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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. Harassment**
- 4. Putting Together the Jigsaw**

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POLL: Discrimination is best described as:

- A. Being prejudiced against another person because of her characteristics, such as ethnic origin or religion.
- B. Where rules or practices place women or minority groups at a particular disadvantage.
- C. Subjecting a person to humiliating or offensive treatment related to her characteristics, such as ethnic origin or religion.

1. Direct Discrimination: the Concept.

- **prejudice, stereotyping.**
- **overt and covert.**



Image Source: <https://www.coe.int/en/web/compass/discrimination-and-intolerance>

The legislative definition

‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’: Art 2(2)(a), Directive 2000/43.

+ Directive 2000/78, Art 2(2)(a); Directive 2006/54, Art 2(1)(a); Directive 2004/113, Art 2(a); Directive 2010/41, Art 3(a).

Direct discrimination cannot be justified:

- EXCEPT where there is a legislative exception
 - eg occupational requirements.
- EXCEPT in relation to age.

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.

'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.



Source:
<https://www.freeimages.com/photo/rainbow-gay-pride-flag-1192851>



Source:
<https://www.freeimages.com/photo/weddingrings-3142254>

2. Indirect Discrimination: the Concept.

- Measures that treat people in the same manner, but which have discriminatory effects
- Why?
 - to avoid the law being circumvented.
 - to tackle under-representation / disadvantage → pursuit of substantive equality.

Legislative Definition

‘where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’

Directive 2000/78, Art 2(2)(b). See also, Directive 2000/43, Art 2(2)(b); Directive 2006/54, Art 2(1)(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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Example: Disability & Indirect Discrimination

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. 76).
- The law pursued the legitimate aim of promoting labour market flexibility, but was there sufficient consideration of the impact on people with disabilities?



Source:
<https://www.freemages.com/photo/flip-calendar-1-1149834>

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Example: Religion & Indirect Discrimination

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.
 - NB. pending cases C-804/18 & C-341/19.



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POLL: If a law firm is recruiting a lawyer, which of the following might constitute indirect discrimination?

- A requirement that applicants have successfully completed a university law degree.
- A requirement that applicants have successfully completed a university law degree in the past 5 years.
- A requirement that applicants are available to work evenings and weekends when required.

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4. Legislative Definition: Harassment

‘where unwanted conduct related to racial or ethnic origin 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’

Directive 2000/43, Art 2(3).

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

When does unwanted conduct constitute harassment?

cf. Case F-42/10 *Skareby v Commission* EU:F:2012:64

- **EU Staff Regs on psychological harassment**

**‘the classification of harassment is subject to the condition of its being objectively sufficiently real, in the sense that an impartial and reasonable observer, of normal sensitivity and in the same situation, would consider it to be excessive and open to criticism’
(§65)**

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.**



Source: <https://www.freemages.com/photo/puzzle-i-1169119>



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Thank you. Questions?