

PROHIBITION OF DISCRIMINATION ON THE GROUNDS OF DISABILITY IN THE EC LAW

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Abstrakt v rodném jazyce

Příspěvek se zabývá právem ES, které upravuje diskriminaci z důvodu zdravotního postižení. Skládá se ze tří hlavních částí. První část je věnována primárnímu právu, které je právním základem pro přijetí sekundární legislativy, druhá část je zaměřena na sekundární právo upravující diskriminaci z důvodu zdravotního postižení a třetí část rozebírá výklad pojmu “zdravotní postižení” v judikatuře Evropského soudního dvora.

Klíčová slova v rodném jazyce

Rovné zacházení, zákaz diskriminace v zaměstnání a povolání, osoby se zdravotním postižením, zdravotní postižení, nemoc, přímá diskriminace, nepřímá diskriminace, obtěžování, navádění k diskriminaci, přiměřené uspořádání, pozitivní činnost, důkazní břemeno.

Abstract

The contribution deals with the EC law regulating discrimination based on disability. It is divided into three main parts. The first part is dedicated to the primary law which is the legal base for adoption of secondary legislation, the second part focuses on the secondary law regulating disability based discrimination and the third part analyses the interpretation of the notion of disability in the case law of the European Court of Justice.

Key words

Equal treatment, prohibition of discrimination in employment and occupation, persons with disabilities, notion of disability, sickness, direct discrimination, indirect discrimination, harassment, instruction to discriminate, reasonable accommodation, positive action, burden of proof.

One of the objectives on which the European Community (hereinafter EC) is founded is improving of living and working conditions. This objective may be achieved inter alia through realization of the principle of equal treatment and prohibition of discrimination based on various grounds. The EC law recognises as grounds of discrimination sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Disability differs from other types of discrimination in that it is a possibility which faces all members of society.¹ Another difference between disability and other grounds of discrimination is that in order to keep the principle of equal treatment with persons with disabilities it is sometimes necessary to take certain measures to enable the persons with disabilities to participate in various fields of social life.

¹ Fredman, S.: Discrimination Law, New York, Oxford University Press, 2002, s. 67.

1. PRIMARY LAW

The most important amendments in the primary law concerning discrimination were introduced by the Treaty of Amsterdam amending the EC Treaty adopted in 1997. This Treaty for the first time recognised disability as grounds of discrimination. New Article 13 of the EC Treaty states that without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This provision of the EC Treaty is very significant due to the fact that it is placed in the Chapter one called "*Principles*". The inclusion of Article 13 in the EC Treaty, directly after Article 12, and, subsequently, the adoption of the two 2000 directives, are vital elements in the process of recognition that equality and non-discrimination are no longer matters related to market integration.²

However, contrary to nationality based discrimination provided for in article 12 the Article 13 does not have direct effect.³ The article 13 is only a legal base for adoption of appropriate measures to combat discrimination on the abovementioned grounds. It does not specify the kind of measures that can be adopted. Because it does not expressly exclude any measures, the term must include not merely all instruments referred to in Article 249 (ex 189) EC, but also the other measures which the Community employs, such as guidelines, action programmes and communications.⁴ But it should be noted that its ambit is restricted to the prohibition of discrimination and that it does not extend to measures to promote equality of opportunity on the wider scale.⁵

The opening phrase of the Article 13 of the EC Treaty "*without prejudice to the other provisions of this Treaty*" may appear as all other provisions of the EC Treaty take precedence over it. However, the formula used in Article 13 EC may be intended to allow non-discrimination clauses to be inserted in legal instruments adopted on the basis of other Treaty provisions.⁶ The measures taken on the basis of this Article must fall within the limits of the powers conferred upon the Community.

2. SECONDARY LAW

On the basis of the article 13 of the EC Treaty the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter Directive) was adopted. Its purpose is stipulated in the article 1 as to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a

² Prechal, S.: Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes, Common Market Law Review, Vol. 41 Issue 2, Kluwer Law International, Netherlands, 2004, p. 550.

³ The Article 12 of the EC Treaty states that nationality based discrimination shall be prohibited.

⁴ Flynn, L.: The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review Vol. 36 Issue 6., Kluwer Law International, Netherlands, 1999, p.1136.

⁵ Ellis, E.: EU Anti-Discrimination Law, Oxford, Oxford University Press, 2005, p. 14.

⁶ Flynn, L.: The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review Vol. 36 Issue 6., Kluwer Law International, Netherlands, 1999, p.1134.

view to putting into effect in the Member States the principle of equal treatment. For the purposes of the Directive the **principle of equal treatment** is defined in its article 2 (1). It means that there shall be no direct or indirect discrimination whatsoever of any of the grounds referred to in the directive. However the Directive does not require the recruitment, promotion or maintenance in employment of an individual who is not competent, capable and available to perform the essential functions of the post concerned.⁷

2.1 NOTION OF DISCRIMINATION

The directive defines the fundamental terms as direct discrimination and indirect discrimination and provides for the forms of discrimination. **Direct discrimination**

on the base of disability 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 the grounds of disability **Indirect discrimination** on the base of disability shall be taken to occur where an apparently neutral provision, criterion or practice would put person having a particular disability at a particular disadvantage compared with other persons. However, there are two exceptions:

- That provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- As regards persons with a particular disability, the employer or any person or organisation, to whom the Directive applies, is obliged under national legislation to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed such provision, criterion or practice..

The Directive recognises as a form of discrimination also harassment and an instruction to discrimination. **Harassment** shall occur when unwanted conduct related to a disability 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. The directive enables to define the concept of harassment is in accordance with the national laws and practice of the Member States. **An instruction to discriminate** is not defined in the Directive. However, according to the article 2 (4) an instruction to discriminate against person on the grounds of disability shall be deemed to be discrimination.

2.2 SCOPE OF APPLICATION

The scope of application of the Directive is defined in the Article 3. The personal scope of application includes all persons, as regards both the public and private sectors, including public bodies. The material scope of application includes

- Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

⁷ See preamble to the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, point 17.

- Access to all types and all levels of vocational guidance, vocational training advanced vocational training and retraining, including practical work experience;
- Employment and working conditions, including dismissals and pay,
- Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The Directive expressly excludes from its scope of application differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and any treatment which arises from the legal status of the third-country nationals and stateless persons concerned. The Directive also does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

The Directive enables to Member States to provide that it shall not apply to armed forces in so far as it relates to discrimination on the grounds of disability and age. The explanation of this provision is contained in par. 18 of its preamble stipulating that the Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or to maintain in employment persons who do not have the required capacity to carry out the range functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. The par. 19 continues that in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States who make that choice must define the scope of such derogation.

2.3 CONCEPT OF REASONABLE ACCOMMODATION

With respect to persons with disabilities the Directive introduced the important concept of **reasonable accommodation**. The article 5 of the Directive provides for that in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Such measures may consist of for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.⁸ The burden imposed on an employer shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

The explanation of the concept of reasonable accommodation is included into the preamble to the Directive. Its point 16 states that the provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on

⁸ See preamble to the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, point 20.

grounds of disability. Contrary to other provisions of the Directive the article 5 imposes the obligation directly on employers who shall take the appropriate action. However, not fulfilling this obligation is not considered as a form of discrimination.

2.4 POSITIVE ACTION

Article 7 of the Directive lays down the **positive action**. According to this provision with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to disability. Par. 2 of this Article contains specific provision with respect to people with disabilities. It states that with regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

2.5 BURDEN OF PROOF

Article 10 (2) of the Directive regulates the **burden of proof**. According to this provision Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. INTERPRETATION OF DISABILITY

In the opinion of the author of this contribution the problems may appear in practice due to the fact that the Directive does not define the grounds of discrimination. It is not clear which types of discrimination shall be prohibited. The result is especially unsatisfactory in relation to such an extremely vague and open-ended term as disability.⁹ In spite of the fact that various international or non-governmental organisations have been trying to provide unified and standard language in this field, there exist no universal definition of disability. Various notions of disability are provided for by national laws of Member States. For example the Czech legal order requires that a person must be recognised as a person with disability by the competent authority in order to enjoy the advantages in employment. The competent authority may only recognise as person with disability a natural person whose impairment lasts or is probable to last at least one year. Moreover, a lot of national laws of Member States contain more definitions of disability with respect to the area in which this group of persons are to be protected (e.g. education, employment, social security or social protection). Some national laws protect against discrimination not only persons with disabilities but also persons who are not themselves disabled but are in certain relation to a person with disability.

With respect to notion of disability the Directive does not state that it should be provided for in the national laws of the Member States. It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law

⁹ Ellis, E.: EU Anti-Discrimination Law, Oxford, Oxford University Press, 2005, p. 35.

which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question.¹⁰

For the purposes of the Directive this term is interpreted in the case-law of the ECJ. At the present time there are two judgements dealing with the interpretation of the term disability. Both of them concern the dismissal. In the first case (C-13/05) the ECJ examined the relation between sickness and disability, more precisely replied the question whether the term sickness falls within the scope of protection provided by the Directive. The ECJ interpreted the term disability in the light of the purpose of the Directive which is lay to down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. In the light of that objective, the concept of 'disability' for the purpose of Directive 2000/78 must be given an autonomous and uniform interpretation.¹¹

According to the opinion of the ECJ the concept of disability is different from the concept of sickness. The ECJ interpreted the concept of disability in relation to the concept of reasonable accommodation. The importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of disability, it must therefore be probable that it will last for a long time. There is nothing in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as develop any type of sickness.¹²

In the second case (C-303/06) the ECJ dealt with question whether the Directive only protects from direct discrimination and harassment person who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to employee who is not himself disabled but who is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition. The Advocate General in the Opinion in this Case noted that directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they too affect the persons belonging to suspect classifications. Indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself,

¹⁰ See Judgement of the ECJ of 11 July 2006 in Case Sonia Chacón Navas v. Eurest Colectividades SA (c – 13/05), par. 40.

¹¹ Op. Cit par. 42.

¹² Op. Cit par. 45, 46.

but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined.¹³

In its judgement the ECJ gave the notion of disability an extensive interpretation. It agreed with the opinion of Advocate General.. In the opinion of the ECJ, it does not follow from those provisions of Directive 2000/78 that the principle of equal treatment which it is designed to safeguard is limited to people who themselves have a disability within the meaning of the directive. On the contrary, the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1. That interpretation is supported by the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78, and which confers on the Community the competence to take appropriate action to combat discrimination based, inter alia, on disability.¹⁴ An interpretation of the Directive limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.¹⁵

CONCLUSION

In the light of the foregoing considerations, it is possible to make conclusion that the EC law does not recognise as grounds of discrimination any limitation resulting from physical, mental or psychological impairment which hinders the participation of the person concerned in professional life. Only limitation that is probable to last for a long time falls within the concept of disability. However, national laws of some Member States prohibit discrimination on the grounds of state of health. Contrary to discrimination on the grounds of racial or ethnic origin, the EC law regulates the discrimination based on disability only in the field of employment and occupation.

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¹³ See the Opinion of Advocate General Poiares Maduro in Case Coleman v. Attridge Law and Steve Law (C-303/06) par 12, 13.

¹⁴ See Judgement of the ECJ of 17 July in Case S. Coleman v. Attridge Law and Steve Law (C-303/06) par 38.

¹⁵ Op. Cit. par. 51.

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