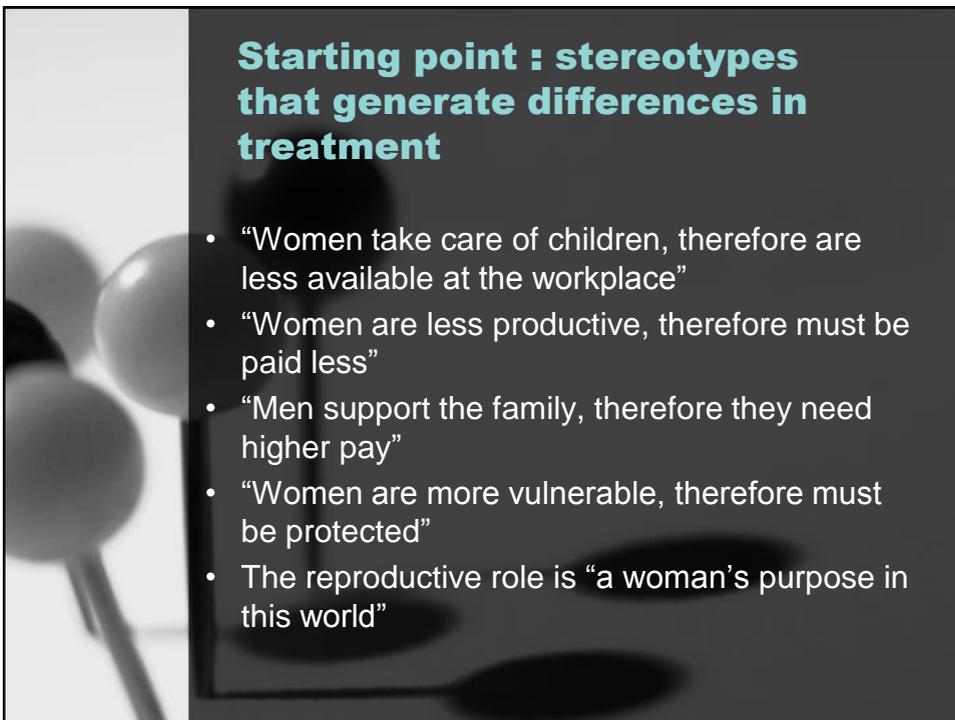


Overview of the existing EU legislation on gender equality and definition of key concepts

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Starting point : stereotypes that generate differences in treatment

- “Women take care of children, therefore are less available at the workplace”
- “Women are less productive, therefore must be paid less”
- “Men support the family, therefore they need higher pay”
- “Women are more vulnerable, therefore must be protected”
- The reproductive role is “a woman’s purpose in this world”



European Union Treaties

- Art. 3 (3) TEU: The EU combats social exclusion and discrimination and promotes social justice and protection, equality between men and women ...;
- Art. 8 TFEU: In all its activities, the ES shall aim to eliminate inequalities, and to promote equality, between men and women;
- Art. 10 TFEU: In defining and implementing its policies and activities, the EU shall aim to combat discrimination based on sex...;
- Art. 19 TFEU: The Council may take appropriate action to combat discrimination based on sex...;
- Art. 153 TFEU: (shared jurisdiction): EU shall support and complement the activities of the Member States – inter alia – in the field of equality between men and women with regard to labor market opportunities and treatment at work;
- Art. 157 (1) TFEU: 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.



European Union Charter of Fundamental Rights

The Charter bans discrimination, including gender-based (art. 21) and recognizes the right to equal treatment also outside employment (art. 23)



The Gender Equality Directives

- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
- Directive 2010/41/EC on the application of the principle of equal treatment between men and women in an activity in a self-employed capacity
- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services



The Gender Equality Directives

- Directive 92/85, regarding pregnant workers and workers who have recently given birth or are breast feeding
- Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security
- Directive 2010/18/EU implementing the revised Framework Agreement on parental leave



Key concepts

- Direct discrimination
- Indirect discrimination
- Harassment
- Objective reason
- Multiple discrimination



I. Direct discrimination

Shall be taken to occur where a person is treated less favorably **(1)** on ground of sex **(2)** than another is, has been or would be treated in a comparable situation **(3)**.



(1) Less favourable treatment

- What is a treatment? It could be a simple statement
- It can be a benefit, which is not provided for all
- Different doesn't necessarily means less favourable
- The intention - irrelevant



(2) Gender – as protected ground

- Race and ethnic origin
- Gender
- Religion or belief, disability, age, the coverage sexual orientation of the relevant



(3) The comparator

- **IS** – Present
(e.g.: in an equal pay dispute - how much is paid the comparator?)
- **HAS BEEN** – Past
(e.g.: how much has been paid the comparator?)
- **WOULD BE** – Virtual – Hypothetical comparator
(e.g.: how much would be paid the comparator?)



(3) The comparator

- In principle, the same employer.
However, Directive 2008/104 on temporary agency work:
comparison between employees of different entities (temporary worker and user)
- In principle, same occupation.
However, Enderby C-127/92 (logopedist/psychologist)

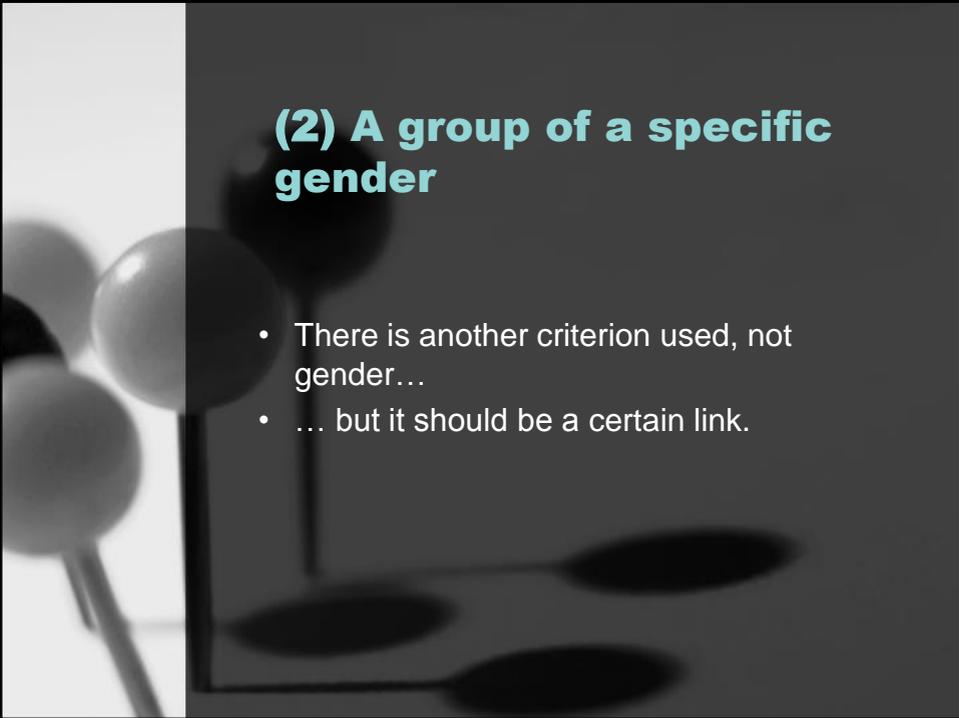


II. Indirect Discrimination

= an apparently gender-neutral provision, criterion or practice **(1)** that affects a group of a specific gender **(2)** in a significantly more negative way by comparison to others in a similar situation **(3)**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary **(4)**.

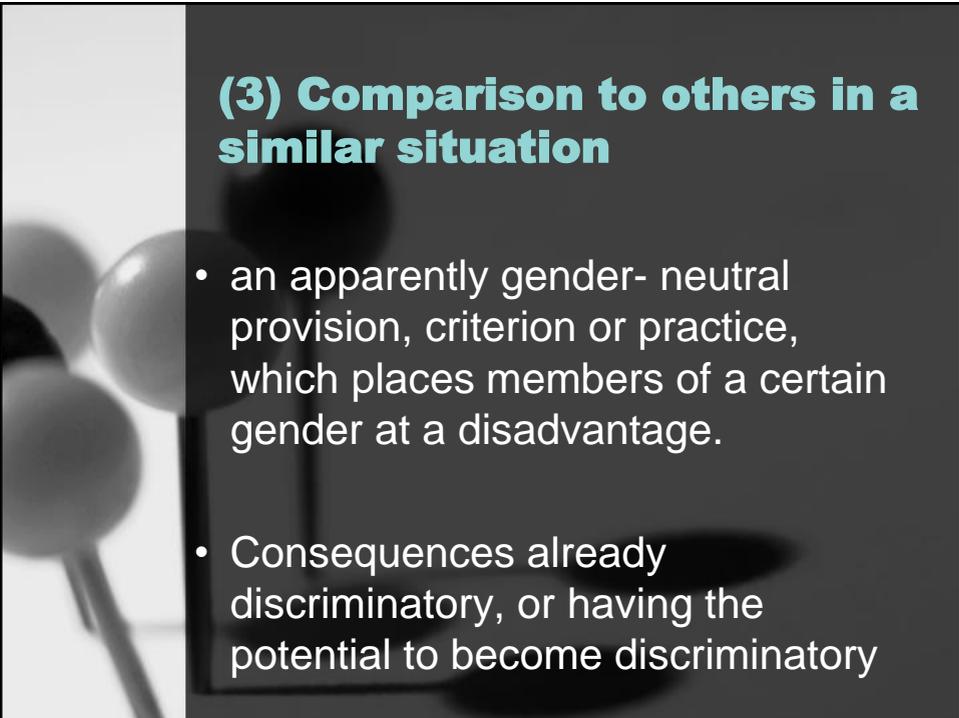
(1) Neutral rule or practice

- E.g.: Different rules applicable to part-time employees, compared to full-time – with an indirect impact on payment (Schönheit case)
- can result of a similar treatment of two persons being in different situations
- The law should distinguish between **the same** – that deserves equal treatment – and **the different** – that deserves unequal treatment



(2) A group of a specific gender

- There is another criterion used, not gender...
- ... but it should be a certain link.



(3) Comparison to others in a similar situation

- an apparently gender- neutral provision, criterion or practice, which places members of a certain gender at a disadvantage.
- Consequences already discriminatory, or having the potential to become discriminatory



(4) Objective justification

- Legitimate aim + appropriate and necessary means
- Maternity, but only proportionately
- The proportionality rule (e.g. C-207/98 – Mahlberg)
- The case of special domains: army, police, penitentiaries, security forces

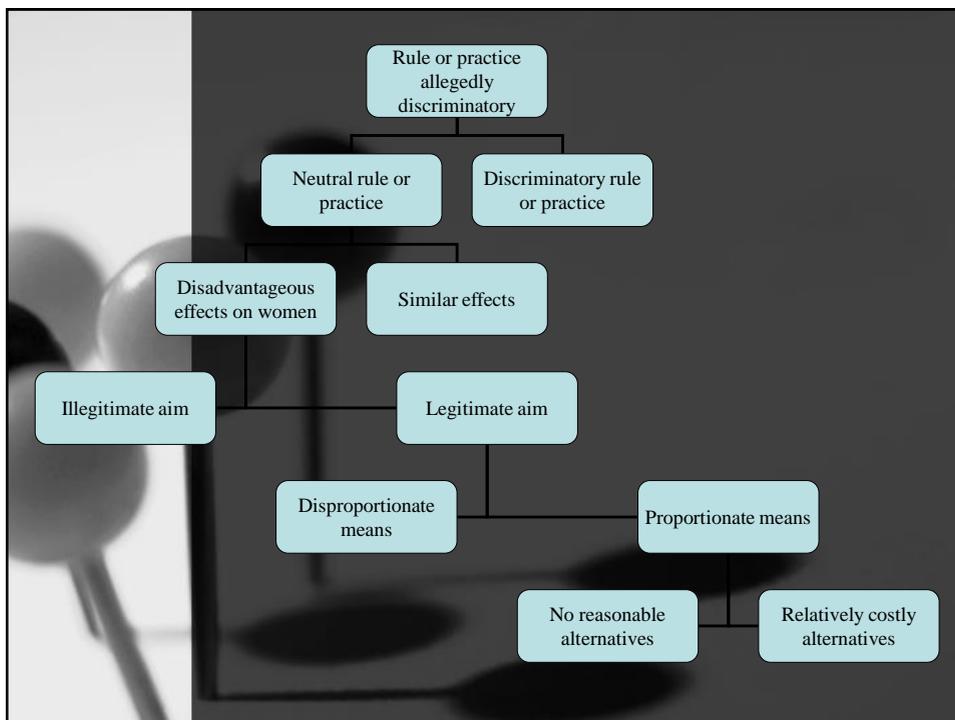


Unacceptable defense

- Savings of costs alone shall not, without other reasons, amount to a legitimate aim so as to justify discrimination
- External causes
- “Woman needs protection”, except for pregnancy time
- Lack of intention (‘I did not want to discriminate’). The victim doesn’t need to prove intent or fraud.

Example - *Bilka case*

- Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted **indirect discrimination against women**, since they made up the vast majority of part-time workers.
- The ECJ found that this could be indirect discrimination, unless the difference in enjoyment is justified. In order to be justified, it would need to be shown that 'the measures chosen by Bilka correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objectives pursued, and are **necessary** to that end.
- Bilka argued that the aim behind the difference in treatment was to discourage part-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing.
- The ECJ found that this could constitute a **legitimate aim**.
- However, it did not answer the question of whether excluding part-time workers from the pension scheme was **proportionate** to achieving this aim.
- The requirement that the measures taken be 'necessary' implies that it must be shown that **no reasonable alternative means exists** which would cause less of an interference with the principle of equal treatment.





III. Harassment

- Shall be deemed to be discrimination when an unwanted conduct related to a protected ground takes place with the **purpose or effect** of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- There is **no need for a comparator** to prove harassment.
- **Sexual harassment** = the situation where unrequited behavior with a sexual connotation is manifested physically, verbally or non-verbally, and where the object or effect is harming a person's dignity and especially creating an atmosphere that is intimidating, hostile, degrading, humiliating or offensive



IV. Instruction to discriminate

- Is deemed to constitute discrimination, even if no definition is provided by the directives.
- A person instructs another person to engage in direct or indirect discrimination or in harassment against another person



Specific case: equal pay

- Matter of confidential pay
- Benefits for uninterrupted activity
- Additional benefits for full-time employees
- Payment for overtime



Specific case: overtime

- A woman's lesser availability to work overtime deriving less income than men even in full observance of the "equal work, equal pay" principle.
- Unavailability for overtime **may not even be real**, but will continue to be presumed by the employer because it matches the patriarchal pattern of labor division in the family.
- Consequently it will not even matter what the reality is in each case; the employer already has a representation of women's unavailability for overtime work.

Specific case: collective bargaining

- Women's under-representation in collective bargaining – collective labor relations
- Most of European and national trade unions confederations have no women in their boards
- Disadvantageous contract arrangements or even precarious work conditions.
- Women's perspective is absent from collective bargaining contracts

Specific case: retirement

"culture of care" (children, elderly, persons requiring family assistance)



option for part time work, flexible working hours, suspension of activity, etc.



Lower pension



Less contribution time



Specific case: insurance

- Member States shall ensure that the use of gender as a factor in calculating bonuses and benefits, in the realm of insurance and related financial services, does not cause material differences in terms of premiums and benefits for the insured person (Directive 113/2004)



Equal treatment

- = having consideration of the different abilities, needs and aspirations of men and women and giving them equal treatment
- Having to choose between career and family is a false option
- The meaning is not that a career is more important than a family and children, but that those are equally important for both genders
- Priority employment for women exceeds the concept of equal treatment (Case C-450/93, Kalanke)



Equal treatment

- Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority.
- Awarding pay for uneven distribution of tasks in the family can lead to perpetuation of such uneven distribution
- ILO Convention 89/1948 banning night-shift work for women.
- Protection can result in discrimination. Any text about “woman’s protection” feeds the stereotypes about her vulnerability