



UNIVERSITÀ  
DEGLI STUDI  
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## DEFINITION OF KEY CONCEPTS

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Funded under the "Rights, Equality and  
Citizenship Programme 2014-2020"  
of the European Commission



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# INTRODUCTION

## WHAT ARE WE TALKING ABOUT WHEN WE TALK ABOUT GENDER INEQUALITY



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# GENDER EQUALITY INDEX IN THE EU

The EIGE index is a comprehensive measure for assessing the state of the art and for monitoring progress in gender equality in the EU developed by the **European Institute of Gender Equality (EIGE)**.

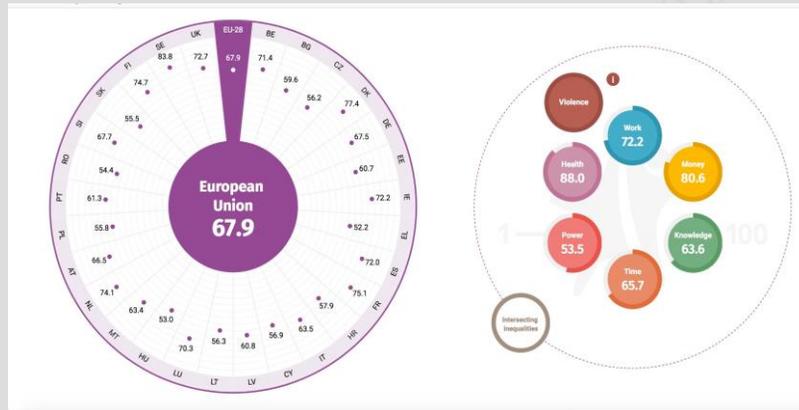
The six key areas of the index are: **power, time, knowledge, health, money and work.**



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# INDEX 2020



# EQUALITY AT “SNAIL’S PACE”

- The EIGE gender equality index for 2020 shows that progress on gender equality is still moving “at snail’s pace,” with an average improvement of just half a point per year.
- With a score of 67.9 out of 100, the EU is at least 60 years away from attaining gender equality.

## GENDER PAY GAP IN EUROPE

In Europe, women earn on average **14.8% less than men**

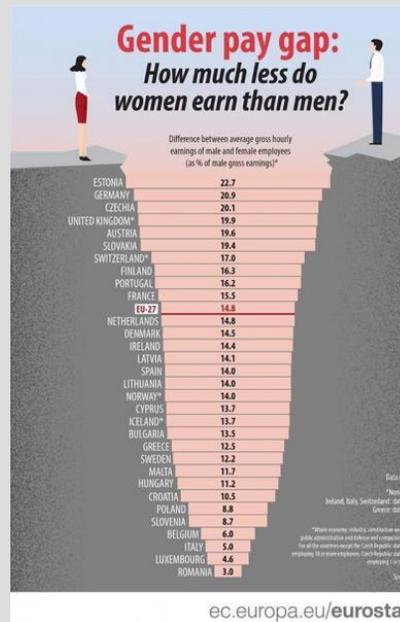
A new proposal for directive  
**ON PAY TRANSPARANCY**

The purpose of the initiative is to:

- introduce binding measures on pay transparency
- make pay systems more transparent
- improve public understanding of the legal concepts used in this field
- bolster enforcement mechanisms



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## GENDER GAP IN THE WORLD

- According to the global gender ranking compiled by the *World Economic Forum*, it will take another century to close the general gap globally, up from 83 years last year. But it will take more than twice as long to close the **economic gender gap: another 217 years** at the current rate of change.



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# PART I

## Function of anti-discrimination protection and legal framework



## EU STRATEGY: POLICIES AND .....

### Gender equality

Promoting equal economic independence for women and men, closing the gender pay gap, advancing gender balance in decision making, ending gender based violence and promoting gender equality beyond the EU.

#### Gender equality strategy

Measures taken to promote the advancement of women and objectives for strategic engagement for gender equality.

#### Women in the labour market / Work-Life Balance

Women's participation in the labour market, gender pay gap, EU rights to work-life balance, EU action to promote work-life balance

#### Equal pay

The gender pay gap in the EU, how the EU fights pay discrimination, actions for improving pay equality.

#### Equality between women and men in decision-making

Women and men in political and economic decision-making, EU action to promote equality in decision-making.

#### Gender-based violence

Actions to eliminate gender-based violence in the EU, funding and support for awareness campaigns.

#### Promoting gender equality & women's rights beyond the EU

Sustainable Development Goals, Partners, EU's external relations, International Cooperation, Gender Equality, Development aid

## ...AND RIGHTS AT THE ORIGIN

The principle of non-discrimination is explicitly enshrined in several provisions of the **original Treaties** so as to foster economic integration, because arbitrary equal treatment of economic actors could have an adverse effect on the implementation of the project to create a common internal market.

In particular, Article 119 of the EEC Treaty guarantees **equal pay for equal work between men and women** to avert social dumping.



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## DEVELOPMENT OF THE FUNCTION OF THE PRINCIPLE OF NON-DISCRIMINATION

The principle of non-discrimination as an expression of the general principle of equality:...

*The prohibitions of discrimination constitute a specific expression of the general principle of equality which, even though not recognized explicitly in the treaties, is to be regarded as a fundamental principle of Community law, an expression of the common tradition of the Member States (for all: Überschär, Case 810/79)*



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...and as a fundamental human right

*“the economic aims are secondary to the social aims... which constitute the expression of a fundamental right” (Defrenne II, Case 149/77; P., Case 13/94)*

*“the result pursued by Directive 76/207/EEC is substantive, not formal, equality” (Thibault, Case 136/95)*

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## 1 GENDER EQUALITY IN THE TREATIES

### Treaty on European Union

Since the Treaty on European Union, EU law has broadened the scope and range of the principle of non-discrimination.

- **Article 2:** The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance justice, solidarity and **equality between women and men** prevail.
- **Article 3.3:** The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, **equality between women and men**, solidarity between generations and protection of the rights of the child.



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## 2 GENDER EQUALITY IN THE TREATIES

### Treaty on the functioning of the European Union

- **Article 8 TFEU:** In all its activities, the Union shall aim to eliminate inequalities, **and to promote equality, between men and women.**
- **Article 10 TFUE:** In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- **Article 19 TFUE:** The EU may take appropriate action to combat discrimination based on **sex**, racial or ethnic origin, religion or belief, disability, age or sexual orientation.



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## 3 GENDER EQUALITY IN THE CFREU

### Charter of the Fundamental Rights of the European Union

- **Article 20 Equality before the law**

Everyone is equal before the law.

- **Art. 21 Non-discrimination**

Any discrimination based on any ground **such as sex**, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

- **Art. 23 Equality between men and women.**

Equality between men and women **must be ensured in all areas**, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific **opinion advantages in favour of the under-represented sex.**



## A NEW GENERATION OF ANTI-DISCRIMINATION LEGISLATION

### DERIVED LAW (within the scope of Gender)

- Directive 2002/73/CE – amends Directive 76/207 on **equal treatment between men and women**
- Directive 2004/113 CE - implements the principle of **equal treatment between man and women in the access to and supply of goods and services**
- Directive 2006/54/CE – **recasts in a single text the directives on equality between men and women** with the exception of Directive 7/79 on social security
- Directive 2010/41 – amends Directive 86/613 **on equality between men and women in self-employment**



## OTHER RELEVANT DIRECTIVES FOR GENDER EQUALITY

- Council Directive 92/85/CEE of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of **pregnant workers and workers who have recently given birth or are breastfeeding**
- Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on **work-life balance** for parents and carers and repealing Council Directive 2010/18/EU.



## PART II

### Key concepts



## VOCABULAR: SEX, GENDER, SEXUAL ORIENTATION

**Sex discrimination includes discrimination arising out of change of sex – Recital 3, 2005/54/CE**

- *P vs S*, Case 13/94
- *MB vs Secretary of State*, Case 451/16

But does not include discrimination based on sexual orientation: *Grant*, Case 249/96

(now prohibited by Directive 2000/78)

*The term “sex” refers to the biological differences between men and women. The term “gender” refers to the socially constructed identities, attributes and roles of women and of men, as well as the social and cultural meaning of these biological differences within society. Cedaw, Recommendation 28 (5):*

*Sexual orientation represents the way in which human beings form emotional bonds. It defines a person’s identity, but does not influence gender identity.*

## OBJECTIVE SCOPE

- **Directive 2006/54/CE** prohibits discrimination between men and women with regard to:
  - Access to employment and to work in an employed and self-employed capacity;
  - Access to all types and levels of vocational orientation and training, further training and retraining;
  - Working conditions, including conditions of remuneration and dismissal;
  - Membership and activity in an organization of workers or employers;
  - Occupational social security schemes.
- **Directive 2004/113/CE** prohibits discrimination between men and women in the access to and supply of goods and services outside private and family life.

## SUBJECTIVE SCOPE

- The two Directives apply to **all natural persons and legal entities** in the EU, in both the public and private sectors, with the exception, as regards access to goods and services, of those offered in the context of private and family life.
- Directive 54/06 concerns **employed and self-employed men and women** (for the self-employed, at least as regards access to employment and occupational social security schemes).
- The person responsible for the conduct may not be the employer, if the conduct is attributed to the latter nonetheless

*(Asociația Accept, Case C-81-12: "there has been 'discrimination' ..., 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").*



## PROHIBITED FORMS OF DISCRIMINATION

- The Directives prohibit
  - **Direct discrimination**
  - **Indirect discrimination**
  - **Harassment**
  - **Multiple and intersectional discrimination**



## DIRECT DISCRIMINATION

### Directive 2006/54/EC

- **Article 2.1.** There is direct discrimination where, as a result of a prohibited factor, one person is treated less favourably than another is, **has been or would be treated** in a comparable situation.



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## DISCRIMINATION ON THE GROUNDS OF PREGNANCY AND MATERNITY

- **Article 2.2.** Direct discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave
- *Dekker, Case 177/88;*
- *Otero Ramos, Case 531/15*
- Comparison is not required (see below)
- Discrimination on the grounds of the use of assisted fertilization is not considered to be discrimination on the grounds of maternity but is deemed to be discrimination on the grounds of gender (*Mayr, Case 506/06*)

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## EXAMPLES OF DIRECT DISCRIMINATION

- *Danfoss*, Case C-109/88: equal pay for work of equal value
- *Kreil*, Case C-285/98: illegality of the exclusion of women from military service involving the use of weapons
- *Cadman*, Case C-17/05 : illegality of the seniority criterion in the job classification/appraisal system which harms women on parental leave.
- *Riežniece*, Case C-7/12: parental leave and criteria for choosing workers for economic dismissal



## CONSTITUENT ELEMENTS

1. Different (**less favourable**) treatment
2. Comparison
3. Causal link
4. No justification allowed in principle; express exceptions



## 1 DIFFERENT (*LESS FAVOURABLE*) TREATMENT

- Treatment, not intention
- Act or omission; legal transaction; conduct; public statement (*Feryn* Case C-54/07; *Asociația Accept* Case C-81/12; *N.*, case 507/18)
- Individual or collective
- With or without an identifiable victim (*Feryn*, Case C-54/07)
- Even in areas “empty” of legally protected rights or interests, and not only where legitimate rights or interests are affected (*Chez*, Case C-83/14), but also in the presence of purely discretionary powers (e.g. power of hiring)



## 2 COMPARISON

### When a person:

- **Is** (concrete and present circumstances)
- **Has been** (subsequent and concrete circumstances, compared to previous discretionary circumstances)

*Macarthy's Case C-129/79: "Equal pay is to be given for equal work and not only for equal work carried out at the same time as a person of the opposite sex with whom comparison is made ("the comparator")"*

- **Would be** (hypothetical circumstances)

*Thibault Case C136/95: "if she had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed for the year in question and could have qualified for promotion"*

**treated less favourable than another person in a comparable situation**



## 2 COMPARISON (CONTINUED)

In certain cases, the comparison is not required:

*Dekker Case C-177/88: “where the reason (for refusing to hire a woman) is that she is pregnant, the decision is determined directly by the sex of the candidate... the lack of male candidates cannot have an impact.”*

The requirement relating to the comparability of the situations does not require those situations to be identical, only “similar” (*MB vs Secretary of State*, Case 451/16)



## 3 CAUSAL NEXUS: “BASED ON”

- Objective causal nexus: subjective intent is not decisive
- BUT ATTENTION: an apparently neutral measure constitutes direct discrimination if the intention is discriminatory or is based on prejudice and stereotypes (*Chez*, Case 83/14)
- The prohibited factor does not necessarily have to be possessed by the party discriminated against: see below for discrimination by association



### 3 CAUSAL NEXUS: “BASED ON” (CONTINUED)

- Or it may be possessed by most, not necessarily all, of the persons concerned (*Chez, Case 83/14: “that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned”*: non-Roma resident in a Roma district)
- Necessary but **not exclusive** cause (multicausality)
  - For example, discriminatory dismissal even if there is a cause for dismissal is provided by law.



### 4 EXCEPTIONS

- In principle, all directives provide for limited and circumscribed **exceptions** (i.e. derogations from equal treatment – even of a general nature – established **ex ante** by the legislator), but **do not provide for justifications** (i.e. reasons of expediency or necessity of the difference in treatment, put forward by the perpetrator of the conduct **after the fact**).



## 4 GENERAL EXCEPTION: ESSENTIAL AND DECISIVE REQUIREMENT

- Article 14.2. Directive 54/06/EC

As regards **access to employment, including the relevant training**, the Member States may establish that a difference in treatment based on a characteristic relating to sex shall not constitute discrimination where, owing to the nature of the particular occupational activities at issue or of the context in which they are carried out, such a characteristic constitutes **an essential and decisive requirement** for the development of occupational activity, provided that the objective is legitimate and the requirement is proportional.

(Example: *Sirdar*, Case C-273-97: the Court of Justice granted the Royal Marines (special combat units which carry out activities for which sex is a decisive factor) the right to exclude women from the possibility of joining them.)



## 4 GENERAL EXCEPTION: ESSENTIAL AND DECISIVE REQUIREMENT (CONTINUED)

- It is a notion which refers to judgement criteria that vary over time
- But since they are exceptions, they must be interpreted restrictively, i.e. they must be limited and proportional.

(*Kreil*, Case C-285/98: ) *“unlawful national provisions, such as those of German law, which generally exclude women from military posts involving weapons and authorize their access only to health services and military music ensembles.”*



## 4 SPECIFIC EXCEPTIONS AND JUSTIFICATIONS

- Article 5 of Directive 2004/113/EC on goods and services exempted, as **exceptions**, different insurance benefits and premiums due to the use of actuarial calculations that take account of the gender factor in contracts in force until 2007.
  - This provision was declared unlawful by the *Testes Achats* judgment, *Case, 236/09*
- Article 4.5 of the same Directive also provides for **justifications**: “This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.



## INDIRECT DISCRIMINATION

- **Directive 2006/54/CE**
- **Article 2.1.** There is indirect discrimination where an **apparently neutral** provision, criterion or practice would put persons of one sex at a **particularly disadvantage** compared with persons of the other sex, unless the provision, criterion or practice is objectively **justified by a legitimate aim** and the means of achieving that aim are **appropriate and necessary**.



## EXAMPLES

- *Breaking case: Sotgiu, Case 152/73*, Community foreign workers, pay
- *Jenkins, Case 96/80*, part-time workers, hourly pay
- *Bilka, Case 170/84*, part-time workers, pension scheme
- *Seymour Smith, Case 167/97*: protection against dismissal for workers with more than two years' seniority
- *Kalliri, Case 409/16*: selection of candidates for a police competition based on an identical minimum height requirement, irrespective of sex, constitutes indirect discrimination



## A DIFFICULT DISTINCTION ...

Examples:

- *Schnorbus, Case C-79/99* : “the provision provides for a number of circumstances which may be taken into account for priority access to practical legal training. They include the completion of compulsory military training or civilian service. In such a case, the benefit of the priority envisaged by the aforementioned provisions cannot be regarded as being **directly** based on the sex of the person concerned; if anything, it may give rise to indirect discrimination because it disadvantages more women than men.
- But an apparently neutral measure nevertheless constitutes direct discrimination if it is “inextricably linked” to a prohibited factor (e.g. pregnancy and sex, *Webb, Case 32/93*; marriage and sexual orientation: *Hay, Case 267/12*)
- *Chez, Case 83/14*: discrimination is **direct** if “that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned;” it is **indirect** if the criterion of tampering with meters is to be found to have been developed in districts predominantly inhabited by Roma



## ...BUT FUNDAMENTAL

- A justification can be invoked only in the case of indirect discrimination
- This possibility has to do with the longer causal chain taken into consideration by the notion of indirect discrimination, which also includes facts, circumstances, contexts outside the direct sphere of control or possibility of choice of the employer

## CONSTITUENT ELEMENTS

1. **Apparently neutral** provision, criterion or practice
2. Particular disadvantage (differential impact)
3. Comparison
4. Causal nexus
5. Justification (absence)

## 1 PARTICULAR ADVANTAGE

Development of the concept: from statistical disparity to *particular disadvantage*”

- *Seymour Smith, Case C-176/97*: The statistical data must show a considerably smaller proportion of women workers and cover a sufficient population, not reflect purely fortuitous or cyclical phenomena
- Directive 97/80/EC on the burden of proof: “*a significantly higher proportion of individuals of either sex.*”
- The abandonment of statistic evidence: *O’Flynn, Case C-237/94*



## 1 PARTICULAR DISADVANTAGE

- The new directives adopt a qualitative approach and speak of “particular disadvantage”
- *Chez, Case 83/14*: “the particular disadvantage **does not designate relevant, obvious or serious cases** of inequality, but means that it is in particular persons of a particular racial or ethnic origin who are disadvantaged by the provision, criterion or practice in question.



## 2 COMPARISON

- *O'Flynn, Case C-237/94*: “It is not necessary in this respect to find that the provision in question does not **in practice** affect a substantially higher proportion of migrant workers. It is sufficient to point out that said provision it **is liable to** have such an effect”
- In the text of the new directives, there is indirect discrimination also if there is even a *risk* that a provision will be disadvantageous to persons belonging to a protected group (“*may put*”).

## 3 CAUSAL NEXUS

- The causal nexus must be **adequate**: likelihood of that particular outcome, according to a criterion of normal foreseeability.
- Common sense and common experience (what happens in practice) are sufficient for considering that there is potential indirect discrimination: See *O'Flynn, Case C-237/94*

## 4 JUSTIFICATIONS

- There is no indirect discrimination if the provision, criterion or practice is objectively justified by a **legitimate aim** which is unrelated to any discrimination on the grounds of sex and the means of achieving that aim are **appropriate and necessary**.
- **Examples:** The flexibility or adaptability to variable working hours and places, vocational training or seniority of the worker (*Danfoss, case 109/88*)
- The measure should not go beyond what is necessary to achieve the objective (*Kalliri, Case 409/16*).
- The justification must be supported by specific evidence; simple generalization are not sufficient (*Seymour Smith, case, 167/97*)
- )



## 4 JUSTIFICATIONS

- The defences of the market are possible (*Enderby, Case C-127/92*)
- Budgetary considerations cannot in and of themselves justify differences in treatment between the sexes (*Kutz-Bauer, Case C 187/00*)
- A means is appropriate and necessary to achieve a legitimate social policy objective if it genuinely fulfils the aim pursued and if it is implemented consistently and systematically to that end (*Leone, Case C-173/13*)



# HARASSEMENT

Directive 2006/54/CE

Article 2.1.c **Unwanted** conduct with the **purpose** or **effect** of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.



# CONSTITUENT ELEMENTS

- **Unwanted** behaviour (the perspective is that of the harassed person, not of the perpetrator of the conduct)
- Purpose or effect (may be intentional or unintentional)
- No comparison: the conduct must be such as to affect human dignity, without the need for comparison with the situation of other people
- It suffices to show that it is **related** to sex.
- Creation of an intimidating, hostile, degrading, humiliating or offensive environment (environmental harassment)

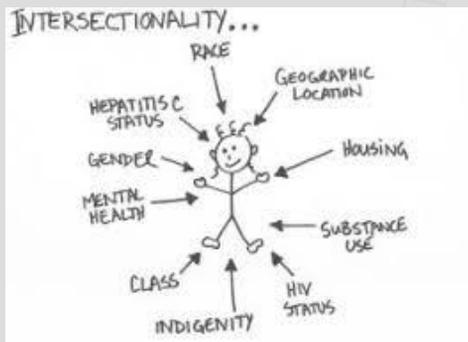
## SEXUAL HARASSMENT

- **Article 2.1.d.** Unlike sex-related harassment, which refers to behaviour in which a person is generally harassed as a woman or a man, in sexual harassment the behaviour is specifically of a sexual nature
- It may be of a verbal, non-verbal or physical nature (e.g. insinuations and equivocal comments about appearance, sexual advances or sexual blackmail)



## MULTIPLE AND INTERSECTIONAL DISCRIMINATION

- A person suffers multiple discrimination when more than one discrimination factor is involved.
- It affects primarily women: Directive 2000/43/CE Recital 14, and Directive 2000/78/CE, Recital 3



## MULTIPLE AND INTERSECTIONAL DISCRIMINATION

- In intersectional discrimination, the unfavourable treatment or particular disadvantage is based on several interaction factors that can no longer be distinguished or separated
- Some examples: *Coleman*, Case C-303/06 (disability and sex); *Meister*, Case C-415/10 (age, sex, ethnic origin); *Achibita*, Case 157/15 (sex and religion)



## DISCRIMINATION BY ASSOCIATION

➤ Is a “**transferred**” discrimination:” *“persons who have a particular characteristic or those who do not have said characteristic, but suffer the unfavourable treatment or particular disadvantage together with the former”* (*Chez*, case 83/14)

*Example:*

- *Coleman*, Case 303/06: a person suffers discrimination and harassment because of the disability of his son;
- *Chez*, Case C-83-/14: a person who is not of Roma origin and resides in districts inhabited by Roma is also affected by the unlawful practice



## OTHER FORMS OF PROHIBITED CONDUCT

- **An order to discriminate** is considered as a form of **discrimination** and prohibited
  - **Retaliation**: hostile treatment (e.g. dismissal) as a reaction to an action aimed at enforcing the principle of equality.
- Protection from retaliation is granted not only to the person discriminated against but also to those who testify or are otherwise involved in the proceedings to ascertain discrimination.

