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

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Pr Jean-Philippe Lhernould, University of Poitiers (FR)
Jean-philippe.lhernould@univ-poitiers.fr

LEGAL INSTRUMENTS
Primary law

• **Art. 3(2) TEU:** "The Union shall promote ... equality between women and men"

• **Art. 157 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"
  — Direct effect! (ECJ Defrenne II, case 43/75)

• **Art.19 TFEU:** "the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex"
  — No direct effect (ECJ Bartsch, case C-427/06)

• **Art.10 TFEU:** In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex

• **Charter of Fundamental Rights of the EU (Art. 21/23):** "Equality between men and women must be ensured in all areas, including employment, work and pay"; "any discrimination based on any ground such as sex..."
  — Direct effect? (pending cases before ECJ)

Secondary law

• Directive 2006/54/EC of the EP and of Council 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
  • Repeals directive 76/207, 75/117, 86/378, 97/80
  • Access to employment, including promotion, and to vocational training
  • working conditions, including pay
  • occupational social security schemes

In principle, no direct effect! But...
Secondary law

• Social security
  – Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security

• Self-employed workers
  – Directive 2010/41 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

• Goods and services
  – Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (e.g. insurance contracts)

Cases of the Court of Justice

• Very active role for the promotion of effective equality of treatment
  – Mainly through preliminary ruling procedure
  – Mix of primary/secondary law
  – At the origin of key concepts and principles: concept of indirect discrimination, burden of proof, etc.

• Case law codification by Directive 2006/54
CONCEPT OF DISCRIMINATION

Definitions

• "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation

• "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, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary
Definitions

• Discrimination includes
  – harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct
    • 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
    • (sexual harassment) where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect...
  – instruction to discriminate against persons on grounds of sex

Indirect discrimination

• Provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (2(1), Dir. 2006/54)
  • ECJ has recognised that the Member States have a broad margin of discretion in defining their employment policies
  • However, mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough
  • Budgetary considerations do not in themselves justify discrimination (ECJ Steinicke, C-77/02)

• Justifications are assessed in a softer manner when the difference of treatment comes from a company regulation
  • A department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking (ECJ Bilka Kaufhaus, 170/84)
  • What if the difference of treatment is provided by a collective agreement?
Indirect discrimination

• Are legislative provisions which derogate from the principle that an employer must continue to pay an employee during illness in the case of employed workers whose regular period of work does not exceed 10 hours a week or 45 hours a month compatible with EU law?
  
  • it is clear that in percentage terms considerably less women than men work the minimum number of weekly or monthly hours required to entitle an employee to the continued payment of wages in the event of inability to work due to illness
  
  • This provision results in discrimination against female workers in relation to male workers and must, in principle, be regarded as contrary to the aim of Article 157 TFUE.
  
  • The position would be different only if the distinction between the two categories of employees were justified by objective factors unrelated to any discrimination on grounds of sex (ECJ Rinner-Kühn, case 171/88)

Indirect discrimination

• Puts the emphasis on:
  
  – Choice of the comparator
    • Ex. 1 – can a female employee be compared to a male employee from another company?
    • Ex. 2 – Can pharmacists be compared to speech therapists?
  
  – Protection of workers with precarious jobs, who often are mainly women (part-time/fixed-term contracts)
    • Statistics are important but not necessarily decisive
    • Ex. lower hourly rate for overtime when applied to part-time workers
  
  – « gendered activities » (nurses, social workers, administrative work, ingeneers...)

• Key question: justification of the difference of treatment
RIGHT TO EQUAL PAY

• “The economic aim pursued by Article 119 of the Treaty (157 TFEU), namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right” (ECJ Schröder, case C-50/96)
Concept of equal pay

• Broad concept
  – «‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer” (157(2) TFEU + Art. 2(1), Dir. 2006/54)

  • E.g.: maintain of salary in case of sickness (ECJ Rinner-Kühn); company pensions (ECJ Barber, case C-262/88); civil servant pensions (ECJ Griesmar, case C-366/99); severance grant paid upon termination of contrat (ECJ Kowalska, C-33/89)...

• Equal work or work of equal value (157 TFEU+ Dir. 2006/54)
  – It is necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work.
  – It is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those concerned, equal value can be attributed to them (ECJ Brunnhoffer, C-381/99)

• Examples of relevant criteria of distinction
  – seniority (ECJ Cadman), degrees and training, working flexibility (ECJ Danfoss), physical effort (ECJ Rummier)
Concept of equal pay

- Remedies
  - Application to members of the group disadvantaged by that discrimination the same arrangements as are applied to other employees (ECJ Nimz, case C-184/89)
  - Unless limitation in time of the ECJ judgment, harsh consequences on public budgets when this rule applies to publicly funded pension schemes!
    - It is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (ECJ Griesmar)
Field of protection

- Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion
- Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience employment and working conditions, including dismissals
- Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession
- A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her (Art. 14/15, Dir. 2006/54)

Pregnancy and maternity

- Combination of Dir. 2006/54 and Dir. 92/85 (safety and health of pregnant workers, workers who have recently given birth and women who are breastfeeding)
  - The protection of women in relation to maternity is designed to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (ECJ Hofmann, 184/83)
  - On the contrary, measures designed to protect women in their capacity as parents, which is a capacity which both male and female workers may have, cannot find justification in EU law (ECJ Griesmar, C-366/99)
Pregnancy and maternity

• Dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex (ECJ Webb, C-32/93)
• a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer would suffer (ECJ Dekker, C-177/88)
• Dismissal cannot be justified even if she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded (ECJ Tele Danmark, C-109/00)
• Non-renewal of a fixed-term employment contract, provided that it is proved that this was due to reasons connected with the pregnancy, also constitutes direct discrimination on grounds of sex (ECJ Melgar, C-438/99)
• national rules which deprive a woman of the right to an assessment of her performance and, consequently, to the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity leave (ECJ Thibault, C-136/95)

Occupational requirements

• As regards access to employment, a difference of treatment 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
  – Ex. 1 - exclusion of women from service in special combat units such as the Royal Marines may be justified (ECJ Sirdar, C-273/97)
  – Ex. 2 - a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services is not justified (ECJ Kreil, C-285/98)
Positive measures

- Member States may maintain or adopt measures with a view to ensuring **full equality in practice** between men and women in working life (157 TFUE + Art.3 Dir. 2006/54)
  - To maintain or to adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers
  - Ex. 1 - national rules which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, are not compatible with EU law (ECJ Kalanke, C-450/93)
  - Ex.2 - a scheme set up by a Minister to tackle extensive under-representation of women within his Ministry under which a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, is compatible with EU law (ECJ Lommers, C-476/99)
Burden of proof

• Member States take such measures as are necessary 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.

  • Where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex (ECJ Enderby, case C-127/92)

Burden of proof

• How can an employee who claims to be discriminated have access to documents held by the employer (pay slips, evaluation doc...)?

  • EU law does not entitle a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process (ECJ Meister, C-415/10)
Defence of rights

• Member States ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them (Art. 17, Dir. 2006/54)
  • the 15-day period for bringing an action for nullity and reinstatement by a woman who was dismissed while pregnant is not compatible with EU law (ECJ Pontin, case C-63/08)

Remedies

• Member States introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered (Art. 18, Dir. 2006/54)
  • A legislation which denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, constitutes less favourable treatment of a woman related to pregnancy (ECJ Pontin)
Victimisation

• Member States introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment (Art.24, dir. 2006/54)