

Legal opinion "EU Equal Treatment Law on the Basis of Gender in Employment - Implications for Switzerland"

by

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Summary

EU primary legislation and Swiss constitutional law each incorporate a subjective right to equal pay for equal work or work of equal value regardless of gender. In addition, they define which bodies have the power to lay down provisions on equal treatment in matters of employment and occupations. Within the EU, Directive 2006/54/EC is particularly relevant, in Switzerland it is the Gender Equality Act (GEA). The Swiss GEA corresponds to the EU directive for the most part. The key differences concern the reduced burden of proof in respect of hiring discrimination, which is lacking in Switzerland, and the failure to expressly mention occupational social security schemes in the scope of the GEA. At the same time, the EU has a directive on equal treatment between men and women working in a self-employed capacity. Switzerland does not have any equivalent rules.

The analysis of the case law of the European Court of Justice (ECJ) and that of the Swiss Federal Supreme Court reveals a broad consensus on key issues such as "quotas", the definition of "discrimination" and "justification for wage discrimination". Unlike the Federal Supreme Court, the ECJ assumes that the concept of pay also covers occupational social security schemes. Like the ECJ, the Federal Supreme Court does not consider discrimination on the basis of sexual orientation to fall within the meaning of "gender" or "sex". However, in contrast to Switzerland, the EU affords a relatively high degree of protection against discrimination on grounds of sex or sexual orientation; the latter is set out in the anti-discrimination directive 2000/78/EC. Both the ECJ and the Federal Supreme Court have handed down decisions on gender equality in respect of statutory social security schemes. Federal Supreme Court case law on cases involving unemployment insurance is particularly noteworthy in this context. The Federal Supreme Court's "message" here is clear: the unemployment insurance authorities must not strengthen discrimination on the labour market by refusing to recognise the ability of unemployed women to find work on grounds of maternity. Mention should also be made of the fact that gender-based differences in treatment in Switzerland's social insurance legislation are problematic in terms of the obligations imposed by the European Convention on Human Rights (ECHR; Art. 14 in conjunction with Art. 8), as confirmed by the relevant case law of the European Court of Human Rights (ECtHR). The decisive point here is the view that treatment which may initially appear to privilege women (for example, with regard to their entitlement to a widow's pension), ultimately only (or also) helps cement traditional role expectations and thus primarily works to the disadvantage of women.

Employees who stand up for the victims of discrimination play an important role in implementing protection against discrimination in day-to-day working life. The ECJ emphatically strengthened the position of persons in this category in its ruling on the Hakelbracht case. It found that the concept of (protection against) victimisation, which is integral to the EU directives on equal treatment, must be

interpreted broadly and include all people who speak out in support of victims of discrimination. The Swiss Gender Equality Act addresses the victimisation concept to a certain extent in Art. 10 GEA (increased protection against termination as a retaliatory measure). The Act as it currently stands does not expressly make provision for any further protection to be extended to employees who defend or support victims of discrimination.

Insofar as the adoption of the respective EU legislation and case law can be deemed desirable, there is a need for action in matters of equal treatment of self-employed persons, protection for employees who stand up for victims of discrimination and extending the reduced burden of proof to include the hiring phase. Gender-specific differences in treatment in matters of social insurance also require particular attention. Case law has scope for action in this context regarding occupational social security benefits that could be considered part of the definition of pay that is open to broad interpretation.

IV) Result

- ¹ Legislation and case law on the equal treatment of women and men in working life as it currently stands in the EU and Switzerland respectively can be depicted as follows:

The provisions of EU *primary legislation* on the equal treatment of women and men are very close in content to the requirements enshrined in the Swiss *constitution*. In both cases, there is a subjective right to equal pay for equal work or work of equal value. In addition, both legal systems *empower* and *obligate* the *legislators* to lay down rules on equal treatment. The key *differences* concern the *reduced burden of proof in respect of hiring discrimination*, which is lacking in Switzerland, and the failure to expressly mention *occupational social security schemes* in the scope of the GEA. It is notable that, in contrast to the EU, the idea of a quota (albeit in an extremely mild form) has “survived” the legislative process in Switzerland. On the other hand, the EU has a directive on equal treatment between men and women working in a *self-employed* capacity. Switzerland does not have any equivalent rules.

There are no fundamental differences in the *case law* of the ECJ and that of the Federal Supreme Court in relation to the *reduced burden of proof*, which also applies in Switzerland in the context of *equal pay*. The “*quota concepts*” are also more or less consistent. A “strict quota” is not permitted either in the EU or in Switzerland. Moreover, the ECJ and the Federal Supreme Court both assume that discrimination on grounds of sexual orientation is not included in the definition of “discrimination on grounds of sex”. However, the *consequences* of this narrow interpretation *differ*: In Switzerland, protection under employment law on the basis of sexual orientation is restricted to the general protection of personality rights (Art. 328 CO) and is thus less effective than the protection against discrimination on the basis of gender. In the EU, “sexual orientation” features as a protected characteristic in directive 2000/78/EC, which affords a comparable level of protection as directive 2006/54/EC (discrimination on grounds of sex).

The case law of the ECJ and that of the Federal Supreme Court regarding *social security in connection with the employment relationship* is worthy of attention. The terms “pay”, “wage” and “salary” are *broadly interpreted* by both courts. In contrast to the ECJ, the Federal Supreme Court does not consider occupational benefits as constituting an element of pay. However, the Federal Supreme Court has made it clear that the unemployment insurance authorities must not strengthen discrimination on the labour market by refusing to recognise the ability of unemployed women to find work on grounds of maternity. Mention should also be made of the fact that gender-based differences in treatment in Switzerland’s social insurance legislation are problematic in terms of the obligations imposed by the ECHR (Art. 14 in conjunction with Art. 8), as confirmed by the relevant case law of the ECtHR. The decisive point here is the view that treatment which may initially appear to privilege women (for example, with regard to their entitlement to a widow’s pension), ultimately only (or also) helps cement traditional role expectations and thus primarily works to the disadvantage of women.

Employees who stand up for the victims of discrimination play an important role in implementing protection against discrimination in day-to-day working life. The ECJ emphatically strengthened the position of persons in this category in its ruling on the Hakelbracht case. It found that the concept of (protection against) victimisation, which is integral to the EU directives on equal treatment, must be interpreted broadly and include all people who speak out in support of victims of discrimination. The Swiss Gender Equality Act addresses the victimisation concept to a certain extent in Art. 10 GEA (increased protection against termination as a retaliatory measure). The Act as it currently stands does not expressly make provision for any further protection to be extended to employees who defend or support victims of discrimination.

- ² An analysis of the Federal Supreme Court's consideration of ECJ case law reveals the following picture:

ECJ case law on the burden of proof has not been entirely reciprocated by the Federal Supreme Court. However, there are no fundamental differences to be found. The Federal Supreme Court adopts the ECJ concept of indirect discrimination, and especially the grounds justifying this kind of discrimination, in several cases. This also applies to the, not uncontroversial, recognition of the "market" as justification for unequal pay where equal work or work of equal value is performed. Federal Supreme Court case law on quotas is largely based on that of the ECJ. It is interesting to note that in BGE 145 II 153 (discrimination on grounds of homosexuality does not fall under Art. 8 para. 3 Cst.), the Federal Supreme Court does not make any reference to the corresponding conclusions in ECJ case law.

- ³ In brief, the analyses in this expert opinion lead to the following conclusions and recommendations:

Swiss gender equality legislation in matters of employment is largely equivalent to that of the EU. There is a need for improvement in the following specific areas:

- Extending the reduced burden of proof to also include hiring discrimination
- Creating the legal foundations for the equal treatment of women and men working in a self-employed capacity
- Broadly interpreting the concept of "pay" under the GEA to encompass differences in treatment in matters of (mandatory and non-mandatory) occupational benefit provision.
- Creating the legal foundations for the protection of employees who support or defend victims of discrimination.