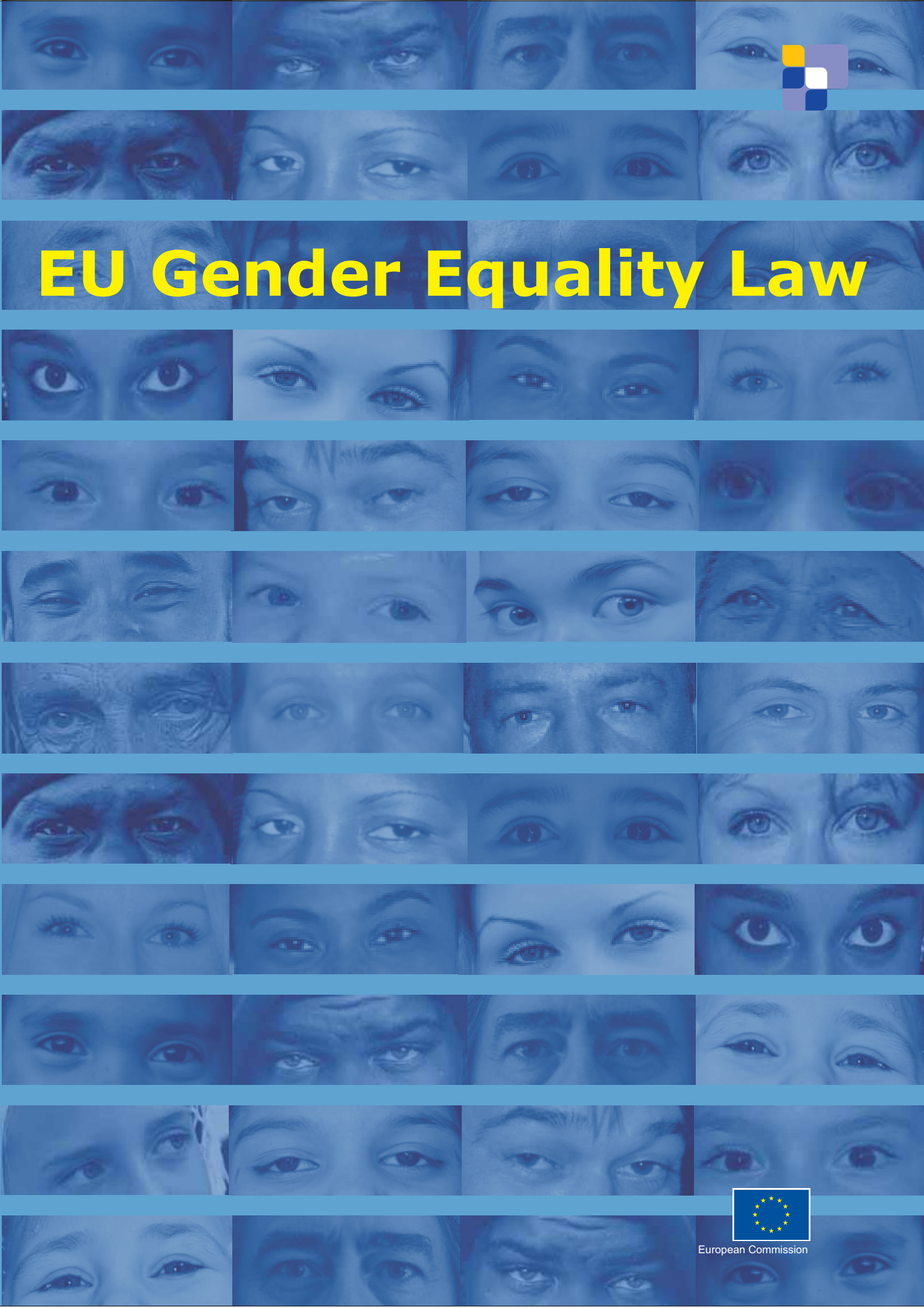




EU Gender Equality Law



European Commission

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European Commission

Directorate-General for Employment, Social Affairs and Equal Opportunities
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EU Gender Equality Law

Susanne Burri and Sacha Prechal*

1. Introduction

The purpose of the present publication is to provide a general overview of gender equality law at the EU level. The publication is aimed at a broad – but not necessarily legal – public and explains the most important issues of the EU gender equality *acquis*.

The term ‘EU gender equality *acquis*’ refers to all the relevant Treaty provisions, legislation and the case law of the European Court of Justice (ECJ) in relation to gender equality. Another often-used term, instead of gender equality, is ‘sex equality’. Both terms are used in the present publication, more or less interchangeably. However, it should be noted that while the term ‘sex’ refers primarily to the biological condition and therefore also the difference between women and men, the term ‘gender’ is broader in that it also comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society.

Another brief explanation that merits attention is the difference between the EU and the EC. Currently, i.e. before the entry into force of the Lisbon Treaty, the European Community and therefore also EC law¹ is only one part of the European Union and of EU law. All gender equality law is law that originates in the EC Treaty, which is older than the EU Treaty. Therefore, while we may speak about EU gender equality law, the more precise references are to the EC Treaty. When – and if – the Lisbon Treaty enters into force, the EC and the EU will be merged into one single unit, the European Union. However, we would continue to work with two treaties, the Treaty on European Union (TEU) that lays down the basic structures and provisions, and the Treaty on the functioning of the EU (TFEU), which is more detailed and elaborates the TEU.²

This publication provides a brief description of the historical development of EU gender equality law (Section 2), which is followed by an overview of the relevant EC Treaty Articles and legislation (Section 3). Apart from Article 141 EC (former article 119 EEC), establishing the principle of equal pay for women and men, the overview covers the following directives: the Directive on equal pay for men and women (75/117), the Directive on equal treatment of men and women in employment (76/207 as amended by Directive 2002/73), the Directive on equal treatment of men and women in statutory schemes of social security (79/7), the Directive on equal treatment of men and women in occupational social security schemes (86/378, as amended by Directive 96/97), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613), the Pregnant Workers’ Directive (92/85), the Parental Leave Directive (96/34), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113) and, finally, the so-called Recast Directive (2006/54).³ Next a number of central concepts of EU gender equality law are discussed

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¹ And previously, before 1992, the European Economic Community and EEC law.

² See Article 1 TEU which provides ‘(...) The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.’

³ The full – official – name of the respective directives and their publication are included in Annex I. Annex II contains a selected bibliography of EU gender equality law (in English).

(Section 4). The present publication concludes with a consideration of certain vital aspects relating to the enforcement of EU gender equality law and some brief general observations (Sections 5 and 6).

2. A brief retrospective overview

In the Treaty establishing the European Economic Community (EEC) adopted in 1957, only one single provision (Article 119 EEC Treaty, now Article 141 EC Treaty) was included to combat gender discrimination, namely the principle of equal pay between men and women for equal work. The background to this provision was purely economic; the Member States, in particular France, wanted to eliminate distortions in competition between undertakings established in different Member States. France had adopted provisions on equal pay for men and women much earlier and it feared that cheap female labour in other Member States would put French undertakings and the economy at a disadvantage. However, in 1976 the European Court of Justice (ECJ) ruled that Article 119 EEC not only had an economic, but also a social aim. As such, it contributed to social progress and the improvement of living and working conditions.⁴ Later on, the ECJ even ruled that the economic aim is secondary to the social aim. It also held that the principle of equal pay is an expression of a fundamental human right.⁵

As we will see throughout this publication, the ECJ has played a very important role in the field of equal treatment between men and women, in ensuring that individuals can effectively invoke and enforce their right to gender equality. Similarly, it has delivered important judgments interpreting EU equality legislation and relevant Treaty Articles.

While in the late 1950s there was only this Article on equal pay, since then a whole plethora of directives, which prohibit discrimination on the grounds of sex in particular, have been adopted. A number of reasons can explain this 'legislative activity' by the then EEC up to the 1990s.

First, Article 119 should have been implemented before 1 January 1962, but the Member States were unable or unwilling to implement this Article. Even after recommendations by the European Commission and the adoption of a new timetable, this Article was not transposed into national law. The implementation of the principle of equal pay became one of the priorities of the social programme agreed upon in 1974 and the Member States decided to adopt a new directive on equal pay between men and women.⁶

Second, from 1975 onwards, there were cases brought to the ECJ in which the Court decided that individuals may rely on Article 119 EEC (now article 141 EC) before the national courts in order to receive equal pay for equal work or work of equal value, without discrimination on grounds of sex. While this case law enabled individuals to bring cases before national courts,⁷ it also made it clear that it is difficult to isolate pay from other aspects of working conditions, pension arrangements included.⁸ Together with the social programme from 1974, this provided an important impetus for legislation in the area of the equal treatment of men and women. Subsequently, these directives were again interpreted by the ECJ, in particular where national courts had requested this in the so-called preliminary procedure.⁹

With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women throughout the European Community has become one of the essential tasks of the Community (Article 2 EC). Furthermore, according to Article 3(2) EC, the Community shall aim to eliminate inequalities, and to promote equality, between men and women in all the activities listed in Article 3 EC. This obligation of gender mainstreaming means that both the Community and the Member States

⁴ ECJ 8 April 1976, Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 (*Defrenne II*), at paras 10-12. Cases in general and also cases which are not yet reported in European Courts Reports (ECR), can be found at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

⁵ ECJ 10 February 2000, Case C-50/96 *Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v Lilli Schröder* [2000] ECR I-743 (*Schröder*), at para 57.

⁶ Council Resolution of 21 January 1974 concerning a social action programme, OJ 1974, C 13/1.

⁷ See below, Section 5.1.

⁸ See below, Section 3.1.

⁹ See below, Section 5.1.

shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.¹⁰

Furthermore, since 1999 the Community has had the competence to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation (Article 13(1) EC). This Article has provided a legal basis for two non-gender related anti-discrimination directives: the Directive on the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC)¹¹, the Framework Directive on equal treatment in employment and occupation (2000/78/EC)¹² and, as far as gender is concerned, the Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (2000/113/EC). As will be discussed below, the Treaty of Amsterdam has also amended Article 141 EC.

The next important moment in the development of EU gender equality law was the adoption of the Charter of Fundamental Rights of the European Union.¹³ This Charter, *inter alia*, prohibits discrimination on any ground, including sex (Article 21); it recognizes the right to gender equality in all areas, thus not only in employment, and the necessity of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the 'right to paid maternity leave and to parental leave' (Article 33).

Currently, the Charter is a non-binding fundamental rights instrument. However, EU institutions, the European Court of Justice included, often rely on the Charter as an authoritative source of fundamental rights that must be respected in the EU. The status of the Charter will change with the entry into force of the Lisbon Treaty, becoming a binding catalogue of EU fundamental rights (see Article 6(1) TEU, as amended by the Lisbon Treaty).

What does the Lisbon Treaty do to gender equality? In principle it confirms the position taken earlier by the EU in the EC Treaty. Articles 13 and 141, for instance, are adopted without changes. It also affirms once again the importance of gender equality in the Union.

Equality between women and men is included in the common values on which the Union is founded (Article 2 TEU), which means, for instance, that it will be a yardstick for determining whether a European State can be a candidate for accession, in accordance with Article 49 TEU. This is also the case under the current Treaty, but the criterion is less explicit.

The promotion of equality between women and men is also listed among the tasks of the Union (Article 3(3) TEU), together with the obligation to eliminate inequalities and to promote equality between men and women in all the Union's activities (Article 8 TFEU). Here, the Lisbon Treaty clearly reiterates the obligation of gender mainstreaming for both the Union and the Member States.

The basic Treaties (TEU and TFEU) are important for the further development of EU gender equality law, because they serve as a basis for the adoption of future legislation and other EU gender equality measures. Furthermore, it is also important what the basic Treaties say in terms of values, tasks and general obligations, since they often guide the ECJ in the interpretation of the existing Treaty provisions and EU legislation. A brief account of these will follow in the next section. We will start with a discussion of the principle of equal pay, enshrined in the Treaty. Following this, there will be an overview of the legislation adopted by the EU, i.e. the directives in the area of gender equality mentioned above. Directives are legislative instruments of the EU which have to be transposed into national law. Thus, for instance, the Member States have to take the necessary measures to ensure that provisions contrary to the principle of equal treatment in laws, regulations, administrative provisions, collective agreements or individual

¹⁰ See also Article 29 of the Recast Directive.

¹¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22.

¹² Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

¹³ The most recent version, after some adaptations, was published in OJ C 303, 14 December 2007, p. 1.

contracts are declared null and void, or are amended. Similarly, as we will see, the Member States have to ensure that victims of discrimination may bring a claim before the courts.

3. EU gender equality legislation

3.1. The pivotal role of Article 141 EC

Any discussion of EU gender equality legislation cannot avoid starting with a brief discussion of a crucial Treaty Article, namely Article 141 EC (former Article 119 EEC), providing for equal pay between male and female workers.

The original text of the former Article 119 EEC Treaty, adopted in 1957, provided that:

‘1. Each Member State shall (...) ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

- a) that pay for the same work at piece shall be calculated on the basis of the same unit of measurement;
- b) that pay for work at time rates shall be the same for the same job.’

The background of this provision was already touched upon above, in Section 1, as was the importance of the ECJ finding that the article is directly effective. Another important aspect to note is that all legislation adopted by the EU legislator must be in conformity with this Treaty Article, as there is a hierarchical relationship between the Treaty and secondary legislation.

There are, however, also other important features to be highlighted:

Who is a ‘worker’ in the sense of Article 141 EC?

The concept of a ‘worker’ has a Community-law meaning and it cannot be interpreted more restrictively in national law. A worker is a person who, for a certain period of time, performs services for and under the direction of another person in return for which he or she receives remuneration.¹⁴ The concept of a worker does not include independent providers of services who are not in a subordinate relationship with the person who receives the services. But once a person can be considered as a ‘worker’ in the sense of Article 141 EC, the nature of his or her legal relationship with the other party to the employment relationship is not relevant for the application of that article. This may imply, *inter alia*, that even when a person is considered as being self-employed under national law, Article 141 must nevertheless be applied.¹⁵

What is ‘pay’?

According to the – extensive and sometimes ground-breaking – case law of the ECJ on this issue, pay includes not only basic pay, but also, for example, overtime supplements,¹⁶ special bonuses paid by the employer,¹⁷ travel facilities,¹⁸ compensation for attending training courses and training facilities,¹⁹ termi-

¹⁴ ECJ 3 July 1986, Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg*, [1986] ECR 2121 (*Lawrie-Blum*), at para 17. This case concerned the free movement of workers. However, in ECJ 14 December 1995, Case 317/93 *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625 (*Nolte*) and ECJ 14 December 1995, Case 444/93 *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz*, now *Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-04741 (*Megner*) the ECJ made clear that the same definition applies in the areas of gender discrimination.

¹⁵ ECJ 13 January 2004, Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-873 (*Allonby*), at paras 65-71.

¹⁶ See, for example, ECJ 6 December 2007, Case 300/06 *Ursula Voß v Land Berlin* [2007] ECR 2007, I-10573 (*Voß*).

¹⁷ See for example ECJ 21 October 1999, Case C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR 7243 (*Lewen*).

¹⁸ See for example ECJ 9 February 1982, Case 12/81 *Eileen Garland v British Rail Engineering Limited* [1982] ECR 359 (*Garland*).

¹⁹ See for example ECJ 4 June 1992, Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötel* [1992] ECR I-3589 (*Bötel*).

nation payments in case of dismissal²⁰ and occupational pensions.²¹ In particular the extension of Article 141 to occupational pensions has been very important.

In *Defrenne I* the Court had to consider the relationship between the concept of pay in Article 141 EC and social security systems. The ECJ ruled that although consideration in the form of social security benefits is not alien to the concept of pay, this concept does not include those social security schemes or benefits, in particular retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, and which apply, on an obligatory basis, to general categories of workers. These schemes ensure certain benefits for workers which are not so much a matter of the employment relationship, but rather a matter of – general – social policy. As we will see below, this distinction between statutory social security schemes and occupational schemes of social security has induced the EU legislator to adopt two different directives, one in 1978 on statutory schemes, and another in 1986 on occupational schemes.²²

In the meantime, the ECJ was also confronted with cases on pensions. After a period of uncertainty about the question whether and how far occupational pensions are covered by the equal pay principle, the ECJ decided in the famous *Barber* judgment, building on what it had already said in *Defrenne I*, that Article 141 EC does apply to schemes which are:

- i) the result of either an agreement between workers or employers or of a unilateral decision of the employer;
- ii) wholly financed by the employer or by both the employer or the workers; and
- iii) where affiliation to those schemes derives from the employment relationship with a given employer.

The *Barber* judgment and the following case law had the effect, *inter alia*, that certain aspects of the Occupational Schemes Directive were contrary to Article 141 EC and had to be amended.²³ This case law also had a considerable impact on equal treatment in occupational pension schemes in those Member States where it had been believed that Article 141 EC was not applicable and certain forms of discrimination were still allowed.

What does Article 141 EC prohibit?

In the first place, Article 141 EC not only prohibits direct discrimination based on sex in the field of pay, but also indirect discrimination. Direct sex discrimination occurs when a person is treated less favourably on grounds of his or her sex. Indirect discrimination refers to discrimination which is the result of the application of a sex-neutral criterion, which disadvantages, in particular, persons belonging to one sex compared with persons of the other sex.²⁴

An important question in equal pay cases is always whether the work performed by a female worker is 'equal' to the work performed by a male worker. In this respect, the ECJ has decided that Article 141 EC also extends to 'work of equal value'. As far as the comparison of the pay which the female and the male worker receive is concerned, the ECJ has stressed the need for genuine transparency, permitting an effective review. This is only achieved if the principle of equal pay is observed in respect of each of the elements of remuneration granted to men and women. Comprehensive or global comparisons of all the considerations granted to men and women are not allowed.²⁵ This implies that often a comparison

²⁰ See for example ECJ 27 June 1990, Case C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591 (*Kowalska*).

²¹ See for example ECJ 13 May 1986, Case 170/84 *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 (*Bilka*) and ECJ 17 May 1990, Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 (*Barber*).

²² See below, Sections 3.4 and 3.5 respectively.

²³ See below, Section 3.5.

²⁴ For a more detailed discussion see below, Section 4.2.

²⁵ ECJ 17 May 1990, Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 (*Barber*), at paras 33-34.

should be made between the work performed and the salary received by male and female workers. However, such comparisons are not always necessary (see Sections 3.2 and 4.1).

Finally, the prohibition applies not only to sex discrimination arising out of individual contracts, but also collective agreements and legislation.²⁶

The Treaty of Amsterdam amendments

Article 141 EC – until then Article 119 – was renumbered and amended with the entry into force of the Treaty of Amsterdam on 1st of May 1999. The first two paragraphs remained nearly the same; however, the provision in Article 141(1) now explicitly states 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.’

As we have seen, the addition ‘work of equal value’ only confirms what had already become clear with the case law of the ECJ. The European Community legislator thus incorporated this case law in the Treaty provision.

Further, two new paragraphs have been added. According to Article 141(3) the Council can adopt measures to ensure the application of the principle of equal opportunities and the 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.

The new Article 141(4) also allows positive action. It stipulates 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 prevent or compensate for disadvantages in professional careers.’

We will return to the notion of positive action below, in Section 4.3.

3.2. Directive on equal pay for men and women

As was already observed above, Article 119 (141 EC) should have been implemented before 1 January 1962, but this did not occur. An important measure to facilitate more effective implementation was the adoption of a directive. The Directive on the application of the principle of equal pay for men and women – the so-called First Equal Pay Directive – was adopted in 1975 (75/117).

The Directive defines the obligations of the Member States. The Member States must abolish all discrimination between men and women arising from laws, regulations or administrative provisions which are contrary to the principle of pay (Article 3). The Member States also have to take the necessary measures to ensure that provisions in collective agreements, wage scales, wage agreements and individual employment contracts which are contrary to the principle of equal pay shall be or may be declared null and void or may be amended (Article 4). They also have to ensure the application of the principle of equal pay by the adoption of laws, regulations and administrative provisions (Article 8(1)).

According to Article 1 of the Directive:

‘The principle of equal pay for men and women as outlined in Article 119 means, for the same work or for work for which equal work is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification scheme is used to determine pay, it must be based on the same criteria for both men and women and so be drawn up to exclude discrimination on grounds of sex.’

²⁶ ECJ 8 April 1976, Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455 (*Defrenne II*), at paras 21-22.

This Article clarifies that the principle of equal pay also applies to work of equal value. It does not alter the meaning of Article 119 EEC, which is in any event impossible since the Treaty is a higher source of law. The ECJ stated in *Worringham* that the Directive explains that the concept of same work in Article 119 includes work to which equal value is attributed.²⁷

The principle of equal pay applies to equal work and work of equal value and also, *a fortiori*, to work of higher value. The ECJ adopted this view stating that otherwise the employer would easily be able to circumvent the principle of equal pay by assigning additional or more onerous duties to workers of a particular sex, who could then be paid a lower wage.²⁸

Furthermore, the Directive contains various provisions that are general in nature in that they can be found in other anti-discrimination directives which have subsequently been adopted. These provisions relate to the information that must be provided to employees about their equal treatment/pay rights (Article 7) and to the enforcement of rights, such as effective access to justice (Articles 2 and 6) and protection against dismissal by an employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay (Article 5). The enforcement aspects of EU gender equality law are discussed separately in Section 5.

3.3. Equal treatment of men and women in employment

In 1976 a second directive was adopted on the implementation of the principle of equal treatment between men and women in employment (76/207). Under this Directive the principle of equal treatment between men and women also applies to access to employment, vocational training and promotion, and working conditions including conditions governing dismissal (Articles 1(1) and 5(1)). The Directive prohibits both direct and indirect discrimination (see Sections 4.1 and 4.2). Article 2(1) defines the principle of equal treatment. This principle means that

‘(...) there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.’

Paragraphs 2 to 4 of Article 2 contain exceptions to the prohibition of direct sex discrimination. One exception concerns occupational activities for which the sex of the worker is a determining factor. This is the case, for example, when an actor in a play or film has to be a man. Article 2(2) reads:

‘This Directive shall 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 which they are carried out, the sex of the worker constitutes a determining factor.’

The ECJ held that the exception of occupational activities in Article 2(2), being a derogation from an individual right laid down in the Directive, must be interpreted strictly.²⁹ According to the ECJ, the exclusion of women from some military units of the Royal Marines fell within the scope of this exception and therefore did not breach the second Directive.³⁰ On the other hand, Germany infringed the Directive by adopting the position that the composition of all armed units in the *Bundeswehr* must remain exclusively male. The Court found that the derogations provided in Article 2(2) can only apply to specific activities and that such a general exclusion was not justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out.³¹

²⁷ ECJ 11 March 1981, Case 69/80 *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited* [1981] ECR 767 (*Worringham*), para 21.

²⁸ ECJ 4 February 1988, Case 157/86 *Mary Murphy and others v An Bord Telecom Eireann* [1988] ECR 673 (*Murphy*), para 9-10.

²⁹ ECJ 15 May 1986, Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (*Johnston*), at para 36.

³⁰ ECJ 26 October 1999, Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-07403 (*Sirdar*).

³¹ ECJ 11 January 2000, Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 (*Kreil*).

The second exception in the Directive concerns the protection of women, particularly as regards pregnancy and maternity (Article 2(3)). This exception allows national provisions to guarantee to women specific rights on account of pregnancy and maternity, such as maternity leave. According to the ECJ, Article 2(3) of the Directive recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.³² These rights are intended to ensure the implementation of the principle of equal treatment for men and women regarding both access to employment and working conditions. Therefore, the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive – not formal – equality.³³ In 1992, the Member States adopted a specific directive regarding pregnant workers: Directive 92/85. (Section 3.7.)

The last exception relates to positive action (Article 2(4); see also below, Section 4.3). In the first draft of Article 2 the idea of positive action was included in the definition of equal treatment, which was defined as:

'The elimination of all discrimination based on sex or on marital or family status, including the adoption of appropriate measures to provide women with equal opportunity in employment, vocational training, promotion and working conditions.'

During the negotiations on this draft Article, the reference to appropriate measures was deleted. Positive action has since then been framed in EC law as an exception to the principle of equal treatment, instead of as an integral part thereof.

The final text of Article 2(4) of Directive 76/207 on positive action stipulates that:

'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'

As far as all the exceptions are concerned, the Equal Treatment Directive has what is called 'a closed system of exceptions' as regards direct discrimination; derogations to the principle of equal treatment are limited to the three exceptions just described.³⁴ Therefore direct sex discrimination in employment is prohibited, unless one of these three exceptions applies. In the case of indirect discrimination, however, the justifications may be based on other – unwritten – grounds. The conditions are, then, that the aim pursued is legitimate and the measures to attain that aim are appropriate and necessary.³⁵

In 2002, Directive 76/207 was amended in order to modernise and harmonise its provisions. Elements of the case law of the ECJ have been incorporated in some of the new and amended provisions. One of the issues addressed in the amending Directive 2002/73 was making the definition of direct and indirect discrimination in the area of gender equality consistent with the definition employed in the Race Directive and the Framework Directive,³⁶ introducing a mainstreaming obligation³⁷ and strengthening the provisions on the enforcement of equal treatment rights. Also, the provisions on equal pay were included in the amended Directive.

³² ECJ 12 July 1984, Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 (*Hofmann*), at para 25.

³³ ECJ 30 April 1998, Case 136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011 (*Thibault*), at paras 24-26.

³⁴ ECJ 8 November 1990, Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941 (*Dekker*), at paras 22-24.

³⁵ For a more detailed discussion see below, Section 4.2.

³⁶ See above, notes 11 and 12.

³⁷ See above, Section 2.

The provisions of (the amended) Equal Treatment Directive were consolidated with other provisions on equal treatment between men and women into one single legal text in 2006, namely in the so-called 'Recast Directive' (Directive 2006/54, see Section 3.10).

3.4. Equal treatment of men and women in statutory social security schemes

In 1976 the Member States could not reach an agreement on the equal treatment of men and women in social security. Therefore Directive 76/207 has postponed the implementation of the principle of equal treatment for men and women in that area by stating that Member States would adopt provisions dealing with social security later on. In December 1978, Directive 7/79 was adopted. This so-called Third Directive on equal treatment between men and women, covers the field of statutory social security.

The Directive prohibits both direct and indirect sex discrimination (Article 4(1)). The persons protected under the Directive are defined in Article 2, which reads:

'The Directive shall apply to the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons.'

The material scope is defined in Article 3. The Directive applies to statutory schemes that provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. It also applies to social assistance, but only in so far as it is intended to supplement or replace the statutory schemes covering the above-mentioned risks. Provisions concerning survivors' and family benefits are excluded, except in the case of family benefits granted by way of increases in benefits due in respect of the risks mentioned above.

This Third Directive contains an extensive list of exceptions. Article 4(2) contains an exception for provisions relating to the protection of women on the ground of maternity. Other exceptions are listed in Article 7. The two most important exceptions from this Article are:

- the determination of different pensionable ages for men and women in old-age pensions and retirement pensions;
- certain advantages related to the fact that the persons concerned had brought up children and may have interrupted employment for that purpose.

In the area of statutory schemes some – often rather complex – cases before the ECJ revolved around the question of whether a scheme is statutory or occupational and what the consequences may be if there is a close link between the statutory scheme and an occupational scheme. This is particularly important since certain exceptions are allowed under the Statutory Schemes Directive but not under the Occupational Schemes Directive.

3.5. Equal treatment of men and women in occupational social security schemes

Only in 1986 was the Directive on the principle of equal treatment in occupational social security schemes adopted (86/378). According to Article 2 of the Directive, occupational social security schemes are schemes that are not covered by Directive 79/7. It does not apply to individual contracts (e.g. individual insurance contracts).

The categories of persons protected under this Directive are the same as under Directive 79/7. The same holds true for the risks covered. Social benefits, and in particular survivors' benefits and family allowances, are covered if such benefits are accorded to employed persons and thus constitute consideration paid by the employer to the worker by reason of the latter's employment.

Although the Directive prohibits both direct and indirect discrimination and gives various examples of provisions that are prohibited (Article 6), it also contains important exceptions: the non-discrimination obligation does not apply to survivors' pensions, differences in the pensionable age, and the use of dif-

ferent actuarial calculation factors. However, since the ECJ interpreted the concept of pay in Article 141 EC to include occupational social security schemes, the significance of these exceptions was consequently rather limited. Under the influence of the ECJ's case law discrimination in relation to survivors' benefits and the pensionable age was no longer allowed. Similarly, in relation to the use of gender-segregated actuarial factors the ECJ 'corrected' the Occupational Schemes Directive to a certain extent.

The case law of the ECJ has been incorporated through an amendment to the Occupational Schemes Directive by the so-called 'Barber Directive' (96/97). Subsequently, the Directive became a part of the recast exercise (Directive 2006/54/EC, see Section 3.10).

3.6. Equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity

Another directive on equal treatment was also adopted in 1986. The aim of Directive 86/613 is to ensure the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to such activity, as regards those aspects which are not covered by Directives 76/207 and 79/7 (Article 1). The persons protected under the Directive are self-employed workers and their spouses, not being employees or partners (Article 2).

In relation to self-employed persons, the Member States were requested to take the measures which are necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment, especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial facilities.

Overall, however, this Directive has so far played only a minor role in practice due to the fact that the obligations laid down in the Directive are rather non-committal. For instance, one of the key problems of helping spouses is that they have no professional status at all. In this respect, the Member States are merely requested to examine under what conditions the recognition of the work of those spouses may be encouraged and, in the light of such examination, to consider any appropriate steps for encouraging such recognition.

Similarly, as far as the protection of female self-employed workers or helping spouses during pregnancy and maternity is concerned, the Member States only have to examine whether, and under what conditions, these persons have access to services supplying temporary replacements or existing national social services, or are entitled to cash benefits under a social security scheme or under any other public social protection system.

3.7. The Pregnant Workers Directive

Directive 92/85, regarding pregnant workers and workers who have recently given birth or are breastfeeding, was adopted in 1992. Its main aim is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Article 1). Some provisions of this Directive are closely linked to the principle of equal treatment between men and women in employment. Article 8 of this Directive stipulates, for example, that Member States have to ensure that women enjoy a period of at least 14 weeks' maternity leave. During this period their employment rights must be ensured; in particular, they have the right to return to the same or an equivalent job, with no less favourable working conditions, and to benefit from any improvement in working conditions to which they would be entitled during their absence.³⁸ They are also entitled to the payment of and/or the entitlement to an adequate allowance being maintained (Article 11(2)(b)).

Furthermore, pregnant women enjoy health and safety protection; they cannot be obliged to carry out night work, and they are protected against dismissal from the beginning of their pregnancy until the

³⁸ ECJ 30 April 1998, Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECR I-2011.

end of the maternity leave (Article 10). The latter protection also covers dismissal because of absences due to incapacity to work caused by an illness resulting from pregnancy.³⁹

The provisions of this Directive have often been interpreted jointly with provisions of Directive 76/207 on equal treatment between men and women in employment. According to the ECJ, discrimination on grounds of pregnancy amounts to direct discrimination (see below, Section 4.1)

3.8. The Parental Leave Directive

The reconciliation of family/private life with work is, according to the ECJ, 'a natural corollary to gender equality' and a means for achieving gender equality not only in law but also in the reality of everyday life.⁴⁰ Therefore, although not adopted as a specific gender equality directive, the Parental Leave Directive (96/34) plays an important role in the gender equality discourse.

This Directive sets minimum standards designed to facilitate the reconciliation of work with family life. It implements the Framework Agreement of the European social partners on parental leave and time off on grounds of *force majeure*.⁴¹ Under this Directive the Member States are obliged to grant all parents a non-transferable right to parental leave. The length of the parental leave must be at least three months and may be taken from the birth or adoption of the child until that child has reached the age of eight years.

The Directive also ensures that workers can exercise this right: the Member States and/or the social partners (management and labour) must take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave. At the end of the parental leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship. The Directive also provides a right to leave on grounds of *force majeure* for urgent family reasons.

The Directive grants these rights on the ground of the birth or adoption of a child, but they can be exercised at any time from the birth/adoption until the point where the child reaches an age of up to eight years (the precise age to be determined by the Member States).

The ECJ has dealt with the issue of parental leave under Directive 96/34/EC in only a few cases. In case C-519/03 *Commission v Luxembourg*,⁴² for instance, it held that the minimum three-month period of parental leave, as provided for under the Directive, may not be reduced when it is interrupted by another period of leave, such as maternity leave, which has a different purpose from parental leave.

3.9. Equal treatment of men and women in the access to and the supply of goods and services

In 2004 the scope of application of the principle of equal treatment of men and women was broadened with the adoption of Directive 2004/113/EC, implementing the principle of equal treatment between men and women in access to and the supply of goods and services. This is the first directive addressing gender equality issues outside the field of employment. The preamble to this Directive recognises that discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market and can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

Directive 2004/113/EC applies to all persons who provide goods and services which are available to the public both in the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context (Article 3(1)). The Directive does not apply to the content of media and advertising and education (Article 3(3)).

³⁹ ECJ 30 June 1998, Case C-394/96 *Mary Brown v Rentokil Ltd.* [1998] ECR I-4185 (*Brown*), at para 18.

⁴⁰ Cases C-243/95 *Hill and Stapleton v the Revenue Commissioners and the Department of Finance* [1998] ECR I-3739 (*Hill*); C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253 (*Gerster*).

⁴¹ Directives may in fact 'hide' framework agreements between the social partners adopted under Article 139(1) EC. The latter may be 'implemented' by the Council in accordance with the procedure provided in Article 139(2) EC. Put in simple terms, in this way, the agreement is transformed into legislation.

⁴² [2005] ECR I-3067.

The principle of equal treatment means that there shall be no direct or indirect discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity. More favourable provisions concerning the protection of women as regards pregnancy and maternity are not contrary to the principle of equal treatment. The Directive further prohibits harassment and sexual harassment and an instruction to discriminate (Article 4). Positive action is allowed under Article 6 of the Directive.

However, the Directive allows various exceptions to the principle of equal treatment, even in cases of direct sex discrimination. Article 4(5) stipulates that the Directive shall not preclude differences in treatment if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means chosen to achieve that aim are appropriate and necessary. The Directive thus has no closed system of exceptions in case of direct discrimination as the other sex equality directives do and it therefore offers less protection against direct sex discrimination.

The Directive also contains specific provisions regarding actuarial factors in insurance contracts. Insurance contracts are often offered on different terms to men and women, both as regards the premiums and the benefits, in particular in private pension schemes. These differences are based on the fact that, on average, women live longer than men and that the insurance companies therefore run a higher financial risk in ensuring women than in ensuring men. Article 5(1) therefore stipulates:

‘Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals’ premiums and benefits.’

However, Member States have the possibility to derogate from this provision (Article 5(2)). But, in any event, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits (Article 5(3)).

3.10. The Recast Directive

In 2006, a new directive was adopted in which the existing provisions of different sex equality directives are brought together and some case law of the European Court of Justice is incorporated (Directive 2006/54). The aim of this so-called ‘recasting’ is to clarify and bring together in a single text the main provisions regarding access to employment, including promotion, and to vocational training, as well as working conditions, including pay and occupational social security schemes. This Recast Directive has to be implemented by 15 August 2008 and the directives which are brought together in this Directive (Directives 76/207, as amended by Directive 2002/73; 86/378, as amended by Directive 96/97; 75/117 and 97/80) shall be repealed one year later (Article 34). The Member States must of course meet their obligations arising from all these directives before the end of the various implementation periods. Nearly all the articles in the Recast Directive correspond to existing articles in one or more of the above-mentioned directives.

The Recast Directive is divided into four titles. The first title on general provisions includes a description of the aim of the Directive and definitions of different concepts such as direct and indirect discrimination, harassment and sexual harassment. We will come back to these central concepts in Section 4. The second title includes provisions on equal pay (Chapter 1) and on equal treatment as regards access to employment, vocational training and promotion and working conditions (Chapter 2). In the third title provisions are brought together regarding remedies and penalties, the burden of proof, victimisation, the promotion of equal treatment through equality bodies, social dialogue and dialogue with NGOs. This title also includes general provisions on, for example, the prevention of discrimination, gender mainstreaming and the dissemination of information.

4. Central concepts of EU gender equality law

In almost all EU gender equality law there are certain concepts, as interpreted by the ECJ, which are common to the different directives and the relevant Treaty provisions. Moreover, these concepts also play a central role even beyond gender equality law.⁴³ The concepts of direct and indirect discrimination have notably been developed by the ECJ. The directives which have been adopted since 2000 contain similar definitions of direct and indirect discrimination and build upon the case law of the ECJ. Harassment, sexual harassment and an instruction to discriminate are also prohibited and defined in the recent directives.

In the following sections, the definitions of these concepts in the Recast Directive (2006/54, see Section 3.10), the most recent directive, will be the starting point, unless indicated otherwise.

4.1. Direct discrimination

Direct discrimination is defined in Article 2(1)(a) of Directive 2006/54 and occurs

‘(...) where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.’

This definition suggests that a person who is treated less favourably should be compared to another person who is in a comparable situation. However, in the majority of cases up until now, the ECJ has found that there is discrimination for the very simple reasons that a person has been put at a disadvantage for reasons of being female or male, without engaging in comparisons of the situations. One of the reasons for this is that the issue of comparisons is not always raised by the national court. However, in cases where the national court puts this issue to the ECJ, the latter will deal with comparisons.⁴⁴

A special category are cases of discrimination for reasons of pregnancy. In such cases, contrary to what national courts have sometimes done, a comparison is not required, according to the ECJ. The Court held that the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. The fact that there are no male candidates is not relevant if the reason for not appointing the woman is linked to her pregnancy.⁴⁵ The ECJ also decided that although pregnancy is not in any way comparable to a pathological condition, the fact remains that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to complete rest for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in pregnancy and less favourable treatment on that ground, or perhaps even dismissal, amounts to direct discrimination as well.

In the Recast Directive the EU legislator has made it clear that the less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c)).

Finally, in relation to the distinction between direct and indirect discrimination, which will be discussed next, it must be stressed once again that direct discrimination is generally prohibited, unless a specific written exception applies. This is different in the case of indirect discrimination.

⁴³ Parallel Race Directive, Framework Directive, Section 1, notes 11 and 12.

⁴⁴ See for instance in the area of equal pay: Case C-132/92 *Birds Eye Walls* [1993] ECR I-5579. On how the national courts may handle issues of EC law, see below, Section 5.1.

⁴⁵ ECJ 8 November 1990, Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941 (*Dekker*), at paras 15-18.

4.2. Indirect discrimination

The concept of indirect discrimination has been developed by the ECJ in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work. The landmark case is *Bilka*, which concerned access to an occupational pension scheme.⁴⁶ According to this scheme, part-time employees may obtain pensions under the scheme if they have worked for at least 15 years full time over a total period of 20 years. The ECJ found that if a much lower proportion of women work full time than men, the exclusion of part-time workers would be contrary to Article 119 (now Article 141 EC), where, taking into account the difficulties encountered by women workers working full time, that measure could not be explained by factors that exclude any discrimination on grounds of sex. The measures could, however, be objectively justified if they correspond to a real need on the part of the undertaking, and are appropriate and necessary to attain that aim. The same objective justification test has been applied in many different ECJ judgments and is now included in the definition of indirect discrimination in the most recent directives.

Indirect discrimination is defined in Article 2(1)(b) of Directive 2006/54 as follows:

'(...) where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

The indirect discrimination test, therefore, comprises the following elements. The first major question to be answered is whether a measure disadvantages significantly more persons of one sex than the other. It is for the applicant to prove that a measure or a practice amounts to indirect discrimination.⁴⁷ In *Seymour* the Court provided more guidance on how to establish such a presumption or *prima facie* case of indirect discrimination.⁴⁸ When there is a *prima facie* case of indirect discrimination, a second major issue arises: the defendant has to provide an objective justification for the indirect discriminatory criterion or practice. Indirect discrimination can be justified if the aim is legitimate and the measures to attain that aim are appropriate and necessary. The arguments put forward have to be specific, and supported by evidence. For example, in *Seymour* the Court considered that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex; in addition, it was necessary to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.

The development of the concept of indirect discrimination has meant that a step has been taken towards a more substantive approach to equality, because it focuses on the effect of a rule or a practice and takes into account everyday social realities. Substantive equality requires that further steps are taken in order to realise true, genuine equality in social conditions. Arguably, this may sometimes require positive action, the topic of the next Section. However, as we will see, the issue of positive action is rather controversial in some Member States and therefore positive action is only allowed for, but it is not laid down (yet) as an EC-law obligation.

4.3. Positive action

As we have seen above, Article 141 EC and some of the gender equality directives allow for positive action. This concept is defined in Directive 2006/54 as follows:

⁴⁶ ECJ 13 May 1986, Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 (*Bilka*).

⁴⁷ ECJ 17 October 1989, Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199 (*Danfoss*), at paras 10-16 and ECJ 26 June 2001, Case 381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961 (*Brunnhofer*), at paras 51-62.

⁴⁸ ECJ 9 February 1999, Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623 (*Seymour*), at paras 58-65.

'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.' (Article 3).

These types of measures, in the absence of such *permissive* provisions, would be considered to infringe the principle of equal treatment if they led to less favourable treatment of members of one sex, for instance an employer-established training course which is only open to female employees.

The measures permitted under the positive action provisions quoted above are those designed to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. The measures should, in particular, encourage the participation of women in various occupations in those sectors of working life where they are currently under-represented.

One of the means to achieve this end is to set targets or even quotas in recruitment and promotion, which, however, must be proportionate to the aim pursued. According to the ECJ a measure that would give automatic and unconditional preference to one sex is not justified in this respect. In the case of recruitment and promotion, targets and/or quotas can only be accepted if each and every candidature is the subject of an objective assessment that takes the specific personal situations of all candidates into account. This case law of the ECJ started with the rather severe judgment in *Kalanke*.⁴⁹ In the meantime, the ECJ has softened its position in favour of positive action.⁵⁰

In *Lommers*,⁵¹ for instance, the Court found that measures that gave preference to female employees in the allocation of nursery places, but did not amount to a total exclusion of male candidates, were justified. Preferential allocation of nursery places to women employees was likely to improve equal opportunities for women since it was established that they were more likely than men to give up their careers in order to raise a child. Although, on the one hand, the case was decided in favour of positive measures, on the other hand, it also illustrated the potential dangers of positive action, in the sense that it continues to stereotype women as caregivers.

4.4. Harassment and sexual harassment

In the gender equality directives adopted since 2000, harassment and sexual harassment are explicitly prohibited. Harassment occurs, in terms of Article 2(1)(c) of the Recast Directive:

'(...) where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'

Note that the conduct has to have the purpose or the effect of violating the 'dignity' of a person *and* creating an intimidating etc. environment. These are cumulative requirements.

Sexual harassment occurs:

'(...) 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.'

⁴⁹ ECJ 17 October 1995, Case 450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-03051 (*Kalanke*).

⁵⁰ ECJ 19 March 2002, Case 476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-02891 (*Lommers*). See further also, for instance, ECJ 28 March 2000, Case 158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR 2000 I-01875 (*Badeck*) and ECJ 30 September 2004, Case 319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR I-08807 (*Briheche*).

⁵¹ ECJ 19 March 2002, Case 476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-02891 (*Lommers*).

Sex discrimination includes harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct (Article 2(2)a of the Recast Directive).

Harassment and sexual harassment cannot be objectively justified.

4.5. Instruction to discriminate

The prohibition on discrimination includes an instruction to discriminate against persons on one of the discrimination grounds covered by the anti-discrimination directives (Article 2(2)(b) of the Recast Directive). This could, for example, be the case if an employer required that an agency supplying temporary workers only recruits persons of a certain sex for a specific job. In that case, both the employer and the agency would be liable and would have to justify such sex discrimination.

5. How can EU gender equality law be enforced?

5.1. Invoking gender equality law in national courts

As was already observed (Section 2), most of the directives have various provisions in common that relate to the enforcement of gender equality rights. However, before turning to the discussion of these provisions it will be useful to point to some general aspects of EU gender equality law as far as they affect the courts of the Member States.

As we have seen above, complying with Article 141 EC on equal pay was apparently not easy for the Member States in the early stages. Similarly, the transposition of directives is sometimes too late or is otherwise not in accordance with EU law. However, due to the supremacy of EU law, equal pay provisions of the EC Treaty and directives prevail in the case of a conflict between national and EU law. Furthermore, quite a few provisions have direct effect, which means that they can be relied upon in litigation before national courts and applied by these national courts in any proceedings. Furthermore, the ECJ has also decided that the national courts have the duty to interpret their national law in conformity with the directive at issue, i.e. doing everything possible to achieve, through the interpretation of national law, the result which the directive aims at.⁵² Under certain conditions, a Member State may also be held liable for damage suffered by individuals due to the fact that a directive has not been transposed in time or has been done so incorrectly into national law.⁵³

Whenever EU gender equality law is relied upon in the national courts, they are able (and the courts of last instance are *obliged*) to request preliminary rulings from the ECJ (Article 234 EC). In the field of equal treatment, the ECJ has since 1971 delivered more than two hundred binding judgments, sometimes providing far-reaching interpretations of relevant provisions. One of the landmark judgments was the already mentioned judgment in *Defrenne II*, where the ECJ decided that Article 141 EC (then Article 119) has horizontal direct effect, i.e. that it can be relied upon by individuals before national courts not only against (organs of) the state, but also against individuals, such as private employers. But also in other respects, the ECJ has played a very important role in improving the ability of women and men to enforce their equality rights. This case law will be discussed below, together with the relevant provisions, in Sections 5.3 through 5.6. Before that, we will turn briefly to the role of the European Commission.

5.2. The role of the European Commission

The European Commission has an important task in the enforcement of EU gender equality law. The Commission monitors and analyses whether the Member States in general fulfil their obligations regarding the implementation of Treaty provisions and directives. More specific inquiries are also initiated by

⁵² The judgment of the ECJ in an equal treatment case has been ground-breaking in this respect. See ECJ 10 April 1984, Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (*Von Colson*), at para 26.

⁵³ ECJ 19 November 1991, Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357 (*Francovich*) and ECJ 5 March 1996, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029 (*Brasserie du Pêcheur*).

the Commission into activities of a particular Member State. Sometimes, these inquiries derive from complaints by individuals or organisations to the Commission. These complaints can be submitted to the services of the Commission rather easily.

According to Article 226 EC the European Commission can start an infringement procedure if it considers that a Member State has failed to fulfil a certain obligation. The Commission first sends a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the Member State does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the ECJ. If the ECJ considers that the Member State has failed to fulfil an obligation and the Member State does not take the necessary measures to comply with the judgment of the ECJ in good time, it might even be subjected to penalties (see Article 228 EC).

5.3. Burden of proof

In the directives adopted since 2000, the case law of the ECJ has been implemented in diverse provisions and the method of enforcing anti-discrimination law has been strengthened. For example, rules on the burden of proof have been developed in the case law of the ECJ, for instance when the ECJ stated that in the case of indirect discrimination it is the defendant who has to provide an objective justification (see also 4.2). Similarly the ECJ has held that where an undertaking applies a system of pay which is totally lacking in transparency, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men, it is then for the employer to prove that his practice in the matter of wages is not discriminatory.⁵⁴ With the Burden of Proof Directive (Directive 97/80), this case law was integrated in legislation as far as sex discrimination was concerned in the field of pay and employment. Now, all the directives adopted since 2000 contain similar provisions.

Article 19(1) of the Recast Directive stipulates that:

‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’⁵⁵

These rules do not apply to criminal proceedings, unless otherwise provided by the Member States. Member States may also introduce more favourable rules for plaintiffs.

Another ground-breaking case in which evidentiary rules were at stake was *Johnston*.⁵⁶ The case concerned, *inter alia*, an evidentiary rule in the Northern Ireland sex discrimination legislation that deprived the national court of the power to decide an issue arising in relation to the Equal Treatment Directive. The ECJ found that this rule was incompatible with the requirement of effective judicial control, stipulated in Article 6 of the Equal Treatment Directive. This article reflects, according to the ECJ, a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in the European Convention on Human Rights. This principle of effective judicial protection did not remain limited to the areas of evidence. It plays a pivotal role in many other respects, such as requiring that access to the judicial process must be guaranteed (see also Section 5.4).

5.4. Defending rights

Member States have the obligation to ensure that judicial procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the

⁵⁴ ECJ 17 October 1989, Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 03199 (*Danfoss*).

⁵⁵ These rules also apply to situations covered by Article 141 and insofar as discrimination based on sex is concerned, to the Pregnancy Directive and the Parental Leave Directive.

⁵⁶ ECJ 15 May 1986, Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651 (*Johnston*).

relationship in which the discrimination is alleged to have occurred has ended.⁵⁷ Organisations and associations which have, in accordance with the criteria laid down in national law, a legitimate interest in whether the provisions of the equal treatment directives are complied with, have *locus standi*. Such organisations, for example associations for women's rights of trade unions, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial or administrative procedure provided for the enforcement of the obligations under the equal treatment directives.

The directives do not lay down any procedural rules for proceedings designed to ensure respect for the principles of equal pay and equal treatment of women and men. For instance, in relation to the time limits for bringing an action the applicable national law applies. However, as a matter of general EU law, the ECJ does require that the procedural rules (and remedies) must be equivalent to those applicable to infringements of domestic law of a similar nature and importance (the so-called principle of equivalence). Similarly, procedural rules or other conditions governing the exercise of an equal treatment claim must not make that exercise excessively difficult (the principle of effectiveness).⁵⁸ In any case, national courts must evolve national rules in order to provide sex equality claims with full and effective legal protection.⁵⁹

5.5. Sanctions, compensation and reparation

The directives adopted since 2000 require that sanctions, which might comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.⁶⁰ The ECJ developed these requirements in the *Von Colson* case, which are now integrated in legislation.⁶¹ As regards compensation or reparation when there has been a breach of the principle of equal treatment between men and women in (access to) employment and access to and the supply of goods and services, the directives further stipulate that the Member States have to introduce such measures as are necessary to ensure real and effective compensation or reparation. Compensation or reparation has to be dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit may, in principle, not restrict such compensation or reparation.⁶² According to the ECJ, in particular in the case *Marshall II*, which is partly incorporated in the provisions of the Recast Directive, national law may not exclude an award of interest either.⁶³

5.6. Victimisation

Protection against dismissal or adverse treatment in reaction to a complaint is provided for in most of the directives.⁶⁴ Article 24 of the Recast Directive reads:

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

This type of provision may, for instance, enable employees to bring legal proceedings against former employers who have refused to provide references to them, where that refusal constitutes retaliation for legal proceedings brought by the employee against the employer with a view to enforcing compliance with the requirement of equal treatment for men and women.⁶⁵

⁵⁷ E.g. Article 17 of the Recast Directive.

⁵⁸ E.g. ECJ 1 December 1998, Case 326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd*, ECR 1998, I-07835 (*Levez*).

⁵⁹ *Johnston* see above, note 56.

⁶⁰ E.g. Article 25 of the Recast Directive.

⁶¹ ECJ 10 April 1984, Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, ECR 1984, 1891 (*Von Colson*), at para 28. Cf. also *Draehmpaehl* (Case C-180/95).

⁶² E.g. Article 18 of the Recast Directive.

⁶³ ECJ 2 August 1993, Case 271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, ECR 1993, I-04367 (*Marshall II*).

⁶⁴ E.g. Article 24 of the Recast Directive.

⁶⁵ ECJ 22 September 1998, Case 185/97 *Belinda Jane Coote v Granada Hospitality Ltd* [1998] ECR I-05199 (*Coote*).

5.7. Equality bodies

The directives on equal treatment between men and women adopted since 2002 oblige the Member States to designate equality bodies.⁶⁶ The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights. These bodies have the competence to provide independent assistance to victims of discrimination, to conduct independent surveys concerning discrimination and to publish independent reports and make recommendations.

5.8. Social dialogue

Member States also have the obligation to promote social dialogue between the social partners and dialogue with non-governmental organisations or dialogue with stakeholders with a view to fostering equal treatment.⁶⁷ The promotion of social dialogue might include the monitoring of practices at the workplace, in access to employment, vocational training and promotion, as well as the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice. The Recast Directive further stipulates in Article 21(2):

'Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, (...) and to conclude, at the appropriate level, agreements laying down anti-discrimination rules (...).'

Some directives also require Member States to encourage employers to promote equal treatment in a planned and systematic way and to provide, at appropriate regular intervals, employees and/or their representatives with appropriate information on equal treatment.⁶⁸ Such information may include an overview of the proportion of men and women at different levels of the organisation, their pay and pay differentials, and possible measures to improve the situation in cooperation with employees' representatives.⁶⁹

6. Final observations

The brief overview presented above illustrates that a great deal of progress has been made in the area of EU gender equality law since 1957. Both the EU legislator and the ECJ have greatly contributed, often in a delicate interplay, to this process. Tribute should also be paid to individuals who have brought cases before their national courts, cases that ended up in the ECJ in Luxembourg. This has enabled the ECJ to deliver its judgments. As we have seen, the case law of the ECJ has, from time to time, been the driving force for EC gender equality standards, in particular in the area of introducing new concepts or other revolutionary novelties, especially in the enforcement of EC equality law. It has played a crucial role in the effective enforcement of gender equality standards in the Member States.

The progressive realization of the equal treatment of women and men is certainly not only an achievement of the EU. Other international instruments, for instance, have no doubt also contributed to the adoption of equality legislation at the national level and the eradication of gender discrimination. It is, however, the mandatory character of EC law and the mechanism of judicial protection in the EU that have provided a crucial impetus to gender discrimination law in the Member States and the EEA countries. It is generally believed that Article 141 EC and the gender equality directives, as interpreted by the ECJ, have been vital to the effective application of gender equality in the Member States. It is often because of the compelling obligation of EC law that the national legislator has introduced a number of na-

⁶⁶ E.g. Article 20 of the Recast Directive.

⁶⁷ E.g. Articles 21 and 22 of the Recast Directive.

⁶⁸ E.g. Article 21((3) and (4) of the Recast Directive.

⁶⁹ See on social dialogue in the European Union: http://ec.europa.eu/employment_social/social_dialogue/index_en.htm (accessed 2 June 2008).

tional measures aimed at the effective implementation of the principle of gender equality. This implementation is the subject of a recent publication by the European Commission's European Network of Legal Experts in the field of Gender Equality.⁷⁰

⁷⁰ European Network of Legal Experts in the field of Gender Equality, *The Implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.2, available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html. For regular up-to-date information about the developments both at EU level and in the Member States see also the European Gender Equality Law Review, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.htm (accessed 8 October 2008).

Annex I Directives

- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women *OJ L 45, 19.2.1975, pp. 19–20.*
- Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 269, 5.10.2002, pp. 15–20.*
- Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security *OJ L 6, 10.1.1979, pp. 24–25.*
- Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes *OJ L 46, 17.2.1997, pp. 20–24.*
- Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood *OJ L 359, 19.12.1986, pp. 56–58.*
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) *OJ L 348, 28.11.1992, pp. 1–8.*
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC *OJ L 145, 19.6.1996, pp. 4–9.*
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *OJ L 373, 21.12.2004, pp. 37–43.*
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Links

See also for information on Gender equality the website of the European Commission:

http://ec.europa.eu/employment_social/gender_equality/index_en.html;

<http://ec.europa.eu/social/main.jsp?catId=418&langId=en>

See also for further information on anti-discrimination legislation and policies the website of the European Commission:

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The present publication provides a general overview of gender equality law at the EU level. A brief description of the historical development of EU gender equality law is followed by an overview of the relevant EC Treaty Articles and legislation. This legislation covers equal pay and equal treatment for men and women in employment, statutory social security, occupational social security schemes, self-employment and access to and the supply of goods and services. A number of central concepts of EU gender equality law, such as direct and indirect discrimination and their interpretation by the European Court of Justice, are discussed. The European Court of Justice has played a very important role in the field of equal treatment between men and women by ensuring that individuals can effectively invoke and enforce their right to gender equality. This publication offers an overview of the most important case law in this area. It concludes with a consideration of certain vital aspects relating to the enforcement of EU gender equality law and some brief general observations.

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