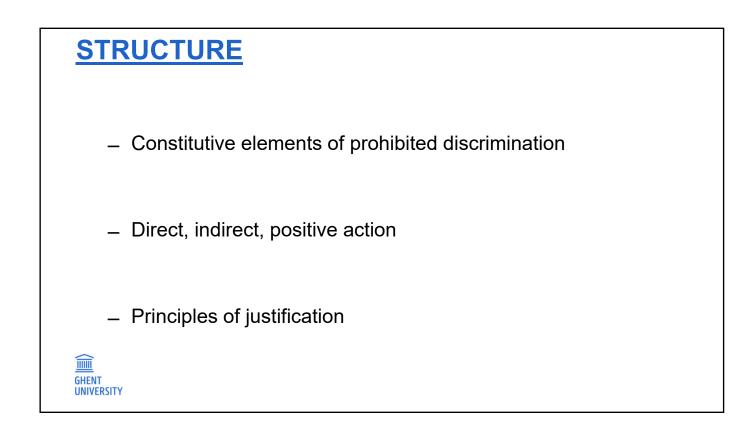
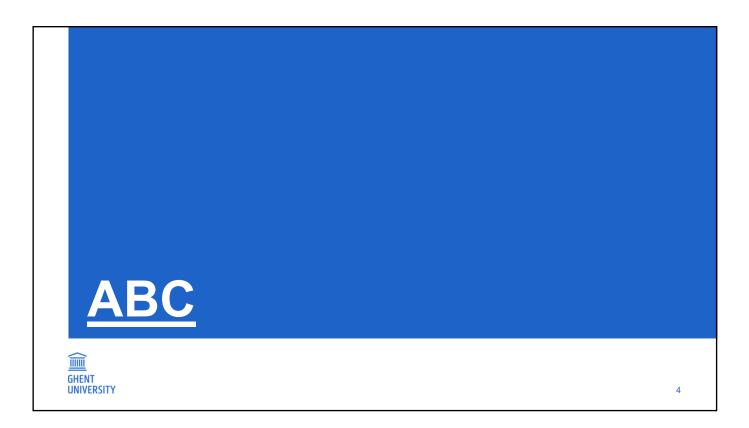


# **PURPOSE & LIMITATION**

- Non-discrimination in EU (employment) law: general concepts
- Pedagogical & introductory approach: 'ABC'
- Excluded:
  - Personal scope
  - Proof & remedies
  - Special regimes: age, disability, religion
  - Human/Fundamental rights







## ACQUIRED PRINCIPLES

- Discrimination is "the application of different rules to comparable situations or the application of the same rule to different situations": different or identical <u>treatment</u>
- Based, directly or indirectly on the protected trait: **<u>causation</u>**
- <u>Direct</u> discrimination: the individual & the trait
- <u>Indirect</u> discrimination: the group & the impact



- Horizontal & vertical
- Only: within the scope of EU-law (*Bartsch* C-427/06)



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# PROTECTED TRAITS Nationality Sex + Gender Sexual orientation Racial or ethnic origin Religion or belief Disability Age "Any ground": Lisbon upgrade of EU Charter of Fundamental Rights

### WARNING

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- No comprehensive theory or concept of discrimination
- Organic development, often case-law driven
- Always developing
- Tango between CJEU and national judges



### **CJEU & DISCRIMINATION**

*'the application of different rules to comparable situations or the application of the same rule to different situations'* 



## **CONSTITUTIVE ELEMENTS**

- Treatment
- Causal link with the protected trait
- <u>Comparison</u>



### TREATMENT

- Action or inaction
- Individual or collective
- Less favourable treatment:
  - Different + negative
  - Extent of the difference irrelevant
  - Both a punctual and a global approach



### **TREATMENT**

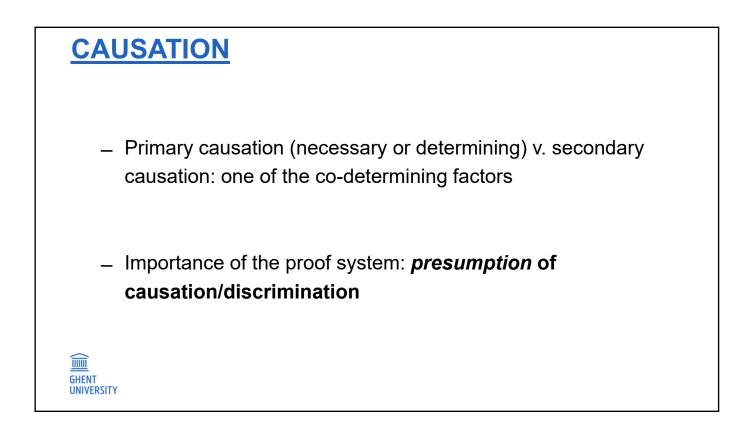
- Action/inaction v. intention or simple words
- Feryn C-54/07 (2008): public declaration that is likely to impact the protected group
- CJEU:
  - Focus on the goal and effectiveness
  - Constitutes direct discrimination, even without any victim
  - Presumption of discrimination for the possible victim



### **CAUSATION**

- Causal link with the protected trait
- Objective causation:
  - Motivation or intention is not determining
  - External <u>origin</u> is covered: e.g., clients, the market, the boss
  - Faulty perception is covered
  - Protection by association is possible

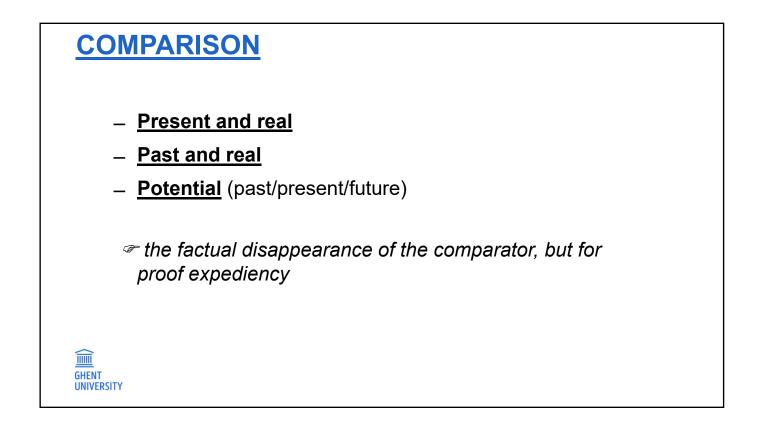




### **COMPARISON**

- Comparison = formal equality
- Employment: in the same company, except if single source (CBA)
- With a person or a group of persons who are objectively comparable (or incomparable), leaving aside the protected trait: the *'comparator'*
- Comparison for the issue in concreto, e.g. "equal work" for equal pay







# <section-header> DIRECT DISCRIMINATION "where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of…" Causation = a priori other person would be treated differently "the factual disappearance of the comparator, but for proof expediency

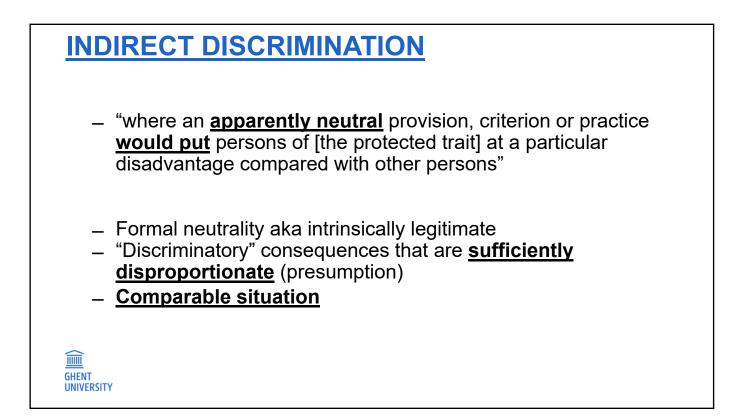
# **EXAMPLES**

– Age:

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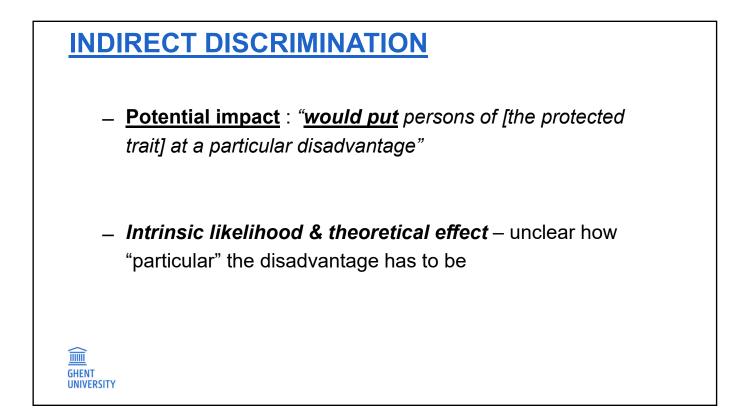
- In human resources policies
- In wage agreements
- At individual or collective dismissal
- Importance of justifications
- Gender, racial/ethnic origin and religion :
  - Direct discrimination less common





### **INDIRECT DISCRIMINATION**

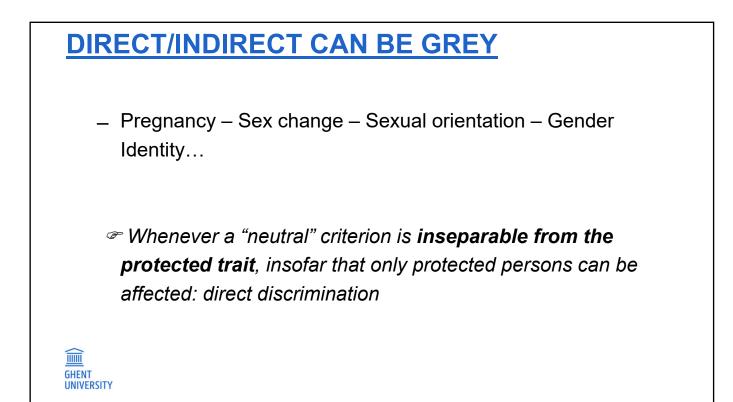
- Statistical analysis :
  - Substantially disproportionate percentages: "a considerably higher number"
  - Statistical impact to be assessed <u>at the level where</u> <u>the measure/legislation under scrutiny was</u> <u>adopted</u> (*Allonby*, *Voss*), *not* the level of its application
  - Difficulty to compose reference groups and become data that are statistically relevant and cover a sufficient period



# **EXAMPLES**

- Seniority or experience @ age
- Blue collar / white collar @ race, ethnic origin
- Working time organisation @ religion/belief
- Clothing conditions @ religion/belief
- Language proficiency *race*, ethnic origin
- Recruitment criteria (experience, degrees, etc.) <sup>©</sup> race or ethnic origin





### THE HEADSCARF AND RELIGION/BELIEF

- 'Religion/belief' covers manifestation of faith in public
- Wearing a headscarf = manifestation of religion...BUT
- G4S Secure Solutions (C-157/15): indirect IF
  - An internal rule of a private undertaking prohibits the visible wearing of any political, philosophical or religious sign in the workplace
  - When the application of the rule covers any manifestation of any beliefs without distinction



### PERIODS OF SERVICE AND AGE

Seniority = indirect age discrimination

Tyrolean Airways C-132/11: "(...) a difference in treatment according to the date of recruitment by the employer concerned (...) is not, directly or indirectly, **BASED on age** (...). That provision is based on a criterion which is neither **inextricably nor indirectly LINKED to the age** of employees, even if it is conceivable that (...)" the time of advancement differs with age





### **POSITIVE ACTION POSITIVE DISCRIMINATION = EXCEPTION**

- Art. 157(4) TFEU & amended and recast Equal Treatment Directive:
  - "With a view of ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."
- Art. 5 D2000/43 and Art. 7.1 D2000/78:
- "With a view of 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." UNIVERSITY

# **THE ACQUIS**

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- Formal equality is the **rule**, positive discrimination the narrow **exception**
- Objectively address occupational difficulties of the favoured group
- Clear and unambiguous criteria
- Proven and genuine group imbalance
- Appropriate and necessary proportionality & thus intrinsically temporary
- No automatic guotas 'saving clause'
- Overall, EU/CJEU emphasis is on formal neutrality BUT there is a lot of positive action that does not run afoul of neutrality: comparator requirement



### **POSITIVE SUBSTANTIVE DISCRIMINATION = GENEROUS**

### Art. 6 D2000/78 – Positive action/discrimination on grounds of age

- "Notwithstanding (...) differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

### **Rosenbladt** (C-45/09) 2010

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– (...) it does not appear unreasonable for the authorities of a Member State to take the view that a measure such as the authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached the age at which he is eligible for a retirement pension may be appropriate and necessary in order to achieve legitimate aims in the context of national employment policy. UNIVERSITY

### **POSITIVE SUBSTANTIVE DISCRIMINATION = GENEROUS**

### Art. 4.2 D2000/43 – Religion

- Religion can be used as an occupational requirement (...) in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, (...) where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement (...)

### Egenberger (C-414/16) 2018

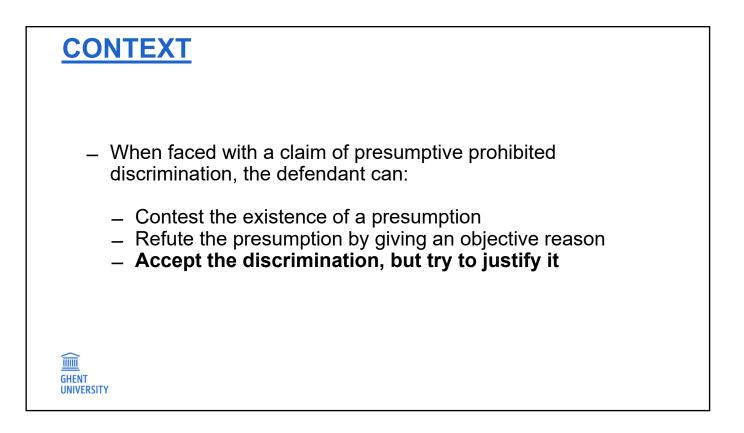
- 'balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, (...) and, (...) the right of workers (...) not to be discriminated against on grounds of religion or belief (...)'. Consequently, EU non-discrimination law must, except in very exceptional cases, refrain from assessing whether the GHENT actual ethos of the church or organisation concerned is legitimate UNIVERSITY

HOW CONSISTENT IS THE CJEU? "POSITIVE" AGE DISCRIMINATION
<ul> <li>How effective is effective? Politics vs. economics and 'the lump of labour' fallacy</li> </ul>
<ul> <li>How necessary is necessary? Group generalisations vs. personal merit</li> </ul>
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JUSTIFICATION PRINCIPLES





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## **PRINCIPLES**

- Direct discrimination cannot be justified unless explicitly authorised (closed system)
- Indirect discrimination can be justified (open system)



### **DIRECT DISCRIMINATION**

- Principle : no justification possible, except where authorized by the law
- Authorized in the 2000 Directives:
  - <u>Age</u>: legitimate aim with proportionality, e.g. legitimate employment policy, labour market and vocational training objectives
  - Religion and belief: the church and Tendenzbetriebe
  - When, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a <u>genuine and determining</u> <u>occupational requirement</u> (GDOR)



- Gender directives: GDOR exception optional for MS

# **GDOR**

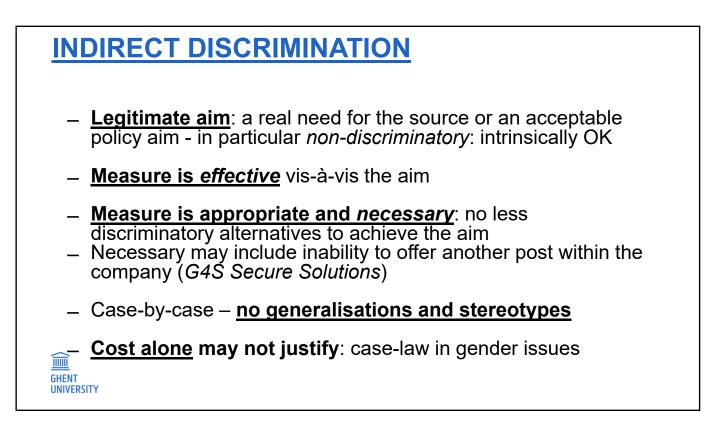
- Requirement must be legitimate, i.e. non-discriminatory: not the protected ground per se but a characteristic related to that ground (Wolf C-229/08; Prigge C-447/09): ≠ churches and Tendenzbetriebe vis-à-vis religion
- Objectively dictated by the nature/context of the occupation, NOT subjective considerations such as customer wishes (*Micropole* C-188/15)
- Requirement must be proportionate not beyond what is necessary
- Remains **exceptional** and to be determined on a case-by-case basis



### **INDIRECT DISCRIMINATION**

- General justification:
  - The neutral provision, criterion or practice is *"objectively justified by a legitimate aim and the means to achieving that aim are appropriate and necessary"*





### **EXAMPLES**

- Seniority or experience @ age
- Blue collar / white collar @ race, ethnic origin
- Working time organisation @ religion/belief
- Clothing conditions @ religion/belief
- Language proficiency *race*, ethnic origin
- Recruitment criteria (experience, degrees, etc.) 
   race or ethnic origin





# CONCLUSION Tool box with quite mature concepts The implication and application of the concepts leaves plenty of room for interpretation at MS level Always a work in progress Policy has moved beyond non-discrimination: mainstreaming and positive action

### **CONCLUSION**

- EU-law is mixing formal and substantive equality in its sources and concepts
- EU-law interpretation of formal equality is embracing substantive equality goals organically
- No binary divide between formal equality of opportunity and substantive equality of outcomes



