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Definition of Key Concepts in EU Gender Equality Law

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Key Concepts

1. **Direct Discrimination**
2. **Indirect Discrimination**
3. **Harassment and Sexual Harassment**
4. **Putting Together the Jigsaw**

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1. 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".

Directive 2006/54, Art 2(1)(a). See also, Directive 2004/113, Art 2(a); Directive 2010/41, Art 3(a).

- **less favourable treatment than a person of different sex in a comparable situation.**
- **on grounds of sex.**

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What is a comparable situation?

Case C-220/02 *Osterreichischer Gewerkschaftsbund* [2004] ECR I-5907.

- **payment on termination of employment was calculated according to length of service.**
- ***Included* time off for military service (100% men).**
- ***Excluded* time off on parental leave (98% women).**
- **CJEU: military service was compulsory; parental leave was a choice.**
- **These situations were not comparable (§64).**



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What is a comparable situation?

Case C-451/16 *MB v Secretary of State for Work and Pensions*
ECLI:EU:C:2018:492. [Directive 79/7 [1979] OJ L6/24.]

Transgender woman	Cisgender woman
Eligible for State pension at 60 if any previous marriage was annulled.	Eligible for State pension at 60 irrespective of marital status.

- **CJEU: comparability must be assessed ‘in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue’ (§42).**

- **transgender women were in a comparable situation to cisgender women as regards the granting of a State pension (§44).**

- **marriage condition = less favourable treatment.**

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Was the treatment ‘on grounds of sex’?

Case C-177/88 *Dekker* [1990] ECR I-3968.

- **CJEU: ‘only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex’ (§12).**
- **‘Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave’ (§12).**



Source: <https://pixabay.com/photos/autumn-fall-maternity-nature-ocean-1850044/>

Directive 2006/54:

- **Discrimination includes any less favourable treatment related to pregnancy or maternity leave (Art 2(2)(c)).**

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Direct discrimination cannot be justified unless this is permitted in the Directive.

eg Art 14(2), Directive 2006/54 - genuine and determining occupational requirement.

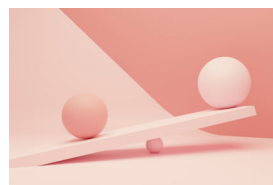
Case C-273/97 *Sirdar v The Army Board* [1999] ECR I-7403.

- men-only commando unit in the armed forces.



2. Indirect Discrimination: the Concept.

- **Measures that treat people in the same manner, but which have discriminatory effects.**



Legislative Definition of Indirect Discrimination

"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"

Directive 2006/54, Art 2(1)(b). See also, Directive 2004/113, Art 2(b); Directive 2010/41, Art 3(b).

⇒ is there particular disadvantage?

⇒ is it objectively justified?

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Case C-625/20 *KM v INSS (Invalidity Pensions)*

ECLI:EU:C:2022:508.



Source: <https://pixabay.com/photos/money-wallet-banknotes-euro-494163/>

Workers could only receive one invalidity pension under the general social security scheme for workers.

In contrast, workers could receive two invalidity pensions under the general scheme combined with the scheme for self-employed persons.

- **General scheme: 48% female, 52% male.**
- **Self-employed scheme: 36% female, 64% male.**

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CJEU



- 'the best approach to the comparison is to compare the respective proportion of workers who are and are not affected by the alleged difference in treatment'. (§40)
- This rule only affected persons who met the conditions to be awarded more than one invalidity pension. What was its impact on women and men?
- 7,723 male workers could combine pensions, 4,047 could not.
- 3,460 female workers could combine pensions, 3,388 could not.
- BUT the data was incomplete ...

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Case C-389/20 *CJ v TGSS (Domestic Workers)* ECLI:EU:C:2022:120.

- Domestic workers were excluded from general scheme for unemployment benefits in the Spanish social security system.
- Of those workers in the alternative scheme for domestic workers, 96% were women.
- Particular disadvantage ✓ → Justification?
- CJEU: State policy must be implemented in a consistent and systematic manner (§62).
- The exclusion did not apply to similar forms of work performed in a domestic setting, such as gardeners or private drivers (§63).

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FRA, 'Violence Against Women: an EU-wide survey' (2014)

<https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>

Figure 6.15: Overall sexual harassment since the age of 15 and in the 12 months before the interview across occupational groups (%)^a



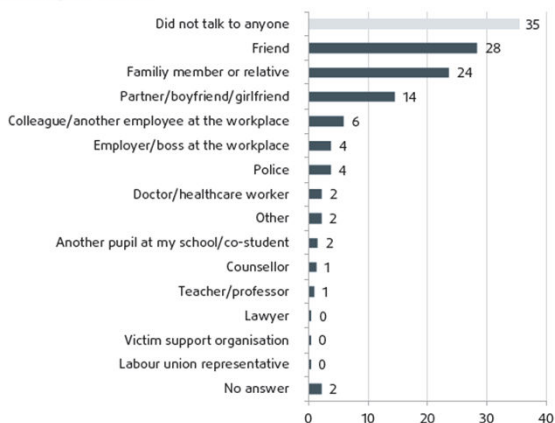
Note: ^a Out of all women who gave details of occupation (n = 41,676; information on occupation was missing for 326 cases). Source: FRA gender-based violence against women survey dataset, 2012

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FRA, 'Violence Against Women: an EU-wide survey' (2014)

Figure 6.21: To whom women talked or reported the most serious incident of sexual harassment since the age of 15 (%)^{a,b}



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3. Harassment and Sexual Harassment

“harassment’: where 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”.

Directive 2006/54, Art 2(1)(c). See also, Directive 2004/113, Art 2(c); Directive 2010/41, Art 3(c).

“sexual harassment’: 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”.

Directive 2006/54, Art 2(1)(d). See also, Directive 2004/113, Art 2(d); Directive 2010/41, Art 3(d).

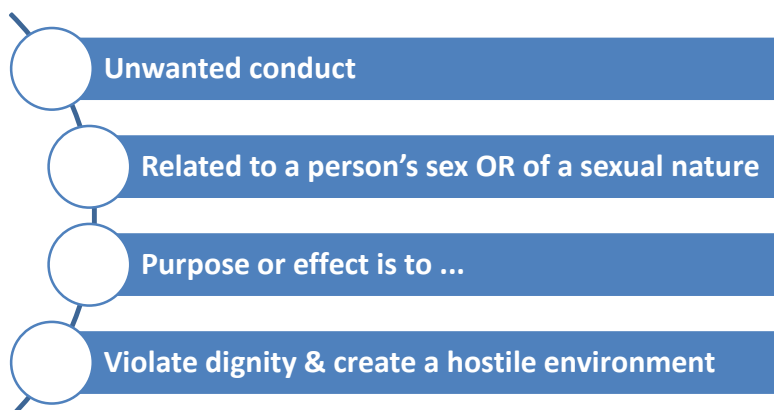
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Definition of harassment



Source: <https://pixabay.com/vectors/harassment-workplace-abuse-incident-4499303/>



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When does unwanted conduct constitute harassment?

cf. Case F-42/10 *Skareby v Commission* ECLI:EU:F:2012:64

- EU Staff Regs on psychological harassment

‘the classification of harassment is subject to the condition of its being objectively sufficiently real, in the sense that an impartial and reasonable observer, of normal sensitivity and in the same situation, would consider it to be excessive and open to criticism’.
(§65)

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Putting Together the Jigsaw

- Factual situations may often give rise to more than one form of discrimination.
- Discrimination and harassment may occur on more than one ground.



Source: <https://www.freeimages.com/photo/puzzle-i-1169119>

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Thank you. Questions?