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# EU Gender Equality Law - key concepts

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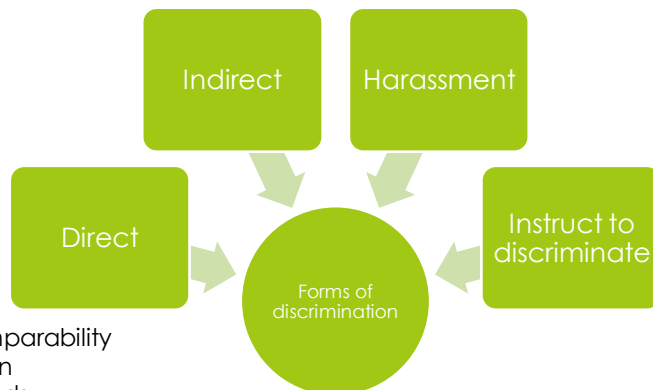
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## Key concepts



- Real/virtual comparability
- Objective reason
- Protected grounds
- Multi-discrimination

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## Some of the relevant Directives

Anti-discrimination Directives (gender)	<ul style="list-style-type: none"><li>Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)</li><li>Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity</li><li>Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services</li></ul>
Work-Life Balance	Directive (EU) 2019/1158 on work-life balance for parents and carers
EU Pay Transparency	Directive (EU) 2023/970 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

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## I. Direct discrimination

Shall be taken to occur where one person is treated less favorably **(1)** than another is, has been or would be treated in a comparable situation **(2)**, on any of the protected grounds **(3)**.

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## (1) Less favourable treatment

- What is a treatment? It could be a simple statement
- It can be a benefit, which is not provided for all
- Different doesn't necessarily means less favourable.  
➡ e.g. retirement age



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## (2) The comparator

□ **IS** –

**Present** (e.g.: in an equal pay dispute - how much is paid the comparator?)

□ **HAS BEEN** –

**Past** (e.g.: how much has been paid the comparator?)

□ **WOULD BE** –

**Virtual – Hypothetical comparator** (e.g.: how much would be paid the comparator?)

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### (3) Gender – as a protected ground

- Under the EU non-discrimination directives the protected grounds are expressly fixed. The list is exhaustive, so other grounds (e.g. sickness) cannot be added (Case C-13/05 Chacon Navas)
- The ECHR, in contrast, contains an open-ended list
- Priority employment for women exceeds the concept of equal treatment (Case C-450/93, Kalanke)

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### Stereotypes that generate differences in treatment

- “Women take care of children, therefore are less available at the workplace”
- “Women are less productive, therefore must be paid less”
- “Men support the family, therefore they need higher pay”
- “Women are more vulnerable, therefore must be protected”
- The reproductive role is “a woman's purpose in this world”

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## II. Indirect Discrimination

= an apparently neutral provision, criterion or practice (1) that affects a group defined by a 'protected ground' (2) in a significantly more negative way by comparison to others in a similar situation (3), unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (4).

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### (1) Neutral rule or practice

- E.g.: Different rules applicable to part-time employees, compared to full-time – with an indirect impact on payment (Schönheit case)
- can result of a similar treatment of two persons being in different situations
- The rule should distinguish between **the same** – that deserves equal treatment – and **the different** – that deserves unequal treatment

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## (2) Disadvantage to a person or a group defined by a 'protected ground'

- There is another criterion used, not gender...
- ... but it should be a certain link.



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## (3) Comparison to others in a similar situation

- an apparently gender - neutral provision, criterion or practice, which places members of a certain gender at a disadvantage.



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## (4) Objective justification

- Legitimate aim + appropriate and necessary means
- The defender should prove:
  - a) Lacking of the similar situation to their 'comparator';
  - b) or that the difference in treatment is based on some objective factor, unconnected to the protected ground.
- The case of special domains: army, police, penitentiaries, security forces



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## (4) Objective justification: YES

- Genuine occupational requirements
- Maternity, **the proportionality rule** - C-207/98 –  
Mahlburg (refusal to appoint a pregnant woman to a post for an indefinite period, because she could not be employed on that position for the duration of the pregnancy)



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## (4) Objective justification: NO

- ❑ **Savings of costs alone** shall not, without other reasons, amount to a legitimate aim so as to justify discrimination
- ❑ **The clients' request** – Feryn Case
- ❑ **Lack of intention** ('I did not want to discriminate'). The victim doesn't need to prove intent or fraud.
- ❑ The intention to provide "**protection**" ('women needs protection', so they cannot work night shifts, overtime, on special working conditions, etc.)
- ❑ Tradition, cultural pattern, religious customs



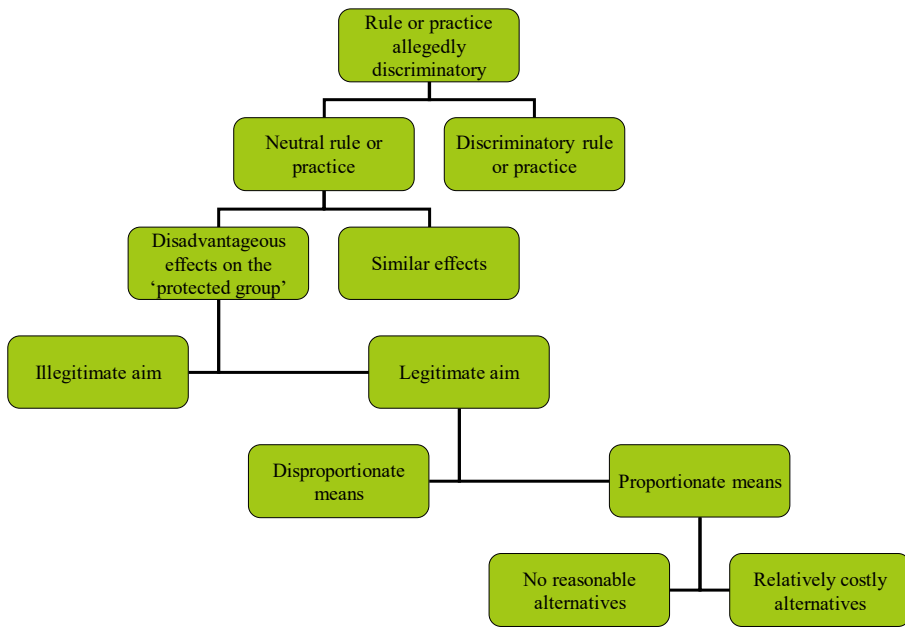
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## Example - Bilka case

- ❑ Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted **indirect discrimination against women**, since they made up the vast majority of part-time workers.
- ❑ The ECJ found that this could be indirect discrimination, unless the difference in enjoyment is justified. In order to be justified, it would need to be shown that 'the measures chosen by Bilka correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objectives pursued, and are **necessary** to that end.
- ❑ Bilka argued that the aim behind the difference in treatment was to discourage part-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing.
- ❑ The ECJ found that this could constitute a **legitimate aim**.
- ❑ However, it did not answer the question of whether excluding part-time workers from the pension scheme was **proportionate** to achieving this aim.
- ❑ The requirement that the measures taken be 'necessary' implies that it must be shown that **no reasonable alternative means exists** which would cause less of an interference with the principle of equal treatment.

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### III. Harassment

- ▣ shall be deemed to be discrimination when an unwanted conduct related to a protected ground 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.
- ▣ There is **no need for a comparator** to prove harassment.

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## Sexual harassment

= the situation where unrequited behavior with a sexual connotation is manifested physically, verbally or non-verbally, and where the object or effect is harming a person's dignity and especially creating an atmosphere that is intimidating, hostile, degrading, humiliating or offensive

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## ILO

▣ Violence and Harassment Convention, 2019 (No. 190) + Recommendation (No. 206)

▣ **Where:**

(a) in the workplace, including public and private spaces where they are a place of work;

(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;

(c) during work-related trips, travel, training, events or social activities;

(d) through work-related communications, including those enabled by **information and communication technologies**;

(e) in employer-provided accommodation; and

(f) when commuting to and from work.

▣ **a single occurrence** or repeated

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## ILO

- “gender-based violence and harassment” = violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.

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## IV. Instruction to discriminate

- Is deemed to constitute discrimination, even if no definition is provided by the directives.
- A person instructs another person to engage in direct or indirect discrimination or in harassment against another person
- Algorithms:
  - In the recruitment system
  - In employee monitoring
  - In evaluation
  - In personnel decision-making

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## Specific case: part-time

### □ Case C-274/18 on part-time work

National legislation: “The total duration of a worker's consecutive employment relationships may not exceed 6 years or, in the case of part-time employment, 8 years”.

CJEU: **NO**, if such rule adversely affects higher percentage of women in the workforce than men in the workforce, and if it is not objectively justified by a legitimate aim or the means of achieving that aim are not appropriate and necessary.

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## Specific case: overtime

- A woman's lesser availability to work overtime deriving less income than men even in full observance of the “equal work, equal pay” principle.
- Unavailability for overtime **may not even be real**, but will continue to be presumed by the employer because it matches the patriarchal pattern of labor division in the family.

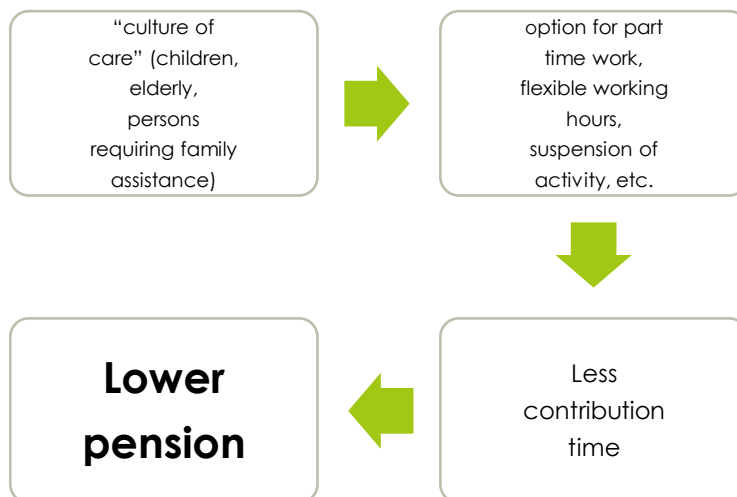
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## Specific case: collective bargaining

- ❑ Women's under-representation in collective bargaining
- ❑ Most of European and national trade unions confederations have no women in their boards
- ❑ Disadvantageous contract arrangements or even precarious work conditions.
- ❑ Women's perspective is absent from collective bargaining contracts

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## Specific case: retirement



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## What can legislation do?

- ❑ Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority. (Case C-104/09 Roca Álvarez).
  - ❑ Access to flexible working
  - ❑ Any text aimed at "protecting women" can lead to the reinforcement of gender stereotypes
- ➔ E.g.: ILO Convention 89/1948 banning night-shift work for women.

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## Multi-discrimination

- ❑ **When grounds intersect**
- ❑ A person may be discriminated on two or more grounds in the same time (Minority within minority)
- ❑ In most of the traditional minorities discriminated against, women are in even a more disadvantaged position than men (e.g. Roma women)
- ❑ Each of us are a combination of belonging to minorities. But the reduction to one dimension – may be sometimes useful in practice

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## Conclusions

- "Why do you discriminate?" – an irrelevant question (in case of indirect discrimination).  
It does not matter the motivation or intent, it only matter the effects
- Protection can be discrimination

