

# Overview of the existing EU legislation on equality and definitions of key concepts:

Direct discrimination, Indirect  
discrimination, Harassment

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# OUTLINE OF PRESENTATION

- INTRODUCTION ON THE ORIGINS OF EU ANITIDISCRIMINATION LAW
- DIRECT DISCRIMINATION
- HARASSMENT, A FORM OF DISCRIMINATION
- INDIRECT DISCRIMINATION
- EXCEPTIONS TO DISCRIMINATION
- CONCLUSION

# Introduction : the origins of Non-discrimination Law in the EU

- The principle of EQUALITY and NON DISCRIMINATION are deeply anchored within EU law and the Treaties and now have given rise to a solid base of EU case law and laws interpreted in the Member States.

Equality is considered as a **fundamental principle** recognized as such by the ECJ: *«equal treatment between men and women is a fundamental right, part of the general principles of EU law which the Court must ensure the respect»* (ECJ Defrenne III).

Its legitimacy is generally reinforced by the EU Charter on fundamental rights which is now binding (article 21)

This means that EQUALITY is a condition for the legality of any EU instrument or any action of EU institutions and agencies. Member States must also abide by it. **NON DISCRIMINATION IS A MORE OPERATIONAL CONCEPT** as is the concept of **HARASSMENT**

# Introduction : the origins of Non-discrimination Law in the EU

**How** did the non discrimination law **framework develop**? **What part** of this framework concerns more specifically concepts of discrimination and harassment? Let us first focus on discrimination which implies harassment in its definition...

- **Initially, the EU Treaty only covered sex** discrimination with regards to equal pay (157 TFEU) and discrimination **based on nationality** (art. 18 after Lisbon Treaty) applying to persons, goods and services..) in order to **remove barriers within the internal market**. We will focus on discrimination in employment.

# Introduction : the origins of Non-discrimination Law in the EU

- It was not until the 1970's, that, on the grounds of sex equality, the ECJ case law (Defrenne I ECJ May 25 1971, Defrenne II April 8 1976, C-43/75, et ECJ Defrenne III June 15 1978, C-149/77) started to build standards for the concepts applied in the antidiscrimination legal framework of the member States.
- The Treaty of Amsterdam of 1997, in its article 13 (now art. 19), gave further impetus to this framework by expanding coverage of antidiscrimination law to other grounds prohibiting discrimination based on sex, racial or ethnic origin, religion or belief, disability (recently Ring/Werge C-335/11, C-337/11), age and sexual orientation (Römer C-147/08, recently Hay, C-267/12 CNCD C-81/12 ). Maternity and parental rights are also gaining in importance in relation to equality: ECJ Sari Kiiski C-116/06, EUCJ Gassmayr C-194/08; Parvianien C-471/08; Danosa Nov. 11 2010 C-232/09
- Meerts C-116/08; Roca Alvarez C-104/09, September 19 2013 **C-5/12**  
Betriu Montull
- Recently pending cases on right to leave for surrogacy agreements (if legal C-167/12; if not legally organized (C-363/12)

# Introduction : the origins of Non-discrimination Law in the EU

- Indeed, article 13 of the Amsterdam Treaty invited « the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, » to « take appropriate action to combat discrimination... »
- The main directives covering the scope of employment were adopted:
  - **Directive 92/85/EEC** of October 19, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
  - **Racial Equality Directive 2000/43** which covers race and ethnic origin (June 29 2000)
  - **Employment Framework Directive 2000/78** which covers religion, disability, age and sexual orientation (Nov. 27 2000)
  - **Recast Directive 2006/54** covers sex discrimination in employment (consolidating, among others, Directive 2002/73 and relevant EU case law)
  - **Revised directive 2010/18/EU** of March 8, 2010 on **parental leave**
  - **Directive 2010/41/EU** of July 7 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a **self-employed** capacity

# Concepts of discrimination (art 2 Directives 2000/43; 2000/78 )

- Direct discrimination  
(disparate treatment discrimination)
- Indirect discrimination  
(disparate impact discrimination)

# Direct discrimination

- Definition: **three** prongs
- Where one person is treated less favorably than another:
  - - **is**
  - - **has been or**
  - - **would be treated** in a comparable situation
- On any grounds covered by the directive (racial or ethnic, sex, religion or belief, disability, age or sexual orientation)

# Direct discrimination

- Where one person...
- **is treated less favorably** in a comparable situation (first prong):
- With a comparator:
- ECJ Dec. 12 2013 Hay, Case C-267/12
- ECJ Nov. 8 1990 Dekker, Case C-177/88

# Direct discrimination

- Where one person...
- - **has been** treated less favorably in a comparable situation (second prong)
- ECJ March 27 1980 Wendy Smith, Case 129/79

# Direct discrimination

- Where one person...
- - **would be** treated less favorably in a comparable situation (third prong):
- ECJ April 30 1998. Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne **Thibault**.
- Equal treatment for men and women - Directive 76/207/EEC - Maternity leave - Right to an assessment of performance
- Case C-136/95

# Direct discrimination (art 2)

- \*- **Discrimination by association:**
  - Against a non-disabled employee because he or she is a carer of, or is otherwise associated with, a disabled person, ECJ Case C-303/06 Coleman
  
- \*- **Overt** (smoking gun):
- **Appearance** of discrimination in the case of **discriminatory statements** (EUCJ April 25 2013 CNCD C-81/12)
- **Discrimination without an identifiable victim**
- ECJ July 10 2008, C-54/07 **Feryn**
  
- The company Feryn specializes in making garage doors. The company **DECLARES** publicly a few years ago that it did not hire foreigners. According to the management, the company's clients did not want foreigners coming into their house.  
  
"There does not have to be a tangible victim. Public declarations, in and of themselves, can constitute the suspicion of discrimination and it is up to the employer to come up with proof to the contrary," ECJ OPINION.
  
- \* **Instruction to discriminate: ECJ Feryn (to please customers...)**
  
- \* **Harassment**

# Harassment, a form of discrimination

- When an unwanted conduct related to any grounds of the Directives (race or ethnic origin, religion or belief, sex, disability, age or sexual orientation) takes place
- With the purpose or the effect of violating a person's dignity
- And of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- (Directive 2000/78, art. 2)
- Sexual harassment: Directive 2006/54, art. 2

# HARASSMENT

- Hostile environment harassment (all grounds)
- Quid pro quo harassment (most often sexual in nature)
- Example: new law in France covers both definitions (August 6 2012)

# Indirect discrimination: definition

## Directives 2000/43; 2000/78 art.2

- **Where an apparently neutral provision, criterion or practice** would put persons having a particular racial or ethnic origin, religion or belief, sex, disability, age or sexual orientation **at a particular disadvantage** compared with other people
- **Except if:**
- this provision, criterion or practice is **objectively justified by a legitimate aim** and the means of achieving that aim are **appropriate and necessary**

# Indirect discrimination

- ECJ March 31 1981 Paula Jenkins, Case 96/80
- EUCJ Oct. 20 2011 Brachner, Case C-123/10  
and
- EUCJ Nov. 12 2012 C-385/11 Elbal Moreno  
**CJUE, Dec. 6 2012, aff. C-152/11, Odar**

# Exceptions to discrimination

## Directive 2000/78

- Not all differences of treatment qualify as discrimination:
- **Genuine and determining occupational requirement** (Directive 2000/78 art. 4)
- **Positive action** (2000/43 art. 5; 2000/78 art. 7)
- **Age** (2000/78 art. 6)
- **Disability** (2000/78: art. 5)
- **Religious employers** (2000/78: art. 4 (2))
- **Armed forces** (age/disability/2000/78 art. 3(4))

# Exception n°1 to discrimination: An occupational requirement

- Genuine and determining occupational requirement (art. 4, Directive 2000/78)
- EUCJ Wolf Case C-229/08:
- Maximum age of 30 for recruitment in intermediate career jobs as firemen
- EUCJ Prigge Case C-447/09:
- Restrictive interpretation of article 4

# Exception n°2 to discrimination: positive action

- Directive 2000/43 art. 5; 2000/78 art. 7:
- ECJ Kalanke Oct 17 1995, Case C-450/93: no automatic priority for women
- ECJ Marshall Nov. 11 1997, Case C-409/95: priority to female candidates unless reasons specific to an individual male candidate tilt the balance in his favor
- ECJ Abrahamsson Case C-407/98: no preference if unequal qualifications
- A restrictive interpretation
- However, adoption March 2011, by the European Council of Ministers of Social affairs, of the « European pact for equality between men and women » (2011-2020): promotion of equal participation of men and women in executive boards and all levels of decisionmaking

# Exception n°3 to discrimination: Age

- Age (2000/78 art. 6): justifications of difference of treatment on the grounds of age do not constitute discrimination:
- When they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labor market and vocational training objectives and if the means of achieving that aim are appropriate and necessary
- Examples of such differences include:
- special conditions for access to employment and vocational training for young and older workers, setting minimum conditions of age, seniority and experience for access to employment or advantages linked to employment, setting a maximum age for recruitment based on training requirement or reasonable period of employment before retirement

# Exception n°3 to discrimination: Age

- Examples:
- ECJ Mangold, Case C-144/04
- ECJ Age Concern England Case C-388/07
- ECJ Hutter Case C-88/08
- EUCJ Petersen Case C-341/08
- EUCJ Rosenbladt C-45/09
- EUCJ Andersen C-499/08
- EUCJ Fuchs C-159/10
- EUCJ Hennigs/Mai C-297/10
- **EUCJ nov. 6 2012 Commission c./Hongrie C-286/12**
- **EUCH, July 5. 2012 Hörnfeldt C-141/11**

# Exception n°4 to discrimination: disability

- Disability (2000/78: art. 5)
- Employers are required to provide reasonable accommodation to persons with disabilities :
- Appropriate measures where needed in a particular case to enable person with a disability to have access to/or advance in employment or training
- **See EUCJ April 11 2013 C-335/11; C-337/11 Ring and Werge on the concept of accommodation**
- Exception: where such measure would impose a disproportionate burden on the employer (not the case if financial support/subsidies for measures exist)
- Member States must require all employers to adopt practical and effective measures for all persons with disabilities
- **EUCJ July 4th 2013 C-312/11 Commission v. Italy**

# Exceptions n°5 and 6 to discrimination: religion and armed forces

- Religious employers (2000/78: art. 4 (2))
- Armed forces (age/disability/2000/78 art. 3(4))

# Conclusion: concepts require proof, effective remedies and enforcement

- Concepts require proof of discrimination: recent case on access to proof and shift of burden of proof in case of discrimination in recruitment and appearance of discrimination: EUCJ **July 21 2011** Kelly C 104/10, EUCJ **April 19 2012** Meister C-415/10; EUCJ April 25th 2013 CNCD C-81/12
- Concepts are worth nothing without effective remedies and enforcement,, ECJ Pontin C-63/08
- **V. ECJ Von Colson C-14/83; ECJ Doris Hartz C-79/83; ECJ Helen Marshall C-271/91**
- Equality bodies: guidelines for case law
- EU Commission's key role in promoting equality and employment discrimination law; see for example on sex equality, the *Strategy for equality between women and men* (2010-2015)