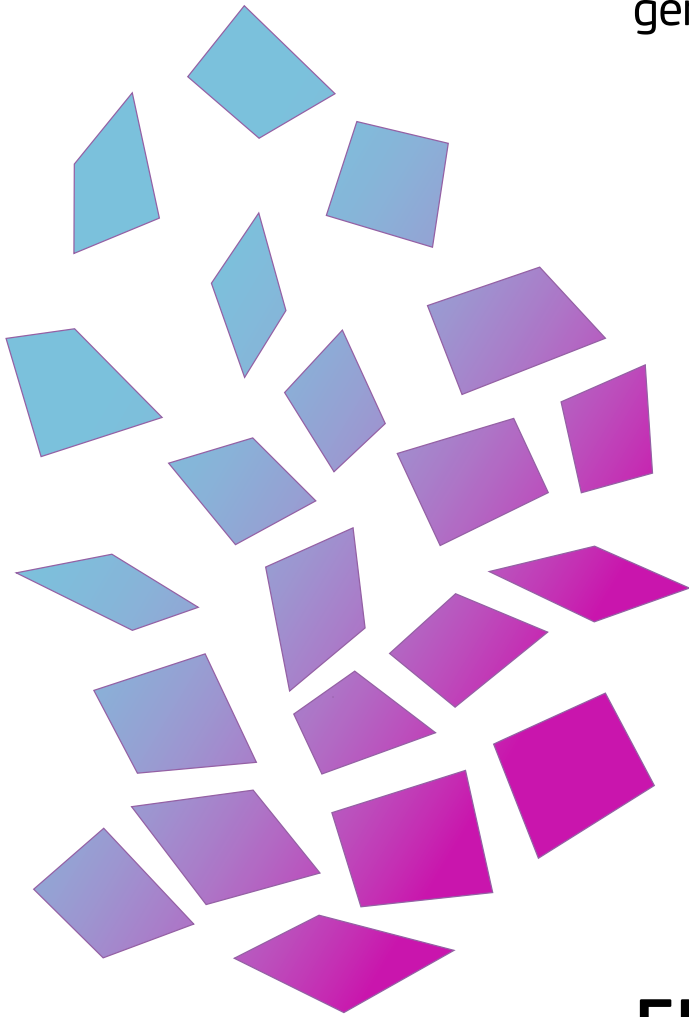




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**EU gender equality law
– update 2018**

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EU gender equality law – update 2018

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November 2018

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1. Introduction¹

The purpose of the present publication is to provide a general overview of gender equality law at the EU level.² The publication is aimed at a broad – but not necessarily legal – public and explains the most important issues of the EU gender equality *acquis*.³

The term ‘EU gender equality *acquis*’ refers to all the relevant Treaty provisions, legislation and the case law of the Court of Justice of the European Union (hereafter: CJEU or Court)⁴ in relation to gender equality. Another often-used term, instead of gender equality, is ‘sex equality’. Both terms are often used more or less interchangeably, also in this publication. 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 (European Union) and the EC (European Community). Before the entry into force of the Lisbon Treaty on the 1st of December 2009, the European Community and therefore also EC law⁵ was only one part of the European Union and of EU law. Most gender equality law discussed in this publication originates in the EC Treaty, which is older than the EU Treaty. Therefore, while we may speak about EU gender equality law, before the entry into force of the Lisbon Treaty, the more precise references are to the EC Treaty. Since the Lisbon Treaty, the EC and the EU have merged into one single unit, the European Union, which has succeeded and replaced the European Community. However, we 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),⁶ which has replaced the EC Treaty and which is more detailed and elaborates the TEU.⁷ In addition, the Charter of Fundamental Rights of the EU entered into force in December 2009 and has the same legal value as the two Treaties (the TEU and the TFEU).⁸ The TEU, the TFEU and the Charter all contain provisions that are relevant in the field of gender equality.⁹

This publication provides a brief description of the historical development of EU gender equality law (Section 2), which is followed by a discussion of the central concepts of EU gender equality law (Section 3). Most concepts are defined in gender equality directives as well as in EU non-discrimination directives. An overview of the relevant TEU, TFEU and EU Charter Articles, EU legislation and case law is provided in Sections 4 and 5. Section 4 covers primarily equal treatment of men and women in employment issues: equal pay; equal treatment at work; occupational and statutory social security; self-employment

1 This report is written by Dr. Susanne Burri, Susanne Burri is Associate Professor at Utrecht School of Law and specialist co-ordinator gender equality law of the European Commission's European network of legal experts in gender equality and non-discrimination. Prof. Dr. Sacha Prechal (currently a judge at the Court of Justice of the European Union) was co-author of the first edition published in 2008. Susanne Burri is responsible for the updated texts published in 2010, 2014 and the present update. She is grateful to Professor Linda Senden for her comments on a draft version of this latest update.

2 See further the list of relevant directives in Annex I and selected bibliography of EU gender equality law publications (in English, French or German) in Annex II.

3 This publication was first published (also) in print in 2008 by the Office for Official Publications of the European Union in English, French and German, the updated electronic version of 2014 can be downloaded at <http://bookshop.europa.eu> (<https://publications.europa.eu/en/publication-detail/-/publication/c7a08f35-e9e8-47f8-8c8b-b8375646d22c/language-en/format-PDF/source-76470393>) and at the website of the network at www.equalitylaw.eu (<https://www.equalitylaw.eu/publications/thematic-reports?page=2>), accessed 18 September 2018.

4 And its predecessor the European Court of Justice (ECJ). In this report, reference is made to the Court of Justice of the EU (CJEU or Court), also in cases pre-dating the Lisbon Treaty.

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

6 Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union have been published in OJ 2016, C 202/19.

7 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’.

8 See Article 6(1) TEU.

9 EU legislation, case law etc. can be found at Eur-lex: <https://eur-lex.europa.eu/homepage.html> and at the website of the CJEU: <https://curia.europa.eu/jcms/jcms/index.html>, accessed 18 September 2018.

in addition to access to and supply of goods and services. Section 5 discusses EU work-life balance legislation and case law and Section 6 addresses gender-based violence issues. 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 7 and 8).¹⁰

10 The yearly reports *Gender Equality Law in Europe: How are EU rules transposed into national law?* provide a general overview of the ways in which EU gender equality law has been implemented in the domestic laws of the 28 Member States of the European Union, as well as Iceland, Liechtenstein and Norway (the EEA countries) and four candidate countries (the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey). In addition, a comparative analysis of the findings of these reports is published each year by the European network of legal experts in gender equality and non-discrimination. The publications are on-line available on the website of the network at: <https://www.equalitylaw.eu/publications/comparative-analyses>, accessed 18 September 2018.

2. 60 years EU gender equality law: A brief retrospective overview

In the Treaty establishing the European Economic Community (EEC) adopted in 1957, only one single provision (Article 119 EEC Treaty, after the entry into force of the Treaty of Amsterdam in 1999, Article 141 EC Treaty and now Article 157 TFEU) 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 Court of Justice 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.¹¹ Later on, the Court even ruled that the economic aim is secondary to the social aim.¹² It also held that the principle of equal pay in Article 119 EEC and the elimination of discrimination based on sex form part of the fundamental human rights.¹³

As we will see throughout this publication, the CJEU (formerly 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.¹⁴ A number of reasons can explain this 'legislative activity' by the then EEC up to the 1990s.

First, Article 119 EEC 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 1974¹⁵ and the Member States decided to adopt a new (first) directive on equal pay between men and women (75/117).¹⁶

Second, from 1975 onwards, there were cases brought to the CJEU in which the Court decided that individuals may rely on Article 119 EEC 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,¹⁷ it also made it clear that it is difficult to isolate pay from other aspects of working conditions, pension arrangements included.¹⁸ 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. In 1976, a second Directive on equal treatment for men and women in employment entered into force (76/207),¹⁹ followed in 1979 by a third Directive, on equal treatment in statutory social security schemes (79/7).²⁰ In 1986, two more directives entered into force, one covering

11 CJEU 8 April 1976, case 43/75, (*Defrenne II*), ECLI:EU:C:1976:56, paragraphs 10 to 12. Cases in general and also cases which are not reported in European Courts Reports (ECR), can be found at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

12 CJEU 10 February 2000, C-50/96, (*Schröder*), ECLI:EU:C:2000:72, paragraph 57.

13 CJEU 15 June 1978, case 149/77, (*Defrenne III*), ECLI:EU:C:1978:130, paragraphs 26-27.

14 The full – official – name of all the gender directives and their publication are included in Annex I of this report.

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

16 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 1975, L 45/19.

17 See below, Section 7.1.

18 See below, Sections 4.1 and 4.4.

19 Council Directive 76/207/EEC of 9 February 1976 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 1976, L 39/40.

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 1979, L 6/24.

occupational social security schemes (the fourth Directive, 86/378)²¹ and one on self-employment (the fifth Directive, 86/613).²² The Member States had of course to meet their obligations arising from all these directives before the end of the various implementation periods. Subsequently, these directives were again interpreted by the CJEU, in particular where national courts had requested this in the so-called preliminary procedure.²³ In 1997, the so-called burden of proof directive (97/80) codified some CJEU case law.²⁴ Except Directive 79/7, these directives have been amended and modernised. In addition, directives on work-life balance issues and equal treatment of men and women in access and supply of goods and services have been adopted and amended. The current gender equality legislation and case law are discussed more in detail below Sections 4 and 5.

With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women throughout the European Community became one of the essential tasks of the Community (the former Article 2 EC). Furthermore, the former Article 3(2) EC now stipulated that 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 shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.²⁵ The Lisbon Treaty emphasises even further the importance of the principles of non-discrimination and equality as fundamental principles of EU law.²⁶ Since then, Article 2 TEU states that ‘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 women and men prevail’. According to Article 3(3) TEU, one of the aims of the EU is to ‘combat social exclusion and discrimination, and (...) promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’. In addition, Article 8 TFEU stipulates that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’. Equality between men and women forms part of the fundamental principles on which the EU is based.

Furthermore, since 1999 the EU 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 (the former Article 13(1) EC, now Article 19 TFEU). Article 13(1) EC 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)²⁷ and the Framework Directive on equal treatment in employment and occupation (2000/78).²⁸ 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 (2004/113)²⁹ has also been based on this provision.

21 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 1986, L 225/40.

22 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 1986, L 359/56.

23 See below, Section 7.1.

24 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998, L 14/6.

25 See also for example Article 29 of Directive 2006/54.

26 See E. Ellis ‘The Impact of the Lisbon Treaty on Gender Equality’, *European Gender Equality Law Review*, 1/2010, pp. 7-13, available at: <https://www.equalitylaw.eu/downloads/2794-european-gender-equality-law-review-1-2010>, accessed 18 September 2018.

27 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.

28 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.

29 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 2004, L 373/37.

Since the entry into force of the Lisbon Treaty, Article 10 TFEU specifies that ‘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’. Article 19 TFEU replaces the former Article 13(1) and provides a legal basis to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. An additional legal basis to ‘adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation...’ is provided in Article 157(3) TFEU (the former Article 141(3) EC). Recent gender equality directives have Article 157(3) TFEU as legal basis³⁰ or implement a framework agreement of the European social partners according to Article 155(2) TFEU.³¹ Two pending proposals in the field of gender equality also have Article 157 TFEU as legal basis.³² As will be discussed below, the Treaty of Amsterdam also amended the former Article 141 EC, now Article 157 TFEU. The wording of this article after the Treaty of Lisbon entered into force has remained roughly the same (except for procedural aspects).

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.³³ This Charter, *inter alia*, prohibits discrimination on any ground, including sex (Article 21);³⁴ it 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. 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).³⁵ 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, as amended by the Lisbon Treaty), 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). The CJEU adopted a broad interpretation of the scope of application of the Charter in *Åkerberg Fransson*, where it held that national law that aimed to achieve the goals of a Directive is qualified as implementing EU law.³⁶ Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation.³⁷ In these circumstances, the Charter is also applicable in horizontal relations between individuals.³⁸ If a national court considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision.³⁹

What is the current state of affairs and what has the Lisbon Treaty added to the promotion of gender equality? The Treaty of Lisbon has not only confirmed what was already enshrined in the EC Treaty, but it has also reinforced the status of the gender equality principle as a common value of the EU. Articles 19 TFEU and 157 TFEU, for instance, have been adopted without changes and the importance of gender equality in the Union is affirmed once again. Equality between women and men is explicitly included in

30 See Council 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, OJ 2010, L 180/1.

31 See Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ 2010, L 68/13.

32 See Proposal for a Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final and Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final.

33 OJ C 2010, C 83/02.

34 The scope of the prohibition of sex discrimination is however limited by the explanations for the Charter, see OJ 2010, C 8303/02.

35 See S. Koukoulis-Spiliotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’, *European Gender Equality Law Review*, 1/2008, pp. 15-24, available at: <https://www.equalitylaw.eu/downloads/2790-european-gender-equality-law-review-1-2008>, accessed 18 September 2018.

36 CJEU 7 May 2013, C-617/10, (*Åkerberg Fransson*), ECLI:EU:C:2013:280.

37 See for an example in relation to disability and the application of Articles 20 and 21 of the Charter: CJEU 9 March 2017, C-406/15, (*Milkova*), ECLI:EU:C:2017:198.

38 See CJEU 17 April 2018, C-414/16, (*Egenberger*), ECLI:EU:C:2018:257, paragraph 76 and CJEU 11 September 2018, C-68/17, (*IR*), ECLI:EU:C:2018:696, paragraph 69. In both cases Article 21 of the Charter was applicable in relation to religion or belief.

39 CJEU 11 September 2018, C-68/17, (*IR*), ECLI:EU:C:2018:696, paragraph 70.

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. 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). The Lisbon Treaty has clearly reiterated the obligation of gender mainstreaming for the Union.

Both Treaties (the TEU and the 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 these Treaties say in terms of values, tasks and general obligations, since they often guide the CJEU in the interpretation of the existing Treaty provisions and EU legislation. Most important are the central concepts enshrined in EU gender equality legislation in the light of the interpretation of these concepts in case law, which is the theme of the next section.

3. Central concepts of EU gender equality law

Equality between men and women is a fundamental principle of the European Union. EU gender equality law is aimed at eliminating inequalities, and promoting equality, between men and women (Articles 2 and 3(3) TEU and 8 TFEU); combatting discrimination based on sex (Articles 10 and 19 TFEU); and, ensuring the implementation of the principle of equal opportunities and equal treatment of men and women (see for example Article 1 Directive 2006/54⁴⁰ and Article 1 Directive 2004/113).⁴¹ These aims are similarly framed, but the different concepts used – equality/equal treatment between men and women – equal opportunities – discrimination based on sex – are not defined in EU legislation. It is therefore not clear what the differences in conceptualisation and scope are.

In addition, in almost all EU gender equality law certain concepts, as interpreted by the CJEU, are common to different directives and the relevant Treaty provisions.⁴² Some of these concepts are defined in legislation and also play a central role even beyond gender equality law.⁴³ The concepts of direct and indirect discrimination have notably been developed by the CJEU. The anti-discrimination directives which have been adopted since 2000 contain similar definitions of direct and indirect discrimination and build upon the case law of the CJEU. Harassment, sexual harassment and an instruction to discriminate are also prohibited and defined in directives. In the following sections, the definitions of these concepts in the Recast Directive (2006/54, see Section 4.2.1), the most recent gender equality directive, will be the starting point, unless indicated otherwise. But first, the concepts of ‘sex’ and ‘gender’ and in how far these concepts are part of EU gender equality law are discussed.

3.1 Sex and gender

In EU legal provisions relevant for this publication both the terms ‘sex’ and ‘gender’ are used, but neither is defined.⁴⁴ For example in Directive 2006/54, the concepts of direct and indirect discrimination on the grounds of sex are defined,⁴⁵ but the term ‘sex’ is not. The same is true for ‘gender’, which is a much broader concept than ‘sex’.⁴⁶ The CEDAW Committee, which monitors the application of CEDAW, the UN-Convention on the Elimination of all Discrimination Against Women, has defined both terms. CEDAW has been ratified or acceded to by all the EU Member States.⁴⁷ CEDAW covers not only sex discrimination, but includes gender-based discrimination, which has been defined and distinguished from ‘sex’ as followed:

‘The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging

40 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), OJ 2006, L 204/23.

41 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 2004, L 373/37.

42 See further the European Network of Legal Experts in the Field of Gender Equality, C. McCrudden & S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Commission 2009, available at: <https://www.equalitylaw.eu/downloads/2812-concepts-of-equality>, accessed 18 September 2018.

43 In addition to gender equality Directives, also the Race Directive 2000/43 and the Framework Directive 2000/78, Section 2, notes 26 and 27. See also S. Prechal, ‘EU Gender Equality Law: a source of inspiration for other EU law areas?’, *European Gender Equality Law Review*, 1/2008, pp. 8-14, available at: <https://www.equalitylaw.eu/downloads/2790-european-gender-equality-law-review-1-2008>, accessed 18 September 2018.

44 See U. Lembke, ‘Tackling sex discrimination to achieve gender equality? The conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, 2/2016, pp. 46-55, in particular Section 3.1, available at: <https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016>, accessed 20 September 2018.

45 See Article 2 (1) sub a and b and Sections 4.1 and 4.2.

46 The term ‘gender’ is used in Directive 2006/54 a few times: in Recital 3 (gender reassignment); Recital 11 (gender-based wage differentials and gender segregation in the labour market); Article 20 (European Gender Equality Institute) and Article 29 (Gender mainstreaming).

47 In Recital 2 of Directive 2004/113, CEDAW is explicitly mentioned.

women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.’

It is thus important to distinguish the two terms as ‘gender’ refers to hierarchies and power relations, expectations and norms about (traditional) roles of men and women and stereotyping.⁴⁸ These definitions can be useful by interpreting and developing EU gender equality law. According to Timmer, while the CJEU has up to now not consistently take issue with gender stereotypes, in some areas of EU equality law the Court has certainly addressed gender stereotypes.⁴⁹

According to case law of the CJEU and Recital 3 of Directive 2006/54, discrimination on the ground of gender reassignment in pay, employment and statutory social security amounts to sex discrimination of a person.⁵⁰ Up to now, legislation and case do not expand further the concept of sex, including for example intersex persons.⁵¹ Currently, in academic writings, the binary sex model – a person being defined either as a man or a woman – is criticised. Lembke for example states that scientific research shows that the biological sex is a continuum. In her view ‘the binary sex/gender model as the essential basis for sex discrimination works in two dimensions by producing an external hierarchy between persons fitting into the binary model and persons not fitting into it and by including an internal hierarchy between men and women. Gender equality law has to cover both.’⁵²

In the gender equality Directives, the following forms of discrimination are defined and will be discussed more in depth in the following sections: direct discrimination (Section 3.2), indirect discrimination (Section 3.3), harassment and sexual harassment (Section 3.5) and an instruction to discriminate (Section 3.6). Positive action is also defined and allowed under certain conditions (Section 3.4).

3.2 Direct discrimination

Direct sex 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, the CJEU has often found that there is direct sex 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 CJEU, the latter will deal with comparisons.⁵³ The comparability of situations does not require that situations are identical, but only similar and must be assessed in a specific

48 See Articles 1, 2 and 5 CEDAW and General Comment 28, paragraph 5.

49 A. Timmer, ‘Gender Stereotyping in the case law of the EU Court of Justice’, *European Equality Law Review*, 1/2016, pp. 37-49, available at: <https://www.equalitylaw.eu/downloads/3867-european-equality-law-review-1-2016>, accessed 20 September 2018.

50 See CJEU 30 April 1996, C-13/94, (*P v S*), ECLI:EU:C:1996:170; CJEU 7 January 2004, C-117/01, (*K.B.*), ECLI:EU:C:2004:7; CJEU 27 April 2006, C-423/04, (*Richards*), ECLI:EU:C:2006:256; CJEU 26 June 2018 (*MB*), ECLI:EU:C:2018:492.

51 See European network of legal experts in the non-discrimination field, S. Agius & C. Tobler, *Trans and intersex people. Discrimination on the grounds of sex, gender identity and gender expression*, European Union 2011, available at: <https://www.equalitylaw.eu/downloads/2671-trans-and-intersex-people>, accessed 20 September 2018 and European network of legal experts in gender equality and non-discrimination, M. van den Brink & P. Dunne, *Transgender and gender identity in non-discrimination law*, forthcoming.

52 See U. Lembke, ‘Tackling sex discrimination to achieve gender equality? The conceptions of sex and gender in EU non-discrimination law and policies’, *European Equality Law Review*, 2/2016, pp. 46-55, at p. 51 and p. 52 available at: <https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016>, accessed 20 September 2018.

53 See for instance in the area of equal pay: CJEU C-132/92, (*Birds Eye Walls*), ECLI:EU:C:1993:868; CJEU 8 June 2004, C-220/02, (*Österreichischer Gewerkschaftsbund*), ECLI:EU:C:2004:334 and CJEU 18 November 2010, C-356/09 (*Kleist*), ECLI:EU:C:2010:703. On how the national courts may handle issues of EU law, see below, Section 7.1.

and concrete manner.⁵⁴ In the first gender reassignment case decided by the CJEU (*P/S*), the comparison was made ‘with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment’.⁵⁵

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 CJEU. 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.⁵⁶ The CJEU 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.⁵⁷

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 that direct discrimination is generally prohibited, unless a specific written exception applies (see Section 4.2.3.). This is different in the case of indirect discrimination.

3.3 Indirect discrimination

The concept of indirect discrimination has been developed by the CJEU in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work.⁵⁸ The landmark case is *Bilka*, which concerned access to an occupational pension scheme.⁵⁹ 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 CJEU 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 correspond to a real need on the part of the undertaking, and are appropriate and necessary to attain that aim. This objective justification test has been applied in many CJEU judgments and is now included in the definition of indirect discrimination in most gender equality and non-discrimination 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.’

54 CJEU 10 May 2011, C-147/08, (*Römer*), ECLI:EU:C:2011:286, paragraph 42 and CJEU 26 June 2018, C-451/16, (*MB*), ECLI:EU:C:2018:492, paragraphs 41-42.

55 CJEU 30 April 1996, C-13/94, (*P v S*), ECLI:EU:C:1996:170, paragraph 21.

56 CJEU 8 November 1990, C-177/88 (*Dekker*), ECLI:EU:C:1990:383, paragraphs 1518.

57 CJEU 30 June 1998, C-394/96, (*Brown*), ECLI:EU:C:1998:331, paragraph 22.

58 See for example European network of legal experts in the non-discrimination field, C. Tobler, *Limits and potential of the concept of indirect discrimination*, European Commission, September 2008, available at: <https://www.equalitylaw.eu/downloads/2720-limpot08-en> and European network of legal experts in the field of gender equality, S. Burri & H. Aune, *Sex discrimination in relation to part-time and fixed-term work*, European Commission November 2013, available at: <https://www.equalitylaw.eu/downloads/2804-sex-discrimination-en>, both accessed 24 September 2018.

59 CJEU 13 May 1986, case 170/84, (*Bilka*), ECLI:EU:C:1986:204.

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.⁶⁰ Each key element of a measure has to be assessed separately.⁶¹ In *Seymour* the Court provided more guidance on how to establish such a presumption or *prima facie* case of indirect discrimination when using statistics.⁶² 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, mere generalisations are not sufficient. 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.⁶³ A measure can be considered appropriate to achieve the stated aim only if it genuinely reflects a concern to attain that aim pursued in a consistent and systematic manner.⁶⁴ The Court considered that the concern to compensate for the disadvantages suffered in the course of their career by all workers, both female and male, who have taken a career break for a period of time in order to devote themselves to bringing up their children indeed constitutes a legitimate social policy aim.⁶⁵

The Court also considered 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 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’.⁶⁶

The CJEU case law provides quite some examples of regulations or practices with criteria amounting to indirect sex discrimination in different areas, for example in access to employment,⁶⁷ employment conditions,⁶⁸ pay⁶⁹ and statutory old age pensions.⁷⁰ 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.

60 CJEU 17 October 1989, case 109/88 (*Danfoss*), ECLI:EU:C:1989:383, paragraphs 10-16 and CJEU 26 June 2001, C-381/99, (*Brunnhöfer*), ECLI:EU:C:2001:358, paragraphs 51-62.

61 See for example CJEU 17 May 1990, C-262/88, (*Barber*), ECLI:EU:C:1990:209, paragraphs 34-35 and CJEU 6 April 2000, C-226/98 (*Jørgensen*), ECLI:EU:C:2000:191, paragraphs 27-36.

62 CJEU 9 February 1999, C-167/97 (*Seymour*), ECLI:EU:C:1999:60, paragraphs 58-65.

63 See also for example CJEU 10 March 2005, C-196/02 (*Nikoloudi*), ECLI:EU:C:2005:141, paragraph 52.

64 See for example CJEU 20 October 2011, C-123/10, (*Brachner*), ECLI:EU:C:2011:675, paragraph 71 and CJEU 17 July 2017, C-173/17, (*Leone Leone*), ECLI:EU:C:2014:2090, paragraph 54.

65 CJEU 17 July 2017, C-173/17, (*Leone Leone*), ECLI:EU:C:2014:2090, paragraph 58.

66 CJEU 24 February 1994, C-343/92, (*Roks and others*), ECLI:EU:C:1994:71, paragraphs 35-36 and CJEU 6 April 2000, C-226/98, (*Jørgensen*), ECLI:EU:C:2000:191, paragraphs 37-42.

67 CJEU 18 October 2017, C-409/16 (*Kalliri*), ECLI:EU:C:2017:767, on a minimum physical height requirement to enter a competition needed for access to a police school.

68 CJEU 2 October 1997, C-1/95, (*Gerster*), ECLI:EU:C:1997:452.

69 CJEU 6 December 2007, C-300/06, (*Voß*), ECLI:EU:C:2007:757.

70 CJEU 22 November 2012, C-385/11, (*Elbal Moreno*), ECLI:EU:C:2012:746, in which a longer period of contributions of part-time workers was at stake.

Substantive equality requires that further steps are taken in order to realise true, genuine equality in social conditions.⁷¹ Arguably, this may sometimes require positive action, the Court also acknowledged this.⁷² However, as we will see in the next Section, 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 EU-law obligation.

3.4 Positive action

Positive action measures are allowed in EU law since 1976. Article 2(4) of the now repealed Directive 76/207⁷³ allowed measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in employment. With the entry into force of the Amsterdam Treaty in 1999, the new Article 141(4) also allowed for positive action measures by the Member States, but now for the 'underrepresented sex'. 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.

The same wording is now included in Article 157(4) TFEU, which 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.'

Some of the gender equality directives also explicitly allow for positive action. This concept 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.'⁷⁴

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.⁷⁵

71 See on substantive equality for example: S. Fredman, S. (2016), 'Substantive equality revisited', *International Journal of Constitutional Law*, 2016, vol. 14, pp. 712-738; C.A. MacKinnon, 'Substantive equality revisited: A reply to Sandra Fredman', *International Journal of Constitutional Law*, 2016, vol. 14, pp. 739-746 and S. Fredman, 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' *International Journal of Constitutional Law*, 2016, vol. 14, pp. 747-751. See also European Network of Legal Experts in the Field of Gender Equality, C. McCrudden & S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Commission 2009, available at: <https://www.equalitylaw.eu/downloads/2812-concepts-of-equality>, accessed 18 September 2018.

72 For example in CJEU 6 July 2000, C-407/98, (*Abrahamsson*), ECLI:EU:C:2000:367, paragraph 48.

73 Council Directive 76/207/EEC of 9 February 1976 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 1972, L 39/40.

74 The provisions on positive action are drafted similarly in the gender equality directives.

75 See further: European Network of Legal Experts in the Field of Gender Equality & S. Fredman, *Making Equality Effective: The role of proactive measures*, European Commission 2009, available at: <https://www.equalitylaw.eu/downloads/2811-making-equality-effective> and European Network of Legal Experts in the Field of Gender Equality & G. Selanec & L. Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Commission 2010 available at: <https://www.equalitylaw.eu/downloads/2812-concepts-of-equality>, accessed 18 September 2018.

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 CJEU 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 CJEU started with the rather severe judgment in *Kalanke*.⁷⁶ In the meantime, the CJEU has softened its position in favour of positive action. For example, the Court held in *Badeck* that it is legitimate for the purposes of that assessment for certain positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. Thus, it may be decided that seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance for the suitability, qualifications and professional capability of candidates. Similarly, it may be prescribed that the family status or income of the partner is immaterial and that part-time work, leave and delays in completing training as a result of looking after children or dependents in need of care must not have a negative effect.⁷⁷ In *Lommers*, 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.⁷⁸ 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.⁷⁹ The Court also considered that measures that allow only or mainly female workers to take early retirement with immediate payment of pension and to grant them a service credit upon their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career, not objectively justified.⁸⁰

A proposal is pending on gender balance on company boards.⁸¹ The proposal sets a minimum objective of a 40 % quota 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. It also includes the application in principle of a priority rule for the underrepresented sex. Non-listed companies and SMEs would be excluded, and Member States would also be able to exclude companies employing less than 10 % of the under-represented sex. Debates in the Council led to the introduction of a flexibility clause and a revised implementation and reporting calendar.⁸²

3.5 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:

76 CJEU 17 October 1995, C-450/93, (*Kalanke*), ECLI:EU:C:1995:322.

77 CJEU 28 March 2000, C- 158/97 (*Badeck*), ECLI:EU:C:2000:163, paragraphs 32-33.

78 CJEU 19 March 2002, C- 476/99, (*Lommers*), ECLI:EU:C:2002:183.

79 See further also, for instance: CJEU 11 November 1997, C-409/95, (*Marschall*), ECLI:EU:C:1997:533; CJEU 16 September 1999, C-218/98 (*Abdoulaye*), ECLI:EU:C:1999:424; CJEU 6 July 2000, C-407/98, (*Abrahamsson*), ECLI:EU:C:2000:367; CJEU 30 September 2004, C-319/05, (*Briheche*), ECLI:EU:C:2004:574.

80 In a case on direct sex discrimination: CJEU 29 November 2001, C-366/99, (*Griesmar*), ECLI:EU:C:2001:648, paragraphs 59-67 and in a case on indirect sex discrimination: CJEU 17 July 2017, C-173/17, (*Leone Leone*), ECLI:EU:C:2014:2090, paragraphs 99-103.

81 COM (2012) 614. See L. Senden & M. Visser 'Balancing a Tightrope: The EU Directive on improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies', *European Gender Equality Law Review*, 2013/1, available at: <https://www.equalitylaw.eu/downloads/2800-european-gender-equality-law-review-1-2013>, accessed 18 September 2018.

82 See for the latest state of affairs: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299(COD)&l=en), accessed 24 September 2018. For more information on developments at national level: European network of legal experts in gender equality and non-discrimination, L. Senden & S. Kruisinga, *Gender-balanced company boards in Europe. An analysis of regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Union 2018, available at: <https://www.equalitylaw.eu/downloads/4537-gender-balanced-company-boards-in-europe-pdf-1-68-mb>, accessed 25 September 2018.

‘(...) 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. In the *Coleman* case, a case on disability discrimination,⁸³ the Court held that the prohibition of harassment is not limited only to people who are themselves disabled. If harassment suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such harassment is also prohibited.⁸⁴

Sexual harassment occurs in terms of Article 2(1)(d) of the Recast Directive:

‘(...) 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.’

Sex discrimination thus 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 Directive 2006/54). Harassment and sexual harassment cannot be objectively justified.⁸⁵

3.6 Instruction to discriminate

The prohibition on discrimination includes an instruction to discriminate against persons on one of the discrimination grounds covered by the equal treatment directives. Such prohibition in relation to sex discrimination is included in 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.⁸⁶

The concepts discussed in this Section are common to the EU gender equality (and non-discrimination) Directives. 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 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. The next two Sections provide overviews of the EU gender equality legislation and case law (Section 4), including work-life balance issues (Section 5).

83 Directive 2000/78, in particular, Articles 1 and 2(1) and (3).

84 CJEU 7 July 2008, C-303/06, (*Coleman*), ECLI:EU:C:2008:415.

85 See further the report of the European Network of Legal Experts in the Field of Gender Equality, A. Numhauser-Henning & S. Laulom, *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, European Commission, 2011, available at: <https://www.equalitylaw.eu/downloads/4541-harassment-related-to-sex-and-sexual-harassment-law-in-33-european-countries> and EU Bookshop <https://bookshop.europa.eu/en/home/>, accessed 1 October 2013.

86 See I. Asscher-Vonk, ‘Instruction to discriminate’ *European Gender Equality Law Review*, 1/2012, pp. 4-12, available at: <https://www.equalitylaw.eu/downloads/2798-european-gender-equality-law-review-1-2012>, accessed 21 November 2013.

4. EU gender equality legislation and case law

4.1 Equal pay for men and women

4.1.1 The pivotal role of Article 157 TFEU

Any discussion of EU gender equality legislation has to start with a brief discussion of a crucial Treaty Article, namely Article 157 TFEU (former Article 119 EEC, 141 EC),⁸⁷ 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.’

In the famous *Defrenne II* case, the Court decided that this Article 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. This Article is directly effective since the date of this judgement, 8 April 1976.⁸⁸

As was already observed above, Article 119 EEC should have been implemented before 1 January 1962, but this did not occur. An important measure to facilitate more effective implementation was the adoption in 1975 of Directive 75/117 on the application of the principle of equal pay for men and women. The CJEU stated in *Worringham* that this Directive explains that the concept of same work in Article 119 EEC (now 157 TFEU) includes work to which equal value is attributed.⁸⁹ The principle of equal pay applies to equal work and work of equal value and also, *a fortiori*, to work of higher value. The CJEU 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.⁹⁰

With the entry into force of the Treaty of Amsterdam on the 1st of May 1999, Article 119 EEC was renumbered (Article 141 EC) and amended. The first two paragraphs remained nearly the same; however, the provision in Article 141(1) EC explicitly stated that:

‘Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.’

The addition ‘work of equal value’ only confirms what had already become clear with the case law of the CJEU. The European Community legislator thus incorporated this case law in the Treaty provision. This wording remained unchanged in Article 157(1) and (2) TFEU. Further, two new paragraphs have been added in 1999. According to Article 141(3) EC 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

87 In this text we refer mostly to Article 157 TFEU, even if case law explains either Article 119 EEC or Article 141 EC.

88 CJEU 8 April 1976, case 43/75 (*Defrenne II*), ECLI:EU:C:1976:56.

89 CJEU 11 March 1981, case 69/80, (*Worringham*), ECLI:EU:C:1981:63, paragraph 21.

90 CJEU 4 February 1988, case 157/86 (*Murphy*), ECLI:EU:C:1988:62, paragraphs 9-10.

of employment and occupation, including the principle of equal pay for equal work or work of equal value. Article 157(3) TFEU offers in similar wording – however adapted to the new procedures in the TFEU – a legal basis for adopting measures in this field.

Directive 75/117 on the application of the principle of equal pay for men and women has now been repealed by the Recast Directive 2006/54. Article 4 of this Directive is now the relevant provision which stipulates:

‘For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.’

This Article also clarifies that the principle of equal pay also applies to work of equal value. It does not alter the meaning of Article 157 TFEU which is in any event impossible since the Treaty is a higher source of law. The prohibition on direct and indirect sex discrimination explicitly applies to pay in the private and public sectors, including public bodies (Article 14(1)(c) of Directive 2006/54).

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 on the Functioning of the EU, which is primary law, and secondary legislation, such as directives. There are, however, also other important features to be highlighted on the scope of this Article and thus on the application of the principle of equal pay for equal work or work of equal value of men and women.

4.1.2 Who is a ‘worker’?

The concept of a ‘worker’ has a EU 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.⁹¹ 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 157 TFEU, 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.⁹² This may imply, *inter alia*, that even when a person is considered as being self-employed under national law, Article 157 TFEU must nevertheless be applied.⁹³ The answer to the question whether a relationship of subordination exists must, in each particular case, be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties.

4.1.3 What is ‘pay’?

According to the – extensive and sometimes ground-breaking – case law of the CJEU on this issue, pay includes not only basic pay, but also, for example, overtime supplements,⁹⁴ special bonuses paid by

91 CJEU 3 July 1986, case 66/85, (*Lawrie-Blum*), ECLI:EU:C:1985:284, paragraph 17. This case concerned the free movement of workers. However, in CJEU 14 December 1995, C-317/93, (*Nolte*), ECLI:EU:EU:C:1995:438 and CJEU 14 December 1995, C-444/93, (*Megner*), ECLI:EU:C:1995:442, the CJEU made clear that the same definition applies in the areas of gender discrimination. See further: European Network of Legal Experts in the Field of Gender Equality, N. Countouris & M. Freedland, *The Personal Scope of EU Sex Equality Directives*, European Commission 2012, available at: <https://www.equalitylaw.eu/downloads/2822-eu-sex-equality-directives>, accessed 15 September 2018.

92 CJEU 11 November 2010, C-232/09, (*Danos*), ECLI:EU:C:2010:674, paragraphs 46-51. This case concerned Directive 92/85, but as the concept of worker has an EU meaning, it is also relevant for Article 157 TFEU and other directives.

93 CJEU 13 January 2004, C-256/01, (*Allonby*), ECLI:EU:C:2004:18, paragraphs 65-71.

94 See, for example, CJEU 6 December 2007, C-300/06, (*Voß*). ECLI:EU:C:2007:757.

the employer,⁹⁵ travel facilities,⁹⁶ compensation for attending training courses and training facilities,⁹⁷ termination payments in case of dismissal⁹⁸ and occupational pensions.⁹⁹ In particular the extension of Article 157 TFEU to occupational pensions has been very important.

In *Defrenne I* the Court already had to consider the relationship between the concept of pay in Article 157 TFEU and social security systems. The CJEU 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.¹⁰⁰ 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, Directive 79/7 on statutory schemes and Directive 86/378, on occupational schemes, amended by Directive 96/97 (both repealed).¹⁰¹ The provisions on occupational social security schemes are now included in Title II, Chapter 2 of the Recast Directive (2006/54).¹⁰²

In the meantime, the CJEU 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 CJEU decided in the famous *Barber* judgment (building on what it had already stated in *Defrenne I*) that Article 157 TFEU 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.¹⁰³

The *Barber* judgment and the following case law had the effect, *inter alia*, that certain aspects of the occupational social security schemes Directive 86/378 were contrary to Article 157 TFEU and had to be amended. 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 157 TFEU was not applicable and certain forms of discrimination were still allowed. The Court decided in *Beune* that a pension scheme for public servants also falls under the concept of pay.¹⁰⁴

4.1.4 What does Article 157 TFEU prohibit?

In the first place, Article 157 TFEU not only prohibits direct discrimination based on sex in the field of pay, but also indirect discrimination (see Sections 3.2. and 3.3.). These prohibitions apply not only to sex discrimination arising out of individual contracts, but also collective agreements and legislation.¹⁰⁵ The definitions of the concepts of discrimination and (sexual) harassment in Article 2(1) of the Recast Directive 2006/54 (as explained in Section 3) apply.

95 See for example CJEU 21 October 1999, C-333/97, (*Lewen*), ECLI:EU:C:1999:512.

96 See for example CJEU 9 February 1982, case 12/81, (*Garland*), ECLI:EU:C:1981:44.

97 See for example CJEU 4 June 1992, C-360/90 (*Bötel*), ECLI:EU:C:1990:246.

98 See for example CJEU 27 June 1990, C-33/89, (*Kowalska*), ECLI:EU:C:1990:265.

99 See for example CJEU 13 May 1986, case 170/84, (*Bilka*), ECLI:EU:C:1986:204 and CJEU 17 May 1990, C-262/88, (*Barber*), ECLI:EU:C:1990:209.

100 CJEU 25 May 1971, case 80/70, (*Defrenne I*), ECLI:EU:C:1971:55, paragraphs 6-13.

101 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 1997, L 46/20, now repealed.

102 See below, Sections 4.3. and 4.4. respectively.

103 CJEU 17 May 1990, C-262/88, (*Barber*), ECLI:EU:C:1990:209.

104 CJEU 28 September 1994, C-7/93, (*Beune*), ECLI:EU:C:1994:350.

105 CJEU 8 April 1976, case 43/75, (*Defrenne II*), ECLI:EU:C:1976:56, paragraphs 21-22.

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 CJEU has decided that Article 157 TFEU also extends to 'work of equal value'.¹⁰⁶ As far as the comparison of the pay which the female and the male worker receive is concerned, the CJEU has stressed the need for genuine transparency, permitting an effective review.¹⁰⁷ 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.¹⁰⁸ This implies that often a comparison should be made between the work performed and the salary received by male and female workers. However, such comparisons are not always necessary (see Section 3.2).

4.2 Equal treatment for men and women in employment

4.2.1 *The Recast Directive 2006/54*

In 2006, a new directive (the Recast Directive 2006/54) 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. The aim of this so-called 'recasting' was 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 so-called Recast Directive has modernised and simplified existing provisions and had to be implemented by 15 August 2008.¹⁰⁹ With effect from 15 August 2009 onwards, it has repealed the following older 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),¹¹⁰ the Directive on equal treatment of men and women in occupational social security schemes (86/378, as amended by Directive 96/97) and the Directive on the burden of proof (97/80). Nearly all the articles in the Recast Directive correspond to articles which already existed 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. These definitions are similar to those contained in the 2000 directives (Directive 2000/43, the so-called Race Directive and Directive 2000/78, the so-called Framework Directive).¹¹¹ The second title includes provisions on equal pay (Chapter 1), equal treatment in occupational and social security schemes (Chapter 2) and on equal treatment as regards access to employment, vocational training and promotion and working conditions (Chapter 3). 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. The Member States are responsible for the compliance of national provisions with the Directive. According to Article 23:

106 See on the application of the principle of equal pay at national level: European network of legal experts in gender equality and non-discrimination, P. Foubert, *Enforcement of the principle of equal pay for work of equal value. A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, European Union 2017, available at: <https://www.equalitylaw.eu/downloads/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb>, accessed 26 September 2018.

107 See also the Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, 2014/124/EU, OJ 2014, L 69/112.

108 CJEU 17 May 1990, C-262/88, (*Barber*), ECLI:EU:C:1990:209, paragraphs 33-34.

109 See European network of legal experts in the field of gender equality, S. Burri & S. Prechal, *The Transposition of Recast Directive 2006/54/EC*, European Commission, February 2009, available at: <https://www.equalitylaw.eu/downloads/2815-transposition-recast-directive-2009>, accessed 9 November 2018.

110 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 2002, L 269/15.

111 See above Section 2.

‘Member States shall take all necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers’ and employers’ organisations or any other arrangements shall be, or may be, declared null and void or are amended;
- (c) occupational social security schemes containing such provisions may not be approved or extended by administrative measures.’

Title III also includes general provisions on, for example, the prevention of discrimination, gender mainstreaming and the dissemination of information. Finally, in Title IV provisions on reporting, reviewing, implementation etc. are brought together. The enforcement aspects of EU gender equality law are discussed separately in Section 7 of this publication.

4.2.2 *Employment, vocational training, promotion and working conditions*

The Recast Directive also repeals the so-called Second Directive on the implementation of the principle of equal treatment between men and women in employment (76/207, as amended by Directive 2002/73). The relevant provisions are now included in Title II, Chapter 3 of Directive 2006/54. The main article is Article 14, which prohibits both direct and indirect sex discrimination¹¹² in the public and private sectors (including public bodies) in relation to:

- ‘(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.’

The scope of the application of the principle of equal treatment of men and women is thus broad.¹¹³ Just as the concept of ‘pay’ (see Section 4.1.3), ‘dismissal’ has to be interpreted broadly. It covers for example compulsory dismissal due to an age limit for retirement set in an employers’ general policy, even if the dismissal involves the grant of a retirement pension.¹¹⁴

4.2.3 *Exceptions to the principle of equal treatment*

The Recast Directive allows some exceptions to the principle of equal treatment of men and women, which are similar to the exceptions which were included in Article 2 (2), (3) and (4) of Directive 76/207.

First, the application of a genuine and determining occupational requirement does not amount to discrimination if some conditions are fulfilled. This is the case, for example, when an actor in a play or film has to be a man. The Recast Directive now stipulates in Article 14(2):

112 Article 2(1) of Directive 76/207 already defined the principle of equal treatment as follows: ‘(...) there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.’

113 See for instance CJEU 18 October 2017, C-409/16, (*Kalliri*), ECLI:EU:C:2017:767, paragraphs 15-26.

114 CJEU 18 November 2010, C-356/09, (*Kleist*), ECLI:EU:C:2010:703, paragraph 26.

'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 CJEU held that the exception of occupational activities in Article 2(2) of Directive 76/207,¹¹⁵ being a derogation from an individual right laid down in the Directive, must be interpreted strictly.¹¹⁶ According to the CJEU, 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 76/207.¹¹⁷ 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.¹¹⁸ This case law is also relevant for the interpretation of Article 14(2) of the Recast Directive.

The second exception 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:

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

This exception allows national provisions to guarantee to women specific rights on account of pregnancy and maternity, such as maternity leave. According to the CJEU, 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.¹¹⁹ 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.¹²⁰

In 1992, the Member States adopted a specific directive regarding pregnant workers: Directive 92/85 (see Section 5.1). The provisions of this so-called Pregnancy Directive prevail over those of the Recast Directive. Article 28(2) stipulates that the provisions of the Recast Directive are without prejudice to the provisions of the Directive (92/85). The same is true for the Parental Leave Directive 94/36, which is repealed by Directive 2010/18 (see Section 5.2).

The last exception relates to positive action (see above, Section 3.4) in Article 3 of the Recast Directive, which reads:

115 Article 2(2) of Directive 76/207 (now repealed) 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.'

116 CJEU, 15 May 1986, case 222/84, (*Johnston*), ECLI:EU:C:1986:206, paragraph 36.

117 CJEU 26 October 1999, C-273/97, (*Sirdar*), ECLI:EU:C:1999:523.

118 CJEU 11 January 2000, C-285/98, (*Kreil*), ECLI:EU:C:2000:2. See on compulsory military service: CJEU 11 March 2003, C-186/01, (*Dory*), ECLI:EU:C:2003:146.

119 CJEU, 12 July 1984, case 184/83, (*Hofmann*), ECLI:EU:C:1984:273, paragraph 25.

120 CJEU 30 April 1998, C-136/95, (*Thibault*), ECLI:EU:C:1998:178, paragraphs 24-26.

‘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.¹²¹

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. The final text of Article 2(4) of Directive 76/207 on positive action stipulated 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).’

Whereas Article 2(4) referred to women’s opportunities, Article 157(4) TFEU allows positive action for the underrepresented sex.

As far as all the exceptions are concerned, the Directive on equal treatment of men and women in employment (76/207) had 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.¹²² The Recast Directive follows the same approach. 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 (see Section 3.3).

In 2002, Directive 76/207 was amended in order to modernise and harmonise its provisions.¹²³ Elements of the case law of the CJEU were 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 2000/43 and the Framework Directive 2000/78, also introducing a mainstreaming obligation and strengthening the provisions on the enforcement of equal treatment rights. The provisions on equal pay were then included in the amended Directive. These provisions are now incorporated in the Recast Directive 2006/54.

4.3 Equal treatment for 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 had postponed the implementation of the principle of equal

121 Article 157(4) TFEU 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.

122 CJEU 8 November 1990, C-177/88 (*Dekker*), ECLI:EU:C:1990:383, paragraphs 2224.

123 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 2002, L 269/15.

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 79/7 was adopted and has not been amended since then.¹²⁴ This so-called Third Directive on equal treatment between men and women covers the field of statutory social security.

The Directive prohibits in Article 4(1) both direct and indirect sex discrimination, but does not define these concepts. In the *MB* case, the Court clarified that the definition of direct sex discrimination in the Recast directive applies also in the context of Directive 79/7.¹²⁵ As regards the concept of indirect sex discrimination, the Court relies on its own case law in relation to this Directive and defines indirect discrimination for example in *Brachner* as follows: ‘according to the Court’s settled case-law, a national measure which constitutes indirect discrimination because, albeit formulated in neutral terms, it in fact works to the disadvantage of far more women than men, is contrary to Article 4(1) of Directive 79/7, unless that measure is justified by objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures chosen reflect a legitimate social-policy objective of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so’.¹²⁶

There is thus consistency in conceptualisation of both direct and indirect sex discrimination between the different areas to which gender equality legislation applies, even if a directive does not provide a definition of these concepts.

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 *X* case, the Court held that a method of calculation which took into account different life expectancies of men and women for the amount of compensation in the form of a lump sum, due in respect of harm resulting from an accident at work, is contrary to Article 4(1), if the sum paid to a man is less than that paid to a woman.¹²⁷

124 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 1979, L 6/24.

125 CJEU 26 June 2018, C-451/16, (*MB*), ECLI:EU:C:2018:492, paragraph 34.

126 CJEU 20 October 2011, C-123/10, (*Brachner*), ECLI:EU:C:2011:675, paragraph 70.

127 CJEU 3 September 2014, C-318/13, (*X*), ECLI:EU:C:2014:2133.

In the area of statutory schemes some – often rather complex – cases before the CJEU 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 79/7 but not under the Occupational Schemes Directive 86/378.

4.4 Equal treatment for 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).¹²⁸ This Directive was amended by Directive 96/97, the so-called ‘Barber Directive’, which incorporated the case law of the CJEU (see Section 4.1.3).¹²⁹ Subsequently, Directive 86/378¹³⁰ became a part of the recast exercise (Directive 2006/54/EC, Title II, Chapter 2, see Section 4.2.1). Important case law has been incorporated in the provisions of this Chapter and some provisions also apply to self-employed persons.

Article 5 of the Recast Directive prohibits both direct and indirect sex discrimination in occupational social security in particular as regards:

- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

The categories of persons protected are listed in Article 6 and include:

‘... members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.’

The risks covered are the same as in Directive 79/7 (Article 7(1)). 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. The Chapter applies, in addition, to pension schemes for a particular category of worker such as public civil servants if the benefits are paid by reason of the employment relationship with the public employer (Article 7(2)).

Directive 86/378 prohibited both direct and indirect discrimination and gave various examples of provisions that were prohibited (Article 6), but it also contained important exceptions: the non-discrimination obligation did not apply to survivors’ pensions, differences in the pensionable age, and the use of different actuarial calculation factors. However, since the CJEU interpreted the concept of pay in Article 157 TFEU to include occupational social security schemes (see Section 4.1.3), the significance of these exceptions was consequently rather limited. Under the influence of the CJEU’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 CJEU ‘corrected’ the Occupational Schemes Directive to a certain extent. The Recast Directive has now incorporated most of this case law and in Article 9 it provides examples of discrimination in this field. Determining different retirement ages in such schemes

128 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, OJ 1986, L 225/40.

129 CJEU 17 May 1990, C-262/88, (*Barber*), ECLI:EU:C:1990:209; 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 1997, L 46/20.

130 Amended by Council Directive 96/97/EC.

is prohibited in Article 9(1)(f). The same is true for suspending the acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer (Article 9(1)(g)). The effect in time has been limited by the CJEU for certain provisions to periods of employment after 17 May 1990 (the date of the *Barber* judgment), except for workers who commenced legal proceedings before that date.

4.5 Equal treatment for men and women engaged in an activity in a self-employed capacity

Another directive on equal treatment was also adopted in 1986.¹³¹ The aim of this Directive 86/613 was 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 were not covered by Directives 76/207 and 79/7 (Article 1). The persons protected under the Directive were 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 were 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 were rather non-committal.¹³² 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 were 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 was concerned, the Member States only had to examine whether, and under what conditions, these persons have access to services supplying temporary replacements or existing national social services, or were entitled to cash benefits under a social security scheme or under any other public social protection system.

Directive 86/613 has been repealed by Directive 2010/41.¹³³ Directive 2010/41 covers aspects concerning the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity which are not covered by Recast Directive 2006/54 and Directive 79/7 (Article 1(1)). The directive applies to self-employed workers, meaning all persons pursuing a gainful activity for their own benefit, and to the spouses of self-employed workers (Article 2(a)). The directive also applies to the life partners of self-employed workers, not being employees or business partners, where they habitually participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks. Conditions laid down in national law might apply (Article 2(b)). The definitions of direct

131 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 1986, L 359/56.

132 See for examples of cases in which the CJEU interpreted this directive together with Directive 76/207: CJEU 11 November 2010, C-232/09, (*Danosá*), ECLI:EU:C:2010:674, paragraph 70 and CJEU 6 April 2000, C-226/98 (*Jørgensen*), ECLI:EU:C:2000:191, paragraph 26.

133 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, OJ 2010, L 180/1. See also European network of legal experts in the field of gender equality, C. Barnard & A. Blackham, *Self-employed. The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in a self-employed activity*, European Union 2015, available at: <https://www.equalitylaw.eu/downloads/2732-self-employed-en>, accessed 27 September 2018.

and indirect discrimination, harassment and sexual harassment are similar to the definitions in the non-discrimination and gender equality directives adopted since 2000 (Article 3, see Section 3).

The principle of equal treatment on the grounds of sex applies to the public or private sectors, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity (Article 4(1)). The directive does not extend the rights to the social protection of the self-employed, but mentions that where a system for social protection for self-employed workers exists in a Member State, that Member State has to take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law (Article 7(1)). This is an improvement compared to Directive 86/613, but is still a rather weak provision, in particular due to the fact that the Member State may decide whether the social protection is implemented on a mandatory or voluntary basis (Article 7(2)).

The Directive also contains a provision on maternity benefits (Article 8). The Member States have to take the necessary measures to ensure that female self-employed workers and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions to their occupational activity owing to pregnancy or motherhood for at least 14 weeks (on a mandatory or voluntary basis). Measures have to be taken to ensure access to any existing temporary replacements or social services. Worth mentioning is that equality bodies should provide, among other things, independent assistance to victims of discrimination, and should conduct independent surveys etc. (Article 11). Even if some provisions of this new directive still appear to be rather weak, on the whole, most of them certainly result in an improvement compared to the rights which self-employed persons had under Directive 86/613.

4.6 Equal treatment for men and women in the access to and 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, implementing the principle of equal treatment between men and women in access to and supply of goods and services.¹³⁴ 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.¹³⁵

Directive 2004/113 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)).

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

134 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 2004, L 373/37. See European network of legal experts in the field of gender equality, S. Burri & A. McColgan, *Sex segregated services*, European Commission December 2008, available at: <https://www.equalitylaw.eu/downloads/4555-sex-segregated-services-pdf-1-134-kb> and S. Burri & A. McColgan, *Sex discrimination in the access to and supply of goods and services and the transposition of Directive 2004/113*, European Commission May 2009, available at: <https://www.equalitylaw.eu/downloads/3855-sex-discrimination-in-the-access-to-and-supply-of-goods-and-services-and-the-transposition-of-directive-2004-113-ec-pdf-1-38-kb>, both accessed 27 September 2018.

135 See on the application of this directive in relation to digital platforms: European network of legal experts in gender equality and non-discrimination, E. Carraciolo di Torella & B. McLellan, *Gender equality and the collaborative economy*, European Union 2018, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>, accessed 27 September 2018.

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. These concepts are defined in Article 2 similarly as in the non-discrimination and equality directives adopted since 2000 (see Section 3).

However, the Directive allows exceptions to the principle of equal treatment. 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.’

Member States had the possibility to derogate from this provision (Article 5(2)). However, in all new contracts concluded after 21 December 2007, the use of sex as a factor in the calculation of premiums and benefits may not result in differences in individual premiums and benefits (Article 5(1)). In addition, in the *Test-Achats* case, the CJEU considered the derogation to this rule as provided in Article 5(2) invalid with effect from 21 December 2012.¹³⁶ In any event, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits (Article 5(3)).

136 CJEU, 1 March 2011, C-236/09, (*Test-Achats*), ECLI:EU:C:2011:100. See on this issue the Communication from the Commission *Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)*, COM (2011) 9497. See on the potential impact of the *Test-Achats* case in relation to a statutory social security scheme: CJEU 3 September 2014, C-318/13 (X), ECLI:EU:C:2014:2133, Paragraphs 41-52.

5. Work-life balance legislation and case law

As we have seen above, according to EU legislation and CJEU case law, any less favourable treatment of a woman in relation to pregnancy and maternity leave amounts to discrimination (Article 2(2)(c) of the Recast Directive).¹³⁷ However, provisions concerning the protection of women, particularly as regards pregnancy or maternity are allowed (Article 28(1) of the Recast Directive) or even required (Article 8 of Directive 2010/41).¹³⁸

Two directives provide in addition specific protection and rights in relation to not only pregnancy and maternity, but also with regards to parental leave. The Pregnancy Directive (92/85) had to be transposed by November 1994 into national law of the EU Member States, while this was required for the Parental Leave Directive (96/34) by June 1998. As we will see below, in the case law of the CJEU, the prohibition of direct and indirect sex discrimination as well as Article 33 of the Charter of Fundamental Rights of the EU on the reconciliation of private/family life and work are relevant with regards to work-life balance issues.¹³⁹ In addition, work-life balance is now firmly embedded in EU law, as the European Pillar of Social Rights, launched in April 2017, not only includes the principle of gender equality and equal opportunities, but also work-life balance.¹⁴⁰

5.1 Pregnancy and maternity

Directive 92/85, regarding pregnant workers and workers who have recently given birth or are breastfeeding, was adopted in 1992.¹⁴¹ Its main aim is to implement measures to encourage improvements in the safety and health at work of those workers (Article 1).¹⁴² The directive applies to the pregnant worker who informs her employer of her condition, the worker who has recently given birth and the worker who is breastfeeding (Article 2). In *Danosa* the CJEU clarified that in case the worker has not informed the employer formally, but the employer learns of her pregnancy, she is a worker in the meaning of the directive. The same is true for a member of a capital company's Board of Directors, who provides services to that company and is an integral part of it, if that activity is carried out, for some time, under the direction or supervision of another body of that company and if she receives remuneration.¹⁴³ However, the scope of the Pregnancy Directive does not include a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus. But if the dismissal is essentially based on the IVF treatment which is in such advanced stage, then Directive 76/207 (now the Recast Directive) precludes such dismissal.¹⁴⁴ The Pregnancy Directive does not apply either to an intended mother whose child is born through a surrogacy arrangement, as she has never been pregnant and given birth, even if she has been breastfeeding the baby.¹⁴⁵

Pregnant and breastfeeding women enjoy health and safety protection. The employer has to take measures to avoid that the worker is exposed to certain risks related to certain chemical, physical and

137 See Section 3.2.

138 See Sections 4.2.3. and 4.5.

139 See for example: European network of legal experts in gender equality and non-discrimination, A. McColgan, *Measures to address challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European Union 2015, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>, accessed 28 September 2018.

140 See *The European Pillar of Social Rights in 20 Principles*, in particular principles 2, 3 and 9: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en, accessed 28 September 2018.

141 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 1992, L 348/1.

142 The legal base of this directive is Article 118a EEC, which allowed the adoption of directives without requiring unanimity in relation to health and safety.

143 CJEU 11 November 2010, C-232/09, (*Danosa*), ECLI:EU:C:2010:674, paragraphs 55-56.

144 CJEU 26 February 2008, C-504/06, (*Mayr*), ECLI:EU:C:2008:119.

145 CJEU 18 March 2014, C-167/12, (*CD*), ECLI:EU:C:2014:169 and CJEU 18 March 2014, Case C-363/12, (*Z*), ECLI:EU:C:2014:159.

biological agents and industrial processes which are considered hazardous (Articles 3-6). Women to which the directive applies cannot be obliged to carry out night work (Article 7).¹⁴⁶

Some provisions of the Pregnancy 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 (see also Article 15 of the Recast Directive).¹⁴⁷ They are also entitled to the payment of and/or the entitlement to an adequate allowance being maintained (Article 11(2)(b)).

Pregnant workers and workers who have recently given birth are protected against dismissal from the beginning of their pregnancy until the end of the maternity leave (Article 10), save in exceptional cases not connected to pregnancy.¹⁴⁸ The protection against dismissal also covers dismissal because of absences due to incapacity to work caused by an illness resulting from pregnancy.¹⁴⁹

In 2008, the European Commission submitted a Work-life Balance Package, including a proposal aimed at amending the Pregnancy Directive 92/85, in particular by extending the pregnancy and maternity leave period up to 18 weeks, fully paid.¹⁵⁰ This proposal met quite some opposition from some Member States and was after years of negotiations withdrawn by the Commission in July 2015.¹⁵¹

The provisions of this Directive have often been interpreted by the Court jointly with the provisions of Directive 76/207 (now the Recast Directive) on equal treatment between men and women in employment. According to the CJEU, discrimination on grounds of pregnancy amounts to direct sex discrimination (see Section 3.2.).¹⁵² The Court recognized in many cases the legitimacy first, of protecting women's biological condition during and after pregnancy and second, of protecting the special relationship of a woman and her child during the period which follows pregnancy and child birth.¹⁵³ The Court has often strengthened the protection of pregnant women, also when working on a fixed-term contract.¹⁵⁴ In particular, in *Jiménez Melgar*, the Court held that the non-renewal of a fixed-term contract, when it comes to an end of its stipulated term, cannot be regarded as a dismissal. Under certain circumstances, the non-renewal of a fixed-term contract might be a refusal of employment. Where non-renewal of a fixed-term contract is motivated by the worker's state of pregnancy, it constitutes direct sex discrimination.¹⁵⁵

146 This also applies to shifts during a part of the night: CJEU 19 September 2018, C-41/17, (*González Castro*), ECLI:EU:C:2018:736.

147 CJEU30 April 1998, C-136/95, (*Thibault*), ECLI:EU:C:1998: 178.

148 The employer has in such exceptional cases to give substantiated grounds in writing and such dismissal has to be allowed under national law: CJEU 11 November 2010, C-232/09, (*Danosá*), ECLI:EU:C:2010:674, paragraph 63. See regarding collective redundancy: CJEU 22 February 2018, C-103/16, (*Porras Guisado*), ECLI:EU:C:2018:99 paragraphs 48 and 53-54.

149 CJEU30 June 1998, C-394/96 (*Brown*), ECLI:EU:C:1998:33, paragraph 18.

150 See *Work-life balance package*, MEMO/08/603, Brussels, 3 October 2008, available at: http://europa.eu/rapid/press-release_MEMO-08-603_en.htm, accessed 28 September 2018 and COM (2008) 600/4 and COM (2008) 637.

151 Press Release 1st of July 2015, *Delivering for parents: Commission withdraws stalled maternity leave proposal and paves the way for a fresh approach*, available at http://europa.eu/rapid/press-release_IP-15-5287_en.htm, accessed 28 September 2018.

152 For a more detailed overview see European Network of Legal Experts in the Field of Gender Equality & S. Burri, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, European Commission 2008; European Network of Legal Experts in the Field of Gender Equality, A. Masselot, E. Caracciolo di Torella & S. Burri, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*, European Commission 2012; both reports are available at: <https://www.equalitylaw.eu/publications/thematic-reports>, accessed 28 September 2018.

153 For the first time in CJEU 12 July 1984, case 184/83 (*Hoffmann*), ECLI:EU:C:1984:273, paragraph 25.

154 See for example CJEU 14 July 1994, C-32/93, (*Webb*), ECLI:EU:C:1994:300 and CJEU 4 October 2001, C-109/00, (*Tele Danmark*) ECLI:EU:C:2001:513.

155 CJEU 4 October 2001, C-438/99, (*Jiménez Melgar*), ECLI:EU:C:2001:509, para 47.

Refusing to provide references as a reaction to proceedings following a dismissal in relation to pregnancy is prohibited.¹⁵⁶ The same is true for taking preparatory steps and notifying a decision to dismiss a worker on the grounds of pregnancy and/or birth during maternity leave or after the end of such leave.¹⁵⁷

This case law illustrates how the prohibition of sex discrimination in relation to pregnancy and maternity and the specific protection and rights provided by the Pregnancy Directive are intertwined and relevant in cases involving pregnancy and/or maternity discrimination in employment. Similarly, the concept of indirect sex discrimination can be relevant in relation to parental leave, if many more women than men take such leave and face (presumed) discrimination.¹⁵⁸ But also direct sex discrimination related to parental leave has been subject of CJEU case law.¹⁵⁹

5.2 Parental leave

The reconciliation of family/private life with work is, according to the CJEU, ‘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.¹⁶⁰ Therefore, although not adopted as a specific gender equality directive, the Parental Leave Directive 96/34¹⁶¹ played an important role in the gender equality discourse. It had to be transposed into national law by June 1998.

The Parental Leave Directive (96/34) has set minimum standards designed to facilitate the reconciliation of work with family life. It implemented the Framework Agreement of the European social partners on parental leave and time off on grounds of *force majeure*.¹⁶² Under this Directive the Member States were obliged to grant all parents a (in principle) non-transferable right to parental leave. The length of the parental leave was at least three months and could be taken from the birth or adoption of the child until that child has reached the age of eight years.

The Directive also ensured that workers could exercise this right: the Member States and/or the social partners (management and labour) had to 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 had 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 provided a right to leave on grounds of *force majeure* for urgent family reasons.

The CJEU has dealt with the issue of parental leave under Directive 96/34/EC in a few cases. In case C-519/03 *Commission v Luxembourg*, 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.¹⁶³

Directive 2010/18 has repealed Directive 96/34 by 8 March 2012 and implemented the revised agreement on parental leave that the European social partners reached in June 2009.¹⁶⁴ The Framework Agreement

156 CJEU 22 September 1998, C-185/97, (*Coote*), ECLI:EU:C:1998:424, see also Section 7.5.

157 CJEU 11 October 2007, C-460/06, (*Paquay*), ECLI:EU:C:2007:601. See on enforcement in relation to less favourable treatment related to pregnancy or maternity leave: CJEU 29 October 2009, C-63/08, (*Pontin*), ECLI:EU:C:2009:666.

158 See for example CJEU 21 October 1999, C-333/97, (*Lewen*), ECLI:EU:C:1999:512 and CJEU 20 June 2013, C-7/12, (*Riežniece*), ECLI:EU:C:2013:410.

159 See CJEU 16 July 2016, C-222/14, (*Maistrellis*), ECLI:EU:C:473.

160 CJEU 2 October 1997, C-1/95, (*Gerster*), ECLI:EU:C:1997:452 and CJEU 17 June 1998, C-243/95, (*Hill*), ECLI:EU:C:1998:298.

161 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996, L 145/4, (now repealed by Council Directive 2010/18).

162 Directives may in fact ‘hide’ framework agreements between the social partners adopted under Article 139(1) EC, now Article 155 TFEU. The latter may be ‘implemented’ by the Council in accordance with the procedure provided in Article 155(2) TFEU. Put in simple terms, in this way, the agreement is transformed into legislation.

163 CJEU 14 April 2005, C-519/03, (*Commission v Luxembourg*), ECLI:EU:C:2005:234.

164 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ 2010, L 68/13.

(annexed to the Directive) lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents (Clause 1(1)). Member States might indeed adopt more favourable measures. The Framework Agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State. The Agreement thus also applies to part-time workers, fixed-term contract workers and temporary agency workers (Clauses 1(1) and 1(2)). They are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child so as to take care of that child until a given age (up to eight years). The age should be defined by the Member States and/or the social partners. The parental leave shall be granted for at least a period of four months (this minimum was three months in Directive 96/34) and should, in principle, be provided on a non-transferable basis. To encourage both parents to take leave on a more equal basis, at least one of the four months has to be provided on a non-transferable basis (Clause 2). In practice, up until now parental leave is still much more often taken by mothers than fathers.¹⁶⁵ Member States are not obliged to introduce (partially) paid parental leave, which would provide an incentive for both parents to take such leave. Workers who take parental leave must be protected against less favourable treatment and dismissal (clause 5(4) and, at the end of the parental leave, they have the right to return to the same or equivalent job (clause 5(1)).¹⁶⁶ Workers are entitled to rights acquired (or in the process of being acquired) on the date on which parental leave starts. These rights have to be maintained as they stand until the end of parental leave.¹⁶⁷

According to Clause 6(1), parents returning from parental leave may request changes to their working hours and/or working patterns for a set period of time. The employer has to consider and respond to such requests, taking into account both the employer's and the worker's needs. Even if this is a rather weak provision, it might offer possibilities in practice to adjust working time and working hours while remaining employed (see also Article 21(2) of the Recast Directive 2006/54).

In the Greek *Zoi Chatzi* case, the Court considered that the principle of equal treatment had implications for the situation of parents of twins.¹⁶⁸ According to the Court 'observance 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.' The Court considered that parents of twins are in a special situation, but the Framework Agreement does not require 'the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born.' However, the national legislation should take due account of the particular needs of parents of twins. The general principle of equal treatment as enshrined in the Charter can thus play a role in work-life balance issues, not only at EU level, but also in national law.

5.3 The work-life balance proposal for a directive

As mentioned above, the European Commission has launched the so-called European Pillar of Social Rights in April 2017.¹⁶⁹ In the 20 key principles of this Pillar, principle 9 specifically addresses work-life balance. It reads:

'Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special

165 See Eurostat: <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>, accessed 28 September 2018.

166 See for example CJEU 7 September 2017, C-174/16, (*H.*), ECLI:EU:C:2017:637.

167 See for example CJEU 22 October 2009, C-116/08, (*Meerts*), ECLI:EU:C:2009:645 and CJEU 27 February 2014, C-588/12, (*Lyreco Belgium*), ECLI:EU:C:2014:99. See on social security entitlements Clause 5(5) of Directive 2010/18 and CJEU 16 July 2009, C-537/07, (*Gómez-Limón*), ECLI:EU:C:2009:462.

168 CJEU 16 September 2010, C-149/10, (*Zoi Chatzi*), ECLI:EU:C:2010:534, paragraphs 63 and 75.

169 See: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en, accessed 29 September 2018.

leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.'

In this framework, the European Commission published a proposal for a directive on work-life balance.¹⁷⁰ If the proposal were adopted, the Parental Leave Directive 2010/18/EU would be repealed. The aim of this proposal is to improve the existing rights and introduce new individual rights. The proposal addresses paternity, parental and carers' leave and flexible working arrangements for working parents and carers. The paternity leave could be taken by fathers on the occasion of the birth of the child for at least ten working days. Some improvements compared to the current provisions of the Parental Leave Directive 2010/18 would be introduced, for example on protection against dismissal and the burden of proof. The proposal includes also a new carers' leave of five working days per year in order to be able to care for seriously ill or dependant relatives. Noteworthy is that an adequate income in the form of a payment or an adequate allowance should be provided during these three leaves at least equivalent to what a worker concerned would receive in case of sick leave. In June 2018, an agreement was reached in the Council of the EU on this proposal: the level of payment of the paternity and the parental leaves would be defined at the level of the Member States, with regards to parental leave for a period of at least one-and-half month.¹⁷¹ Flexible working arrangements allowing adjustment of working patterns, remote working arrangements, flexible working schedules, or a reduction of working hours would be available for parents, until the child is at least twelve years old. The Council of the EU reduced this age to at least eight years old. The European Parliament still has to adopt its position at the time of writing (September 2018).¹⁷² If it were adopted, this proposal would extend the scope of work-life balance legislation. With regards to gender-based violence, EU law is also steadily developing.

170 Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253.

171 See <http://www.consilium.europa.eu/en/press/press-releases/2018/06/21/leave-and-flexible-work-for-parents-and-carers-council-agrees-general-approach-on-the-draft-directive-on-work-life-balance/>.

172 See [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0085\(COD\)&l=en#documentGateway](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2017/0085(COD)&l=en#documentGateway), accessed 29 September 2018.

6. Combating gender-based violence and protecting and supporting victims

Combating gender-based violence has for years been a matter of EU gender equality policy. One of the key actions of the Gender Equality Strategy of the European Commission is to combat gender-based violence and to protect and support victims.¹⁷³

6.1 Protecting and supporting victims

An important aspect of the EU policies aimed at combatting gender-based violence is the continuing enforcement of the Victims' Rights Directive 2012/29.¹⁷⁴ The main objective of this directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings (Article 1(1)). A few explicit references are made to gender-based violence in the directive, for example in relation to support of victims by offering public or private services among others to victims of gender-based violence (Article 9(3)(b)) and individual assessments of victims to identify specific protection needs (Article 22(3)). In Recital 17, 'gender-based violence' is described as follows:

'Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.'

The term 'domestic violence' is not used in the Victims' Rights Directive, but instead 'violence in close relationships' is explicitly addressed. Recital 18 specifies that:

'Where violence is committed in a close relationship, it is committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.'

With the accession of the EU to the Council of Europe (CoE) Convention on Preventing and Combating Violence against Women and Domestic Violence – the so-called Istanbul Convention¹⁷⁵ – a major step would be taken in addition to the protection and support provided by the EU Victims' Rights Directive 2012/29.

173 European Commission, *Strategic Engagement for Gender Equality 2016-2019*, DS-04-15-858-EN-C, p. 6, available at: https://ec.europa.eu/info/sites/info/files/strategic_engagement_en.pdf, accessed 28 September 2018.

174 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012, L 315/57.

175 Treaty No. 210, available at: <https://www.coe.int/en/web/istanbul-convention/home?desktop=true>, accessed 28 September 2018.

6.2 The Istanbul Convention

The Istanbul Convention offers a comprehensive framework and includes a broad range of legal and non-legal measures.¹⁷⁶ The Istanbul Convention has been signed by the EU on 13 June 2017.¹⁷⁷ The process of ratification is ongoing at the time of writing (September 2018). All the 28 EU Member States have also signed the Istanbul Convention, but not all have (yet) ratified it.¹⁷⁸

The Convention aims at preventing and combatting violence against women and domestic violence. The aims of the Convention are specified in Article 1:

- a. protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;
- b. contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;
- c. design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;
- d. promote international cooperation with a view to eliminating violence against women and domestic violence;
- e. provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.

According to Article 3(a) “violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

Different provisions illustrate that the Istanbul Convention significantly relies on CEDAW,¹⁷⁹ as reflected in its aim of ‘eliminating all forms of discrimination against women’; the definition of gender in its Article 3(c): “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men’ and the obligation for State Parties to ‘take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men’ (Article 12(1)). It has been suggested that the ‘Member State and international experience and practices deriving from the CEDAW could become more prominent in EU policies’.¹⁸⁰

The Istanbul Convention covers a broad area of both legal and non-legal measures aimed at preventing and combatting violence against women and domestic violence. Its objective to eliminate all forms of discrimination against women and promoting substantive equality between women and men, is closely related to the EU gender equality legislation. Ratification by the EU and all EU Member States of this Convention would amount to extending EU gender equality legislation beyond the areas of employment,

176 See European network of legal experts in gender equality and non-discrimination, K. Nousiainen & C. Chinkin, *Legal implications of the EU accession to the Istanbul Convention*, European Union 2016, available at: <https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention>, accessed 28 September 2018.

177 See the list of signatories and ratifications available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>, accessed 28 September 2018.

178 On 27 September 2018, the following Member States had not ratified the Convention: Bulgaria, Czech Republic, Hungary, Ireland, Latvia, Lithuania, Slovakia and the UK.

179 See Section 3.1.

180 European network of legal experts in gender equality and non-discrimination, K. Nousiainen & C. Chinkin, *Legal implications of the EU accession to the Istanbul Convention*, European Union 2016, p. 57, available at: <https://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention>, accessed 28 September 2018.

social security and services. The Convention offers many more possibilities to prevent and combat gender-based violence at national level than the provisions on the prohibition of (sexual) harassment in the existing EU gender directives. It would also contribute to more convergence between the EU and CoE policies and instruments in this area.

In the next Section, enforcement of the existing EU gender equality legislation is discussed. Many actors contribute to the enforcement of this legislation, in addition to individuals who seek justice: the EU legislator, the CJEU, the EU Commission, equality bodies, social partners and non-governmental organisations in particular. The EU gender equality directives discussed above all include provisions on enforcement issues, including the burden of proof and sanctions and the CJEU has played a crucial role by interpreting these provisions.

7. How can EU gender equality law be enforced?

7.1 Invoking gender equality law in national courts

As was already observed in previous sections, 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 157 TFEU 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, provisions of the Treaties (TEU and TFEU), the Charter 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 CJEU 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.¹⁸¹ 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.¹⁸²

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 CJEU (Article 267 TFEU).¹⁸³ In the field of equal treatment, the CJEU has since 1971 delivered hundreds of 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 CJEU decided that Article 157 TFEU (then Article 119 EEC) 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 CJEU has played a very important role in improving the possibilities of women and men to enforce their equality rights. This case law will be discussed below, together with the relevant provisions, in Sections 7.2 through 7.6.

7.2 Burden of proof

In the directives adopted since 2000, the case law of the CJEU has been codified in diverse provisions and the method of enforcing anti-discrimination law has been strengthened. Thus, rules on the reversal of the burden of proof in non-discrimination cases have been developed in the case law of the CJEU. The CJEU considered for example that in the case of indirect discrimination, it is the defendant who has to provide an objective justification (see also Section 3.3.). Similarly the CJEU 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.¹⁸⁴ With the Burden of Proof Directive 97/80, this case law was integrated in legislation as far as sex discrimination

181 The judgment of the CJEU in an equal treatment case has been ground-breaking in this respect. See CJEU 10 April 1984, case 14/83, (*Von Colson*), ECLI:EU:C:1984: paragraph 26.

182 See in particular CJEU 19 November 1991, Joined cases C-6/90 and C-9/90, (*Francovich & Bonifaci*), ECLI:EU:C:1991:428 and CJEU 5 March 1996, Joined cases C-46/93 and C-48/93, (*Brasserie du Pêcheur*), ECLI:EU:C:1996:79; CJEU 12 December 2006, C-446/04, (*Test Claimants in the FII Group Litigation*), ECLI:EU:C:2006:774 and CJEU 3 September 2014, C-318/13, (X), ECLI:EU:C:2014:2133, paragraphs 41-51.

183 See on the concept of 'national court' in this respect: CJEU 31 January 2013, C-394/11, (*Belov*), ECLI:EU:C:2013:48.

184 CJEU 17 October 1989, case 109/88, (*Danfoss*), ECLI:EU:C:1988:383.

was concerned in the field of pay and employment.¹⁸⁵ Now, all the gender equality and non-discrimination directives adopted since 2000 contain similar provisions.¹⁸⁶ In the following sections, only the relevant provisions of the Recast Directive 2006/54 are mentioned by way of example.

Article 19(1) of the Recast Directive on the burden of proof 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.'¹⁸⁷

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. In *Meister* the Court held that this provision does not entitle a worker who claims plausibly that he meets all the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer has engaged another applicant.¹⁸⁸ However, a refusal of disclosure by the employer, could risk compromising the achievement of the objective of equal treatment pursued by the directive. The national court has to assess whether this is the case.¹⁸⁹

Another ground-breaking case in which evidentiary rules were at stake was *Johnston*.¹⁹⁰ 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 76/207. The CJEU found that this rule was incompatible with the requirement of effective judicial control, stipulated in Article 6 of this directive. This article reflects, according to the CJEU, 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.

7.3 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 relationship in which the discrimination is alleged to have occurred has ended. 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 or 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 (Article 17 of the Recast Directive).

185 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998, L 14/6. This directive 97/80 has been repealed by the Recast Directive since 15 August 2009, see Section 4.2.1.

186 See further European network of legal experts in gender equality and non-discrimination, L. Farkas & O. O'Farrell, *Reversing the burden of proof. Practical dilemmas at the European and the national level*, available at: <https://www.equalitylaw.eu/downloads/1076-burden-of-proof-en>, accessed 28 September 2018.

187 These rules also apply to situations covered by Article 157 TFEU and insofar as discrimination based on sex is concerned, to the Pregnant Workers Directive and the Parental Leave Directive: Article 4(a) Directive 2006/54.

188 CJEU 19 April 2012, C-415/10, (*Meister*), ECLI:EU:C:2012:217.

189 See also CJEU 21 July 2011, C-104/10, (*Kelly*), ECLI:EU:C:2011:506.

190 CJEU 15 May 1986, case 222/84 (*Johnston*), ECLI:EU:C:1986:206.

The directives do not lay down any procedural rules for proceedings designed to ensure respect for the principles of equal pay and equal treatment for 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 CJEU 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).¹⁹¹ In any case, national courts must interpret national rules in order to provide sex equality claims with full and effective legal protection.¹⁹²

7.4 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 (Article 25 of the Recast Directive). The CJEU developed these requirements in the *Von Colson* case, which are now integrated in legislation.¹⁹³ 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 (Article 18 of the Recast Directive). According to the CJEU, 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.¹⁹⁴ The full loss and damage suffered has to be compensated.¹⁹⁵

7.5 Victimization

Protection against dismissal or adverse treatment in reaction to a complaint is provided for in most of the directives. 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.¹⁹⁶

7.6 Equality bodies

The directives on equal treatment between men and women adopted since 2000 oblige the Member States to designate equality bodies (Article 20 of the Recast Directive). The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment. They may form part of agencies

191 See for example CJEU 1 December 1998, C-326/96, (*Levez*), ECLI:EU:C:1998:577.

192 CJEU 15 May 1986, Case 222/84 (*Johnston*), ECLI:EU:C:1986:206.

193 CJEU 10 April 1984, Case 14/83, (*Von Colson*), ECLI:EU:C:1984:153, paragraph 28. See also CJEU 22 April 1997, C-180/95 (*Draehmpaehl*), ECLI:EU:C:1997:208.

194 CJEU 2 August 1993, Case 271/91, (*Marshall II*), ECLI:EU:C:1993:335.

195 CJEU 17 December 2015, C-407/14, (*Arjona Camacho*), ECLI:EU:C:2015:831.

196 CJEU 22 September 1998, C-185/97, (*Coote*), ECLI:EU:C:1998:424.

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.¹⁹⁷

7.7 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 (Articles 22-23 of the Recast Directive). 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 specifically 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.¹⁹⁸ 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.¹⁹⁹ We now turn to the role of the European Commission.

7.8 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 generally fulfil their obligations regarding the implementation of Treaty provisions and directives. More specific inquiries are also initiated by the Commission into the 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 258 TFEU 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 in question 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 CJEU. If the CJEU 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 CJEU in good time, it might even be subjected to penalties (see Article 260 TFEU).

197 See for more information the website European network of Equality bodies (Equinet): <http://www.equineteurope.org/>, accessed 29 September 2018.

198 See for example Article 21((3) and (4) of the Recast Directive.

199 See on social dialogue in the European Union: http://ec.europa.eu/employment_social/social_dialogue/index_en.htm, accessed 29 September 2018.

8. Final observations

The 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 CJEU 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 CJEU in Luxembourg. This has enabled this Court to deliver its judgments. As we have seen, the case law of the CJEU has, from time to time, been the driving force for EU gender equality standards, in particular in the area of introducing new concepts or other revolutionary novelties, especially in the enforcement of EU equality law. It has played a crucial role in providing rules and principles for the effective enforcement of gender equality standards in the Member States.

The progressive realisation 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 at combatting gender discrimination. It is, however, the mandatory character of EU law and the mechanism of judicial protection in the EU that have provided a crucial impetus to gender equality law in the Member States and the EEA countries. It is generally believed that Article 157 TFEU and the gender equality directives, as interpreted by the CJEU, have been vital to the effective application of gender equality in the Member States. It is often because of the compelling obligation of EU law that the national legislator has introduced a number of national measures aimed at the effective implementation of the principle of gender equality. Major steps have been taken, even if the enforcement of EU gender equality law often presents difficulties in practice. There is certainly room for further improvements as is illustrated by other publications by the European Commission's European network of legal experts in gender equality and non-discrimination on the implementation of EU gender equality law at national level.²⁰⁰

200 See the comparative analysis available at: <https://www.equalitylaw.eu/publications/comparative-analyses> and the country reports (<https://www.equalitylaw.eu/country>) produced by the European network of legal experts in gender equality and non-discrimination, accessed 29 September 2018.

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 1975, L 45/19 (repealed).

Council Directive 76/207/EEC of 9 February 1976 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 1976, L 39/40 (repealed).

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 1979, L 6/24.

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, OJ 1986, L 225/40 (repealed).

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 1986, L 359/56 (repealed).

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 1992, L 348/1.

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996, L 145/4 (repealed).

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 1997, L 46/20 (repealed).

Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998, L 14/6 (repealed).

Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998, L 14/9.

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 2002, L 269/15 (repealed).

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 2004, L 373/37.

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), OJ 2006, L 204/23.

Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ 2010, L 68/13.

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, OJ 2010, L 180/1.

Annex II – Selected bibliography

Notice:

This selected bibliography is limited to publications in English, French and German (most since 2000) on EU law and law of the EU Member States which have not yet been mentioned in footnotes in the text. The country reports of the European network of legal experts in gender equality and non-discrimination include in annex per country a larger bibliography for all the 35 countries participating in this network. All the publications of this network, including the *EU Gender Equality Law Review* and the *European Equality Law Review* are available on the website of this network at: <https://www.equalitylaw.eu/>.

Many publications of this network are also available at EU Bookshop:
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Useful databases and websites

Eur-lex (legislation, case law etc.): <https://eur-lex.europa.eu/>.

Legislative observatory of the European Parliament: <http://www.europarl.europa.eu/oeil/home/home.do>.

Court of Justice of the EU: <https://curia.europa.eu/jcms/jcms/index.html>.

See for EU publications <https://publications.europa.eu/en/home> and EU Bookshop: <https://publications.europa.eu/en/web/general-publications/publications>.

See for policies and documents published by the European Commission on gender equality: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en.

See for publications of Equinet, the European network of equality bodies: <http://www.equineteurope.org/>.

See on the European Institute for Gender Equality: <https://eige.europa.eu/>.

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