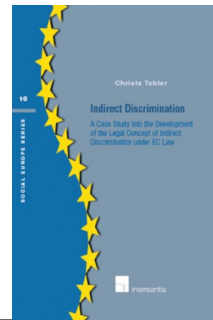
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The emergence of indirect discrimination

Development through case law

- Originally, the European Court of Justice interpreted the prohibitions of discrimination of the EEC Treaty in a uniform sense:
 - Prohibition of unequal treatment which is expressly based on the criterion mentioned therein (e.g. nationality).
 - Corresponds (in part) to the current concept of direct discrimination.
- Subsequently, the Court **added the concept of indirect discrimination**: formally based on a different criterion (e.g. something other than nationality).
- For the history of this case law, which began in 1969, see e.g. this book:



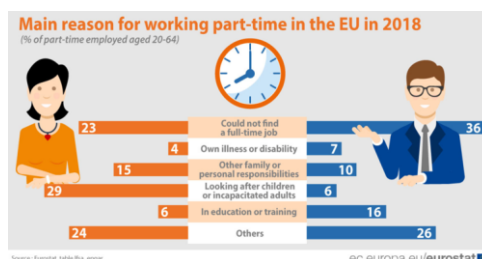
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The emergence of indirect discrimination

Rationale

- Reason for the new approach: **effectiveness** of the prohibition of discrimination, **prevention of circumvention**; e.g. *Sotgiu* (1974).
- Best known example from the field of sex equality:
 - Different pay for men and women (i.e. clearly based on sex) is prohibited.
 - In order to save money, an employer could be tempted to change approach and pay differently e.g. **on the basis working time**: more for full-time workers, less for part-time workers.
- That may disadvantage women in particular.



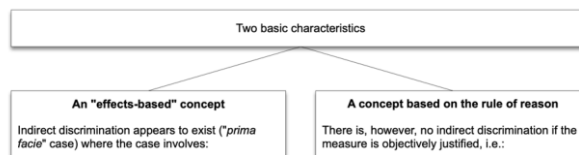
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Indirect discrimination

Essential elements/basic characteristics

- An **effects-based** concept:
 - Apparently neutral measure (regulation, criterion, procedure) ...
 - ... with (potentially) a de facto disadvantageous effect.
- A concept based on the so-called «*rule of reason*», with the possibility of **objective justification**:
 - Measure pursues a legitimate aim ...
 - ... and is proportionate (i.e. suitable and necessary in view of the legitimate aim).

- See **Chart 10/11**:



- [Note: in addition, there may be statutory justification grounds.]

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Indirect discrimination

Definitions

- Legal definition in Art. 2(2)(b) of Directive 2000/43:

«indirect discrimination shall be taken to occur where **an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage** compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.»

- Note the slight difference in the wording of Art 2(2)(b) of Directive 2000/78:

«would put persons of **a particular** religion or belief, disability, age or sexual orientation at a particular disadvantage compared with other persons».

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Indirect discrimination

Definitions

- So, a «**particular**» age, religion and so forth? See e.g. the *WABE* case (part of *WABE and Müller*):
 - Regarding compliance with the neutrality requirement of a childcare facility for employees with customer contact (no visible signs of political, ideological or religious convictions).
 - CJEU: indirect unequal treatment exists «if the apparently neutral obligation [...] results, in fact, in **persons adhering to a particular religion** or belief being put at a particular disadvantage» (para. 59).
- The Court in essence said the same even for ethnic origin; *Jyske Finans*.
- But note the recent decision in *Schackenborgvænge*: «the scope of Directive 2000/43 **cannot be limited to combating discrimination against a single ethnic group**» (= overruling *Jyske Finans*).
- Will the same follow for Directive 2000/78?

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Distinction between direct and indirect discrimination

Delimitation

- Direct and indirect discrimination concern the **intensity of the link** of the rule or action in question **with the discrimination ground**.
- Qualification has important consequences, notably in view of justification: In principle, direct discrimination can be justified only based on statutory justification grounds; see again **Chart 10/13**.
- Therefore, important questions:
 - **How strong must the link be** to amount to direct, rather than indirect discrimination?
 - How to **distinguish** between the two concepts?



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The distinction between direct and indirect discrimination

Shifting the dividing line by the CJEU

- Two lines of argumentation of the CJEU:
 - Reason for discrimination – *Nikolova*.
 - Type of criterion – *Szpital Kliniczny*; this line is more prominent.
- Briefly, the CJEU in *Nikolova*:
 - There is **direct** discrimination **when the reason for the difference in treatment is ethnicity**. (E.g. based on stereotypes and prejudices.)
 - Otherwise indirect discrimination, whereby objective justification must not stigmatise.
- (Potential) illustration: electricity meters are placed too high to be read in districts inhabited predominantly by members of Roma people. The complainant is a non-Roma who runs a business in a Roma neighbourhood.

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Distinction between direct and indirect discrimination

Shifting the dividing line by the CJEU

- The CJEU in *Szpital Kliniczny*:
 - If a provision or practice is based on **a criterion that is inextricably linked to a ground of discrimination**, then there is direct discrimination.
- CJEU gives examples from previous case law:
 - *Maruko, Römer, Hay* (sexual orientation);
 - *Andersen* (age);
 - *Kleist* (sex) – here, there is also even older case law (*Nikoloudi*).
- Illustration, using the case of sexual orientation:
 - Certain advantages are granted upon marriage/to married workers.
 - Under the domestic law, marriage is restricted to heterosexual couples only.
 - Due to this law, homosexuals can never meet this criterion; it leads to a total exclusion.
 - CJEU: in such a situation, there is **direct** discrimination on the ground of sexual orientation.

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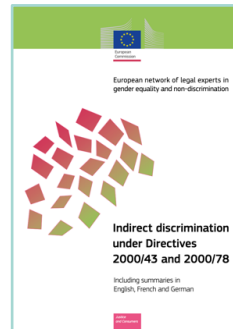
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Distinction between direct and indirect discrimination

Delimitation, a complex issue ...

- So much by way of examples.
- Should you wish to know more about it, see two of my publications (freely available online):
 - 2008 thematic report for the European Commission's European Equality Network;
 - 2022 **a second report, with updated information** (notably regarding CJEU case law).

(Note: from before the recent change in the case of *Schackenborgvænge*).



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Harassment

A special category

- E.g. Art. 2(3) of Directive 2000/43:

«Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an **unwanted conduct** related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.»

- To be noted:
 - This is **not based on comparability or a comparison (!)**.
 - Background: Prof Catherine MacKinnon's work in the USA from the 1970s onwards.



See again **Chart 10/10**

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Harassment

Hardly any CJEU case law ... the example of *Coleman*

- In CJEU case law, the question was first posed in *Coleman* (2008):
«Voluntary» dismissal of a worker in the UK ultimately because of her son's severe disability; raised the question of discrimination by association, including also the aspect of harassment (offensive statements against the plaintiff).
- CJEU, paras. 59 and 60:
 - Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of their child, whose care is provided primarily by that employee, «such conduct is contrary to the principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof.»
 - According to the wording of Art. 2(3) of the directive, the concept of harassment «may be defined in accordance with the **national laws and practice of the Member States.**»

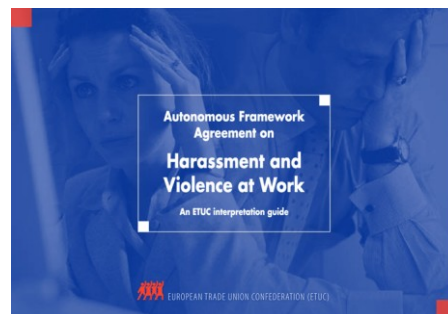
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Harassment

Social Partners Framework Agreement

- In 2007, the European Social Partners concluded a «**Framework Agreement on Harassment and Violence at work**», see e.g.
<https://osha.europa.eu/de/legislation/guidelines/framework-agreement-harassment-and-violence-work>
- There is an interpretative guide by the European Trade Union Confederation (ETUC).



See https://www.etuc.org/sites/default/files/pdf_CES-Harcelement-Uk-2_1.pdf

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Finally: mobbing ...

... is not the same as harassment under present EU law

- In French: «*harcèlement morale*», in English mostly «mobbing».
- Often seen as a health and safety issue, falling under the relevant EU legislation.
- According to academic writing, that is not sufficient; there should be a specific **EU Directive**; see e.g.:

Maria Isabel S. Guerrero, 'The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation' 27 *Boston College International and Comparative Law Review* 477 (2004).

Thank you
for your attention!

christa.tobler@unibas.ch

r.c.tobler@law.leidenuniv.nl