



DISCRIMINATIONS – DEFINITION OF KEY CONCEPTS

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SEPTEMBER 2024



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2 OBJECTIVES

- What is a discrimination as forbidden by Law ?
- What are the paradigm of its legal regime ?

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TRANSVERSAL DIRECTIVE RACE AND ETHNIC ORIGINE

- **Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**
 - Covers employment, access to goods and services and social protection
- **Notion of Ethnic origine** : not defined in the directive
- **Excludes nationality** : Article 3 par 2
- CJEU, *Chez RB*, 17/07/2015, C-83/14
 - The concept of ethnic origine relates to social groups with a community of nationality, religious faith, language, cultural origine, tradition and life setting
 - The directive covers all persons affected by a measure adopted on the ground of ethnic origine

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EMPLOYMENT DIRECTIVE

- **Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**
- Covers 5 prohibited grounds : Article 1 :
 - religion or belief, disability, age or sexual orientation
- Covers all aspects of employment : Article 3 par 1
- Excludes Social protection : Article 3 par 3

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DIRECTIVE EMPLOYMENT BETWEEN WOMEN AND MEN

Directive 2006/78 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Unequal treatment on the ground of pregnancy is discrimination on the ground of sex (article 2 par 2 c)

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SCOPE

- All directives cover nationals and non-nationals (Recital 13)
- All directives cover moral persons (Recital 16)
- They do not cover issues related to rights related to immigration and conditions of residence (Article 3 par 2)

- As regards non nationals : the real issue is the challenge of the abuse of the condition of nationality

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3 CUMULATIVE ELEMENTS

- Unfavorable treatment against a person or a group of persons
- In a domain specified by law
- Based on one or many grounds prohibited by law

That is not otherwise authorized through an exception provided by the directive and national law

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FORMS OF DISCRIMINATION – ARTICLE 2

- **Directives:**
 - Direct discrimination
 - Indirect discrimination
 - Harassment
 - Injunction to discriminate Victimisation (Article 11)
- **Jurisprudence:**
 - Public statement of intention to discriminate assimilated to injunction to discriminate (CJEU Feryn, 18/07/2008, C-54/07)
 - Discrimination by association (CJEU Coleman, 17/07/2008, C-303/06)
 - EU Law does not cover Multiple/ Intersectional - CJEU Parris, 26/11/ 2016, C-443/15

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DIRECT DISCRIMINATION - ARTICLE 2 PAR. 2 A)

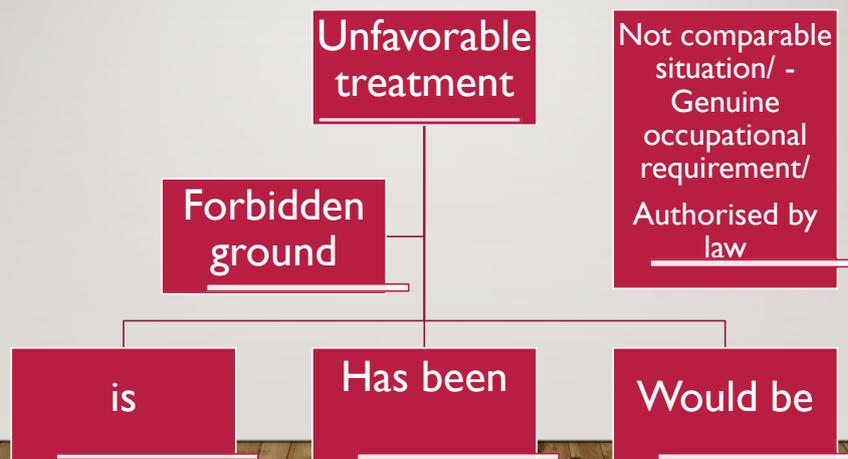
Where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on a ground prohibited by law

No justification possible except

- Authorisation of the law
- or
- Genuine occupational requirement

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DIRECT DISCRIMINATION NO JUSTIFICATION



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EXAMPLES – DIRECT DISCRIMINATION

• **Discriminations that we can observe**

- Distinction (stereotypes- ignorance of excluding factors)
- Sanction
- Imposing additional requirements
- Refusal- preference-exclusion
- Biased analysis
- Withdrawing an advantage
- Extended delays- Physical appearance- National diploma not required by law,- To talk the dialect

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INDIRECT DISCRIMINATION – ARTICLE 2 PAR. 2 B)

2 STEPS

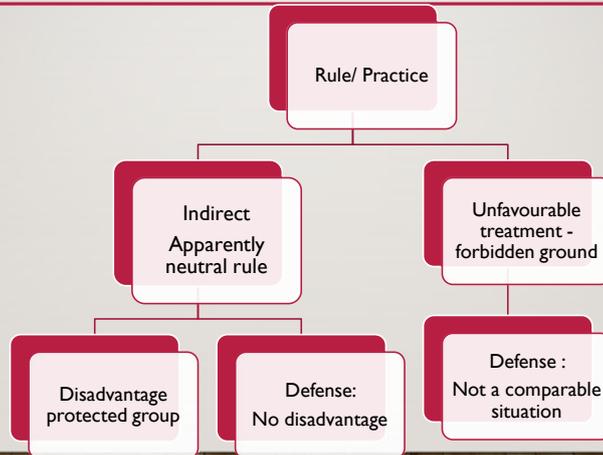
- Where an apparently neutral provision, criterion or practice would put a persons related to a prohibited ground at a particular disadvantage compared with other persons

Possible justification:

- Unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary

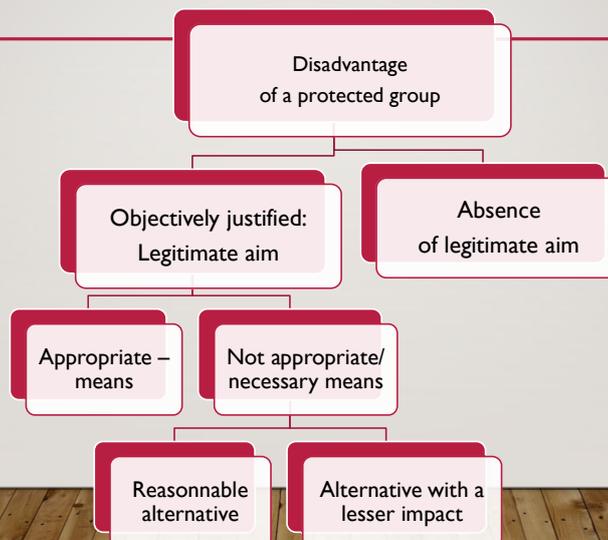
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REASONING CHART DIRECT AND INDIRECT DISCRIMINATION



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JUSTIFICATION INDIRECT DISCRIMINATION



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EXAMPLES INDIRECT DISCRIMINATION

- **Discrimination that we analyse**

- Challenge of existing rules and practices
- Impact and proportionality of the adverse impact
 - Work organisation
 - Requirements of flexibility
 - Relevance of seniority
 - Transparency
 - Proximity residence requirements

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JUSTIFICATIONS

- Must not be related to the discriminating ground
- Economic justifications are irrelevant : CJUE Kutz-Bauer, 20/03/2003, C- 187/00
- Clients requests are irrelevant: CJUE, FERYN, CJUE Bougnaoui, 14/03/2017, C-188/15
- The labour market is not a justification unless one establishes labour shortages : ECJ Enderby, 27/10/ 1993 C-127/92
- Collective bargaining without intention to discriminate is not a justification: Enderby, supra
- Individual negotiation is not a justification : CJEU, Brunnhofer, 26/06/2001, C-381/99
- Performance after employment is not a justification for unequal pay at the time of hiring : Brunnhofer, supra

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HARASSMENT – ARTICLE 2 PAR 3

Harassment is be deemed to be discrimination when :

- an unwanted conduct related to a prohibited 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.

In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

*** One occurrence is enough - no need for repetitive conduct

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EXAMPLES HARASSMENT

Discrimination as a violence – offensive attitude related to a forbidden ground

Jokes – Hateful speech- Sexually related attitudes- Intimidation - Violence - Harassment – Environment – Rituals of initiation- Offensive behaviour – Name calling

Environment: France C.A. Orléans 7 February 2017

Jokes: TV Humorist dismissed for offensive sexist jokes on TV – Cass.soc. No 20-10852 20 April 2022

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EXCEPTIONS – ARTICLE 4 DIRECTIVE 2000/78 AND 2000/43, AND ARTICLE 14 PAR 2 DIRECTIVE 2006/54

- **Genuine and determining occupational requirements**

Difference of treatment related to the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

** General norm that can be defined by the regulatory power or in collective agreements ; CJEU Prigge, 13/09/ 2011 C-447/09; CJEU Gennaro Cafaro , 07/11/ 2019, C-396/18

Religious signs: CJEU Bougnaoui vs Micropole, 14/03/ 2017 C-188/15

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REASONABLE ACCOMMODATION

ARTICLES 2 AND 5 OF EMPLOYMENT DIRECTIVE 2000/78

- Article 2 : As regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in order to eliminate disadvantages entailed by such provision, criterion or practice.
- Article 5: In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that 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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

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REASONABLE ACCOMMODATION

- Reasonable accommodation is understood as referring to the "elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers – CJEU HK Danmark, 11/04/ 2013, C-335/11 and C-337/11 par 53
- Tailored to the person with a disability (Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 25(a))
- It can be used to challenge the modalities of application of a genuine and determining occupational requirement ; CJEU Tartu Vangla , 15/07/ 2021, C-795/19

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SANCTIONS

ARTICLE 17 OF DIRECTIVE 2000/78 - ARTICLE 15 DIRECTIVE 2000/43,ARTICLE 25 DIRECTIVE 2006/54

Sanctions must be effective, proportionate and dissuasive
CJUE ACCEPT, 21/03/2013 C-91/12,

Must result in the compensation in comparison with the more favorable applicable rule : **Levelling-up** :

CJUE Starjakob, 28/01/2015, C-417/13 ; CJEU Jonkman, 21/06/2007 C-231/06

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