

# **Key Concepts**

of the EU Anti-Discrimination Directives

## **SEMINAR FOR LEGAL PRACTITIONERS**

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Anna Braunroth  
Legal officer in team of advisors,  
Federal Anti-Discrimination Agency, Berlin



# **Key Concepts**

of the EU Anti-Discrimination Directives

## **Grounds for protection and scopes of application**

### **Forms of discrimination**

- Direct und indirect discrimination
- Harassment and sexual harassment
- Instruction to discriminate
- Reasonable accommodation for persons with a disability

### **Other concepts**

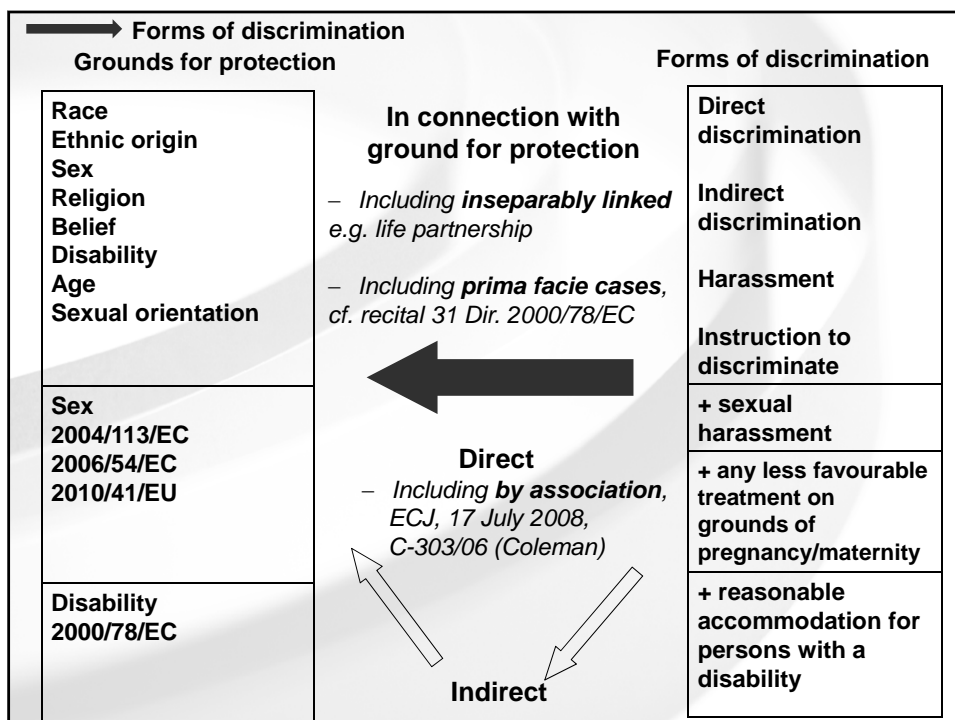
- Positive action
- Victimisation
- Sanctions
- Burden of proof
- Enforcement of rights: Advocacy groups und similar organisations may participate in judicial / administrative proceedings
- Minimum requirements

<b>→ Grounds for protection and scopes of application (1)</b>			
<b>Scope</b>	<b>Directive</b>	<b>Grounds</b>	<b>Exemption</b>
<b>Employment and occupation</b>	2000/78/EC	<b>RBDAS: Religion Belief Disability Age Sexual orientation</b>	<b>National social security / benefits</b>  <b>National provisions on retirement age</b>  <b>Armed forces: age / disability</b>  <b>Health &amp; safety at work: disability</b>  <b>General security proviso</b>
	2000/43/EC	<b>Race Ethnic origin</b>	<b>Entry / residence</b>
	2000/78/EC	<b>RBDAS</b>	
	2000/78/EC	<b>RBDAS</b>	<b>Marital status</b>
	2006/54/EC	<b>Sex</b>	<b>Freedom of association</b>

<b>→ Grounds for protection and scopes of application (2)</b>			
<b>Scope</b>	<b>Directive</b>	<b>Grounds</b>	<b>Exemptions</b>
<b>Employment and occupation</b>	2006/54/EC	<b>Sex</b>	<b>Protection during pregnancy/maternity</b>  <b>Company pensions for employment before 17 May 1990</b>
<b>Goods &amp; services</b>	2004/113/EC	<b>Sex</b>	<b>Private / family life</b>  <b>Media/advertising</b>  <b>Education</b>  <b>Protection during pregnancy/maternity</b>
<b>+ education + national social security / benefits + healthcare services</b>	2000/43/EC	<b>Race Ethnic origin</b>	<b>Entry / residence</b>  <b>Private / family life</b>

➔ **Grounds for protection and scopes of application (3): And also**

Scope	Directive	Grounds	Exemptions
National social security / benefits	97/7/EEC	Sex	Protection during pregnancy/maternity  Survivors' / family benefits
Protection of self-employed persons outside the scope of Directive 2006/54/EC, in particular maternity protection	2010/41/EU	Sex	National social security / benefits  Marital status  Relationship with spouses / life partners
Proposal: Goods & services Education National social security / benefits & healthcare services	COM(2008)426	RBDAS	Marital status  Entry / residence  Educational mission / neutrality of the state  General security proviso





Anna Chakvetadze - Rome 2009 - Pascale at en.wikipedia (CC Attribution-Share Alike)

## Direct and Indirect Discrimination

No religious jewellery  
at place of work



## → Direct Discrimination

“on grounds of”	Less favourable treatment	Comparator <i>Exception: pregnancy</i>
<p>= Direct connection</p> <div style="border: 1px solid black; border-radius: 50%; width: 100px; height: 100px; margin: 20px auto; display: flex; align-items: center; justify-content: center; text-align: center;"> <p>No religious jewellery</p> </div>	<p>Including public announcement <i>ECJ, 10 July 2008, C-54/07 (Feryn)</i></p>	<p>Including hypothetical „would be treated“</p> <p><b>in comparable situation, e.g.</b></p> <ul style="list-style-type: none"> <li>– <i>Similar legal position of marriage and life partnership, ECJ, 1 April 2008, C-267/06 (Maruko)</i></li> <li>– <i>Termination of employment for the same reason and under the same conditions, CJEU, 6 Dec. 2012, C-152/11 (Odar)</i></li> </ul> <p><b>not comparable</b>, e.g. differences between men and women in the provision of healthcare services due to physical differences <i>Recital 12 in Directive 2004/113/EC</i></p>

## → Indirect Discrimination

No jewellery

Neutral provision, criterion or practice	At a disadvantage with protected ground	Without objective reason
<p>e.g. connection with</p> <ul style="list-style-type: none"> <li>– <b>part-time work</b> <i>CJEU, 22 Nov. 2012, C-385/11 (Elbal Moreno)</i></li> <li>– <b>Retirement age</b> <i>CJEU, 6 Dec. 2012, C-152/11 (Odar)</i></li> <li>– <b>Absence because of disability</b> <i>CJEU, 11 April 2013, C-335/11, C-337/11 (HK Danmark)</i></li> </ul>	<p><b>Compared with comparator group</b> <i>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)</i></p> <p><b>Put persons at a particular disadvantage</b> <i>e.g. statistically affects women far more than men, CJEU, 2 Nov. 2012, C-385/11 (Elbal Moreno)</i></p>	<ul style="list-style-type: none"> <li>– <b>No legitimate aim and/or</b></li> <li>– <b>Means of achieving that aim are not appropriate and/or necessary</b></li> </ul> <p><i>To be examined in national context, CJEU, 11 April 2013, C-335/11, C-337/11 (HK Danmark)</i></p>

<b>Justification of Direct Discrimination</b>		
	<b>Protected grounds</b>	<b>Justification</b>
2000/43/EC 2006/54/EC	Race Ethnic origin Sex	Genuine and determining occupational requirements
2000/78/EC	RBDAS	+ reasonable accommodation for persons with disabilities  + occupational requirements of religious/ideological employers  + legitimate aims with regard to age
2004/113/EC	Sex	Legitimate aims <i>e.g. protection from violence, freedom of association, cf. recital 16</i>  <b>Actuarial factors</b> <i>CJEU, 1/03/2011, C-236/09 (Test-Achats)</i>
2006/54/EC	Sex	Actuarial factors

<b>→ Positive Action (optional)</b>		
<b>Disadvantages due to protected ground</b>	<b>Prevent or compensate</b>	<b>Proportionality</b>
De facto inequalities in society <i>ECJ, 6 July 2000, C-407/98</i>	e.g. promoting equality of opportunity between men and women	<b>No absolute priority for underrepresented group</b> <i>ECJ, 11 Nov. 1997, C-409/95 (Marschall)</i>  <b>Suitable measures</b> <i>Not suitable, e.g. perpetuation of traditional distribution of roles of men and women, CJEU, 30 Sept. 2010, C-104/09 (Álvarez)</i>
<b>→ Reasonable Accommodation (mandatory)</b> <i>for persons with disabilities</i>		
<b>Objective: Equitable access to employment</b>	<b>Appropriate and necessary measure in given case</b>	<b>Proportional burden on employers</b>

## → 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

## → Victimization

## → 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!**  
***Annaelise.braunroth@ads.bund.de***