



An Introduction to European Equality Legislation

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The evolution of European law

- From Article 119 of the Treaty of Rome to the Treaty of Lisbon



Community sources



Community sources

- Article 2 (ex. Article 1 TEU)

“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 pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”



Community sources

Article 3 (ex Article 2 TEU)

“It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.”



Community sources

- Article 8 (ex Article 3 TEC):
“In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.”
- Article 10
“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

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Community sources

- Article 19 TFEU (ex Article 13 TEC)

“Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

Community sources - Article 157 TFEU (ex Article 141)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- (b) that pay for work at time rates shall be the same for the same job.

Community sources - Article 157 TFEU (ex Article 141)

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and 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.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Community sources. EU Charter of Fundamental Rights

- Article 20 – Equality before the law
Everyone is equal before the law.
- 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.

Community directives

Dir. 75/117	Recast Dir. 2006/54	Equal pay
Dir. 76/207 (amended by Dir. 2002/73)	Recast Dir. 2006/54	Equal treatment in employment
Dir. 97/80	Recast Dir. 2006/54	Burden of proof
Dir. 86/78 (amended by Dir. 96/97)	Recast Dir. 2006/54	Equal treatment in occupational social security schemes



Community directives on equality between men and women

- Dir. 79/7
- Dir. 86/613
- Dir. 92/85
- Dir. 96/34
(amended by
Dir. 2010/18)
- Dir. 2004/113
- Social security
- Self-employment
- Protection for
pregnant workers
- Parental leave
- Goods and
services



Concepts

Direct discrimination

Direct discrimination

- Definition Article 2 Dir. 2006/54
“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



Direct discrimination: comparison

- Comparison is crucial to ascertaining whether discrimination has taken place: it has to be verified that one person (or group) has been treated less favourably than another on grounds of sex. The emphasis is on comparability between situations.



Direct discrimination: comparison

- The expression “is, has been or would be” broadened the scope of possible comparisons: the comparator may exist in the present or in the past or be hypothetical. It is not essential for a situation to be compared with that of a male employee in an identical job, and the comparison can refer to a former situation (the present job and the job previously performed by a man) or to a hypothetical one.

Direct discrimination: comparison

- An example of hypothetical comparison: ECJ, 30 April 1994, C-13/94: “where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.”



Direct discrimination: comparison

- Comparison may sometimes not be necessary: less favourable treatment of a pregnant woman

ECJ, 16 July 2009, C-357/07, Gómez-Limón

- Ms Gómez-Limón Sánchez-Camacho had been employed full-time by a hypermarket since 17 December 1986. From 6 December 2001 she took parental leave in the form of a reduction in her working hours by one-third. Her pay and the social security contributions made on that basis were cut by the same proportion. In 2004, she was found to be suffering from permanent invalidity as the result of an ordinary disease. In accordance with the Spanish rules, her pension entitlement was calculated on the basis of the contributions paid in over the eight years prior to the pension application, i.e. between 1 November 1998 and November 2004. Her pension had therefore been reduced because of the period when she worked part-time.
- Does the rule in question constitute indirect discrimination, in so far as women opt more frequently than men for periods of reduced working time?

ECJ, 16 July 2009, C-357/07, Gómez-Limón

- The Court can find no discrimination here. Discrimination consists in the application of different rules to comparable situations or the application of the same rule to different situations.
- In this case, the specific situation of an employee benefiting from parental leave cannot be compared to that of a man or woman who works on a full-time basis.



Direct discrimination: exceptions

- Art. 14(2) "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 the objective is legitimate and the requirement is proportionate."

Direct discrimination: exceptions

- Strict interpretation of exceptions. They must be limited and proportionate. Example: ECJ, 11 January 2000, C-285/98, Kreil



Concepts

Indirect discrimination



Indirect discrimination

- Definition Article 2 Dir. 2006/54
“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



The concept of indirect discrimination

- Discrimination is indirect if it occurs on grounds other than sex which appear to be objective and acceptable but in fact result in different treatment for one sex.



Indirect discrimination

- Unlike direct discrimination, indirect discrimination is not immediately obvious. It can only be indirectly attributed to the prohibited ground.
- An example: a measure affecting part-time workers

The concept of indirect discrimination

- i) the indirect nature of the discrimination:
 - a) the existence of a formally neutral measure, i.e. a measure or practice that is not directly or obviously inspired by a prohibited ground for discrimination;
 - b) a disparate effect resulting from that measure in the sense of an expressly prohibited ground, in other words, the measure is only apparently neutral, because in practice it entails a disadvantage for a group protected by a specific anti-discrimination rule;
- ii) absence of an objective justification:
 - a) being founded on a legitimate aim which has nothing to do with the prohibited ground, in other words, the measure must pursue a legitimate non-discriminatory aim;
 - b) proportionality of the measure in this context, in other words:
 - aa) the measure is appropriate (suitable) in the context of the legitimate aim;
 - bb) the measure is necessary (required) in this context.



The concept of indirect discrimination: a measure that places one sex at a particular disadvantage

- The disadvantageous effect must obtain a certain level.
- Indirect discrimination has occurred when a “considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure”.

The concept of indirect discrimination: a measure that places one sex at a particular disadvantage

- Indirect discrimination has also occurred if evidence reveals a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement (ECJ 9 February 1999, C-167/97 Seymour Smith).



Justification for indirect discrimination

- When the action has been taken by an employer, a measure must reflect a real need on the part of the company, and the different treatment must be based on factors other than discrimination of whatsoever kind.
- Economic justification is possible: “The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground” (ECJ, 27 October 1993, C-127/92)

Justification for direct discrimination

- “Since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;” (Cadman, 3 October 2006, C-17/05)



Justification for indirect discrimination

- In the case of Member State legislation, the rule in question must reflect a legitimate aim of the Member State's social policy that is not linked to sex discrimination
- A simple statement of a general nature is insufficient evidence that the aim of the measures in question has nothing to do with sex discrimination of any kind



Justification for indirect discrimination

- Although budgetary factors may underlie the Member State's choice of social policy and influence the nature or extent of the social protection measures it wishes to adopt, they do not in themselves constitute an aim of that policy and hence cannot be submitted as a justification for discriminating against one sex.



The difference between direct and indirect discrimination

- Direct discrimination can include cases where a rule based on an officially neutral criterion only affects one group.
- Indirect discrimination, on the other hand, applies in cases where an apparently neutral criterion has a less far-reaching impact which nevertheless achieves a certain level.



Concepts

Harassment

Harassment

- (6) “Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.” (Preamble to Directive 2006/54)

Harassment

- Definition Article 2 Dir. 2006/54
“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



Sexual harassment

- Definition Article 2 Dir. 2006/54
“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

Harassment and sexual harassment

- Both concepts relate to violations of a person's dignity and to the creation of an intimidating, hostile, degrading, humiliating or offensive environment. The big difference lies in the fact that harassment related to a person's sex means that this person is badly treated for being a man or a woman. Sexual harassment implies, rather, that a person is subjected to unwanted sexual advances or that the behaviour of the person committing the harassment is designed, for example, to obtain sexual favours.