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’.

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
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
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)