Key Concepts
of the EU Anti-Discrimination Directives

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Key Concepts
of the EU Anti-Discrimination Directives

Grounds for protection and scopes of application
Forms of discrimination
– Direct and indirect discrimination
– Harassment and sexual harassment
– Instruction to discriminate
– Reasonable accommodation for persons with a disability

Other concepts
– Positive action
– Victimisation
– Sanctions
– Burden of proof
– Enforcement of rights: Advocacy groups and similar organisations may participate in judicial / administrative proceedings
– Minimum requirements
### Grounds for protection and scopes of application (1)

<table>
<thead>
<tr>
<th>Scope</th>
<th>Directive</th>
<th>Grounds</th>
<th>Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2000/43/EC</td>
<td>Race, Ethnic origin</td>
<td>Entry / residence</td>
</tr>
<tr>
<td></td>
<td>2000/78/EC</td>
<td>RBDAS</td>
<td>Marital status</td>
</tr>
<tr>
<td></td>
<td>2006/54/EC</td>
<td>Sex</td>
<td>Freedom of association</td>
</tr>
</tbody>
</table>

### Grounds for protection and scopes of application (2)

<table>
<thead>
<tr>
<th>Scope</th>
<th>Directive</th>
<th>Grounds</th>
<th>Exemptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment and occupation</td>
<td>2006/54/EC</td>
<td>Sex</td>
<td>Protection during pregnancy/maternity, Company pensions for employment before 17 May 1990</td>
</tr>
<tr>
<td>Goods &amp; services</td>
<td>2004/113/EC</td>
<td>Sex</td>
<td>Private / family life, Media/advertising, Education, Protection during pregnancy/maternity</td>
</tr>
<tr>
<td>+ education</td>
<td>2000/43/EC</td>
<td>Race, Ethnic origin</td>
<td>Entry / residence, Private / family life</td>
</tr>
</tbody>
</table>
## Grounds for protection and scopes of application (3): And also

<table>
<thead>
<tr>
<th>Scope</th>
<th>Directive</th>
<th>Grounds</th>
<th>Exemptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>National social security / benefits</td>
<td>97/7/EEC</td>
<td>Sex</td>
<td>Protection during pregnancy/maternity, Survivors' / family benefits</td>
</tr>
<tr>
<td>Protection of self-employed persons outside the scope of Directive 2006/54/EC, in particular maternity protection</td>
<td>2010/41/EU</td>
<td>Sex</td>
<td>National social security / benefits, Marital status, Relationship with spouses / life partners</td>
</tr>
</tbody>
</table>

## Forms of discrimination

<table>
<thead>
<tr>
<th>Grounds for protection</th>
<th>Forms of discrimination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>Direct discrimination</td>
</tr>
<tr>
<td>Ethnic origin</td>
<td>Indirect discrimination</td>
</tr>
<tr>
<td>Sex</td>
<td>Harassment</td>
</tr>
<tr>
<td>Religion</td>
<td>Instruction to discriminate</td>
</tr>
<tr>
<td>Belief</td>
<td>+ sexual harassment</td>
</tr>
<tr>
<td>Disability</td>
<td>+ any less favourable treatment on grounds of pregnancy/maternity</td>
</tr>
<tr>
<td>Age</td>
<td>+ reasonable accommodation for persons with a disability</td>
</tr>
<tr>
<td>Sexual orientation</td>
<td></td>
</tr>
</tbody>
</table>

- Direct discrimination
  - Including *inseparably linked* e.g. life partnership
  - Including *prima facie cases*, cf. recital 31 Dir. 2000/78/EC

- Indirect discrimination
  - Including *by association*, ECJ, 17 July 2008, C-303/06 (Coleman)
Direct and Indirect Discrimination

No religious jewellery at place of work
Direct Discrimination

“on grounds of”  
Less favourable treatment

Comparators

Exception: pregnancy

= Direct connection

Including public announcement
ECJ, 10 July 2008, C-54/07 (Feryn)

No religious jewellery

ECJ, 10 July 2008, C-54/07 (Feryn)

In comparable situation, e.g.
- Similar legal position of marriage and life partnership,
  ECJ, 1 April 2008, C-267/06 (Maruko)
- Termination of employment for the same reason and under the same conditions,
  CJEU, 6 Dec. 2012, C-152/11 (Odar)

not comparable, e.g. differences between men and women in the provision of healthcare services due to physical differences
Recital 12 in Directive 2004/113/EC

Indirect Discrimination

Neutral provision, criterion or practice

At a disadvantage with protected ground

Without objective reason

- No legitimate aim and/or
- Means of achieving that aim are not appropriate and/or necessary

To be examined in national context,
CJEU, 11 April 2013, C-335/11, C-337/11 (HK Danmark)

e.g. connection with
- part-time work
  CJEU, 22 Nov. 2012, C-385/11 (Elbal Moreno)
- Retirement age
  CJEU, 6 Dec. 2012, C-152/11 (Odar)
- Absence because of disability
  CJEU, 11 April 2013, C-335/11, C-337/11 (HK Danmark)

 Compared with comparator group
  e.g. a worker with a disability compared with a worker without a disability, CJEU, 11 April 2013, C-335/11, C-337/11 (HK Danmark)

Put persons at a particular disadvantage
  e.g. statistically affects women far more than men,
  CJEU, 2 Nov. 2012, C-385/11 (Elbal Moreno)
### Justification of Direct Discrimination

<table>
<thead>
<tr>
<th>Protected grounds</th>
<th>Justification</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000/43/EC</td>
<td>Race</td>
</tr>
<tr>
<td>2006/54/EC</td>
<td>Ethnic origin</td>
</tr>
<tr>
<td>2000/78/EC</td>
<td>Genuine and determining occupational requirements</td>
</tr>
<tr>
<td>2004/113/EC</td>
<td>Sex</td>
</tr>
<tr>
<td>2006/54/EC</td>
<td>Actuarial factors</td>
</tr>
</tbody>
</table>

- **Positive Action (optional)**
  - De facto inequalities in society (ECJ, 6 July 2000, C-407/98)
  - Prevent or compensate: e.g. promoting equality of opportunity between men and women
  - Proportionality: No absolute priority for underrepresented group (ECJ, 11 Nov. 1997, C-409/95 (Marschall))

- **Reasonable Accommodation (mandatory)**
  - Objective: Equitable access to employment
  - Appropriate and necessary measure in given case
  - Proportional burden on employers

- *RBDAS + reasonable accommodation for persons with disabilities*
- *+ occupational requirements of religious/ideological employers*
- *+ legitimate aims with regard to age*
Harassment and Sexual Harassment

Unwanted conduct

Violation of dignity and hostile environment

On account of protected ground

Sexual harassment = unwanted conduct of a sexual nature

with the purpose or effect

Independent of comparator

Sexual harassment = sex

Instruction to discriminate

Victimisation

Sanctions

effective

proportional

dissuasive

Principle: No upper limit for compensation

(cf. Article 10 Directive 2010/41/EU)

Exception with regard to employment and occupation: The employer can prove that the only damage suffered by an applicant as a result of discrimination is the refusal to take his/her job application into consideration.

(cf. Article 18 Directive 2006/54/EC)

Thank you very much for your attention!

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