

## The EU Legal Framework on Gender Equality

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## International Level (I)

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### United Nations:

- **Convention on the Elimination of all Forms of Discrimination Against Women (1979) (CEDAW)**
  - Arts 1 y 2: discrimination concept and duties of state parties
  - Art 4: measures to promote gender equality are not discriminatory
  - Art 5: maternity as a social function → common responsibility of women/men in the upbringing/development of their children
  - Role of social/cultural patterns
- **Optional protocol (1999)** → Competence of the Committee on the Elimination of Discrimination against Women → Communications (claims on violations of rights)

### International Labour Organisation (ILO):

- Equal Remuneration Convention, 1951 (No. 100)
- **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**
- Workers with Family Responsibilities Convention, 1981 (No. 156)
- Maternity Protection Convention, 2000 (No. 183)

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## International Level (IV)

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### Council of Europe (I):

- **European Convention on Human Rights (1950) (ECHR):**

#### ✓ Art 14:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, [...]" → **Ancillary right** (→ should be invoked with another ECHR right)

#### ✓ Protocol No. 12 (2000):

**Art 1:** 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex [...]' (para 1) and '[n]o one shall be discriminated against by any public authority' (para 2) → **Broader right**

#### ✓ Art 8(1):

"Everyone has the right to respect for his private and family life, his home and his correspondence."

↳ **Autonomous rights**

↳ Potential causes of interference: Art 8(2)

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## International level (V)

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### Council of Europe (II): Revised European Social Charter (1996):

#### Discrimination:

**Art 20:** Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

#### Work-family life balance:

**Art 16:** Right of the family to social, legal and economic protection

**Art 27:** Take measures to protect the “right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers”

#### Maternity protection:

**Art 8:** Right of employed women to protection of maternity

→ **Collective complaints system** (Additional Protocol, 1995)

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## International Level (VI)

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### Council of Europe (III):

- **Rec (2002)5 on the protection of women against violence**
- **Convention on preventing and combating violence against women and domestic violence (2011) ('Istanbul Convention')**
  - Ratified by **some Member States of the EU**
  - The EU signed it in 2017 (but has not ratified it yet)
  - Ratification is a priority for the European Commission → [Gender Equality Strategy 2020-2025](#)
  - EU Parliament has an Opinion from the CJEU in 2019 ([Opinion 1/19 – pending](#))

#### Key features:

##### Art 2: Aim

Eliminate discrimination against women & promote **substantive equality**

Broad concept of “**violence**” → **almost any form of violence covered:**

- ✓ Physical, sexual, psychological or economic harm or suffering (Art 3)
- ✓ Domestic violence, sexual harassment, rape, forced marriage (Preamble)
- ✓ Forced abortion & forced sterilisation (Art 39)
- ✓ Threats of such acts, coercion or arbitrary deprivation of liberty (Art 3)

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## EU – Treaties & Charter (I)

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- **Treaties:**

- ✓ **Art 3(3) TEU** → equality between men & women = **foundational value**

- ✓ **Art 8 TFEU** → ‘mainstreaming’

- ↳ Promoting gender equality through transversal actions/policies

- ✓ **Art 19 TFEU** → the EU has powers to **enact legislation/take other measures** to address discrimination

- ↳ Legislation: Unanimity at Council + Parliament approval

- ↳ **Lack of direct effect**

- ↳ Directives 2000/43/EC, 2000/78/EC, **2004/113/EC**

- ✓ **Art 157(1) TFEU**

- ↳ **Principle of equal pay** between men & women

- ↳ **Direct effect: vertical & horizontal** (→ Case 43/75 *Defrenne No. 2*)

- ↳ Directive 2006/54/EC

- ✓ **Art 157(4) TFEU**

- ↳ Allows positive action to encourage/promote equal pay

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## EU – Treaties & Charter (II)

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- **EU Charter of Fundamental Rights:**

- ✓ **Art 21(1)** → **Prohibition of discrimination** based on sex (& other grounds):

- “Any discrimination based on any ground such as sex [...] shall be prohibited”

- ✓ **Art 23** → Equality between men and women:

- “Equality between men and women must be ensured **in all areas**, including employment, work and pay.

- The principle of equality **shall not prevent** the maintenance or adoption of **measures providing for specific advantages** in favour of the under-represented sex”

**Note:**

**Art 51(1):** The Charter is addressed to EU institutions/bodies and to MS when they are implementing EU law

**Art 51(2):** The Charter does not create/modify the powers/tasks of the EU

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## EU – Treaties & Charter (III)

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How can the Charter be used? → Example:

### Case C-236/09, Test-Achats:

- ✓ Dir 2004/113/EC, Art 5(2) → equal treatment exception:  
Differences based on sex to calculate insurance premiums  
(based on actuarial factors)
- ✓ **Breach of Arts 21 & 23 of the EU Charter of Fundamental Rights?**
- ✓ **CJEU:**
  - Yes → breach of the equal treatment principle (Arts 21, 23 Charter)
  - Void from 21 December 2012

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## EU – Secondary Legislation (I)

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### • Employment:

#### Equal treatment:

Dir 2006/54/EC - Workers  
Dir 2010/41/EU – Self-employed

#### Equal pay & Gender Pay Gap:

Art 157 TFEU  
Dir 2006/54/EC – Art 4  
Rec 2014/124/EU – Transparency

#### Atypical work:

Dir 1997/81/EC – Part-time work  
Dir 1999/70/EC – Fixed-term work  
Dir 2008/104/EC – Agency workers

#### Work – family life balance:

Dir 92/85/EEC – Pregnancy  
Dir 2003/88/EC – Working time  
Dir 2010/18/EU – Parental leave  
Dir 2019/1158/EU – Work-life balance

#### Company boards:

Proposal COM/2012/0614: Non-executive directors of listed companies

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## EU – Secondary Legislation (II)

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- **Other areas:**

**Access to goods and services:**

Dir 2004/113/EC – Equal treatment in the access to/supply of goods & services

**Violence against women:**

Reg 606/2013/EU – Mutual recognition: protection measures in civil matters

Dir 2012/29/EU – Protection of victims of crime

Dir 2011/99/EU – European protection order

**Social security:**

Dir 79/7/EEC – Equal treatment in protection against sickness, invalidity, old age, accidents at work/occupational diseases, unemployment, social assistance

Dir 2006/54/EC – Art 5 – Prohibition of discrimination on grounds of sex in occupational social security schemes

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## Employment field (I)

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**Scope:**

- **Directive 2006/54/EC – Equality in Employment ‘Recast’**

**Art 1:**

- ✓ Access to employment
- ✓ Promotion
- ✓ Vocational training
- ✓ Working conditions (including pay)
- ✓ Occupational social security schemes

- **Directive 2010/41/EU – ‘Self-employed’**

**Art 2:**

- ✓ Self-employed → all persons pursuing a gainful activity for their own account
- ✓ Spouses/partners of self-employed workers who, not being employees/business partners, habitually participate in the activities of the self-employed worker (same tasks or ancillary tasks)

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## Employment (II)

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### Directives 2006/54 & 2010/41 – Common features:

- Prohibition of:
  - ✓ Direct discrimination:
    - Claimant treated less favourably on grounds of sex → comparison
    - Present, past or future situations
  - ✓ Indirect discrimination:
    - Apparently neutral provision, criterion or practice
    - Puts persons of one sex at a particular disadvantage compared with persons of the other sex → comparison
    - Can be objectively justified
  - ✓ Harassment and sexual harassment
  - ✓ Retaliation
- Allows positive action
- Equality bodies

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## Employment (III)

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### Directives 2006/54 & 2010/41 – Distinctive features:

- Directive 2006/54/EC:
  - ✓ Art 15 – Return from maternity leave
  - ✓ Art 16 – Protection against dismissal in MS which recognise a right to paternity & adoption leave
  - ✓ Art 19 – Shift (?) of the burden of proof
- Directive 2010/41/EU:
  - ✓ Art 4(1) – Prohibition of discrimination in relation to the establishment, equipment or extension of a business
  - ✓ Art 8 – Maternity allowance (min. 14 weeks) for female self-employed workers (& spouses/partners of self-employed workers)

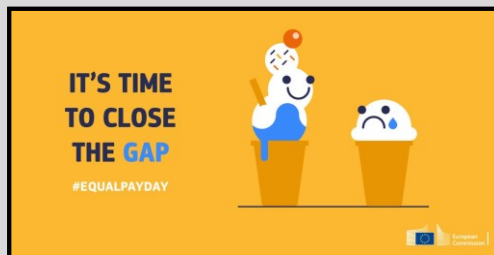
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## Employment (IV)

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### Equal Pay ≠ Gender Pay Gap

- ✓ **Equal pay for equal work** → Dir 2006/54/EC
- ✓ **Gender Pay Gap** → Rec 2014/124/EU
  - [EU Action Plan 2017-2019: Tackling the gender pay gap](#)
  - [Consultation on Pay Transparency](#): **OPEN** until 28 May 2020
  - Plan to release a **Proposal for a Directive** (4<sup>th</sup> quarter of 2020) → [Roadmap](#)



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## Work – family life balance

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- **Directive 92/85/EEC** – Pregnancy, maternity & breastfeeding:
  - ✓ Workers who are pregnant, have recently given birth or are breastfeeding (Arts 1 y 2)
  - ✓ Protection of safety and health at work
  - ✓ Includes:
    - ✓ Prohibition of dismissal (Art 10)
    - ✓ Adequate payment/allowance (Art 11(2))
- **Directive 2003/88/EU** – Working time (+Communication: [COM\(2017\) 252](#))
  - ✓ Minimum periods of daily rest, weekly rest and annual leave
  - ✓ Night work, shift work and patterns of work
- **NEW: Directive 2019/1158/EU** – Work-life balance
  - **Personal scope**: (Art. 2) – “all workers...”
  - **Material scope**: (Art. 1)
    - Paternity leave, parental leave and carers’ leave
    - Flexible working

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## Atypical work (I):

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### Scope of application:

- **Directive 1997/81/EC – part-time work**

Clause 2:

- ✓ Part-time workers (according to national law)
- ✓ Possibility to exclude part-time workers who work on a casual basis

- **Directive 1999/70/EC – fixed-term work**

Clause 2:

- ✓ Fixed-term workers
- ✓ MS can exclude:
  - Initial vocational training relationships and apprenticeship schemes
  - Publicly-supported training, integration and retraining contracts

- **Directive 2008/104/EC – agency workers**

Art 1:

- ✓ Workers with a contract with a temporary-work agency **AND**
- ✓ Who are assigned to user undertakings to work temporarily under their supervision and direction

**\*NEW:** Directive 2019/1152/EU on transparent and predictable working conditions

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## Atypical work (II):

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→ Women tend to be more affected

### Equal treatment principle:

**Directive 1997/81/EC**, Clause 4 → As regards full-time workers

**Directive 1999/70/EC**, Clause 4 → As regards permanent workers

**Directive 2008/104/EC**, Art 5 → As regards workers who have been directly recruited by the user undertaking to occupy the same job

**But:** Directives 97/81/EC y 1999/70/EC:

↳ Allow discriminatory treatment **if objectively justified**

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## Goods & Services

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### Directive 2004/113/EC

- **Scope:**
  - ✓ Goods and services available to the public
  - ✓ Public and private sector
  - ✓ Excludes transactions in the private and family sphere
    - Eg: buying a 2<sup>nd</sup> hand bike from the neighbour
- **Prohibition of:**
  - ✓ Direct/indirect discrimination
  - ✓ Harassment, retaliation, instructions to discriminate
- Allows **positive action**
- 'Shift' (?) of the **burden of proof**
- **Equality bodies**

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## Final comments

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- **International Treaties (UN, ILO):**
  - Both positive and negative obligations
  - Tools for their effective enforcement:
    - ✓ Periodic reports' system
    - ✓ Complaints' system: CEDAW
      - ↳ [Committee on the Elimination of Violence Against Women](#)
- **Council of Europe:**
  - Tools for their effective enforcement:
    - ✓ ECHR: European Court of Human Rights → **individual complaints**
    - ✓ Revised European Social Charter: European Committee of Social Rights → **collective complaints**
- **European Union:**
  - Direct effect: Art 157 TFUE
  - Transposition of Directives into national law
  - Lack of transposition → Direct or indirect effect

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