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## Definition of Key Concepts in EU Anti-Discrimination Law

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### Key Concepts

1. **Direct Discrimination**
2. **Indirect Discrimination**
3. **Distinguishing Direct and Indirect Discrimination**
4. **Harassment**
5. **Putting Together the Jigsaw**



## Example



### Case C-177/88 *Dekker* [1990] ECR I-3968

- refusal to hire a pregnant woman due to the financial costs of her future maternity leave.
- direct or indirect discrimination?
- CJEU: refusal to employ someone due to pregnancy is direct discrimination on grounds of sex.

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## Is it necessary to show a discriminatory motive?

- **Motive cannot justify less favourable treatment.**
- **Case C-54/07, *Firma Feryn* [2008] ECR I-5187.**
- director of a company that installed doors stated that he did not recruit 'immigrants' because of objections by customers.
- CJEU: evidence of direct discrimination on grounds of racial or ethnic origin.

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## 'in a comparable situation'

Who is the correct comparator?

### Case C-267/12 *Hay* EU:C:2013:823

- Employer provided special leave & financial bonus for employees when they got married.
- Was a 'civil solidarity pact' with a same-sex partner 'comparable' to marriage?
- CJEU: 'it is required not that the situations be identical, but only that they be comparable and, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned'.
- His status was comparable to marriage as regards pay or working conditions.



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## Exceptions

- **Genuine occupational requirements**
  - Directive 2006/54, Art 14(2); Directive 2000/43, Art 4; Directive 2000/78, Art 4.
- **Requirements of organisations with an ethos based on religion or belief**
  - Art 4(2), Directive 2000/78.
- **Disability / age and the armed forces**
  - Art 3(4), Directive 2000/78.
- **Measures necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others**
  - Art 2(5), Directive 2000/78.

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## 2. Indirect Discrimination: the Concept.

- measures that treat people in the same manner, but which have discriminatory effects

Case C-409/16,  
*Kalliri*  
EU:C:2017:767



- **Why?**
  - to avoid the law being circumvented.
  - to tackle under-representation / disadvantage = pursuit of substantive equality.

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## Example

Case 170/84, *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607.

- part-time employees were excluded from the occupational pension scheme.
- 'Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.' (para. 31).



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## Legislative Definition

**‘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’**

Directive 2006/54, Art 2(1)(b). See also, Directive 2000/43, Art 2(2)(b); Directive 2000/78, Art 2(2)(b); Directive 2004/113, Art 2(b); Directive 2010/41, Art 3(b).

⇒ is there particular disadvantage?

⇒ is it objectively justified?

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## Establishing ‘Particular Disadvantage’.

Indirect Discrimination without statistics.

- Cases C-335/11 & 337/11 *Ring and Skouboe Werge*, EU:C:2013:222
- Danish legislation permitted dismissal with 1 month of notice after 120 days of paid sick leave in any 12 month period.
- CJEU: disabled workers have a greater risk of experiencing sick leave.
- ‘it is thus apparent that the 120-day rule ... is liable to place disabled workers at a disadvantage’ (para.



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## Justifying Indirect Discrimination.

### *Bilka-Kaufhaus:*

- the measures must correspond to a 'real need on the part of the undertaking' (§36), and be appropriate and necessary.

### *Ring and Skouboe Werge:*

- Legitimate aim of promoting labour market flexibility, but was there sufficient consideration of the impact on people with disabilities?

## 3. Distinguishing Direct and Indirect Discrimination

### Case C-83/14, *CHEZ v KZD and Nikolova*, EU:C:2015:480

- electricity meters positioned at 6m height in Roma neighbourhoods.
- CJEU: 'it is sufficient, in order for there to be direct discrimination ... that that ethnic origin determined the decision to impose the treatment' (para. 76)
  - a neutral requirement motivated by ethnic origin = direct discrimination.
- if indirect discrimination:
  - 'common knowledge' is not sufficient evidence to prove that the measure was objectively justified;
  - need to consider the stigmatising effect on consumers.



## Headscarf Bans & the EU Court of Justice

Case C-188/15, *Bougnaoui*,  
EU:C:2017:204.

- Dismissed following an objection by a client.
- Unless there was a company policy that applied to all employees, this was direct discrimination.



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Case C-157/15, *Achbita v G4S Secure Solutions NV*  
EU:C:2017:203

- the employer had a neutral requirement that no visible signs of religious/political beliefs should be worn in the workplace
  - NOT *direct* but it could be *indirect* discrimination.
  - Is it objectively justified?
- A desire to display religious neutrality = legitimate aim.
- Prohibiting visible religious symbols may be proportionate.

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## FRA, 'Violence Against Women: an EU-wide survey' (2014)

Figure 6.15: Overall sexual harassment since the age of 15 and in the 12 months before the interview across occupational groups (%)<sup>a</sup>



Note: <sup>a</sup> Out of all women who gave details of occupation (n = 41,676; information on occupation was missing for 326 cases).  
Source: FRA gender-based violence against women survey dataset, 2012

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## 4. Legislative Definition: Harassment

**harassment: 'where 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'**

Directive 2006/54, Art 2(c). See also Directive 2000/43, Art 2(3); Directive 2000/78, Art 2(3); Directive 2004/113, Art 2(c); Directive 2010/41, Art 3(c).

**Key issues:**

- 'unwanted'
- 'purpose or effect'
- Dignity / Environment

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## Legislative Definition: Sexual Harassment

‘where any form of unwanted 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’

Directive 2006/54, Art 2(d); Directive 2004/113, Art 2(d);  
Directive 2010/41, Art 2(d).

Key issue: ‘conduct of a sexual nature’

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## Further Issues

### Liability of the Employer

- For acts of co-workers
- For acts of clients or service-users
- Any duty to *prevent* harassment?

### Harassment Because of Association

- C-803/06, *Coleman v Attridge Law and Steve Law*  
EU:C:2008:415.
- Mother claiming harassment because of her son’s disability.

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## Putting Together the Jigsaw

- **Factual situations may often give rise to more than one form of discrimination.**
- **Discrimination and harassment may occur on more than one ground.**
- **Multiple pieces of EU legislation to be considered, but the underlying concepts are shared.**



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**Thank you.**



