

**Definition of Key Concepts, Direct  
Discrimination, Indirect Discrimination,  
Harassment  
Webinar 9 October 2020**



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Expansion of anti-discrimination protection in EU law

- Directive No 76/207, novelized with Directive No 2002/73
- Directive No 2006/54, the base text of **gender** anti-discrimination law in the field of employment; reorders and merges rules scattered in previous directives
- Directives No 2000/43 and No 2000/78 for other factors of discrimination such as **race, ethnic origin, sexual orientation, religious belief and belief, disability, age.**
- traits of homogeneity in fundamental concepts

## direct and indirect discrimination: the key concepts (dir. 2006/54)



- "a situation in which a person is **treated less favourably on the** basis of sex than another person is, has been or would be treated in a similar situation".
- "a situation in which an apparently neutral provision, criterion or practice may place 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".
- "Less favourable treatment" or "particular disadvantage": what role do the Member States play in determining this concept?

## Comparator



- can one disregard a comparative judgement? *likes should be treated alike*
- who is the **comparable worker** in direct discrimination and what is the context to identify him/her? Is it necessary for the work to be carried out simultaneously? Is comparative judgement extendable or not beyond the boundaries of the same employer?
- can a comparison be made with the salary of a "hypothetical" worker?

## "on the ground of"



- How should the formula «*on the ground of*» codified in the directives be interpreted?
- the discrimination factor as a *sine qua non* of the least favourable treatment
- *Reason and motives* in British case law
- stereotypes

## Indirect discrimination



- The principle behind the concept
- from the reference to the "proportionally greater disadvantage" to the general formula "*particular disadvantage*".
- the composition of the groups to be compared

## Scrutiny to be applied to a justification defence



- How should the legitimacy of the objectives be assessed?
- What discretionary margin of appreciation is allowed for such control?
- How to assess whether the instruments are suitable and necessary in relation to the objectives?

## The borderline between the two definitions



- The need for a dividing line between the two definitions
- The collective dimension of indirect discrimination
- The circle of affected persons

## Harassment



- "**Harassment**: a situation in which unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of that person and creating an intimidating, hostile, degrading, humiliating or offensive climate.
- "**Sexual harassment**: a situation in which unwanted conduct of a sexual nature occurs, expressed in physical, verbal or non-verbal form, with the purpose or effect of violating the dignity of a person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive climate".

## Elements of the case



- an equalization, not an identification
- Objectivity of the notion
- additional elements:
  - **undesirable** conduct related to sex;
  - the purpose or effect of "violating" the dignity of a worker;
  - the purpose or effect of creating a climate of degradation and humiliation in the workplace, regardless of the will of the agent

## *Harassment and bullying*



- a deep conceptual closeness between bullying and harassment.
- teleological criterion common to both
- creation of the new category of *straining* in some systems
- the expansive scope of the notion of harassment and its ability to deploy effects in *mobbing* (German case law)