MASTER THESIS

- GENDER DISCRIMINATION IN THE EUROPEAN UNION -

EQUAL PAY FOR WORK OF EQUAL VALUE – SEXUAL HARASSMENT –
DEROGATIONS FROM THE BAN ON DISCRIMINATION

SUPERVISOR:
MATTHEW J. ELSMORE
DEPARTMENT OF LAW

AUTHOR:
EYDÍS HAUKSDÓTTIR - 276224
M.Sc. IN EU BUSINESS AND LAW
ABSTRACT

Equal treatment for men and women is an important objective of labour policy in the European Union, mainly because there is ample evidence of gender discrimination in the Member States. The purpose of this paper is to investigate legislations and cases concerning gender discrimination in the EU. Topics of particular focus include equal pay for work of equal value, together with sexual harassment in the workplace and examination of the main exceptions from the discrimination rules. Each year cases related to claims of sexual harassment are increasing, with the recent passage of the amended Equal Treatment Directive the European Union policymakers have taken a courageous step toward outlawing sexual harassment as a form of gender-based discrimination throughout the EU. In the last part of the paper, derogations from the ban on discrimination are examined together with cases concerning affirmative action and acts of sex discrimination done for reasons related to the protection of public safety. The aim is to explore the main changes in law and regulations concerning gender discrimination at work in the European Union since the founding treaties, further to see if cases on this matter have effected new legislations made in this field.
# Table of Content

1. **Introduction** .................................................................................................................. 7
   1.1. Problem statement ........................................................................................................... 7
   1.2. Limitations ..................................................................................................................... 8
   1.3. Method .......................................................................................................................... 8
   1.4. Structure of the paper .................................................................................................... 9

2. **Gender Discrimination** .................................................................................................. 11
   2.1. Introduction .................................................................................................................. 11
       2.1.1. Definition ............................................................................................................... 12
   2.2. Historical background .................................................................................................. 12
       2.2.1. Future legislation ................................................................................................... 14
   2.3. Legal Framework .......................................................................................................... 14
       2.3.1. Article 141 of the EC Treaty ............................................................................... 15
       2.3.2. Article 2 and 3 of the EC Treaty ......................................................................... 16
       2.3.3. Article 13 of the EC Treaty ................................................................................ 16
       2.3.4. The Equal Treatment Directive ......................................................................... 17
   2.4. Cases Concerning Gender Discrimination ................................................................... 18
       2.4.1. Defrenne I (Case 80/70) .................................................................................... 18
       2.4.2. Defrenne II (Case 43/75) ................................................................................... 19
       2.4.3. Defrenne III (Case 149/77) ............................................................................... 21
   2.5. Chapters findings .......................................................................................................... 21

3. **Sexual Harassment** ....................................................................................................... 23
   3.1. Introduction .................................................................................................................. 23
       3.1.1. Definition ............................................................................................................... 23
   3.2. Historical background .................................................................................................. 24
       3.2.1. Code of Practice ................................................................................................... 26
   3.3. Legal Framework .......................................................................................................... 27
       3.3.1. The Consolidated Equal Treatment Directive ...................................................... 28
       3.3.2. The Burden of proof directive ............................................................................. 29
   3.4. Cases Concerning Sexual Harassment ........................................................................ 29
       3.4.1. Ms A v A Contract Cleaning Company .................................................................. 30
       3.4.2. Reed and Bull Information Systems Ltd v Stedman ............................................. 32
   3.5. Chapter Findings .......................................................................................................... 35
4. DEROGATIONS FROM THE BAN ON DISCRIMINATION ................. 37

4.1. Introduction ................................................................................................................. 37

4.2. Legal Framework ........................................................................................................... 37
   4.2.1. Article 2 of the Equal Treatment Directive .......................................................... 38
   4.2.2. Affirmative Action ................................................................................................. 39

4.3. Cases concerning the derogations ................................................................................ 39
   4.3.1. Johnston (Case 222/84) ......................................................................................... 40
   4.3.2. Sirdar (C-273-97) ................................................................................................. 42
   4.3.3. Kreil (C-285/98) .................................................................................................... 43
   4.3.4. Marschall (C-409/95) ........................................................................................... 45

4.4. Chapter findings .......................................................................................................... 47

5. CONCLUSION .............................................................................................................. 50

6. BIBLIOGRAPHY .......................................................................................................... 52
TABLE OF CASES


Case 80/70 Gabrielle Defrenne v Belgium [1971] ECR 445


Case 222/84 Marguerite Johnston v The Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651

Case C-273/97 Angela Maria Sirdar v The Army Board, Secretary of State for Defence [1999] ECR 0000

Case C-285/98 Tanja Kreil v Germany [2000] ECR 0000

Case C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363

Case C-450/93, Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051


Case (1) Reed and (2) Bull Information Systems Ltd. v Stedman [1999] IRLR 299 EAT
ABBREVIATIONS

Art. ............................ Article
CFI.......................... Court of First Instance
CT............................ Constitutional Treaty
Dir............................ Directive
EAT.......................... Employment Appeal Tribunal
EC............................ European Community
EC Treaty.................... European Community Treaty
ECHR....................... European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR....................... European Court of Human Rights
ECJ.......................... European Court of Justice
ECR.......................... European Court Reports
ECSC........................ European Coal and Steel Community
EEC.......................... European Economic Community
ETD.......................... Equal Treatment Directive
EU............................ European Union
IGC.......................... Intergovernmental Conference
ILC.......................... International Labour Conference
ILO.......................... International Labour Organization
MS............................ Member State
OJ............................ Official Journal
RCE.......................... Report from Committee of Experts (ILO)
RUC.......................... Royal Ulster Constabulary
TEC.......................... Treaty establishing the European Community
UNICE...................... Union des Confédérations d'Industrie et des Employeurs
1. INTRODUCTION

Modern national labour law in Europe arose in the wake of the industrialization with male workers as the typical model and was partially extended to encompass women workers at an equal footing with men. In most European countries, legislation providing for some sort of equal access to public positions was introduced in the period shortly after women won the right to vote in general elections. Apart from the opening of the public sector following the enfranchisement of women, the next great wave of equal rights debate in Europe happened in the period when EU legislation was beginning to take the lead. All EU Member States have amended and adapted their equality legislation to fulfil the requirements of Community law. Elaborate legislation providing a ban on sex discrimination is now in place in all the Member States of the EU.

1.1. PROBLEM STATEMENT

The aim of the present thesis will be to examine cases and legislations regarding gender discrimination in the European Union, with special focus on equal pay for equal work, sexual harassment and derogations from the rule.

What are the main changes in the law and regulations concerning sexual discrimination at work in the European Union since the founding treaties?

a. Have cases about gender discrimination at work changed the discrimination law in the European Union?

b. Have cases about equal pay for equal work changed the law about wage discrimination in the European Union?
c. Have cases about sexual harassment changed the law about sexual harassment in the European Union over the last decades?

d. Are there any exceptions from the rules that allow gender discrimination of some kind?

### 1.2. LIMITATIONS

In this paper the focus will be on discrimination between the genders, especially concerning equal pay for equal work, sexual harassment and derogations from the ban on discrimination. This paper will not cover discrimination based on nationality, race or ethnic origin, religion or belief, disability, age or sexual orientation. Further, discussion about pregnancy and maternity will also mostly be left out, together with the Pregnancy and Maternity Directive introduced in 1992. Two additional directives have been implemented through the neo-corporatist processes on social policy, which have been inspired in part by case law on indirect sex discrimination. These are the “Part-time workers Directive” and the “Fixed Term Workers Directive”. These directives will not be further discussed in this thesis. The Race Equality Directive and the Framework Employment Directive are also excluded because their primary focus is not on gender discrimination.

### 1.3. METHOD

The analyses and conclusions in this thesis will mainly be based upon examination of the legal framework in the European Union, concerning gender discrimination, sexual harassment and derogations from the rule. Cases from the European Court of Justice, together with cases from national courts in Europe will be analysed to see if these cases have provoked changes for future legislations.
1.4. Structure of the Paper

The thesis is divided into five parts where the first part contains introduction, limitations, problem statement and methods used to examine the subject in question.

The second part contains an overview over different kind of discrimination at work and explains what the term “gender discrimination” really means. Some facts will be used, which will be helpful in the process of understanding and explaining the situation concerned. The main focus will be on equal pay for equal work, which will be further elaborated in a special chapter. Then follows a historical background of the discrimination law in the European Union where the legal framework is laid down. Main emphasis will be placed on The Equal Treatment Directive, together with Article 141 of the EC Treaty. Cases are analyzed about discrimination where the principle of equal pay for work of equal value is broken. The Defrenne case is discussed as it is one of the first cases in the European Union about discrimination at work.

In the third part sexual harassment is analyzed with the same structure as in part two with the purpose to examine whether sexual harassment cases have made any influences on the European Union and their Member States to improve the law about sexual harassment. The laws and regulations concerning sexual harassment is rather new field in the European Union and it was not until 2005 that a definition of sexual harassment was applicable across Europe.

In the fourth part the derogations from the ban on discrimination are discussed and the legal framework about Article 2 of the Equal Treatment Directive is laid down. This is followed by cases concerning the interpretation of this article. Main emphasis is placed on legislation regarding positive action and measures taken by Member States for reasons of public safety.
The **fifth** and final part of the paper states the final conclusion. Each part of the thesis will conclude with appropriate findings which will be summarized and connected with other parts of the thesis as well as in the final conclusion.
2. GENDER DISCRIMINATION

2.1. INTRODUCTION

Women often experience a “glass ceiling” and according to the United Nations, there are no societies in which women enjoy the same opportunities as men. The term “glass ceiling” describes the process by “which women are barred from promotion by means of an invisible barrier”.¹ There are several reasons for the glass ceiling phenomenon and among them is the lack of role models, networking options, mentoring, and literature has singed out stereotypes of the societies and prejudices against women in positions of power. There are also lot of complexities of the dual role as working woman and housekeeper.²

EC law on equality between men and women is complex and well developed, and, more recently, the scope equality law has expanded to cover other types of inequality. Many people would say that the meaning of equality is straightforward. It means treating people the same and not discriminating, or making differences between them. However, treating everyone the same is too simplistic a solution. In order to apply the principle of equality, it is necessary to rely on external standards in order to decide when people are to be treated the same and when, and how, they should be treated differently. A number of legal strategies can be used to achieve equality. A non-discrimination strategy involves legislation prohibiting any discrimination between categories of people. Equality policies do not aim at the overall equality between all human beings, but rather at eliminating specific inequalities affecting particular disadvantaged groups. Thus, equality polices address equality between people of different ethnic origins or different

¹ United Nations, Human Rights.
religions, equality between people with disabilities and able-bodied people, equality between people of different sexual orientations, equality between people of different ages and the most dominating policy of them all is the gender equality policy.³

2.1.1. Definition

Gender discrimination is discrimination against a person or group on the grounds of sex or gender identity. There are many definitions of the word “discrimination” but the most common one is “unfair treatment of a person or group on the basis of prejudice”.⁴ Socially, sexual differences have been used to justify cultures in which one sex or the other has been restricted to considerably inferior and secondary roles.

2.2. Historical Background

When the European Union was established and the founding Treaties were made, they did not contain any specific provision on fundamental rights. The central concern in the Paris and Rome Treaties reflected sectoral and functionalist approach. But since then, things have changed considerably and the fundamental rights have found their place in the Treaties.

The European Court of Justice began to monitor, in the judgments it published, when the Community institutions and the Member States showed respect for fundamental rights and took action within the areas covered by Community law. The situation changed rapidly and for example the ECJ recognized the freedom to engage in economic activity and the right to property, which are very important parts of the internal market. The fundamental rights were ranked as general principles of Community law, based on the constitutional traditions of the Member States, and the

⁴ WordReference.com.
international Treaties to which the Member States belonged. These two sources identified by the ECJ were the reason for the Joint Declaration signed by the European Parliament, the Commission and the Council in 1977, in which they wade into to continue respecting the fundamental rights. It went even further in 1986 when the introduction to the Single European Act (SEA) included a reference to the democracy on the basis of fundamental rights.\(^\text{5}\)

The Treaty on European Union states that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law“.\(^\text{6}\)

Speculations came up at the same time about whether or not the Community as such should accede to the European Convention on Human Rights. The Court was asked for its opinion on whether membership of the Convention would be reconcilable with the Treaties. But the way the Community law stood at that time, the Community was competent to accede to the Convention according to the Court in 1996.

The European Union has slowly but surely widened its field of action as European integration has advanced. In areas that until now have been a strictly national preserve, the Member States have been persistent in acting as one. For example, in areas like internal security and fight against racism and xenophobia. Because of these changes, it was necessary to make a clear legal text which set forth respect for fundamental rights as a basic principle of the European Union. The Treaty of Amsterdam meets this requirement.\(^\text{7}\)

By the adoption of the Amsterdam Treaty which came into force in May 1999 explicit main-streaming provisions were inserted into Article 3(2) EC which provides: “In all the activities referred to in this Article, The Community shall

\(^{5}\) The Treaty of Amsterdam, (1997).

\(^{6}\) The Treaty on European Union: Article 6(2), Ex Article F.2.

\(^{7}\) The Treaty of Amsterdam, (1997).

\(^{8}\) Article 3 EC enumerates all the fields of activity within Community competence.
aim to eliminate inequalities, and to promote equality, between men and women”.

2.2.1. Future Legislation

The European Constitution, officially known as the “Treaty establishing a Constitution for Europe”, was conceived as the continuation of the process of institutional reforms initiated by the Treaty of Nice. The Constitutional Treaty (CT) was signed in Rome on 29 October 2004 by the 25 Heads of State and Government of the Member States. To enter into force, the CT had to be ratified by all the Member States in accordance with each one’s constitutional rules, namely either parliamentary ratification or referendum. Following the difficulties in ratifying the Treaty in some Member States, European leaders reached a compromise in June 2007 and agreed to call together an Intergovernmental Conference (IGC) to finalize and adopt a “Reform Treaty” for the European Union. The new treaty, which will be known as the “Treaty of Lisbon”, came to terms on 19 October 2007 after overcoming last-minute Polish and Italian objections at a EU summit in the Portuguese capital. EU leaders returned to Lisbon on December 13 to formally sign the text. This Treaty is to come into force in January 2009.⁹

The aim of the new treaty is to make the enlarged Europe more effective, democratic and transparent. It is intended to replace the Treaty on European Union and the Treaty establishing the European Community. In this new treaty a considerably large part concerns equality and non-discrimination.

2.3. Legal Framework

The main issues of the Amsterdam Treaty are freedom, security and justice, together with fundamental rights and non-discrimination. In the provision of the new Treaty is stated: “more effective action is to be taken to combat not

only discrimination based on nationality but also discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. In the Treaty establishing the European Community, new provisions are inserted, on equal treatment for men and women. Title XI of the EC Treaty concerns “social policy, education, vocational training and youth”, and that is the primary legislation for equal pay and treatment.

2.3.1. Article 141 of the EC Treaty

The cornerstone of European law is the EC Treaty and for these purposes, Article 141 of that Treaty is crucially relevant. It provides that “men and women should receive equal pay for equal work”. Articles 141 appertain to Chapter 1 (Social provisions) of Title XI. It is laid down in Article 141 (ex Article 119) the principle of non-discrimination between men and women but it only concerns equal pay. Article 141(1) provides that “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”. In Article 141(3) is stated that 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”. Furthermore, Article 141(4) complements the above articles and states that “with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting 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”.

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10 Foster, (2004), p. 44, Article 141(1).
2.3.2. Article 2 and 3 of the EC Treaty

The Treaty of Amsterdam extends Articles 2 and 3 of the Treaty to include equality between men and women, which previously figured only in Article 141 of the EC Treaty. The amendment of Article 2 is that the list of tasks facing the Commission will include the promotion of equality between men and women.\(^\text{13}\) In Article 3 a new paragraph has been added, reading as follows: “In all the other activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.”\(^\text{14}\)

2.3.3. Article 13 of the EC Treaty

Since the original Treaty in 1957, the non-discrimination on the basis of nationality of a Member State or of gender (in work-related circumstances) has been a part of EU policy. But the Treaty of Amsterdam restates the principle of non-discrimination in stronger terms, adding two new provisions to the EC Treaty. Article 13 complements Article 12, which prohibits discrimination on grounds of nationality. The new Article 13 permits the Council to take suitable action to fight discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. When the Council acts on the basis of Article 13, it does so unanimously on a proposal from the Commission and after consulting the European Parliament.\(^\text{15}\) With the passage of the “Race and Framework Directive”, the legal grounds of Article 13 have been activated. It provided a template for the 2002 Directive by expanding the scope and prohibited grounds of EC discrimination law.\(^\text{16}\)

\(^{13}\) The Treaty of Amsterdam, (1997), p. 22, Article 2(2).
\(^{15}\) The Treaty of Amsterdam, (1997).
\(^{16}\) Costello & Davies, (2006).
2.3.4. **The Equal Treatment Directive**

“The objective of this Directive is to simplify, modernise and improve Community legislation in the area of equal treatment for men and women in employment and occupation by bringing together in a single text the relevant provisions from the directives relating to this subject in order to make them clearer and more effective for the benefit of all citizens”.  

The simple statement of Article 141, that provides that “men and women should receive equal pay for equal work”, is expanded by the Equal Treatment Directive. Today it has been amended by the Consolidated Equal Treatment Directive 2006/54 which provides that the principle of equal pay “means for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration”. The new Directive was at first aimed at updating the ETD in light of the Court’s case law. It includes a number of new clauses, like a precise human rights foundation, acknowledgement of the need for proactive measures to fight discrimination and the fact that it preserves minimum standards. It also includes new definitions of discrimination (direct and indirect); harassment; sexual harassment; pay and occupational social security schemes. This Directive is based on the main provisions of Directive 75/117/EEC, according to which equal or equivalent work must be paid the same; a job classification system used to determining pay must be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on grounds of sex.

Seven directives will be repealed as of 15 August 2009:

- Directive 75/117/EEC on equal pay
- Directive 76/207/EEC (amended by Directive 2002/73/EC) on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

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18 EC Directive 75/117/EEC.
19 The Consolidated Equal Treatment Directive 2006/54.
Directive 86/378/EC (amended by Directive 96/97/EC) on occupational social security schemes

Directive 97/80/EC (amended by Directive 98/52/EC) on the burden of proof in cases of discrimination based on sex\footnote{OJ L 204 of 26.07.07.}

2.4. **CASES CONCERNING GENDER DISCRIMINATION**

The development of gender equality in the European Union is a difficult task even at the turn of the new millennium. This has been experienced by the ECJ which has been dealing with cases concerning sex discrimination for many decades.

Article 141 (ex Article 119) stood out as the only provision in the first chapter of the Title on Social Policy that placed an express obligation on Member States to ensure by the first stage, 1962, and subsequently maintain, the principle that men and women should receive equal pay for equal work. In fact this period was extended to 1964. A few years later it was found that progress had been extremely slow and there was still widespread sex discrimination in remuneration and general working practices in the Member States.\footnote{The Sullerot Report, issued to the Commission in 1972.} Article 141 was only revivified by a fresh drive for social policy in the 1970s and, above all, by the determination of a Belgian air steward, Gabrielle Defrenne, who brought a series of legal actions designed to bind the Member States to their equal pay commitments.\footnote{Kenner, (2003).}

2.4.1. **DEFRENNE I (CASE 80/70)**

*In the Defrenne case from 1971, the ECJ gave an early ruling on what subsequently became a very tangled relationship between pay and pensions.*

A Belgian air steward, Gabrielle Defrenne brought an action before the Tribunal du travail, in Brussels, in three different cases. In the first case

\footnote{Case 80/70 Defrenne v Belgium (1971) ECR 445.}
Defrenne II (Case 43/75)

Defrenne case in 1976, concerning Article 141 EEC (ex Article 119 EC) about equal pay for work of equal value.

In the second case (hereinafter Defренne II), Gabrielle Defренne brought an action for compensation for the loss she had incurred in terms of salary, allowance on termination of contract and pension in comparison with male 

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25 Case 80/70 Defrenne v Belgium (1971) ECR 445.
27 Case 43/75 Defrenne v Sabena (1976) ECR 455.
members of the crew performing identical duties. The Belgian appeal court referred the case to the ECJ.

The ECJ held that the equal pay provision of Article 141 had as its aims both economics and social functions. It ruled that article 141 “forms part for the social objectives of the Community, which is not merely an economic union, but at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions”. ²⁸

It can be seen in the judgment of Defrenne II, that the direct effect is used to initiate the proper implementation of a Treaty provisions. Article 141 appeared to lack sufficient accuracy to be invoked by an individual and directly enforced by a national court. Article 141 at that time required States to ensure “the application of the principle that men and women should receive equal pay for equal work”. ²⁹ The term “principle”, is not very specific, nor were the terms “pay” and “equal work” defined in Article 141. Therefore, it did not impose a very precise negative obligation on the Member States.

However, in Defrenne I, the ECJ dismissed the argument that Article 141 could be relied upon only as against the State: “Since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals”. ³⁰

According to the ECJ in Defrenne II, while Article 141 could have direct effect in a situation of clear and direct pay discrimination, it could not in the case of indirect and disguised discrimination, since further legislation might be required in the latter context before such discrimination could be identified.

²⁸ Case 43/75 Defrenne v Sabena (1976) ECR 455.
²⁹ Craig & de Búrca, (2003).
³⁰ Case 80/70 Defrenne v Belgium (1971) ECR 445.
2.4.3. **Defrenne III (Case 149/77)**

Defrenne\(^{31}\) case in 1978, concerning the general principle of equal treatment between men and women as a fundamental right in the Community legal order.

In Defrenne III, it was argued to the ECJ that the principle of equal treatment of men and women was a fundamental principle of Community law. More precisely, it was argued that the discriminatory compulsory termination of the complainant’s employment contract at age 40 was contrary to Article 141. But the ECJ ruled that although the two Treaty Articles preceding Article 141 contemplated the harmonization of national social systems and the improvement of the conditions of employment, they were of a programmatic character, unlike the special and precise equal-pay rule. It was not possible to extend the scope of Article 141 at that stage to fundamentals of the employment relationship other than pay. However, the ECJ went on to say that the elimination of sex discrimination more generally was a fundamental personal human right, and thus part of the general principles of Community law whose observance it must ensure.\(^{32}\)

2.5. **Chapters Findings**

The equal treatment principle received a boost from the ruling in Defrenne II that Article 141 could be applied directly in the national courts. A directive on equal pay was adopted. This was followed by directives on equal treatment generally in employment, state and occupational social security. This case was a turning point in securing the effectiveness of Community laws in the national courts by accepting horizontal direct effect. Since Article 141 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well

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\(^{31}\) Case 149/77, Defrenne v Sabena (1978) ECR 1365.

\(^{32}\) Craig & de Búrca, (2003).
as to contracts between individuals. The ECJ took the view, in Defrenne II, as regards Article 141 concerning equal pay, that it pursues a twofold purpose, both economic and social. It has since become usual to interpret not only equal pay legislation but labour law in general as governed by this double aim of pursuing both economic and social goals. Since the adoption of the Amsterdam Treaty the mixed economic and social purpose of the Community is explicitly provided for in the text of the EC Treaty.

In Defrenne III, and more recently in other cases, the ECJ ruled that the elimination of sex discrimination was one of the fundamental personal human rights which had to be protected within Community law. However, this principle was held not to be directly applicable against Member States in Defrenne III, since the Community had not yet assumed competence in the area of equal treatment at work and the Treaty at that stage only prohibited the states directly from maintaining unequal pay between the sexes.

33 Case 43/75 Defrenne v Sabena (1976) ECR 455, paragraph 39.  
34 Nielsen, (2000).  
37 Craig & de Búrca, (2003).
3. SEXUAL HARASSMENT

3.1. INTRODUCTION


It is not always easy to differentiate between sexual harassment and general harassment related to sex. For example, it is sexual harassment when an employer requests a sexual favour from an office female employee under the threat of dismissal. However, if an employer orders an office female employee to clean the floor, water the plants or polish his shoes while never treating the male employees this way, it might be interpreted as general harassment tainted by the sex of the worker.

3.1.1. DEFINITION

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”.38

38 The Commission's final agreement on a definition of “sexual harassment”.

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The concept of harassment, first introduced in European law by the “Article 13 Directives”, \(^{39}\) includes the American notion of “hostile environment”. \(^{40}\) Article 2(2) of the new Equal Treatment Directive provides that “there is harassment where an 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”. The same formula is applied to sexual harassment with the addition that the prohibited conduct is of “sexual nature”.

### 3.2. HISTORICAL BACKGROUND

In 1976, The Equal Treatment Directive was made (the “ETD”) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition. \(^{41}\) While this equal participation of men and women in the labour market was a fundamental principle underlying the EU, sexual harassment in the workplace did not receive serious attention by EU policymakers until the mid-1980s. On 11 June 1986, the European Parliament made Resolution on violence against women, requesting the adoption of a Directive prohibiting sexual harassment. This was followed by the publications of the first research on sexual harassment in Europe, a Council Resolution on the protection of the dignity of women and man at work, \(^{42}\) a Commission Recommendation and Code of Practice to combat sexual harassment, \(^{43}\) and

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\(^{39}\) Article 2(3) of Directive 2000/78 for instance defines harassment as “an unwanted conduct related to racial or ethnic origin […] with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.


\(^{42}\) Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work.

the failure of the social partners to agree on a text. After determining that sexual harassment was widespread throughout the EU, the commission undertook a number of initiatives in the early 1990s to remedy the problem. A more recent study found evidence that perhaps as many as 40 to 50 percent of women, and 10 percent of men, have experienced sexual harassment at some point in their working lives.

Prior to the Directive, some Member States took the initiative to develop strong public policy responses to workplace sexual harassment, while other Member States were not as aggressive in adopting anti-harassment legislation.

The European Commission published a proposal in June 2000, which aimed to improve the ETD from 1976. The focal point of the innovation concerned new clause relating to sexual harassment, which is described as sex discrimination at the workplace. Two years later, the Council and the Parliament made a joint adoption of the new EU law that extended the scope of the ETD on equality in the workplace. The amended Directive provides stronger support for any employee who feels she or he has been treated unfairly on the grounds of their sex. This was the first time at EU level that a binding legislation defined sexual harassment and established that it constitutes a form of sex discrimination. The new Directive includes provision for enforcement, compensation without an upper limit and sanctions. The Directive also states that employers will need to introduce preventive measures against sexual harassment and to give a regular “equality” report to every employee in the enterprise.

44 Consultation of management and labour on the prevention of sexual harassment at work, COM(1996), 373.
46 e.g. the UK, Ireland, France, The Netherlands, Belgium, and Germany.
47 e.g. Italy, Luxembourg, Portugal, and Greece.
3.2.1. CODE OF PRACTICE

The Commission formally adopted a code of practice on measures to combat sexual harassment on November 27, 1991. Part 2 of the Code gives examples of sexual harassment including unwelcome physical, verbal or non-verbal conduct. Thus, a range of behaviour may be considered to constitute sexual harassment as the Commission explain:

“The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious. It is the unwanted nature of the conduct which distinguishes sexual harassment from friendly behaviour, which is welcome and mutual”.

Through the mechanism of the Code, the Commission seeks to directly address employers, trade unions and equal opportunity agencies concerned with the implementation of equal treatment on the ground in both public and private sectors and in small and medium-sized enterprises. The overriding aim of the Code is to ensure that sexual harassment does not occur and, if it does occur, to guarantee that sufficient procedures are readily available to deal with the problem and prevent its recurrence. The Code thus seeks to support the development and implementation of policies and practices that create working environments free of sexual harassment and in which women and men respect one another’s human integrity. The Commission significantly follows through this logic and note that some groups are particularly vulnerable to sexual harassment:

“… including divorced and separated women, young women and new entrants to the labour market and those with irregular or precarious employment contracts, women in non-traditional jobs, women with disabilities, lesbians and women from racial minorities are disproportionately at risk. The Commission

also note that gay men and young men are also vulnerable to harassment. It is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behaviour”.

This statement was to provide a direct point of reference for the Commission when drafting its proposals on Community measure to combat discrimination under Article 13 EC, added by the Treaty of Amsterdam.

As a Community instrument the Code is a means by which formal equality guaranteed by the Directive can be converted into real equality on the ground based on best employment practice. The social policy actors are supplied with a detailed definition of sexual harassment, guidance on the law, including the possibility of making sexual harassment a criminal offence. Employers are offered specific advice about investigative and disciplinary procedures. The aim, therefore, is to facilitate changes in attitudes and behaviour through both practical and legal steps.49

3.3. **Legal Framework**

The Equal Treatment Directive (EC Directive 76/207/EEC), now the Consolidated Equal Treatment Directive 2006/54 covers all aspects of employment. It requires that there shall be “no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status”.50 Article 2 of this Directive now includes definitions of sexual harassment, harassment, direct and indirect discrimination. Article 6 of the ETD requires Member States to introduce measures necessary to enable all persons to enforce the principle of equal treatment and to pursue their claims through the judicial system.

According to Article 2(3) of the new ETD, harassment, sexual harassment and victimization are all considered sex discrimination and are prohibited by the law. This means that the rules of evidence as provided by the “Burden of Proof Directive”\(^{51}\) apply to situations of sexual harassment.

### 3.3.1. The Consolidated Equal Treatment Directive

The consolidated Equal Treatment Directive entered into force in 2005 and the main points are:

- A new article verifying that harassment on the basis of sex as well as sexual harassment constitute discrimination and providing, for the first time, a definition of sexual harassment applicable across Europe
- Definitions of direct and indirect discrimination, in line with those in the existing laws on antidiscrimination adopted under Article 13 of the Amsterdam Treaty
- New provisions on enforcement of the law and the elimination of any upper limit on the compensation and reparation
- A new responsibility on Member States to establish agencies with specified powers to promote equal opportunities
- For employers, the concepts of taking “preventive measures” against all forms of discrimination especially sexual harassment, as well as the introduction of enterprise level “equality plans” which are to be made available to workers\(^{52}\)

In some Member States sexual harassment is considered a violation of the ban on direct sex discrimination. Article 1a was added to the 1976 Directive, whereas it is clarified that sexual harassment is indeed a discrimination on the grounds of sex.\(^{53}\) It is defined as “sexual harassment shall be deemed to be discrimination on the grounds of sex at the workplace when an unwanted conduct related to sex takes place with the purposes or effect of affecting the

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\(^{52}\) European Commission, (2002).

\(^{53}\) Nielsen, (2000).
dignity of a person and/or creating an intimidating, hostile, offensive or disturbing environment”.  

The amended Article 2(5) provides that “Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace”. This provision places a relatively light obligation on the shoulder of the employers and social partners.

3.3.2. **THE BURDEN OF PROOF DIRECTIVE**

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. The principle of equal treatment means the absence of any discrimination based on sex, either directly or indirectly. This Directive concerns the way in which sex discrimination claims in employment and vocational training are handled. The purpose of the Directive is to improve clarity in sex discrimination cases and promote fairness between the parties. It recognizes that complainants will often have difficulty in successfully bringing a sex discrimination claim because they do not have access to sufficient information about their employers’ actions. This Directive is now part of the new Consolidated Equal Treatment Directive.

3.4. **CASES CONCERNING SEXUAL HARASSMENT**

Each year cases related to claims of sexual harassment and harassment in the workplace are increasing. Most of these cases are issued before the national courts of Europe and does rarely go to the ECJ. Two sexual harassment cases have become important factors in setting legislations in the UK and Ireland. One of them sets grounds for the maximum award that is to

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be made in sexual harassment cases in Ireland and the other one sets guidelines for future sexual harassment cases in the UK.

3.4.1. Ms A v A Contract Cleaning Company

Ms. A. v. A Contract Cleaning Company case from 2004,\(^56\) where Ireland’s Equality Tribunal ruled in favour of a woman who had complained of sexual harassment and victimisation, and awarded her the maximum amount allowed under the relevant legislation.

On 29 November 2004, the Equality Tribunal of Ireland issued its decision in a case of alleged sexual harassment and victimisation. The complainant, hereinafter called Ms. A., worked as a cleaner and was assigned cleaning duties at a shopping centre. This dispute concerned a claim by Ms. A. that she was discriminated against by her employer on grounds of gender in that she was sexually harassed by a security guard who was an employee of a security firm who worked in the same location as her. Ms. A. also contended that she was victimised contrary to the Employment Equality Act\(^57\) when she reported the matter to her employer and the security guard’s employer. The complaint involved:

- The harasser making rude and sexually offensive remarks to her and her female co-workers;
- The harasser pushing her into the employees canteen, pulling down her trousers and underwear and smacking her on the bottom. This was witnessed by the company supervisor who said the harasser was only “messing” and “it was only a joke”;
- Ms. A. reported the incident to the police. She raised the matter with the respondent’s Regional Manager who told her the matter had nothing to do with the respondent and to take the matter up with the harasser’s employer;


\(^57\) Employment Equality Act, 1998: sections 6, 15, 23 and 74.
Ms. A. experienced the “cold shoulder” from some of her co-workers after reporting the harassment, and her working relationship with them, which had previously been good, deteriorated; She was threatened with dismissal if she did not drop her complaint to the police; She was subjected to the respondent’s internal disciplinary procedure during which the previous incident of sexual harassment was discussed and where her supervisor inferred to those participating in the disciplinary procedure that the complainant was lying about the incident.\(^{58}\)

The Equality Officer found that Ms. A. was sexually harassed, that the respondent did not take such steps as were reasonably feasible after the complainant reported the incident, and that the actions of the respondent after the incident constituted victimisation of Ms. A.

The complainant’s case was upheld and she was awarded the equivalent of €21,000, the equivalent of 104 weeks salary. This is the maximum amount allowed under the Employment Equality Acts. An Equality Officer at the Tribunal stated that he felt “constrained by the statute in the level of compensation [... ] and would have ordered a significantly higher award given the severity of the treatment to which the complainant was subjected to”.\(^{59}\)

This case established the inappropriateness of the respondent’s reactions to the incident, the flawed manner in which the respondent abdicated responsibility for the issue to the harasser’s employer and the flawed nature of the investigation conducted by the employer of the harasser. There is a clear message to employers in this regard to ensure that they have sufficient policies and procedures in place to prevent sexual harassment and to deal successfully with any incidents occurring. These measures must be adequate to dealing with sexual harassment. Not only harassment by another employee or employer, but also by other clients, customers or business contacts.

\(^{58}\) The Equality Tribunal, (2004).

\(^{59}\) Sheehan, (2005).
3.4.2. Reed and Bull Information Systems Ltd v Stedman

Reed and Bull Information Systems Ltd v Stedman case\(^{60}\) from 1999, concerning whether behaviour is to be judged by objective or subjective standards to constitute sexual harassment.

Ms. Stedman was Mr. Reed’s secretary at Bull Information Systems Ltd. Ms. Stedman resigned on the ground that she found it intolerable to work with Mr. Reed. She brought an action in the Employment Appeal Tribunal in UK, against the company and the tribunal found the following incidents occurred.

Mr. Reed suggested to Ms. Stedman that sex was a beneficial form of exercise to which Ms. Stedman made no response. Mr. Reed made an attempt to look up Ms. Stedman’s skirt and laughed when she angrily left the room. Mr. Reed said: “You’re going to love me so much for my presentation so that when I finish you will be screaming out for more and you will want to rip my clothes off”. Mr. Reed showed Ms. Stedman and others a newspaper cartoon which depicted an affair in a marketing department. He frequently stood behind Ms. Stedman when telling other colleagues dirty jokes. When Ms. Stedman complained about this, the practice ceased.

The tribunal upheld her claim of sex discrimination, finding “there was an element of sexual harassment in Mr. Reed’s behaviour”. The tribunal found that Ms. Stedman never confronted Mr. Reed nor made any identifiable protests about his behaviour with the exception of the complaint she made about him telling dirty jokes to colleagues in her presence.

The tribunal decided that no single incident was serious enough to be capable of constituting sexual harassment, but found that there had been a series of sexual inferences with a pervading sexual innuendo and sexist stance. The tribunal found that Ms. Stedman had made complaints to other members of staff and colleagues in the personnel department were aware of her deteriorating health. The tribunal held that by failing to investigate the cause

\(^{60}\) Reed and Bull Information Systems Ltd. v. Stedman [1999] IRLR 299 EAT.
of her illness and the complaints made, Bull committed a serious breach of contract as they failed to deal with the issue of sexual harassment sufficiently.

When Ms. Stedman appealed, the EAT dismissed the appeal, finding that the tribunal did not go wrong in finding that there was a course of conduct mounted by the manager which amounted to sexual harassment and for which Bull are ultimately responsible.61

What is especially interesting about this case is that the EAT set out some general guidance as to tribunals' approach in sexual harassment cases. Some of the main points of the guidance are:

- The question in each case is whether the alleged victim has been subjected to a detriment and, second, was it on the grounds of sex. Motive and intention of the alleged discriminator is not an essential ingredient although it will often be a relevant factor to take into account. Lack of intent is not a defence.
- The essential characteristic of sexual harassment is that it is words or conduct which are unwelcome to the recipient and it is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive. A characteristic of sexual harassment is that it undermines the victim's dignity at work. It creates an “offensive” or “hostile” environment for the victim and an arbitrary barrier to sexual equality in the workplace.
- Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.

o It is particularly important in cases of alleged sexual harassment that the tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. The impact of separate incidents may accumulate and the work environment created may exceed the sum of the individual episodes. A blatant act of a sexual nature, such as the deliberate looking up of the victim’s skirt whilst she was sitting down, may well make other incidents take on a different colour and significance. Once unwelcome sexual interest has been shown by a man in a female employee, she may well feel bothered about his attentions which, in a different context, would appear quite unobjectionable.

o Some conduct, if not expressly invited, could properly be described as unwelcome. A woman does not, for example, have to make it clear in advance that she does not want to be touched in a sexual manner. At the lower end of the scale, a women may appear, objectively, to be unduly sensitive as to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct she had made it clear that she found such conduct unwelcome. It is not necessary for a woman to make a public fuss to indicate her disapproval; walking out of the room might be sufficient. Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and whose defence may often be that the victim was being over-sensitive. Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally, be regarded as harassment.

o Whether an applicant was subjected to a detriment does not depend on the number of incidents. A one-off act may constitute a detriment.\(^{62}\)

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\(^{62}\) Employment Appeal Tribunal (EAT).
The guidance in this case is very important factor in making it clear what kind of conduct will constitute sexual harassment. Conduct of a sufficiently serious nature may be sex discrimination without need for prior indication that such conduct is unacceptable. Conduct of a less serious nature, which may be acceptable to some but not to other, will become harassment if persisted in after the individual makes it clear that the conduct is unwelcome. The test for sexual harassment is subjective to the extent that the individual has a right to define what is unacceptable to her, provided she makes this clear in advance in cases of less serious conduct.63

3.5. **CHAPTER FINDINGS**

Evidence from several Member States suggests that the “Code of practice” have had a stimulating effect. Within a year of its adoption, a Belgian decree was issued which forces employers to ensure that employees are aware that sexual harassment of a verbal, non-verbal and physical nature, is forbidden, to provide support to victims, to set up a complaints procedure and to establish disciplinary sanctions for offenders. In Ireland a Code of Practice has been drawn up by the Employment Equality Agency. The Irish Code builds on the Commission’s Code by providing for a formal procedure for complaints to be investigated and pursued involving assistance from an outside expert where necessary. Perhaps the most significant impact of this formalistic approach is that it encourages preventative action to be taken by employers before any question of unequal treatment contrary to the Directive arises. In France the Labour Code was amended to provide statutory protection to victims and witnesses of “the abuse of authority at work in sexual matters” and also grants them a right to a legal remedy if they suffer discrimination in employment as a result. In addition the Penal Code has been amended to make sexual harassment a criminal offence. In the UK the statutory Equal Opportunities Commission has issued a guide on the subject

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to employers, trade unions and employees advocating both formal and informal methods of conflict resolution. Further, a criminal law measure has been adopted by the UK parliament that renders intentional racial, sexual, or other forms of harassment in the street and at work a criminal offence punishable by imprisonment.64

The guidelines set at the end of the decision in Reed and Bull Information System Ltd. v. Stedman have made a great impact on tribunals’ approach in sexual harassment cases. But while the judge’s decision is to be welcomed in adopting an approach more supportive to victims of sexual harassment, it also raises a number of problems by placing a burden on the victim to place the harasser on notice that she does not welcome his behaviour. The guidelines are likely to be usefully applied in any jurisdiction that has rules forbidding sexual harassment.65

In the recent case between Ms. A. and A Contract Cleaning Company, the Equality Authority in Ireland has welcomed what it sees as a significant ruling. This case set a standard in making the maximum award which is not only proportionate but also dissuasive. It’s also important in acknowledging the serious nature of sexual harassment and victimisation. Each year cases related to claims of sexual harassment and harassment are increasing. Settlements of this scale establish the context necessary for a new culture of compliance with equality legislation in the workplace. This is crucial if elimination of sexual harassment is to be successful and the damaging and distressful impact these have on those involved.66 The Equality Authority underlined the courage and conviction displayed by the complainant in taking this important case. Ms. A. faced mockery, isolation, pressure and victimisation. The case took a number of years to come to a conclusion but she has achieved a conclusion that not only vindicates her courage and conviction but that serves as a significant preventative to employers allowing such a situation to emerge again.

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4. DEROGATIONS FROM THE BAN ON DISCRIMINATION

4.1. INTRODUCTION

To discriminate means to differentiate or to treat differently, which in itself seems harmless. In Community law it is however impermissible when done without sufficient justification on the basis of one of the prohibited grounds, or when there is no relevant difference between two persons or situations which would justify a difference in their treatment. These are not inevitably easy criteria to apply, since it is not always clear which aspects may be taken into account in determining whether two persons are equally situated. It’s also not clear if differences in situation are taken into account to justify discriminatory treatment, this should be seen as a form of justified “positive discrimination” or should in fact be seen as not discriminatory at all.

In EC legislations, there are several exceptions from the non-discrimination rule. Two of the most common used are the occupational exception and the positive-action provision. The first one relates to occupational activities, including training, in respect of which by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. The positive-action provision permits measures designed to redress inequality between the genders and to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities.

4.2. LEGAL FRAMEWORK

The aim of the Equal Treatment Directive is to secure equal treatment between men and women in three broad, employment-related areas, namely
access to employment and promotion, vocational training, and working conditions. This Directive is distinctive, however, in that, unlike the equal-pay provisions, it permits several exceptions to the equal-treatment principle. References to the Court on the interpretation of Article 2 of the Equal Treatment Directive have tended to arise where Member States have sought to exclude women from performing certain roles in the police and armed forces. Proportionality is not expressly referred to in that provision, although it has been inferred by the Court which has limited the exception to what is appropriate and necessary in order to achieve a particular aim and requires the principle of equal treatment to be reconciled, as far as possible, with the requirements of public security, viewed in the context in which the activities are performed.  

4.2.1. Article 2 of the Equal Treatment Directive

Article 2 of the Equal Treatment Directive sets out three matters which Member States may exclude. The first one is Article 2(2), which relates to occupational activities in respect of which “by reason of their nature or the context in which they are carried out” the sex of the worker constitutes a determining factor. The second area of exception to the principle of formal equality is in Article 2(3). This Article relates to provisions adopted by the Member States “concerning the protection of women, particularly as regards pregnancy and maternity”. A third area which may be excluded from the equal-treatment principle is set out in Article 2(4) – the “positive action” provision which permits measures designed to redress inequality between men and women and to “promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities” in the three areas covered by the Directive.

4.2.2. **Affirmative Action**

Affirmative action is a national law which guarantees priority for women in promotions in the public sector in cases where there are male and female candidates who are equally qualified for the post in question. In the working world, a male candidate will tend to be promoted even if a female candidate is equally qualified for the post in question. Men benefit from deep-rooted prejudices and from stereotypes as to the role and capacities of women. It is the fear that women will interrupt their careers more frequently, they will be less flexible in their working hours because of household and family duties or that they will absent more from work because of pregnancy, childbirth and breastfeeding. All these factors lead to discrimination against them.\(^{68}\) The Court concludes from this that priority given to equally qualified women – which is designed to restore the balance – is not contrary to Community law provided that an objective assessment of each individual candidate, irrespective of the sex of the candidate in question, is assured and that, accordingly, promotion of a male candidate is not excluded from the outset. Under EC law, positive action measures have long been offered as part of a triad of measures to promote equality in the labour market. Governments throughout the European Community have implemented various positive action schemes for women. Debate over the legality of these measures has most often involved the interpretation of two provisions of the Equal Treatment Directive, Article 2(1) and Article 2(4).

4.3. **Cases concerning the derogations**

Since the ETD was made in 1976, the ECJ has issued three significant judgments concerning the interpretation of Article 2(2). It expressly provides that it is “to be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in

\(^{68}\) Case C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen (1997) ECR I-6363.
which they are carried out, the sex of the worker constitutes a determining factor”.

These three cases are: Johnston (Case 222/84) on 15 May 1986, Sirdar (C-273-97) on 26 October 1999, and Kreil (C-285/98) on 11 January 2000.

Another case, the Marschall case, dating back to 1997, concerning “Affirmative action”, took place in the Federal Republic of Germany. It is one of the leading cases in which the ECJ carried the principle of gender equality into effect.

4.3.1. Johnston (Case 222/84)

Johnston case on 15 May 1986, concerning the fact that women police officers were not equipped with firearms or trained in their handling.

The Johnston case concerned prohibition of women from police work in Northern Ireland. In the United Kingdom, police officers do not usually carry fire-arms at work except for special operations and in these special operations is no distinction made between men and women. But the Chief Constable of the Royal Ulster Constabulary (RUC) considered that he could not maintain that practice because of the high number of police officers killed in the line of duty in Northern Ireland over the years. He decided that, in the RUC, men should carry fire-arms in the regular performance of their duties but that women would not be equipped with them and would not receive training in the handling and use of fire-arms. He also decided not to offer or renew any more contracts for women in the RUC and the RUC full-time reserve except where they had to perform duties assigned only to women officers. Mrs. Johnston had been a member of the RUC full-time reserve from 1974-1980. In those years, she had efficiently performed the general duties of a uniformed police officer. She had worked as a station-duty officer, taken part in mobile patrols, driven the patrol vehicle and assisted in searching persons brought to the police station. She was never armed when she carried out those duties and

was normally accompanied in duties outside the police station by an armed male officer of the RUC full-time reserve. When the new policy made by the Chief Constable took affect in 1980, he refused to renew her contract with regard to female members of the RUC full-time reserve. Mrs. Johnston claimed that she had suffered unlawful discrimination prohibited by the sex discrimination order. The reason Chief Constable gave for the refusal of further full-time employment to Mrs. Marguerite I. Johnston, was that it was done for the purpose of safeguarding national security; and protecting public safety and public order.71

In the Johnston case, the ECJ held that “it is not permissible to read into the treaty, regardless of the specific cases envisaged by certain of its provisions, a general proviso covering any measure taken by a member state for reasons of public safety. Recognition of such a general proviso might impair the binding nature of community law and its uniform application. It follows that acts of sex discrimination done for reasons related to the protection of public safety must be examined in the light of the derogations from the principle of equal treatment of men and women”.72

Since article 2(2) of the ETD authorizes derogations from the right to equal treatment, the ECJ held that it must be interpreted strictly and applied in conformity with the principle of proportionality. The sex of the officer constitutes a determining factor for that work-related activity, in deciding whether, by reason of the context in which the activities of a police officer are carried out. It is not excluded that a Member State may take into consideration requirements of public safety in order to restrict general policing duties, in an internal situation characterized by recurrent assassinations, to men equipped with fire-arms.73

4.3.2. SIRDAR (C-273-97)

Sirdar case on 26 October 1999, concerning the exclusion of women from the British Royal Marines (British Army).

The authorities in the Royal Marines set out a policy in June 1994 that was entitled: “Revised Employment Policy for Women in the Army – Effect on the Royal Marines”. This policy excludes women from service on the ground that their presence is incompatible with the requirement of “interoperability”. This means that every Marine have to be capable of fighting in a commando unit, regardless of his specialization.

Angela Sirdar had been employed in the British Army since 1983 and had worked as a chef in a commando regiment of the Royal Artillery since 1990. She was dismissed from employment in February 1994 and told that she was to be made redundant for economic reasons and it would take effect from February 1995. This redundancy also affected over 500 other chefs. In July 1994, the responsible authorities in the Royal Marines had a shortage of chefs and sent an offer of transfer for mistake to Mrs. Sirdar, not realizing that she was a woman. Subsequently, when she applied to serve as a chef in the Royal Marines, her application was refused on the grounds that the Royal Marines did not admit women according to the new policy. Mrs. Sirdar considered that she was the victim of discrimination on the grounds of sex and referred the matter to the Industrial Tribunal in Bury St. Edmunds.  

The Industrial Tribunal referred number of questions to the ECJ, concerning the principle of equal treatment between men and women as regards access to employment in the army or a unit of the armed forces. The ECJ remarked that decisions regarding access to employment in the armed forces were generally required to observe the principle of equal treatment between men and women. However, the Court considered that the Royal Marines were organized in a way which varied fundamentally from the way in which other

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74 Case C-273/97 Angela Maria Sirdar v The Army Board, Secretary of State for Defence (1999) ECR 0000.
75 Case C-273/97 Angela Maria Sirdar v The Army Board, Secretary of State for Defence (1999) ECR 0000.
units of the British armed forces were organized. Within that unit, chefs were obliged to serve in front-line commandos, with no exceptions from the rule.\textsuperscript{76} In the circumstances of this case, the Court considered that in the exercise of Article 2(2) of the ETD, national authorities could reserve access to the Royal Marines solely for men due to the specific conditions governing their deployment as front-line commando units.\textsuperscript{77} The reason for this ruling is that the fundamental characteristic of the Royal Marines is their rapid deployment capacity, as assault troops, in a wide variety of military actions and close engagement with the enemy.

\textbf{4.3.3. \textit{Kreil} (C-285/98)}

\textit{Kreil}\textsuperscript{78} case on 11 January 2000, concerning the exclusion of women from almost all military jobs in the German army (Bundeswehr).

Tanja Kreil was a trained electronics technician who applied for a job in the weapons electronics maintenance service of Bundeswehr, the Federal German army. Her application was rejected on the grounds that German law bars women from military posts involving the use of arms. Article 12a of the German Constitution provides: “Men who have attained the age of eighteen years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organisation ... If, while a state of defence exists, civilian service requirements in the civilian public health and medical system or in the stationary military hospital organisation cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a law. They may on no account render service involving the use of arms”.\textsuperscript{79} These stipulations are applied as a general principle prohibiting women from performing armed service. Tanja

\textsuperscript{76} CVRIA - Cour de justice des Communautés européennes, Press and Information Division, Press Release no. 83/99, Judgment in Case C-273/97, Angela Maria Sirdar and the Army Board, Secretary of State for Defence, (1999).
\textsuperscript{77} Nielsen, (2000).
\textsuperscript{78} Case C-285/98 Tanja Kreil v Germany (2000) ECR 0000.
Kreil brought an action in the Administrative Court\textsuperscript{80} of Hannover, against the Federal German army, after the rejection of her application. She claimed in particular that the rejection of her application, based solely on her sex, was contrary to Community law. The German court decided to ask the ECJ if the Community directive precludes the application of national provisions which bar women from military posts involving the use of arms, and which only allow them access to the medical and military-music services.

It was first noted by the ECJ that “it is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organization of their armed forces. However, such decisions do not fall entirely outside the scope of the Community principle of equal treatment for men and women, which also applies, given its general scope, in the public sector and therefore within the armed forces”\textsuperscript{81}. Such exclusion cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out, because it applies to almost all military posts in the Bundeswehr. German legislation barring women outright from army jobs involving the use of arms is contrary to the Community principle of equal treatment for men and women. However, the derogations provided for in Article 2(2) of the Directive remains possible where sex constitutes a determining factor for access to certain special combat units.

Furthermore, considering the very nature of armed forces, the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from entering military posts. Basic training in the use of arms is provided in the services of the Bundeswehr that are accessible to women, to enable personnel in those services to defend themselves and to assist others. The national authorities could not, in those circumstances, adopt the general position that the composition of all armed units in the Bundeswehr had to remain exclusively male, without breaking the

\textsuperscript{80} Verwaltungsgericht.
principle of proportionality.\textsuperscript{82} Finally, concerning the provision of the directive involving the protection of women, particularly as regards pregnancy and maternity, it does not allow women to be excluded from a post on the ground that they should be given greater protection than men against risks to which both men and women are equally exposed.\textsuperscript{83}

\textbf{4.3.4. Marschall (C-409/95)}

\textit{Marschall\textsuperscript{84} case on 11 November 1997, concerning a German teacher that was denied promotion in favour of a woman because of Affirmative Action.}

Mr. Hellmut Marschall, was working as a tenured schoolteacher in the service of the Land Nordrhein-Westfalen. He submitted his application for promotion to a post in the comprehensive school in Schwerte. The competent authority informed him, however, that it planned to appoint a female candidate to the post. He was told that under the applicable regulation the female candidate must be promoted because the candidates were equally qualified and, at the time when the post was advertised, there were fewer women than men in the career bracket.

The applicable law in the Land provided: \textit{"Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour."}\textsuperscript{85}

Mr. Marschall brought an action before the Administrative Court, Gelsenkirchen in Germany, for an order directing the Land to promote him to

\begin{footnotes}
\item[82] Nielsen, (2000).
\item[84] Case C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen (1997) ECR I-6363.
\item[85] CVRIA - Cour de justice des Communautés européennes, Press and Information Division, Press Release no. 74/97, \textit{Judgment of the Court of Justice of the EC in Case C-409/95, Hellmut Marchall v Land Nordrhein-Westfalen}, (1997).
\end{footnotes}
the post in question. The German court remarked that the priority accorded as a matter of principle to women seemed to amount to discrimination which was not eliminated by the possibility of giving preference, exceptionally, to a male candidate.

The Administrative Court asked the ECJ to decide whether the 1976 directive conflicted with the rule in the staff regulations of the Land. The Court replied that Article 2(1) and 2(4), of Council Directive 76/207/EEC did not conflict with a national rule stating that, where candidates of different sexes were equally qualified as regards their aptitude, skills and performance, female candidates should be given preference in areas of the public service where women were less numerous than men at the level of the post in question except where, for reasons relating to the person of a male candidate, the balance should be deemed to be in his favour. This is, however, subject to the condition that the rule in question should guarantee, in each individual case, to male candidates with qualifications equal to those of the female candidates, that applications are the subject of an objective assessment which takes account of all criteria relating to the persons of the candidates and waives priority for female candidates where one or more of these criteria is deemed to tilt the balance in favour of the male candidate. In addition, such criteria must not be discriminatory vis-à-vis female candidates.86

In the Kalanke case, two years earlier, a German landscaper working for the Bremen Parks Department was passed over for promotion in favour of a female colleague. Both candidates were found to be qualified for the position, but priority was given to the female candidate under a Bremen law which required that, in such “tie break” situations, priority must be given to the woman for positions where women do not make up at least half of the employees at that level.

In a somewhat surprising ruling in Kalanke, the ECJ took the view that Article 2(4) was “derogation” from the right to equal treatment, and thus must be strictly interpreted. The ECJ struck down the law, holding that national

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regulations guaranteeing automatic promotion of women who hold qualifications equal to their male counterparts exceed the requirements of the Equal Treatment Directive and constitute impermissible discrimination.

4.4. **CHAPTER FINDINGS**

Article 2(2) of the ETD is derogation from an individual right laid down in the directive and should therefore to be used very carefully. The ECJ has observed that Community law provides for strictly defined exceptions to the application of the principle of equal treatment where sex is a determining condition for the exercise of the activity in question in view of its nature. The exceptions must be appropriate and necessary to the aim to be achieved. The national authorities enjoy a certain margin of discretion in adopting the measures which they consider necessary to guarantee public security. The derogations provided for in the directive can apply only to specific activities for the exercise of which the Court has recognized that sex could constitute a determining factor, like in the *Johnston* case concerning the situation in Northern Ireland where there are serious internal disturbances. The sex was also a determining factor in the *Sirdar* case concerning the British Royal Marines, because it is a special combat unit in national army operating in the frontline.

The principle of proportionality, which is one of the general principles of Community law, must be observed, in determining the scope of any derogation from a fundamental right such as equal treatment of men and women. That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the objective and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed. In the *Kreil* case, the Court found that Germany’s policy that women may “on no account render service involving the use of arms” was disproportionate because such a prohibition
may only be applied to specified activities. The main conclusion which can be
drawn from these cases is that the degree of discretion given to Member
States on this issue is subject to strict scrutiny. It can only concern specific
posts and Member States must periodically reassess the legitimacy of the
exclusion.

The Kalanke ruling prompted a flood of criticism and comment, both from
women’s interest groups as from academic and practising lawyers. Even the
European Commission itself issued a communication on the interpretation of
the judgment. The Commission stated that not all quotas would be unlawful,
and listed a range of positive-action measures which would, in its view, be
acceptable despite the ruling. It proposed also to amend the terms of Article
2(4) to provide that a soft quota like the one in the Kalanke case would not be
contrary to the Directive, so long as it did not automatically give preference to
the under-represented sex, but permitted the assessment of an individual’s
specific circumstances in a given case.\(^\text{87}\)

In contrast with the Kalanke proceedings, in which the only national
intervention was from the UK government in support of the applicant, five
governments intervened in the Marschall case to support the compatibility of
the positive-action legislation with EC law, and only the UK and France
opposed it. The ECJ distinguished the rule in Kalanke from the Marschall rule
by reference to its “saving clause”, but also adopted a more nuanced view of
the equal chances of men and women on the labour market.

The ECJ stated in the Kalanke case, that affirmative action programs, such as
preferential treatment and quotas in favour of women, were not bringing about
the end of discrimination. On the contrary, they were no longer discriminating
women, but men. Therefore, affirmative action programs of that kind were not
compatible with the ETD which aims at the equal treatment of both women
and men.

\(^{87}\) Craig & de Bûrca, (2003).
Evaluating the judgments on affirmative action the reflection of the main arguments of Kalanke and Marschall leads to an examination of the concurrence of European and national protection of fundamental rights. The supremacy of European law affects even constitutional law. The German Constitutional Court, in the first place, doubts of sufficient protection of fundamental rights through European law, but as long as ECJ and the German Constitutional Court, in the reasoning, do not dissent, affirmative actions should not be in danger.\(^8\)

It is stated in the Marschall judgment that a qualification introduced by a “saving clause” which enables male candidates to be made the subject of an objective assessment excludes absolute and unconditional priority for women, which would go beyond the limits set by the relevant Community provisions and which the Court had found unlawful in the Kalanke judgment. The judgments of these cases had enormous impact on German constitutional law and challenged affirmative action in Germany.

\(^8\) Zuleeg, (1999).
5. Conclusion

Over the last 25 years or thereabouts, the ECJ has contributed considerably to the development of EU discrimination law while at the same time promoting the evolution of general principles of EU law. The ECJ has used discrimination law cases as starting points for discovering and developing basic principles of European law, such as for example directly binding effect *viz a viz* private individuals, duty to interpret national law in conformity with directives and state liability. EU law principles concerning equality between men and women have been elevated into fundamental rights and general principles of law.

EC law concerning sex-discrimination was originally divided mainly into three parts; equal pay, equal treatment, and social security. Non-discrimination on grounds of sex is the basic principle of them all three, but each is governed by different legal provisions which differ somewhat in content.

The principle of equal treatment between men and women has received a boost from the ruling of many cases, especially from the Defrenne cases in the seventies that made enormous impact on future legislation in the EU. A directive on equal pay was adopted, followed by other directives concerning equal treatment in employment, state and occupational social security.

There has also been a considerable amount of soft law in the section of equal treatment, with the adoption of resolutions, memoranda, and recommendations on a variety of equal-opportunities matters. Sometimes these issues have lead to new legislations in the form of harder law, and sometimes they have remained as an alternative to legislation. Apart from the various concrete regimes of sex equality law, the ECJ has frequently stated that the general principle of equal treatment between men and women is a fundamental one in the Community legal order.

Each year cases related to claims of sexual harassment and harassment have been increasing and because of that development, the European Union has
taken a major step toward harmonizing public policy aimed at reducing sexual harassment in the workplace. It is possible that individual Member States find it desirable to chart their own legislative path given existing social and cultural differences within the European Union. However, each Member State give considerable attention to the benefits – for employers and employees alike – of more clearly defining the boundaries between acceptable and unacceptable workplace behaviour. As Member States undertake initiatives leading to an environment free of harassment, it would be exciting to observe how they will implement the new consolidated Equal Treatment Directive.

There are some exceptions from the ban on discrimination that allow gender discrimination. The exceptions must be appropriate and necessary to the aim to be achieved. The national authorities enjoy a certain margin of discretion in adopting the measures which they consider necessary to guarantee public security. The exceptions provided for in the Equal Treatment Directive can apply only to specific activities for the exercise of which the Court has recognized that sex could constitute a determining factor.

Another kind of exception is affirmative action measures that have long been offered under EC law as part of a triad of measures to promote equality between men and women. These law guaranties priority for women in promotions in the public sector in cases where there are male and female candidates who are equally qualified for the post in question. These measures have been criticized for discriminating men instead of women. In the field of affirmative action, the ECJ has enhanced protections for women and allowed Member States greater scope to develop affirmative action programmes.

The aim of the “Treaty of Lisbon” is to make the enlarged Europe more effective, democratic and transparent and considerably large part concerns non-discrimination and equality between men and women. It is therefore clear when future legislations are observed that equality and non-discrimination have received greater attention in the European Union.
6. BIBLIOGRAPHY


Employment Appeal Tribunal (EAT), *The EAT hears appeals from decisions made by employment tribunals, by the Certification Officer or by the Central Arbitration Committee*. Retrieved October 24, 2007 from http://www.employmentappeals.gov.uk/


Europa – Activities of the European Union, Summaries of legislation: *Equal opportunities and equal treatment for women and men in employment and


