

# Definition of key concepts: Direct discrimination, Indirect discrimination, Harassment

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## International Law

- The right to equality and the prohibition of discrimination is a universal right recognised by the
  - Universal Declaration of Human Rights,
  - European Convention on Human Rights,
  - European Social Charter
  - ILO Convention 111 concerning Discrimination in respect of Employment and Occupation.

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## European Union law

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- The principle of non-discrimination occupies a central place in the EU and has been reinforced in the Lisbon Treaty.
- Arts. 2 and 3 TEU
- Arts. 19, 45 and 57 TFEU
- Article 21 of the CFREU
- Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

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## Key concepts

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- Direct discrimination
- Indirect discrimination
- Harassment
- Other concepts: multiple discrimination

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## Direct discrimination — arts. Article 2(2)(a) of Directive 2000/43 and Article 2(2)(a) of Directive 2000/78

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Direct discrimination shall be deemed to exist where

- a person is **treated less favourably than**
- another is (present)
- has been (past)
- or would be treated (hypothetic)
- in a **comparable situation.**

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## Requirements

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- Unfavourable treatment
- Cause
- No reason or intention required
- Need to establish a comparison
  - Ex: In Case C-356/09, of 18 November 2010, *Kleist* judgment
    - ‘The comparability of such situations must be examined, in particular in the light of the subject-matter of the rules establishing the difference in treatment’.

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- Direct discrimination occurs when it is possible to compare the less favourable treatment with another person in a comparable situation who is, has been or would be treated.
  - The comparison must be made with someone who has, has had or will have the same circumstances and who are not materially different from the applicant's, except for the fact that the protected characteristic, *inter alia*, racial origin, ethnicity, sexual orientation, age, disability and sex.

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## Examples:

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- On grounds of nationality: case C-181/19 of 6 October 2020 - *Jobcenter Krefeld*
- On grounds of sex — equal treatment: case C-624/19 of 3 June 2021 - *Tesco Stores*
- On grounds of race or ethnic origin: case C-83/14 of 16 July 2015 - *Chez*
- On grounds of age: process: case C-223/19 of 24 September 2020 - *YS v NK AG*
- Because of disability: case C-485/2020 of 10 February 2022 - *HR Rail SA*
- On account of sexual orientation: case C-507/18 of 23 April 2020 - *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford*
- On grounds of religion — Joined Cases C-804/18 and C-341/19 of 15 July 2021 - *X v WABE eV and MH Müller Handels GmbH v MJ*

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## Less favourable treatment than has been (past)

- Case C-129/79 of 27 March 1980 - *Société Macarthy's Ltd v Wendy Smith*
- "1. The principle that men and women should receive equal pay for equal work, enshrined in Article 119 of the EEC Treaty, is not confined solely to cases where men and women are contemporaneously doing equal work for the same employer.
- 2. The principle of equal pay enshrined in Article 119 applies to the case where it is established that, having regard to the nature of her services, **a woman has received less pay than a man who was employed prior to the woman's period of employment and who did equal work for the employer.**

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## Less favourable treatment than would be given (hypothetical)

- C-136/95 of 30 April 1998 - *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*:
- 'The principle of non-discrimination requires that a female worker, who continues to be bound to her employer by her contract of employment during maternity leave, should not be deprived of the benefit of the working conditions which apply to both men and women and are the result of that employment relationship. In circumstances such as those of this case, to deny a female employee the right to have her performance assessed annually **would discriminate against her merely in her capacity as a worker because, if she had not been pregnant and had not taken the maternity leave** to which she was entitled, she would have assessed for the year in question and could therefore have qualified for promotion.'

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## Several direct discriminations are prohibited:

- **Discrimination by association** - *Coleman* judgment, Case C-303/06, 17 July 2008:
- 'Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and in particular Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the **prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee, is, has been, or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).**'

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- Case C-83/14 *Chez*, 16 July 2015
- 'the scope of Directive 2000/43, in the light of its objective and the nature of the rights which it seeks to safeguard, be defined restrictively, is, in this instance, such as to justify the interpretation that **the principle of equal treatment to which that directive refers, applies not to a particular category of person, but by reference to the grounds mentioned in Article 1 thereof, so that the principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds.**

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## Public statements

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- C-54/07, *Feryn* judgment, 10 July 2008
- ‘(1) The fact that an employer **declares publicly that it will not recruit employees of a certain ethnic or racial origin, constitutes direct discrimination** in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, since **such statements may strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.**

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- ‘2) Public statements by which an employer lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption, which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43’.
  - ‘3) Article 15 of Directive 2000/43 requires that, even where there is no identifiable victim, the rules on sanctions applicable to infringements of national provisions adopted pursuant to this directive must be effective, proportionate and dissuasive.’

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- In Case C-81/12 - *ACCEPT*, of 25 April 2013
  - 'Articles 2(2) and 10(1) of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to 'facts from which it may be presumed that there has been discrimination' as regards a professional football club, even though the statements at issue come from a person presenting himself and being perceived, in the *media* and by the public, as playing a leading role in that club, without, however, necessarily having the legal capacity to bind it or represent it in recruitment matters'.

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- Although the person who made the statements is **not legally able to bind the defendant in recruitment matters**, it does not prevent it from being possible that there are established facts giving rise to a presumption of discrimination:
  - 'does not suggest that, in order to establish the existence of 'facts from which it may be presumed that there has been discrimination', in accordance with Article 10(1) of Directive 2000/78, the person who made the statements concerning the recruitment policy of a particular entity **must necessarily have legal capacity directly to define that policy or to bind or represent that entity in recruitment matters**.

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- A defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy by **merely asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.**
- In a situation **such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned** is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.

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- In Case C-507/18 of 23 April 2020 - *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford*
- 'The concept of 'conditions of access to employment... or occupation' in Article 3<sup>(1)</sup>(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **statements made by a person during an audiovisual programme, according to which, that person would never recruit persons of a certain sexual orientation, even though no recruitment procedure has been opened, nor was planned**, provided that the link between those statements and the conditions for access to employment or to occupation with that employer must not be hypothetical.
- (2) Directive 2000/78 must be interpreted as precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, automatically on account of that objective and irrespective whether it is a for-profit association, has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

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## Guiding principles:

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- The status and capacity of the person making the statements should be examined.
- The nature and content of the statements made should be taken into account.
- The context in which the statements were made is equally relevant.
- It is important to consider to what extent the nature, content and context of the statements made may discourage persons belonging to the group concerned from applying for a job with that employer or even from thinking about being promoted.

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- Cases of direct discrimination where there is formally a neutral criterion but which in fact affects only one particular group:
    - Judgment in *Maruko*, Case C-267/06 of 1 April 2008 — the Court ruled that the refusal to grant survivors' benefits to same-sex partners constituted discrimination on grounds of sexual orientation.
    - In the present case, there was no intention to discriminate against people on the basis of their sexual orientation, but it was clear from the reading of national law that the reason for not conferring the social benefit was based on the fact that the applicant was not heterosexual.

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## Exceptions to the prohibition of direct discrimination: in principle they are prohibited but

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- Article 4(1) of Directive 2000/78/EC
  - Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

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## Article 6 Justification of differences of treatment on grounds of age

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- Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of **age** shall not constitute discrimination if within national law, **they are objectively and reasonably justified** under national law by **a legitimate aim**, including legitimate **employment policy, labour market and vocational training** objectives, and if the means of achieving that aim are **appropriate and necessary**.

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- Such differences of treatment may include, among others:
  - the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities, in order to promote their vocational integration or ensure their protection;
  - the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
  - the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.’

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- Article 2(5)
    - ‘This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others’.

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## Comparator — “comparable situation”

- In Case C-267/12 - *Hay* of 12 December 2013
- ‘It should be made clear in that regard that, first, it is not required that the situations be identical, but simply comparable, and, second, the examination of such a comparable nature must not be carried out in a comprehensive and abstract manner, but in a specific and concrete manner from the point of view of the benefit in question’ — par. 33
- Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of a collective agreement, such as the one at issue in the main proceedings, in which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned does not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, **that employee is in a comparable situation to an employee who marries.**

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## Indirect discrimination

- ‘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:
  - that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’

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- There is indirect discrimination where
    - a provision, criterion or practice, apparently neutral
    - would put persons at a disadvantage compared with other persons,
    - unless that provision, criterion or practice is
      - a) objectively justified by a legitimate aim and
      - b) that means achieving that aim are appropriate and necessary

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- **Provision** — for example, any kind of provision, from the law, ICLR, individual employment agreement clauses, an order and codes of conduct.
  - **Criterion** is related to the factor which gave rise to the employer's decision, such as at the time of the termination of the employment agreement or at the time of the worker's promotion.
  - **Practice** includes the practical application of a provision or criterion.

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- Choice of a comparator
  - Prove a disadvantage
    - BUT
    - What is admissible as proof?
      - use of statistics
      - other means of proof
      - recital 15 of Directive 2000/78/EC evidence of indirect discrimination can be determined by any means of proof

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## In Case 96/80 of 31 March 1- *Paula Jenkins*

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- “1. Therefore a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.
- 2. Where the national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the payment of lower hourly rates of remuneration for part-time work than for full-time work represents discrimination based on difference of sex the provisions of Article 119 of the Treaty apply directly to such a situation”.

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## In Case C-300/06 of 6 December 2007, *Ursula Voß*

- ‘Article 141 ° EC is to be interpreted as precluding national legislation on the remuneration of civil servants, which defines overtime for both full-time civil servants and part-time civil servants as hours worked over and above their normal working hours and, which remunerates those additional hours at a rate lower than the hourly rate applied to their normal working hours, so that part-time civil servants are less well paid than full-time civil servants in respect of hours which are worked over and above their normal working hours, but which are not sufficient to bring the number of hours worked overall above the level of normal working hours for full-time civil servants where:
  - — in the group of workers subject to that legislation, a considerably higher percentage of women is affected as compared with the percentage of men so affected;
  - and — the difference in treatment is not justified by objective factors wholly unrelated to discrimination based on sex.’

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## Justification of indirect discrimination

- In Case C-170/84, 13 May 1986 - *Bilka-Kaufhaus*,
  - The employer has proved that objective factors, unrelated to discrimination, gave rise to the difference in treatment.
  - ‘(1) Article 119 of the Treaty is infringed by an undertaking 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’.
  - ‘Under Article 119, a large department store may justify the adoption of a wage policy involving the exclusion of part-time workers from the occupational pension scheme, irrespective of their sex, by showing that its aim is to employ as few part-time workers as possible, where it is established that the means chosen to achieve that objective correspond to a genuine need of the undertaking, are suitable for attaining the objective in question and necessary for that purpose.’

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## However, budgetary arguments cannot be considered as justification

- In Case C-187/00 of 20 March 2003 - *Helga Kutz-Bauer*
- 'As regards the German Government's argument concerning the additional burden associated with allowing female workers to take advantage of the scheme at issue in the main proceedings even when they have acquired entitlement to a retirement pension at the full rate, the Court observes that although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not, in themselves, constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes.'
- 'Moreover, to concede that **budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex, would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and space according to the state of the public finances of Member States**'

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## Example: disability/indirect discrimination relationship? — Joined Cases C-335/11 and C-337/11 of 11 April 2013

- CJEU: workers with disabilities may be more likely to take sick leave
- 'a worker with disability is more exposed to the risk of application of the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability. As the Advocate General observes in point 67 of her Opinion, compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability. He thus, runs a greater risk of accumulating days of absence on grounds of illness and, consequently of reaching the 120-day limit provided for in paragraph 5 (2) of the FL. It is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference in treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78' — par. 76
- Did Danish legislation pursue the legitimate objective of promoting labour market flexibility, but did it take due account of the impact on people with disabilities?

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## Harassment

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- Harassment is also considered a form of discrimination and consists of unwanted conduct which is related to any of these various factors of discrimination. The notion of harassment can be found in the various Directives.

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- Article 2(3) of Directive 2000/43/EC states that "harassment shall be deemed to be discrimination within the meaning of paragraph 1 when an **unwanted conduct related to racial or ethnic origin takes place, with the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.** In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States".

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- Article 2(3) of Directive 2000/78/EC states that "harassment shall be deemed to be discrimination within the meaning of paragraph 1 when an **unwanted conduct related to racial or ethnic origin takes place, with the purpose or effect of violating the dignity of the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.** In this context, the concept of «harassment» may be defined in accordance with the national laws and practice of the Member States”.

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- The CJEU has already passed judgment in the *Coleman* case, Case C-303/06 on discriminatory harassment:
    - ‘where it is established that the unwanted conduct amounting to the harassment 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 laid down by Article 2(3) of Directive 2000/78.

## Case F-42/10 of 16 May 2012 - *Skareby v Commission*

- ‘that to be classified as harassment, the reprehensible conduct in question must have led ‘objectively’ to consequences...’ that discredit the victim or impair the latter’s working conditions. As the conduct in question, must under Article 12a(3) of the Staff Regulations, be improper, it follows that 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’. — para. 65

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## Multiple discrimination — brief analysis

- It occurs when more than one factor of discrimination is at stake.
- Directive 2000/43/EC — "(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities and to promote equality between **men and women, especially since women are often the victims of multiple discrimination.**
- Directive 2000/78/EC — "(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities and to promote equality between men and women, especially since **women are often victims of multiple discrimination**".

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# Examples

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- **Case C-415/10 of 19 April 2012 - *Galina Meister***: discrimination on grounds of sex, origin and age during a recruitment procedure.
- **Case C-443/15 of 24 November 2016 — David L. Parris**: discrimination on grounds of sexual orientation and age (retirement) — not considered by the CJEU —
- Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule which, such as that at issue in the main proceedings, is not capable of creating discrimination resulting from the combination of sexual orientation and age, where that rule **does not constitute discrimination either on the grounds of sexual orientation or on the ground of age** taken in isolation.

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- Thank you so much!
  - Thank you very much!

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