



EU LAW ON EQUALITY BETWEEN WOMEN AND MEN IN PRACTICE
“Overview of the existing EU legislation on gender equality and definitions of key concepts”

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Structure

Background (brief)

Sources – Treaty and secondary legislation

Overview of **main** existing (*with one draft*) EU **legislation** on gender equality

Purpose of legislation

Scope – personal and material

Prohibition (discrimination)/principle of equal treatment – defined and general

Key concepts – definitions – legislative and CJEU case law

Background

- EU law on equality between men and women has its roots in the European Economic Community Treaty (into force 1 January 1958) – article 119 on equal pay for equal work (for men and women). Now TFEU article 157.....
- This was a compromise between those (future founding) member states which had ratified ILO Convention No. 100 Equal Remuneration, and those which had not (yet) ratified it. Fear of competitive disadvantage was a key factor – particularly for the French.

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- Madame **Gabrielle Defrenne** took three cases (to the European Court of Justice, seeking preliminary rulings) arising from the fact that her employer, Sabena, required her to retire at 40 (as a woman, but this did not apply to men); she had been **paid less** than male stewards, had had a **shorter working life**, a **smaller pension** arising therefrom. The question of **pension** being considered **pay** was raised, as was whether one could **rely on the Treaty** article, in the **absence of legislation**.
 - Essentially Madame Defrenne established a future agenda as the EECT addressed **only** the issue of **equal pay for equal work**. The effect of Madame Defrenne's cases can be seen in much of today's corpus of EU equality legislation – which also goes beyond what she might have envisaged more than 40 years ago.

EU gender equality legislation(brief) overview (plus **main** TFEU article 157)

- Five (broad) divisions
 - 1. Employment and occupation (employed and self-employed, including **atypical** work)
 - 2. Reconciliation of work and family life (i.a. protective measures for pregnant women, maternity leave, parental leave)
 - 3. State social security
 - 4. Access to - goods and services
 - 5. Decision-making (Board membership): **draft**

TFEU (article 157): (directly effective)

- **1. Each Member State shall** ensure that the principle of **equal pay** for male and female workers for **equal work** or work of **equal value** is applied.
- 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and **any other consideration, whether in cash or in kind**, which the worker receives **directly or indirectly**, in respect of his **employment**, from **his employer**.
- Equal pay without **discrimination based on sex** means:
- (a) that pay for the **same work** at **piece rates** shall be calculated on the basis of the same unit of measurement..;
- (b) that pay for work at **time rates** shall be the same for the **same job**.

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- 3. provides legal basis for adoption of secondary legislation (Directives)
 - (major change since EECT - originally – general harmonising 100/235 articles were used)
 - 4. *With a view to 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.*



Employment and occupation:



Workers/employees

Recast Directive 2006/54/EC

This repealed/replaced four existing (amended) Directives on
(**i.** equal treatment – employment, **ii.** equal treatment job pensions, **iii.** equal pay, and **iv.** on the burden of proof in sex discrimination cases)



Purpose - article 1

*To ensure the implementation of the principle of **equal opportunities and equal treatment of men and women** in matters of **employment and occupation**. To that end, it contains **provisions to implement** the principle of equal treatment in relation to.. -*

Scope – material

- (a) **access** to employment, including promotion, and to vocational training;
- (b) working conditions, including **pay**;
- © occupational (job) social security schemes (**article 1**)

- Right to claim **flexible pension age** (on same conditions for men and women – **article 13**)

- **Prohibition of discrimination** on (material scope) – articles –
 - **4** (equal pay),
 - **5** (occupational social security schemes),
 - **14** (access to employment, etc.)



Personal scope

Men and women- in matters of employment and occupation – article 1

Working population (as defined) – occupational social security schemes – article 6



Prohibits:

Direct and indirect discrimination,
Harassment
Sexual harassment
(on grounds of sex)

Definitions provided - article 2(1)
Discrimination includes all above – article 2(2)



Examples of discrimination listed in **article 9** -

Provisions contrary to the principle of equal treatment include those based on **sex, either directly or indirectly**

examples given relate to access to
'occupational social security schemes'
(job pensions)



Self-employed: Directive 2010/41/EU

on the application of the principle of equal treatment between men and women engaged in an activity in a **self-employed capacity** and repealing Council Directive 86/613/EEC

Transposition by **5 August 2012**

OR 2014 *if a Member State has particular difficulties relating to social protection + maternity benefits*

Purpose (scope + exclusions) – article 1

- 1.lays down a **framework** for putting into effect in the Member States the principle of **equal treatment** between men and women **engaged in an activity** in a self-employed capacity, **or contributing to the pursuit** of such an activity, as regards those aspects **not covered** by Directives 2006/54/EC (employment/occupation) and 79/7/EEC (social security).
- 2. ...implementation of the principle of equal treatment between men and women in the **access to and supply of goods and services remains covered** by Directive 2004/113/EC.

Scope: personal - article 2 (NB gender neutral)

- (a) **self-employed workers**,... **all persons** pursuing a gainful activity for **their own account**, under the conditions laid down by national law;
- (b) the **spouses** of self-employed workers or, when and **in so far as recognised by national law**, the **life partners** of self-employed workers, **not** being employees or business partners, **where they habitually**, under the conditions laid down by national law, **participate** in the activities of the self-employed worker and **perform the same tasks or ancillary tasks**.

Scope: material - article 4

Principle of equal treatment

- 1.*principle of equal treatment means that there shall be **no discrimination whatsoever** on grounds of **sex** in the **public or private** sectors, either **directly** or **indirectly**, for instance in relation to the **establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.***

Scope – material – conditions for the establishment of a company -article 6

- *Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, the Member States **shall take** the measures necessary to ensure that **the conditions for the establishment of a company between spouses, or between life partners when and in so far as recognised by national law, are not more restrictive** than the conditions for the establishment of a company between other persons.*

NB: Article 5 Positive action

- Member States may maintain or adopt measures within the meaning of **Article 157(4) of the Treaty on the Functioning of the European Union** with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurship initiatives among women.



Prohibits:

Direct and indirect discrimination

Harassment

Sexual harassment
(on grounds of sex)

Definitions provided - article 3

Discrimination includes all above – article 4



Work/employment related and reconciliation of work and family life: ***Atypical work en bref:***

Directive 97/81/EC concerning the Framework Agreement on part-time work

Directive 1999/70/EC fixed-term work

Directive 2008/104/EC on temporary agency work

Women are in majority in atypical work positions – for a range of reasons, including family responsibilities, and impact of career breaks (family) on career progression/experience



Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex :
Framework agreement on part-time work

*Purpose (clause 1(a)) to provide for the **removal of discrimination** against part-time workers and to **improve the quality** of part-time work...*



Principle of non-discrimination (clause 4)

1. In respect of **employment conditions**, **part-time workers shall not** be treated in a **less favourable manner** than **comparable full-time workers** solely because they work part time **unless** different treatment is **justified on objective grounds**.

....



Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP

Purpose: (clause 1)

- (a) [to] *improve the quality of fixed-term work by **ensuring the application of the principle of non-discrimination***;
- (b) *to establish a **framework to prevent abuse** arising from the use of successive fixed-term employment contracts or relationships.*

Principle of non-discrimination (clause 4)

1. In respect of **employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.**

DIRECTIVE 2008/104/EC on temporary agency work (transposition by 5 December 2011) – based on EC T in particular Article 137(2)

- Article 2
- The **purpose...** is to **ensure the protection** of temporary agency workers and to **improve the quality** of temporary agency work by ensuring that the **principle of equal treatment**, as set out in **Article 5**, is **applied to temporary agency workers**, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to **contributing** effectively to the creation of jobs and to the development of **flexible forms of working**.

Personal scope (and exclusions): article 1

- ..workers with a **contract of employment or employment relationship** with a **temporary-work agency** who are assigned to user undertakings to work temporarily under their supervision and direction.
- 2.applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.
- 3. Member States may, after consulting the social partners, provide that**does not apply to employment contracts or relationships** concluded under a specific public or publicly supported vocational training, integration or retraining programme.

Article 5 : The principle of equal treatment (and material scope)

- 1. The **basic working and employment conditions** of temporary agency workers shall be, for the duration of their assignment at a **user undertaking, *at least*** those that would apply if they had been recruited directly by that undertaking to occupy the same job.
- For the purposes of the application of the first subparagraph, the rules in force in the user undertaking on:
 - (a) **protection of pregnant women and nursing mothers** and protection of children and young people; and
 - (b) **equal treatment for men and women** and **any action to combat any discrimination** based on **sex**, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation;
- **must be complied with** as established by legislation, regulations, administrative provisions, collective agreements and/or any other general provisions.



Material scope: (includes specifically)

– articles

6. Access to employment, collective facilities and vocational training

7. Representation of temporary agency workers

8. Information of workers' representatives



Reconciliation of work and family life

Includes *i.a.*

- Protection of pregnant worker
- Maternity leave
- Parental leave

(In addition to atypical work *en bref*)



Directive 92/85/EEC 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Proposal for amendment COM(2008) 637 final -

Scope – personal – article 2

Definitions of pregnant workers, workers who have recently given birth and breastfeeding mothers



Scope – material *i.a.*

Protection against **discriminatory** dismissal

Work environment protection - from specified substances/circumstances

Night work - during their pregnancy and for a period following childbirth

Maternity leave and ante-natal attendance

Employment rights and maternity pay/allowance

(+ Directive 2008/104/EC (agency workers) –article 5)

Maternity leave

- **Maternity benefits (leave) – self-employed** – Directive 2010/41/EU article 8
- **Return from maternity leave** “*shall be entitled to ..*”: Directive 2006/54/EC article 15

Paternity and adoption leave

Directive 2006/54/EC

- Article 16
- This Directive is without prejudice to the **right of Member States to recognise distinct rights to paternity and/or adoption leave**. Those Member States which **recognise** such rights **shall take the necessary measures to protect working men and women** against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.



Parental leave

Directive 2010/18/EU implementing the revised **Framework Agreement** on parental leave concluded by **BUSINESSEUROPE**, **UEAPME**, **CEEP** and **ETUC** and repealing Directive 96/34/EC – transposition by **8 March 2012** or **extra year** if justified by difficulties, or introduction by collective agreement



Purpose – repeals and replaces Directive 96/34/EC

Provides **individual right** to **parental** leave on the grounds of the **birth** or **adoption** of a child to take care of that child **until a given age up to eight** years to be defined by Member States **and/or** social partners.



Scope: Agreement annexed to Directive (clause 2)

1. *This agreement entitles **men and women workers** to an **individual right to parental** leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners*

Purpose: Agreement annexed to Directive (clause 2)

2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis.

And also *force majeure leave*

*.....for urgent family reasons in cases of sickness or accident making the immediate presence of the **worker** indispensable. ... (clause 7)*

Employment rights and **non-discrimination** (clause 5)

.....

4. *In order to ensure that **workers** can exercise their right to parental leave, Member States and/or social partners shall take the necessary measures to **protect workers against less favourable treatment or dismissal on the grounds** of an **application** for, or the **taking of, parental leave** in accordance with national law, collective agreements and/or practice.*



Directive 79/7/EEC on the **progressive** implementation of the principle of equal treatment for men and women in matters of social security



Purpose – article 1

*.....the **progressive implementation**, in the field of social security and other elements of social protection provided for in Article 3, of the principle of **equal treatment for men and women** in matters of social security...*



Scope (personal) – article 2

the **working population** - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons.

Scope (+exclusions)– material – article 3

- 1. ...*(a) **statutory schemes** which provide protection against the following risks: - sickness,*
 - - *invalidity,*
 - - *old age,*
 - - *accidents at work and occupational diseases,*
 - - *unemployment;*
- *(b) **social assistance**, in so far as it is intended to supplement or replace the schemes referred to in (a).*

- 2.*shall **not apply** to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a).*

Scope – material (prohibits discrimination) -article 4

- 1. ...equal treatment... no discrimination **whatsoever** on ground of **sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:**
 - - the scope of the schemes and the conditions of access thereto,
 - - the obligation to contribute and the calculation of contributions,
 - - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.
- 2.equal treatment shall be **without prejudice** to the provisions relating to **the protection of women on the grounds of maternity.**

Exclusions – article 7

1. ...without prejudice to the right of Member States to exclude from its scope:
 - (a) *the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;*

NB distinction between **State** pensionable **age** (matter for Member States) and **employment** retirement **age** (no discrimination by employer on grounds of sex)



Directive 2004/113/EC
of 13 December 2004

implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Purpose – article 1

*.....to lay down a **framework for combating discrimination based on sex in access to and supply of goods and services**, with a view to putting into effect in the Member States the **principle of equal treatment between men and women.***

Scope - article 3

- 2.does **not** prejudice the individual's freedom to choose a **contractual partner as long as** an individual's choice of contractual partner is **not** based on that person's **sex**.
- 1. Within the limits of the powers conferred upon the Community, shall apply to **all persons** who provide **goods and services**, which are available to the **public** irrespective of the person concerned as regards both the **public and private sectors**, including public bodies, and which are offered **outside the area of private and family life** and the transactions carried out in this context.



Scope (exclusions) - article 3

3.shall **not** apply to **the content of media and advertising nor to education.**

4.shall **not** apply to **matters of employment and occupation.. of self-employment,**

Principle of equal treatment=no discrimination - article 4

- 1. ...the principle of equal treatment ... shall mean that
- (a) ...no **direct** discrimination based on sex, **including less favourable treatment of women for reasons of pregnancy and maternity**;
- (b)no **indirect** discrimination based on **sex**.

- 2. This Directive shall be **without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity**.

- 3. Harassment and sexual harassment
- 4. Instruction to **direct** or **indirect** discrimination ...

- 5. This Directive **shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary**.



DRAFT: Directive – listed companies, board gender balance

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures /* COM/2012/0614 final - 2012/0299 (COD) */

Proposal is experiencing some resistance: less strong than envisaged originally by Commissioner Reding; choice of legal basis disputed TFEU 19 or 157 – affecting European Parliament input: Subsidiarity concerns by governments of NL, UK, Denmark, Sweden, Poland + Czech Republic; German government had previously expressed concerns – seem allayed. Reasoned opinions on <http://www.ipex.eu>

- *Article 1 Subject matter*
- This Directive lays down measures to ensure **a more balanced representation of men and women** among the non-executive directors of listed companies by **establishing measures** aimed at accelerated progress towards **gender balance** while allowing companies sufficient time to make the necessary arrangements.
- Article 3 Does not apply to SMEs.

Article 4

Objectives with regard to non-executive directors

(article sets out search/appointment/redress system)

- 1. **Member States shall ensure** that listed companies in whose boards members of the under-represented sex hold less than **40 per cent** of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by **applying pre-established, clear, neutrally formulated and unambiguous criteria**, in order to attain the said percentage at the latest by 1 **January 2020** or at the latest by 1 **January 2018** in case of listed companies which are public undertakings.



DEFINITIONS

Discrimination

Direct discrimination

Indirect discrimination

Harassment

Sexual harassment



Discrimination - Directives

2006/54/EC – article 2;

2010/41/EU - articles 3+4

Direct/indirect discrimination on grounds of sex (contrary to principle of equal treatment)

harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

instruction to discriminate against persons on grounds of sex;



Variations: (of definition of discrimination)
Directive 2004/113/EC article 4, paras 3 + 4

3. **Harassment and sexual harassment** within the meaning of this Directive... **A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.**

4. Instruction to **direct or indirect discrimination** on the grounds of sex...



Additionally:

Directive 2006/54/EC article 2(2)©

any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC



Direct discrimination:

Directives

2004/113/EC article 2(a)

2006/54/EC, article 2(1)(a)

2010/41/EU article 3(a)

*where one person is treated less favourably on grounds of sex than another **is, has been or would be**, treated in a comparable situation*



Comparator: three ways: claimant can show (there)

'**is** difference in treatment'

'**was** difference in treatment'

or

'Hypothetical comparator' (**would**)

Indirect discrimination: atypical work cases important for developing concept

- **ECJ jurisprudence** was important in developing the concept of indirect discrimination/burden of proof/objective justification e.g. Case 170/84 *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, [1986] ECR 1607
- **ECJ initial** approach to **indirect discrimination** subsequently replaced by legislative definitions, as in *i.a.* Directive 2006/54/EC. This was influenced by the two non-gender 2000 Directives

Indirect discrimination:

Directives:

2004/113/EC article 2(b)

2006/54/EC article 2(1)(b)

2010/41/EU article 3(b)

*where an **apparently neutral** provision, criterion or practice **would put** persons of **one sex** at a **particular disadvantage** compared with persons of **the other sex**,*

*[unless that provision, criterion or practice is **objectively justified** by a **legitimate aim**, and the means of achieving that aim are **appropriate and necessary**]*



How to prove '*particular disadvantage*'

Disparate effect? –has to be high

Note: 'would put' = allows for potential disadvantage NOT necessarily actual



Harassment

Directives:

2004/113/EC article 2©

2006/54/EC article 2(1)©

2010/41/EU article 3©

*where an unwanted conduct related to the sex of a person occurs with the **purpose or effect** of violating the dignity of a person **and** of creating an intimidating, hostile, degrading, humiliating or offensive environment*

Definition of harassment

- **Note:** Directives: 2004/113/EC, 2006/54/EC, 2010/41/EU **do not** have any reference to Member States' legislation (for definition) **unlike** the two 2000 non-gender discrimination directives.
- Harassment is prohibited without any potential qualification.



Sexual Harassment

Directives:

2004/113/EC article 2(d)

2006/54/EC article 2(1)(d)

2010/41/EU article 3(d)

*where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the **purpose or effect** of violating the dignity of a person, **in particular** when creating an intimidating, hostile, degrading, humiliating or offensive environment*



Harassment

Sexual Harassment

Indirect discrimination does not arise

Objective justification does not arise

Intent (or lack of it) – irrelevant (*purpose*
OR *'effect'*)

No comparability of situations

Summary:

- Material and personal scope have grown since early days of EECT article 119 (now TFEU article 157 as amended (and Madame Defrenne's early cases - 3))
- **EEC T article 119 (equal pay) – only EEC mandatory measure: compare with today's list of Directives; general harmonising Treaty articles used at first**
- ECJ preliminary ruling case law particularly important (early days-to present)
- Principle of equal treatment = no discrimination (on stated grounds)
- **Symmetry has emerged in definitions of key concepts from non-gender to sex discrimination/gender Directives**
- Objective justification – indirect discrimination; not for harassment or sexual harassment
- **Legislative** definitions of concepts:
 - Discrimination (includes instruction to discriminate + for following such instructions)
 - Direct discrimination
 - Indirect discrimination
 - Harassment*
 - Sexual harassment*
 - * no comparator needed