10. Equal treatment: The EU approach

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I. INTRODUCTION

Equal treatment is a multifaceted and multi-layered concept, in particular in EU law. EU equal treatment legislation and case law is extensive and complicated, in particular in the field of social security. EU equal treatment law has developed since 1957, with the first provision on equal pay between men and women and a prohibition of discrimination based on nationality in the EEC Treaty. Nowadays, the principle of equal treatment is enshrined in many Treaty provisions (both in the Treaty on European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU)), in the European Charter of Fundamental Rights and in diverse directives. Member States have in addition their own national legal systems, with often an important role for their Constitution in addition to Labour Code provisions and specific sex equality and/or anti-discrimination Acts. They also have obligations based on international treaties, in particular UN and ILO Treaties. The accession of the EU to the European Convention on Human Rights raises even more questions on the interplay between the Court of Justice of the EU (hereafter: Court of Justice or Court) and the European Court of Human Rights (ECtHR). The European Social Charter (ESC) is also relevant. At the core of all these legal instruments and their interpretation by courts and supervisory committees are different conceptualisations of the principle of equality. The scope of legal instruments, in particular in EU law, mirrors the limited objectives and competences of the EU and the difficulties in reaching agreements within the EU institutions. Issues of growing importance, such as an increasing need for care in an ageing society, are not (yet) addressed in EU legislation, even if some directives include provisions on the reconciliation of work and care. But there are even more weaknesses and inconsistencies in the existing EU equal treatment legislation.

This chapter offers an analysis and critical assessment of the *acquis communautaire* on equal treatment. This contribution aims at discussing some implicit assumptions of EU equality concepts, limits of EU equal treatment law, gaps in legislation and inconsistencies in case law. However, strong points in the light of the aims of EU legislation will be highlighted as well, in addition to pending initiatives. Attention is also paid to the potential of the EU Charter and some UN Treaties. Given the limited scope of this chapter, no attention is paid to national law, ILO Treaties and the other European systems such as the ECHR and the ESC. The focus is on EU equal treatment law in employment, as the issue of women and social security is dealt with in Chapter 11 of this volume. This chapter on equal treatment deals with the discrimination

grounds mentioned in Article 19 TFEU: sex, racial or ethnic origin, religion or belief, disability and sexual orientation.[1]

II. SCOPE OF EU EQUAL TREATMENT LEGISLATION

The scope of EU equal treatment legislation is rather limited and differs for the various discrimination grounds.[2] The consequence is that some issues are not addressed at all in EU law, for example age discrimination in statutory social security regulations and the supply of goods and services. The reason for differences in scope is partially historical as sex equality[3] directives have been adopted since 1975 and most of them have been amended since. The extensive interpretation by the Court of the concept of pay in the equal pay Treaty provision[4] has influenced the scope of, in particular, the directive on occupational social security schemes.[5] The two so-called 2000 Directives, on equal treatment between persons irrespective of racial or ethnic origin (hereafter: the Race Directive) and the Framework Directive also show differences in (material) scope.

II.i Differences in Scope

Article 19 TFEU is an enabling provision, which allows the EU to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability and sexual orientation. The material scope is not delimited in this article and this allows the EU in principle to take a broad range of actions. Up to now, the scope of equal treatment legislation in directives has, however, been limited to (access to) employment, social security (both occupational and statutory) and (the access to and supply of) goods and services.

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[1] The nationality ground is not addressed specifically, as quite different aspects are related to the prohibition of discrimination on the ground of nationality, in particular in relation to third nationals. Additional directives in the field of sex equality and reconciliation issues (in particular Directives 92/95 and 2010/18) are not discussed either.

[2] See for an overview E Ellis and P Watson, *EU Anti-discrimination Law* (Oxford University Press 2012).

[3] Sometimes these directives are called *gender equality directives* and both terms are often used interchangeably. However these are two different concepts: 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, S Burri and S Prechal, *EU*, *Gender Equality Law. Update 2013* (European Commission 2014). See also P Auvergnon (ed), *Genre et droit social* (Bordeaux: Presses Universitaires de Bordeaux 2008); S Burri, 'Un regard critique sur l'approche de genre en droit du travail communautaire', in P Auvergnon (ed), *Genre et droit social* (Bordeaux: Presses Universitaires de Bordeaux 2008) 53–71. In this contribution, the term *sex equality* is used in reference to legislation.

[4] Article 157 TFEU (ex Article 119 EEC Treaty, ex Article 141 EC).

[5] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40, later repealed by the Recast Directive 2006/54.

Of all the existing equal treatment directives, the Race Directive 2000/43 has the broadest scope.[6] It applies to all persons in the private and public sector in access to employment, self-employment and vocational training; to employment and working conditions, including dismissals and pay; to membership and involvement in a workers' or a professional organisation; to social protection, including social security and healthcare; to social advantages; to education; and to access to and supply of goods and services. However, differences of treatment based on nationality are not covered.[7]

When we compare the scope of the Race Directive with the existing sex equality directives, the scope regarding employment is similar (see Article 14 of the Recast Directive 2006/54).[8] However, the Race Directive is more precise concerning social security matters, as it explicitly mentions *social protection* (including social security and healthcare) and *social advantages*.

The development of the principle of equal treatment between men and women in social security matters reflects a piecemeal approach, starting in the 1970s, which has led to a complex interplay of legal provisions and case law. The relevant sex equality directives apply now to occupational social security schemes as defined in Chapter 2 of the Recast Directive, which implements some case law of the Court of Justice, in particular on the interpretation of the concept of pay in Article 157 TFEU, which includes occupational schemes.[9] Since 1979, there has been a directive applicable to the principle of equal treatment for men and women in statutory social security schemes.[10] The delimitation between occupational schemes and statutory schemes in relation to sex equality is not easy to make and some Member States, in particular from Eastern and Southern Europe, have, for example, pension systems that cannot easily be defined as either occupational or statutory schemes.[11] This distinction is important as the allowed derogations form the principle of equal treatment differ depending on whether a scheme falls under the concept of pay, the provisions on occupational social security schemes or statutory social security schemes. Such differences are irrelevant in the case of race discrimination, while they are crucial in relation to sex discrimination. However, a specific directive applies to equal treatment of self-employed men and

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

[7] Article 3. In addition Article 3(2) specifies that the directive is without prejudice to the entry into and residence of third-country nationals and stateless persons.

[8] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23. This Directive repealed Directives 75/117/EEC, 76/207/EEC (amended by Directive 2002/73/EC), 1986/378/EEC (amended by Directive 96/97/EC) and 1997/80/EEC with effect from 15 August 2009.

[9] An issue which was, for example, at stake in the famous Case C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 and Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

[10] 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 [1979] OJ L 6/24.

[11] See on this issue, S Renga, D Molnar-Hidassy and G Tisheva, *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries* (European Commission 2010).

women (2010/41).[12] Even if the provisions of this directive are rather weak, the scope of the prohibition of sex discrimination seems broader in this respect than the scope of the Race Directive, the latter covering only conditions to *access* to self-employment. It is submitted that there are no good reasons why protection against race discrimination in these fields should differ from protection against sex discrimination. The reasons seem purely historical and lead to inconsistencies in the scope of protection of two discrimination grounds which are both considered to be suspect in many legal systems.

An important difference concerns the prohibition of race discrimination compared to sex discrimination in (access to and) supply of goods and services. In the sex equality Directive 2004/113, the content of media and advertising, and education are explicitly excluded in Article 3(3). Vocational education falls under the Recast Directive, but this would not cover primary and secondary education. However, indirect sex discrimination in education might occur in relation to ostensible religious symbols, such as the veil. The Dutch Institute for Human Rights has published a few Opinions in which pupils of schools felt discriminated against because they were not allowed to wear the veil during gym for example.[13] The Dutch legislation applies to education and according to the Dutch Equality Body this amounts to indirect discrimination on the ground of religion. However, it is submitted that this is a clear example of intersectional discrimination as the grounds racial or ethnic minority, sex and religion intersect in such cases.[14] Currently, only indirect racial discrimination in primary and secondary education would fall under the scope of EU law.

A single reference to multiple discrimination is included in the preamble of the Framework Directive, where it is recognised that women are often victims of multiple discrimination.[15] However, there is no further attention to this concept in EU equal

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[12] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1. In addition, the Recast Directive implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which seems broader than employment. The personal scope of this directive includes self-employed persons (Article 6) and the Member States have specific obligations regarding the provisions of occupational social security schemes for self-employed persons (see Articles 10 and 11).

[13] See Opinions 2013-122 and 2013-17.

[14] See on this issue, for example, E Howard, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law from the UK' (2009) 4(1) *Journal of Religion and Human Rights* 7–24; E Howard, 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-discrimination?' (2011) (6)2 *Journal of Religion and Human Rights* 127–149; T Loenen, 'The Headscarf Debate: Approaching the Intersection of Sex, Religion and Race under the ECHR and EC Equality Law', in D Schiek and V Chege (eds), *European Union Non-discrimination Law. Comparative Perspectives on Multi-dimensional Equality Law* (Routledge-Cavendish 2009) 313–328; T Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice', in K Alidadi, M-C Foblets and J Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 103–120.

[15] Para 3.

treatment law.[16] It is worth mentioning that cases on religious symbols have been decided by both the European Court of Human Rights and the Human Rights Committee, some with different outcomes, even if the facts of the cases were similar.[17] In these cases the principle of non-discrimination and the freedom of religion were at stake. It is submitted that the concept of intersectionality might be useful in highlighting in court all the relevant characteristics and circumstances of a case and taking into account structural forms of discrimination resulting from intersectional discrimination.[18] This concept thus merits further research.[19]

As mentioned above the prohibition of race discrimination applies to the (access to and) supply of goods and services. Sex discrimination is not prohibited in the content of media and advertising. It is, however, clear that sexism is broadly reflected in media and advertising. This is, however, a field where no action from the EU can be expected in the short term. At national level, cases on this issue are rare.[20]

The differences in scope between the Race Directive 2000/43 and the Framework Directive 2000/78[21] are even greater, the latter applying only to (access to) employment. Differences based on nationality and social security and protection are explicitly excluded from the scope of this directive in Article 3(2) and (3). In addition, Member States can exclude the application of the principle of equal treatment in relation to disability and age in the armed forces (Article 3(4)). A proposal is pending which aims at extending the scope of the Framework Directive to the area of goods and services.[22] However, the last time this proposal was discussed in the Council was in 2011 and no progress has been made since in the Council.[23] Member States considered then in particular that competences, the disability provisions and the legal certainty in the directive as a whole had to be discussed. An extension of the scope of the Framework

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[16] See on this issue and the state of affairs in national law, S Burri and D Schiek, *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Commission 2009).

[17] See, for example, *Ranjit Singh v France*, Appl No 27561/09 (ECHR, 20 June 2006) and *Bikramjit Singh* Communication 1852/2008 (HRC, 4 December 2012).

[18] See on the added value of this concept in relation to the work of the Dutch Equality Body, S Burri, 'Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission's Case Law', in D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011) 97–110.

[19] See, for example, E Graham, D Cooper, J Krishnadas and D Herman, *Intersectionality and Beyond. Law, Power and the Politics of Location (*Routledge Cavendish 2009); D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination (*Ashgate 2011); and T Loenen, 'Framing Headscarves and Other Multicultural Issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law' (2012) 30(4) *Netherlands Quarterly of Human Rights* 472–488.

[20] See for an overview of sex equality legislation and case law at national level, S Burri and S Prechal, *EU Gender Equality Law. Update 2013* (European Commission 2014).

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

[22] [2008] COM 426.

[23] Press Release, Council meeting Employment, Social Policy, Health and Consumer Affairs, 1 and 2 December 2011. State of affairs in November 2014.

Directive in the near future is therefore unlikely. The gaps in protection in EU law mentioned here will therefore probably not be remedied in the short term.

It has been suggested that the differences in scope and thus protection afforded by these directives reflects a hierarchy of grounds.[24] As mentioned, the differences in scope in protection against race and sex discrimination are particularly striking, as it is generally accepted that these grounds are suspect discrimination grounds. Therefore these grounds are the first discrimination grounds mentioned in international and European human rights instruments and both grounds are generally subjected to a strict test: only a few reasons might provide an objective justification for race or sex discrimination. The same might be true, for example, for sexual orientation. However, it would seem that this is much less a case of discrimination based on age, a ground which is not explicitly mentioned in many European and international human rights instruments. The differences between the grounds are reflected in the allowed exceptions, which differ from one ground to another (see Section III). In the EU Charter of Fundamental Rights and Freedoms, a more holistic approach to equality is taken.

II.ii The (Potential) Role of the EU Charter

The common values of the EU as stated in Article 2 TEU provide a promising and ambitious framework. It reads:

> The union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.

Some of these values are further developed in the Charter of Fundamental Rights of the EU. The Charter, *inter alia*, reaffirms the principle of equality before the law in Article 20. The principle of non-discrimination is firmly embedded in Article 21, which reads:

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social rights, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on the grounds of nationality shall be prohibited.

Thus this article prohibits discrimination on any ground and offers potentially a wide protection against discrimination. The Charter also recognises the right to gender equality in all areas, thus not only in employment, and the possibility of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality, for example. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the

[24] See, for example, E Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13(4) *Maastricht Journal of European and Comparative Law* 445–470.

'right to paid maternity leave and to parental leave' (Article 33).[25] Since the entry into force of the Lisbon Treaty, the Charter has become a binding catalogue of EU fundamental rights (see Article 6(1) TEU), addressed to the EU institutions, bodies, offices and agencies, and to the Member States when they are implementing Union law (Article 51(1) of the Charter). This is an important limit in the potential scope of the Charter.[26] However, the Court of Justice adopted a broad interpretation of the scope of application of the Charter in *Fransson*, where it held that national law that aimed to achieve the goals of a directive is qualified as implementing EU law.[27] Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation.

In addition, the general principle of equal treatment has been recognised and applied by the Court of Justice of the EU in many equal treatment cases. In the famous *Defrenne III* case of 1978, the Court stated that the elimination of sex discrimination belongs to the general principles of EU law, just like the fundamental personal human rights.[28] More recently, the Court considered in *Mangold* that principle of non-discrimination on grounds of age must be regarded as a general principle of EU law.[29] Individuals could rely on this principle in this case against an employer. The Court followed a similar approach in the *Kücükdeveci* age discrimination case.[30]

In the Greek *Chatzi* case, the Court went even further and considered that the principle of equal treatment had implications for the situation of parents of twins.[31] According to the Court:

> [O]bservance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights.[32]

The Court considered that parents of twins are in a special situation. It concluded that the Framework Agreement on parental leave[33]

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[25] See on the significance of the Charter in relation to gender equality, for example, S Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Acquis* in Gender Equality' (2010) 1 *European Gender Equality Law Review*; E Ellis, 'The Impact of the Lisbon Treaty on Gender Equality' (2010) 1 *European Gender Equality Law Review* 7–13.

[26] See further the explanations relating to the Charter [2002] OJ C 02 and [2002] OJ C 83-03.

[27] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR nyr.

[28] Case 147/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365.

[29] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

[30] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.

[31] Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-8489.

[32] Para 63.

[33] The Annex of Directive 2010/18, which repealed Directive 96/34.

> is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.[34]

The general principle of equal treatment as enshrined in the Charter can thus play a role in reconciliation issues, not only at EU level, but also in national law.[35]

In the famous *Test-Achats* case, the Court considered the exception in Article 5(2) of Directive 2004/113 on equal treatment between men and women in access to and the supply of goods and services contrary to Articles 21 and 23 of the Charter.[36] Article 5(2) allowed a derogation from the general rule requiring unisex premiums and benefits. An important argument for the Court was that the derogation was not limited in time.

The Court thus uses the Charter provisions in its interpretation of the principle of equal treatment, even when there is no direct relation with a discrimination ground mentioned in Article 19 TFEU, such as in the *Chatzi* case. In addition, the consequences might be far reaching, in particular when a provision of a directive is considered invalid, as in the *Test-Achats* case. These cases illustrate the role of the Charter in the case law of the Court and its potential to extend the protection of the equal treatment directives. The *Test-Achats* case also illustrates that exceptions to the principle of equal treatment have to be interpreted strictly.

III. EXCEPTIONS

The equal treatment directives allow different exceptions, depending on the ground of discrimination at stake and the area. Some exceptions are quite similar, for example for the racial or ethnic origin and sex grounds.

The Race Directive allows only two exceptions: genuine and determining occupational requirements (Article 4) and positive action (Article 5). There is no case law yet of the Court of Justice on the interpretation of these provisions in relation to racial or ethnic origin. But there is case law on the interpretation of these two exceptions in relation to sex discrimination, which are framed similarly to the provisions in the Race Directive.

The Recast Directive allows three exceptions to the principle of equal treatment, which are similar to the exceptions which were included in Article 2 (2), (3) and (4) of

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[34] Para 75.

[35] See on the impact of this judgment on Greek legislation and case law, S Koukoulis-Spiliotopoulos, 'Greece' (2014) 1 *European Gender Equality Law Review* 66–69.

[36] Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] I-00773. The Court ruled that Article 5(2) is invalid with effect from 21 December 2012 (paras 32–34).

Directive 76/207. First, the application of a genuine and determining occupational requirement does not amount to discrimination if some conditions are fulfilled. The Recast Directive now stipulates in Article 14(2):

> Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

The Court of Justice held that the exception of occupational activities in Article 2(2) of Directive 76/207, which was framed similarly, being a derogation from an individual right laid down in the Directive, must be interpreted strictly.[37] According to the Court of Justice, the exclusion of women from some military units of the Royal Marines fell within the scope of this exception and therefore did not breach Directive 76/207.[38] On the other hand, Germany infringed Directive 76/207 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.[39] This case law is also relevant for the interpretation of Article 14(2) of the Recast Directive and will probably also be relevant for the similar exceptions in the Race Directive and in the Framework Directive.

The second exception in the Recast Directive concerns the protection of women, particularly as regards pregnancy and maternity. It is now mentioned in Article 28(1) of the Recast Directive on the relationship to EU and national provisions and reads:

> 1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

According to the Court of Justice, Article 2(3) of Directive 76/207 – which was exactly the same as Article 28(1) of the Recast 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.[40] The extension of the protection in the second aim mentioned here has been criticised as it perpetuates a motherhood ideology.[41] Recently, the Court in the *Betriu Montull* case unfortunately emphasised once again the role of mothers in this respect, denying rights

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[37] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651[36].

[38] Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-07403.

[39] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

[40] Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 [25].

[41] See, for example, C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality' (2000) 6 *European Law Journal* 29–44.

to fathers.[42] However, in the very similar *Roca Álvarez* case the Court had emphasised the role of both fathers and mothers as parents.[43] This case law reflects lack of consistency.

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.[44] This reference to substantive equality is certainly welcome, but there are only few cases in which the Court ruled that the aim of a directive is substantive equality.

The last exception in Article 3 of the Recast Directive relates to positive action (see also Section V.v.) and reads:

> 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 141(4) has not been amended and is now Article 157(4) TFEU. It reads:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 3 of the Recast Directive replaces Article 2(4) of Directive 76/207. 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 EU law as an exception to the principle of equal treatment, instead of as an integral part thereof. Such approach amounts to formal equality. In addition, another change was made in the provision on positive action with the Treaty of Amsterdam. Whereas Article 2(4) of Directive 76/207 referred to women's opportunities, Article 157(4) TFEU allows positive action for the under-represented sex. However, Declaration 28 stipulated at the time of the adoption of the Treaty of Amsterdam that positive action measures should in the first instance aim at improving the situation of women in working life. We see here a purely symmetric approach to equality (see Section V.i.).

As far as all the exceptions are concerned, the Race Directive and the Recast Directive have what is called 'a closed system of exceptions' as regards direct

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[42] Case 5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, nyr.

[43] Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661.

[44] Case 136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011 [24]–[26].

discrimination; derogations to the principle of equal treatment are limited to the exceptions just described.[45]

The exceptions in the Framework Directive 2000/78 are partially quite different from the ones described above. Both occupational requirements (Article 4(1)) and positive action (Article 7) are framed similarly to the provisions in the Recast Directive and in the Race Directive. However, there are more exceptions, to begin with a general exception in Article 2(5), which reads:

> The Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

No other EU equal treatment directive contains quite such an unusual general exception. This exception has also to be interpreted strictly and if measures aim at protecting public health, they have to be coherent.[46] In addition to the exceptions on occupational requirements and positive action, there is a specific exception for churches and other organisations the ethos of which is based on religion or belief. Specific provisions apply to discrimination on the ground of disability and age. The fact that there are more exceptions allowed to discrimination on the ground of religion, disability and age compared with the grounds of race or ethnic origin, sex and sexual orientation might suggest that the EU legislator considered some grounds of discrimination more suspect than others at the time of drafting the 2000 Directives.

In the case of indirect discrimination, justifications may be based on other – unwritten – arguments. The conditions are, then, that the aim pursued is legitimate and the measures to attain that aim are appropriate and necessary (see Section V.iii.).

IV. DEFINITIONS

Some concepts are not defined in EU equal treatment law. This is so in the case of 'race' for example.[47] Sex is not defined either, but the Court considered that discrimination against a transgender amounts to sex discrimination.[48] The concept of religion has not been defined either. The Court of Justice might here use the relevant case law of the European Court of Human Rights in its interpretation of this concept.

The concept of handicap has now been defined by the Court taking into account the definition of the UN Convention on the Rights of Persons with Disabilities, which has

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[45] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-0394 [22]–[24].

[46] Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-08003 and Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047.

[47] See E Howard, 'Race and Racism: Why does European Law have Difficulties with Definitions?' (2008) 24(1) *International Journal of Comparative Labour Law and Industrial Relations* 5–30.

[48] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-02143.

been approved by the EU.[49] The Court considered that the UN Convention acknowledges that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others' (preamble sub e) and that Article 1(2) states that persons with disabilities include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The Court of Justice ruled that the concept of 'disability' in the Framework Directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments, which in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. In addition, the Court considered that it follows from Article 1(2) of the UN Convention that the physical, mental or psychological impairments must be 'long term'.

The Court thus adopted a social model of disability instead of a medical model.[50] The fact that the UN Convention was binding for the EU led the Court to adopt a definition of handicap which is in line with the definition in the UN Convention, even if it had adopted a different, narrower, definition in a previous case.[51] The broader definition of the UN Convention has now to be applied in EU law and offers more protection against discrimination on the ground of disability than the previous definition. The UN Convention on the Rights of Persons with Disabilities is the first UN Convention approved by the EU. It is submitted that other UN Conventions can be a source of inspiration for EU equal treatment law. This is in particular true for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). However, it is striking that there is not even a reference to this Convention in the preamble of the Recast Directive. CEDAW is mentioned in the preamble of Directive 2004/113 on the access to and supply of goods and services.[52] But the approaches to sex discrimination in CEDAW and EU law are quite different.

V. CONCEPTS OF DISCRIMINATION

V.i Asymmetric versus Symmetric Approach to Equality

CEDAW prohibits discrimination against women and requires that States Parties take all appropriate measures (Articles 1 and 2). It aims at the recognition, enjoyment and

[49] By Decision 2010/48; Case C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* nyr [36]–[39].

[50] See further LB Waddington, 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in LB Waddington, E Quinn and E Flynn (eds), *European Yearbook of Disability Law* (Intersentia 2013) 169–200.

[51] This case was decided before the EU approved the UN Convention, Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467.

[52] Alongside the ECHR and other UN Conventions in I.ii.

exercise by women of human rights and fundamental freedoms on a basis of equality of men and women. The approach adopted by CEDAW is thus an asymmetric approach: discrimination against women is prohibited.

By contrast, EU equal treatment law follows a strict symmetric approach, emphasising the principle of equal treatment between men and women.[53] Thus men are also protected against sex discrimination, even if social reality shows that generally speaking women have less power, income and opportunities than men, in particular in relation to employment. The conceptualisation of equality in employment does not take into account the fact that the participation and position of men in employment is much less hampered by responsibilities other than work, such as care.[54] Even if there are some legal instruments in relation to care responsibilities in EU law, the most important being the Pregnancy Directive 92/85 and the Parental Leave Directive 2010/18,[55] the dominant model in employment is a worker without or with only few care responsibilities (see also the contribution of Westerveld, Chapter 11 in this volume). The careers of women are much more often influenced than those of men by family and care responsibilities, for example care for elderly or disabled relatives. The statistics show that women in Europe are over-represented in groups who leave the labour market temporarily or those working part time.[56]

In order to realise not only formal, but also substantive, true and genuine equality in results, the differences in relation to care between men and women are relevant in employment matters.[57] A symmetric approach to equality does not take these differences into account. The same is true for a formal approach to equality when relevant differences are not taken into account.

This having been said, it should be noted that the conceptualisation of discrimination concepts in EU law has contributed to combating discrimination. This is particularly true for the development of the concept of indirect discrimination in the case law of the Court. The definitions of the discrimination concepts are now similar in all equal treatment directives. Defined are direct and indirect discrimination, harassment and sexual harassment. In addition, an instruction to discriminate is also prohibited.

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[53] See for a comparison of CEDAW and EU equal treatment law, A Wiesbrock, 'Equal Employment Opportunities and Equal Pay: Measuring EU Law Against the Standards of The Women's Convention' in I Westendorp (ed), *Women's Convention Turned 30* (Intersentia 2012) 227–245.

[54] See on this issue, for example, S Fredman and J Fudge, 'The Legal Construction of Personal Work Relations and Gender (2013) 7 *Jerusalem Review of Legal Studies* 112–122.

[55] Council Directive 92/85/EEC 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 89/391/EEC) [1992] OJ L 348/1 and Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L 68/13. See on these directives, S Burri and S Prechal, *EU Gender Equality Law. Update 2013* (European Commission 2014) 15–18.

[56] See European Commission, *Employment and Social Development in Europe 2013* (European Commission 2013).

[57] See on the concept of substantive equality, T Loenen, 'Substantive Equality as a Right to Inclusion: Dilemmas and Limits in Law' (1995) 94(2) *American Philosophical Association Newsletter on Law and Philosophy* 63–66.

V.ii Direct Discrimination

The most recent definitions in the Recast Directive are discussed here by way of example, as there is much more case law on sex discrimination than on the other grounds. 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 sex discrimination cases up until now, the Court of Justice has found that there is discrimination when 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.

In pregnancy cases, a comparison is not required. 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.[58] 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)). Given the drafting of this provision, it would be interesting to know if a man who is pregnant (a transgender) would also be protected against discrimination based on pregnancy. In many countries no requirement of sterilisation applies anymore to transgenders and thus more men can become pregnant. A well-known example is Thomas Beatie.[59]

Direct discrimination can only be justified by written exceptions. There is thus a closed system of exceptions for race, sex, disability, religion and sexual orientation. However as far as age discrimination is concerned, the test is different (see Article 6 of the Framework Directive). The same is true for sex discrimination in access to and supply of goods and services (see Article 4(5) of Directive 2004/113). This is again a clear example of how complicated and multifaceted the system in the different directives is. For each ground of discrimination there are different possibilities to justify direct discrimination and these might even differ from one area to the other as is the case for direct sex discrimination. The question which reasons might justify indirect discrimination is even more complicated.

V.iii Indirect Discrimination

The concept of indirect discrimination has been developed by the Court of Justice in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work.[60] The landmark case is *Bilka*, which concerned access to an

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[58] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941 [15]–[18].

[59] See: http://en.wikipedia.org/wiki/Thomas_Beatie.

[60] See RC Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2015) and S Burri and H Aune,

occupational pension scheme.[61] According to this scheme, part-time employees could obtain pensions if they had worked for at least 15 years full time over a total period of 20 years. The Court of Justice 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 EEC (now Article 157 TFEU), 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 corresponded to a real need on the part of the undertaking, and were appropriate and necessary to attain that aim. The same objective justification test has been applied in many different Court of Justice judgments and is now included in the definition of indirect discrimination in all the equal treatment 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.[62] In *Seymour* the Court provided more guidance on how to establish such a presumption or *prima facie* case of indirect discrimination.[63]

When there is a *prima facie* case of indirect discrimination 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 Court also considered in *Roks* that

> although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes. Moreover to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, … would be to accept that the

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'Sex Discrimination in Relation to Part-Time and Fixed-Term Work' (2014) 1 *European Gender Equality Law Review* 11–21.

[61] Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

[62] Case 109/88 *Danfoss* [1989] ECR 3199 [10]–[16] and case 381/99 *Brunnhofer* [2001] ECR I-04961 [51]–[62].

[63] Case C-167/97 *Seymour-Smith and Laura Perez* [1999] ECR I-00623 [58]–[65].

> application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.[64]

This is a very important consideration of the Court of Justice in matters of statutory social security, as in the *Roks* case a statutory social security scheme was at stake falling under Directive 79/7. However, sometimes the indirect discrimination test applied in social security matters is less strict and amounts to a reasonableness test, as for example in *Nolte*.[65] The Member States have a broad margin of discretion in this field. Nevertheless, in some cases, the Court critically assesses the arguments put forward in the light of the aim of a measure and concludes that there is no objective justification in case of indirect sex discrimination.[66]

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. This concept thus reflects the multi-layered and multifaceted dimension of the concept of equality. However, the concept of indirect discrimination means only a step towards substantive equality, as true genuine equality requires that even further steps are taken in order to realise equality in social conditions.[67]

V.iv Comparability Issues

According to the Court discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.[68] Sometimes the issue of comparability might be problematic and have the effect that rights are denied to claimants. In the judgment *Österreichischer Gewerkschaftsbund*, for example, the Court considered that unpaid periods of leave due to military service and such periods due to parental leave were not comparable.[69] The Court ruled that 'in the present case, parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such a situation may be.' The Court emphasised that the performance of national service, on the other hand, corresponds to a civic obligation laid down by law and is not governed by the individual interests of the worker.[70] The Court ruled that in each case, the suspension of the contract of employment is based on particular reasons, more

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[64] Case 343/92 *De Weerd and others* [1994] ECR I-571 [35]–[36] and case C-226/98 *Jørgensen* [2000] ECR I-2447 [37]–[42].

[65] Case C-317/93 *Nolte* [1995] ECR I-04625.

[66] Case C-123/10 *Brachner* [2011] ECR I-10003.

[67] See further T Loenen, 'Indirect Discrimination: Oscillating between Containment and Revolution', in T Loenen and PR Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (Kluwer Law International 1999) 195–211.

[68] See Case C-342/93 *Gillespie* [1996] ECR I-00475 [36].

[69] Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

[70] Paras 60–61.

precisely the (individual) interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. As those reasons are of a different nature, the workers who benefit are not in comparable situations.[71] Therefore the regulation at stake was not contrary to the principle of equal pay between men and women. The public/private divide is clearly reflected in the approach of the Court in this case and fails to take into account the context of lacking child care facilities. In the formal approach taken by the Court, unequal treatment of unequal cases is not problematic. A substantive approach to equality might arguably sometimes require positive action.

V.v Positive Action

Positive action is allowed for all the discrimination grounds mentioned in Article 19 TFEU. However, there is only case law in relation to positive action for women. Positive action is defined in Directive 2006/54 (Article 3) as follows:

> 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.

The measures permitted under the positive action provisions 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.[72]

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 Court of Justice 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 Court of Justice started with the rather severe judgment in *Kalanke*, which reflects a formal approach to equality.[73] In the meantime, the Court of Justice has softened its position in favour of positive action.[74]

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[71] Para 64.

[72] See, for example, S Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369; S Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Commission 2009); G Selanec and L Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* (European Commission 2011).

[73] Case 450/93 *Kalanke* [1995] ECR I-03051. See T Loenen and A Veldman, 'Preferential Treatment in the Labour Market after Kalanke: Some Comparative Perspectives' (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations* 43–53.

[74] Case 476/99 *Lommers* [2002] ECR I 02891. See also Case 158/97 *Badeck* [2000] ECR 2000 I-01875 and Case 319/03 *Briheche* [2004] ECR I-08807.

In *Lommers*,[75] 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 care-givers.

A proposal is pending on gender balance on company boards. The proposal sets a minimum objective of a 40 per cent representation for the under-represented sex among companies' non-executive directors. It would require companies with a lower representation to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions, in order to attain that objective. A deadline would be set for 2018 (public sector) and 2020 (private sector). The directive would expire by the end of 2028. Non-listed companies and SMEs would be excluded, and Member States would also be able to exclude companies employing less than 10 per cent of the under-represented sex.[76] If the proposal were accepted, which is not yet certain, it would be the first time that EU legislation required specific positive action measures from the Member States. Such an approach seems in line with Article 4 CEDAW, which allows for temporary special measures aimed at accelerating *de facto* equality between men and women.[77] CEDAW also imposes an obligation on States Parties to combat gender stereotypes in Article 5. While case law of the Court sometimes recognises the negative impact of gender stereotypes,[78] EU equal treatment legislation does not address prejudices and negative stereotyping yet explicitly. Article 5 CEDAW might in this sense be a source of inspiration.[79]

V.vi Harassment and Sexual Harassment

The EU directives explicitly prohibit harassment, which is defined similarly in all the equal treatment directives adopted since 2000. The sex equality directives prohibit in

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[75] Case 476/99 *Lommers* [2002] ECR I-02891.

[76] [2012] COM 614. See for more information: http://libraryeuroparl.wordpress.com/2013/11/14/gender-balance-on-company-boards/, accessed 24 November 2014.

[77] See on the compatibility of this Article and the EU positive action approach, LB Waddington and L Visser, 'Article 4 – Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?' in I Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia 2012) 95–107.

[78] See Case C-409/95 *Marschall* [1997] ECR I-06363 [79].

[79] See, for example, HMT Holtmaat and RC Tobler, 'Convention on the Elimination of all Discrimination Against Women and the European Union's Policy in the Field of Combating Gender Discrimination' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 399–425, and HMT Holtmaat, 'Article 5 Convention on the Elimination of all Discrimination Against Women', in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women; a Commentary* (Oxford University Press 2012) 141–167.

addition sexual harassment.[80] Both concepts are defined and both forms of discrimination cannot be objectively justified. A prohibition of harassment in relation to race discrimination also applies to (statutory) social security matters, but this is not the case for harassment based on sex and sexual harassment. Sexual harassment is not prohibited in the Framework Directive. This can also be considered a gap in protection in relation to the ground of sexual orientation, as in particular homosexuals are confronted with harassment of a sexual nature more often than heterosexuals.[81] The protection against harassment can probably fill this gap. There is no case law yet of the Court of Justice on the concepts of harassment or sexual harassment.

V.vii 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. This could, for example, be the case if an employer required that an agency supplying temporary workers only recruit persons of a certain sex for a specific job or no disabled persons. In that case, both the employer and the agency would be liable and would have to justify such discrimination.[82] It should be noted that incitement of discrimination is not explicitly mentioned in the EU directives. There is no case law of the Court of Justice on instruction to discriminate and hopefully the Court will adopt a broad concept, including incitement to discriminate. The Court adopted a broad interpretation in relation to the concept of disability when it decided that discrimination by association was included in the prohibition of disability discrimination.

V.viii Discrimination by Association

In the *Coleman* case, a female worker who had the sole care responsibility for her disabled son was treated unequally in comparison with her colleagues who had no disabled child and she was harassed by her employer.[83] She quit her job, but sued her employer for disability discrimination. The Court considered that the prohibition of direct disability discrimination in the Framework Directive is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less-favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by

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[80] See further A Numhauser-Henning and S Laulom, *Harassment Related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity* (European Commission 2011).

[81] Recent research in the Netherlands shows, for example, that homosexuals are more often confronted with criminal behaviour and disrespect than heterosexuals, CBS, 'Homoseksuelen voelen zich onveiliger en zijn vaker slachtoffer' [2013] *Webmagazine* available at: www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2013/2013-3847-wm.htm, accessed 20 September 2014.

[82] See I Asscher-Vonk, 'Instruction to Discriminate' (2012) 1 *European Gender Equality Law Review* 4–12.

[83] C-303/06 *Coleman* [2008] ECR I-05603.

that employee, such treatment is contrary to the prohibition of direct discrimination. The Court followed a similar reasoning on harassment. Such interpretation extends the protection afforded by the Directive and implicitly recognises the value of care.[84] The case shows that a formal approach to equality – in this case the situation of Ms Coleman was considered comparable to the situation of a worker who is disabled – might extend the scope of the Directive, provided that the context of a case is taken into account. The *Coleman* case shows the potential difference in result when the context is taken into account. The different approach of the Court on this point compared to the *Österreichischer Gewerkschaftsbund* case described in Section V.iv. is striking. In the latter case the context of lack of childcare facilities was not considered relevant by the Court.

V.ix Reasonable Accommodation

The Framework Directive requires in Article 5 that reasonable accommodation is provided to persons with disabilities. Employers have to take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The burden shall not be disproportionate when it is sufficiently remedied by measures existing in the framework of the disability policy of the Member State. A specific exception on indirect disability discrimination is provided in Article 2(2)(b)(ii), which relates to the duty to provide a reasonable accommodation. A reasonable accommodation can, for example, consist of a reduction of working hours.[85] The question whether such reasonable accommodation also applies to other discrimination grounds, for example religion, has been the subject of research.[86]

V.x Mainstreaming

As already mentioned, equality between men and women is one of the values on which the EU is based (Article 2 TEU). The promotion of equality between men and women throughout the EU is one of the essential tasks of the EU (Article 3(3) TEU). Since the entry into force of the Lisbon Treaty, Article 8 TFEU specifies that:

> In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

This obligation of gender mainstreaming means that both the EU and the Member States shall actively take into account the objective of equality when formulating and

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[84] See also A Stewart, S Niccolai and C Hoskyns, 'Discrimination by Association: A Case of the Double Yes?' (2011) 20 *Social and Legal Studies* 173–190.

[85] Case C-335/11 *Jette Ring*, nyr [64].

[86] See, for example, E Howard, 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law' (2013) 38(3) *European Law Review* 360–375.

implementing laws, regulations, administrative provisions, policies and activities.[87] Although these provisions do not create enforceable rights for individuals as such, they are important for the interpretation of EU law and they impose obligations on both the EU and the Member States.

Article 10 TFEU contains a similar mainstreaming obligation for all the discrimination grounds mentioned in Article 19 TFEU and reads:

> In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Open Method of Coordination is one of the means to mainstream gender equality and the other Article 19 TFEU non-discrimination grounds.[88]

VI. SOME ENFORCEMENT ISSUES

Enforcement of non-discrimination law is of crucial importance, but is generally speaking rather weak as it depends to a great extent on individuals who feel discriminated against and are ready to start proceedings. Proceedings are often long and costly, as legal aid free of charge is not available in many EU countries. In some countries, for example in the Netherlands, anti-discrimination bureaus offer free legal aid.[89]

The prevention of discrimination receives little attention in the EU equal treatment directives. Only the Recast Directive has a specific provision addressing this issue (Article 26), stating that Member States shall encourage in particular employers to take effective measures to prevent discrimination. There are thus no specific obligations in the directives for employers or social partners, for example, to take measures to prevent discrimination. This can be considered a weak point of the equal treatment directives.

However, all the equal treatment directives address specific enforcement issues. This is the case for the burden of proof, which is more lenient in discrimination cases than in labour or civil law. The burden of proof requires that the applicant establishes facts from which it may be presumed that there has been direct or indirect discrimination. The burden of proof then shifts to the respondent, who has to prove that there has been no breach of the principle of equal treatment.[90] A provision on the burden of proof is lacking in the Directive on equal treatment of self-employed persons 2010/41, one more example of the lack of consistency in the protection against discrimination in the

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[87] See also Article 29 of the Recast Directive 2006/54 and Article 12 of Directive 2010/41 and F Beveridge, 'Building against the Past: The Impact of Mainstreaming on EU Gender Law and Policy' (2007) 32 *European Law Review* 193–212.

[88] See, for example, F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination* (Ashgate 2008).

[89] See www.discriminatie.nl/antidiscriminatiebureaus, accessed 20 September 2014.

[90] See Article 8 of Directive 2000/43, Article 10 of Directive 2000/78, Article 9 of Directive 2004/113 and Article 19 of Directive 2006/54.

EU equal treatment directives. Hopefully the Court will remedy this omission in its case law.[91]

Other enforcement provisions concern, in particular, access to justice, protection against victimisation, the dissemination of information, the role of social partners and dialogue with NGOs and obligations of Member States to ensure compliance with the principle of equal treatment. The equal treatment directives all require that sanctions, penalties, compensation or reparation have to be effective, proportionate and dissuasive. However the wording differs slightly in the respective provisions.

At national level, equality bodies have an important role in enforcing the EU equal treatment directives. They can, for example, provide independent assistance to victims of discrimination, conduct independent research and make recommendations. EU law requires such an equality body for the grounds of racial or ethnic origin and sex.[92] However – and this is again a gap in EU legislation – no such body is required by the Framework Directive. In many Member States equality bodies or human rights agencies cover all the Article 19 TFEU discrimination grounds and sometimes even more grounds, depending on the national legislation.

VII. CONCLUSIONS

The aim of this chapter was to provide an analysis and critical assessment of the *acquis communautaire* on equal treatment. The analysis illustrates that EU equal treatment law has become a very complicated field of law and shows quite some inconsistencies between the different equal treatment directives. Gaps in protection were identified in relation to the scope of these directives, but also in relation to the exceptions allowed. Exceptions are not only different with regard to the discrimination grounds, but depend also on the field. The strongest protection is found in the Race Directive. There is then a graded scale with the protection against sex discrimination being fairly strong. The Framework Directive 2000/78 offers the least protection as, for example, it does not cover social protection (including social security), nor the access to and supply of goods and services. In addition, a general exception is included in this directive, which is quite unusual in this field of EU law. The exceptions also differ for the different grounds (disability, religion or belief, sexual orientation and age). Generally speaking, the scope of the equal treatment directives is rather limited; social protection issues related, for example, to people residing illegally in an EU Member State are not addressed in these directives. Recently the European Committee on Social Rights (ECSR) considered that shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country.[93] The case illustrates the added value of, for example, the ESC in the field of social protection.

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[91] There are no cases yet on this issue.

[92] See Article 13 of Directive 2000/43, Article 12 of Directive 2004/113, Article 20 of Directive 2006/54 and Article 11 of Directive 2010/41. There is a European Network of Equality Bodies: Equinet, see www.equineteurope.org.

[93] *Conference of European Churches (CEC) v The Netherlands* Complaints No 90/201 and No 86/2012 (ECSR 11 November 2014).

The analysis also shows the important role the Court of Justice plays when interpreting the principle of equal treatment. Case law of the Court is often incorporated in directives. This is the case for pregnancy discrimination for example: the Recast Directive makes clear that no comparison is required in this case. The concept of indirect discrimination as developed by the Court allows more hidden forms of discrimination to be addressed. It can be considered as a step towards a more substantive approach to equality, given the fact that a disproportionate disadvantage for a certain group, which results from the application of a neutral criterion, measure or practice, might amount to a presumption of discrimination. The protection afforded depends much on comparability issues and on the application of the objective justification test in indirect discrimination cases. In social security matters, Member States enjoy a broad margin of discretion. The result is sometimes that the disadvantages some vulnerable groups suffer, for example workers with minor part-time jobs, are not remedied. The concept of indirect discrimination is now defined similarly in all the equal treatment directives. The case law of the Court on sex equality has in addition influenced other EU law areas.[94]

A truly substantive conception of equality is rather exceptional in the case law of the Court, the most obvious example of a mere formal approach to equality being the interpretation of the concept of positive action for women. In this field, the Court could have made the difference by adopting an asymmetric and a (more) substantive approach to equality. A substantive approach to equality could potentially be developed by the Court in future case law on positive action for ethnic minorities, specific groups such as Roma, or disabled people for example.

The fact that the EU has approved the UN Convention on the Rights of Persons with Disabilities has been decisive for the interpretation of the concept of disability in EU law, which now reflects a social model, instead of a mere medical model. Such influence cannot (yet) be detected in the case law of the Court in relation to CEDAW, while this Convention with its asymmetric approach and the explicit obligation to combat gender stereotypes could have a positive influence in addressing structural forms of discrimination, for example in relation to part-time work and care responsibilities. The contextual approach taken by the Court in *Coleman* can in this sense be considered as a step towards a recognition of the value of care. In this case, the Court took the care responsibilities of Ms Coleman into account in defining the scope of protection on the ground of disability. A contextual approach can of course also be applied to grounds of discrimination other than disability.

The Court has also relied on the provisions of the EU Charter and this amounts to an extension of the equal treatment protection afforded in the directives. The potential of the Charter merits further investigations and the Court will hopefully fully use the Charter in its future case law. There are some promising cases pointing at such development. Another area which has not been addressed here concerns the consequences of the accession of the EU to the ECHR for the conceptualisation of equality as a human right. In some respects the two Courts address, for example, similar sex

[94] See S Prechal, 'EU Gender Equality Law: A Source of Inspiration for Other EU Law Areas?' (2008) 1 *European Gender Equality Law Review* 8–14.

discrimination issues differently.[95] Further research into a coherent system of European human rights and social rights, offering the best possible protection against multiple forms of discrimination, forms a challenging prospect.

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[95] See S Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9(1) *Utrecht Law Review* 80–103.

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