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***EU Anti-Discrimination Law:
Definition of key concepts***

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EU law taps the resources of international law

- The directives refer to fundamental international texts from the United Nations, and in particular the ILO and the Council of Europe
- EU law has adopted the approach underlying international law: its conceptualisation of discrimination is objective (discrimination results from a policy or measure which has the **effect** of undermining equal treatment)

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Some dates in EU anti-discrimination law

- 1957 Rome: free movement of labour (prohibition of discrimination linked to nationality) and equal pay for men and women
- 1997 Amsterdam: scope of European law extended to other grounds: nationality and sex, ***race or ethnic origin, religion or beliefs, disability, age, sexual orientation***

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Treaty on European Union

- Art. 2 TEU: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and equality between women and men prevail.
- Art. 3.3 TEU: the EU shall “promote equality between men and women”

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Treaty on the Functioning of the European Union

- Art. 19 TFEU: *the EU has the competence to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”*
- Art. 45 TFEU: “Free movement of workers shall be secured within the EU. It entails the abolition of any discrimination based on **nationality** between workers of the Member States (...)”
- Art. 157 TFEU: the EU shall adopt measures aimed at ensuring **equal treatment of men and women** in matters of employment and occupation

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CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (Art. 6 TUE)

Article 21 Non-discrimination

- “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
- 2. Within the scope of application of the Treaties ... any discrimination on grounds of nationality shall be prohibited.”

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European Union

Directives

- 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

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Key Concepts in EU Anti-Discrimination Law

The challenge of definition

- Speaking the same language (legal terminology helps to conceptualise discrimination in an objective way)
- Avoiding confusion (distinction, injustice, inequality, discrimination,...)
 - distinctions (distinctions may be legitimate...)
 - unfavourable treatment (unfavourable treatment may be justified...)
 - injustice (injustice is not always discrimination...)
- ***Making use of legal means to detect discrimination (characterising the discriminatory facts)*** and taking action to eliminate them

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The law seeks to ensure the lack of
discrimination = equal treatment

Discrimination may consist of:

- the application of different rules to comparable situations or
- the application of the same rule to different situations

(ECJ 30 June 1998, Mary Brown)

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Generally, discrimination is expressed through a measure that is:

- ***unfavourable*** (acts of management: access to employment, including promotion and training, conditions of work and employment, including pay, ...)
- ***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

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Any discrimination is in itself an infringement of human rights

Discrimination may be:

I. direct

II. indirect

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I. Direct Discrimination

- where one person is treated less favourably than another
 - is (present concrete circumstances)
 - has been (successive concrete circumstances)
 - would be (hypothetical circumstances) in a comparable situation

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A person is treated less favourably than another is

- **Sex (equal treatment for men and women)**
 - ECJ 1971, 1976, 1978, Gabrielle Defrenne
 - ECJ 1 July 1986, Rummler v. Dato-Druck,
 - ECJ 17 October 1989, Danfoss,
 - ECJ 27 October 1993, Pamela Enderby,
 - ECJ 9 February 1999, Regina v. Seymour-Smith,
 - ECJ 10 February 2000, Deutsche Post,
 - ECJ 26 June 2001, Susan Brunnhofer,
 - ECJ 4 October 2001, TeleDanmark,
 - ECJ 1 March 2011, Association belge des consommateurs Test-Achats ASBL
 - etc.
 - Sex change
- **Nationality:**
 - ECJ 15 Oct. 1969, Ugliola;
 - ECJ 17 Dec. 1980, Com. v. Belgium;
 - ECJ 11 March 2008, Commission v. France; etc.

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A person is treated less favourably than another is

- **Racial/ Ethnic origin:**
 - ECJ 10 July 2008, Firma Feryn NV;
- **Age:**
 - ECJ 2005, Mangold;
 - ECJ 2007, Palacios de la Villa;
 - ECJ 5 March 2009 Age Concern England;
 - ECJ 18 June 2009 Hütter
 - ECJ 12 Jan. 2010, Wolf and ECJ 12 Jan. 2012, Petersen;
 - ECJ 19 Jan. 2010, Seda Küçükdeveci;
 - ECJ 12 Oct. 2010, Rosenbladt;
 - ECJ 18 Nov. 2010, Georgiev;
 - ECJ 8 Sep. 2011, Hennings and Land Berlin;
 - ECJ 21 July 2011, Fuchs and Köhler;
 - ECJ 13 Sep. 2011, Prigge;
- **Disability:**
 - ECJ 11 July 2006, Chacon Navas;
 - ECJ 17 July 2008, S. Coleman;
- **Sexual orientation:**
 - ECJ 1 April 2008, Maruko;
 - ECJ 10 May 2011, Römer
- **Religion and belief ...**

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A person is treated less favourably than another has been

- ECJ 27 March 1980, Wendy Smith

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A person is treated less favourably than another would be

- ECJ 23 May 1996, John O'Flynn
- ECJ 30 April 1998, Évelyne Thibault v. CNAVTS

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Direct Discrimination (cont'd)

- By instruction
- By harassment
- By association
- By intention
- By multiple discrimination

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Discrimination on instruction

- When a person is instructed to discriminate against other persons on grounds related to one of the prohibited criteria
 - requests by clients, employees, etc. to an employer or other company manager
 - such requests constitute discrimination
 - such requests cannot serve to justify discrimination

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Discrimination by harassment

- 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, offensive or disturbing **environment**
- Sexual harassment: unwanted (physical, verbal) conduct with sexual connotations with the purpose or effect of violating (...)

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Discrimination by association

- ECJ 17 July 2008, S. Coleman (discrimination associated with disability; the person suffered discrimination and harassment because of the disability of her child)

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Discrimination by intention

- ECJ 10 July 2008, Firma Feryn NV (discrimination on racial/ethnic grounds)

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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 – directives 2000/43 recital 14 and 2000/78 recital 3)

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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 this is provided by the Member State
 - if the objective is legitimate and the requirement is proportionate
- Specific derogations related to
 - the criteria of
 - Age,
 - Disability
 - occupational activities within churches

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II. Indirect Discrimination

- where an apparently neutral provision or practice applied (by the company...) 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...) applying the provision or practice proves that it is
 - objectively justified by a legitimate aim (pertinence)
 - and that the means for achieving it are appropriate and necessary (proportionality)

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Indirect Discrimination

- This method permits the examination of the *effects* of a rule or practice (objective conceptualisation of discrimination)
- 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** (justification does not derive from: budgetary data – ECJ 20 March 2003, Helga Kutz-Bauer, etc.)

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A Concept and a Method

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

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Indirect discrimination and Positive Action

- Indirect discrimination invites the adoption and implementation of measures of 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 disadvantages (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
- Measures determined by the ECJ

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Access to Relevant Documents

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

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

- Case-law from 1954 to 2009: European Community (EEC/EC) B-15.05
- Case-law from 2010: Internal Policies of the European Union 14-4.05

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

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