



CHARLES UNIVERSITY
Faculty of Law

Definition of key concepts



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Agenda

- Introduction
- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment

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Introduction

- Equality and non-discrimination as one of the basic principles of international and EU law

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EU secondary non-discrimination law

Gender equality

- Directive 2006/54/EC of the European Parliament and of the Council concerning the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- Council Directive 92/85/EEC on the introduction of measures to promote the improvement of safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding
- Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in matters of social security
- Directive 2010/41/EU of the European Parliament and of the Council concerning the application of the principle of equal treatment for men and women exercising an autonomous activity and repealing Council Directive 86/613/EEC
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women as regards access to goods and services and their provision
- Directive (EU) 2019/1158 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

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EU secondary non-discrimination law

Non-discrimination (race, religion, disability, gender and sexual orientation)

- Council Directive 2000/43/EC which implements the principle of equal treatment between persons irrespective of racial or ethnic origin
- Council Directive 2000/78/EC which implements the principle of equal treatment in employment between persons irrespective of sexual orientation, age, disability and religion

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Direct discrimination

- where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in the relevant legislation
- Disadvantage
- Comparator
- Discrimination grounds
- Discrimination fields
- Absence of justification

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Disadvantage

Some examples in the area of employment...

- Rejection to hire
- Terms and conditions of work
- Access to benefits
- Failure to promote, provide pay rise,...
- Dismissal
- Harrassment or retaliation

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Comparator

- A person without the relevant protected characteristics whose circumstances are not materially different
- Example: C-423/04 Richards (equal treatment for men and women in matters of social security)
- Exceptions – no comparator needed:
 - Pregnancy (C-32/93 Webb)
 - Public statements (C-54/07 Feryn)

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Secondary EU law

Grounds Field	Race	Sex	Religion	Disability	Age	Sexual orientation
Employment Vocational training	Green	Green	Green	Green	Green	Green
Education	Green	Red	Red	Red	Red	Red
Goods and services	Green	Green	Red	Red	Red	Red
Social protection	Green	Green	Red	Red	Red	Red

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Discrimination „on the grounds of“

- Is there a link between the disadvantage and the protected characteristics?
- Is motive or intention necessary?
- Discrimination by assumption
- Discrimination by association (C-303/06 Coleman)

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Justification of unequal treatment

Examples from the Framework Directive:

- Genuine and determining occupational requirement
- Setting minimum/maximum age in justified situations (C-143/16 Abercrombie & Fitch)
- Religion or belief being an occupational requirement in churches (C-414/16 Egenberger)

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Indirect discrimination

- where an apparently neutral provision, criterion or practice would put persons having a protected characteristics at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
- Focus on the outcome of the rule – not on (un)equal treatment

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The test of indirect discrimination

- Identify the apparently neutral provision, criterion or practice
- What is the disadvantage it creates for those with a protected characteristics?
- Is it objectively justified by a legitimate aim?
- Are the means of achieving that aim appropriate and necessary?

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Example of indirect discrimination

- Greek Police Academy implemented a rule where any applicants (male and female) had to meet a minimum height requirement of 1.7 meters for admission
- C-409/16 Kalliri

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Reasonable accommodation

- Direct or indirect discrimination?
- Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

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Harassment

- a form of discrimination when unwanted conduct related to any of the prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

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Components of harassment

- Unwanted conduct
- Related to a protected characteristics
- Purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment
- Victim: Objective and subjective element
- Perpetrator: Intention irrelevant

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Issues with harassment

- Lack of case law
- Different perceptions – cultural battles
- Claimant has to prove it happened – shift of burden of proof does not really help

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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
- Quid pro quo vs hostile work environment
- Less favorable treatment based on a persons' rejection of or submission to such conduct

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Other key concepts

- Instruction to discriminate
- Victimisation
- Retaliation
- Positive action

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Thanks for your attention



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