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

Direct discrimination, Indirect discrimination, Harassment and sexual harassment
OUTLINE OF PRESENTATION

- INTRODUCTION ON THE ORIGINS OF EU EQUALITY LAW
- DIRECT DISCRIMINATION
- HARASSMENT and SEXUAL HARASSMENT, A FORM OF DISCRIMINATION
- INDIRECT DISCRIMINATION
- EXCEPTIONS TO DISCRIMINATION
- CONCLUSION
Introduction: the origins of EU EQUALITY LAW

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 AND BOTH CONCERN UNEQUAL TREATMENT.
Introduction: the origins of EU EQUALITY LAW

How did the EQUALITY 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.

We will discover that equality and antidiscrimination rules in employment now cover the whole spectrum of events during a lifetime understanding the complexity of gender and family responsibility discrimination as it is sometimes referred to.
Introduction: the origins of Non-discrimination and equality 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. ECJ equal pay case law was also instrumental to understand wage discrimination when work was of equal value.

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, age and sexual orientation (Römer C-147/08). Maternity and parental rights are also gaining in importance in relation to equality: ECJ Sari Kiiski C-116/06, EUCJ Danosa C-232/09; EUCJ Gassmayr C-194/08; Parvianien C-471/08; Meerts C-116/08; Roca Alvarez C-104/09, Chatzi C-149/10
Introduction: the origins of Non-discrimination Law and Equality 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
- **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
Diversification of grounds related to gender: sexual orientation discrimination

CJCE *Maruko*, CJUE *Römer* and French case pending CJUE *Hay*

Not employment cases but concern benefits for same sex couples

The challenges of gender discrimination: life choices, privacy rights, relational rights not strictly bound to physical characteristics
ECJ equal pay case law was also instrumental to understand systemic discrimination based on the sexually segregated workforce. Since Enderby (C-127/92) for example and see the 2006 Directive (point 8): the PRINCIPLE OF EQUAL PAY for equal work or work of equal value has CONSISTENTLY been UPHELD IN THE CASE-LAW and CONSTITUTES an important aspect of the principle of equal treatment between men and women.

See 2006 Directive Point (9) IN ACCORDANCE WITH SETTLED CASE-LAW of the Court of Justice: in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and TRAINING and working conditions, those workers may be considered to be in a COMPARABLE situation.
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 EU law
Direct discrimination

Where one person...

is treated less favorably in a comparable situation (first prong):

Though discrimination exists even if a man did not apply for the job:

ECJ Nov. 8 1990 Dekker, Case C-177/88

No need for a comparator in France
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

- **would be** treated less favorably in a comparable situation (third prong)/use of a hypothetical comparator (a non pregnant woman):

ECJ April 30 1998. Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault.


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) 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 is a form of discrimination**
Harassment and sexual 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 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)
Indirect discrimination: definition
Directives 2000/43; 2000/78 art.2

Where an apparently neutral provision, criterion or practice would put persons having a particular sex at a particular disadvantage compared with others

No intention to discriminate necessary

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
- ECJ December 6 2007 Ursula Voss, Case 300/06
- EUCJ October 20 2011, Brachner Case 123/10
Exceptions to discrimination included in the 2000/2006 Directive

- Not all differences of treatment qualify as discrimination:
  - Genuine and determining occupational requirement (Directive 2000/78 art. 4)
  - Positive action (art.157 TFEU and see Preamble of 2006 Directive pt 22)
  - Protection of biological condition during pregnancy and maternity and measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; 2006 Directive is without prejudice to Directive 92/85/health and security and 2010/18/parental leave (Preamble pt 24 and art.14/15 no discrimination after leaves)
Exception to discrimination:  
An occupational requirement

- Genuine and determining occupational requirement (Directive 2000/78 art. 4 and Directive 2006/54 art. 14)
- Member States may provide, as regards access to employment including training thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such characteristic constitutes a genuine and determinating occupational requirement, provided its objective is legitimate and the requirement is proportionate

- Restrictive interpretation of article 4: EUCJ Prigge Case C-447/09:
Exception to discrimination: An occupational requirement

Example set by ECJ Oct. 26 1999, Angela Maria Sirdar

Angela Maria Sirdar v The Army Board and Secretary of State for Defence.

Equal treatment for men and women - Refusal to employ a woman as a chef in the Royal Marines.

Case C-273/97
Exception to discrimination: positive action

- Positive action (2006/54, art. 3; 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 March 28 2000 Badeck C-158/97
- ECJ Abrahamsson Case C-407/98: no preference if unequal qualifications
- A restrictive interpretation of positive action

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: maternity and parental leave

This protection concerns health and safety issues that specifically affect women and further regulated by Directive 92/85. Linked to the protection of health of mother after birth and the «special relationship between mother and child » outside of stereotypical notions of women’s role described in ECJ Hoffmann C-184/83.

Today case law revolves around certain issues like adequate pay during pregnancy : for example, if job transfer (see EUCJ Parviainien July 1 2010)

Proposed change in directive on minimal duration of maternity leave was rejected for the time being

Revised directive 2010/18/EU of March 8, 2010 on parental leave; no doubling the duration of parental leave for twins EUCJ Chatzi Sept. 16 2010 C-149/10
Exception: maternity and parental leave

Parental leave:

- Revised Directive of 2010
- Case law: CJCE Meerts Oct 22 2009
- C-116/08; Roca Alvarez C-104/09; EUCJ Chatzi

Maternity leave:

- Danosa Nov. 11 2010 C-232/09
Conclusion: concepts require proof, effective remedies, enforcement and protecting family responsibilities

- Concepts require proof of discrimination: recent case on access to proof in case of sex discrimination: EUCJ July 21 2011 Kelly C 104/10, EUCJ April 19 2012 Meister C-415/10
- Concepts are worth nothing without effective remedies and enforcement, ECJ Pontin C-63/08
  V. aussi CJCE Von Colsen C-14/83; CJCE Doris Hartz C-79/83; CJCE Helen Marshall C-271/91
- Equality bodies: guidelines for case law
- « Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law. » ECJ June 17 1998 Kathleen Hill C-243/95
- EU Commission’s role in promoting equality and employment discrimination law and an emphasis on work/life balance as a question for families and the EUCJ confirms this through the recognition of parental rights
- See for example on sex equality, the Strategy for equality between women and men (2010-2015)