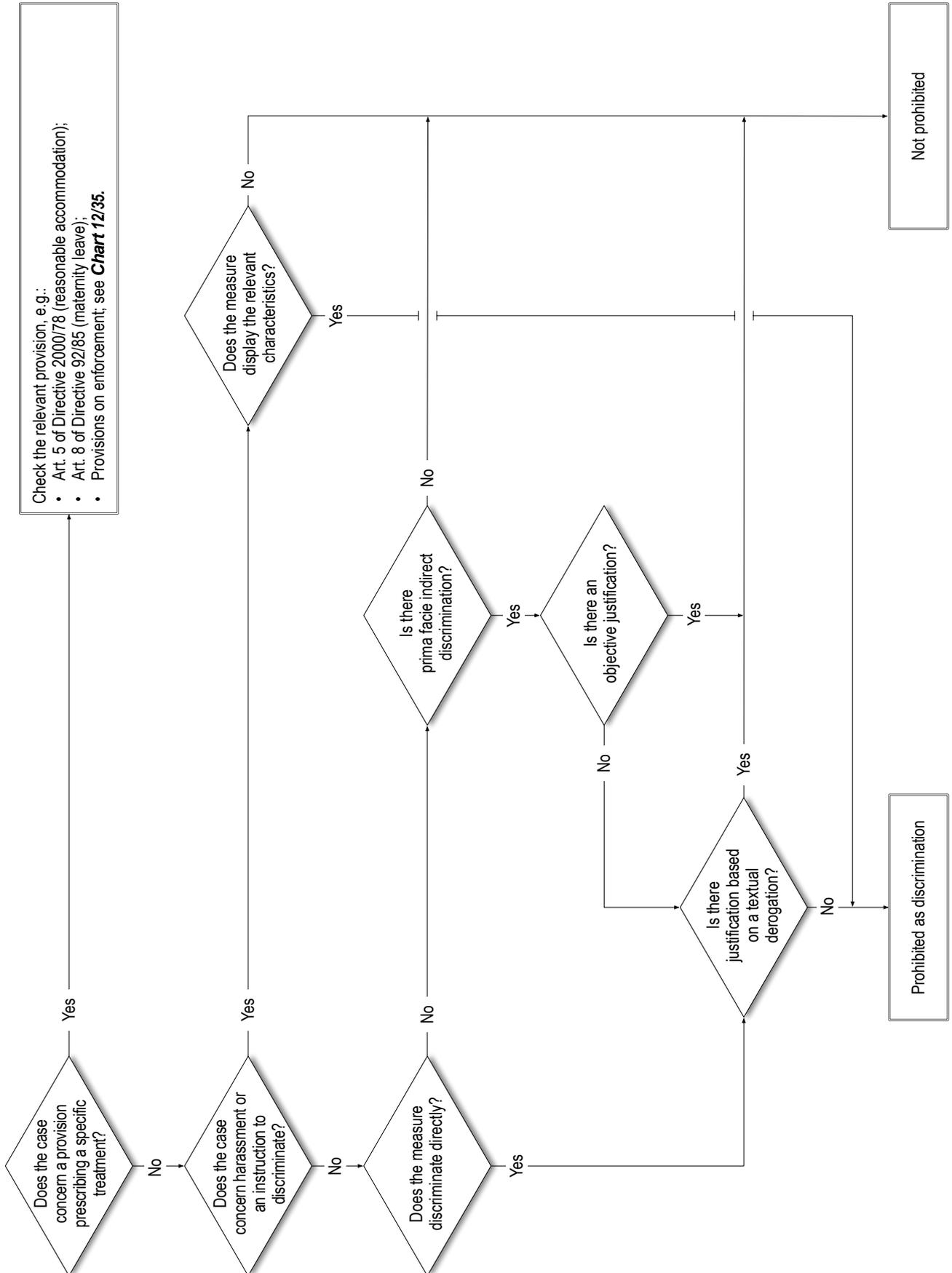


Social Law

Decision tree: discrimination cases

Chart 10 | 7



Social Law

Scope of non-discrimination legislation

Chart 10 | 8
Topic:

The different pieces of EU non-discrimination law that are relevant for the area of social law have very different fields of application.

Field of application of non-discrimination law

Comprehensive application: Art. 18(1) TFEU and provisions on free movement

In all fields of EU law, prohibition of discrimination on grounds of nationality; see **Chart 7/15**. Includes social issues; e.g. social advantages under Art. 7(2) of Regulation 492/2011; see **Chart 8/42**.

Very broad (though not comprehensive): Directive 2000/43

Prohibition of discrimination on grounds of race or ethnic origin with respect to:

- Access to employment, to self-employment and to occupation, including promotion;
- Employment and working conditions, including dismissal and pay;
- Access to all types and to all levels of vocational guidance, training and retraining;
- Membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession;
- Social protection, including social security and healthcare;
- Social advantages;
- Education;
- Access to, and supply of, goods and services available to the public, including housing.

Comparatively narrow: sex equality law

Prohibition of sex discrimination:

- Art. 157 TFEU: equal pay and positive action;
- Directive 2006/54 (Recast Directive): equal pay; occupational social security; access to employment, self-employment and occupation, vocational training and promotion; working conditions (as under Directive 2000/43);
- Directive 79/7: statutory social security;
- Directive 2010/41: self-employment, including agriculture;
- Directive 2004/113: access to, and supply of, goods and services available to the public; reminder: Art. 5(2) is invalid; *Test-Achats* (2011).

Very narrow: Directive 2000/78

Prohibition of discrimination on grounds of religion or belief, disability, age, sexual orientation:

- Only access to employment, self-employment and vocational training and promotion; working conditions (as under Directive 2000/43);
- Exemption of social security;
- Exemptions in relation to discrimination on grounds of age and disability in the armed forces.

Note: there is a proposal for a new directive (2008) that would extend the protection beyond employment matters.

Social Law

Forms of discrimination

Chart 10 | 10

Topic:

Originally, the term "discrimination" had only one meaning. Conversely, the most recent generation of social non-discrimination law distinguishes between four different forms of discrimination, three of which are defined in the legislation.

Different forms of discrimination

Originally: only one form of discrimination

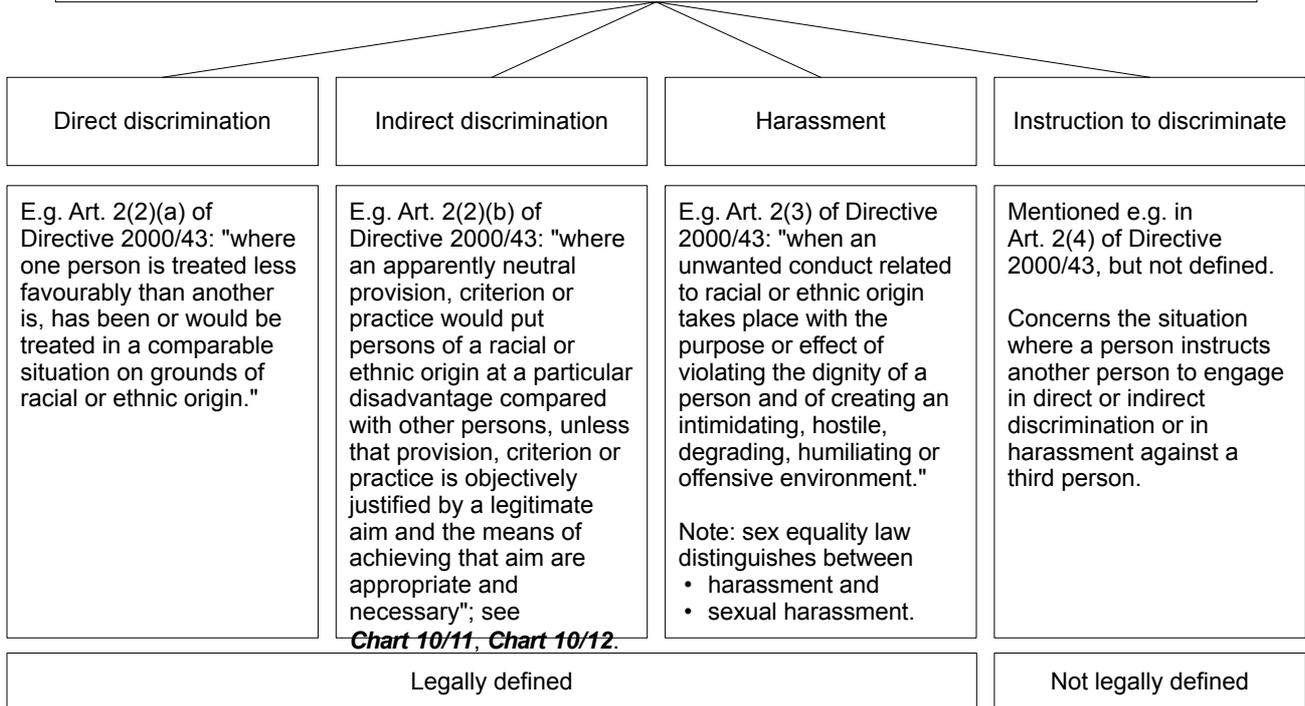
Originally, discrimination was unequal treatment of comparable situations explicitly based on the prohibited criterion.

Based on CJEU case law: direct and indirect discrimination

Subsequently, the CJEU developed the distinction between direct and indirect discrimination; see **Chart 7/14**. Subsequently, certain directives mentioned both forms of discrimination, though without defining either of them; e.g. Directive 76/207. First definition of indirect discrimination: Directive 97/80 (burden of proof).

The most recent generation of directives: four forms of discrimination

- Directive 2000/43 (discrimination on grounds of racial or ethnic origin);
- Directive 2000/78 (discrimination on grounds of religion or belief, disability, age and sexual orientation);
- Directive 2004/113 (discrimination on grounds of sex; goods and services);
- Directive 2006/54 (discrimination on grounds of sex; employment, self-employment and occupation).



Social Law

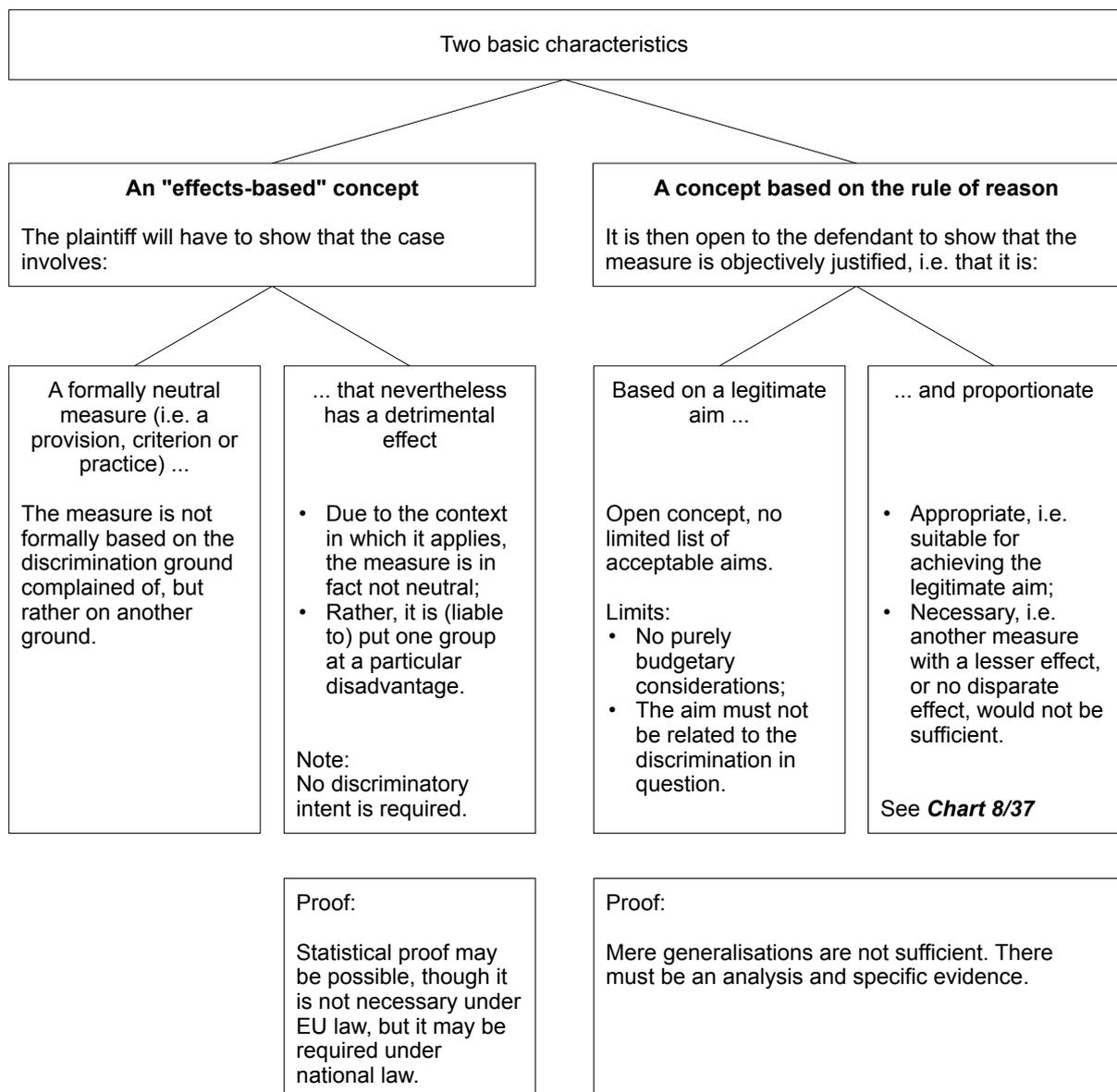
Indirect discrimination: an overview

Chart 10 | 11

Topic:

The prohibition of indirect discrimination is particularly important in social law, because unlike in free movement law, here the prohibition of discrimination is not complemented by a prohibition of restrictions. Indirect discrimination is an "effects-based" concept and a concept based on the rule of reason.

The legal concept of indirect discrimination



Social Law

Same and different treatment

Chart 10 | 13

Topic:

Equality and non-discrimination in EU social law may mean either same treatment or different treatment, depending on the situation.

Same and different treatment in non-discrimination law

The starting point: same treatment

Traditionally, equality and non-discrimination in EU social law have meant a right to equal (same) treatment. Areas where different treatment is acceptable, or even demanded, are specified in the law.

Different treatment

Possibilities to treat differently

Duty to treat differently

Reasonable accommodation for persons with disabilities, Art. 5 of Directive 2000/78
E.g. *Ring* (2013)

Occupational requirements

Protection of women in sex equality law

Positive action

Public security, order, health, and the protection of the rights of others

Objective justification

E.g. Art. 14(2) of Directive 2006/54, Art. 4 of Directive 2000/43, Art. 4 of Directive 2000/78

E.g.:

- *Sirdar* (1999), *Kreil* (2000), both in relation to sex;
- *Wolf* (2010), *Prigge* (2011), both in relation to age.

E.g. Art. 28(1) of Directive 2006/54

E.g. *Stoeckel* (1991).

Note:
Since then Directive 92/85 has also become relevant in this field.

E.g. Art. 157(4) TFEU, Art. 3 of Directive 2006/54, Art. 5 of Directive 2000/43, Art. 7 of Directive 2000/78

E.g. *Badeck* (2000), *Lommers* (2002) and *Briheche* (2004), all in relation to sex.

Art. 2(5) of Directive 2000/78 (note: this possibility only applies to this particular directive)

E.g. *Petersen* (2010), *Prigge* (2011), both in relation to age.

Part of the definition of indirect discrimination; see **Chart 7/14**

Normally not available for direct discrimination; *Hay* (2013).

Exceptions:

- Art. 6(1) of Directive 2000/78 (age), but only in the field of social and employment policy; e.g. *Mangold* (2005); *Prigge* (2011);
- Art. 4(5) of Directive 2004/113 (sex).

Social Law

General principles of equality / equal treatment and non-discrimination

Chart 10 | 14

Topic:

As in EU economic law, social non-discrimination law has to be seen against the background of the general principles of equality / equal treatment and non-discrimination.

**The background:
General principles of equality / equal treatment and non-discrimination**

On the most general level
The general principle of equality / equal treatment and non-discrimination

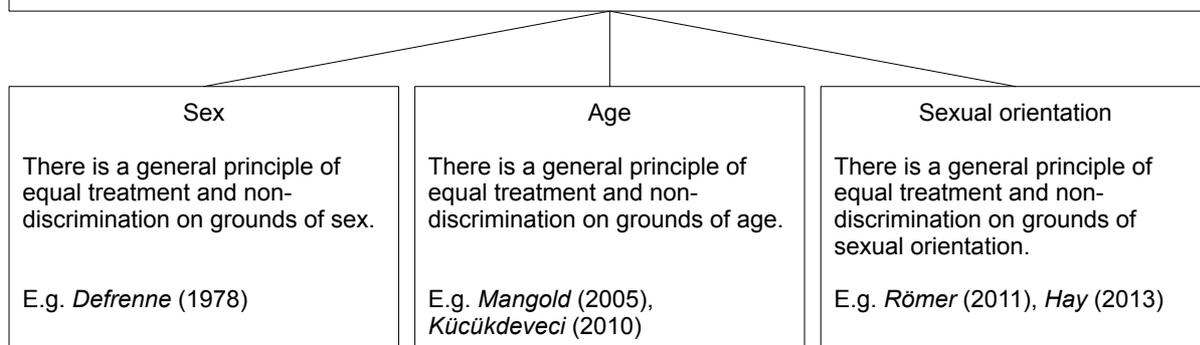
- The prohibitions of discrimination in EU social law are specific expressions of the general principle of equality / equal treatment and non-discrimination.
- The general principle of equality / equal treatment requires that comparable situations are treated in the same manner and that non-comparable situations are treated in a different manner; see **Chart 7/13**.

E.g. *Chatzi* (2010)

More specifically:
General principles related to specific discrimination grounds

In EU law, there are also general principles of equal treatment or non-discrimination on grounds of specific criteria; see **Chart 7/13**.

Examples from case law

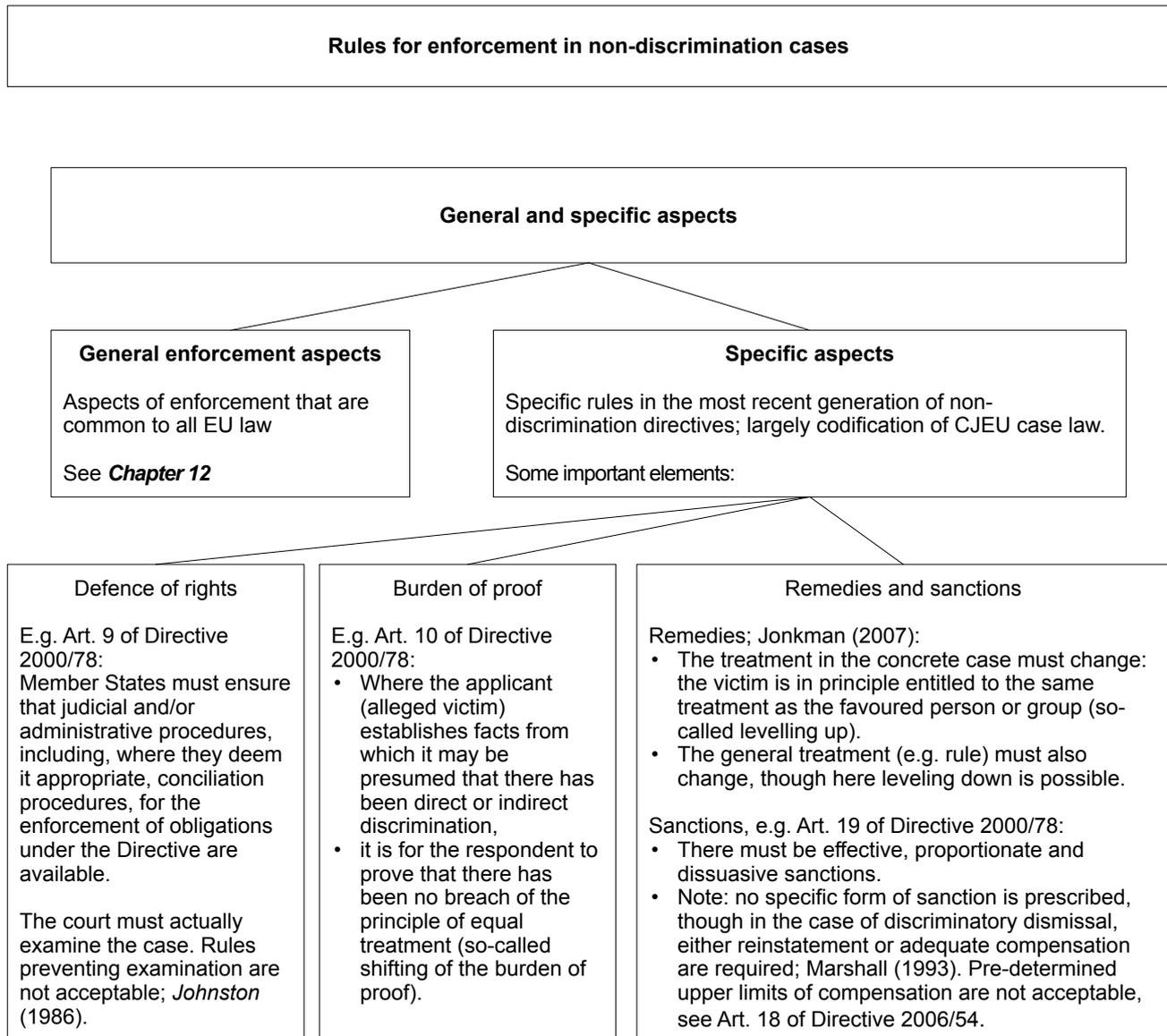


Social Law

Enforcement of non-discrimination law

Chart 10 | 15
Topic:

The most recent generation of non-discrimination directives contains specific rules on enforcement.



Equality bodies may also play an important role in the enforcement of non-discrimination law

Art. 13 of Directive 2000/43, Art. 12 of Directive 2004/113, Art. 20 of Directive 2006/54, Art. 11 of Directive 2010/41: Member States are obliged to designate a body or bodies for the promotion of equal treatment of all persons covered by the Directives. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguarding of individuals' rights.

Note: Directive 2000/78 does not contain a corresponding provision, but the Proposal for a new directive (2008) does.