

# EU anti-discrimination law: Definition of key concepts

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## Introduction: reference material

### CJEU case law; charts on EU law

- CJEU case law:
  - Presentation refers to case law on sex (or gender) discrimination *and* on other types of discrimination.
  - Reason: basically the same concepts in different fields.
- Charts:
  - Presentation includes references to charts (see seminar materials).
  - Source:  
Christa Tobler & Jacques Beglinger,  
Essential EU Law in Charts, 5<sup>th</sup>, post-Brexit edition,  
Budapest: HVG-ORAC 2020; [www.eur-charts.eu](http://www.eur-charts.eu).

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## Introduction: how to proceed in practice

### Analysis of discrimination cases

- First step in every instance:  
Determine the **relevant law** (ground of discrimination, scope of application) – see next sheet.
- Then step by step analysis of:
  - **Form of discrimination.**
  - Possible justification for different treatment:
    - Differs depending on grounds of discrimination and form of discrimination.
    - Including, among others, **positive action.**
  - In case of a finding of discrimination: sanctions (not covered).

## Relevant law on the level of the EU

### EU anti-discrimination law

- **Several levels** within Union law:
  - Charter of Fundamental Rights / general principles.
  - TFEU: Art. 157(1) and (2) TFEU.
  - Various directives with different material scopes; see **Chart 10/8** (see also **Chart 10/9**, multiple discrimination).
- **Relevance and relationship:**
  - *Bauer and Broßonn* (2018): directive for vertical and CFR/general principle for horizontal cases.
  - *Egenberger* (2018): Art. 21 CFR has horizontal direct effect.
  - *Popławski* (2019): Primacy of EU law alone is not sufficient for individuals.

## Types of discrimination (1)

### Development: direct and indirect discrimination

- Originally:
  - The CJEU interpreted the non-discrimination provisions of the EEC Treaty in one sense only: prohibition of unequal treatment explicitly based on the criterion mentioned in the law.
  - This corresponds (partially) to the present concept of direct discrimination.
- Subsequently the CJEU also developed the concept of indirect discrimination, which is formally linked to a different criterion.

For more information, see **Chart 10/10**

## Types of discrimination in modern EU law (2)

### Secondary law of the EU

- Subsequently, secondary law began to **mention** direct and indirect discrimination; first **legal definition** of indirect discrimination in the Burden of Proof Directive (1980).
- As of 2000 a new generation of directives, mention of 4 types of discrimination, 3 definitions:
  - Direct discrimination;
  - Indirect discrimination;
  - Harassment (a new concept in EU law);
  - Instruction to discriminate (no legal definition).

## Basis for the definitions

### Legislation

- **Legal definitions** in most of the directives; but no express distinction/definition in:
  - Directive 79/7 (statutory social security, sex discrimination);
  - Art. 157 TFEU.
  - Arts. 21 and 23 of the Charter of Fundamental Rights.
- Court tends to use the same definitions everywhere; *MB* (2018) in relation to Directive 79/7; *Praxair* (2019) in relation to Art. 157 TFEU.
- [By way of comparison: no legal definitions in the core provisions of internal market law.]

## Direct discrimination (1)

### An easy concept at first sight ...

- **Case-law definition** in *Dekker* (1990) on the question of whether a refusal of employment may be regarded as direct discrimination on grounds of sex:

“The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.”

- In the *Dekker* case:
  - Refusal to hire the applicant ultimately due to her pregnancy.
  - CJEU: direct discrimination since only women can get pregnant.

## Direct discrimination (2)

### Legal definition

- E.g. Art. 2 (a) of Directive 2004/113:  
“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation” - though only in the absence of justification; see **Chart 10/13.**)
- Still appears to be simple – focus on the use of the prohibited criterion. But: more recent case law is far less clear (covered later).

## Direct discrimination (3)

### Some examples (1)

- A historical example - Elizabeth von Arnim (from her novel “Elizabeth and her German garden”, 1875):
  - About pay for hired hands on the farm of the author’s husband.
  - “[The men] get a mark and a half to two marks a day and as many potatoes as they can eat. The women get less, not because they work less, but because they are women and must not be encouraged.”
- Increasingly rare in case-law of the CJEU:
  - Discrimination on the basis of ethnicity: special cases such as *Feryn* (2008) and *ACCEPT* (2013), concerning speech acts.
  - Frequent in cases of discrimination on grounds of age:, e.g. *Mangold* (2005), *Kücükdeveci* (2010), *Prigge* (2011).

## Direct discrimination (4)

### Some examples (2): *Feryn*

- The director of a Belgian company for security installations states publicly that he will not employ immigrants/Moroccans (*speech act*). An association brings a case.
- CJEU:
  - This relates to a case of direct discrimination (a “speech act”), “such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.”
  - “The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim”.

## Direct discrimination (5)

### Some examples (3): *Prigge* (2011)

- The German airline Lufthansa dismisses pilots at age 60 (automatic mechanism provided for in a collective agreement). Three pilots bring an action.
- CJEU:
  - Unequal treatment directly on grounds of age:  
“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.”
  - The CJEU held that there was no justification for this (see next slide).

## Direct discrimination (6)

### Some examples (4): *Prigge (2011)* – justification

- In theory, three justification grounds are possible.
- But none of them applies in the case at hand:
  - Neither Art. 2(5) on public safety (here: in aviation): a prohibition of the activity is not necessary.
  - Nor Art. 4(1) on a 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.
  - Nor Art. 6(1) on a legitimate objective, including legitimate employment policy, labour market and vocational training objectives, plus appropriate and necessary means: only social policy aims, which is not at issue in the present case.

See **Chart 10/13**

## Indirect discrimination (1)

### For less obvious cases

- Leading cases *Sotgiu (1974)*, *Bilka (1986)*, *O'Flynn (1996)*.
- Legal definition, e.g. Art. 2(b) of Directive 2004/113: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

See **Chart 10/10, Chart 10/11**

## Indirect discrimination (2)

### Some examples

- CJEU case-law, leading case *O'Flynn* (1996):
  - Regulation in the UK under which the needy can apply to the State for a financial contribution to funeral costs for a relative.
  - Condition: funeral must take place in the UK; disadvantages migrant workers.
  - No justification.
- Part-time work, e.g. *Bilka* (1986), *Villar Láiz* (2019):
  - Often mainly women; can operate in a discriminatory manner.
  - Note: there is now a specific Directive 97/81, prohibiting direct discrimination on the grounds of part-time working.

## Indirect discrimination (3)

### Some examples

- Length of service, e.g. *Cadman* (2006):
  - Can lead to a particular disadvantage for women.  
“Since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard.”
- An example experienced by your speaker:
  - European Commission conference on discrimination in Lisbon in 2005.
  - Visit to the famous Saõ Jorge Castle, where residents of Lisbon do not have to pay an admission fee.



## Delimitation (1)

### Boundaries moved in practical applications

- *Nikoloudi* (2005):
  - Part-time workers could only become established employees if they had previously worked full-time for two years.
  - Under the general staff regulations, recruitment as part-time cleaners was reserved for women.
- Sex discrimination, direct or indirect? CJEU:
  - Exclusion from inclusion in the established staff through a seemingly gender-neutral reference to a group of employees which was composed solely of women on the basis of a national regulation constitutes direct discrimination on the grounds of gender.
  - If men were also employed: indirect discrimination.

## Delimitation (2)

### Boundaries moved in practical applications (cont'd)

- E.g. *Maruko* (2008):
  - The surviving partner of a same-sex partnership concluded in Germany received no widow's pension because he was not married to his partner.
  - In Germany only different-sex couples can marry.
- Indirect discrimination on the grounds of sexual orientation? CJEU: *direct* discrimination – precise reason not explained.
- Same approach e.g. in *Römer* (2011).
- Clarification in *Hay* (2013) – see below.

## Delimitation (3)

### Explanation in the seminal case of *Hay* (2013)

- Facts:
  - An employer in France refuses marriage benefits to a registered same-sex partner because he is not married.
  - In France, a “PACS” (civil partnership) is available to both same-sex –and opposite-sex couples.
  - Same-sex couples at the time could not marry.
- Direct or indirect discrimination on grounds of sexual orientation? Argument that that where a form of partnership is open to both sexes, there cannot be direct discrimination.
- CJEU: *direct* discrimination (which for that reason can be justified only on the basis of statutory grounds).

## Delimitation (4)

### Explanation in *Hay* (2013) - continued

- CJEU:
  - “The fact that the PACS [...] is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.”
  - “The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”
- Effect: clearly, boundaries have shifted!

## Delimitation (5)

### Later also *Nikolova* (2015)

- Facts:  
Installation of electricity meters too high up to be readable in urban areas populated predominantly by members of the Roma ethnic group. Complainant was not a Roma but ran a business in a Roma district.
- Discrimination on grounds of ethnic origin? CJEU:
  - *Direct* discrimination if the grounds for the different treatment was ethnic origin. To be noted here: stereotypes and prejudices.
  - Otherwise *indirect* discrimination, in which case an objective justification may not stigmatise.

See **Chart 10/12**

## Comparability

### Aristotelian approach in both cases?

- Background – the general definition by the CJEU, e.g. in Case C-253/09 *Commission v Hungary*, para. 50: “[...] it is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations [...].”
- Legal definitions of direct and indirect discrimination:
  - Direct discrimination: the above clearly applies, see wording of the definition.
  - Also for indirect discrimination?
    - Disputed among academics, since not mentioned in the definition.
    - Also relevant here in my view, see e.g. *Wippel* (2004). Also cf. *Kenny* (2013) as regards pay.

## Harassment (1)

### A new element

- E.g. Art. 2(c) of Directive 2004/113:  
“where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.
- Note:
  - Here clearly not an Aristotelian approach.
  - Background: work of Catherine MacKinnon in the USA from the 1970s onwards.

See again **Chart 10/10**

## Harassment (2)

### Also: sexual harassment

- E.g. Art. 2(d) of Directive 2004/113:  
“where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”
- Emphasis here on “conduct of a sexual nature”.

Again see **Chart 10/10**

## Harassment (3)

### Examples (1): *Coleman* (2008)

- Issue arises first in *Coleman* (2008), on disability.
- Facts and finding:
  - “Agreed” termination of employment of a worker ultimately because of the severe disability of her son.
  - This is discrimination by association, including harassment as one particular aspect (offensive remarks addressed to the employee).
  - CJEU: “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 his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment [...]”

## Harassment (4)

### Examples (2)

- Compare EU staff law, where psychological harassment (in the German version: “*mobbing*”) is also prohibited; Art. 12a(3) of the Staff Regulations:

“ ‘Psychological harassment’ means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.”
- E.g. Case F-52/05 Q v. *Commission* :
  - Allegation of isolation from other offices, avoiding talks, no tasks, negative rumours.
  - CJEU: Does not require any bad intention.

## Briefly: positive action

### Context: same and different treatment

- Starting point in EU law: *same* treatment of men and women.
- Different treatment is allowed in certain circumstances; see **Chart 10/13**. One such issue: positive action; e.g. Art. 6 of Directive 2004/113:  
“With a view to ensuring **full equality in practice** between men and women, 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 sex.**”
- In practice:  
Preferential treatment of one group (usually women).

## Derogation or a form of equality?

### A complex discussion

- CJEU tends to treat positive action measures as derogations.
- Academic argument (e.g. by me):
  - Should be seen as the “other” side of equality (“to treat what is not comparable differently”).
  - Much debated: usefulness of such measures.
- Complicated CJEU case law:  
Equal qualifications, no automatic preference, proportionality ... see **Chart 10/13**.

## Example

### **Abrahamsson (2020)**

- Facts: University of Göteborg wishes to hire women as professors if they are sufficiently qualified for the job (rather than the best qualified). This is authorized by the Swedish law.
- Acceptable positive action approach? CJEU:
  - Looks the Treaty and at secondary law in force at the time.
  - Finds:
    - The idea is that of substantive, rather than merely formal equality.
    - Here: the assessment of the qualifications of candidates is not based on clear and unambiguous criteria; it is also automatic.
    - Not allowed.

## ... to be seen against the background of international law (CEDAW)!

E.g. Christa Tobler, 'Going Global in Sex Equality Law. The Case of Gender Representation Rules for Company Boards'

in: Mario Monti/Prinz Nikolaus von und zu Liechtenstein/Bo Vesterdorf/Jay Westbrook/Luzius Wildhaber (eds), *Economic Law and Justice in Times of Globalisation / Wirtschaftsrecht und Justiz in Zeiten der Globalisierung. Festschrift for Carl Baudenbacher*, Baden-Baden: Nomos/Bern: Stämpfli/Wien: Verlag Österreich 2007, 891-916.

**And finally ...**

... thank you for your attention!

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