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EU anti-discrimination law: Definition of key concepts

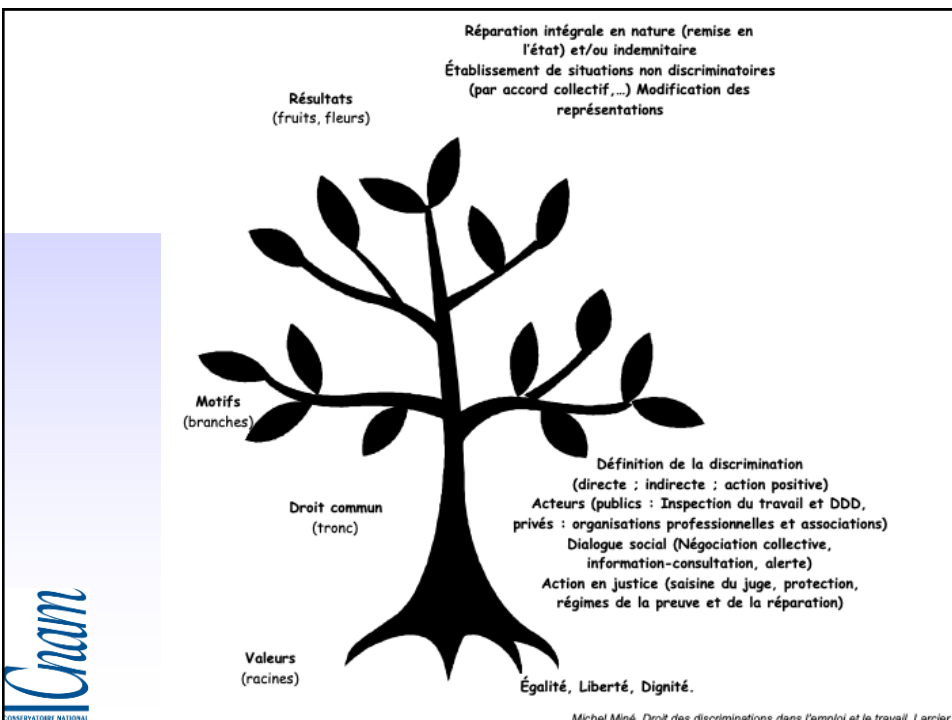
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Droit des discriminations dans l'emploi et le travail, 2016, Éditions Larcier (Bruxelles).



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Definition of fundamental concepts

- International Law - International Labour Organization - ILO *Convention No. 111 concerning Discrimination (Employment and Occupation) and reports of Committee of Experts*
- International Law – *European Convention on Human Rights and European Social Charter, Case law of the ECtHR and Decisions of the European Committee of Social Rights*
- EU Law: *TEU (Arts. 2, 3) and TFEU (Arts. 19, 45, 157) and EU Charter of Fundamental Rights (Art. 21)*
- *Directive 2000/43 of 29 June 2000 – equal treatment between persons irrespective of racial or ethnic origin*
- *Directive 2000/78 of 27 November 2000 – a general framework for equal treatment in employment and occupation - Grounds: religion or belief, disability, age, sexual orientation*



EU Law

Fundamental concepts of anti- discrimination law



The challenges of defining discrimination

- **Speaking the same language** (legal terminology helps to conceptualise discrimination in an objective way)
- **Avoiding confusion** (distinctions, injustice, inequality, discrimination, etc.)
 - **distinctions** (distinctions may be legitimate...)
 - **unfavourable treatment** (unfavourable treatment may be justified...)
 - **injustice** (injustice is not always discrimination...)

Misnaming things adds to the misfortunes of this world, Albert Camus
- **Making use of legal means to**
 - **detect discrimination** (identifying the facts as discrimination),
 - **applying the right legal framework and taking action to eliminate discrimination**



Objective of the law:

Absence of discrimination = equal treatment

Discrimination may consist of:

- The application of different rules to comparable situations
- The application of the same rule to different situations
(CJEU, 30 June 1998, Mary Brown)



General definition

Discrimination is manifested through a **measure** that is:

unfavourable (any management measure: access to employment, including promotion and training; conditions of work and employment, including pay, etc.)

unjustified

unlawful, linked to a criterion that must not be applied to this decision - sex (gender), nationality, "racial"/ethnic origin, religion, age, disability, sexual orientation.



***Any discrimination is in itself
an infringement of human rights***

Discrimination may be:

I. Direct

II. Indirect



I. Direct Discrimination

Where **one person** is treated less favourably than another:

- **is treated** (present concrete circumstances)
- **has been treated** (subsequent concrete circumstances)
- **would be treated** (hypothetical circumstances)

in a **comparable** situation.



A person is treated less favourably **than** another is treated

•Nationality:

- CJCE 15 October 1969, Ugliola
- CJCE 12 February 1974, Sotgiu
- CJCE 17 December 1980, Commission v Belgium
- CJCE 7 May 1986, Gül v Regierungspräsident Düsseldorf
- CJCE 3 June 1986, Commission v France
- CJCE 16 June 1987, Commission v Italy
- CJCE 21 June 1988, Brown v Secretary of State for Scotland
- CJCE 30 May 1989, Allué et al. v Università degli studi di Venezia
- CJCE 15 December 1995, Union royale belge des sociétés de football association et al. v Bosman
- CJCE 11 March 2008, Commission v France
- CJEU 28 June 2012, Emy
- CJEU 25 October 2012, Prete
- CJEU 13 December 2012, Caves Krier Frères
- CJEU 20 June 2013, Giersch et al.
- CJEU 19 June 2014, Saint Prix
- CJEU 4 September 2014, Schiebel Aircraft
- CJEU 10 September 2014, Haralambidis
- CJEU 5 February 2015, Commission v Belgium
- CJEU 19 September 2019, Daknėvičiūtė (C-544/18)
- CJEU 10 October 2019, Krah (C-703/17)
- CJEU 24 October 2019, Belgian State
- CJEU 2 April 2020, Landkreis Südliche Weinstraße (C-830/18)
- CJEU 6 October 2020, Jobcenter Krefeld (C-181/19)
- CJEU 25 November 2021, Finanzamt Österreich (C-372/20)
- CJEU 10 March 2022, Commission v Belgium (C-60/21)
- CJEU General Court 23 March 2022, Necci v Commission (T-129/19 RENV)
- CJEU 8 December 2022, Caisse nationale d'assurance pension (C-731/21)



A person is treated less favourably than another is treated

•**Sex (equal treatment for men and women):**

- CJCE 1971, 1976, 1978, Gabrielle Defrenne
- CJCE 1 July 1986, Rummler v Dato-Druck,
- CJCE 17 October 1989, Danfoss,
- CJCE 27 October 1993, Pamela Enderby,
- CJCE 9 February 1999, Regina v Seymour-Smith,
- CJCE 10 February 2000, Deutsche Post,
- CJCE 26 June 2001, Susan Brunnhofer,
- CJCE 4 October 2001, Tele Danmark,
- CJCE 27 April 2006, Richards, C-423/04 (Sex change)
- CJEU 21 July 2011, Kelly
- CJEU 28 February 2013, Kenny
- CJEU 20 June 2013, Riežniece
- CJEU 3 September 2014, X



- CJEU 14 April 2015, Cachaldora Fernández
- CJEU 16 July 2015, Maistrellis
- CJEU 17 December 2015, Arjona Camacho
- CJEU 16 June 2016, Estrella Rodríguez Sánchez, C-351/14;
- CJEU 14 July 2016, Maria Cristina Elisabetta Ornano, C-335/15;
- CJEU 28 July 2016, Nils-Johannes Kratzer, C-423/15;
- CJEU 13 July 2017, Kleinstaub, C-354/16;
- CJEU 7 September 2017, H, C-174/16;
- CJEU 18 October 2017, Kalliri, C-409/16;
- CJEU 19 October 2017, Otero Ramos, C-531/15;
- CJEU 7 February 2018, Matiru, C-142/17;
- CJEU 19 September 2018, Gonzalez Castro, C-41/17
- CJEU 20 June 2019, Hakelbracht, C-404/18
- CJEU 7 October 2019, Safeway Ltd, C-171/18
- CJEU 15 October 2019, AEAT, C-439/18 et C-472/18
- CJEU 5 November 2019, Commission v. Poland, C-192/18
- CJEU 4 June 2020, Fetico, C-588/18
- CJEU 24 September 2020, YS v NK AG, C-223/19
- CJEU 18 November 2020, Syndicat CFTC C-463/19
- CJEU 3 June 2021, Tesco Stores C-624/19
- CJEU 14 October 2021, Instituto Nacional de la Seguridad Social (INSS) C-244/20
- CJEU 5 May 2022, DVAEP, C-405/20



A person is treated less favourably than another is treated

"Racial"/ Ethnic origin:

- CJCE 10 July 2008, Firma Feryn NV
- CJEU 12 May 2011, Malgožata Runevič-Vardyn
- CJEU 19 April 2012, Galina Meister
- CJEU 31 January 2013, Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and others
- CJEU 16 July 2015, CHEZ Razpredelenie Bulgaria AD / Komisija za zashtita ot diskriminatsia
- CJEU 16 July 2015, Razpredelenie Bulgaria AD / Komisija za zashtita ot diskriminatsia



Age

- CJCE 2005, Mangold;
- CJCE 2007, Palacios de la Villa;
- CJCE 5 March 2009, Age Concern England;
- CJCE 18 June 2009, Hütter;
- CJEU 12 January 2010, Wolf;
- CJEU 12 January 2010, Petersen;
- CJEU 19 January 2010, Seda Küçükdeveci;
- CJEU 8 July 2010, Bulicke;
- CJEU 12 October 2010, Rosenblatt;
- CJEU 12 October 2010, Ingeniørforeningen i Danmark v Region Syddanmark;
- CJEU 18 November 2010, Georgiev;
- CJEU 8 September 2011, Hennigs and Land Berlin;
- CJEU 21 July 2011, Fuchs and Köhler;
- CJEU 13 September 2011, Prigge;
- CJEU 6 November 2012, Commission v Hungary;
- CJEU 6 December 2012, Odar;
- CJEU 26 September 2013, HK Danmark;
- CJEU 26 September 2013, Dansk Jurist- og Økonomforbund
- CJEU 19 June 2014, Specht et al.
- CJEU 11 November 2014, Schmitzer
- CJEU 28 January 2015, Starjakob
- CJEU 13 November 2014, Vital Pérez
- CJEU 28 January 2015, Starjakob
- CJEU 21 January 2015, Felber
- CJEU 28 January 2015, Starjakob



- CJEU 26 February 2015, Ingeniørforeningen i Danmark
- CJEU 21 May 2015, SCMD;
- CJEU 9 September 2015, Daniel Unland;
- CJEU, 1 October 2015, O. (...);
- CJEU 19 April 2016, Dansk Industri (DI), C-441-14;
- CJEU 2 June 2016, C., C-122/15;
- CJEU 16 June 2016, Franz Lesar, C-159/15;
- CJEU 10 November 2016, J.J. de Lange, C-548/15;
- CJEU 15 November 2016, Gorka Salaberria Sorondo, C-258/15;
- CJEU 24 November 2016, Parris, C-443/15;
- CJEU 21 December 2016, Bowman, C-539/15;
- CJEU 13 July 2017, Kleinsteuber, C-354/16
- CJEU 19 July 2017, Abercrombie & Fitch Italia, C-143/16
- CJEU 28 February 2018, John, C-46/17
- CJEU 14 March 2018, Stollwitzer, C-482/16
- CJEU 24 September 2020, YS v NK AG, C-223/19
- CJEU 8 October 2020, Universitatea "Lucian Blaga" Sibiu and Others, C-644/19
- CJEU 15 April 2021, Olympiako Athlitico Kentro Athinon, C-511/19
- CJEU 3 June 2021, Ministero della Giustizia (Notaries) C-914/19
- CJEU 2 June 2022, HK v Danmark and HK Privat C-587/20
- CJEU 17 November 2022, Ministero dell'Interno, C-569/21



A person is treated less favourably than another is treated

Disability:

- CJCE 11 July 2006, Chacon Navas;
- CJCE 17 July 2008, S. Coleman;
- CJEU 6 December 2012, Odar ;
- CJEU 11 April 2013, HK Danmark ;
- CJEU 4 July 2013, Commission c/ République italienne;
- CJEU 18 March 2014, Z.;
- CJEU 18 December 2014, FOA;
- CJEU 1er December 2016, Mohamed Daouidi, C-395/15;
- CJEU 9 March 2017, Milkova, C-406/15
- CJEU 18 January 2018, Ruiz Conejero, C-270/16
- CJEU 19 September 2018, Bedi, C-312/17
- CJEU 26 January 2021, VL, C-16/19
- CJEU 15 July 2021, Tartu Vangla C-795/19
- CJEU 21 October 2021, Komisija za zashtita ot diskriminatsia, C-824/19



A person is treated less favourably than another is treated

Sexual orientation:

CJEU 1 April 2008, Maroko;
CJEU 10 May 2011, J. Römer
CJEU 6 December 2012, Dittrich, Klinke and Müller
CJEU 12 December 2013, Frédéric Hay v Crédit agricole mutuel
CJEU 25 April 2013, Asociația ACCEPT
CJEU 24 November 2016, David L. Parris, C-443/15
CJEU 15 Januar 2019, E.B., C-258/17
CJEU 23 April 2020, NH v. Associazione Avvocatura per i diritti LGBTI, C-507/18
CJEU 12 January 2023, TP, C-356/21



A person is treated less favourably than another is treated

Religion and beliefs

CJEU 14 mars 2017, C-157/15, G4S (Belgique)
et
CJEU 14 mars 2017, C-188/15, Micropole (France)

CJEU 17 avril 2018, Egenberger, C-414/16
CJEU 11 septembre 2018, IR, C-68/17
CJEU 22 January 2019, Cresco Investigation, C-193/17
CJEU 15 July 2021, WABE and MH Müller Handel (C-804/18 and C-341/19)
CJEU 13 January 2022, MIUR, C-282/19



A person is treated less favourably than another **has been** treated

CJCE 27 March 1980, Wendy Smith, C-129/79



A person is treated less favourably than another **would be** treated

CJCE 30 April 1998, Évelyne Thibault v CNAVTS (**sex** - national rules depriving a woman of the right to an assessment of her performance owing to her absence from the undertaking whilst on maternity leave)

CJCE 23 May 1996, John O'Flynn (**nationality** - grant of a funeral payment subject to the funeral taking place on national territory)



Direct Discrimination (cont.)

By instruction

By harassment

By association

By intent

By multiple discrimination



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Direct discrimination *by instruction* (cont.)

When a person is instructed to discriminate against other persons on grounds related to one of the prohibited criteria

- Requests by
 - clients (CJCE 10 July 2008, Firma Feryn NV, etc.),
 - employees (ECHR 3 Oct. 2013, I.B. v Greece, etc.),
 - other persons,

addressed to an employer (or responsible person)

- such requests constitute discrimination
- **such requests cannot serve to justify discrimination**



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Direct discrimination *by harassment* (cont.)

- **Harassment:**

unwanted **conduct**

(linked to one of the grounds)

with the purpose

or effect

of violating the dignity of a person

and of creating an intimidating, hostile, degrading, humiliating or offensive **environment**



Direct discrimination *by harassment* (cont.)

- **Sexual harassment**

unwanted physical or verbal conduct

with sexual connotations

with the purpose or effect of

violating the dignity of a person

and of creating an intimidating, hostile, degrading, humiliating or offensive environment.



Direct discrimination *by intent* (cont.)

When statements have discriminatory effects

CJCE 10 July 2008, Feryn Firma NV, C-54/07

CJEU 23 April 2020, NH v. Associazione Avvocatura per i diritti LGBTI

Public **statement** by the director of an undertaking to the effect that he could not recruit persons of a certain racial or ethnic origin because of the reluctance of customers

The statements constitute **a presumption of direct discrimination (dissuasive impact of the statements)**

Situations in which the undertaking lets it be known that persons covered by one of the grounds (sex, race, age, etc.) will not be:

- recruited
- allocated to certain jobs,
- promoted to certain positions, etc.



Direct discrimination *by association* (cont.)

When a person is unfavourably treated because of their association with a person covered by one of the grounds

CJCE 17 July 2008, S. Coleman v Attridge Law, C-303/06

a person suffered discrimination and harassment because of the disability of her child

“The prohibition of direct discrimination [...] **is not limited to people who themselves have a disability.**”

The principle of equal treatment applies not to a specified category of persons, but to the grounds set out in Article 1 of the Directive (§ 38).



Multiple discrimination (direct or indirect)

A person experiences
“multiple” (or cumulative) discrimination
when more than one ground is involved
(especially women:

- Directive 2000/43 recital 14
- Directive 2000/78 recital 3)

CJEU 19 April 2012, Galina Meister, C-415/10
discrimination on grounds of age, sex and ethnic origin
suffered during a recruitment procedure

CJEU 24 November 2016, David L. Parris, C-443/15 - discrimination on
grounds of age and sexual orientation (retirement) – not found

Directive 2023/970 10 May 2023

“intersectional discrimination”

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Derogations to direct discrimination

- **In principle: impossible**
- By way of an exception (interpreted strictly): difference in treatment does not constitute discrimination when a characteristic (associated with one of the grounds) constitutes a “**genuine and determining occupational requirement**” by reason of the nature of the activities or the context in which they are carried out
 - If the Member State has opted for a derogation (“information provided to the Commission”)
 - if the objective is legitimate and the requirement is proportionate
- Specific derogations related to:
 - the criteria of
 - age,
 - disability,
 - occupational activities within churches.



II. – Indirect discrimination

- **Where an apparently neutral**
- **provision or practice** applied (by a company, etc.)
- would put persons of a particular group (linked to one of the grounds) at a particular **disadvantage** compared with other persons,
- unless the entity (company, etc.) applying the provision or practice proves that it is
 - objectively **justified** by a legitimate aim (relevance)
 - and that the means for achieving it are appropriate and necessary (**proportionality**)



Indirect Discrimination

This method permits the examination of the **effects** of a rule or practice (objective concept of discrimination)
(ILO Convention 111)

If the company can justify the legitimacy and proportionality of the provision or practice that has been challenged, the **difference in treatment** is not discriminatory

Case-law establishes strict standards for accepting a **justification**
(for example, budgetary data does not provide justification: CJEU
20 March 2003, Helga Kutz-Bauer)



Indirect discrimination: a concept and a method

Sex (examples):

- CJCE 31 March 1981, Paula Jenkins (part-time workers, hourly wage)
- CJCE 13 May 1986, Bilka (part-time workers, company pension scheme)
- CJCE 7 February 1991, Nimz (part-time workers, career development)
- CJCE 6 December 2007, Ursula Voss (part-time workers, overtime rates for hours worked beyond contract)

Nationality (examples):

- CJCE 24 September 1998, Commission v France (retirement benefit refused to cross-border workers)
- CJCE September 2003, Köbler (seniority benefit refused to workers who had performed the same activity in a different Member State)



Indirect discrimination and *Positive action*

Indirect discrimination invites the adoption and implementation of measures for positive action

“With a view to ensuring full equality in practice, 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 any of the grounds)”

- Actions to compensate (recruitment, pay, training, promotion, etc.)
- Actions to prevent disadvantage (training, etc.),
- For the benefit of persons who have suffered discrimination or belong to a group that has suffered discrimination on one of the grounds



Positive action

Positive action measures limited by the CJEU

“saving clause” for persons meeting other criteria

- CJCE 17 October 1995, Kalanke / Freie Hansestadt Bremen (C-450/93) (§ § 18-19, 21-24 and operative part)
- CJCE 11 November 1997, Marschall / Land Nordrhein-Westfalen (C-409/95) (§ 35 and operative part)
- CJCE 28 March 2000, Badeck et al. (C-158/97) (§ § 38, 44, 55, 63, 66 and operative part)
- CJCE 6 July 2000, Abrahamsson and Anderson (C-407/98) (§ § 53-62, operative part 3)



Access to relevant documents

Texts: <http://eur-lex.europa.eu>

Case-law: <http://curia.europa.eu>

- Case-law from 1954 to 2009:
 - B. European Community (EEC/EC)
 - B-15 Social policy
- Case-law since 2010:
 - 4. EU internal policy
 - 4.14 Social policy



Grazie mille !

Děkujeme !

Danke schön !

Σας ευχαριστώ !

Kiitos!

Merci pour votre attention !

Hvala vam !

Vă mulțumim !

Muchas gracias !

Благодаря ви !

Dziękuję !

Ačiū !

Tak !

Obrigado !

Paldies !

Aitäh !

Dank je !

Ačiū !

Köszönöm !

Tack !

Thank you !