

Definition of key concepts

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Principles and rationale for equal treatment legislation

1. the prohibition of discrimination is complementary to the creation of an EU internal market

Economic reason for equal treatment legislation
e.g. Art. 157 TFEU (gender pay discrimination)

2. the prohibition of discrimination is an expression of a fundamental right (human right)

social reason for equal treatment legislation

3. consequences:

for the prohibition of discrimination, a direct horizontal effect is recognised.

since "Mangold", C-144/04, "Association de Mediation Sociale", C-176/12.

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Legal Sources:

Art. 157 TFEU : Equal pay

Article 19 TFEU: enabling clause

Art. 21 GRC: Prohibition of discrimination

**Directive on the protection against
discrimination**

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Meaning of *discrimination*

- **Application of different rules to comparable situations = different (adverse) treatment**

or

- **Application of the same rule to different situations = identical treatment**
- **Directly or indirectly based on protective grounds**
- **Without the existence of an exception or justification**

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Scope of the Anti-discrimination Directives

- **Material scope: *employment***
access to employment, self-employment
vocational training
employment/working conditions (including dismissal and pay)
membership of organisations
Directive 2000/43/EC covers issues outside the
employment field
- **Personal scope: *all natural and legal persons in the EU***
- Employers and self-employed
public and private employers
Liability also for the conduct of stakeholders who are perceived to
hold a leadership position in the organization,
"Accept", C-81/12

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Prohibited conduct

- **direct and indirect discrimination**
- **Harassment**
- **Instruction to discriminate**
- **Victimization**

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Constructive features of discrimination

- Disadvantage
- on account of the reason for protection
- compared with a relevant reference person

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Disadvantage

- based on action or inaction
 - "Speech act" (utterance) is sufficient, "Feryn", C-54/07
- targeted at an individual or a group
 - an identifiable victim is not required
 - (Presumption of discrimination against a potential victim)
- (objective) treatment is sufficient, no intention required
- Less favourable (negative) for the discriminated person
- Extent of difference is irrelevant

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Grounds for discrimination: exhaustive list

- Gender, Ethnic Origin, Religion, Disability, Age, Sexual Orientation
- Multiple discrimination (ECJ, C-415/10 - Galina Meister)

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Causality - "because of"

- **The adverse treatment has a causal link with the protective feature**
A co-decisive factor is sufficient
- **Subjective intention/motive is not assumed**
- **Incorrect assumption of a protective feature is sufficient**
- **Association with a protected person is sufficient (protected are characteristics, not a person possessing these characteristics: "Coleman", C-303/06)**

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Comparison

- One person
- experiences (present and real, related to concrete circumstances)
- has experienced (in the past and real, related to concrete circumstances)

or

- would experience (potentially, related to past, present or future hypothetical circumstances)

less favourable treatment than another person in a comparable situation

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Current Development:

Discrimination can take place not only between trait carriers and non-trait carriers, but also within the group of trait carriers. ECJ, 26.1.2021, C-16/19 - Szpital Kliniczny (persons with visible and with non-visible disabilities).

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Objective comparability

- sufficient degree of similarity in relation to all the relevant circumstances
- comparable working conditions/ categories of employment/ applicants or 'bogus' applicants
- Employment in the same company and beyond, if a common, single source has made the differentiation, i.e. can also eliminate it (law/collective agreement/remuneration regulations) (= cross-company comparison is permissible)

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Direct discrimination

- Unequal treatment
- on a prohibited ground of discrimination
- Causality: evident
- No general exceptions
essential job requirements, positive
Action
specific exceptions for discrimination on grounds of
age/religion

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Examples

- Age limits for employment/termination of the employment relationship
- age-related charges
- Membership requirements in church-organized enterprises
- Speech acts against immigrants and/or homosexuals

Otherwise, direct discrimination is less widespread

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Indirect discrimination

- apparently neutral rules/procedures
- with regard to persons with the protective feature
- which cause disproportionate adverse consequences
- in a similar position
- unless the procedures are objectively justified
legitimate aim/appropriate and necessary means

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Indirect discrimination: examples

- Part-time work, physical capacity: gender
- Length of service, experience: Age
- Company affiliation: Gender?
ECJ (Cadman, 2006) generally does not require proof that professional experience goes hand in hand with improved performance. Therefore, indirect discrimination against women only if the plaintiff presents and proves the basis for any doubts.
- Clothing: Religion
- Language skills/residency requirements: Ethnicity

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"Particularly disadvantageous"

- Statistical analysis: 'a significantly higher number' (Bilka case: 80 % women)
but: reference groups are difficult to define,
statistically relevant data are hardly available
- therefore: potential effects are sufficient
"(the protected group) could be particularly disadvantaged".
intrinsic probability, foreseeable consequences
"Specificity" of such disadvantage not measurable

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Examples

- **statistical analysis: degrees and ethnicity in recruitment**
Comparison: Composition of the applicant pool
Composition of recruited applicants for the type of job
in the respective company
statistically relevant difference?
- **potential impact: Language proficiency in recruitment**
Probability of exclusionary effects

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Objective Justification:

Direct discrimination cannot be justified unless permitted by law [age, religion].

general requirements:

- **legitimate objective business necessity/socio-political objective**
- **the measure applied is proportionate to the objective pursued**
implemented effectively and coherently to achieve this objective
appropriate and not going beyond what is necessary to
necessary to achieve the objective
least intrusive option
- **Cost savings or administrative simplification alone are not justification**

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Example: justification on the basis of "customer requirements",

ECJ, 15.7.2021 C-804/18.

Legitimate aim: - Appeal to discriminatory wishes cannot be legitimate.

- genuine business need - threat of significant disadvantages

Coherently implemented: all use cases equally affected

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Blurred distinction between direct/indirect discrimination

Pregnancy

Clothing with religious connotations

Registered partnership

do not in themselves constitute protective features ("neutral")

but in case of inseparability from the protected characteristic (only protected groups can be affected):

= direct discrimination

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Positive action

"specific measures to prevent or compensate for disadvantages"

- formal concept of equal treatment: positive action may be justified but is discriminatory
- Equal treatment concept: positive action constitutes substantive equal treatment
- EU Directives: The principle of equal treatment does not prevent Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages

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Conditions for positive action

- objective disadvantage of a group
- manifest imbalance to the detriment of a protected group
- Proportionate application of measures to achieve the objective of prevention/compensation.
("diversity" alone is not sufficient)

→ no automatic quotas

Distinction: "reasonable accommodation" for the employment of disabled persons is not such a measure, but an obligation of the Member States.

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Harassment:

- **unwanted conduct (verbal, non-verbal, physical) related to a protected characteristic (not the characteristic itself) which has the purpose OR effect of violating the dignity of a person and creating an environment of hostility**
- **Violation of dignity: Bullying: repetition of behaviors creates an "environment".**
- **Discrimination against a person who has rejected or accepted harassment**
- **Sexual harassment: if the conduct has a sexual connotation.**

