



UNIVERSITY OF  
PORTSMOUTH

# KEY CONCEPTS IN EU EQUALITY LAW

ERA – Academy of European Law  
March 2024

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Funded by  
the European Union

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## Presentation outline

- Key features of EU equality law
- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment
- Victimisation
- Intersectionality / multiple discrimination

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## EU equality law: Key features

- EU equality law **prohibits** four types of **conduct**:
  - *Direct discrimination*
  - *Indirect discrimination*
  - *Harassment (including sexual harassment)*
- EU equality law **protects** a number of personal **characteristics** (grounds) which is:
  - *unspecified – Article 21 EUCFR:” Any discrimination based on any ground such as...”*
  - *specific and limited – see EU equality Directives*

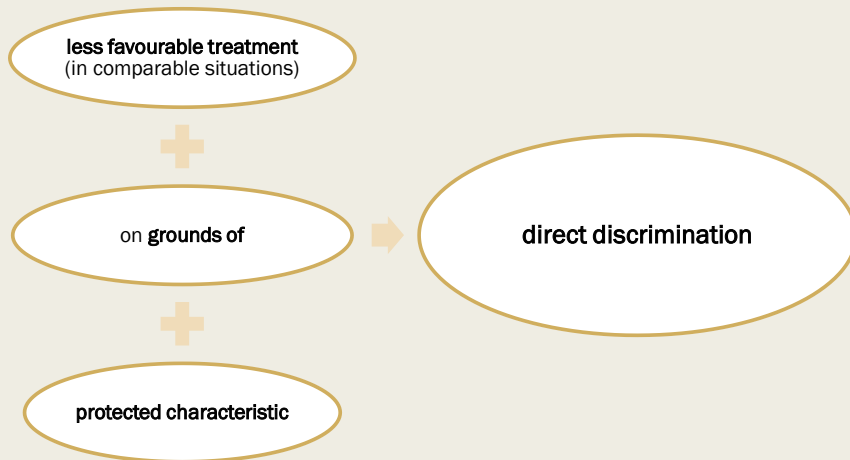
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## EU equality law: Key features

- Each EU equality Directive will determine its own **scope of application** rationae materiae and rationae personae.
- Key concepts have the **same meaning** across different legal instruments (both in secondary and in primary law).
- Rules on the **(reversal of) the burden of proof** apply equally to all national judicial proceedings involving claims arising in connection to EU equality law.
- EU equality Directives (as all EU Directives) have vertical but not horizontal direct effect.
  - *Direct effect* → can be directly relied upon before domestic court
  - *Indirect effect* → duty of harmonious interpretation (by national courts)
  - *State liability* → obligation to pay damages for breach of EU rights

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## Key concepts: Direct discrimination



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## Key concepts: Direct discrimination

### Recast Equal Treatment Directive, Article 2(1)(a)

'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

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## Key concepts: Direct discrimination

### Less favourable **treatment**

- pay (Case 43/75 *Defrenne No 2*)
- work-related policies, practices and benefits (C-222/14 *Maistrellis*)
- being refused access to a good or service (Case C-236/09 *Test Achats*)

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## Key concepts: Direct discrimination

### Less favourable **treatment**

- Less favourable = (different + detrimental) treatment that that afforded to a **comparator**
  - *person without the PC in a comparable situation to claimant*
- Comparator can be
  - *contemporaneous – “is” (Case 109/88 Danfoss)*
  - *past – “has been” (Case 129/79 Macarthys Ltd v Wendy Smith)*
  - *hypothetical – “would be” (Case C-136/95 Thibault)*

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## Key concepts: Direct discrimination

### Less favourable treatment

- Comparable situations must be similar, not identical (C-147/08 *Römer*)
- **Examples:**
  - female worker paid less than a male colleague for the same work (Case 43/75 *Defrenne No 2*)
  - persons deterred from applying for a job because of race / ethnicity (Case C-54/07 *Firma Feryn*)
- **NB: unfavourable** (no comparator) treatment because of **pregnancy** constitutes direct discrimination (C-177/88 *Dekker*)

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## Key concepts: Direct discrimination

### because of

- **Causal link** between treatment and PC.
- Intent or motive is irrelevant (C-77/88 *Dekker*)
- Causal link is also satisfied:
  - Discrimination by association or associative discrimination (C-303/06 *Coleman*)
  - Instruction to discriminate (Art. 2(2)(b) Recast Directive)

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## Key concepts: Direct discrimination

### protected characteristic

- Numerous clausus of PCs.
- Sex construed broadly to encompass gender, including gender identity and gender reassignment (Recital 3, Recast Directive).
- **NB: Nationality** is not a PC for the purposes of EU equality law.

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## Key concepts: Direct discrimination

### EXEMPTIONS

- **Genuine occupational requirements** (GOR) (Article 14 (2), Recast Directive)
- Exclusion of members of one sex from a particular post, position, or occupation, as long as it is objectively justified (Case C-222/84 *Johnston*)
- GOR must be interpreted narrowly and cannot include subjective considerations (Case C-188/15 *Bougnaoui*)
- Assessment of what is a legitimate GOR (in light of proportionality) may change over time, with reference to changing social conditions
  - Exclusion of women from certain military units of the Royal Marines (C-273/97 *Sirdar*)

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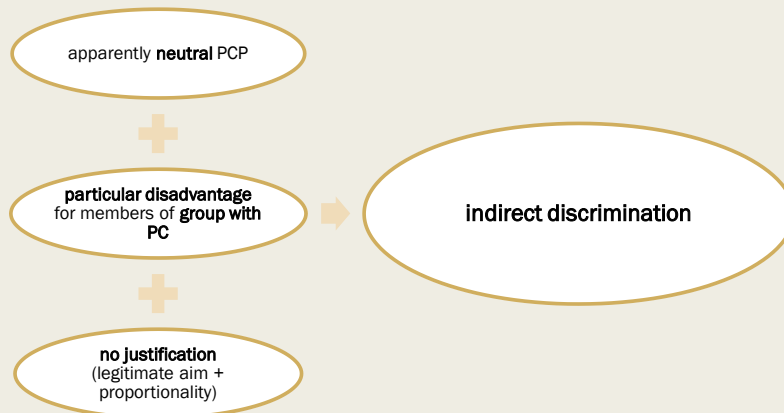
## Key concepts: Direct discrimination

### EXEMPTIONS

- **Positive action** (Article 157(4) TFEU; Article 3, Recast Directive etc)
- Priority to members of the underrepresented sex in promotions, with saving clause (C-158/97 *Badeck*)
- Not permissible if it reinforces stereotypes
  - Breastfeeding leave only for employed mothers not permissible (C-104/09 *Roca Álvarez*)

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## Key concepts: Indirect discrimination



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## Key concepts: Indirect discrimination

### apparently neutral PCP

- Same treatment, **different impact**.
- PCP applies to all without any reference to a PC
- Example – full-time v. part-time workers
  - National law requiring a proportionally greater contribution period from part-time workers than from full-time workers for the former to qualify for a contributory retirement pension amounts to indirect discrimination (C-385/11) *Elbal Moreno*)

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## Key concepts: Indirect discrimination

### particular disadvantage for members of group with PC

- Degree of adversity or percentage of members of group with PC affected by the apparently neutral PCP
  - C-167/97 *Seymour-Smith*, para 61: “[A particular disadvantage could also be present] if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women”
  - C-123/10 *Brachner*, paras 62-63: “[...] 75% of male pensioners were liable to benefit from the exceptional increase in pensions whereas that was the case for only 43% of female pensioners. Such a disparity is large enough to [...] place at a disadvantage a significantly higher percentage of female pensioners than male pensioners.”
- C-83/14 *CHEZ* → **indirect discrimination by association**

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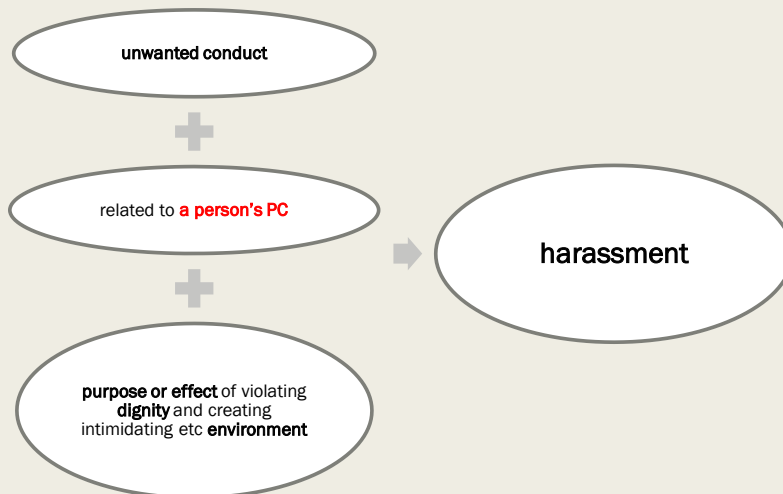
## Key concepts: Indirect discrimination

### no objective justification

- ECJ will determine legitimacy of aim but leave proportionality principle (appropriateness and necessity) to the national courts (Case 170/84 *Bilka-Kaufhaus*)
- **Examples**
  - *Bilka-Kaufhaus* (Case 170/84) → discouraging part-time work
  - *Enderby* (C-127/92) → market forces determining rate of pay
  - *Danfoss* (Case 109/88) → length of service as a criterion to determine pay
  - *Schnorbus* (C-79/99) → offsetting men's career delay due to compulsory military service
  - *Kirsammer-Hack* (C-189/91) → special economic measure supporting small and medium-sized businesses

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## Key concepts: Harassment



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## Key concepts: Harassment

### unwanted conduct

Article 2(c), Recast Equal Treatment Directive (etc)

- Subjective test (perception of the victim)
- No need for a comparator (unlike direct discrimination)
- No need for comparison (unlike indirect discrimination).

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## Key concepts: Harassment

### related to a person's PC

#### ■ Examples

- bullying
- derogatory comments
- use of stereotypes

- Harassment by **association** (Case C-303/06 *Coleman*)

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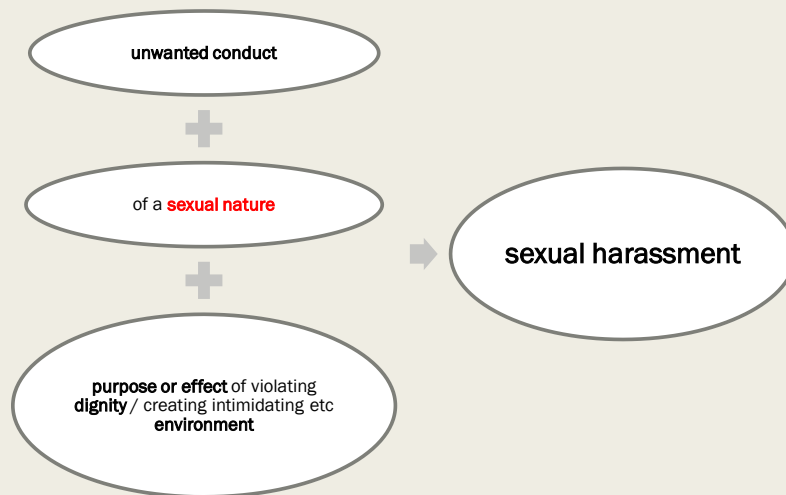
## Key concepts: Harassment

**purpose or effect of violation of dignity and creating intimidating etc. environment**

- **Purpose or effect** → disjunctive, not conjunctive (each is a sufficient but neither is a necessary condition)
  - Intent of harasser may be relevant (sufficient condition)
- **Violation of dignity and creating intimidating etc environment** → conjunctive (each is a necessary but not sufficient condition)
- **NB:** EU equality law sets **minimum** levels of protection.
- **Harassment cannot be objectively justified.**

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## Key concepts: Sexual harassment



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## Key concepts: Sexual harassment

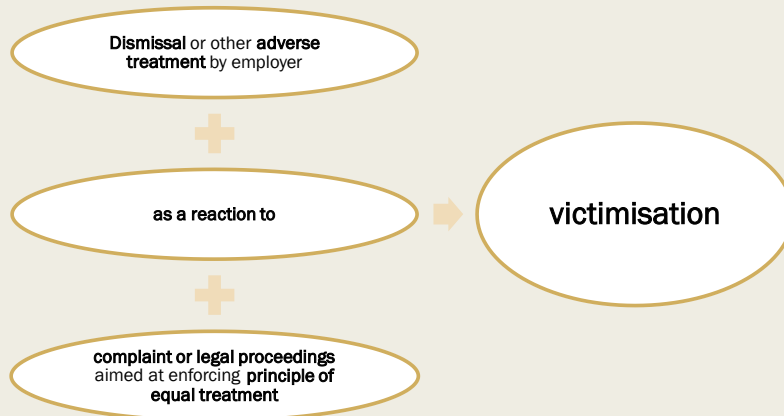
Article 2(d), Recast Directive

Sexual harassment occurs “where any form of unwanted verbal, non-verbal or physical conduct **of a sexual nature** occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

- Sexual harassment cannot be objectively justified.

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## Key concepts: Victimisation



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## Key concepts: Victimisation

Article 24, Recast Equal Treatment Directive etc

### dismissal or other adverse treatment by employer

- **Adverse** treatment is sufficient → **no comparator / comparison**
- Recast Directive explicitly identifies **dismissal** as one form of adverse treatment.
- Broad interpretation
  - refusal of an employer to provide references for a former employee who was dismissed (C-185/97 Coote)

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## Key concepts: Victimisation

### complaint or legal proceedings aimed at enforcing compliance with the principle of equal treatment

- **Any complaint** will suffice (including any type of legal proceedings).
- Purpose of complaint should be to enforce compliance with the principle of equal treatment → not necessary to be the only purpose.
- Person raising the complaint (and subsequently suffering victimisation) does not need to be the (alleged) victim of the violation

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## Key concepts: Victimisation

### causal link (as a reaction to)

- Causal link between
  - **adverse treatment or consequences** (suffered by the person raising the complaint / initiating the legal proceedings) **and**
  - **action of complaining or initiating legal proceedings**
- **NB:** The causal link is **not** between the adverse treatment or consequences and the protected ground (e.g. race).
- **NB:** Whether the complaint is valid or not (including the outcome of any legal proceedings) is **irrelevant**.
- **Victimisation cannot be objectively justified.**

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## Key concepts: Gaps and challenges

### Intersectionality / multiple discrimination

(NB: No single, settled terminology)

- **Multiple discrimination** → victim suffers less favourable treatment / disadvantageous impact because of multiple PCs
- **Intersectional discrimination** → “discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC” – Article 3(2)(e), Directive (EU) 2023/970 (Pay Transparency Directive).
- Why is multiple discrimination / intersectionality crucial?
  - ☞ **comparator (direct discrimination)**
  - ☞ **group for comparison (indirect discrimination)**

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## Key concepts: Gaps and challenges

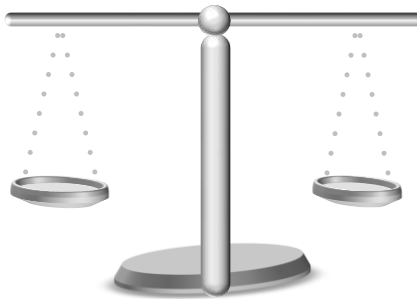
### Intersectionality / multiple discrimination

- The ECJ has adopted a relatively broad approach when dealing with some combinations of PCs, e.g. gender and **age**
  - C-152/84 *Marshall*; C-123/10 *Brachner*
- But intersectionality has been dismissed as a possibility in cases where religion and gender are combined:
  - Joined Cases C-804/18 and C-341/19 *WABE and MH Müller Handels* (para 58)
  - C-188/15 *Bougnaoui*

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Thank you for listening!

Questions / Comments / Ideas?



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