

EU Anti-Discrimination Law - key concepts

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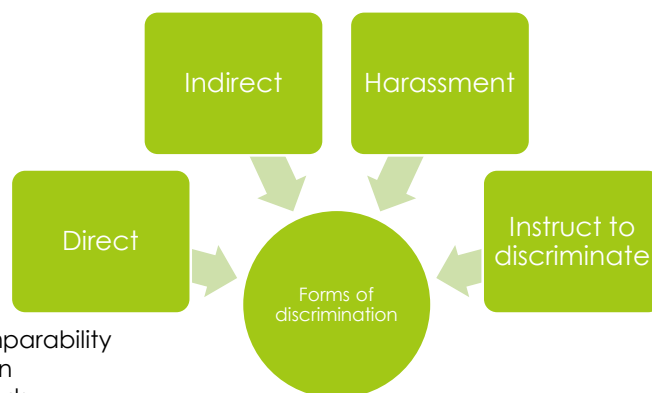
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Key concepts



- Real/virtual comparability
- Objective reason
- Protected grounds
- Multi-discrimination

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I. Direct discrimination

Shall be taken to occur where one person is treated less favorably (1) than another is, has been or would be treated in a comparable situation (2), on any of the protected grounds (3).

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(1) Less favourable treatment

- ❑ What is a treatment? It could be a simple statement. Sometimes, there is no identifiable victim. E.g.: The public statement by an employer saying that he will not employ workers because of their race or ethnic origin - constitutes direct discrimination in hiring since such statements could prevent certain candidates from submitting their application and thus hinder their access to the labour market (Feryn, CJEU C-54/07)
- ❑ It can be a benefit, which is not provided for all
- ❑ Different doesn't necessarily mean less favourable

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(2) The comparator

□ IS –

Present (e.g.: in an equal pay dispute - how much is paid the comparator?)

□ HAS BEEN –

Past (e.g.: how much has been paid the comparator?)

□ WOULD BE –

Virtual – Hypothetical comparator (e.g.: how much would be paid the comparator?)

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(3) Protected Grounds

	Protected Grounds	Directives
I.	Gender	• Directive 2006/54/EC • Directive 2010/41/EC • Directive 2004/113/EC
II.	Race and ethnic origin	Directive 2000/43/EC
III.	+ Religion or belief, disability, age, sexual orientation	Directive 2000/78/EC

- Under the EU non-discrimination directives the protected grounds are expressly fixed. The list is exhaustive, so other grounds (e.g. sickness) cannot be added (Case C-13/05 Chacon Navas)
- The ECHR, in contrast, contains an open-ended list
- The causal link between the protected ground and the less favourable treatment

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II. Indirect Discrimination

= an apparently neutral provision, criterion or practice (1) that affects a group defined by a 'protected ground' (2) in a significantly more negative way by comparison to others in a similar situation (3), unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (4).

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(1) Neutral rule or practice

- E.g.: Different rules applicable to part-time employees, compared to full-time – with an indirect impact on payment (Schönheit case)
- can result of a similar treatment of two persons being in different situations
- The rule should distinguish between **the same** – that deserves equal treatment – and **the different** – that deserves unequal treatment

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(2) Disadvantage to a person or a group defined by a 'protected ground'

- There is another criterion used, not the protected ground ...
- ... but it should be a certain link.



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(3) Comparison to others in a similar situation

- an apparently neutral provision, criterion or practice, which places a 'protected group' at a certain disadvantage.
- This is where indirect discrimination differs from direct discrimination:
 - Direct discrimination - focused on the individual
 - Indirect discrimination - focuses on group of individuals
- Consequences already discriminatory, or having the potential to become discriminatory

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(4) Objective justification

- Legitimate aim + appropriate and necessary means
- The defender should prove:
 - a) Lacking of the similar situation to their 'comparator';
 - b) or that the difference in treatment is based on some objective factor, unconnected to the protected ground.

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(4) Objective justification: YES

- Age – certain qualifications required
- Genuine occupational requirements
- Exceptions in relation to religious institutions
- Seniority (if it is genuinely necessary)
- Training (qualifications)
- Maternity, **the proportionality rule** - C-207/98 – Mahlburg (refusal to appoint a pregnant woman to a post for an indefinite period, because she could not be employed on that position for the duration of the pregnancy)



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(4) Objective justification: NO

- ❑ **Savings of costs alone** shall not, without other reasons, amount to a legitimate aim so as to justify discrimination
- ❑ **The clients' request** – Feryn Case
- ❑ **Lack of intention** ('I did not want to discriminate'). The victim doesn't need to prove intent or fraud.
- ❑ The intention to provide "**protection**" ('women needs protection', so they cannot work night shifts, overtime, on special working conditions, etc.)
- ❑ Tradition, cultural pattern, religious customs



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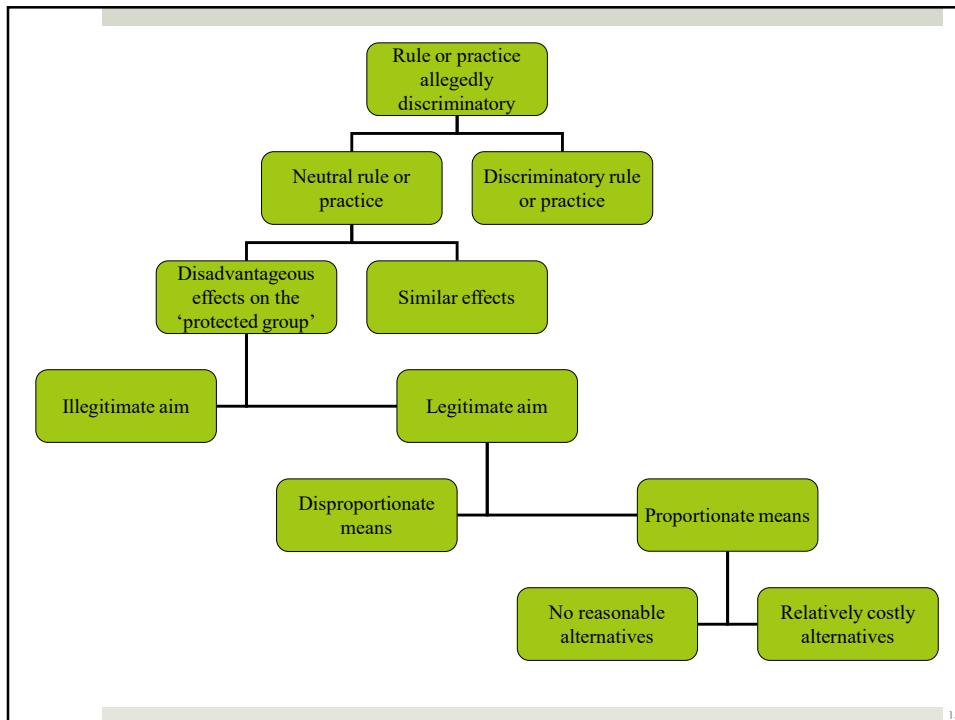
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Example - Bilka case

- ❑ Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted **indirect discrimination against women**, since they made up the vast majority of part-time workers.
- ❑ The ECJ found that this could be indirect discrimination, unless the difference in enjoyment is justified. In order to be justified, it would need to be shown that 'the measures chosen by Bilka correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objectives pursued, and are **necessary** to that end.
- ❑ Bilka argued that the aim behind the difference in treatment was to discourage part-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing.
- ❑ The ECJ found that this could constitute a **legitimate aim**.
- ❑ However, it did not answer the question of whether excluding part-time workers from the pension scheme was **proportionate** to achieving this aim.
- ❑ The requirement that the measures taken be 'necessary' implies that it must be shown that **no reasonable alternative means exists** which would cause less of an interference with the principle of equal treatment.

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III. Harassment

- ▣ shall be deemed to be discrimination when an unwanted conduct related to a protected ground 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.
- ▣ There is **no need for a comparator** to prove harassment.

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IV. Instruction to discriminate

- Is deemed to constitute discrimination, even if no definition is provided by the directives.
- A person instructs another person to engage in direct or indirect discrimination or in harassment against another person

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The hierarchy of protected grounds

- Race and ethnic origin
- Gender
- Religion or belief, disability, age, sexual orientation

} the coverage of the relevant directives (the scope)

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Disability

- May include not only the obligation 'not to do' but also the obligation 'to do': 'reasonable accommodation' to allow those with physical or mental disabilities to be given equal employment opportunities.
- **Discrimination by association (Coleman)** - Dismissal of an employee who is not disabled herself, but whose child is disabled.
- **Obesity** – not a 'disability' by its nature - **but** Case C-354/13 Kaltoft: exception, when it entails a long-term limitation which results in particular from physical, mental or psychological impairments that may hinder the full and effective participation of that person in professional life on an equal basis with other workers

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Religion

- Protected ground + positive freedom
- Not only traditional religions
- Religion could be a result of a personal option (personal belief) or it can be an element of the very identity of a community



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Gender

- Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms
- Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers



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Gender

- Access to flexible working
- Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority.
- Protection can be discrimination
- Role of law: *poiesis* or *praxis*?



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Age

- Young/seniors
- Special objective justifications: Directive 2000/78 – art. 6: employment policies
- What is the scope of the vulnerable? Even after 45 years it can be difficult to get a job
- Now retirement age is increasing late, which entails problems of discrimination against persons who have not yet reached retirement age
- Keeping seniors in management can lead to blocking promoting youth

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Age

- Discrimination in employment may be related to the discrimination in training – which may lead to a lower level of competence for workers, after a certain age.
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- Occupational requirements **but** - proportionality principle (Case C-416/13 Mario Vital Pérez - maximum age for recruitment of local police officers at 30 years)
- Digital discrimination



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Multi-discrimination

- **When grounds intersect**
- A person may be discriminated on two or more grounds in the same time (Minority within minority)
- In most of the traditional minorities discriminated against, women are in even a more disadvantaged position than men (e.g. Roma women)
- Each of us are a combination of belonging to minorities. But the reduction to one dimension – may be sometimes useful practical

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Conclusions

- "Why do you discriminate?" – an irrelevant question (in case of indirect discrimination). It does not matter the motivation or intent, it only matter the effects
- Objective liability
- **Postmodern approach:** Discrimination is not always based on group characteristics, but sometimes on individual characteristics

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