

Workshop: Update on EU case law

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Scope (1)

Which and how much EU law?

- **Old or new legislation?** *Kalliri* (2017):
Depends on the time of the facts; here Directive 76/207, rather than Directive 2006/54.
- **One or more pieces of legislation?** Two examples:
 - *Begoña Espadas Recio* (2017), on unemployment benefits:
Only Directive 79/7, since Directive 97/81 (part-time work) does not cover statutory social security.
 - *Kleinstauber* (2017), on the method of calculating pension rights for part-time workers under an occupational pension scheme:
 - Directive 97/81 (part-time work) is relevant.
 - Directive 2006/54 (sex equality) is relevant if there is discrimination against part-time workers, „in that, according to the referring court, part-time work is mostly carried out by women“.
 - Directive 2000/78 (age discrimination): not possible to assess.

Scope (2)

Special link through legislation

- *Otero Ramos* (2017):
 - Concerns risk assessment with respect to breastfeeding for an emergency nurse.
 - CJEU:
 - Directive 92/85 (health and safety) requires a specific risk assessment taking into account the worker's individual situation.
 - **Burden of proof rule under Directive 2006/54 applies in the framework of Directive 92/85:** According to Art. 19(1) of Directive 2006/54, the burden of proof rule under that Directive also applies to situations covered by Directive 92/85 in so far as there is discrimination on grounds of sex.
 - Situation of Ms Otero Ramos:
Employer was unwilling to take into account proof offered by Ms Otero Ramos with respect to her specific situation.

Scope (3)



Personal and material scope – some examples

- **Employment and employment conditions**, e.g.:
 - Access to employment: *Salaberria Sorondo* (2016), recruitment of police officers in Spain; *Kalliri* (2017), competition for enrolment in the Greek Police.
 - Dismissal: *Daouidi* (2016), *Milkova* (2017), *Achbita* (2017), *Bougnoaoui* (2017), *Bordonaro* (2017).
 - Employment conditions:
 - *Kleinstauber* (2017), *Parris* (2017): occupational social security benefit.
 - *Oteros Ramos* (2017): assessment of the health risk of the work for a worker who is breastfeeding.
 - Access to vocational training: *de Lange* (2016).
- **Access to goods and services**:
Jyske Finans (2017): loan to purchase a car.

Discrimination (1)

List of grounds

- Reminder: closed list of discrimination grounds!
Different from Art. 14 ECHR and from Art. 21 of the EU Charter.
- Not included:
 - The professional category or place of work; *Florescu* (2017) – treatment of judges as opposed to certain other state employees.
 - The nature of the employment relationship; *Milkova* (2017) – treatment of civil servants as opposed to employees under private law.
 - The combined effect of two or more grounds (**cumulative** vs. **intersectional discrimination**); *Parris* (2017):
„While discrimination may indeed be **based on several of the grounds** set out in Article 1 of Directive 2000/78, there is, however, **no new category of discrimination resulting from the combination of more than one of those grounds**, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.“

Discrimination (2)

Meaning of discrimination grounds

- “Pregnancy” = sex, *Oteros Ramos* (2017).
- “Disability” - *Daouidi* (2016), *Milkova* (2017):
 - Definition according to the UN Convention:
Limitation resulting in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in the professional life on an equal basis with other workers.
 - *Daouidi* (2016): 6 months incapacity due to a dislodged elbow (working accident)? Assessment left to the national court.
- “Religion”- *Achbita* (2017), *Bougnaoui* (2017):
Same as the ECHR: covers both the *forum internum* = the fact of having a belief, and the *forum externum* = the manifestation of religious faith in public.

Discrimination (3)

Direct and indirect discrimination

- Few truly obvious cases of direct discrimination; prime category relates to cases on age discrimination; e.g. *Bordonaro* (2017).
- **Direct** or **indirect**? E.g. *Milkova* (2017), disability:
 - Dismissal of civil servant with a 50 % disability without authorisation as required by the Bulgarian employment law for private employees.
 - Criterion: nature of the employment relationship:
 - **Not inseparably linked to disability**; thus no direct link to disability.
 - Instead:
 - **Apparently neutral measure**: the law is formulated in neutral terms.
 - But: no **particular disadvantage**. Use of the criterion does not appear to mean that particularly persons with a disability are disadvantaged.



Discrimination (4)

Direct and indirect discrimination – relevance of facts

- *Achbita* (2017) and *Bougnaoui* (2017), religion:
 - *Achbita* – clear facts:
 - Written rule of the employer, adopted with the approval of the works council: “Employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them.”
 - CJEU on dismissal because of wearing the Islamic headscarf: no direct discrimination, **indirect discrimination** on grounds of religion “not inconceivable”; assessment left to the national court.
 - *Bougnaoui* – less clear facts:
 - According to Ms Bougnaoui, there is a prohibition of wearing the Islamic headscarf when in contact with customers of the employer’s business.
 - According to the employer, there is a general ban on the wearing of religious signs when attending the premises of those customers.
 - CJEU: not clear from the facts whether **direct** or **indirect** discrimination; assessment left to the national court.

Discrimination (5)

Parris (2017)

- Facts:
 - Refusal to grant the worker's civil, same-sex partner the survivor's pension provided for by the occupational benefit scheme. Reason: payment is excluded where the worker married or entered into a civil partnership after the age of 60.
 - For Mr Parris, earlier marriage/partnership not possible for legal reasons.
- Different treatment **directly based on age**; justification?

Art. 6(2) of Directive 2000/78 allows „the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex“.

Discrimination (6)



Parris (2017)

- Different treatment on grounds of **sexual orientation**?
- Not according to the CJEU:
 - No **direct** discrimination: surviving civil partners are not treated less favourably than surviving spouses as regards the survivor's benefit.
 - No **indirect** discrimination either?
 - The situation is a consequence of the Irish law at the time of Mr Parris' 60th birthday, and of the absence, of transitional provisions in the new law.
 - Recital 22 of the Directive: the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
- Unsatisfactory outcome! What about the approach under previous case law such as *Hay* (2013)?



Discrimination (7)

Direct and indirect discrimination

- *Jyske Finans* (2017), race or ethnic origin:
 - Concerns a loan to purchase a car. Where the person in question produces a driving licence indicating a country of birth other than an EU or an EFTA Member State, the company requires as additional proof of identity a copy of a passport or residence permit.
 - Mr Huskic, a Danish national born in Bosnia and Herzegovina, complains of **indirect** discrimination on grounds of ethnic origin.
 - District court finds **direct** discrimination; High Court turns to CJEU.
 - CJEU on **direct** discrimination:
 - Is a person's country of birth to be regarded as directly or inextricably linked to this person's specific ethnic origin?
 - No, country of birth by itself is not enough for creating a direct link; thus no direct discrimination.

Discrimination (8)

Jyske Finans (cont.)

- CJEU on indirect discrimination:
 - Apparently neutral measure that leads to a particular disadvantage?
 - The allegedly discriminatory measure must have the effect of placing a person of a particular ethnic origin at a disadvantage.
 - Finding out requires not a general abstract comparison, but a specific concrete comparison (reference to the AG in this context).
 - Argument that the use of a person's country of birth is generally more likely to affect persons of a 'given ethnicity' than others cannot be accepted.
- ??? Do we perhaps have a misunderstanding between AG and CJEU?
 - AG Wahl refers to the issue of comparability, which requires a specific comparison.
 - CJEU of applies this to unfavourable treatment – which is not the same thing!
 - Perhaps the CJEU means something else, namely the issue of „a given / specific ethnic origin“, rather than ethnic origin more generally?

Justification (1)

Objective justification for indirect discrimination

- *Kalliri* (2017), sex:
 - Minimum height of 1,70 cm for police officers.
 - CJEU: women are very clearly at a disadvantage compared with men, thus (*prima facie*) indirect discrimination on grounds of sex.
 - Objective justification?
 - Greece: effective accomplishment of the tasks of the Greek police.
 - CJEU: operational capacity and proper functioning of the police constitutes a **legitimate objective**. Measure must be **suitable** and **necessary**.
 - Here: there used to be a difference for women and men police officers (1,65 cm vs. 1,70 cm). For the armed forces, port police and coast guard, there are still different minimum heights – only 1,50 cm for women.
 - CJEU: looks like the rule in question is not justified.



Justification (2)

Objective justification for indirect discrimination (*cont.*)

- *Achbita* (2017), dismissal because of headscarf:
 - If there is (*prima facie*) indirect discrimination on grounds of religion: objective justification?
 - **Legitimate aim:**
 - “The desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.”
 - Also related to the freedom to conduct a business, Art. 16 of the Charter, “notably where the employer involves [...] only those workers who are required to come into contact with the employer’s customers.”
 - See also ECHR case law (*Eweida*).
 - **Proportionality:**
 - **Appropriate**, if genuinely pursued in a consistent and systematic manner.
 - Necessary, if only for workers who interact with customers.

Justification (3)

Objective justification for indirect discrimination (*cont.*)

- *Achbita* (2017) (*cont.*):
 - For the specific case of Ms Achbita:
 - Only what is strictly necessary.
 - National court must assess whether, “taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it was have been possible for G4S [...] to offer her a post not involving any visual contact with those customers, instead of dismissing her.”
 - Rather generous to the employer, not very generous to the employee ...

Justification (4)

Statutory justification: Art. 6(1) of Directive 2000/78 (objective justification for direct age discrimination)

- *Bordonaro* (2017), automatic termination of employment at age 25:
 - Argument by the Italian government: aim to fight youth unemployment and give an *initial* job to young people, as the lack of professional experience is a factor which hampers young people.
 - CJEU:
 - Encouragement of recruitment is a **legitimate aim of social or employment policy**, especially for young people.
 - **Proportionality**: “in a context of persistent economic crisis and weak growth, the situation of a worker aged under 25 years who, thanks to a flexible and temporary employment contract, can access the labour market is preferable to the situation of someone who does not have such a possibility and who, as a result, is unemployed”. (Plus some additional considerations.)
- See also *de Lange* (2016): vocational integration of young people.

Justification (5)

Other statutory justification

- Compare *Bougnaoui* (2017) with *Salaberra Sorondo* (2016), both regarding **genuine and determining occupational requirements** under Art. 4(1) of Directive 2000/78.
- *Bougnaoui* (2017):
 - Dismissal because of wearing the Islamic headscarf, as a consequence of the **wish of a customer** (“No veil next time!”).
 - CJEU in case that this amounts to unequal treatment on grounds of religion:
 - Art. 4(1) concerns a characteristic related to the ground, not the ground itself.
 - Narrow interpretation: only in very limited circumstances.
 - Therefore: a requirement that is **objectively dictated by the nature of the occupational activities concerned or the context in which they are carried out**
 - to the **exclusion of subjective considerations**, such as the willingness of the employer to take account of the particular wishes of the customer.

General principles and fundamental rights (1)

The (strange?) case of *Milkova* (2017)

- Starting point:
According to the CJEU, there is no discrimination under Directive 2000/78; nevertheless, the Court addresses the issue of positive action.
- Bulgarian Government tries to defend itself against the allegation of discrimination: the distinction between employees with and without a disability, in relation to specific protection in the event of dismissal, includes **positive action for the purposes of Art. 7(2) of the Directive.**
- CJEU:
Takes the argument up in a different context.

General principles and fundamental rights (2)

The (strange?) case of *Milkova* (2017) (cont.)

- CJEU:
 - Discusses positive action in the context of “implementing Union law” (Art. 51(1) of the EU Charter of Fundamental Rights) / acting within the scope of Union law (CJEU case-law on general principles).
 - Namely: where Member States act within the scope of EU law, they are required to respect fundamental rights defined in the context of the EU and the general principles of EU law.
 - Here relevant: the general principle of equal treatment, “now enshrined in Articles 20 and 21 of the Charter”; appears to be breached here.
- *Note:*
Member States are not obliged to act under Art. 7 – *but* if they do, they must respect primary EU law; same mechanism as in *Hudzinski* in the field of internal market law.

Thank you for your attention!

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