

Overview of existing EU legislation on equality and definitions of key concepts

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Presentation outline

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The presentation consists of three main parts:

- I. Overview of existing EU legislation, the progress from formal to substantive equality and the significance of the clarification of key concepts of equality in this process
- II. Direct and indirect discrimination – with special regard to the distinction between them, the difficulties of the distinction and the role of the distinction in the promotion of equality.
- III. Harassment – with the historic importance of the development of the concept of sexual harassment as a form of discrimination and with the development of the concept of harassment providing protection on various grounds and establishing the liability of the employer for the detrimental impacts of harassment at the workplace.

I. Overview of existing EU legislation

1. The crucial role of art. 119 (→ 141 in the Amsterdam Treaty, → 157 in TFEU)

Besides the commonly known background of article 119 in the 1957 Treaty providing for that men and women should receive equal pay for equal work and its role in triggering the development of the equality law of the European Union, its specific role in the development and progress of the text of the Treaty as well as the case law of the Court will to be underlined an important factor in the development of some of the basic concepts of

2. Article 13 of the Amsterdam Treaty (now Art. 19 of TFEU)

- a.) The new powers conferred on the Community and the overall value of the “Article 13 Directives”
- b.) From the prohibition of discrimination to the promotion of equal treatment
- c.) From formal equality towards substantive equality

3. General features of the development of key concepts of discrimination

- a.) Concepts of formal and substantive equality,
- b.) The conceptual link between direct/indirect discrimination on the one hand and positive action on the other.
- c.) Differences between the ‘symmetric’ and ‘asymmetric’ approach to equality and the issue of the hierarchy of prohibited grounds of differential treatment.

II. Direct and indirect discrimination.

The key concepts of the existing EU equality law are laid down now in a uniform phrasing directives 2000/43/EC (the Race Directive), 2000/78/EC (the Framework Directive) and Directive

2006/54 the recast directive replacing four, considerably amended former gender equality directives¹

1. Direct discrimination

The text of Article 2 (1) (a) of the Recast Directive (identical with the same concept in the Article 13 Directives):

Direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.'

a.) Elements of direct discrimination

- The concept of adverse treatment: the change from differential treatment to “less favourable” treatment
- The issue of comparator (the shift from required real to hypothetical comparator)
- Causality – required between the action and the sex (protected attribute) of the employee (“on grounds of” – objective criterion)
- The role of intent → no discriminatory intent (malice) required

b.) The role of statistical evidence in direct discrimination cases

c.) The criteria and scope of justification (exceptions) in direct discrimination cases

2. Indirect discrimination

The text of Article 2 (1) (b) of the Recast Directive (identical with the same concept in the Article 13 Directives):

Indirect discrimination: 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.'

a.) Elements of indirect discrimination

- The concept of adverse impact
- The difficulty of assessing the difference of the impact to men and women (whether there is a “particular disadvantage”)
- Causality – no causality required between the sex of the person and the employers action - causality required between the group (“class”) of persons belonging to one sex
- The role of intent – the distinction between indirect discrimination and masked (direct) discrimination

¹ Directive 75/117/EEC (the Equal Pay Directive), Directive 76/207/EEC as amended by Directive 2002/73/EC (the Gender Equality Directive in employment and vocational training), 86/378/EEC (gender equality in occupational social security schemes) as amended by Directive 96/97/EC, Directive 97/80/EC (Burden of Proof Directive) as amended by Directive 98/52/EC.

- b.) The role of statistical evidence with regard to indirect discrimination cases
- c.) Justification – plays no role → absorbed by the (lack of) causality.

1. Special issues regarding the distinction between direct and indirect discrimination

- a.) Difficulties with the transposition of EU provisions
- b.) The role of realities – the role of the sensitivity of the courts to the differences of adverse impact
- c.) Pregnancy – its pivotal role in the principal distinction between direct and indirect discrimination.
- d.) The role of the hierarchy of prohibited grounds
- e.) The distinction between the “individual” and “group” (“class”) character of direct and indirect discrimination.

4. Conclusion:

Demonstration of the promotion of equality through the concept of indirect discrimination.

III. Harassment

1. Brief history of the slow development of harassment as a justiciable form of workplace discrimination – outside and inside Europe

- a.) Sex discrimination: the road from unpunished individual misbehaviour through liability for private wrongdoing to the liability of the employer for harassment- as an accompanying risk present at the workplace.
- b.) The cautious development in Europe: soft law methods developing the right to dignity at the workplace.²
- d.) Explicit prohibition of harassment in the wake of “Article 13”.
 - Hard and deficient implementation
 - Scarce or no case law (except a few cases before the Public Service Tribunal of the EU)

2. Conceptual and practical problems of the prohibition of harassment as a form of discrimination.

a.) Efforts to give uniform definition of harassment on all grounds

The text of Article 2(1)(c) of the Recast Directive lays down:

² Commission Communication on the consultation of management and labour on the prevention of sexual harassment at work COM (1996) 378x. Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment (92/131/EEC).

'harassment': 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 definition of harassment is identical with the corresponding text in the two other equality directives³. There is one exception: the other two directives leave way to the definition of the concept of harassment that the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

- The concept of “unwanted” conduct
- The concept of “violating the dignity”
- Preconditions: intent and/or result
- The relationship with sex (and other protected attribute)
- Difference between ‘mobbing’ and ‘harassment’

b.) Efforts to separate harassment based on sex and sexual harassment

The text of Article 2(1)(d) of the Recast Directive lays down:

'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.'

- The reasons of separation
- Possible forms of sexual harassment
- The concept of “unwanted” conduct
- The role of workplace status and hierarchy

3. The liability of the employers for the discrimination by harassment

Article 2(2)(a) of the Recast Directive:

Sex discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct

- a.) The forms of the “less favourable” effect establishing liability of the employer
- b.) Causality: the scope of persons covered by the liability of the employer
 - victims of harassment
 - harassers whose conduct is imputed to the employer
- c.) No permitted exception or justification
- d.) Means available for employers in order to shield themselves from liability – ‘positive measures’ taken.

³ Except that the directive does not leave a way to the definition of the concept of harassment “in accordance with the national laws and practices of the Member States”, whereas this is allowed in the case of the other two directives (the Race Directive and the Framework Directive.)