

KEY CONCEPTS OF EU GENDER EQUALITY LAW



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OUTLINE

- 1** DIRECT DISCRIMINATION
- 2** INDIRECT DISCRIMINATION
- 3** HARASSMENT AND SEXUAL HARASSMENT
- 4** OTHER CONCEPTS
 - Discrimination by association
 - Multiple and intersectional discrimination
 - Victimization

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1 Direct discrimination

- Art. 2(a) Directive 2004/113 (goods & services)
- Art. 2(1)(a) Directive 2006/54 (employment and occupation)

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

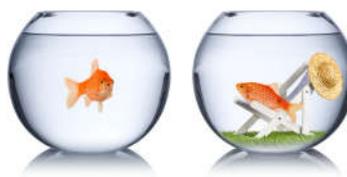
→ 3 criteria



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1.1. Differential treatment



Example: C-450/18 *WA v Instituto Nacional de la Seguridad Social*

A supplement to the contributory social security pension granted to mothers and not fathers is discriminatory on grounds of sex.

→ Consider how such differential treatment perpetuates gender stereotyping in social roles: female caregiver/male breadwinner.

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Direct discrimination is intentional discrimination?

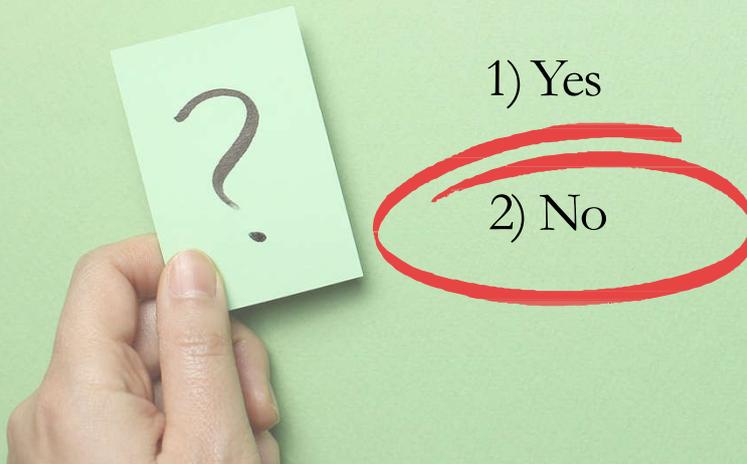


1) Yes

2) No

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Direct discrimination is intentional discrimination?



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Direct discrimination ≠ intentional discrimination

A discriminatory intent is not required: C-177/88 *Dekker*, para. 24:

'if [...] liability for infringement of the principle of equal treatment were made subject to proof of a fault [...], the practical effect of [the principle of equal treatment] would be weakened considerably'

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12. On grounds of a protected category

- ▶ 'Because of sex: for example in C-451/16 MB, para. 37-38 ,the Court indicated that a difference made between cis- and transgender persons with a view to awarding a pension is 'based on sex'
- ▶ This includes 'inseparable' characteristics:
 - C-177/88 *Dekker*: discrimination on grounds of pregnancy is direct sex discrimination
 - C-356/09 *Kleist*: a difference based on entitlement to old-age pension is direct sex discrimination where the pensionable age differs for men and women



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13. The comparison test

- ➔ C-451/16 MB, para. 41-42:
 - 'the requirement relating to the comparability of situations *does not require those situations to be identical, but only similar*'
 - 'The comparability of situations must be assessed not in a global and abstract manner, but in a *specific and concrete manner* having regard to all the elements which characterise them'

➔ in MB 'the situation of a person who changed gender after marrying and that of a person who has kept his or her birth gender and is married are comparable' 'in the light of the subject matter of the retirement pension and the conditions under which it is granted' [44]



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14. Direct discrimination: a closed regime of justifications

Not justifiable in principle, but a few exceptions:

- **Genuine and determining occupational requirements**

Art. 14(2) of Directive 2006/54: 'where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out [...] provided that its objective is legitimate and the requirement is proportionate.'

Example: an actress to play a female role in a movie (see list of examples in C-248/83 *Commission v. Germany*) or an all-male specific commando combat unit (C-273/97 *Sirdar*; contrast with C-285/98 *Kreil*)



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Direct discrimination: a closed regime of justifications

- **Positive action**: Art. 3 Directive 2006/54; Art. 157(4) TFEU; Art. 6 Directive 2004/113
- **Special provisions concerning the protection of women, particularly as regards pregnancy and maternity**: Article 28(1) Directive 2006/54

Example: AG Opinion, in C-450/18 *WA v Instituto Nacional de la Seguridad Social*, para. 98:

"Many of the disadvantages suffered by women emanate from a socially constructed role attributed to them, and a broad interpretation of the 'maternity' exception as covering 'motherhood' is likely to perpetuate and further petrify those roles, therefore running counter to the very purpose of positive action."
(contrast with C-463/19 *Syndicat CFTC*)



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15. A critical appraisal of the direct discrimination doctrine

Same starting line...

- Formal equality: the Aristotelian formula according to which 'likes should be treated alike' is 'tautological' and 'circular' in the absence of an external normative point of reference (Westen 1982)
- Sameness/difference logic controls 'access to equality claims' (MacKinnon 1990)
- Symmetry: assimilationist version of equality (Fredman 2016)

...but different vehicles

- Power of norm definition?
- Accommodation of
- differences? Eliminating disadvantage?



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16. Rationale for the doctrine of indirect discrimination

- Harm resulting from 'the application of the same rule to different situations' or the 'equal treatment of different situations' (Tobler 2005)
- Aim: to dismantle structural discrimination, that is certain organisation patterns in society and given choices that reproduce and amplify existing inequality

- Substantive equality: completing the equal treatment principle
- From a perpetrator-centred focus to a focus on the discriminatory effect of a measure or practice
- Beyond the individual paradigm: group justice and collective harm
- Asymmetry: treating different groups differently



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What is a major difference between direct and indirect discrimination?

- 1) Indirect discrimination does not require a comparison
- 2) Indirect discrimination does not involve a defendant's fault
- 3) Indirect discrimination can be justified on a wider basis

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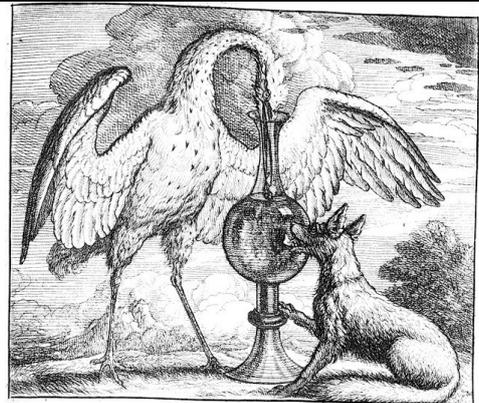
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2 Indirect discrimination

- Art. 2(b) Directive 2004/113 (goods and services)
- Art. 2(1)(b) Directive 2006/54 (employment)



'where an *apparently neutral* provision, criterion or practice would put persons of one sex at a *particular disadvantage compared with* persons of the other sex, unless that provision, criterion or practice is *objectively justified* by a *legitimate aim* and the means of achieving that aim are *appropriate and necessary*'

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21. An apparently neutral provision, measure or practice



=formulated by reference to other criteria not related to a protected characteristic

Examples:

- C-409/16 *Kalliri*, para. 31: minimum height requirements to enter a police school

'indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men'

- C- 274/18 *Schuch-Ghannadan*: rules disadvantaging part-timer workers affecting a larger proportion of women

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22 A particular disadvantage

- 'Particular' = disproportionate
- But no prescribed quantification or threshold
- Contextual assessment of impact on protected group
- Open-ended criterion
- Can be established by any means, including statistics



Example: C- 274/18 *Schuch-Ghannadan*, para. 45

'The existence of a particular disadvantage may be established, for example, if it is proved that legislation [...] is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex'

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23. The comparison test

C-223/19 *YS v NK*, Opinion of AG Kokott, [64]: absolute comparisons between the groups affected by the measure would yield 'a distorted picture' and 'only illustrate the social conditions of the time'

- context: unbalance 'at most linked to an already existing state of inequality'
- careful use of statistical evidence: use of ratios between individuals disadvantaged and not disadvantaged by the reforms within each affected group

Joined cases C-804/18 and C-341/19 *WABE* and C- 157/15 *Achbita*: disagreement between AG Sharpston and Kokott/Rantos shows lack of consensus on how to delineate the right comparator group

- AG Sharpston: employees whose religion 'mandates' the wearing of religious apparel
- AG Kokott and Rantos: all religious employees

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24. Indirect discrimination: an open-ended justification regime

A three-pronged proportionality test:

(1) Legitimate aim

E.g. C-409/16 *Kalliri*, [36]: 'the concern to ensure the operational capacity and proper functioning of the police services constitutes a legitimate objective'

(2) An objective measure that is appropriate

E.g. Do all police functions require physical force? Not always, eg 'assistance to citizens or traffic control' [38] + 'physical aptitude' not 'necessarily connected with being of a certain minimum height' [39]

(3) The necessity requirement

E.g. 'The aim pursued [...] could be achieved by measures that are less disadvantageous to women, such as a preselection of candidates [...] based on specific tests allowing their physical ability to be assessed.' [42]



Contextual variation of the test: C-223/19 *YS v NK*, Opinion of AG Kokott, [76]: the existing economic inequality between the sexes is not exacerbated further' so 'the requirements regarding the justification of any indirect discrimination are correspondingly lower'



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Harassment can be for example:

- 1)when an employer calls a female employee 'incompetent' once during an argument
- 2)when a manager repeatedly bullies a female colleague, routinely sabotages her work and makes sexist jokes about her in front of others
- 3)when an employer prohibits a female employee from wearing a religious headscarf at work

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3 Harassment and sexual harassment

➔ Art. 2(c) and (d) and 2(1)(c) and (d) of Directives 2004/113 and 2006/54

- Harassment: '*where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*'
- Sexual harassment: '*where any form of unwanted physical, 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*'



- cumulative conditions:
 - dignity-based harm: subordination (role of power)
 - 'environment': likely not to capture single occurrence
- No comparator needed
- E.g C-303/06 *Coleman*: insults, threats of dismissal...

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4 Other concepts



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4.1 Discrimination by association:

C-303/06 *Coleman*, [66]:

'the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment'

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4 Other concepts

4.2 Multiple and intersectional discrimination:

- C-363/12 *Z.*: maternity leave refused to female worker with uterus-related disability because she had not given birth but instead her biological child was born via surrogacy

- C-443/15 *Parris*, Opinion of AG Kokott, [153]:
"The combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law."



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4 Other concepts

4.3. Victimisation:

- Art. 10 of Directive 2004/113 and 24 of Directive 2006/54
- 'dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment'



C-404/18 *Hakelbracht*, para. 34:

'the effectiveness of the protection [...] would not be assured if it did not cover the **measures which an employer might take against employees having, formally or informally, defended the protected person or testified in that person's favour**. Those employees [...] could then be discouraged from intervening on behalf of that person for fear of being deprived of protection [...], which could seriously jeopardise attaining the objective pursued by Directive 2006/54 by reducing the likelihood that cases of discrimination on grounds of sex are detected and resolved.'

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Thank you!
Aitäh!

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