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Definition of key concepts: direct discrimination, indirect discrimination, harassment

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(Very) brief history of (EU) non-discrimination law

I) Equal pay and nationality discrimination (Art. 119 + 12 EC Treaty)

II) CJEU case law

- Non-discrimination as a general principle of EU law
 - E.g. Case C-144/04 (GC) *Mangold*

III) Art. 13 of 1997 Amsterdam Treaty by granting EU broader competences in the domain

=> Adoption of *inter alia* Directives 2000/43/EC, 2000/78/EC.....

IV) Art. 21 Charter of Fundamental Rights of EU

"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"



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Definitions – broad differences

I) Article 14 ECHR (+ Protocol No. 12)

“The enjoyment of the rights and freedoms set forth [in this European Convention on Human Rights] [by law] shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status**”

II) Article 2.2 Directive 2000/43/EC

(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;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin 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.



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Direct discrimination – EU law

I) Definition

Key elements: (i) less favourable **treatment**, (ii) **comparable** situation, (iii) on a **prohibited** ground

II) Comparability

Not always required, see e.g.: pregnancy discrimination (Case C-177/88 *Dekker*)

III) Intentionality

Intention is irrelevant for direct discrimination (Case C-180/95 *Draehmpaehl* (preclusion of damage reparation only if fault-based discrimination))

IV) Exceptions/exemptions/special rules

- Artt. 4 (genuine occupational requirement), 6(1) (age discrimination) + specific employers (army, religious organizations) under Directive 2000/78/EC,
 - See e.g.: Case C-414/16 *Egenberger*



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Indirect discrimination – EU law definitions

I) Definitions

Key elements: (i) neutral criterion or practice, (ii) puts a person with a prohibited criterion at a particular disadvantage compared to another group, (iii) no objective justification and means are inappropriate and unnecessary

II) Justifications (examples)

- Case C-196/02 *Nikoloudi* (budgetary considerations cannot justify indirect sex discrimination)
- Case C-409/16 *Kalliri* (height requirements to effectively accomplish task of Greek police unjustified)

III) Direct or indirect discrimination? Examples

- Case C-267/06 (*Maruko*)
- Case C-83/14 (*CHEZ*)
- Joined Cases C-804/18 and C-341/19 (*WABE and Müllers Handel GmbH*)



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Harassment - EU law

- E.g.: Article 2(3) of Directive 2000/78/EC: “Harassment shall be deemed to be a form of discrimination [...] 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 the affected person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the individual regulations and practice of the Member States.”
- Little guidance so far from CJEU case law (Case C- 303/06 *Coleman v. Attridge Law* + AG Kokott in Case C-83/14 *CHEZ*)



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Other concepts

I) Instruction to discriminate

- An instruction to discriminate against persons on a prohibited ground shall be deemed to be discrimination
- Case C-54/07 *Feryn* and Case C-188/15 (GC) *Bougnouli and ADDH?*

II) Positive action

- E.g. Article 5 Directive 2000/43/EC: With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.
- Sex: Case C-450/93 *Kalanke*; Case C-409/95 *Marshall*; Case C-158/97 *Badeck*
 - Disability quotas?

III) Discrimination by association

- Case C-303/06 *Coleman*
- Case C-83/14 (GC) *CHEZ*

IV) Intersectionality

- Case C-443/15 *Parris*



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Anything missing?

I) Stereotypes

- CJEU has not (yet) referred to this aspect but ECtHR has.

II) Vulnerability

- Again, the ECtHR has relied heavily on this notion but not the CJEU.

III) Retaliatory discrimination

- Article 2.2 (a) Directive 2006/54/EC: "For the purposes of this Directive, discrimination includes: harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct" (*quid pro quo* harassment)
- Related examples: *Palmer v. Thompson* (377 U.S. 218) and Tribunale di Brescia, Ordinanza 12 March 2009



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