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EU Gender Equality Law

Definition of key concepts

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Droit des discriminations dans l'emploi et le travail, 2016, p. 852, Éditions Larcier (Bruxelles). michel.mine@lecnam.net



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Origins of gender equality law in employment and occupation

International Labour Organization

- Treaty of Versailles ILO (1919):
- "The principle of equal pay, without gender discrimination, for work of equal value."
- ILO convention n° 100 (1951)



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Origins of gender equality law in employment and occupation

Community/European law (EEC/EU)

- Treaty (Rome, 1957): Art. 119 women and men should receive equal pay for equal work
- Directive of 10 February 1975 equal pay for work of equal value
- Directive of 9 February 1976 equal treatment in employment



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Origins of EU law

- Case law: Gabrielle Defrenne v Sabena judgements
 - ECJ 25 May 1971, I: direct effect
 - ECJ 8 April 1976, II: The principle that men and women should receive equal pay is one of the foundations of the Community
 - ECJ 15 June 1978, III: « respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure; elimination of discrimination based on sex forms part of those fundamental rights» (§ 26-27).

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Treaty on European Union (TUE)

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which ..., non-discrimination, ...and equality between women and men prevail. (Art. 2)

 The EU shall "combat ... discrimination and promote... equality between men and women" (Gender mainstreaming) (Art. 3.3)

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Treaty on the functioning of the EU

- Art. 8 TFEU: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.
- Art. 10 TFUE: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex.(...).
- Art. 19 TFEU: the EU has the competence to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"
- Art. 157 TFEU: the EU shall adopt measures aimed at ensuring equal treatment
 of men and women in matters of employment and occupation, including the
 principle of equal pay for equal work or work of equal value.



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Charter of fundamental rights of the EU

Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 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.

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Directives on equality between men and women

Dir. 79/7 – social security

Dir. 86/378 – occupational social security schemes

Dir. 92/85 – safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

Dir. 96/34 – parental leave (European collective agreement)

Dir. 97/80 – burden of proof (CJEU case law)

Dir. 2002/73 – employment and occupation (including harassment)

Dir. 2004/113 of 13 December 2004 - goods and services (access and supply)

Dir. 2006/54 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)

Dir. 2010/41 of 7 July 2010 of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

Dir. 2019/1158 of 20 June 2019 on work-life balance for parents and carers



Key concepts in EU law

Equality between women and men



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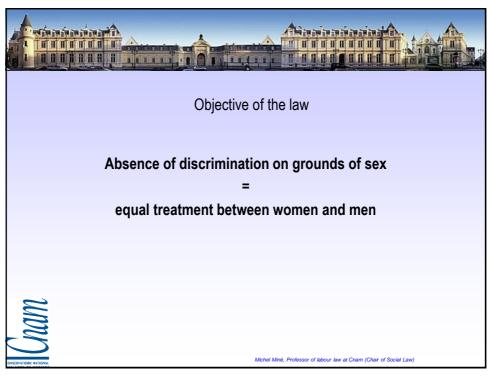


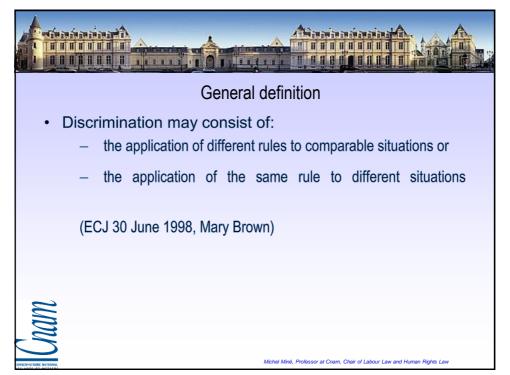
The challenges of defining discrimination

- Speaking the same language (legal terminology helps to conceptualise discrimination in an objective way)
- "To name things wrongly is to add to the misfortune of the world"
 Albert Camus
- Avoiding confusion (distinctions, injustice, inequality, discrimination, etc.)
 - distinctions (distinctions may be legitimate)
 - unfavourable treatment (unfavourable treatment may be justified)
 - injustice (injustice is not always discrimination)



Making use of legal means to detect discrimination (identifying the facts as discrimination), applying the right legal framework and taking action to eliminate discrimination







General definition

Discrimination is manifested through a *measure* that is:

unfavourable (any management measure: access to employment, including promotion and training; conditions of work and employment, including pay, etc.)

unjustified

unlawful, linked to a criterion that must not be applied to this decision - sex (gender), nationality, "racial"/ethnic origin, religion, age, disability, sexual orientation.

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Any discrimination is in itself an infringement of human rights

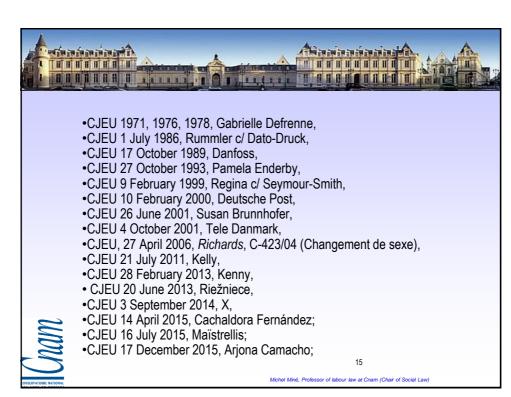
Discrimination may be:

I. Direct

II. Indirect



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I. – Definition of direct discrimination where one person (a woman) is *treated less favourably*

in a comparable situation,

than another (a man)

- is (present concrete circumstances)
- has been (successive concrete circumstances)
- would be (hypothetical circumstances)

"Given the current situation (...), Member States should, in the first instance, aim at improving the situation of women in working life." (Dir., recital 22)

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A person is treated less favourably than another is

- ECJ 1 July 1986, Rummler / Dato-Druck (237/85) (paras. 17, 25 and operative part): *job classification system (need for several criteria)*
- ECJ 3 October 2006, Cadman (C-17/05) (paras. 38-40 and operative part): seniority classification system evaluation of the work



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A person is treated less favourably than another **is**

- ECJ 17 October 1989, **Danfoss** (C-109/88): equal pay for work of equal value
- •ECJ 27 October 1993, Enderby / Frenchay Health Authority and Secretary of State for Health (C-127/92) (paras. 13-14, 17-19, 22-25, 29, operative part): *impact of collective bargaining and employment market in the pay fixation*
- ECJ 31 May 1995, Specialarbejderforbundet i Danmark / Dansk Industri (C-400/93) (paras. 38, 43, 47, operative part 4): **Assessment of the value of the work**

• ECJ 26 June 2001, Brunnhofer (C-381/99) (para 80 and operative part): **pay – assessment of work of equal value**

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A person is treated less favourably than another is

- ECJ 12 July 1984, *Hofmann /* Barmer Ersatzkasse (184/83) (§ 24-28): *protection of pregnant women and maternity*
- •ECJ 4 October 2001, Tele Danmark (C-109/00) (paras. 34, 39 and operative part): protection of the employment of the pregnant worker in a fixed-term contract
- ECJ 30 March 2004, Alabaster (C-147/02) (para 50, operative part 1): pay increase during maternity leave
- CJEU 1 July 2016, *Ornano* (C-335/15) (§ § 30-34 et 40-44) : maternity leave and impact on pay remuneration
- CJEU 6 March 2014, Napoli (C-595/12) (paras. 33-39): access to professional training, necessary for an appointment, with regard to maternity leave and responsibility of the Member State (§ 43)

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- CJEU 20 June 2013, Riežniece (C-7/12) (paras. 36, 54, 56 and operative part): parental leave and assessment of work and for dismissal economic reasons (abolishment of post)
 - •CJEU 16 July 2015, **K. Maïstrellis** (C-222/14) (§ § 41-53) : right to parental leave for a civil servant (man);
 - •CJEU 17 December 2015, *Arjona Camacho* (C-407/14) (§ § 34-45) : reparation of the loss and damage (nature and amount of compensation)
 - CJUE 7 February 2018, *Maturi e.a.* (C-142/17 and C-143/17), temporary possibility for entertainment workers having reached the retirement age to continue working until the age formerly recognised by prior regulations for pension rights (Setting age at different levels, according to gender) Direct discrimination based on gender

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A person is treated less favourably than another is

Health and safety at work (occupational risk assessment...) & gender equality

- CJUE 19 October 2017, Otero Ramos (C-531/15) (§ § 55-76 and provisions): any less favourable treatment of a worker because of her status as a breastfeeding woman constitutes direct sex discrimination
- CJEU 19 Sepember 2018, Isabel González Castro v Mutua Umivale (C-41/17) - Shift work partly performed at night



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A person is treated less favourably than another **has been**

ECJ 27 March 1980, Wendy Smith, C-129/79

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A person is treated less favourably than another **would be**

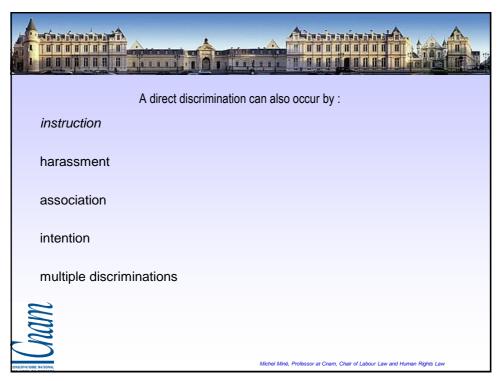
 ECJ 30 April 1998, Caisse nationale d'assurance vieillesse des travailleurs salariés v. Évelyne Thibault (C-136/95) (paras. 32-33 and operative part):

Lack of yearly assessment of performance - national rule which deprives an employee of the right to an assessment of performance (and of receiving a pay raise, a promotion) because of absence from the undertaking

Woman absent on account of maternity leave?



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- Requests by
 - clients (CJEC 10 July 2008, Firma Feryn NV, etc.),
 - employees (ECHR 3 Oct. 2013, I.B. v Greece, etc.),
 - · other persons,

addressed to an employer (or responsible person)

- such requests constitute discrimination
- such requests cannot serve to justify discrimination

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Direct discrimination by harassment

- « Sexist » harassment : unwanted **conduct** related to the sex of a person **with the purpose or effect** of violating the dignity of a person and of creating an intimidating, hostile, offensive or disturbing **environment**
- Sexual harassment: where any form of unwanted verbal, nonverbal 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



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Direct discrimination by intention having discriminatory effects

CJEC 10 July 2008, Feryn Firma NV, Public statement by the director of an undertaking to the effect that he could not recruit persons of a certain racial or ethnic origin because of the reluctance of customers

The statements constitute a presumption of direct discrimination (dissuasive impact of the statements)

Situations in which the undertaking lets it be known that persons covered by one of the grounds (sex, race, age, etc.) will not be:

- recruited
- allocated to certain jobs,
- promoted to certain positions, etc.

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Direct discrimination by association

When a person is unfavourably treated because of their association with a person covered by one of the grounds

CJEC 17 July 2008, S. **Coleman** v Attridge Law, C-303/06 a person suffered discrimination and harassment because of the disability of her child

"The prohibition of direct discrimination [...] is not limited to people who themselves have a disability."

The principle of equal treatment applies not to a specified category of persons, but to the grounds set out in Article 1 of the Directive (§ 38).

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Multiple discrimination (direct or indirect)

A person experiences "multiple" (or cumulative) discrimination when more than one ground is involved

(especially women:

- Directive 2000/43 recital 14
- Directive 2000/78 recital 3)

ASSERTATOIRE NATIONAL

CJEU 19 April 2012, Galina Meister, C-415/10 discrimination on grounds of age, sex and ethnic origin suffered during a recruitment procedure

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Direct discrimination - derogations

- In principe: impossible ECJ 8 November 1990, Dekker
- By way of an exception (interpreted strictly): difference in treatment does
 not constitute discrimination when a characteristic (associated with one of
 the grounds) constitutes a "genuine and determining occupational
 requirement" by reason of the nature of the activities or the context in
 which they are carried out
 - If this is provided by the Member State

+

as regards access to employment (of particular activities)

+

- if the objective is legitimate and the requirement is proportionate

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Direct discrimination - derogations

- For transparency, under the control of the Commission and the judge :
- ECJ 30 June 1988, Commission v France, C-318/86, paras. 24-27
- ECJ, 26 October 1999, Angela Maria Sirdar v. The Army Board and Secretary of State for Defence (C-273/97, paras. 15-16, 29-31, operative part)
- ECJ, 11 January 2000, Kreil, C-285/98, paras. 26-29



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II. - Indirect discrimination

- provision or practice applied (by the company...)
- apparently neutral (regarding sex or another protected ground)
- putting persons of one sex at a **particular disadvantage** (compared with other persons of the other sex) effect
- unless the entity (company...) applying the provision or practice proves that it is
 - objectively **justified** by a legitimate aim (justification)
 - and that the means for achieving it are appropriate and necessary (proportionality)

ONSERVATOIRE NATION

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Indirect discrimination: a concept and a method

This method permits the examination of the *effects* of a rule or practice (objective conceptualisation of discrimination)

If the company can justify the legitimacy and proportionality of the provision or practice that has been challenged, the **difference in treatment** is not discriminatory

Case-law establishes strict standards for accepting a justification



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Indirect discrimination: a concept and a method

ECJ 31 March 1981, **Jenkins** / Kingsgate (96/80) (paras. 11-15, 17-18, operative part): *part-time workers, hourly rate of pay*

ECJ 13 May 1986, **Bilka** / Weber von Hartz (170/84) (paras. 20-22, 31-37, 43, operative part): *part-time workers, occupational pension scheme*

ECJ 7 février 1991, **Nimz** / Freie und Hansestadt Hamburg (C-184/89) (paras. 9-10, 15, operative part) : *part time workers, career development*



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Indirect discrimination: a concept and a method

ECJ 9 February 1999, **Seymour-Smith and Perez** (C-167/97) (paras. 50, 65, 76-77, operative part 3-5): assessment of national legislation (dismissal)

ECJ 20 Mars 2003, **Kutz-Bauer** (C-187/00) (paras. 50-63, operative part 1): budgetary considerations cannot justify a difference in treatment



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Indirect discrimination: a concept and a method

ECJ 10 March 2005, **Nikoloudi** (C-196/02) (para 57, operative part 2): statutory exclusion from appointment as an established member of staff of part-time workers

ECJ 6 December 2007, **Ursula Voβ** (C-300/06) (para 44 et operative part): part time employees, rate of pay for overtime



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Indirect discrimination: a concept and method in progerss

- CJUE 18 October 2017, Μαρίας-Ελένης Καλλίρη (C-409/16),
- Minimal height requirement of 1m70 for admission of applicants to the police academy entrance exam;
- This regulation puts a far greater number of women at a disadvantage than men, and would appear neither suitable nor necessary in achieving its legitimate objective
- CJUE 9 November 2017, María Begoña Espadas Recio c/ Servicio Público de Empleo Estatal (SPEE) (C-98/15), unemployment compensation for part time employees

(...)

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Positive action

Indirect discrimination invites the adoption and implementation of measures for positive action

The « Member States *may* maintain or adopt positive measures with a view to ensuring full equality in practice between men and women in working life » (Art. 157 (4) TFEU, Recital 22 and Art. 3 Dir 2006/54)

Actions:

- to compensate (recruitment, pay, training, promotion, etc.)
- to **prevent** disadvantage (training, etc.),

for the benefit of persons who have suffered discrimination or belong to a group that has suffered discrimination on one of the grounds

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Positive action

Positive action measures limited by the CJEU

"saving clause" for persons meeting other criteria

- CJEC 17 October 1995, Kalanke / Freie Hansestadt Bremen (C-450/93) (§ § 18-19, 21-24 and operative part)
- CJEC 11 November 1997, Marschall / Land Nordrhein-Westfalen (C-409/95) (§ 35 and operative part)
- CJEC 28 March 2000, Badeck et al. (C-158/97) (§ § 38, 44, 55, 63, 66 and operative part)
 - CJEC 6 July 2000, **Abrahamsson and Anderson** (C-407/98) (§ § 53-62, operative part 3)

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Access to Relevant Documents

Texts http://eur-lex.europa.eu

Case-law http://curia.europa.eu

- Case-law from 1954 to 2009: European Community (EEC/EC) B-15 Social policy – B.15.1
- Case-law from 2010: Internal Policies of the European Union 4.14 Social policy 4-14.01.02



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