

Definitions of the Key Concepts:

Direct and Indirect Discrimination

Harassment and Victimisation



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A brief history of the
Directives 2000/43/EC
and 2000/78/EC

1985:

European Parliament's Committee of Inquiry into the "Rise of Fascism and Racism in Europe":
For EU mandate in the field of anti-discrimination

European Commission:
"Guidelines for a Community policy on migration": Combating racism as a task of the EC

1986

"Joint Declaration against Racism and Xenophobia":
by EP, Commission, Council
– no specific measures

1992:

"Starting-Line Group": NGO platform:

- Proposal to incorporate the principle of non-discrimination into the EC Treaty
- Lobbying with support from the European Commission



1994:

Corfu Summit

Kohl and Mitterrand decide to establish the “Advisory Committee against Racism and Xenophobia”

1995:

Kahn Report – Proposals:

- Elimination of racial discrimination as a condition for implementing free movement
- Legal basis in EC Treaty
- Independent body for monitoring racism

1997:

European Year against Racism
Irish Presidency

**Treaty of Amsterdam
Art.13**

The 1997 Treaty of Amsterdam

- Anti-discrimination policy – indirect migration policy
 - Article 13: “... *the Council, acting unanimously ... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*”
 - Two anti-discrimination directives:
 - Horizontal labour market directive,
 - Vertical directive to combat racial discrimination
 - Anti-discrimination as an objective of action plans on employment
 - Funding programmes and budget lines (EQUAL, INTI etc.)



EU Anti-Discrimination Law

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- “Assisted” by political development in Austria – agreement on directives reached in record time



Proscribed Grounds of Discrimination

- Ethnic affiliation, race, ethnic origin
- Religion & belief
- Disability
- Sexual orientation
- Age



ARTICLE 2.2(A) **DIRECT** **DISCRIMINATION**

...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;



DIRECT DISCRIMINATION

‘on grounds of’ includes:

- Attributed / presumed affiliation
- Association
- Proscribed characteristic as a ground of less favourable treatment



***‘but for’* test**



DIRECT DISCRIMINATION

- **What is a “comparable situation”**
- **Search for a comparator**
- **Hypothetical comparator possible**



DIRECT DISCRIMINATION

- Motivation or intention is not relevant - if the effect is less favourable treatment
- No justification except for genuine and determining occupational requirements or positive action.



INSTRUCTION TO DISCRIMINATE

‘An instruction to discriminate against persons on grounds of (...) shall be deemed to be discrimination’



INSTRUCTION TO DISCRIMINATE

Hierarchy of power – Responsibility moves up the chain of command

- Hierarchy of authority, where A is expected to follow the instructions of B
- The proscribed act is giving the instruction, not the discrimination that has occurred



INDIRECT DISCRIMINATION

ARTICLE 2.2(B)

“where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless...”



INDIRECT DISCRIMINATION

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



INDIRECT DISCRIMINATION

Justification

- Is the provision, criterion or practice justified by a legitimate aim?
- appropriate and necessary: could this aim be achieved with other means?
- Question of proportionality



ARTICLE 2.3 HARASSMENT

- Unwanted conduct related to the protected characteristic
- with the purpose or effect of
 - violating the dignity of a person and
 - creating an intimidating, hostile, degrading, humiliating or offensive environment



HARASSMENT

- No comparator required
- “purpose or effect” – intention or outcome
- Victim’s perspective & objective elements



ARTICLE 9 VICTIMISATION

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.



VICTIMISATION

Protected actions:

- Filing a complaint about discrimination
- Instituting proceedings because of discrimination
- Supporting another person in taking action against discrimination
- **Protects not only the original victim**

