



Gender equality law

Key concepts

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BRIEF REVIEW OF LEGAL INSTRUMENTS

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Treaty and Charters



- **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" (§1) + "The European Parliament and the Council (...) shall adopt measures to ensure the application of the principle of equal opportunities and 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" (§3)*
 - 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..."*

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Directives



- Directive 2006/54/EC 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

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Court of Justice



- Very active role for the promotion of effective equality of treatment
 - Mainly through preliminary ruling procedure
 - Designed key concepts/rules: **direct discrimination, indirect discrimination, burden of proof**, etc.
- **Case law codification** by Directive 2006/54 (+ Directive 2023/970 on “pay transparency”)

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DIRECT DISCRIMINATION

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Definition



- “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**
 - Gender is an overt/explicit criterion
 - Employer wants to hire a man for a job requiring physical strength
 - Women are granted a day off for “back to school” day
 - Social security advantage is reserved to women
 - Criterion looks neutral but is inseparable from gender
 - national rules which permits an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men [C-356/09, Kleist]

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Identical/comparable situation (1)



- **Discrimination only if the men and women are in identical or comparable situations**
 - Comparability appreciated with regard to the criterion used
 - Example: social plan (negotiated by social partners) fixes age giving entitlement to a “**bridging allowance**” at 50 for women and 55 for men
 - Why? because women were entitled to an early retirement pension under the statutory scheme from the age of 55, whereas 60 for men
 - **No direct discrimination** = male workers are **not in a situation identical** to that of female workers in the same age group **in terms of the likelihood of unemployment** [C-19/02, Hlosek]

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Identical/comparable situation (2)



- **Flexible perimeter of gender comparability**
 - National level (e.g. statutory social security scheme)
 - Group of companies (if there is one single source of regulation, e.g. a group company agreement), company level...
 - As long as there is a “single source”
- **Hypothetical comparator (a) / past comparator (b)**
 - (a) Company / department only composed of women
 - (b) e.g., Comparison with a male who used to be employed

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Identical/comparable situation (3)



- **Comparability is not always required**
 - Where adverse treatment is relating to **pregnancy**
 - “dismissal of a female worker on account of pregnancy constitutes direct discrimination on the grounds of sex” [case C-506/06, Mayr]
- Adverse treatment for **transsexuals**
 - Transgender women: not eligible to a survivor’s pension since not married to partner...however marriage not allowed / **marriage condition = discrimination on grounds of sex** [C-117/01, KB]
 - person dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment [C-13/94 , P & S]

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Occupational requirement (1)



- No discrimination if “**occupational requirement**”: a difference of treatment based on a characteristic related to sex is not a discrimination where, **by reason of the nature of the particular occupational activities**, such a characteristic constitutes a genuine and determining occupational requirement ” (Art. 14(2) Dir. 2006/54)
 - “The exclusion of women from service in **special combat units** may be justified by reason of the nature of the activities and the context in which they are carried out” [case C-273/97, Oct. 1999 - Sirdar] = still valid?

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Occupational requirement (2)



- **Restrictive interpretation**
 - a) Employer wants to hire a man because because “women are always in a bad mood”, “too emotional for this type of job”, “won’t be enough available for a leading position” or “are likely to get pregnant in the middle of the project”
 - b) Employer wants to recruit a woman in a beauty salon (“that’s the clients’ wishes to be taken care of by a (young) woman”)
 - c) Social security advantage is reserved to women because statistics show they raise children and have a fragmented career
- **distinguish real occupational requirements from stereotypes / habits**
 - Recruitment of a female actor for a movie to play a female character is OK, but is it OK to recruit only men to work for a funeral company if that is the “custom”?

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INDIRECT DISCRIMINATION

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Definition (1)

- “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
- “Article 119 of the EEC Treaty is infringed by a **department store company which excludes part-time employees from its occupational pension scheme,**
 - where that exclusion **affects a far greater number of women than men,**
 - unless the undertaking shows that the exclusion is based on **objectively justified factors unrelated to any discrimination on grounds of sex** [case 170/84 Bilka-Kaufhaus]

Focus on the effect of the measure, irrespective of the intention

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Definition (2)



- **Step 1: identifying two gendered groups of comparison around a neutral criterion**
 - one mainly composed of men, the other one mainly composed of women
 - Freedom to make up groups as long as they are in a comparable situation
 - Purpose: **identification of a “particular disadvantage” for one of the two groups** (genders) although they are in a comparable situation
- **Step 2: finding out whether there a justification to the neutral criterion**
 - **“Objectively justified factors unrelated to any discrimination on grounds of sex”** [case 170/84 Bilka-Kaufhaus]

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Groups of comparison (1)



- **All men and women**
 - Of a social security scheme, of a country (all workforce) company...
- **Men and women working in the same company / department / group**
 - Comparison between full-time / part-time employees
 - Comparison between cleaners (mainly women) and waiters (mainly men): pay difference
 - Comparison between leave for military service (men) and parental leave (women)?

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Groups of comparison (2)



- **Groups chosen must be in a comparable situation with regard to the rule discussed**

- “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” [case C-127/92 Enderby : **speech therapist v. pharmacist**]

National courts have discretion over
identification of relevant comparable group

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Groups of comparison (3)



- comparison is not relevant where it involves **groups formed in an arbitrary manner** so that one comprises predominantly women and the other predominantly men
 - The average hourly piece-work pay of the **group of painters**, all but one of whom were women, was less than that of the **group of machine operators**, all of whom were men
 - “Where such a comparison involves the average pay of two groups of workers paid by the piece, it must encompass groups each comprising all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation” [case C-400/93, Royal Copenhagen]

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Groups of comparison (4)



- Comparison between two groups must show a “**particular disadvantage**” : flexible assessment
 - “it must be ascertained whether the **statistics available indicate that a considerably smaller percentage of women** than men is able to satisfy the condition of two years' employment required by the disputed rule...” [case C-167/97 Seymour-Smith]
 - if that **different treatment affects considerably more women than men**” [case C-285/02, Elsner-Lakeberg]
 - **the great majority of workers** entitled to benefit from the scheme for a period of five years from the age of 60 **are male** [case C-187/00, Kutz-Bauer]

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Groups of comparison (5)



- **Statistics not necessarily required**
 - “where an undertaking applies **a system of pay which is wholly lacking in transparency**, it is for the employer to prove that his practice in the matter of wages is not discriminatory
 - if a female worker establishes, **in relation to a relatively large number of employees**, that the average pay for women is less than that for men” [case 109/88, Danfoss]
 - **Statistics must not be fortuitous, cover short-term periods, and must be significant** = to be assessed by national courts

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Justification?



- Difference of treatment can be objectively justified by a **legitimate aim, and the means of achieving that aim are appropriate and necessary**
 - Two types of justifications
 - **social policy** (eg. recruitment policy, combat against unemployment...)
 - **company's need**
 - but probably not purely economic reasons (costs cutting, competitiveness...)
 - Method based on search of a legitimate aim + proportionality test
 - Member States have a **broad margin of discretion** in defining their employment policies
 - **Mere generalisations** are not enough
 - **Budgetary considerations** do not in themselves justify discrimination

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A debatable case (1)



- The **daily subsistence allowance paid at flat rate to airline cabin crew (mostly women)** for certain expenses incurred in the performance of their employment contract is significantly **lower than the daily subsistence allowance paid to pilots (mostly men)** for the same expenses.
- Is this gender (indirect?) discrimination prohibited by Directive 2006/54?

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A debatable case (2)



- It follows from Article 4 of Directive 2006/54 that **such a difference in treatment, as regards the pay of the workers, can constitute indirect discrimination** on grounds of sex, prohibited by that provision, **only if** that pay were paid 'for **the same work or for work to which equal value is attributed**'
- In view of the training required to perform the work of a pilot and the responsibilities associated with it, **the work of pilots cannot be considered to be of equal value to the work of cabin crew members**, within the meaning of Article 4 of Directive 2006/54.
- The **difference of treatment** (due to two separate collective agreements) is **not prohibited**! [C-314/23, Air Nostrum, 4 Oct. 2024]

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HARASSEMENT AND SEXUAL HARASSMENT

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Definition (1)



- Harassment (= sexist behavior?)
 - 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
 - Ex. During job interview, employer asks female candidate if she plans to get pregnant within the next 12 months
 - Ex. The marketing director loves to share the latest “blond jokes” with his teammates
- 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
 - Ex. A male colleague touches breast of a female colleague
 - Ex. A male colleague makes explicit sexual propositions to another colleague

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Definition (2)



- **Does not refer to a less favourable treatment** based on gender
 - no need for a comparator
- **No need for a repetition**
- **No need for an identified victim**
- **Intention of harassment is not necessary**
 - “with the purpose or effect”
- Sexual harassment does not require the existence of an intimidating, hostile, degrading, humiliating or offensive environment” - whereas harassment does

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Definition (3)



- No CJEU case law yet on gender equality matter, but
 - In the field of EU civil servants: “the **classification of harassment** is subject to the condition of its **being objectively sufficiently real**, in the sense that an impartial and reasonable observer, of normal sensitivity and in the same situation, would consider it to be excessive and open to criticism” [Case F-42/10 Skareby]
 - In the field of disability discrimination: “The **rules on the burden of proof** must be adapted when there is a prima facie case of discrimination. In the event that Ms Coleman **establishes facts from which it may be presumed that there has been harassment**, the effective application of the principle of equal treatment then requires that **the burden of proof should fall on the respondents, who must prove that there has been no harassment** in the circumstances of the present case” [case C-303/06 Coleman]

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