



# Editorial: Mainstreaming Equality in EU Law and Beyond

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## EDITORIAL



## ABSTRACT

This Special Issue addresses the topic of mainstreaming equality. Put simply, mainstreaming equality entails that all policy fields must take a core principle into account, namely equality. While there is extensive political science and governance literature on this topic, mostly from a gender perspective, there is much less EU *legal* literature studying the concept of mainstreaming. The contributions in this Special Issue have in common that they reflect on the challenges of mainstreaming equality in different areas of law. Several of the articles identify EU law as both part of the problem and of the solution, exploring the ambivalent role which law can play in both maintaining and reducing inequality. The articles identify obstacles as well as some recent opportunities to mainstream equality.

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## 1. INTRODUCTION

This Special Issue addresses the topic of mainstreaming equality. Put simply, mainstreaming equality entails that all policy fields must take a core principle into account, namely equality.<sup>1</sup> The concept and practice of mainstreaming is extensively studied in political science literature, mostly from a gender perspective.<sup>2</sup> The analysis has turned on policy instruments, institutions, and political actors. However, there is much less EU *legal* literature studying the concept of mainstreaming,<sup>3</sup> and hardly any literature beyond the fields of EU gender equality and non-discrimination law as such. The authors who participated in this project find the core idea that an equality perspective should be an integral part of all law- and policymaking compelling, and worth investigating further from various legal perspectives.

Section 2 of this editorial discusses the origins of the concept of mainstreaming and the ways in which it has further developed in EU law over the past three decades. Most of the progress has been made in relation to gender equality, although even here there is still a world to win. Mainstreaming equality is, however, greatly underdeveloped in other areas. Section 3 will touch upon the high aspirations that exist for the concept – both in scholarship and in official EU policy – and the difficulties of putting the concept into practice. Section 4 concludes the editorial by introducing the articles in this Special Issue, and briefly reflecting on some overarching themes.

## 2. THE ORIGINS OF THE CONCEPT OF MAINSTREAMING AND LEGAL BASIS IN EU LAW

The origins of the concept of equality mainstreaming are in the international women's rights movement, and the practice of mainstreaming has been transnational from the beginning.<sup>4</sup> The term appeared for the first time in international texts concerning the role of women in development following the United Nations Third World Conference on Women held in Nairobi in 1985. At the Fourth World Conference on Women, held in Beijing in 1995, international commitment to gender mainstreaming was formalized in the Beijing Declaration and Platform for Action. After some years of preparation,<sup>5</sup> and following the Beijing Conference, the European Commission adopted gender mainstreaming as official policy with the 1996 Communication on 'Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities'.<sup>6</sup>

There is no uniform definition of gender and/or equality mainstreaming in EU law or policy. The European Institute for Gender Equality (EIGE) refers to the definitions by the Council of Europe and the United Nations Economic and Social Council (ECOSOC).<sup>7</sup> The ECOSOC definition of 1997 is as follows:

The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and

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<sup>1</sup> Jo Shaw, 'Mainstreaming equality and diversity in European Union law and policy' (2005) 58 CLP 255, 259.

<sup>2</sup> E.g. Johanna Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) ch 6; Rosalind Cavaghan, *Making Gender Equality Happen: Knowledge, Change and Resistance in EU Gender Mainstreaming* (Routledge 2017).

<sup>3</sup> But see e.g. Shaw (n 1); Francesca Ippolito, 'Mainstreaming Equality in the EU Legal Order: More than a Cinderella Provision?' in Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019); Elise Muir, Victor Davio and Lucia van der Meulen, 'The horizontal equality clauses (Arts 8 & 10 TFEU) and their contribution to the course of EU equality law: still an empty vessel?' (2022) 7 European Papers 1381.

<sup>4</sup> Sylvia Walby, 'Introduction: Comparative gender mainstreaming in a global era' (2005) 7 International Feminist Journal of Politics 453; Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 Harvard Human Rights Journal 1.

<sup>5</sup> Anna van der Vleuten, *The Price of Gender Equality. Member States and Governance in the European Union* (Routledge 2007).

<sup>6</sup> European Commission Communication on Incorporating Equal Opportunities for Women and Men in all Community Policies and Activities, COM (96) 67 final.

<sup>7</sup> See <<https://eige.europa.eu/gender-mainstreaming/concepts-and-definitions>> under 'gender mainstreaming', accessed 29 September 2023.

programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.<sup>8</sup>

The 1998 Council of Europe definition in particular has been influential, prepared for the Council of Europe by a ‘Group of Specialists on Mainstreaming’, and it holds that:

Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.<sup>9</sup>

Verloo, who was the chair of the Group of Specialists, explains that this definition ‘positions gender mainstreaming as a process, a process of changing policy routines’.<sup>10</sup>

Around the same time, the concept was introduced in EU primary law with the 1997 Treaty of Amsterdam which provided, in Article 3(2) EC, that ‘In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women’. With the inclusion of this mainstreaming provision, the Treaty of Amsterdam constitutionalized a much more proactive approach to equality on the part of the Community.<sup>11</sup> EU equality law then officially became three-dimensional,<sup>12</sup> consisting of (1) anti-discrimination; (2) positive action (Article 141(4) EC),<sup>13</sup> and (3) gender mainstreaming. At the same time, the Treaty expanded the discrimination grounds on which the EU could take action from sex to also include racial or ethnic origin, religion or belief, disability, age and sexual orientation (Article 13 EC, now Article 19 TFEU).

The adoption of Article 3(2) EC has been described as a ‘watershed’ moment, as it entails a commitment to a (potentially) transformative strategy.<sup>14</sup> By committing to mainstreaming, the EU recognizes that legislation and litigation are not enough to tackle structural inequalities.<sup>15</sup> Ashiagbor has remarked that ‘[m]ainstreaming ... presupposes a “hybrid” approach to regulation, which combines “old governance” mechanisms such as directives with new governance methods, such as the adoption of ambitious employment targets for women or targets on the provision of childcare’.<sup>16</sup>

Currently the obligation to mainstream equality is laid down in Articles 8 and 10 TFEU, which form part of the ‘horizontal clauses’.<sup>17</sup> Article 8 TFEU covers gender mainstreaming and is largely similar to Article 3(2) EC already quoted above: ‘In all its activities, the Union shall

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<sup>8</sup> Economic and Social Council, ‘Report of the Economic and Social Council for the Year 1997’, UN GAOR, 52nd Session Supp. No. 3 (A/52/3/Rev. 1), 24.

<sup>9</sup> Council of Europe, ‘Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices, Final Report of Activities of the Group of Specialists on Mainstreaming’ (1998) EG-S-MS (98) 2 rev, 15. Following this report the Committee of Ministers adopted Recommendations: Committee of Ministers, Recommendations of the Committee of Ministers to Member States on Gender Mainstreaming (7 October 1998), Rec(98)14.

<sup>10</sup> Mieke Verloo, ‘Displacement and empowerment: Reflections on the concept and practice of the Council of Europe approach to gender mainstreaming and gender equality’ (2005) 12 Social Politics 344, 350.

<sup>11</sup> See e.g. Kantola (n 2); Susan Millns, ‘Gender Equality, Citizenship and the EU’s Constitutional Future’ (2007) 13 ELJ 218; Elise Muir, *EU Equality Law. The First Fundamental Rights Policy of the EU* (OUP 2018).

<sup>12</sup> Kantola (n 2) 13–14.

<sup>13</sup> Article 141(4) EC introduced a provision enabling positive action in the field of gender equality, building on earlier case law of the CJEU on this topic. Article 141(4) EC stated: ‘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’.

<sup>14</sup> Petra Debusscher and Anna van der Vleuten, ‘Equality Policies in the EU through a Feminist Historical Institutional Lens’ in Heather Macrae and Elaine Weiner (eds), *Towards Gendering Institutionalism: Equality in Europe* (Rowman & Littlefield 2017) 15.

<sup>15</sup> Diamond Ashiagbor, ‘Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance’ (2008) 61 CLP 265, 284.

<sup>16</sup> *ibid* 284.

<sup>17</sup> Muir, Davio and van der Meulen (n 3).

aim to eliminate inequalities, and to promote equality, between men and women'.<sup>18</sup> Article 10 was added with the Treaty of Lisbon, which entered into force in 2009, and includes a wider commitment to combating discrimination on six grounds, adding 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'. Admittedly these provisions establish obligations on the Union, not on the Member States.<sup>19</sup> Yet these provisions entail that combating discrimination is relevant to all areas of EU law, even in the areas where there are no specific equal treatment provisions – and even in the areas that one might not necessarily associate with equality, such as competition, agriculture, and commercial policy (Article 3(1) EC).

### 3. HIGH ASPIRATIONS BUT DIFFICULT TO PUT INTO PRACTICE

The ultimate goal of mainstreaming equality is of course to achieve equality, as per the ECOSOC definition quoted above. Equality is, however, a deeply contested concept, thereby making mainstreaming also necessarily a contested process.<sup>20</sup> Indeed, one of the criticisms that have been levelled at the EU's mainstreaming efforts is that it is not clear what kind of equality they seek to achieve.<sup>21</sup> In the 1990s Rees distinguished three main models of gender equality which mainstreaming aims for: equality as sameness; equality as difference; and equality as transformation.<sup>22</sup>

Officially, EU institutions seek to mainstream multiple dimensions of equality. The EU Gender Equality Strategy 2020–2025 (GES), for example, uses highly ambitious language when it comes to gender mainstreaming, stating that:

The core challenges affecting the EU today – including the green and digital transitions and demographic change – all have a gender dimension. The inclusion of a gender perspective in all EU policies and processes is essential to reach the goal of gender equality.

Gender mainstreaming ensures that policies and programmes maximise the potential of all – women and men, girls and boys, in all their diversity. The aim is to redistribute power, influence and resources in a fair and gender-equal way, tackling inequality, promoting fairness, and creating opportunity.

The Commission will integrate a gender perspective in all major Commission initiatives during the current mandate(...)<sup>23</sup>

Thus, the GES recognizes that core EU issues all have a gender dimension. The stated aim to redistribute power, influence and resources, while promoting fairness and creating opportunities, refers to multiple dimensions of equality.<sup>24</sup>

However, it has proved difficult to bring the transformative aspirations of equality and diversity mainstreaming into practice, as this Special Issue will also show.<sup>25</sup> Considerable confusion continues to exist as to what mainstreaming precisely means and who is

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<sup>18</sup> Along the same lines, the Gender Recast Directive formulates a gender mainstreaming duty for the Member States, by providing that they 'shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive' (Article 29). Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

<sup>19</sup> See e.g. Case C304/21, *VT Ministero dell'Interno* [2022] ECLI:EU:C:2022:897, para 34.

<sup>20</sup> Sylvia Walby, 'Gender Mainstreaming: Productive Tensions in Theory and Practice' (2005) 12 *Social Politics: International Studies in Gender, State and Society* 321. Walby has pointed out that the classical arguments within feminist theory about equality, difference, universalism, and particularism are all visible in an analysis of gender mainstreaming.

<sup>21</sup> Ashiagbor (n 15).

<sup>22</sup> Teresa Rees, *Mainstreaming Equality in the European Union* (Routledge 1998).

<sup>23</sup> European Commission, 'A Union of equality: gender equality strategy 2020–2025', COM(2020) 152 final, 5 March 2020.

<sup>24</sup> Sandra Fredman, *Discrimination Law* (3rd edn, OUP 2022) ch 1.

<sup>25</sup> E.g. Kantola (n 2); Cavaghan (n 2).

responsible for implementing it.<sup>26</sup> Concerning the EU institutions, scholars have found that implementation of gender mainstreaming is uneven across the various Directorates-General of the European Commission,<sup>27</sup> with the market-oriented Directorates-General less receptive than, for instance, the Directorate-General for International Partnerships (DG INTPA)<sup>28</sup> – which also raises the issue of (in)coherence between internal and external action. Moreover, mainstreaming beyond gender, taking a holistic and intersectional perspective, remains difficult.<sup>29</sup> Mainstreaming is at risk of becoming a box-ticking exercise rather than a substantive requirement.<sup>30</sup> What is more, equality mainstreaming tends to lose out against other priorities particular when these are constructed as ‘crises’, such as (restricting) migration and climate change.<sup>31</sup>

#### 4. THE ARTICLES IN THIS SPECIAL ISSUE AND CROSS-CUTTING THEMES

While the contributions in this Special Issue vary in form and focus, they have in common that they reflect on the challenges of mainstreaming equality in different areas of law. Several of the articles identify EU law as both part of the problem and of the solution, exploring the ambivalent role which law can play in both maintaining (or, in the case of migration, creating) and reducing inequality.

Frans Pennings and Sonja Bekker examine how equality can be streamlined in employment relationships, focusing on improving the position of self-employed persons. In their article entitled ‘The Increasing Room for Collective Bargaining on Behalf of Self-employed Persons’, they take Principle 5 of the European Pillar of Social Rights (EPSR) as the starting point.<sup>32</sup> Pennings and Bekker argue that this is a mainstreaming provision, streamlining as it does equality in employment regardless of the type of employment relationship. Asking how equality can be realized in practice, the article then investigates the potential of collective bargaining in realizing a better position for the self-employed. Pennings and Bekker identify EU competition law as an obstacle in this regard. Using an innovative socio-legal method, which included interviews, they are cautiously optimistic and consider that the possibilities of realizing decent working conditions for the self-employed have increased.

In ‘Fair Working Conditions for Workers Providing Informal Care for the Elderly in Poland and in the Netherlands’, Agnieszka Furmańska-Maruszak and Susanne Heeger also depart from the EPSR, in particular Principle 9 covering ‘fair working conditions in balancing work and life’. The authors zoom in on a particular group of workers which is numerically quite large,<sup>33</sup> but which has not received sustained attention in legal scholarship, namely people (more often women than men, mostly between the ages of 45–65) who combine paid employment with unpaid care for elderly people. They analyse to what extent EU law and policy facilitate fair working conditions for this group in Poland and the Netherlands. The main EU instruments in this regard

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<sup>26</sup> This has not changed much since earlier writings on mainstreaming, see e.g. Teresa Rees, ‘Reflections on the uneven development of gender mainstreaming in Europe’ (2005) 7 *International Feminist Journal of Politics* 555.

<sup>27</sup> E.g. Rees (n 26); Rachel Minto and Lut Mergaert, ‘Gender mainstreaming and evaluation in the EU: comparative perspectives from feminist institutionalism’ (2018) 20 *International Feminist Journal of Politics* 204.

<sup>28</sup> Debusscher and van der Vleuten (n 14) 15–16.

<sup>29</sup> Shaw (n 1); Ashiagbor (n 15); Rita Kaur Dharmoon, ‘Considerations on Mainstreaming Intersectionality’ (2011) 64 *Political Research Quarterly* 230.

<sup>30</sup> This risk is also explicitly acknowledged by EIGE, see <[https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/general-considerations?language\\_content\\_entity=en](https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/general-considerations?language_content_entity=en)> accessed 29 September 2023.

<sup>31</sup> Gill Allwood, ‘Gender Equality in EU Development Policy in Times of Crisis’ (2020) 18 *Political Studies Review* 329.

<sup>32</sup> Principle 5 states: ‘Regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions, access to social protection and training’. The Pillar, adopted in 2017, is a recommendation of the European Commission, the Council and Parliament, which mentions 20 principles, to be elaborated in various forms (recommendations, directives, action plans) at distinct levels (EU, Member States, social partners).

<sup>33</sup> Furmańska-Maruszak and Heeger report that 36.7% of the Dutch population provide care to people with long-term illness or to the elderly.

are the EPSR and the European Care Strategy<sup>34</sup> (both soft law instruments) and the Work-Life Balance Directive.<sup>35</sup>

In ‘Gender Quota for Corporate Directors: a Task for the Union? The revival of the Directive on Gender Balanced Company Boards’, Albertine Veldman shines her light on a very specific employment area where inequalities continue to exist, namely corporate boardrooms. After 10 years of negotiation, the EU recently adopted the Gender-Balanced Company Boards Directive.<sup>36</sup> Of the four articles in this Special Issue, this one is the closest to EU equality law in the narrow sense, as the Gender-Balanced Company Directive is based on Article 157(3) TFEU. Veldman welcomes the Directive because it may help to break the glass ceiling for women in the corporate world and thus further the mainstreaming of gender equality in employment by achieving a ‘critical mass’ of women in decision-making positions. She points out that ‘[u]nderlying the discussions about the need for European legislation on women on company boards are interesting questions relating to the concepts of equality and subsidiarity in the context of Union law’. Veldman argues that the Directive does fit the tasks and competences of the Union, implementing as it does equality between women and men – one of the Union’s core aims. She provides a detailed analysis of the EU legal framework on positive action in employment, most of which consists of Court of Justice of the European Union (CJEU) case law which is quite old, and comes to the conclusion that the new Directive does not really push the equality concept much further.

The final article in this Special Issue covers another area where inequalities are evidently pressing, namely migrants’ access to social benefits. In ‘Migrants’ Equal Access to Social Benefits under EU law: Fragmentation and Exclusion during the Covid-19 Crisis in Italy’, Virginia Passalacqua and Lorenzo Grossio are critical of the lack of clear and coherent criteria for third-country nationals’ equal treatment under EU law. EU law, they argue, creates ‘by-status fragmentation’, by dividing migrants into different categories according to their residence permits and granting highly unequal access to social benefits to these different categories of migrants. This may be exacerbated at the national level, as is the case in Italy the authors argue, creating ‘multilayered fragmentation’. Thus, there appears to be a great need to mainstream equality in the area of migration, but here too the potential of EU law is limited, as both the EU legislature and the CJEU have consistently held that EU non-discrimination law – which prohibits discrimination based on race and ethnic origins – does not apply to discrimination based on nationality.

Taken together, the articles in this Special Issue point to some positive developments. The adoption of the Gender-Balanced Company Board Directive signals a willingness of the EU legislature to take positive action to improve the position of women in employment. Similarly, the adoption of the Work-Life Balance Directive has potential to improve the working conditions of people who combine paid employment with unpaid care for the elderly. Pennings and Bekker show that collective bargaining is a way forward to realizing decent working conditions for the self-employed. The articles in this Special Issue also point to various obstacles to mainstream equality, however. The problem of legal fragmentation is explained in depth by Passalacqua and Grossio. What is more, their contribution illustrates that where EU law itself creates inequalities, the mainstreaming provisions will have limited effect.

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## COMPETING INTERESTS

The author has no competing interests to declare.

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<sup>34</sup> Communication from the Commission on the European care strategy COM/2022/440 final.

<sup>35</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79.

<sup>36</sup> The final text was adopted in November 2022: Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures [2022] OJ L315/44.

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