EU Gender Equality Law

Definition of key concepts

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Droit des discriminations dans l’emploi et le travail,
2016, p. 852, Éditions Larcier (Bruxelles).

Origins of EU gender equality law in employment and occupation

• Treaty of Versailles – ILO (1919):
• “The principle of equal pay, without gender discrimination, for work of equal value.”
• ILO convention n° 100 (1951)

• Treaty (Rome, 1957): Art. 119 – women and men should receive equal pay for equal work
• Directive of 10 February 1975 - equal pay for work of equal value
• Directive of 9 February 1976 - equal treatment in employment
Origins of EU law

- Case law: *Gabrielle Defrenne v Sabena* judgements
  - ECJ 25 May 1971, I : direct effect
  - ECJ 8 April 1976, II : The principle that men and women should receive equal pay is one of the foundations of the Community
  - ECJ 15 June 1978, III : « respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure; elimination of discrimination based on sex forms part of those fundamental rights» (§ 26-27).

Treaty on European Union (TUE)

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 …, non-discrimination, …and equality between women and men prevail. (Art. 2)

- The EU shall “combat … discrimination and promote… equality between men and women” (Gender mainstreaming) (Art. 3.3)
Treaty on the functioning of the EU

- Art. 8 TFEU: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

- Art. 10 TFUE: In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex. (...). »

- Art. 19 TFEU: the EU has the competence to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”

- Art. 157 TFEU: the EU shall adopt measures aimed at ensuring 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.

Charter of fundamental rights of the EU

**Article 21 Non-discrimination**
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

**Article 23 Equality between men and women**
Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
Directives on equality between men and women

- Dir. 79/7 – social security
- Dir. 86/378 – occupational social security schemes
- Dir. 92/85 – safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding
- Dir. 96/34 – parental leave (European collective agreement)
- Dir. 97/80 – burden of proof (CJEU case law)
- Dir. 2002/73 – employment and occupation (including harassment)
- Dir. 2004/113 of 13 December 2004 – goods and services (access and supply)

**Dir. 2006/54 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)

- Dir. 2010/41 of 7 July 2010 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

Key concepts in EU law
The challenges of defining discrimination

- **Speaking the same language** (legal terminology helps to conceptualise discrimination in an objective way)
  
  “To name things wrongly is to add to the misfortune of the world”
  
  Albert Camus

- **Avoiding confusion** (distinctions, injustice, inequality, discrimination, etc.)
  - distinctions (distinctions may be legitimate)
  - unfavourable treatment (unfavourable treatment may be justified)
  - injustice (injustice is not always discrimination)

**Making use of legal means to detect discrimination** (identifying the facts as discrimination), **applying the right legal framework and taking action to eliminate discrimination**

Objective of the law

Absence of discrimination = equal treatment
General definition

- Discrimination may consist of:
  - the application of different rules to comparable situations or
  - the application of the same rule to different situations

(ECJ 30 June 1998, Mary Brown)

Discrimination is manifested through a measure that is:

- unfavourable (any management measure: access to employment, including promotion and training; conditions of work and employment, including pay, etc.)

- unjustified

- unlawful, linked to a criterion that must not be applied to this decision - sex (gender), nationality, "racial"/ethnic origin, religion, age, disability, sexual orientation.
Any discrimination is in itself an infringement of human rights

 Discrimination may be:
   I. Direct
   II. Indirect

I. – Definition of direct discrimination

where one person (a woman) is treated less favourably in a comparable situation,

than another (a man)
   – is (present concrete circumstances)
   – has been (successive concrete circumstances)
   – would be (hypothetical circumstances)

“Given the current situation (…), Member States should, in the first instance, aim at improving the situation of women in working life.”
(Dir., recital 22)
A person is treated less favourably than another is


- ECJ 1 July 1986, Rummler / Dato-Druck (237/85) (paras. 17, 25 and operative part): job classification system (need for several criteria)

- ECJ 17 October 1989, Danfoss (C-109/88): equal pay for work of equal value

- ECJ 27 October 1993, Enderby / Frenchay Health Authority and Secretary of State for Health (C-127/92) (paras. 13-14, 17-19, 22-25, 29, operative part): impact of collective bargaining and employment market in the pay fixation

- ECJ 31 May 1995, Specialarbejderforbundet i Danmark / Dansk Industri (C-400/93) (paras. 38, 43, 47, operative part 4): Assessment of the value of the work

- ECJ 26 June 2001, Brunnhofer (C-381/99) (para 80 and operative part): pay – assessment of work of equal value
A person is treated less favourably than another is

- ECJ 4 October 2001, Tele Danmark (C-109/00) (paras. 34, 39 and operative part): *protection of the employment of the pregnant worker in a fixed-term contract*
- ECJ 30 March 2004, Alabaster (C-147/02) (para 50, operative part 1): *pay increase during maternity leave*
- ECJ 3 October 2006, Cadman (C-17/05) (paras. 38-40 and operative part): *seniority – classification system – evaluation of the work*
- ECJ 26 February 2008, Mayr (C-506/06) (paras. 50, 52, 54 and operative part): *dismissal of an employee who was at an advanced stage of IVF treatment*

- CJEU 20 June 2013, Riežniece (C-7/12) (paras. 36, 54, 56 and operative part): *parental leave and assessment of work and for dismissal economic reasons (abolishment of post)*
- CJEU 6 March 2014, Napoli (C-595/12) (paras. 50, 51, operative part 3): *direct effect of Directives*
  - CJEU 16 July 2015, K. Maïstrellis (C-222/14) (§ §§ 41-53) : right to parental leave for a civil servant (man);
  - CJEU 17 December 2015, Arjona Camacho (C-407/14) (§ §§ 34-45) : reparation of the loss and damage (nature and amount of compensation)
  - CJEU 1 July 2016, Ornano (C-335/15) (§ §§ 30-34 et 40-44) : maternity leave and impact on pay remuneration
A person is treated less favourably than another is

• CJEU 19 October 2017, *Otero Ramos* (C-531/15) (§§ 55-76 and provisions): any less favourable treatment of a female worker because of breastfeeding constitutes a direct discrimination on grounds of sex. CJEU 19 sept. 2018 (C-41/17)

• CJEU 7 February 2018, *Maturi e.a.* (C-142/17 and C-143/17), temporary possibility for entertainment workers having reached the retirement age to continue working until the age formerly recognised by prior regulations for pension rights (Setting age at different levels, according to gender) – Direct discrimination based on gender

• CJEU 26 June 2018, *MB* (C-451/16), change of sex and retirement pension.

A woman can be subject to discrimination as regarding one or several grounds (EU) other than gender:

• Nationality
• Race
• Sexual orientation
• Age
• Disability
• Religion and belief
A person is treated less favourably than another has been

- ECJ 27 March 1980, Wendy Smith, C-129/79

A person is treated less favourably than another would be

- ECJ 30 April 1998, Caisse nationale d'assurance vieillesse des travailleurs salariés v. Évelyne Thibault (C-136/95) (paras. 32-33 and operative part):
  
  **Lack of yearly assessment of performance** - national rule which deprives an employee of the right to an assessment of performance (and of receiving a pay raise, a promotion) because of absence from the undertaking.  

  Woman absent on account of maternity leave?
A direct discrimination can also occur by:

- instruction
- harassment
- association
- intention
- multiple discriminations

Direct discrimination by instruction

Any behaviour consisting in instructing anyone to discriminate on grounds such as sex

- Requests by
  - clients (CJE 10 July 2008, Firma Feryn NV, etc.),
  - employees (ECHR 3 Oct. 2013, I.B. v Greece, etc.),
  - other persons,

  addressed to an employer (or responsible person)

- such requests constitute discrimination
- such requests cannot serve to justify discrimination
Direct discrimination by harassment

« Sexist » harassment: 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, offensive or disturbing environment

- Sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment

Direct discrimination by intention having discriminatory effects

CJEC 10 July 2008, Feryn Firma NV, Public statement by the director of an undertaking to the effect that he could not recruit persons of a certain racial or ethnic origin because of the reluctance of customers

The statements constitute a presumption of direct discrimination (dissuasive impact of the statements)

Situations in which the undertaking lets it be known that persons covered by one of the grounds (sex, race, age, etc.) will not be:
- recruited
- allocated to certain jobs,
- promoted to certain positions, etc.
Direct discrimination by association

When a person is unfavourably treated because of their association with a person covered by one of the grounds

CJEC 17 July 2008, S. Coleman v Attridge Law, C-303/06
a person suffered discrimination and harassment because of the disability of her child

“The prohibition of direct discrimination [...] is not limited to people who themselves have a disability.”

The principle of equal treatment applies not to a specified category of persons, but to the grounds set out in Article 1 of the Directive (§ 38).

Multiple discrimination (direct or indirect)

A person experiences “multiple” (or cumulative) discrimination when more than one ground is involved

(especially women:
- Directive 2000/43 recital 14
- Directive 2000/78 recital 3)

CJEU 19 April 2012, Galina Meister, C-415/10
discrimination on grounds of age, sex and ethnic origin suffered during a recruitment procedure
Direct discrimination - derogations

• In principe: impossible - ECJ 8 November 1990, Dekker

• By way of an exception (interpreted strictly): difference in treatment does not constitute discrimination when a characteristic (associated with one of the grounds) constitutes a "genuine and determining occupational requirement" by reason of the nature of the activities or the context in which they are carried out
  – If this is provided by the Member State
  +
  – as regards access to employment (of particular activities)
  +
  – if the objective is legitimate and the requirement is proportionate

• For transparency, under the control of the Commission and the judge:

  - ECJ 30 June 1988, Commission v France, C-318/86, paras. 24-27
  - ECJ, 26 October 1999, Angela Maria Sirdar v. The Army Board and Secretary of State for Defence (C-273/97, paras. 15-16, 29-31, operative part)
II. - Indirect discrimination

- **provision or practice** applied (by the company…)
- **apparently neutral** (regarding sex – or another protected ground)
- putting persons of one sex at a **particular disadvantage** (compared with other persons of the other sex) – effect

- **unless** the entity (company…) applying the provision or practice proves that it is
  - objectively **justified** by a legitimate aim (justification)
  - and that the means for achieving it are appropriate and necessary (**proportionality**)
Indirect discrimination: a concept and a method

ECJ 31 March 1981, Jenkins / Kingsgate (96/80) (paras. 11-15, 17-18, operative part): *part-time workers, hourly rate of pay*

ECJ 13 May 1986, Bilka / Weber von Hartz (170/84) (paras. 20-22, 31-37, 43, operative part): *part-time workers, occupational pension scheme*

ECJ 7 February 1991, Nimz / Freie und Hansestadt Hamburg (C-184/89) (paras. 9-10, 15, operative part): *part time workers, career development*

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Indirect discrimination: a concept and a method

ECJ 9 February 1999, Seymour-Smith and Perez (C-167/97) (paras. 50, 65, 76-77, operative part 3-5): *assessment of national legislation (dismissal)*

ECJ 20 Mars 2003, Kutz-Bauer (C-187/00) (paras. 50-63, operative part 1): *budgetary considerations cannot justify a difference in treatment*
Indirect discrimination: a concept and a method

ECJ 10 March 2005, **Nikoloudi** (C-196/02) (para 57, operative part 2): *statutory exclusion from appointment as an established member of staff of part-time workers*

ECJ 6 December 2007, **Ursula Voβ** (C-300/06) (para 44 et operative part): *part time employees, rate of pay for overtime*

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Indirect discrimination: a concept and method in progress

- **CJUE 18 October 2017**, **Μαρία-Ελένη Καλλίρη** (C-409/16),
  - Minimal height requirement of 1m70 for admission of applicants to the police academy entrance exam;
  - This regulation puts a far greater number of women at a disadvantage than men, and would appear neither suitable nor necessary in achieving its legitimate objective

- **CJUE 9 November 2017**, **María Begoña Espadas Recio c/ Servicio Público de Empleo Estatal (SPEE)** (C-98/15), unemployment compensation for part time employees

(…)

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Positive action

Indirect discrimination invites the adoption and implementation of measures for positive action
The « Member States may maintain or adopt positive measures with a view to ensuring full equality in practice between men and women in working life » (Art. 157 (4) TFEU, Recital 22 and Art. 3 Dir 2006/54)

Actions:
– to compensate (recruitment, pay, training, promotion, etc.)
– to prevent disadvantage (training, etc.),
for the benefit of persons who have suffered discrimination or belong to a group that has suffered discrimination on one of the grounds

Positive action measures limited by the CJEU

“saving clause” for persons meeting other criteria

- CJEC 17 October 1995, Kalanke / Freie Hansestadt Bremen (C-450/93) (§ 18-19, 21-24 and operative part)
- CJEC 11 November 1997, Marschall / Land Nordrhein-Westfalen (C-409/95) (§ 35 and operative part)
- CJEC 28 March 2000, Badeck et al. (C-158/97) (§ 38, 44, 55, 63, 66 and operative part)
- CJEC 6 July 2000, Abrahamsson and Anderson (C-407/98) (§ 53-62, operative part 3)
Access to Relevant Documents


  - Case-law from 1954 to 2009: European Community (EEC/EC) B-15 Social policy – B.15.1
  - Case-law from 2010: Internal Policies of the European Union – 4.14 Social policy 4-14.01.02

European Commission [http://ec.europa.eu/social](http://ec.europa.eu/social)