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EC law on equal treatment
between women and men in practice

Definition of key concepts:
Direct discrimination, indirect discrimination, harassment and sexual harassment

I. The concept of direct discrimination

The prohibition of direct discrimination concerns cases where one person is treated less favourably than another on the grounds of belonging to a particular sex. It addresses individual situations where a particular person suffers a disavantage because of his or her sex. It assumes that it is possible to demonstrate that a person has been treated differently from someone else because of his or her sex or, as the Court of Justice has ruled, sexual reassignment (ECJ, P. v. S., 30 April 1996, C-13/94). The eventualities it covers are those that arise when the distinction has been explicitly founded on sex. Under this circumstance, there is no reason to delve beyond appearances to expose discrimination which might have been camouflaged by other motives.

Direct discrimination is defined in the Recast Directive of 2006 (Directive 2006/54, Article 2) as occurring “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”. This definition presumes that it can be shown, by comparing with a member of the other sex in the same situation, that treatment is less favourable.

Of course, there is nothing automatic about proving discrimination of this kind. It is true that in the European approach there is no obligation to reveal an intention to treat the person concerned less favourably, or to take account of the motives for treating people of different sex differently.

But things are made more difficult, at least on the surface, by the requirement to compare with someone of the other sex in a comparable situation[1].

There was no compulsion to opt for this approach, explicitly enshrined in the 2006 directive. One might equally tackle direct discrimination by condemning any treatment of a less favourable nature that has been inspired by the consideration of a person's sex. Direct discrimination can be construed from the fact that gender played a part in the decision.

However, this demand for a comparison is tempered in Union law in a number of ways.

First of all, there is no need to engage in comparisons if the less favourable treatment is linked to pregnancy or maternity leave. According to the Court of Justice, any unfavourable treatment of a woman associated with her pregnancy or maternity leave constitutes direct discrimination on grounds of sex (ECJ, 8 November 1990, Dekker, C-177/88, refusal to appoint a pregnant woman, and 30 April 1995, Thibault, 136/95, less favourable assessment because absence on maternity leave was treated as absence for sickness). The 2006 Directive echoes this solution by stating that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes discrimination.

Secondly, the comparison can be performed with a historical situation (such as that of a previous employee) or a hypothetical one, which makes recognising the discrimination somewhat easier.

The fact remains that in occupations practised essentially by the members of one or the other sex (like midwives) or where posts are predominantly taken by members of one or the other sex (like secretaries), it may prove impossible to come up with the comparison required in order to recognise a discrimination. Here we stumble across one of the limits to proceedings in the field of direct discrimination.

[1] On the difficulties of comparing, see in particular D Schiek, L Waddington, M Bell (eds.), Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Oxford, Hart Publishing, 2007, p. 205-237.

Although the directives do not explicitly say so, direct discrimination is always prohibited. The texts do not provide for any justification, which they do in the case of indirect discrimination. The principle one can derive from this is that direct discrimination cannot be justified (in this sense, see in particular ECJ, Dekker, cited above, and ECJ, 2001, Tele Danmark, C-109/00). Different treatment on grounds of sex may, nevertheless, be upheld in those cases where the law of the European Union makes explicit provision for it. For example, as Directive 2006/54 indicates, a person's sex may be taken into account if it constitutes a determining requirement for carrying out an occupational activity (the classical example is playing a male or female part in a film or stage play). This option to uphold different treatment founded directly on sex is expressed as follows under the terms of the 2006 Directive: "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." This wording reflects a desire not to open the door too widely to the possibility of justifying different treatment founded directly on gender.

It should be stressed, however, that Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services offers broader justification for direct discrimination. According to Article 4 (5) of this directive, differences in treatment are not precluded "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". This is about allowing the provision of goods and services aimed specifically at one or the other sex. The Directive lays itself open to a little more criticism by authorising – although not without insisting that such exceptions must be temporary in nature – sex to be used as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services (cf. Article 5 of the directive). When it comes to the supply of goods and services, then, the prohibition of direct discrimination does not have the same force as elsewhere.

Differences in treatment may also be upheld, according to the Court of Justice in applying Directive 2006/54, with a view to protecting pregancy and maternity leave. The 2006 Directive is without prejudice, as it explicitly states, to Directive 92/85 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. Nor does it detract from Directive 96/34 on the framework agreement

on parental leave concluded by UNICE, CEEP and the ETUC. Moreover, according to Article 15 of the 2006 Directive, prohibiting sex discrimination implies that a woman on maternity leave shall be entitled, after the end of this period, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence. Parallel to this, Article 16 of the 2006 Directive stipulates that Member States may, without breaching the prohibition of discrimination on grounds of sex, recognise distinct rights to paternity and/or adoption leave. Nevertheless, those Member States which do so must 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.

A few extensions to the scope of this prohibition of direct discrimination have recently been confirmed. First, under Article 2 of the 2006 Directive, an instruction to discriminate against persons on grounds of sex is considered to constitute discrimination. This addition makes it possible to challenge, for example, the behaviour of employers drawing on the services of recruitment or temping agencies if they require candidates to be screened according to discriminatory criteria. Second, in recent case-law the Court of Justice ruled that the fact that an employer states publicly that he will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment[2], such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market (ECJ, 10 July 2008, Feryn, C-54/07). This solution also applies to cases of sex discrimination.

[2] within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000.

II. The concept of indirect discrimination

According to Article 2 of the 2006 Directive, indirect discrimination occurs “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”.

The Court had already indicated in its case-law that the principle of equal treatment excludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors wholly unrelated to sex discrimination (cf. ECJ, 13 May 1986, Bilka-Kaufhaus, C-170/84 and more recently, 6 December 2007, C-300/06, Ursula Voss).

The prohibition of indirect discrimination is intended to take account of the impact of rules, measures, actions and failures to act on groups of people identified by their membership of one or the other sex. This approach to the notion of discrimination is justified for a number of reasons. It is intended to thwart those who seek to bypass the prohibition of discrimination on grounds of sex by recourse to other criteria which are not prohibited but make it possible to achieve the same result. It also aims to implement equality between men and women in more concrete terms by permitting a challenge to choices and forms of organisation which, while their purpose is not to distinguish between men and women, have the practical effect of sustaining the disadvantage experienced by one sex.

Prohiiting indirect discrimination is based on the idea that we must delve beyond appearances to challenge what makes apparently neutral rules and behaviour have the effect of disfavouring one or the other sex. It reflects the idea that the same treatment, or an apparently neutral system or organisation, may have an unfavourable effect on the members of a particular sex because of previously existing differences between the two groups.

The point of departure in recgnising a case of indirect discrimination is the observation of a different, less favourable situation for the members of one of these groups.

The most common example, which elicited rulings from the Court in the early days of its case-law, is that of pay and employment conditions for part-time workers (ECJ, 31 March 1981, Jenkins, C-96/80, lower wage rate for part-time workers when all but one of these workers were women). One might conclude that less favourable treatment for part-time work constitutes indirect discrimination if the workers concerned are essentially women. Another example from ECJ case-law relates to the period of continuous employment required in order to contest an unfair dismissal: the effect of that condition was to place essentially women at a disadvantage, as in general they have served fewer years in the company (ECJ, 1999, Seymour-Smith, C-167/97).

The Court's case-law has argued that it is not absolutely vital to identify a criterion or condition as a result of which the male or female group is suffering a disadvantage. In the circumstances behind the Enderby case (ECJ, 27 October 1993, C-127/92), it ruled that indirect discrimination could result from the existence of collective bargaining agreements determining less favourable conditions of employment for one occupation, carried out almost exclusively by women, than for another, exercised predominantly by men.

One of the difficulties associated with the concept of indirect discrimination relates to the proportion of individuals of one sex who have to be affected before there can be a presumption of discrimination. Case-law from the European Court of Justice shows that statistical evidence is not always required if the difference in treatment is seen as being evidently to the detriment of one or the other sex (cf. for example ECJ, 2000, Kachelmann, C-322/98, when the Court conceded that it was common ground that part-time workers were far more likely to be women). There are a number of cases, however, where statistics are necessary. In the Enderby judgment (cited above), the Court referred to statistics showing "an appreciable difference". More recently the Court has required the difference in treatment to affect a "considerably" higher number of women than men (ECJ, Ursula Voss, cited above). As a consequence, the absence of statistics sufficiently demonstrating differences from a suitable comparison group makes it hard to identify indirect discrimination (cf, for example, on equal pay, ECJ, 31 May 1995, Royal Copenhagen, C-400/93).

As for using statistics, the Court has had occasion to offer some guidance on method. First, in order to ascertain whether the difference in treatment found between full-time workers and part-time workers affects a considerably higher number of women than men, a national court should take into account all those workers subject to the national rules in which the difference in treatment has its origin (cf. the judgment on Ursula Voss, cited above, para. 40). In principle, the Court tells us, it is the scope of those rules which determines the category of persons who may be included in the comparison (ECJ, 13 January 2004, Allonby, C-256/01, para. 73). Moreover, the Court lays down that the best approach to using statistics is to compare the proportion of men in the workforce affected by the said difference in treatment with the proportion of women in the workforce affected by it (ECJ, 9 February 1999, Seymour-Smith and Perez, C-167/97, para. 59).

The notion of indirect discrimination entails the idea of a balance that needs to be struck between, on the one hand, the needs of the person taking the measure or decision which has an unfavourable impact on the members of a particular sex and, on the other, the objective of non-discrimination. This substantiates the requirement for the fairly broad options available to justify apparently neutral measures. The matter of justification is one of the main difficulties presented by the notion of indirect discrimination. As Directive 2006/54 sets out, the disadvantage suffered by the members of one or the other sex does not constitute indirect discrimination if it can be "objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". In the case-law from the Court, the language used is slightly different: a justification for the different treatment experienced requires showing "whether there are objective factors wholly unrelated to sex discrimination" (cf. in particular the Ursula Voss judgment cited above). The ECJ has sometimes been very amenable to the justifications put forward by employers. For example, continous employment with a company, which in the Court's view gives rise to greater experience and competence, can justify higher pay, and hence essentially benefit men (ECJ, 17 October 1989, Danfoss, C-109/88).

III. Harassment and sexual harassment

The 2006 Directive defines harassment as occurring "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". The aim here is to prohibit any bad treatment linked to membership of one or the other sex.

Alongside this notion of harassment on grounds of sex, the concept of “sexual harassment” is described by the 2006 Directive as occurring “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”. This time the situation envisaged is that of a person becoming the object of unwanted sexual advances or one where the person doing the harassing hopes to obtain favours of a sexual nature. Unike the concept of harassment, that of sexual harassment does not appear to require both conditions simultaneously (violation of dignity and creation of a hostile environment). Creating a hostile environment is presented. rather, as a particular instance of violating dignity. Nevertheless, we have to admit that the boundary between harassment and sexual harassment is not clearly drawn. In neither case does proof of harassment require any comparison.

Unlike some national legislation, notably French, the law of the European Union addresses harassment and sexual harassment through the prohibition on discrimination (cf. Article 2 of the 2006 Directive). Discrimination, says the text, includes: “harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct”. This link with the notion of discrimination has the advantage that it justifies including the prohibition of harassment in the anti-discrimination directives. We might choose to see this as a question of competence rather than substance, as the notion of harassment has been defined fairly broadly in the law of the Union.