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EU Gender Equality Law

Definition of key concepts

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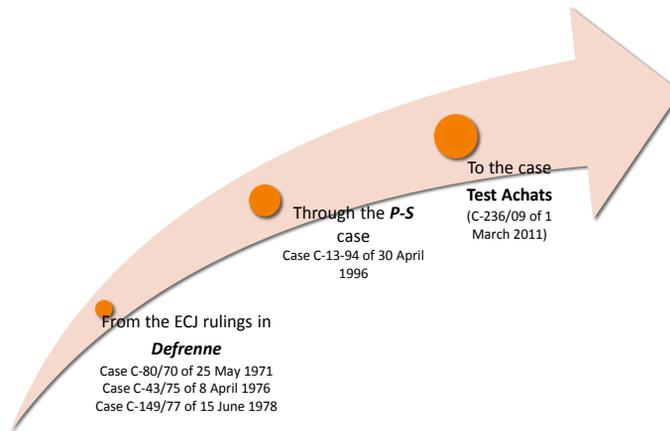
A necessary premise

Background: gender equality within the construction of "social" EU law

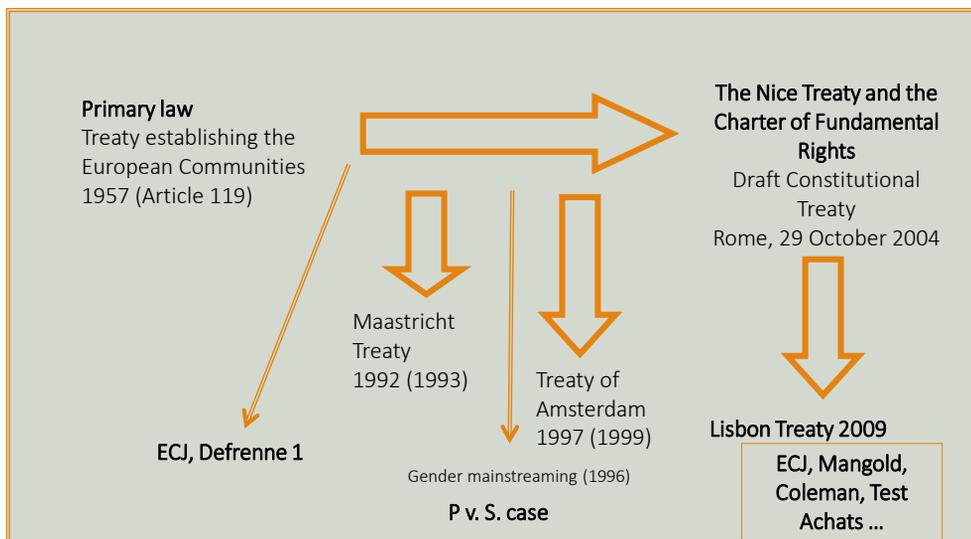
The transformation of EU anti-discrimination law on a technical and institutional level

Key concepts within anti-discrimination, focus on case law

Background



New frontiers for the principle of equality within EU law



The combination of the primary law contained in the Treaties and the Charter of Fundamental Rights

Article 141 of the EC Treaty, now Article 157 TFEU – Articles 20 – 23

Secondary Community law:

Directive 75/117 – Directive 76/207 – Directive 98/70 – 86/378/EC, as amended by Directive 1996/97/CE Directive 2002/73 – Directive 2004/113

DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006

on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

referred to as *recast* specifically as the aim is to harmonise the provisions contained in the previous directives dedicated to gender equality in access to employment, training and promotion in work, within the sector of occupational social security schemes and relating to equal pay along with the rules concerning the burden of proof in cases of gender discrimination, also in the light of the case law of the European Court of Justice

The meta-model: gender, the instruments of anti-discrimination law and the extension to risk factors other than sex/gender

Primary law:

Article 13 of the EC Treaty, as amended by the Treaty of Amsterdam and the Nice Treaty in 2001, subsequently Article 19 TFEU

Charter of Fundamental Rights of 2000 (subsequently recognised as binding by the Lisbon Treaty of December 2007, entered into force in December 2009)

Secondary law:

Directive 2000/43 and Directive 2000/78

Suspends the approval procedures for Directive 2000/78 (also known as the horizontal directive, which is necessary for the various fields of application of the legislation cited)

Key points

- The consolidation of the link between gender and other risk factors within the case law of the Court
- The harmonisation of the instruments available under anti-discrimination law
- The promotion of the link between prohibitions on discrimination and fundamental rights
- The influence of anti-discrimination law on techniques for protecting the rights of male and female workers
- The extension of the scope of the prohibitions “beyond” work

The relationship between the principles of non-discrimination and fundamental rights after the adoption of the Charter of Fundamental Rights of the EU

Prohibitions based on subjective factors:

- Art. 20 Equality before the law

All people are equal before the law

- Art. 21 Non-discrimination Prohibition of any form of discrimination, in particular, on the grounds of sex, race, skin colour or ethnic or social origin, genetic characteristics, language, religion or personal convictions, political opinions or of any other nature, being a member of a national minority, property, birth, handicaps, age or sexual orientation.

- Art. 23 Equality between men and women

Equality between men and women must be assured in every field, including employment, labour and remuneration.

The principle of equality does not preclude the maintenance or adoption of measures establishing special advantages for the under-represented sex.

Prohibitions associated with directives on *non-standard* employment have been defined as “principles of Community social law” (ECJ, *Del Cerro Alonso* case), although in functional terms the Court treats them in the same way ...

From the theoretical system to legal practice: the potential for multi-level engagement with reference to the principle of non-discrimination

The prerequisite for this expanded usage – insofar as elastic – of the Charter of Fundamental Rights based on the principle of non-discrimination is the existence of directives defined as being “of broad scope”: these include the so-called second generation Directives (in particular 2000/43 and 2000/78), which are characterised by broad and general provisions, the specific features of which have been established in the case law of the Court of Justice.

This offers an interpretation of the right not to be discriminated against as a central value within the process of asserting the principle of equality.

EU law consistent
Interpretation

Preliminary rulings
that the national
Courts of all levels
have directed the
Court of Justice and
disapplication
(eventually)

Clarifications: from
the cases to the
techniques!

Key concepts

Prohibitions on discrimination: what is the objective and subjective scope of Directive 2006/54?

Objective field of application

Dir. 2006/54 implementing principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes

Dir. 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Subjective field of application

Directive 2006/54 prohibits discrimination between men and women:

members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, to retired and disabled workers and to those claiming under them, in accordance with national law and/or practice

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

A necessary comparison with other directives:
is there a hierarchy within EU law?

Equal treatment with reference to race and ethnic origin

Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Equal treatment and other risk factors

- a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- c) employment and working conditions, including dismissals and pay;
- d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

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Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Direct Discrimination– Legal Definition

- Direct discrimination exist when one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation
- Discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC

The constituent elements of discrimination (objective: no need for any intention to discriminate):

Different (less favourable) treatment

Comparison Causal link

- Causal link (on ground ...)
- No justification allowed

Focus of the CJEU on the structure and functioning of the prohibition on direct discrimination on the grounds of sex (or gender)

Macarthy C-129/79

Thibault C-136/95

Dekker C-177/88

Interpretative problems

The grounds for justification and derogations from the operation of the prohibition: no grounds for justification accepted for direct discrimination!

What is the difference between a derogation and a justification under anti-discrimination law?

General Exception to equal treatment as regards access to employment, vocational training and promotion and working conditions

(Article 14(2) of Directive 2006/54)

Member States may provide, as regards access to employment including the training leading 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 a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Focus on the ECJ: Sirdar C-273/97, Kreill C-285/98

The question of maternity and parental allowances

- The evolution of cases on maternity, from protections available to mothers to questions of parenthood (the position of fathers and mothers under EU anti-discrimination law)
- The relationship with Directive 92/85 on protection for the health of pregnant workers and Directive 2010/18 on parental leave
- The treatment of fathers under EU anti-discrimination law (from Hofmann in 1984 to Marc Betriu Montull in 2013)

Focus on the ECJ: Dekker C-177/88; Brown C-394/96; Paquay C-460/06; Mayr C-506/06

Parenthood, discrimination and the family in transformation

Cases brought before the CJEU:

CJEU 26.2.2008, C-506/06, *Mayr*, a case involving the dismissal of a worker who had undergone in vitro fertilisation;

CJEU 18 March 2014, C-167/12, *CD/ST* and CJEU 18 March 2014, C-363/12, *Z/ A Government department, The Board of management of a community school*, both concerning the allowances due to the commissioning mother in two different cases involving a surrogate pregnancy contract under the laws of the United Kingdom and Ireland

Reflections: The Court upheld the refusal of any recognition of maternity leave even where, as in the Irish case, “the commissioning mother may breastfeed following birth or where she does breastfeed the baby”. The right not to suffer discrimination does not protect either of the mothers because “an employer’s refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex”, and Directive 2000/78 is not applicable because “a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability”.

Indirect discrimination– Legal definition

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

Interpretative issues

The fulfilment of the three prerequisites for discrimination

1. An apparently neutral criterion or practice
2. A particularly detrimental situation (for the group ... compared to the members of another group)
3. The assessment as to whether the criterion or practice is objectively justified [legitimate aim and means used are appropriate and necessary: Article 2(2)(b)]

Focus on the CJEU

- The Danfoss judgment of 17 October 89 (Case 109/88) and indirectly discriminatory systems for classifying staff
- Indirect discrimination with regard to pay: Enderby judgment of 27 October 1993, C-127/92)
- Part time work and indirect sex discrimination: Jenkins (Case C-96/80, 31 March 1981) and Bilka (Case C-170/84, 13 May 1986)

Focus on social security and the retirement age

Access to social benefits and social security

Out of the anti-discrimination directives, only the directive on racial equality (2000/43) provides broad protection against discrimination in access to the **social security system** and other forms of social security. Includes access to benefits in kind operated on a mutual basis by the state, such as public health insurance, education and the social security system. However, the directive on equal treatment for men and women in the area of social security prohibits discrimination on the grounds of sex within the more limited area of **social security**.

Social protection, including social security and health care provision

There is uncertainty concerning the precise extent of this aspect as the directive on racial equality does not contain a definition of that notion and the case law of the Court of Justice has not yet considered it.

The directive on equal treatment for men and women in the area of social security provides for equal treatment in relation to legal social security regimes.

Gender equality: the EU regulatory system

- Directive 79/7 on equal treatment in matters of social security (not incorporated into Directive 2006/54)
- Directive 86/378 on equal treatment in occupational social security schemes (incorporated into Directive 2006/54 (recast))
- Directive 2004/113 on gender equality in the access to and supply of goods and services

Regarding the first pillar: statutory social security schemes

COUNCIL DIRECTIVE 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes

COUNCIL DIRECTIVE du 11 décembre 1986 sur l'application du principe de l'égalité de traitement entre hommes et femmes exerçant une activité indépendante, y compris une activité agricole, ainsi que sur la protection de la maternité

COUNCIL DIRECTIVE of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes

COUNCIL DIRECTIVE of 19 December 1978 n. 7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

The scope of the principle of equality

Article 1

The purpose of this Directive is 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, hereinafter referred to as 'the principle of equal treatment'.

The application of the principle

1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in parti

cular 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. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity

A recent example of the application of Directive 79/7: the X case (C-318/13)

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.

A case involving indirect discrimination: part-time work and eligibility for an old-age pension (Moreno case, C-385/11)

Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

Directive 79/7 exceptions to the principle of equality (to be interpreted narrowly)

This Directive shall be 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 ;

(b) advantages in respect of old-age pension schemes granted to persons who have brought up children ; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children ;

(c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife :

(d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife ;

(e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

Coordination between contributions, benefits and retirement age at issue for retirement: difficulties

Barber case (C-262/88 of 17 May 1990): the Court considered as remuneration (subject to the Treaty as well as the Directive on equal pay) both pension contributions as well as benefits paid under a private pension scheme of any type: pension schemes negotiated at company level were held to be discriminatory, even though they had substitute and complementary status

The consequence? The Court changed its view. In bringing all elements of negotiated pension schemes under the scope of the Treaty article on equal treatment (now Article 157 TFEU), the Court extended the principle of equality also to the retirement age because the Treaty does not provide for any exceptions. The same applies for early retirement and for benefits paid to employees in the event of dismissal due to business considerations.

The question of retirement age

Different ages can still apply under public sector pension schemes

- Article 7(1)(a) of Directive 79/7

Occupational social security schemes (defined-benefit)

- Article 2(1)(f) of Directive 2006/54

The question of retirement age within public sector employment: the judgment in Case C-46/07 Commission v. Italy

In maintaining in force legislation under which public sector employees are entitled to receive old-age pensions from different ages for men and women, Italy failed to comply with its obligations under Article 141 of the EC Treaty.

Harassment – Legal Definition

“where 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;

‘sexual harassment’: where any form of unwanted 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;

Interpretative issues

Harassment and discrimination: dignity and equality (or equal treatment) and the comparative assessment ... doctrinal problems?

Loss of depth of the concept of discrimination ...

Reference to Coleman and Feryn judgments

Focus on the CJEU: Coleman 2008

Directive 2000/78, and, in particular, Articles 1 and 2(1) and (3) thereof, must be interpreted as meaning that the prohibition of harassment laid down by those provisions is not limited only to people who are themselves disabled. Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3).