

Recent anti-discrimination case-law of the Court of Justice of the European Union

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Overview

Structure of the presentation

- Preliminary remarks:
What is “EU anti-discrimination law” and why is it relevant for the Nordic countries?
- Briefly: common features of the different rules.
- Discussion of recent case-law of the Court of Justice of the European Union (CJEU) in the field of labour law, for different types of discrimination.

Note:

The **Charts** mentioned in this presentation are taken from:

Christa Tobler/Jacques Beglinger, Essential EU Law in Charts, 3rd edition (2014), Budapest: HVG-Orac 2014.

Preliminary remarks (1)

What is “EU anti-discrimination law”?

- A large body of law that developed over a long time, covering different grounds, including notably:
 - Nationality, Art. 19(1) TFEU, further e.g. Art. 45(2) TFEU, parts of Regulation 492/2011 and Directive 2014/54.
 - Sex: notably Art. 157 TFEU and Directive 2006/54 (replaces older legislation).
 - Racial and ethnic origin: Directive 2000/43.
 - Religion or belief, disability, age, sexual orientation: Directive 2000/78.
 - Part-time work: Directive 97/81.
 - Fixed-term work: Directive 1999/70.
 - Temporary work: Directive 2008/14.
- Plus: Art. 21 EU Charter of Fundamental Rights (CFR).

Preliminary remarks (2)

Why is it relevant for the Nordic countries?

- For the EU Member States:
Direct relevance as part of the Union legal *acquis*.
- For the EFTA countries:
 - EEA/EFTA countries Iceland, Liechtenstein and Norway:
 - Direct relevance of internal market law and sex discrimination law as part of the EEA *acquis*.
 - Depending on the country, indirect relevance of other law (notably Directives 2000/43 and 2000/78) through “autonomous adaptation” of national law, independent of any obligation flowing from EEA law.
 - [Switzerland: indirect relevance of sex discrimination law through “autonomous adaptation“, independent of any obligation flowing from the so-called bilateral agreements concluded by the EU and Switzerland.]

Common features (1)

Prohibition of discrimination: three step analysis

- For all prohibitions of discrimination, the same three step approach for understanding the prohibition and for applying it to concrete cases applies:
 - **Scope** (field of application) of the provision in question;
 - **Right/obligation** under the provision;
 - Where applicable: **Derogations** from the prohibition.
- The following is a reminder of some basic information on these issues, plus some additional elements.

See the decision tree in **Chart 10/7**

Common features (2)

Scope

- Different scope of the different prohibitions.
- Good for our present topic:
Labour law is covered by all the above-mentioned provisions in the TFEU, Regulations and Directives.

See **Chart 10/8**

(which, however, does not mention discrimination on grounds of part-time work, fixed-term work and temporary work)

Common features (3)

Right/obligation

- Different forms of discrimination, depending on the field.
- Internal market law: two only, direct and indirect discrimination, based on case-law (plus the prohibition of restrictions – very important in practice).
- Modern social law: four, including some legal definitions:
 - Direct discrimination
 - Indirect discrimination
 - Harassment (sex discrimination: also sexual harassment)
 - Instruction to discriminate

For social law, see **Charts 10/10** and **10/11**

Common features (4)

Derogations or justification

- Under EU law, prohibitions of discrimination are rarely absolute.
- Normally, there are possibilities for different treatment (and exceptionally even a duty).
- Which derogation grounds are available, depends on the type of discrimination.

See **Chart 10/13**

(Note: for part-time, temporary and fixed-term work, a similar system to age discrimination applies – objective justification is possible even for direct discrimination).

Common features (5)

Enforcement

- General EU law requirements with respect to enforcement; e.g. on levelling up or down in discrimination cases, CJEU in *Jonkman* (2006).,
- Specific provisions in modern anti-discrimination law (previously largely developed by the CJEU; see e.g. Christa Tobler, 'The Impact of Non-Discrimination Law in Developing a General Doctrine of Enforcement Under EU Law', in: Evelyn Ellis/Kristín Benediktsdóttir (eds), *Equality into Reality. Action for Diversity and Non-Discrimination in Iceland*, Reykjavík: University of Iceland Press 2011, 67-107).

See **Chart 10/15**

Common features (6)

General principles

- Specific non-discrimination law is always an expression of broader, unwritten principles of EU law.
- Recognised by the CJEU long before the existence of the CFR (which today embodies many general principles):
 - The general principle of equal treatment (equality) and non-discrimination;
 - General principles of equal treatment with respect to specific grounds (sex, sexual orientation, age).

See **Chart 10/14**

Recent CJEU case-law (1)

Focus on employment cases

- Discussion of cases from the field of **employment law**.
- To the exclusion of issues of discrimination arising in other contexts:
 - E.g. Case C-528/13 *Léger* on blood transfusions under Directive 2004/33, read together with Art. 21 CFR.
 - Note, however, that cases from other field may include elements of general importance; e.g. Case C-83/14 *Nikolova* on the provision of services (sale and delivery of electricity) and discrimination by association.

Recent CJEU case-law (2)

Cases discussed: some discrimination grounds only

- No recent cases (last year, as of September 2014) on:
 - Temporary work;
 - Racial and ethnic origin;
 - Sexual orientation;
 - Religion or belief; though there are some particularly interesting pending cases, including Case C-157/15 *Abchita*, on the prohibition on wearing, as a female Muslim, a headscarf at the workplace where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace – discrimination?
- There are cases on the other grounds. First question: what is the relevant law?

Recent CJEU case-law (3)

Which Directive applies?

- Example: Case C-222/14 *Maïstrellis* (16 July 2015).
- Judge Maïstrellis requests 9 months of paid parental leave. This is refused to him, based on the argument that he would be entitled to the leave only if his wife exercised a gainful activity (employment, profession). Exception: if due to a serious illness or injury she is unable to meet the needs related to the upbringing of the child.
- Which instrument of employment law applies?
 - Sex discrimination law on employment (Directive 2006/54)?
 - Special legislation on parental leave (then Directive 96/34, today Directive 2010/18)?
 - Special health and safety law on maternity (Directive 92/85)?

Recent CJEU case-law (4)

Which Directive applies? (*Maistrellis* continued)

- Principle:
More specific law is applied before general law (variation in EU law: positive integration law is applied before negative integration law; so-called *Tedeschi* principle).
- Explicit rule in Art. 28(2) of Directive 2006/54:
The Directive is without prejudice to the provisions of Directive 96/34 (parental leave, today Directive 2010/18) and Directive 92/85 (workers who are pregnant, have recently given birth or are breastfeeding) - so, these other directives have to be checked first.

Recent CJEU case-law (5)

Which Directive applies? (*Maistrellis* continued)

- CJEU on maternity legislation:
Exclusion of maternity legislation (Directive 92/85), since the deprivation, for the father of the child, of the right to parental leave because of the employment situation of his wife in no way constitutes a measure to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- CJEU on parental leave and sex equality legislation:
 - For (unpaid) parental leave up to 3 months: (then) Directive 96/34 (today Directive 2010/18).
 - Beyond that, Directive 2006/54.

Recent CJEU case-law (6)

Which Directive applies? (*Maistrellis* continued)

- Parental Leave Directive 96/34:
 - Clause 2.1 of the Framework Agreement:
“This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.”
 - Clause 2.3:
Sets out the conditions of access to parental leave and the detailed rules for applying parental leave that Member States and/or the social partners may adopt.
- [Today Directive 2010/18: at least 4 months of leave, one of which is non-transferrable.]

Recent CJEU case-law (7)

Which law applies? (*Maïstrellis* continued)

- CJEU on parental leave:
 - The conditions and rules in Clause 2.3 “do not in any way provide that one of the parents can be denied the right to parental leave, inter alia, because of the employment status of his or her spouse”. This literal interpretation is supported by the objectives and context of the agreement.
 - Therefore, “each parent is entitled to parental leave, which means that Member States cannot adopt provisions under which a father exercising the profession of civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession.”
- *But note:*
3 (today: 4) months only, no obligation of payment!

Recent CJEU case-law (8)

Which law applies? (*Maïstrellis* continued)

- CJEU therefore also looks at Directive 2006/54.
- Prohibition of discrimination, Art. 14:
“There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to: [...] (c) employment and working conditions [...].”
- Positive action in favour of women, Art. 3:
“Member States may maintain or adopt measures within the meaning of Article [157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.”

Recent CJEU case-law (9)

Which law applies? (*Maistrellis* continued)

- CJEU on positive action in favour of women:
Far from ensuring full equality in practice between men and women in working life, the rule at issue is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.
- CJEU on sex discrimination:
 - The granting of parental leave has consequences on the exercise of the professional activities of the civil servants. Therefore, the conditions for granting parental leave fall within employment and working conditions, within the meaning of Article 14(1)(c) of Directive 2006/54.

Recent CJEU case-law (10)

Which law applies? (*Maïstrellis*, continued)

- (CJEU on sex discrimination, continued)
 - The situation of male and female employees who are parents are comparable as regards the bringing-up of children.
 - Here: mothers who are civil servants are always entitled to parental leave, whereas fathers who are civil servant are entitled to such leave only if the mother of their child works or exercises a profession.
 - Therefore: direct sex discrimination in respect of fathers who are civil servants, as regards the granting of parental leave.
 - (No question on justification.)
- Therefore, here two Directives apply side by side.

Recent CJEU case-law (11)

Three step analysis: a warming up case on nationality

- Case C-270/13 *Haralambidis* (10 September 2014):
May illustrate the issue of the three step analysis in the context of preliminary ruling cases. Note: preliminary ruling cases before the CJEU do not necessarily raise questions on all three issues.
- Greek Mr Haralambidis is refused the job as post of President of a Port Authority in Brindisi because he is not an Italian. According to Italy, the job involves the exercise of powers of a public authority.
- Issue (among other things):
Breach of Art. 45 TFEU (free movement for workers)?

Recent CJEU case-law (12)

The text of Art. 45 TFEU (focus on discrimination)

- Different elements in one provision:
 - (1) “Freedom of movement for **workers** shall be secured **within the Union**.”
 - (2) „Such freedom of movement shall entail **the abolition of any discrimination based on nationality** between workers of the Member States as regards employment, remuneration and other conditions of work and employment.“
 - (3) „It shall entail the right, **subject to limitations justified on grounds of public policy, public security or public health**: (a) to accept offers of employment actually made [...];“
 - (4) „The provisions of this Article shall **not apply to employment in the public service**.“
- Social law: usually more than one provision.

Recent CJEU case-law (13)

Haralambidis (continued)

- Only some elements of Art. 45 TFEU were disputed.
- Namely, certain elements relating to the issue of **scope**:
 - Cross-border case: undisputed.
 - Worker - **partially disputed**:
 - Italy: not really a worker.
 - CJEU recalls *Lawrie-Blum*. Here: effective and genuine activity performed under the management and supervision of the Minister, payment determined by reference to the salaries of Directors-general of the Ministry.
 - Exercise of public authority – **disputed**:
 - Italy: ‘trust mission’ delegated by a government authority connected with the exercise of public tasks.
 - CJEU: does not involve the exercise of state powers and the safeguard of the general interests of the State such as to justify the exclusion of other nationals.

Recent CJEU case-law (14)

Haralambidis (continued)

- **Right/obligation:** direct discrimination - undisputed.
- **Derogations (Art. 45(3) TFEU):** none - undisputed.
- Leads to the following overall finding of the CJEU:
“In circumstances such as those at issue in the main proceedings, Article 45(4) TFEU must be interpreted as not authorising a Member State to reserve to its nationals the exercise of the duties of President of a Port Authority.”
- Ultimately implies the solution for the whole case.

Recent CJEU case-law (15)

Other cases on the issue of scope

- Usually not a problematic element: well-established CJEU anti-discrimination case law in the field of employment.
- Usual issues: access to employment, employment conditions (including pay), promotion, dismissal.
- E.g.:
 - Pay: a dependent child allowance that is paid on the basis of the collective agreement applicable to bank staff and bankers in Case C-476/12 *Österreichischer Gewerkschaftsbund* (5 November 2014);
 - Other employment conditions: parental leave, as in *Maïstrellis*.

Recent CJEU case-law (16)

Prohibition of discrimination

- Here, issues such as the meaning of a discrimination ground, comparability of situations, form of discrimination.
- Meaning of a discrimination ground: disability in the Case C-354/13 *Kaltoft* (18 December 2014).
 - Mr. Kaltoft complains about his dismissal after 15 years of work as a child minder for a Swedish community. He thinks that it is due to his obesity. The employer says it is due to a decrease in the work load (too much personnel).
 - Is the dismissal discriminatory under EU law, in particular under Directive 2000/78?

Recent CJEU case-law (17)

Prohibition of discrimination (*Kaltoft* continued)

- Two issues before the CJEU with respect to the discrimination grounds:
 - Is obesity as such a discrimination ground under EU law?
 - Is obesity covered by the ground of disability?
- CJEU on obesity as such, based on previous case law: The list in Directive 2000/78 cannot be extended. Therefore, obesity cannot be regarded as a ground in addition to those in relation to which the Directive prohibits discrimination.
- [Note: Art. 21 CFR, which is openly formulated, can only apply within the scope of EU law.]

Recent CJEU case-law (18)

Prohibition of discrimination (*Kaltoft* continued)

- CJEU on disability:
 - Concept: a limitation which results 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 professional life on an equal basis with other workers. Disability also relates to a hindrance to the exercise of an activity (not only the impossibility).
 - Obesity is not in itself a disability because it does **not necessarily** entail the existence of such a limitation. However, under given circumstances obesity **may** entail such a limitation. If it is a long-term one, it can be covered by the concept of disability.
 - The national court must check whether that is the case.

Recent CJEU case-law (19)

Comparability of situations

- Equal treatment requires comparability of the situations.
- E.g. Case C-476/12 *Österreichischer Gewerkschaftsbund* (5 November 2014), on part-time work.
- Reminder: part-time work was originally an issue of sex equality, now specific legislation in Directive 97/81. Clause 4 of the framework agreement:
 - “1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.
 2. **Where appropriate**, the principle of pro rata temporis shall apply.”

Recent CJEU case-law (20)

Comparability of situations (continued)

- *Österreichischer Gewerkschaftsbund*:
 - A dependent child allowance is paid on the basis of the collective agreement applicable to bank staff and bankers, but to part-time workers only pro rata temporis. The applicant asks for full payment.
 - CJEU, based on previous case law:
 - Taking account of the reduced working time as compared with that of a full-time worker constitutes an objective criterion allowing a proportionate reduction of the rights of the workers concerned.
 - Therefore no discrimination in a case such as that at issue.
- I.e. an issue of comparability. Do you agree with the Court's approach?

Recent CJEU case-law (21)

Comparability of situations: fixed-term work

- Clause 4(1) of the Framework Agreement on fixed-term work, Directive 1999/70:

“In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.”
- Case C-177/14 *Regojo Dans* (15 July 2015):
 - Ms Regojo Dans is refused a three-yearly length-of-service increment because of her particular status as a member of the non-permanent staff.
 - Discrimination on grounds of fixed-term work?

Recent CJEU case-law (22)

Comparability: fixed-term work (continued)

- *Regojo Dans* (continued):
 - CJEU:
 - Purpose of the law: ensuring that fixed-term workers enjoy the same benefits as those enjoyed by comparable permanent workers, except where a difference in treatment is justified on objective grounds.
 - A “comparable permanent worker” is defined in Clause 3(2) as “a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills”.
 - Here: It is for the national court to determine whether the duties performed by Ms Regojo Dans are identical or similar to those performed by a career official.

Recent CJEU case-law (23)

Form of discrimination

- All recent cases discussed here concern **direct** discrimination; no discussion of other forms of discrimination.
- Note:
The *Nikolova* case on services (sale of electricity) would appear to be an indirect discrimination case (ethnic origin).

Recent CJEU case-law (24)

Specific statutory derogations

- Not often at issue in the cases discussed here.
- In fact, just one example, namely Case C-416/13 *Vital Pérez* (13 November 2014):
 - In Spain, a notice of competition for the jobs of police officers lists as one condition that applicants can be no more than 30 years of age. Mr Vital Pérez challenges this court.
 - Age discrimination? National court asks, among others, about Art. 4(1) of Directive 2000/78, concerning genuine and determinative occupational requirements.

Recent CJEU case-law (25)

Specific statutory derogations (*Vital Pérez* continued)

- Art. 4(1) of Directive 2000/78:
“Member States may provide that a difference of treatment which is based on a characteristic related to [a.o. age] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’
- Previous case law: this concerns a characteristic related to the ground for differentiation (not the ground itself).
- Preamble: only “in very limited circumstances”.

Recent CJEU case-law (26)

Specific statutory derogations (*Vital Pérez* continued)

- CJEU on Art. 4(1) of the Directive:
 - The possession of particular physical capacities is one characteristic relating to age. Here: whilst some duties of police officers are not likely to require the use of physical force, the fact remains that tasks relating to the protection of persons and property, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force.
 - Ensuring the operational capacity and proper functioning of the police service is a legitimate objective under Art. 4(1).
 - But: the measure goes beyond what is necessary (it is not proportionate; different from the earlier case of fire-fighters).
- CJEU therefore also looks at Art. 6(1).

Recent CJEU case-law (27)

Objective justification: age, Art. 6(1) of Directive 2000/78

- A very difficult and unpredictable issue; see e.g. Christa Tobler, 'EU Age Discrimination Law and Older and Younger Workers: Court of Justice of the European Union Case Law Development', in: Ann Numhauser-Henning/Mia Rönnmar (eds), *Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond*, Alphen a.d. Rijn: Kluwer 2015, 93-113.
- Five recent cases:
 - Case C-530/13 *Schmitzer* (11 November 2014)
 - Case C-416/13 *Vital Pérez* (13 November 2014) – **our focus**
 - Case C-529/13 *Felber* (21 January 2015)
 - C-417/13 *Starjakob* (28 January 2015)
 - Case C-515/13 *Landin* (26 February 2015)

Recent CJEU case-law (28)

Objective justification: age (continued)

- Art. 6(1):
“Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.”
- Art. 6(2) mentions examples, a.o. a maximum recruitment age: “(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement. “

Recent CJEU case-law (29)

Objective justification: age (continued)

- CJEU in *Vital Pérez*:
 - Here, the age requirement is based on training requirements of the post in question and the need for a reasonable period of employment before retirement or transfer to another activity.
 - Mentioned in Art. 6(2)(c), thus in principle acceptable.
 - Proportionality: is the measure appropriate and necessary?
 - In principle broad discretion of the Member States.
 - But: no evidence before the Court on proportionality.
 - Further, police officers may work to the age of 65. Accordingly, there is in fact a reasonable period of employment before retirement.
- Accordingly: no justification.

Recent CJEU case-law (30)

Objective justification: fixed-term work

- *Regojo Dans*, CJEU on objective justification:
 - The concept of objective grounds does not permit a difference in treatment between fixed-term workers and permanent workers provided for by a general, abstract norm.
 - Rather, it requires the existence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. May result e.g. from the specific nature of the or their inherent characteristics or from pursuit of a legitimate social-policy objective of a Member State.

Recent CJEU case-law (31)

Objective justification: fixed-term work

- *Regojo Dans* (continued):
 - Although it is as a rule for the referring court to assess whether those arguments constitute objective grounds, the non-permanent nature of the category of staff could in no case be considered such a ground.
 - Further, although some of the differences relating to the manner in which career civil servants and non-permanent staff are engaged, to the qualifications required and to the nature of the duties undertaken could, in principle, justify different treatment as regards their conditions of employment, that does not seem to be the case in the dispute in the main proceedings.
- Thus: CJEU hints that there are no objective grounds.

Recent CJEU case-law (32)

A final issue: general principles and Directives

- Remember *Mangold* and *Kücükdeveci*: the prohibition on age discrimination flows from a general principle. That principle, as “given specific expression by the Directive in the field of employment and occupation”, applies.
- Change of heart in subsequent case law? *Schmitzer*:
 - National court asked, among others, about Art. 21 CFR.
 - CJEU: When ruling on the interpretation of the general principle of non-discrimination on grounds of age, as enshrined in Article 21 CFR and Directive 2000/78, in proceedings involving an individual and a public administrative body, the Court examines the question **solely in the light of the directive** (see Case C-132/11 *Tyrolean Airways*, concerning a collective agreement – horizontal case!).

To conclude

Thank you for your attention!

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On the **Charts**: www.eur-charts.eu