



## Academy of European Law (ERA)

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### **EU anti-discrimination law: Definition of key concepts**

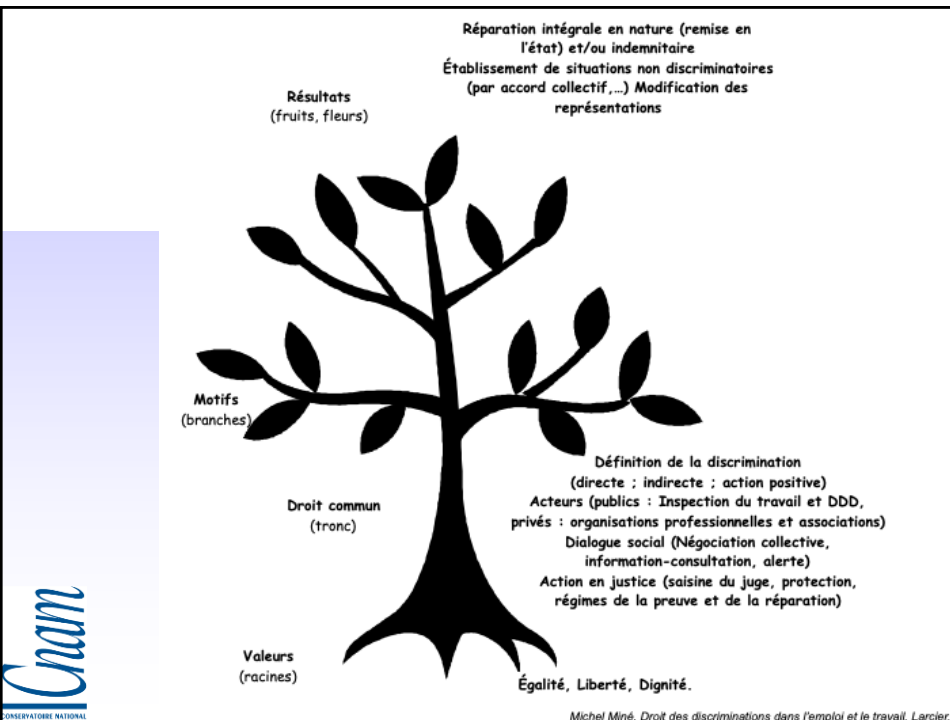
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*Drout des discriminations dans l'emploi et le travail*, 2016, Éditions Larcier (Bruxelles).

**Cham**  
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### **Definition of fundamental concepts**

- **International Law - International Labour Organization - ILO Convention No. 111 concerning *Discrimination (Employment and Occupation)* and reports of Committee of Experts**
- **International Law – *European Convention on Human Rights and European Social Charter, Case law of the ECtHR and Decisions of the European Committee of Social Rights***
- **EU Law: *TEU (Arts. 2, 3) and TFEU (Arts. 19, 45, 157) and EU Charter of Fundamental Rights (Art. 21)***
- ***Directive 2000/43 of 29 June 2000 – equal treatment between persons irrespective of racial or ethnic origin***
- ***Directive 2000/78 of 27 November 2000 – a general framework for equal treatment in employment and occupation - Grounds: religion or belief, disability, age, sexual orientation***



## **EU Law**

### **Fundamental concepts of anti- discrimination law**



## The challenges of defining discrimination

- **Speaking the same language** (legal terminology helps to conceptualise discrimination in an objective way)
  - **Avoiding confusion** (distinctions, injustice, inequality, discrimination, etc.)
    - **distinctions** (distinctions may be legitimate...)
    - **unfavourable treatment** (unfavourable treatment may be justified...)
    - **injustice** (injustice is not always discrimination...)
- Misnaming things adds to the misfortunes of this world, Albert Camus*
- **Making use of legal means to**
    - **detect discrimination** (identifying the facts as discrimination),
    - **applying the right legal framework and taking action to eliminate discrimination**



## Objective of the law:

Absence of discrimination = equal treatment

Discrimination may consist of:

- The application of different rules to comparable situations
- The application of the same rule to different situations  
(CJEU, 30 June 1998, Mary Brown)



## General definition

Discrimination is manifested through a **measure** that is:

**unfavourable** (any management measure: access to employment, including promotion and training; conditions of work and employment, including pay, etc.)

**unjustified**

**unlawful**, linked to a criterion that must not be applied to this decision - sex (gender), nationality, "racial"/ethnic origin, religion, age, disability, sexual orientation.



***Any discrimination is in itself  
an infringement of human rights***

**Discrimination may be:**

- I. Direct**
- II. Indirect**



## I. Direct Discrimination

Where **one person** is treated less favourably than another:

- **is treated** (present concrete circumstances)
- **has been treated** (subsequent concrete circumstances)
- **would be treated** (hypothetical circumstances)

in a **comparable** situation.



A person is treated less favourably than another is treated

### •Nationality:

- CJCE 15 October 1969, Ugliola
- CJCE 12 February 1974, Sotgiu
- CJCE 17 December 1980, Commission v Belgium
- CJCE 7 May 1986, Gül v Regierungspräsident Düsseldorf
- CJCE 3 June 1986, Commission v France
- CJCE 16 June 1987, Commission v Italy
- CJCE 21 June 1988, Brown v Secretary of State for Scotland
- CJCE 30 May 1989, Allué et al. v Università degli studi di Venezia
- CJCE 15 December 1995, Union royale belge des sociétés de football association et al. v Bosman
- CJCE 11 March 2008, Commission v France
- CJEU 28 June 2012, Erny
- CJEU 25 October 2012, Prete
- CJEU 13 December 2012, Caves Krier Frères
- CJEU 20 June 2013, Giersch et al.
- CJEU 19 June 2014, Saint Prix
- CJEU 4 September 2014, Schiebel Aircraft
- CJEU 10 September 2014, Haralambidis
- CJEU 5 February 2015, Commission v Belgium

\*(...)



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•**Sex (equal treatment for men and women):**

- CJCE 1971, 1976, 1978, Gabrielle Defrenne
- CJCE 1 July 1986, Rummler v Dato-Druck,
- CJCE 17 October 1989, Danfoss,
- CJCE 27 October 1993, Pamela Enderby,
- CJCE 9 February 1999, Regina v Seymour-Smith,
- CJCE 10 February 2000, Deutsche Post,
- CJCE 26 June 2001, Susan Brunnhofer,
- CJCE 4 October 2001, Tele Danmark,
- CJCE 27 April 2006, Richards, C-423/04 (Sex change)
- CJEU 21 July 2011, Kelly
- CJEU 28 February 2013, Kenny
- CJEU 20 June 2013, Riežniece
- CJEU 3 September 2014, X



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•**Sex (equal treatment for men and women):**

- CJEU 14 April 2015, Cachaldora Fernández
- CJEU 16 July 2015, Maistrellis
- CJEU 17 December 2015, Arjona Camacho
- CJEU 16 June 2016, Estrella Rodríguez Sánchez, C-351/14;
- CJEU 14 July 2016, Maria Cristina Elisabetta Ornano, C-335/15;
- CJEU 28 July 2016, Nils-Johannes Kratzer, C-423/15;
- CJEU 13 July 2017, Kleinsteuber, C-354/16;
- CJEU 7 September 2017, H, C-174/16;
- CJEU 18 October 2017, Kalliri, C-409/16;
- CJEU 19 October 2017, Otero Ramos, C-531/15;
- CJEU 7 February 2018, Matiru, C-142/17;
- CJEU 19 September 2018, Gonzalez Castro, C-41/17
- CJEU 20 June 2019, Hakelbracht, C-404/18
- CJEU 7 October 2019, Safeway Ltd, C-171/18
- CJEU 15 October 2019, AEAT, C-439/18 et C-472/18
- CJEU 5 November 2019, Commission v. Poland, C-192/18
- CJEU 4 June 2020, Fetico, C-588/18



A person is treated less favourably than another is treated

### "Racial"/ Ethnic origin:

- CJCE 10 July 2008, Firma Feryn NV
- CJEU 12 May 2011, Malgožata Runevič-Vardyn
- CJEU 19 April 2012, Galina Meister
- CJEU 31 January 2013, Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and others
- CJEU 16 July 2015, CHEZ Razpredelenie Bulgaria AD / Komisia za zashtita ot diskriminatsia



A person is treated less favourably than another is treated

### Age

- CJCE 2005, Mangold;
- CJCE 2007, Palacios de la Villa;
- CJCE 5 March 2009, Age Concern England;
- CJCE 18 June 2009, Hütter;
- CJEU 12 January 2010, Wolf;
- CJEU 12 January 2010, Petersen;
- CJEU 19 January 2010, Seda Küçükdeveci;
- CJEU 8 July 2010, Bulicke;
- CJEU 12 October 2010, Rosenblatt;
- CJEU 12 October 2010, Ingeniørforeningen i Danmark v Region Syddanmark;
- CJEU 18 November 2010, Georgiev;
- CJEU 8 September 2011, Hennigs and Land Berlin;
- CJEU 21 July 2011, Fuchs and Köhler;
- CJEU 13 September 2011, Prigge;
- CJEU 6 November 2012, Commission v Hungary;
- CJEU 6 December 2012, Odar;
- CJEU 26 September 2013, HK Danmark;
- CJEU 26 September 2013, Dansk Jurist- og Økonomforbund
- CJEU 19 June 2014, Specht et al.
- CJEU 11 November 2014, Schmitzer
- CJEU 28 January 2015, Starjakob
- CJEU 13 November 2014, Vital Pérez



A person is treated less favourably than another is treated

- CJEU 28 January 2015, Starjakob
- CJEU 21 January 2015, Felber
- CJEU 28 January 2015, Starjakob
- CJEU 26 February 2015, Ingeniørforeningen i Danmark
- CJEU 21 May 2015, SCMD;
- CJEU 9 September 2015, Daniel Unland;
- CJEU, 1 October 2015, O. (...);
- CJEU 19 April 2016, Dansk Industri (DI), C-441-14;
- CJEU 2 June 2016, C., C-122/15;
- CJEU 16 June 2016, Franz Lesar, C-159/15;
- CJEU 10 November 2016, J.J. de Lange, C-548/15;
- CJEU 15 November 2016, Gorka Salaberria Sorondo, C-258/15;
- CJEU 24 November 2016, Parris, C-443/15;
- CJEU 21 December 2016, Bowman, C-539/15;
- CJEU 13 July 2017, Kleinsteuber, C-354/16
- CJEU 19 July 2017, Abercrombie & Fitch Italia, C-143/16
- CJEU 28 February 2018, John, C-46/17
- CJEU 14 March 2018, Stollwitzer, C-482/16



A person is treated less favourably than another is treated

**Disability:**

- CJCE 11 July 2006, Chacon Navas;
- CJCE 17 July 2008, S. Coleman;
- CJEU 6 December 2012, Odar ;
- CJEU 11 April 2013, HK Danmark ;
- CJEU 4 July 2013, Commission c/ République italienne;
- CJEU 18 March 2014, Z.;
- CJEU 18 December 2014, FOA;
- CJEU 1er December 2016, Mohamed Daouidi, C-395/15;
- CJEU 9 March 2017, Milkova, C-406/15
- CJEU 18 January 2018, Ruiz Conejero, C-270/16
- CJEU 19 September 2018, Bedi, C-312/17





## **Sexual orientation:**

CJEU 1 April 2008, Maroko;  
CJEU 10 May 2011, J. Römer  
CJEU 6 December 2012, Dittrich, Klinke and Müller  
CJEU 12 December 2013, Frédéric Hay v Crédit agricole mutuel  
CJEU 25 April 2013, Asociația ACCEPT  
CJEU 24 November 2016, David L. Parris, C-443/15  
CJEU 15 Januar 2019, E.B., C-258/17  
CJEU 23 April 2020, NH v. Associazione Avvocatura per i diritti LGBTI, C-507/18



## **Religion and beliefs**

CJEU 14 mars 2017, C-157/15, G4S (Belgique)  
et  
CJEU 14 mars 2017, C-188/15, Micropole (France)  
  
CJEU 17 avril 2018, Egenberger, C-414/16  
CJEU 11 septembre 2018, IR, C-68/17  
CJEU 22 January 2019, Cresco Investigation, C-193/17



A person is treated less favourably than another has been treated

CJCE 27 March 1980, Wendy Smith, C-129/79



A person is treated less favourably than another would be treated

CJCE 30 April 1998, Évelyne Thibault v CNAVTS (**sex** - national rules depriving a woman of the right to an assessment of her performance owing to her absence from the undertaking whilst on maternity leave)

CJCE 23 May 1996, John O'Flynn (**nationality** - grant of a funeral payment subject to the funeral taking place on national territory)



## Direct Discrimination (cont.)

By instruction

By harassment

By association

By intent

By multiple discrimination



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## Direct discrimination *by instruction* (cont.)

***When a person is instructed to discriminate against other persons on grounds related to one of the prohibited criteria***

- Requests by
  - clients (CJCE 10 July 2008, Firma Feryn NV, etc.),
  - employees (ECHR 3 Oct. 2013, I.B. v Greece, etc.),
  - other persons,

addressed to an employer (or responsible person)

- such requests constitute discrimination
- **such requests cannot serve to justify discrimination**



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## Direct discrimination *by harassment* (cont.)

- Harassment:

unwanted **conduct** (linked to one of the grounds)

**with the purpose or effect**

of violating the dignity of a person

and of creating an intimidating, hostile, degrading, humiliating or offensive **environment**

- Sexual harassment

unwanted physical or verbal conduct **with sexual connotations** with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.



## Direct discrimination *by intent* (cont.)

**When statements have discriminatory effects**

CJCE 10 July 2008, Feryn Firma NV, C-54/07

CJEU 23 April 2020, NH v. Associazione Avvocatura per i diritti LGBTI

Public **statement** by the director of an undertaking to the effect that he could not recruit persons of a certain racial or ethnic origin because of the reluctance of customers

The statements constitute **a presumption of direct discrimination (dissuasive impact of the statements)**

Situations in which the undertaking lets it be known that persons covered by one of the grounds (sex, race, age, etc.) will not be:

- recruited
- allocated to certain jobs,
- promoted to certain positions, etc.



Direct discrimination **by association** (cont.)

**When a person is unfavourably treated because of their association with a person covered by one of the grounds**

CJCE 17 July 2008, S. Coleman v Attridge Law, C-303/06  
a person suffered discrimination and harassment  
because of the disability of her child

“The prohibition of direct discrimination [...] **is not limited to people who themselves have a disability.**”

The principle of equal treatment applies not to a specified category of persons, but to the grounds set out in Article 1 of the Directive ( § 38).



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**Multiple** discrimination (direct or indirect)

A person experiences  
“multiple” (or cumulative) discrimination  
when more than one ground is involved

(especially women:

- Directive 2000/43 recital 14
- Directive 2000/78 recital 3)

CJEU 19 April 2012, Galina Meister, C-415/10  
discrimination on grounds of age, sex and ethnic origin  
suffered during a recruitment procedure

CJEU 24 November 2016, David L. Parris, C-443/15 - discrimination on  
grounds of age and sexual orientation (retirement) – not found



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## **Derogations** to direct discrimination

- **In principle: impossible**
- By way of an exception (interpreted strictly): difference in treatment does not constitute discrimination when a characteristic (associated with one of the grounds) constitutes a “**genuine and determining occupational requirement**” by reason of the nature of the activities or the context in which they are carried out
  - If the Member State has opted for a derogation (“information provided to the Commission”)
  - if the objective is legitimate and the requirement is proportionate
- Specific derogations related to:
  - the criteria of
    - age,
    - disability,
  - occupational activities within churches.



## **II. – Indirect discrimination**

- **Where an apparently neutral provision or practice** applied (by a company, etc. )
- would put persons of a particular group (linked to one of the grounds) at a particular **disadvantage** compared with other persons,
- unless the entity (company, etc.) applying the provision or practice proves that it is
  - objectively **justified** by a legitimate aim (relevance)
  - and that the means for achieving it are appropriate and necessary (**proportionality**)



## Indirect Discrimination

This method permits the examination of the **effects** of a rule or practice (objective concept of discrimination)  
(ILO Convention 111)

If the company can justify the legitimacy and proportionality of the provision or practice that has been challenged, the difference in treatment is not discriminatory

Case-law establishes strict standards for accepting a **justification**  
(for example, budgetary data does not provide justification: CJEU 20 March 2003, Helga Kutz-Bauer)



## Indirect discrimination: a concept and a method

### **Sex** (examples):

- CJCE 31 March 1981, Paula Jenkins (part-time workers, hourly wage)
- CJCE 13 May 1986, Bilka (part-time workers, company pension scheme)
- CJCE 7 February 1991, Nimz (part-time workers, career development)
- CJCE 6 December 2007, Ursula Voss (part-time workers, overtime rates for hours worked beyond contract)

### **Nationality** (examples):

- CJCE 24 September 1998, Commission v France (retirement benefit refused to cross-border workers)
- CJCE September 2003, Köbler (seniority benefit refused to workers who had performed the same activity in a different Member State)



## Indirect discrimination and *Positive action*

Indirect discrimination invites the adoption and implementation of measures for positive action

“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 any of the grounds)”

- Actions to compensate (recruitment, pay, training, promotion, etc.)
- Actions to prevent disadvantage (training, etc.),
- For the benefit of persons who have suffered discrimination or belong to a group that has suffered discrimination on one of the grounds



## *Positive action*

Positive action measures limited by the CJEU

“saving clause” for persons meeting other criteria

- CJCE 17 October 1995, Kalanke / Freie Hansestadt Bremen (C-450/93) ( § § 18-19, 21-24 and operative part)
- CJCE 11 November 1997, Marschall / Land Nordrhein-Westfalen (C-409/95) ( § 35 and operative part)
- CJCE 28 March 2000, Badeck et al. (C-158/97) ( § § 38, 44, 55, 63, 66 and operative part)
- CJCE 6 July 2000, Abrahamsson and Anderson (C-407/98) ( § § 53-62, operative part 3)





## Access to relevant documents

Texts: <http://eur-lex.europa.eu>

Case-law: <http://curia.europa.eu>

- Case-law from 1954 to 2009:
  - B. European Community (EEC/EC)
  - B-15 Social policy
- Case-law since 2010:
  - 4. EU internal policy
  - 4.14 Social policy

Commission <http://ec.europa.eu/social>