




**Academy of European Law – ERA
Paris Bar Association
5 October 2022**

EU Gender Equality Law

Definition of key concepts

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



CONSERVATOIRE NATIONAL



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Michel Miné, Professor at Cnam, Chair of Labour Law and Human Rights Law

1



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)



CONSERVATOIRE NATIONAL

Michel Miné, Professor at Cnam, Chair of Labour Law and Human Rights Law

2



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**



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).



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)



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 TFEU: 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.**



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.



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 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



Michel Miné, Professor at Cnam, Chair of Labour Law and Human Rights Law

9



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**

Michel Miné, Professor of labour law at Cnam (Chair of Social Law)

10



Objective of the law

**Absence of discrimination on grounds of sex
=
equal treatment between women and men**



General definition

- Discrimination may consist of:
 - the application of different rules to comparable situations or
 - the application of the same rule to different situations

(ECJ 30 June 1998, Mary Brown)



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.



***Any discrimination is in itself
an infringement of human rights***

Discrimination may be:

- I. Direct**
- II. Indirect**



- CJEU 1971, 1976, 1978, Gabrielle Defrenne,
- CJEU 1 July 1986, Rummler c/ Dato-Druck,
- CJEU 17 October 1989, Danfoss,
- CJEU 27 October 1993, Pamela Enderby,
- CJEU 9 February 1999, Regina c/ Seymour-Smith,
- CJEU 10 February 2000, Deutsche Post,
- CJEU 26 June 2001, Susan Brunnhofer,
- CJEU 4 October 2001, Tele Danmark,
- CJEU, 27 April 2006, *Richards*, C-423/04 (Changement de sexe),
- CJEU 21 July 2011, Kelly,
- CJEU 28 February 2013, Kenny,
- CJEU 20 June 2013, Riežniece,
- CJEU 3 September 2014, X,
- CJEU 14 April 2015, Cachaldora Fernández;
- CJEU 16 July 2015, Maïstrellis;
- CJEU 17 December 2015, Arjona Camacho;



- CJEU 16 June 2016, Estrella Rodríguez Sánchez, C-351/14;
- CJEU 14 July 2016, Maria Cristina Elisabetta Ornano, C-335/15;
- CJEU 28 July 2016, Nils-Johannes Kratzer, C-423/15;
- CJEU 13 July 2017, Kleinsteuber, C-354/16;
- CJEU 7 September 2017, H, C-174/16;
- CJEU 18 October 2017, Kalliri, C-409/16;
- CJEU 19 October 2017, Otero Ramos, C-531/15;
- CJEU 7 February 2018, Maturi, C-142/17
- CJEU 19 September 2018, Gonzalez Castro, C-41/17
- CJEU 20 June 2019, Hakelbracht, C-404/18
- CJEU 7 October 2019, Safeway Ltd, C-171/18
- CJEU 15 October 2019, AEAT, C-439/18 et C-472/18
- CJEU 5 November 2019, Commission européenne contre République de Pologne, C-192/18
- CJEU 4 June 2020, Fetico, C-588/18
- CJEU 24 September 2020, YS contre NK AG, C-223/19
- CJEU 18 November 2020, Syndicat CFTC (C-463/19)
- CJEU 3 June 2021, Tesco Stores (C-624/19)
- CJEU 5 May 2022, BVAEB (C-405/20)



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)*

Michel Miné, Professor at Cnam, Chair of Labour Law and Human Rights Law

17



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*



Michel Miné, Professor at Cnam, Chair of Labour Law and Human Rights Law

18



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**



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)**



- 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. Maistrellis** (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



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 September 2018, **Isabel González Castro v Mutua Univale** (C-41/17) - Shift work partly performed at night



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

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



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?



A direct discrimination can also occur by :

instruction

harassment

association

intention

multiple discriminations



Direct discrimination *by instruction*

When a person is instructed to discriminate against other persons on grounds related to one of the prohibited criteria

- 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



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, 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



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.



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).



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)

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



Direct discrimination - **derogations**

- **In principle : 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**



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



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**)



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**



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*



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*



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 Voß** (C-300/06) (para 44 et operative part): *part time employees, rate of pay for overtime*



Indirect discrimination: a concept and method in progress

- 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



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



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)



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

