

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

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Structure of the Presentation

1. A brief historical introduction - economic and social rationales
2. Key sources – Treaty, Directives, General principles
3. The scope *ratione materiae* of EU sex equality law (Recast Directive)
4. The scope *ratione personae* of EU sex equality law (Recast Directive)
5. The concept of direct discrimination
6. The concept of indirect discrimination
7. Conclusions

1. Historical Introduction

- Article 119 of the Treaty of Rome (now A 157 TFEU) – ‘equal pay for equal work’
 - Economic rationale (level playing field for the textile sectors in France and Italy)
- Case C-43/75, *Defrenne 2*, and the emerging ‘social aim’
 - *[8]. Article 119 pursues a double aim. ... [12]. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community’.*
- Equal Pay Directive 75/117 EC, and Equal Treatment Directive 76/2007

continued

- Treaty of Amsterdam 1997 and the emergence of a fundamental rights rationale
 - ‘equal pay for work of equal value’
 - Introduction of Article 13 EC (now A 19 TFEU) – broader legal base
- The Charter of Fundamental Rights of the EU (2000 and 2007), Article 23:
 - ‘Equality between women and men must be ensured in all areas, including employment, work and pay’*
- Recast Equality Directive 2006/54

2. Key Sources

- Treaty

- Article 157 TFEU – equal pay, treatment, and positive action
- Article 19 TFEU – general legal base
- Article 8 TFEU – horizontal sex equality clause
- Article 21 CFREU - general
- Article 23 CFREU – sex equality specific

- Directives

- **‘Recast’ Equality Directive 2006/54**
- Access to Goods and Services Directive 2004/113
- Equal-treatment in self-employment Directive 2010/41
- Pregnancy Directive 92/85 and Parental Leave Directive 2010/18

continued

- Decisions of the CJEU
 - Legal effects of EU Treaties and Directives
 - Interpretation of key concepts
- General principle of EU Law (since Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753 – see also Case C-144/04, *Mangold* [2005] ECR I-9981)
- ECHR
 - Article 6(3) TEU
- ‘Constitutional Traditions common to MSs’
 - Article 6(3) TEU

3. The Material Scope

Directive 2006/54

- Four main areas of application
 - Equal Pay (A 4)
 - Equal treatment in occupational social security (A 5-13)
 - Equal treatment in employment and working conditions (A14-16)
 - Procedural matters (remedies and burden of proof, A 17-19)
- And some important general provisions and concepts
 - E.g. Positive action (A3); definitions (A2); victimisation (A24)

continued

Equal Pay (A 4)

- Equal pay for work of equal value
- Prohibits both direct and indirect discrimination
- Broad definition of 'remuneration'
- Prescribes 'gender neutral' criteria for job classification schemes

continued

Equal treatment in employment and working conditions (A 14-16)

- Prohibition of DD and ID in
 - Access to employment, self-employment, including selection and promotion
 - Access to training and work experience
 - Employment and working conditions (including dismissal and pay)
 - Trade union/professional organisation membership and activity
 - Notice G.O.R. exception in A 14(2)
- Maternity, paternity and parental leave protections

4. The personal scope

Equal Pay Provisions

- ‘workers’ (see case C-256/01, *Allonby*)
 - Equivalent to ‘worker’ concept under FMW

Equal treatment provisions of Dir. 2006/54

- Emphasis on ‘employment, self-employment, and occupation’

5. Direct Discrimination

A 2(1)(a) of the Recast Directive

‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’

- Comparator need not be employed at the same time (Case 129/79, *Macarthys*)
- Hypothetical comparators (except for equal pay claims - *Macarthys*?)
- Single Source of Discrimination? (Case C- 256/06, *Allonby*)
- Includes
 - Discrimination by association (C-303/06, *Coleman*)
 - Discrimination in job advertisement (Case 177/88 *Dekker*, C-54/07, *Firma Feryn*)
- No Justification – But G.O.R. A 14 (and positive action)

6. Indirect Discrimination

Article 2(1)(b) of the Recast Directive

‘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’

- ‘Would put’ – potential disparate impact is enough
- ‘Particular disadvantage’ – no longer insistence on ‘statistically relevant’ disadvantage (as in Case C-167/97, *Seymour Smith*)

6. *continued*

- Justification
 - Case C-170/84, *Bilka-Kaufhaus* – business need
 - Case C-197/92, *Enderby* - market forces
 - Case C-17/05, *Cadman* – length of service

7. Conclusions

- The most vital part of EU social law
- An area in ‘transition’
- Residual fragmentation of sources and concepts
- Remaining national variations

- Recommended Reading
 - C. Barnard, *EU Employment Law* (OUP, 2012)
 - E. Ellis and P. Watson, *EU Anti-Discrimination Law* (OUP, 2012)