

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

Direct discrimination, indirect discrimination,  
sexual harassment

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# OUTLINE

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- HARASSMENT AND SEXUAL HARASSMENT, A FORM OF DISCRIMINATION
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# INTRODUCTION: ORIGINS OF EQUALITY AND ANTI-DISCRIMINATION LAW

- The principles of equality and anti-discrimination are deeply anchored within EU law and the Treaties and have given rise to a solid base of EU case law and laws interpreted in the Member States.

Equality is considered a fundamental principle, recognized as such by the CJEU: “equal treatment between men and women is a fundamental right, part of the general principles of EU law which the Court must ensure the respect” (CJEC Defrenne III). Its legitimacy is reinforced by Article 21 of the EU Charter on Fundamental Rights.

In other words, equality is a condition for the legality of any EU instrument or any action of EU institutions and bodies. Member States must also abide by it. Anti-discrimination is at times a **more operational** concept (**linked to grounds**), as is the concept of harassment, both requiring **equality of treatment**.

# Introduction: Origins of European equality and anti-discrimination law

**How did the European anti-discrimination law framework develop? What part of this framework concerns the concepts of discrimination and harassment?**

Initially, the EU Treaty only covered sex discrimination relating to equal pay (Art. 119 et 141 EC, now Art. 157 TFEU) and discrimination based on nationality (Art. 12 EC, now Art. 18 of the Lisbon Treaty), applying to persons, goods and services, with the aim of removing barriers within the internal European market.

- Today we will see that the rules on equality and anti-discrimination in employment cover a very broad range of life events, often associated with sex, embracing the complexity of discrimination on the basis of gender, sexual orientation and family responsibilities.

# Introduction: Origins of European equality and anti-discrimination law

- It was not until the 1970s that, on the grounds of sex equality, European case law (CJEC Defrenne I of 25 May 1971, Defrenne II of 8 April 1976, C-43/75, and CJEC Defrenne III of 15 June 1978, C-149/77) started to build standards for the concepts applied in the legal anti-discrimination framework of the Member States.
- CJEU case law has also played a pivotal role in understanding equal pay when the work of men and women has been considered to be of equal value (as we will see).

# Introduction: Origins of European equality and anti-discrimination law

- The Treaty of Amsterdam of 1997, in its Article 13 (now Art. 19), gave further impetus to this framework by expanding coverage of antidiscrimination law to other grounds, prohibiting not only discrimination based on sex, racial or ethnic origin, but also that based on religion or belief, disability and age (Ring/Werge C-335/11, C-337/11), as well as sexual orientation (Hay, C-267/12 and CNCD, C-81/12).
- Maternity and parental rights are also covered: CJEC Sari Kiiski, C-116/06; CJEU Gassmayr, C-194/08; CJEU Danosa, C-232/09; Parvianien, C-471/08; Meerts C-116/08; Roca Alvarez C-104/09, Chatzi, C-149/10; 19 September 2013 **C-5/12** Betriu Montull

Two other cases on right to leave for surrogacy agreements (if legal C-167/12); if illegal in the country concerned (C-363/12), the right to maternity leave refused for commissioning mother (CJEU 18 March 2014)

# Introduction: Origins of European equality and anti-discrimination law

- Indeed, Article 13 of the Amsterdam Treaty invited “the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament” to “take appropriate action to combat discrimination...”
- The main directives covering the scope of employment were adopted:
  - Racial Equality Directive 2000/43 which covers race and ethnic origin (29 June 2000)
  - Employment Framework Directive 2000/78 which covers religion, disability, age and sexual orientation (27 November 2000)
  - **Recast Directive 2006/54 covering sex discrimination in employment (consolidating, among others, Directive 2002/73 and relevant EU case law)**
  - Revised Directive 2010/18/EU of 8 March 2010 on parental leave
  - Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

Before Article 13, the Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

# Diversification of the criteria invoked as sexual orientation which expose gender-linked stereotypes

- Growing body of case law on discrimination on the grounds of sexual orientation: CJEC Maruko, CJEU Römer and CJEU Hay 12 December 2013, case C-267/12; CNCD, C-81/12
- Differential treatment on the basis of sexual orientation relates not merely to employment as such but on how employment gives rise to benefits for dependents of the couple.
- The criterion of sexual orientation allows account to be taken of an emotional attachment or a social link. Echoing the account taken of parenthood and the discrimination that it gives rise to.

# Case law on equal pay and Directive 2006/54: understanding systemic pay discrimination

- The case law on equal pay has been decisive for understanding systemic discrimination based on the segmentation of the employment market by gender. Since the Enderby judgment (C-127/92) for example, and the 2006 Directive (pt. 8): “The principle of equal pay for equal work or work of equal value... consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women ”
- Likewise the 2006 Directive (point 9), strengthened by community case law of the CJEU: in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.

# Concepts of discrimination

- Direct discrimination
- Indirect discrimination

# Direct discrimination

- Definition: three prongs
- Where one person is treated less favourably than another:
  - - is
  - - has been or
  - - would be treated in a comparable situation
- Regardless of the criterion of discrimination used by European law

# Direct discrimination

- Where one person...
- **is treated less favourably in a comparable situation (first prong)**
- The question of the comparator does not always imply the actual existence of a comparator
- CJEC 8 Nov. 1990 Dekker, C-177/88
- In France, AFP A Soc. Decision **16 Dec. 2008, No. 06-45262**

# Direct discrimination

- Where one person...
- - has been treated less favourably in a comparable situation (second prong)
- CJEC 27 March 1980 Wendy Smith, C- 129/79

# Direct discrimination

- Where one person...
- - would be treated less favourably in a comparable situation (third prong)
- CJEC 30 April 1998, Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne **Thibault**.
- Equal treatment for men and women - Directive 76/207/EEC - Maternity leave - Right to an assessment of performance
- Thibault, C-136/95

# Direct discrimination

- **\*- Discrimination by association:**
  - Against a non-disabled employee because he or she is a carer of, or is otherwise associated with, a disabled person (CJEC, Case C-303/06 Coleman)
- **\*- Overt** (smoking gun)
  
- **\*- Discrimination without an identifiable victim**
- CJEC 10 July 2008, Case C-54/07 Feryn
  
- "There does not have to be a tangible victim. Public declarations, in and of themselves, can constitute the suspicion of discrimination and it is up to the employer to come up with proof to the contrary" (CJEC, Feryn case)
- **Appearance of discrimination** (CJEU 25 April 2013 CNCD, C-81/12)
- **\* Instruction to discriminate: CJEC Feryn (to please customers...)**
- **\* Harassment**

# Harassment and sexual harassment, a form of discrimination

- The situation 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”
- Directive 2006/54, Art. 2; Directive 2000/78, Art. 2

# Two kinds of HARASSMENT

- Harassment that creates a hostile environment (any prohibited criterion)
- “Quid pro quo” harassment (most often requests for sexual favours in exchange for professional advantage or just goodwill)
- In France, psychological harassment falls within the types of discrimination based on sex: Soc. 22 October 2014, No. 13-18362

# 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
- ...except if this provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

# Indirect discrimination

- CJEC 31 March 1981 Paula Jenkins, C-96/80
- CJEC 6 December 2007 Ursula Voss, C-300/06

CJEU 20 October 2011 Brachner, Case C-123/10

CJEU 17 July 2014 Leone, Case C-173/13

In France: judgments have followed in quick succession since 2007

## Indirect discrimination in national law: an explosion in case law

- Soc. 3 Nov. 2011, No. 10-20765
- Soc. 30 Sept. 2013, No. 12-14.752
- Soc. 12 Feb. 2012, No. 11-27689
- Soc. 6 June 2012, No. 10-21.499
- Soc. 3 July 2012, No. 10-23.013

# Crucial shift in burden of proof for discrimination

- Provided inter alia in Directives 2000/78 and 2000/43
- Article 10
- Burden of proof
- 1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
- In France, Article 1134-1 of the labour code and effective access to evidence
- CJEU 19 April 2012, C-415/10 Meister

# Exceptions to discrimination in the 2006 Directive

- Not all differential treatment constitutes discrimination:
- Genuine and determining **occupational requirement** (Directive 2006/54 Art. 14)
- **Positive action** (Art. 157 TFEU and see preamble to 2006 Directive, recital 22)
- **Protection of biological condition:** the Court of Justice has systematically recognised the legitimacy, with regard to the principle of the equal treatment, of **protecting a woman on the grounds of her biological condition during pregnancy and maternity**, and to take measures to protect maternity as a means of achieving real equality between the sexes. The present directive should thus be read without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (recital 24 and recitals 14/15 on the prohibition of discrimination following leave)

# Exception to discrimination No. 1: Genuine and determining occupational requirement

- Genuine and determining occupational requirement (Art. 4, Directive 2000/78 and Art. 14, Directive 2006/54)
- 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 its objective is legitimate and the requirement is proportionate.**
- Restrictive interpretation in CJEU Prigge, C-444/09

# Exception to discrimination No. 1: Genuine and determining occupational requirement

- Example: CJEC 26 Oct. 1999, Angela Maria Sirdar
- **Angela Maria Sirdar v. The Army Board and Secretary of State for Defence.**
- Equal treatment for men and women – Refusal to hire a woman as cook in the Royal Marines.
- C-273/97.

# Exception to discrimination No. 2: positive action

- Positive action (Art. 3, Directive 2006/54; Art. 5, Directive 2000/43; Art. 7, Directive 2000/78)
- CJEC Kalanke 17 October 1995, C-450/93
- CJEC Marshall 11 November 1997, C-409/95
- CJEC 28 March 2000 Badeck, C-158/97
- CJEC 6 July 2000 Abrahamsson, C-407/98

However, adoption in March 2011, by the European Council of Ministers of Social affairs, of the “European pact for equality between men and women” (2011-2020): promotion of equal participation of men and women in executive boards and at all levels of decision-making

# Exception No. 3: Maternity and parental leave

- This protection relates to health and safety issues which are particularly relevant to women, set out in greater detail in Directive 92/85. Linked with the protection of the mother's health after birth and the particular relationship between the mother and the child outside stereotypes on the role of women taken into account in CJEC Hofmann, C-184/83
- Today, the case law concentrates on adequate pay during pregnancy: for example, in cases of reassignment to a less well paid position during pregnancy (see CJEU Parviainen, 1 July 2010)
- Danosa, 11 November 2010, C-232/09; CJEU, 6 March 2014, Napoli, C-595/12; CJEU, 27 February 2014, Lyreco Belgium, C-558/13;

# Exception No. 3: Maternity and parental leave

- Parental leave:
- 2010 revised directive on parental leave: one month, not transferable
- CJEC 22 Oct. 2009 Meerts, C-116/08: part-time parental leave but lower compensation for dismissal, C-116/08; Roca Alvarez, C-104/09; CJEU Chatzi
- Maternity leave even without employee status:
- CJEU 11 Nov. 2010 Danosa, C-232/09
- In national law, the family situation also serves as a criterion  
Law on true equality of 4 August 2014: month not transferable to the other parent

# Conclusion: concepts require proof, effective remedies, follow-up, checks on legislation and protection of family responsibilities

- The concepts require **proof** of the discrimination: CJEU 21 July 2011 Kelly
- The concepts are valueless without **effective remedies and checks on compliance with laws** Interesting European case law on pregnant women: national legislation offering recourse in the event of dismissal of a pregnant woman is not discriminatory if the recourse is not less favourable than an ordinary case and European legal checks are not hindered: CJEC 29 Oct. 2009 Pontin, C-63/08
- **Role/authorities on equality**: recommendations to back up judicial and administrative case law: Défenseur des droits in France, etc.
- **Role of the Commission** in promoting equality and anti-discrimination in employment and emphasising gender mainstreaming and work/life balance as a parental issue and personal fulfilment with the blessing of the CJEU:
- “Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.” CJEC 17 June 1998 Kathleen Hill, C-243/95, point 42
- Also, on equality between the sexes see the “STRATEGY FOR EQUALITY BETWEEN WOMEN AND MEN 2010-2015”. In France, Law 2014-873 of 4 August 2014 on real equality between the women and men opts for a horizontal vision of the subjects.