



# EU Legislation on Gender Equality – Definition of Key Concepts

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# Outline

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# A. Introduction: Normative framework

## I. European primary law

- ▶ Since 1957: Principle of equal pay

**Article 157(1) TFEU (ex Article 141; ex Article 119 ECT)**

- ▶ Legislative competence of Parliament and the Council:  
**Art. 157(3) TFEU; Article 19(1) TFEU (ex Article 13 ECT)**
- ▶ Concept of equality: **substantive/material equal opportunities;**

*CJEU C-312/86 (Commission/France) of 25 October 1988:*

“to eliminate ... **actual instances of inequality** which may exist in the **reality of social life**”

# A. Introduction: Normative framework

## I. European primary law

- ▶ **Article 21(1), Article 23 Charter of Fundamental Rights;**
- ▶ **Article 33 Charter of Fundamental Rights:**

“The family shall enjoy legal, economic and social protection.

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.”

# A. Introduction: Normative framework

## I. European primary law

- ▶ Principle of non-discrimination as an integral part of the EU's **economic and social constitution**
- ▶ **Human rights aspects** of EU anti-discrimination law:

*CJEU Defrenne II – C-43/75 of 8 April 1976:*

“The principle that men and women should receive equal pay, which is laid down by Article 119, is one of the **foundations of the Community**. It may be relied on before the national courts. These courts have the duty to ensure the protection of the rights which that provision vests in individuals. [...]” (Summary)

# A. Normative framework

## II. International law

- ▶ Charter of the United Nations
- ▶ Covenants on Human Rights
- ▶ European Convention on Human Rights
- ▶ ILO Conventions 110 (1951); 111 (1958)
- ▶ Convention on the Elimination of All Forms of Discrimination Against Women 1979 (**CEDAW**)

# A. Normative framework

## II. International law

### Under **Article 1 CEDAW**

“the term ‘discrimination against women’ shall mean any **distinction, exclusion or restriction made on the basis of sex** which has the effect or purpose of impairing or nullifying the **recognition, enjoyment or exercise by women,** irrespective of their marital status, on a basis of equality of men and women, **of human rights and fundamental freedoms** in the political, economic, social, cultural, civil or any other field.”

# B. Legal bases

## I. Gender Directives

- 79/7/EEC of 19 December 1978 -> *social security*
- 92/85/EEC of 19 October 1992 -> *pregnant workers and maternity protection*
- Directive 2004/113/EC of 13 December 2004 -> *goods and services*
- 2006/54/EC of 5 July 2006 -> *employment and occupation*
- 2010/18/EU of 8 March 2010 -> *parental "leave"*
- 2010/41/EU of 7 July 2010 -> *self-employed persons*

# B. Legal bases

## II. Interpretation

- ▶ Obligation to **interpret national law in conformity with the directives**; in the event of doubts: reference to the CJEU, Article 267 TFEU
- ▶ Directives must be interpreted so as to **maximise their impact**;
  - C-29/69 (*Stauder*) [1969] ECR 419: Intention needs to be interpreted in the light of all the language versions
  - C-212/04 (*Adeneler*): Purpose needs to be interpreted in conjunction with recitals
- ▶ Obligation to **interpret directives in conformity with international law**:
  - C-335/11 and C-337/11 of 11 April 2013 (*Ring and Werge*), paras. 28 ff.;
  - C-320/11 of 22 November 2012, (*Digitalnet*), para. 39

# C. Key concepts

## I. Direct discrimination

Article 2 a Directive 2004/113/EC; Article 2 Directive 2006/54/EC; Article 3 Directive 2010/41/EC:

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

- ▶ Absolute prohibition of discrimination; no unwritten grounds of justification
- ▶ Concept of comparator
- ▶ Including hypothetical comparator

# I. Direct discrimination

## 1. "in a comparable situation"

- ▶ Pregnancy?

*CJEU C-32/93 (Webb) of 14 July 1994 [1994] ECR I-03567.*

- ▶ **Biological differences** are crucial,

Cf. recital 12, Directive 2004/113/EC:

"Accordingly, for example, **differences between men and women in the provision of healthcare services, which result from the physical differences between men and women**, do not relate to comparable situations and therefore do not constitute discrimination."

- ▶ However: lack of comparability only if there is actually a biological difference:

*CJEU on "breastfeeding leave" C-104/09 of 30 September 2010 (Álvarez)*

# 1. Direct discrimination

## 2. "on grounds of sex"

- ▶ Discriminating motive may be crucial

*CJEU (Dekker) of 8 November 1990 C-177/88, para. 17*

"... that the reply to the question whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer to the first question."

-> Distribution of the burden of proof

# II. Indirect discrimination

## 1. Definition

Article 3 Directive 2010/41/EU; Article 2 Directive 2006/54/EC; Article 2 Directive 2004/113/EC

“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**;

- ▶ Factual discrimination
- ▶ Group concept – no comparison of individual cases

# II. Indirect discrimination

## 2. “particular disadvantage”

- ▶ **Defining comparative group**; example of part-time work:

*CJEU (Bilka) C-170/84 of 13 May 1986 [1986] ECR 01607*

- ▶ Use of **statistics** as evidence? Admissible, but not necessary; not merely short-term phenomena:

*CJEU (Kenny) of 28 February 2013 – C-427/11*

Attention: gender stereotypes do not constitute “common experience”;  
cf. *CJEU (Lommers) C-476/99 of 19 March 2002 [2002] ECR I-02891*

- ▶ No ruling by CJEU when a difference in impact is “**considerable**”: e.g. if 8 % more women are affected?

*CJEU C-167/ 97 of 9 February 1999 [1999] ECR I-00623 (Seymour-Smith)*

# II. Indirect discrimination

## 3. Objective justification

- ▶ Some of the provisions in the directives are precise,  
Cf. for example recital 16 Directive 2004/113/EU; and also CJEU of  
*1 March 2011 - C-236/09*
- ▶ Established case-law of the CJEU:
  - Legitimate aim presented as justification must be gender-neutral!
  - Appropriate and necessary means: non-discriminatory alternatives?

*C-109/88 (Danfoss) (1989) ECR 3199; C-184/89 (Nimz) [1991] ECR I-297;  
C-17/05 (Cadman) of 3 October 2006; (Kenny) of 28 February 2013 –  
C-427/11*

# III. Harassment

- ▶ Article 2 Directive 2006/54/EC; Article 4 Directive 2004/113/EU; Article 3 2010/41/EC:

“unwanted conduct related to the sex of a person ... with the **purpose or effect of violating the dignity of a person**, and of creating an intimidating, hostile, degrading, humiliating or offensive **environment**;

- ▶ Any conduct
- ▶ However, materiality level: violation of dignity
- ▶ “purpose or effect”, i.e. no intention required / effect from the perspective of the person affected

# IV. Sexual harassment

- ▶ Article 2 Directive 2006/54/EU; Article 3 Directive 2004/113/EC; Article 3 2010/41/EC:

“ any form of unwanted verbal, non-verbal or physical **conduct of a sexual nature** ..., with the **purpose or effect** of violating the dignity of a person, **in particular** when creating an intimidating, hostile, degrading, humiliating or offensive environment”;

- ▶ Conduct of a sexual nature (perspective of objective observer);
- ▶ Only violation of dignity required, as indicated, for instance, by hostile environment

# V. Reasonable accommodation

## 1. Concept

- ▶ Explicitly specified in Article 7 Directive 2000/78/EC (Equal Treatment Framework Directive)
- ▶ Idea: **Adjustments** have to be made to achieve effective equal opportunities and prepare the ground for the applicability of the principle of equal treatment
- ▶ This idea is embraced by **Article 33(2) Charter of Fundamental Rights** and by **Directive 2010/41/EC**

# V. Reasonable accommodation

## 2. Example: Directive 2010/18/EU

Clause 6 No.1 Framework Agreement on Parental Leave:

“In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request **changes to their working hours and/or patterns for a set period of time**. Employers shall consider and respond to such requests, taking into account both employers’ and workers’ needs.”

# V. Reasonable accommodation

## 3. Modern anti-discrimination law

The approach is so effective because

- ▶ **it dispenses with the difficulty of proving unequal treatment;** structural disadvantages do not have to be proven, but are assumed to exist when a right to adjustments is granted; cf. recital 1.8. Framework Agreement on Parental Leave
- ▶ **it dispenses with reasoning based on typical gender roles**
- ▶ **the proportionality test** (*reasonableness*) is verifiable by examining specific circumstances
- ▶ the rights have **preventive** effect / anticipate gender-based difference in treatment

# D. Outlook

- ▶ Hypothesis: “Reasonable accommodation” will be a key concept of gender equality law in the future
- ▶ The effectiveness of this concept will mainly depend on how it will be practised:

In Germany, for instance, the Parental Leave Directive 2010/18/EU has not yet been fully transposed; national law needs to be interpreted in conformity with the Directive in order to bring to bear the adjustment rights laid down in Directive 2010/18/EU

Thank you very much for your  
attention!

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