



EU Gender Equality Law - Key Concepts



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Starting point : stereotypes that generate differences in treatment



- “Women take care of children, therefore are less available at the workplace”
- “Women are less productive, therefore must be paid less”
- “Men support the family, therefore they need higher pay”
- “Women are more vulnerable, therefore must be protected”
- The reproductive role is “a woman’s purpose in this world”

European Union Charter of Fundamental Rights



- The Charter bans discrimination, including gender-based (art. 21) and recognizes the right to equal treatment also outside employment (art. 23)



The Gender Equality Directives



- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
- Directive 2010/41/EU on the application of the principle of equal treatment between men and women in an activity in a self-employed capacity
- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- Directive 92/85/EEC, regarding pregnant workers and workers who have recently given birth or are breast feeding
- Directive 2019/1158/EU on work-life balance for parents and carers

Key concepts



- Direct discrimination
- Indirect discrimination
- Harassment
- Objective reason
- Multiple discrimination



I. Direct discrimination



Shall be taken to occur where a person is treated less favorably **(1)** on ground of sex **(2)** than another is, has been or would be treated in a comparable situation **(3)**.



(1) Less favourable treatment



- What is a treatment?
It could be a simple statement
It can be a benefit, which is not provided for all
- Different doesn't necessarily means less favourable → e.g. retirement age

(2) Gender – as protected ground



- Under the EU non-discrimination directives the protected grounds are expressly fixed. The list is exhaustive, so other grounds (e.g. sickness) cannot be added (Case C-13/05 Chacon Navas) 
- The ECHR, in contrast, contains an open-ended list

Multi-discrimination



- **When grounds intersect**
- A person may be discriminated on two or more grounds in the same time (Minority within minority)
- In most of the traditional minorities discriminated against, women are in even a more disadvantaged position than men (e.g. Roma women)
- Each of us are a combination of belonging to minorities. But the reduction to one dimension – may be sometimes useful and practical

(3) The comparator



- **IS** – Present
(e.g.: in an equal pay dispute - how much is paid the comparator?)
- **HAS BEEN** – Past
(e.g.: how much has been paid the comparator?)
- **WOULD BE** – Virtual – Hypothetical comparator
(e.g.: how much would be paid the comparator?)

(3) The comparator



- In principle, the same employer. However, Directive 2008/104 on temporary agency work: comparison between employees of different entities (temporary worker and user)
- In principle, same occupation. However, Enderby C-127/92 (logopedist / psychologist)



II. Indirect Discrimination



= an apparently gender-neutral provision, criterion or practice **(1)** that affects a group of a specific gender **(2)** in a significantly more negative way by comparison to others in a similar situation **(3)**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary **(4)**.

(1) Neutral rule or practice



- E.g.: Different rules applicable to part-time employees, compared to full-time – with an indirect impact on payment (Schönheit case)



- can result of a similar treatment of two persons being in different situations
- The law should distinguish between **the same** – that deserves equal treatment – and **the different** – that deserves unequal treatment

(2) A group of a specific gender



- There is another criterion used, not gender...
- ... but it should be a certain link.



(3) Comparison to others in a similar situation



- an apparently gender- neutral provision, criterion or practice, which places members of a certain gender at a disadvantage.
- Consequences already discriminatory, or having the potential to become discriminatory

(4) Objective justification



- Legitimate aim + appropriate and necessary means
- Maternity, but only proportionately
- The proportionality rule (e.g. C-207/98 – Mahlberg)
- The case of special domains: army, police, penitentiaries, security forces



Unacceptable defense

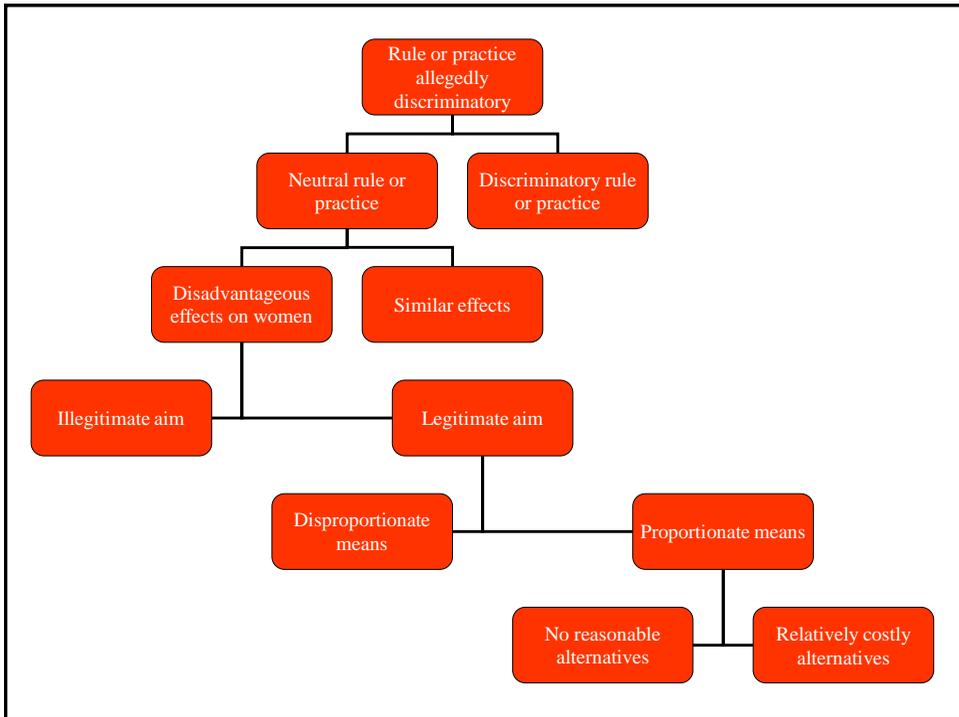


- **Savings of costs** alone shall not, without other reasons, amount to a legitimate aim so as to justify discrimination
- **External causes** (e.g. The clients' request – Case C-54/07 Feryn, Case C-188/15 – Bougnaoui)
- **“Woman needs protection”**, so they cannot work night shifts, overtime, on special working conditions, etc. Exception: pregnancy time
- **Lack of intention** (‘I did not want to discriminate’).

Example - *Bilka case*



- Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted **indirect discrimination against women**, since they made up the vast majority of part-time workers.
- The ECJ found that this could be indirect discrimination, unless the difference in enjoyment is justified. In order to be justified, it would need to be shown that ‘the measures chosen by Bilka correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objectives pursued, and are **necessary** to that end.
- Bilka argued that the aim behind the difference in treatment was to discourage part-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing.
- The ECJ found that this could constitute a **legitimate aim**.
- However, it did not answer the question of whether excluding part-time workers from the pension scheme was **proportionate** to achieving this aim.
- The requirement that the measures taken be ‘necessary’ implies that it must be shown that **no reasonable alternative means exists** which would cause less of an interference with the principle of equal treatment.



III. Harassment



- Shall be deemed to be discrimination when an unwanted conduct related to a protected ground takes place with the **purpose or effect** of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- There is **no need for a comparator** to prove harassment.
- **Sexual harassment** = the situation where unrequited behavior with a sexual connotation is manifested physically, verbally or non-verbally, and where the object or effect is harming a person's dignity and especially creating an atmosphere that is intimidating, hostile, degrading, humiliating or offensive

III. Harassment



- Sexual harassment – victims: not only women
- Includes many forms of abuse
- Having the effect of undermining the personality, dignity or physical or psychological integrity of a person.
- Psychological harassment = improper conduct in the form of physical behaviour, spoken or written language, gestures or other acts, which takes place over a period and is **repetitive or systematic** → a **process** that occurs over time and presupposes the existence of repetitive or continual behavior which is intentional, as opposed to accidental (Cases T-275/17 Michela Curto and T-377/17 SQ)



IV. Instruction to discriminate



- Is deemed to constitute discrimination, even if no definition is provided by the directives.
- A person instructs another person to engage in direct or indirect discrimination or in harassment against another person

Specific case: equal pay



- Matter of confidential pay
- Benefits for uninterrupted activity
- Additional benefits for full-time employees
- Payment for overtime

Specific case: part-time



- **Case C-274/18 on part-time work**

National legislation: “The total duration of a worker's consecutive employment relationships may not exceed 6 years or, in the case of part-time employment, 8 years”.



CJEU: **NO**, if such rule adversely affects higher percentage of women in the workforce than men in the workforce, and if it is not objectively justified by a legitimate aim or the means of achieving that aim are not appropriate and necessary.

Specific case: overtime



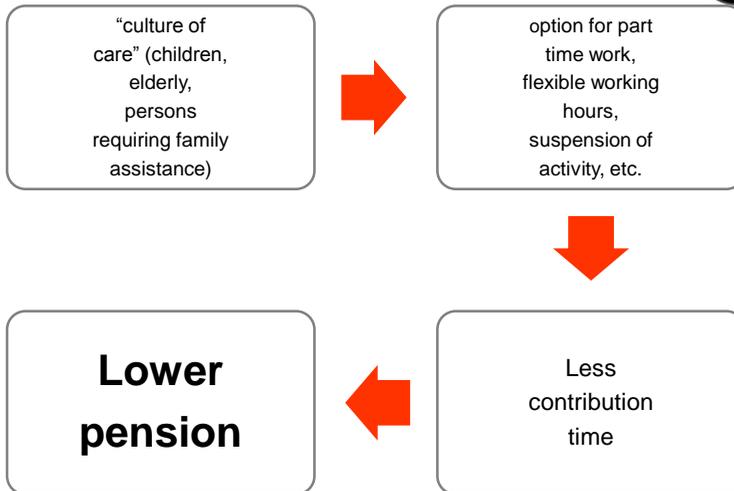
- A woman's lesser availability to work overtime deriving less income than men even in full observance of the "equal work, equal pay" principle.
- Unavailability for overtime **may not even be real**, but will continue to be presumed by the employer because it matches the patriarchal pattern of labor division in the family.
- Consequently it will not even matter what the reality is in each case; the employer already has a representation of women's unavailability for overtime work.

Specific case: collective bargaining



- Women's under-representation in collective bargaining – collective labor relations
- Most of European and national trade unions confederations have no women in their boards
- Disadvantageous contract arrangements or even precarious work conditions.
- Women's perspective is absent from collective bargaining contracts

Specific case: retirement



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Equal treatment



- = having consideration of the different abilities, needs and aspirations of men and women and giving them equal treatment
- Having to choose between career and family is a false option
- The meaning is not that a career is more important than a family and children, **but that those are equally important for both genders**
- Priority employment for women exceeds the concept of equal treatment (Case C-450/93, Kalanke)

Equal treatment



- Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority.
- Awarding pay for uneven distribution of tasks in the family can lead to perpetuation of such uneven distribution
- ILO Convention 89/1948 banning night-shift work for women.
- Protection can result in discrimination. Any text about “woman’s protection” feeds the stereotypes about her vulnerability

What can legislation do?



- Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority.
(Case C-104/09 Roca Álvarez) 
- Role of law: *poiesis* or *praxis*?

