

## DEFINITION OF KEY CONCEPTS

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## COMMONALITIES

1. **Concepts** (discrimination, indirect discrimination, harassment etc.)
2. Horizontal provisions (burden of proof, remedies, enforcement, mainstreaming)
3. Relation to EU Charter of fundamental rights - general principle of non-discrimination

## DIFFERENCES

1. Different scope of application
2. Different allowed exceptions (eg. From the notion of non-discrimination)

# SCOPE OF APPLICATION

	Employment		Pensions		Social "protection"	Edu	Business	
	Pay	Other	State	Occup.			Access	Goods/ser vices
<b>Sex / gender</b>								
2006/54	V	V		V				
79/7			V					V
2010/41								
2003/114	V							V
TFEU 157 III								
<b>Race, ethnic origin</b>								
2000/43	V	V			V	V		V
<b>Age</b>								
<b>Disability</b>	V	V						
<b>Religion, beliefs</b>								
<b>Sex. orientation</b>								
2000/78								

Gender / sex	Race, ethnic origin	Age, disability, religion, sexual orientation
<b>DIRECTIVE 2006/54/EC</b>	<b>DIRECTIVE 2000/43/EC</b>	<b>DIRECTIVE 2000/78/EC</b>
Article 1	Article 3	Article 3
<b>Purpose</b>	<b>Scope</b>	<b>Scope</b>
The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.	1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:	1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
To that end, it contains provisions to implement the principle of equal treatment in relation to:	(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;	(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(a) access to employment, including promotion, and to vocational training;	(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;	(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(b) working conditions, including pay;	(c) employment and working conditions, including dismissals and pay;	(c) employment and working conditions, including dismissals and pay;
(c) occupational social security schemes.	(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;	(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
<b>DIRECTIVE 2004/113/EC</b>	(e) social protection, including social security and healthcare;	
Article 3	(f) social advantages;	
<b>Scope</b>	(g) education;	
1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.	(h) access to and supply of goods and services which are available to the public, including housing.	
3. This Directive shall not apply to the content of media and advertising nor to education.		
	Consumers' / private law	Occupational pensions
	Social protection / social services / edu	Employment law (largo sensu)
		Self-employed

# WHAT IS PROHIBITED AND HOW?

## DIRECTIVE 2006/54/EC

Article 4

### Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

Article 14

### Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

## DIRECTIVE 2000/43/EC

Article 2

### Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

## DIRECTIVE 2000/78/EC

Article 2

### Concept of discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

# DISCRIMINATION

Article 2

### Definitions

2. For the purposes of this Directive, discrimination includes:

- (a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;
- (b) instruction to discriminate against persons on grounds of sex;
- (c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

### Forms:

1. Direct discrimination
2. Indirect discrimination

### Legal fictions:

3. Harassment *as discrimination*
4. Sexual harassment *as discrimination*
5. Instruction to discriminate *as discrimination*

## EU Charter of Fundamental Rights

Article 20

### Equality before the law

Everyone is equal before the law.

Article 21

### Non-discrimination

1. 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.

Article 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 advantages in favour of the under-represented sex.

CJEU, C-144/04, Mangold

CJEU, C-555/07, Küçükdeveci

CJEU, C-414/16, Egenberger:

<sup>76</sup> The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).

<sup>79</sup> Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.

# DIRECT DISCRIMINATION

1. For the purposes of this Directive, the following definitions shall apply:

(a) '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;

(a) direct discrimination shall be taken to occur 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;

## 1. Treatment:

1. the person **"is"**
2. **"has been"** or
3. **"would be"**

CJEU, C-54/07, Feryn

## 2. Less favourable

CJEU, C-303/06, Coleman

## 3. On the ground of ... (sex, age, race etc.)

CJEU, C-356/09, Kleist

## 4. Comparable person / comparable situation

# EXCEPTIONS

<u>Gender / sex</u>	<u>Race, ethnic origin</u>	<u>Age, disability, religion, sexual orientation</u>
<b>DIRECTIVE 2006/54/EC</b>	<b>DIRECTIVE 2000/43/EC</b>	<b>DIRECTIVE 2000/78/EC</b>
- <b>Nature of work</b> (Art. 14 (2)) CJEU C-285/98, Kreil	- <b>Nature of work</b> (Art. 4)	- <b>Nature of work</b> (Art. 4)
- <b>Positive action</b> (Art. 3)	- <b>Positive action</b> (Art. 5)	- <b>Positive action</b> (Art. 7)
- <b>Pregnancy protection</b> (Art. 28) CJEU, 184/83, Hofmann		- <b>Reasonable accommodation (disability)</b> (Art. 5) - <b>Legitimate aim (age)</b> (Art. 6)

# INDIRECT DISCRIMINATION

(b) '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;

CJEU, 170/84, Bilka	1. neutral provision
	2. " <del>is, has been,</del> <b>would put</b> '
	3. persons (pl.) of group <del>on the ground</del>
CJEU, C-167/97 Seymour-Smith	4. particular disadvantage <del>Less favourable position</del>
CJEU, C-249/97, Gruber	5. comparable person / comparable situation
	6. justification possible !

# JUSTIFICATION

Unless:

“the provision, criterion or practice is objectively justified by:

1. legitimate aim
2. appropriate means
3. necessary” (proportionality test)

Neutral attributes of sex, age group, ethnic minority:

- high, childcare, parental leave, length of service, physical condition,
- work-pattern (part-timers)..

# HARASSEMENT

(c) ‘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;

1. unwanted conduct
2. related to ... (sex, age, disability, race...)
3. with the purpose or effect

- violation of dignity

**and**

-creation of intimidating hostile, degrading, humiliating or offensive environment

# SEXUAL HARASSMENT

'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;

1. unwanted **verbal, non-verbal, or physical** conduct
2. **sexual** nature
3. with the purpose or effect
4. violation of dignity  
- **in particular**, when creating intimidating, hostile, humiliating or offensive environment

# APPLICATION OF CONCEPTS

TFEU 157 (1)

Sex/pay

Direct vertical  
and horizontal  
effect

Equality directives

Transposition legislation

Situations with direct effect

- self-executing
- 'public' employer

EU Charter - general principle of EU law