

Anti-Discrimination Law in the European Union



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Outline

- Historical notes
 - Definitions
 - Legislative provisions / interpretation
through case-law
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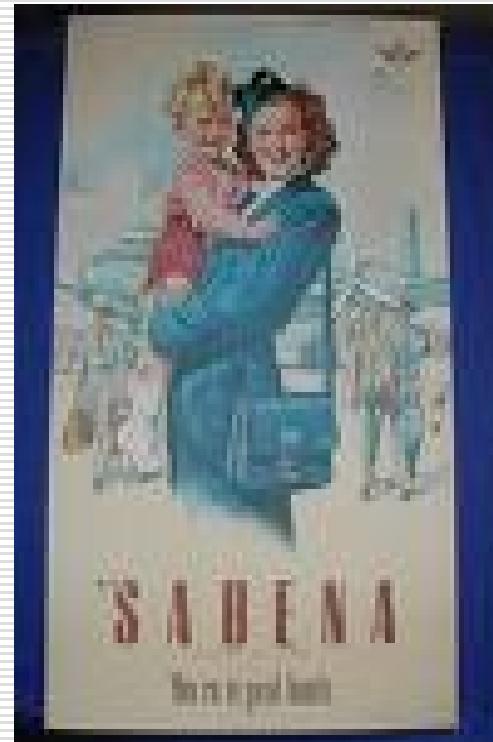
Sleeping Beauty waking up...

- Article 119 EEC
- Case 80/70 *Defrenne*
(no. 1) [1971] ECR 445;
Case 43/75 *Defrenne*
(no. 2) [1976] ECR 455;
Case 149/77 *Defrenne*
(no. 3) [1978] ECR 1365
- Directive 75/117 on
equal pay



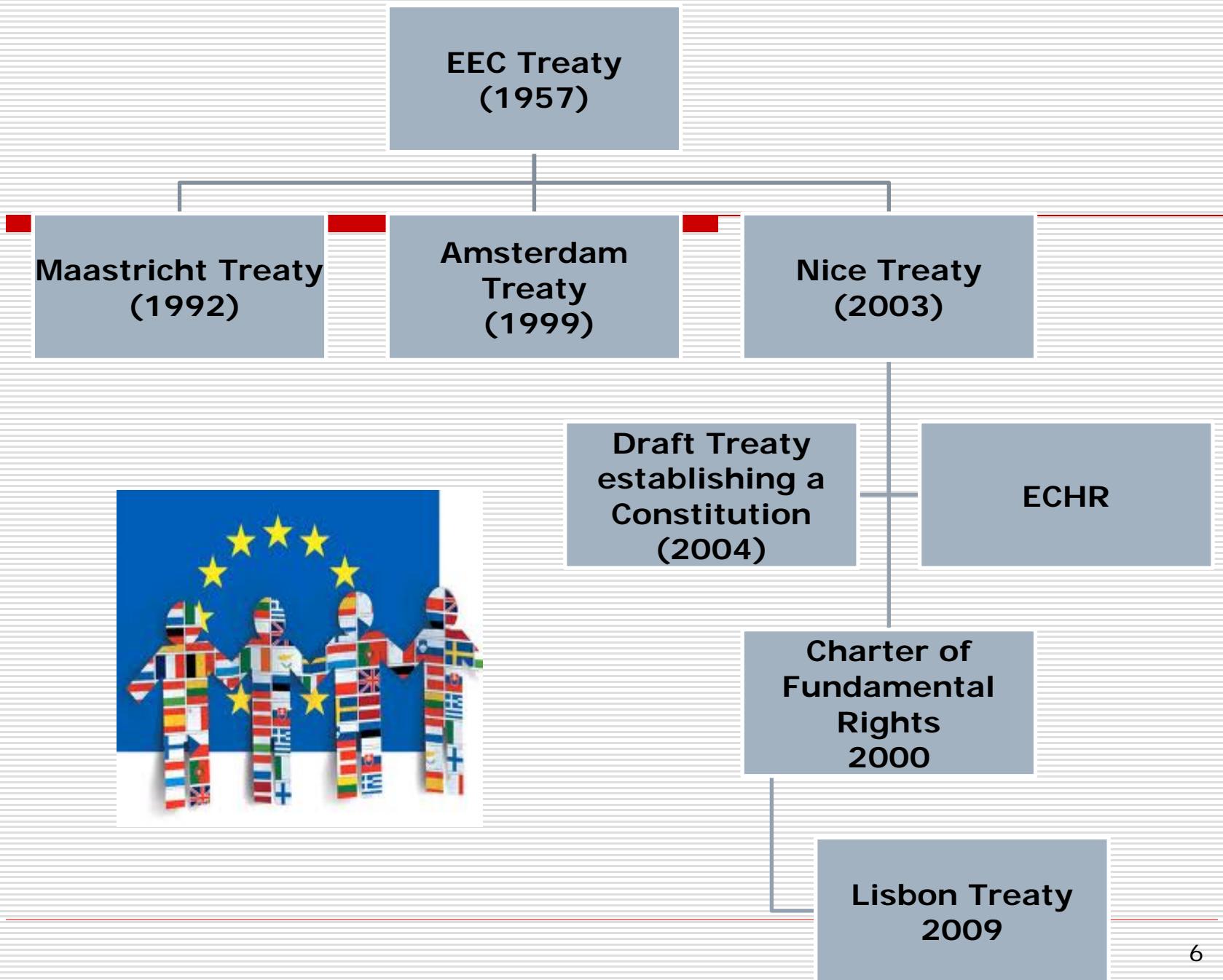
- Case 149/77 *Defrenne* (no. 3) [1978] ECR 1365: the twofold objective (economic and social) of Article 119 TEC

cf. C. Barnard, The Economic Objective of Article 119, in Hervey, O'Keeffe, Sex Equality in the European Union, 1996



From economic to social aim

- Case C-270/97
Deutsche Post:
The economic aim
is secondary to the
social aim.
 - Case C-442/00
Caballero
 - Case C-236/09
Test-Achats
Equality between men
and women is a
fundamental principle
of the European Union.
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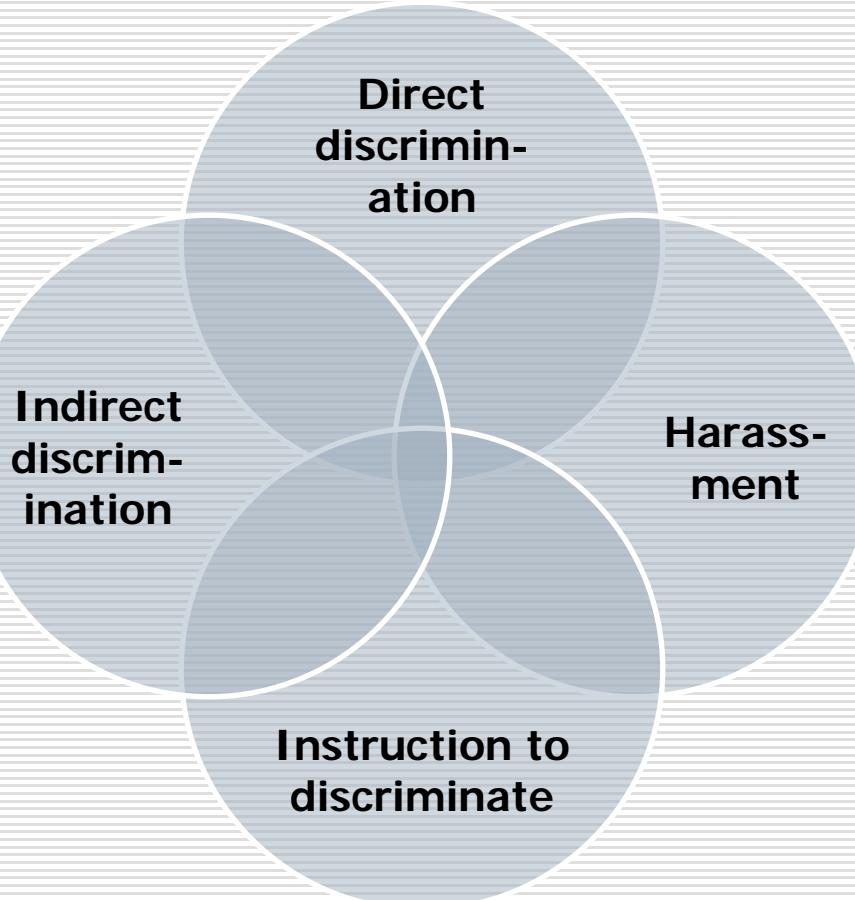


What is meant by anti-discrimination law?

“A body of provisions intended, through prohibitions, to prevent the fate of individuals being determined by natural or socially ascribed statuses (sex, ethnic origin, and so on) and at the same time, through positive obligations, to ensure that different subjective identities are equally protected.”

(translated from an article on “the horizontal effect of the principle of non-discrimination” published by M. Barbera in the “Revista Giridica dal Lavoro” in 2008)

The key concepts in anti-discrimination legislation



Direct discrimination

shall be taken to occur when one person is treated less favourably than another is, has been or would be in a comparable situation on grounds of their race, ethnic origin, age, disability, sexual orientation, religion or belief.

Indirect discrimination

shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular race, ethnic origin, age, disability, sexual orientation, belief or religion at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary.

Harassment

shall be deemed to be ... unwanted conduct related to grounds of race, ethnic origin, age, disability, sexual orientation, belief or religion with the purpose or effect of violating the dignity of a person and of creating a hostile, degrading, humiliating or offensive environment.

Article 2 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.

Article 3 TEU

The Union 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.



Article 6 (ex Art. 6 TEU)

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
 3. Fundamental rights, as guaranteed by the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.
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- The Charter of Fundamental Rights (“Nice Charter”), 2000. This has acquired binding legal effect with the Lisbon Treaty (2009).
But consider:
- Case C-540/03 *Parliament v. Council* [2006]
ECR I-5769
- Articles 20-23
- European Convention on Human Rights (ECHR)
 - Consider in particular its Article 14 (non-discrimination).

Article 19 (ex Art. 13 TEC)

1. 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.
 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.
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Article 157 (ex Art. 141 TEC)

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.

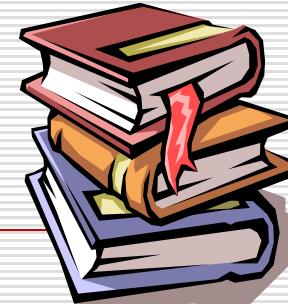
Equal pay without discrimination based on sex means:

- (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.

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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.
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Three generations of directives for combating discrimination?



First generation:
in the traditional
context of the
employment
relationship

**Second
generation:**
filling gaps left
by the earlier
directives

Third generation:
move into areas other
than the employment
relationship;
recast

- Equal pay
- Equal treatment
- Social security ...

- Equal treatment in
employment matters
- Racial equality

- Equal treatment in
access to goods and
services
- recast

Derived community law

Directive 75/117/EE on equal pay

What this directive basically does is make provision for the member states to include measures in their own legislation to exclude any form of discrimination with regard to pay on grounds of sex in order to extend protection to all jobs, not just mixed ones, i.e. regardless of whether they are performed by women or men.

This provision also establishes the possibility for every worker who feels she or he has been a victim of sexual discrimination in matters of pay to take legal action, emphasising moreover the protection against any form of abusive dismissal.



Directive 76/207/EEC on equal treatment in working conditions, access to employment, vocational training and promotion

As laid down in the directive, women who feel they have been discriminated against on grounds of their sex or family status may take legal action to establish their rights and to ensure that they are respected.

This directive was amended by Directive 2002/73 and then incorporated in Directive 2006/54 (recast).

Directive 79/7/EEC on equal treatment in matters of social security

The principle of equal treatment presupposes the absence of any form of direct or indirect discrimination on grounds of sex, in particular through references to marital or family status, specifically as regards the scope of social-security schemes and the conditions of access to them, the obligation to contribute to them and the calculation of contributions, including increases due in respect of a spouse and dependents and the conditions governing the duration and retention of entitlement to benefits.

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- **86/378/EEC Directive on equal treatment in occupational social-security schemes**
 - **86/613/EEC Directive on equal treatment in self-employment**

In conformity with the following provisions, this directive is intended to ensure the application in the member states of the principle of the equal treatment of men and women carrying out a self-employed activity or contributing to the performance of a self-employed activity, including agriculture, and also on the protection of women during pregnancy and motherhood as regards those aspects not covered by Directives 76/207/EEC and 79/7/EEC.

Its contents were amended and extended by Directive 2010/41 EU, which entered into force on 5 August 2012.

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- Directive 2006/54/EC 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)
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- Directive 92/85/EEC on measures to encourage improvements in the health and safety conditions at work of pregnant workers and workers who have recently given birth or are breastfeeding
- Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, amended by Directive 2010/18
- Directive 2010/18 EU





Directive 97/80/EC on burden of proof in cases of discrimination based on sex

- Directive 97/81/EC concerning the framework agreement on part-time work** concluded by UNICE, CEEP and the ETUC.
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation**
- Directive 2000/43/EC on racial equality prohibiting discrimination based on race or ethnic origin in the context of employment and occupation and also in access to protection and social security as well as access to goods and services**
- Directive 2004/113/EC on equal treatment between women and men in access to and supply of goods and services.**

The contribution from case-law: *inter alia* ...

Case C-13/94 *P v. S* [1996]

Case C-249/96 *Grant* [1998]

Case T-264/97 *D. v. EU Council* [1999]

Case C-222/84 *Johnston* [1986]

Case C-177/88 *Dekker* [1990]

Case C-243/95 *Hill and Stapleton*

C-1/95 *Gerster v. Freistaat Bayer* [1997]

Case 165/82 *Commission v. UK* [1983]

Case C-273/97 *Sirdar* [1999]

Case C-285/98 *Kreil* [2000]

Case C-421/88 *Hertz* [1990]

Case C-450/93 *Kalanke* [1995] ECR I-3051

Case C-409/95 *Marshall* [1997] ECR I-6363



Soft law and further initiatives

- Sexual harassment: Commission Recommendation 92/131 and Code, [1992] OJ L49/1
 - Care services: Council Recommendation [1992] OJ L123/16
 - Promoting solidarity between the generations COM (2007) 244 final
 - Communication by the Commission: **Roadmap for equality between women and men (2006-2010)**, COM(2006) 92 final
 - Communication by the Commission: Strengthened commitment to equality between women and men, COM (2010) 78 final
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Did Cinderella get to the ball?

