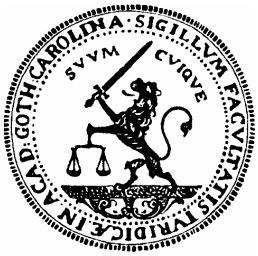

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By

Kolbrún Sævarsdóttir

Equal Treatment of Men and Women in the European Community

Supervisor

Ineta Ziemele

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Contents

1 INTRODUCTION

This thesis will focus on interesting aspect of European Community[1] law, that of gender equality. The principle of equal treatment of men and women was first established in Article 119 (now Article 141) of the European Community Treaty of 1957[2] which introduced the principle of equal pay between the sexes. The principle has been developing gradually over the years through legislation, judicial action and Treaty amendment. It is an area of law which illustrates clearly the competing priorities of the economic and the social objectives of the European Community.[3]

An important factor when examining this subject is to take into account the "the supranational" character of the European Union[4] as international organization. EC law claims absolute priority over any conflicting national law of the Member States and can on occasion be invoked by individuals in actions before their national courts.[5] It is therefore obvious that EC law, compared to the majority of other international treaties, can be significant from the viewpoint of individuals claiming equal treatment.

However, EC gender equality law are limited in scope, mainly because all the legislation is in some way related, either directly or indirectly, to the world of work. Another limitation is the restrictive interpretation which seems to have been given to equality, both in legislation and case law. It is also well known that the principle of equal treatment has not been fully implemented in the Community. The labour market continues to be sex segregated, with the women's work undervalued and less paid, than that of men. Women are not equally represented in the professions and are far more likely to be unemployed than men.

Community law in the area of gender equality can be said to be divided principally into three parts: equal pay, equal treatment and social security. Although the basic principle of equality between women and men is common to all three, each is governed by different legal provision. In brief, *equal pay* is governed by Article 141 and Directive 75/117, *equal treatment* by Article 141 and Directives 76/207, 86/613 and 96/34, and *social security* by Directives 79/7, 86/378 and 96/97. This thesis will focus on equal pay and treatment, but not on social security. The thesis is divided into 10 chapters, including this introduction chapter.

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[1] Hereinafter "the EC" or "the Community".
[2] Henceforth all "Treaty" references in the present work will be to the European Community Treaty.
[3] Craig and de Burca, *EU Law*, p. 842.
[4] Hereinafter "the EU". (The Treaty on the European Union was signed in Maastrict 1992. Since then the term "European Community" is limited to the previous European Economic Community and its treaty).
[5] The doctrines of "supremacy" and "direct effect" of EC law.

In chapter 2 the main international instrument concerning gender equality rights which the EC Member States are all signatories to will be briefly examined.

In chapter 3 the status of human rights in the EU will be discussed. As we will see none of the EC Treaties contains a bill or list of enumerated rights. The observance and protection of human rights and fundamental freedoms in the Community are matters which fall primarily within the jurisdiction of the Member States. However, the Treaty of Amsterdam signed in 1997, marked a significant step towards intergrating human rights into the legal order of the EU. Futhermore, the Charter of Fundamental Rights signed in December 2000 although not legally binding, sets out in a single text, for the first time in EU history, the whole range of civil, political, economic and social rights of the European citizens and all persons resident in the EU.

In chapter 4 the general principle of equality in EC law will be discussed, as well as the difference between the concepts equality and non-discrimination. There are a number of Treaty provison in which the principle of equal treatment or non-discrimination is expressly mentioned. The principle of equality has, however, not been recognised as a free-standing, directly effective basis for legal action by individual against Member States and private parties in the national courts.

The development of EC gender equality law will be discussed in chapter 5. As will be demonstrated the gender equality principle remained for a long time fairly limited in scope. However, recent years have brought an apparently more determined institutional commitment to mainstreaming gender equality across the EU policies and activates. This commitment was enshrined at Amsterdam in Article 3 of the EC Treaty which declares that in all the activities listed "the Community shall aim to eliminate inequalities and promote equality, between men and women". This means that no legislative or administrative decision should be taken without detailed analysis of the likely impact of that decision on the female population.[6] But the mainstreaming method is a political commitment, not a legal right which individuals can enforce.

In chapter 6 the equal pay principle will be examined. As stated above the principle of equal treatment on grounds of sex was first established in Article 119 (now Article 141) of the Treaty which introduced the principle of equal pay between the sexes. Article 141 is important in the respect that it is is the only provision of EC sex equality law that impose postive obligation to employers through the doctrine of (horizontally) "direct effect".

In chapter 7 the principle of equal treatment will be examined. The equal pay principle in the Treaty was complemented by the Equal Treatment Directive which introduces the principle of equal treatment as regards

[6] Ellis, *EC Sex Equality Law*, p. 329.

access to employment, vocational training, promotion and working conditions. As will be demonstrated, the Directive permits exceptions to the equal-treatment principle. There are exceptions where sex is a determining factor of a particular job and where there are special provision protecting women during pregnancy and maternity or measures taken to secure positive action. It can be stated that this is the most controversial field of EC equality law. The Court has been heavily criticised for being to formal and failing to take into account the structurally different social situation between women and men in the labour market. It is therefore important to examine, in some details, the case law in this field.

In chapter 8 the concept of indrect discrimination will be discussed. It was initially introduced by the European Court of Justice[7] through its interpretation of the equal treatment principle. There was no statutory underpinning until 1997, when a definition of indirect sex discrimination was included in the Burden of Proof Directive 97/80/EC. When the Equal Treatment Directive 76/207/EEC[8] was amendend in 2002 definitions of the concept was inserted in the Directive. As used in EC law this concept has at least potentially, significantly broaden the scope of the traditional, strictly formal concept of non-discrimination. However, there are limitations because the discrimination can be objectively justified and the case law shows that the test of objective justification is sometimes relatively easy to pass.

In chapter 9 the enforcement of EC gender equality law will be examined. Rights laid down in domestic law or international treaties are not of great value if individuals do not have an effective remedy against measures which they consider to interfere with their rights. It is therefore necessary to examine how enforcement of gender equality is guaranteed in EC law.

In chapter 10 some conclusion form the study will be drawn.

[7] Hereinafter "the ECJ" or "the Court".
[8] 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. Hereinafter "the Equal Treatment Directive".

2 MAIN INTERNATIONAL INSTRUMENST CONCERNING EQUAL RIGHTS

2.1. INTRODUCTION

The principle of the equal enjoyment of human rights irrespective of sex was introduced by the adoption of the United Nations Charter in 1945.[9] It is also included in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations 1948.[10] It is now included it most international conventions adopted by the United Nations, its specialized agencies and regional organizations. The basic rationale of rules concerning equal rights and prohibition of discrimination is that the human rights enshrined into the conventions should be guaranteed to everyone irrespective of grounds such as race, colour, sex language and religion, unless a reasonable and objective justification for not doing so can be demonstrated.[11] All Member States of the European Union are signatories to the following Conventions.

2.2. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR) AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (CCPR)[12]

Under Article 2 of the Conventions States undertake to ensure all individuals within their territory the rights recognized in the Conventions"without distinction of any kind". Under Article 3, States futher undertake to "ensure the equal rights of men and women" to enjoyment of all rights set forth in the Conventions. But the non-discrimination guarantee under the CCPR goes further since, in addition to the prohibition of the discrimination in regard to the rights provided for in the Conventions, the CCPR includes an autonomous right of all persons not to be subjected to discrimination, but Article 26 states that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection to the law. In these respect, the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[9] Articles 1(3), 13(1) (b), 55(c), 62(2) and 76 (c).
[10] Aricles 1, 2 and 7.
[11] Frostell and Scheinin, *Economic, Social and Cultural Rights*, p. 333.
[12] Opened for signature, ratification and accession by the General Assembly of the United Nations 1966. Entered into force 1976.

Article 26 prohibits discrimination in law or in fact any field regulated and protected by public authorities.[13] The non-discrimination principle is not limited to the rights set forth in the Convention, but can also be applied to economic, social and cultural rights. This interpretation was introduced in connection with the two landmark cases of *Zwaan-de Vries and Broeks*.[14]

2.3. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)[15]

A wide principle of non-discrimination is introduced in Article 1 of the CEDAW which stipulates that "discrimination against women" should be understood as: "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural civil or any other field."

The States parties to the CEDAW are obliged not only to prohibit discriminatory behaviour, but to also take appropriate measures to ensure the full development and advancement of women in their enjoyment of human rights (Articles 2 and 3). In addition, Article 4 provides that so-called temporary special measures aimed at accelerating *de facto* equality should not be considered discrimination.

2.4. EUROPEAN SOCIAL CHARTER (ESC)[16]

Article E of the revised Charter[17] provides that the enjoyment of the rights set forth in the Charter shall be secured without discrimination on "any ground". In the present context Article 8 and 20 of the Charter are of particular importance. Article 8 secures the rights of employed women to protection of maternity. Article 20 states that the Parties undertake to recognise the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex and to take appropriate measures to ensure or promote the right application in matters of employment and occupation.

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[13] General Comments of the Human Rights Committee No. 18 (1989) on non-discrimination, para. 12. UN doc. A/45/40, p. 173-175.
[14] Communication No. 182/1984, *Zwaan-de Vries v. the Neterlands* and No. 172/1984, *Broeks v. the Neterlands*, *Yearbook of the Human Rights Committee* 1987, Vol. II, pp. 300-304 and 293-297.
[15] Adopted by the General Assembly of the United Nations 1979. Entered into force 1981.
[16] Adopted by the Council of Europe 1961. Entered into force 1965.
Additional Protocol of 1988.
[17] The revised Charter emodies in one instrument all rights guranteed by Charter of 1961, its additional Protocol of 1988 and adds new rights.

2.5. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)[18]

Article 14 of the ECHR states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 prohibits discrimination only in combination with other substantive rights protected by the Convention and its Protocols. There is no independent self-standing guarantee of equality in contrast to the independent guarantee of equality in Article 26 of the CCPR. But even though, the European Court of Human Rights has found other ways to address gender discrimination in connection with various social rights. In the case of *Willis*[19] the Court found, that the United Kingdom authorities' refusal to pay a man the social security benefits to which he would have been entitled had he been a woman in a similar position (Widowed Mother's Allowance and Widow's Payment) constituted discrimination against him on grounds of sex contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. [20]

This provision has now been significantly enlarged by the adoption, in 2000, of Protocol No 12 to the ECHR, which establishes a non-discrimination clause of a general nature, but Article 1 of the Protocol statest that:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The Protocol will enter into force when 10 states have ratified it. As of 1 of May 2003, the Protocol has been signed by 31 of the 45 Member States and 4 States have ratified it.[21] It seems that the States that have not signed Protocol 12 are concerned that the open textured language of the Protocol may have unforeseen consequences in practice.[22]

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[18] Adopted by the Council of Europe 1950. Entered into force 1953.

[19] *Willis v. United Kingdom*, judgement of 11 June 2002.

[20] It should be noted that the principle of equal treatment in the Social Security Directive 79/7/EEC does not apply to the provisions in statutory social security schemes concerning survivors' benefits. Therefore, in this case, Mr. Willis was better protected under the ECHR than under EC law.

[21] www.conventions.coe.int/Treaty/EN/searchsig.asp (last visited 02/05/03)

[22] Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, p. 1.

3 THE EU AND HUMAN RIGHTS

In the Treaties establishing the European Communities human rights, in their broadest sense, are hardly mentioned. None of the Treaties contains a bill or list of enumerated rights. The observance and protection of human rights and fundamental freedoms in the Community are matters which fall primarily within the jurisdiction of the Member States; the individual is protected, on the one hand, by national constitutional provision and, on the other; the supervision which the bodies of the ECHR exercise over domestic legal systems. The Community institutions are not subject to the direct supervision of the Strasbourg Court. However the ECJ has gradually produced a body of case-law on the role of human rights in the EU. The Court decided back in 1974 that fundamental right form part of the general principles of Community law that it is required to uphold, and that in safeguarding such rights it should be guided by the constitutional traditions of the Member States.[23]

The 1957 EEC Treaty was restricted essentially to the aim of economic integration, and no mention of political union or human rights was included. Craig and de Burca[24] point out that it is conceivable that the drafters assumed that a functionally limited economic organisation would be unlikely to encroach on traditionally protected fundamental rights, and that powerful economic actors rather than individual citizens would be the most directly affected. However, the Community before long established itself as powerful entity whose actions had considerable impact on many broader political and social issues, and it is express policy competence were extended into areas such as the environment, consumer protection, culture, health, and education. Further, Community action through the doctrine of direct effect often had an direct legal impact on private economic and commercial interests. These interests began to claim legal protection for fundamental property and commercial rights which were given specific protection within certain Member State constitutions. Thus the first steps taken by the ECJ in the field of fundamental rights protection concerned economic rights such as the right to property and the freedom to pursue trade or profession.

A considerable step in integrating human rights into the policy of the Community was taken with the entry into force of the Treaty on the European Union (the Maastricht Treaty) was signed in 1992. In particular, Article 6 declares that respect for fundamental rights and freedoms constitutes on of the basic principle on which the Union is founded.

The *Treaty of Amsterdam*, signed in 1997, marks another significant step forward in integrating human rights into the legal order of the EU. The

[23] Case 4/1973, *Nold* v. Commission [1974] ECR 491.
[24] Craig and de Burca, *EU Law*, p. 318-319.

Amsterdam Treaty inserts a new Article 6 in the Treaty on the European Union, which reaffirms that the EU "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedom, and the rule of law, principles that are common to the Member States". Article 13 of the Treaty of Amsterdam provides that the Community legislature may take "appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

To strengthen the protection of fundamental rights in the EU the Council asked the ECJ in to draw up a report on whether the Community had the power to accede to the ECHR. In 1996 the Court held in its opinion[25] on "Accession by the Community to the ECHR" that such step could not be taken in the absence of a specific treaty amendment to that effect.

The Charter of Fundamental Rights of European Union[26] was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice in December 2000. The proclamation of the Charter was a first result of the decision taken at the Cologne European Council held in December 1999 in which heads of State or Government agreed on the need to establish a Charter of fundamental rights of the EU in order to make their overriding importance and relevance more visible to the Union's citizens.[27] The draft of the Charter was drawn up by an ad hoc body, which came to be known as the Convention and consisted of 62 members.[28]

The Charter is not legally binding. For the citizens of the EU the Charter is a reference documents making them aware of their rights and the values which the EU is built.[29] The Charter sets out in a single text, for the first time in the EU history, the whole range of civil, political, economic and social rights of the European citizens and all persons resident in the EU. These rights are divided into six sections:

Dignity (Articles 1-5)
Freedoms (Articles 6-19)
Equality (Articles 20-26)
Solidarity (Articles 27-38)
Citizens rights (Articles 39-46)
Justice (Articles 47-50)

The rights are based, in particular, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU member States, the Council of Europe's

[25] Opinion 2/94 [1996] ECR I-1759.
[26] OJ C 364, 18.12.2000.
[27] EU annual report on Human Rights 2001, p. 10.
[28] 15 representavies of the Heads of Government of the Member States, 16 representative of the European Commission, 16 members of the European Parliament and 30 members of national parliments.
[29] EU annual report on Human Rights 2001, p. 12.

Social Charter, the Community Charter of Fundamental Social Rights of Workers and the other international conventions to which the European Unions or its Member States are parties.

The following Articles of the Charter concerning equality are of particular importance in the present context:

Article 20: Equality before the law.
Everyone is equal before the law.

Article 21: Non-discrimination.

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on the European Union, and without prejudice to the special provision of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 23:
Equality between men and women must be ensured in all areas, including employment, work and pay.
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

The Charter was significant development for the EU in an number of ways. Primarily In the first place (despite of criticism of its content) the document was largely well received and welcomed as a step forward the legitimacy and human rights commitment of the EU. Secondly, the process by which it was adopted also attracted positive comments as a considerable improvement on the typically secretive and in transparent process by which the treaties and other agreements have traditionally been negotiated and drawn up at EU level. [30]

The question of the legal scope of the Charter will be examined subsequently, in accordance with the conclusion of the Cologne European Council. The declaration on the future of the Union annexed to the Treaty of Nice lists the status of the Charter amongst those points which are to be the subject of wide-ranging public debate in preparations for the Intergovernmental Conference planned for 2004.[31]

[30] Craig and de Burca, *EU Law*, p. 44.
[31] EU annual report on Human Rights 2001, p. 12.

4 THE GENERAL PRINCIPLE OF EQUALITY IN EC LAW

4.1. EQUALITY AND NON-DISCRIMINATION

A basic distinction is drawn between formal and substantive equality. The first refers to enforcement and requires equality before the law. Public authorities must apply the law consistently and treat equally citizens who are in the same position. The second refers to the content of laws. It requires that law must not discriminate between citizens on arbitrary grounds.[32] EC law protects not only formal but also substantive equality. However, there are different views of how substantive the equality is. In the area of sex equality, Fredman[33] maintains that the EC model of "equal opportunities" lies somewhere between those two concepts. This is based on the idea that true equality cannot be achieved if individuals begin the race from different starting points. The aim is therefore to equalise the starting point. The outlines of an equal opportunities model are clearly visible in the Equal Treatment Directive. According to Article 2(4), the Directive "shall be without prejudice to measures to promote *equal opportunity* for men and women, in practicular by removing existing inequalities which affect womens's opportunities."

A distinction is can be drawn between non-discrimination and equality. It is said that the former requires absention from discriminatory treatment whereas the second signifies more the notion of postive obligations. According to Tridimas[34] such a distinction is not drawn in the Community judicature which seems to use the terms equality and non-discrimination as interchangable.

The equality clauses in EC sex equality law are defined in the terms of non-discrimination, with an exhaustive list of prohibited grounds. This can be seen in Article 141of the Treaty which provides for "[e]qual pay without discrimination based on sex".[35] In similar ways Article 2(1) of the Equal Treament Directive states that the principle of equal treatment means "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in practicular to marital or family status." Because these concept in essence connote the same idea they will are used as interchangable in this thesis.

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[32] Tridimas, *The General Principles of EC Law*, p. 40.
[33] Fredman, *Women and the Law*, p. 384.
[34] Tridimas, *The General Principles of EC Law*, p. 42.
[35] Article 1 of the Equal Pay Directive 75/117/EEC explains that the principle of equal pay outlined in Article 119 (now Article 141) means "the elimination of all discrimination on grounds of sex.".

4.2. GENERAL PRINCIPLES

General principles of law are an important part of the "common law" of the Communities. That is to say they constitute an unwritten source of law which is, where relvant, applied by the ECJ.[36] There are a number of Treaty provison in which the principle of equal treatment or non-discrimination is expressly mentioned. The main examples are the key provison in Article 12 non-discrimination on grounds of nationality, Article 32(2), non-discrimination as between producers and between consumers in the common market agricultural policy, Article 86(1) equal treatment between public and private undertakings and Article 141 equal pay for equal work of men and women. Althoug certain provisions of the Treaty provide for the principle of equal treatment with regard to special matter, the Court has held that the principle of equality is a general principle of law "to be observed by any court."[37] As a general principle, it precludes comparable situation form being treated differently unless the difference in treatment is objectively justified and it also precludes different situation form being treated in the same way unless such treatment is objectively justified.[38]

In its Opinion on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedom, the Court pointed out that it has relied on the general principle of Community law in practicular in its protection of fundamental rights:

> Fundamental rights form an integral part of the general principle of law whose observance the Court ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and form the guidelines supplied by international treaties for the protection of human rights which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the [European] Convention [on the Protection of Human Rights and Fundamental Freedoms] has special significance (see, in particular, the judgement in Case C-260/89 *ART* [1991] ECR I-2925, paragraph 41).[39]

As regards international treaties it is according to Ellis[40]evident that the most prominent sources of general principles are the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and the Community Charter on the Fundamental Rights of Workers of 1989.[41]

4.3. THE GENERAL PRINCIPLE OF GENDER EQUALITY

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[36] Ellis, *EC Sex Equality Law*, p. 168.
[37] Case 8/78 *Milac* [1978] ECR 1721, para. 8.
[38] Tridimas, *The General Principles of EC Law*, p. 40-41.
[39] Opinion 2/94 [1996] ECR I-1759, at. 1789.
[40] Ellis, *EC Sex Equality Law*, p. 170.
[41] Ibid. at p. 171.

The ECJ regards the principle of equality between men and women as on of the general principle of EU law, indeed as a fundamental human rights. Thus, in *Defrenne III*[42] it stated:

> The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure. There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.

This approach has morover been lent aa greater strength recently by the Amsterdam Treaty which has emphasised the importance of the principle of equality between men and women in a number of its provisons.

The principle of equality between men and women has not been recognized as a free-standing, directly effective basis for legal action by individual against Member States and private parties in the national court.[43] For the principle to apply there must be some other Community law "for the principle to bite on". [44] For example at the time of *Defrenne III*[45] in 1978, the principle was not directly applicable against Member States so as to prohibit laws permiting unequal treatment of men and women, since the Community had not yet assumed competence in the area of equal treatment at work and could only, at that stage, prohibit the States from maintaining unequal pay between the sexes. This situation was reversed with the coming into force of the Equal Treatment Directive.

The ECJ has relied on the principle of equality between men and women both to quash discriminatroy administrative decision (the act of *Community* institutions, mainly staff cases) and to justify a broad interpretation for various pieces of EC legislation.[46]

In the case of *Razzouk and Beydoyn v. Commission*[47] the widower of a decesed Commission employee was refused a survivior's pension by the Commission in circumstances in which, under the Staff Regulation, a surviving widow would have recived shuch a pension. He argued that this treatment amounted either to the breach of a principle analogus to Article 119 which applied to Community employees, or else to the breach of a general rule of EC law that employees should be treated equally in like or comparable situations. The Advocate General commented that there was a clearly discrimination between Community employees, and consequently between their spouses, on the ground of sex, since both male and female officials made the same pension contribution during their employment but stood to receive different benefits in the event of predeceasing their spouses. This discrimination could not be shown to be justified on any objective

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[42] Case 149/1977, *Defrenne v. Sabena*, [1978] ECR 1365.
[43] Barnard, *Gender Equality in the EU*, p. 232.
[44] Ellis, *EC Sex Equality Law*, p. 188.
[45] Case 149/77, *Defrenne v. Sabena* [1978] ECR 1365.
[46] Ellis, *EC Sex Equality Law*, p. 181 and Barnard, *Gender Equality in the EU*, p. 232.
[47] Case 75 and 117/83 [1984] ECR 1509.

ground and he would have annulled it both on the ground that it offended against the general principle of non-discrimination and the narrower principle akin to Articel 119. The Court agreed that the decision of the Commission should be annulled but based it descision wholly on the general principle of non-discrimination, saying that the Staff Regulations were "[C]ontrary to a fundamental right and therefore inapplicable in so far as they treated the surviving spouse of officials unequally according to the sex of the person concerned.

In the case of *P. v S and Cornwall County Council*[48] the ECJ was asked whether the Equal Treatment Directive prohibited discrimination against transsexuals. The applicant, who was born with the physical attributes of a male, was dismissed after a series of operations intended to change his gender. Although the Directive seems to be confined to cases of discrimination between men and women, the Court ruled that it prohibited the dismissal of a transsexual for a reason related to a gender reassignment. The Court emphasised that the right not to be discriminated against on the ground of one's sex was one of the fundamental rights it has a duty to uphold. The Directive could not therefore be confined "simply to discriminations based on the fact that the person is of one or other sex". Discrimination arising from a gender reassignment was to be regarded as based essentially on the sex of the persons concerned. "To tolerate such discriminations would be tantamount, as regards such a persons, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard".

According to Barnard[49] this case is an example that shows that the Court has not been slow to draw on the rhetoric of equality as a fundamental right to give a broad interpreation to the principle of non-discrimination, but such ideas did not permeate *Grant*[50], where the Court was not prepared to use the fundamental rights argument to extend the protection of the principle of non-discrimination to gays and lesbians. The *Grant* case concerned a claim by a female employee with a female partner for rail benefits to which married couples were entitled. The Court rejected this, stating that the reference to "sex discrimination" was not a reference to gender orientation. It pointed out that "the travel concession are refused to a male worker if he is living with a person of the same sex".[51] The Court concluded that "in the present state of the law within the Community, stable relationship between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with the partner of the same sex as equivalent to that of persons who is marriage to or has a stable

[48] Case C-13/94, *P. v S and Cornwall County Council,* 1996 ECR I-2143.
[49] Barnard, *Gender Equality in the EU*, p. 232-233.
[50] C-249/96, *Grant v. South-West Trains* [1998] ECR I-621.
[51] Para. 27.

relationship outside marriage with the person of the opposite sex".[52] In making reference to Article 13 of the Amsterdam Treaty concerning sexual orientation, which gives the Community the competence to take appropriate action to address discrimination on number of grounds but was not yet in force at that the time, the ECJ argued that it was not for it to extend Community law beyond the scope provided for in the Treaty. [53]

This judicial restraint was reinforced in the case of *D. v. Council*[54], which also concerned unequal benefits for an EU employee whose relationship with the same-sex partner had been granted formal status as a registered partnership under Swedish law. Craig and de Búrca maintains that the ECJ seems to be more comfortable in promoting a stronger notion of equality as a fundamental right in more conventionally accepted spheres of anti-discrimination such as gender equality.[55]

Fredman[56] has stated that by contrast the European Court of Human Right has held that sexual orientation is included in the prohibition against discrimination on grounds of sex, as set out in Article 14 of the ECHR.[57] In this context Fredman refers to the 1999 case of *Salgueiro da Silva*[58] and states that the Court in that case held that the refusal to grant custody of a child to her gay father on grounds only of his sexual orientation amounted to a denial of his right to family life which was discriminatory on grounds of sex contrary to Article 14 of the ECHR. One could argue that this is an overstatement by Fredman because in the judgement the Court points out that the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as".[59] The Court did not directly held that sexual orientation was included in the prohibition on *sex* discrimination. Because Article 14 of the ECHR is open for discrimination on other grounds than expressly mentioned in the Article, the European Court of Human Right is in a better position than the ECJ to conclude that sexual orientation

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[52] Para. 35. As wee can see everything here depends on who is chosen as the *comparator*. If a gay woman is compared with a heterosexual men, there may well be a discrimination. But if a gay women is compared with a gay men, the opposite conclusion can be reached. In this case the Court held that the relevant comparator was not heterosexual, but a homosexual men.

[53] Para. 47-48. Discrimination on the grounds of sexual orientation is now covered by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The Directive was adopted on the basis of Article 13 of the Amsterdam Treaty.

[54] C-122 and 125/99P *D. v. Council* [2001] ECR I-4319.

[55] Craig and de Búrca , *EU Law*, p. 355-356.

[56] Fredman, *Discrimination Law*, p. 73.

[57] Ibid.

[58] *Salgueiro da Silva Mouta v. Portugal* (ECHR December 21, 1999)

[59] Para. 28 (2) : "The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72)."

is a concept which is covered by Article 14 of the Convention. The ECJ on the other hand would have to extend the scope of Article 141 of the Treaty and the Directives where the protection of sex equality is expressed with an exhaustive list of prohibited grounds. It has been argued that the ECJ may have been concerned about the potential number of people affected by the judgements and the cost of extending equality to homosexuals in the terms of pension and health insurance.[60]

Ellis[61] maintains that the potency of the principle of sex equality would be vastly increased if the Treaty were to be amended so as to contain a provison which articulate it in directly effective terms. The opportunity for such a reform was not used when the Amsterdam Treaty was agreed. Were such a directly effective article to be included in some future version of the Treaty, the doctrine of supremacy would enable individual litigants not only to use it to asert a positive rights to sex equality throughout the entire field of application of the Treaty but also to impung national law which sought to deny equality. This would amount to a fundamental constitutional protection for this basic human rights.

[60] Barnard, *The Principle of Equality in the Community Context*, p. 357.
[61] Ellis, *EC Sex Equality Law*, p. 190.

5 THE DEVELOPEMENT OF EC GENDER EQUALITY LAW

Article 141 (ex Article 119) of the amendend Treaty establishes the principle that men and women should receive equal pay for equal work and for work of equal value. Article 119 on equal pay for equal work was introduced into the Treaty of Rome (1957) largely to serve an economic purpose. France insisted on the inclusion of the provision in the Treaty since it feared that its worker protections legislation, including its laws on equal pay, would put it at a competivive disadvantage in the common market, due to the additional costs borne by French industry.[62] Given the emphasis when the Treaty of Rome was drafted on the creation of the European *Economic* Community, it comes as a little suprise that there was no reference to the social and moral justification for sex equality. Yet, within twenty years the Community had adopted directives on equality, and the Court had started to recognize that the principle of equality was a fundamental one in Community law which served a social as well as an economic funtion. This was first identified in the landmark judgement in *Defrenne II*[63]where the Court observed:

> Article 119 pursues a double aim. *First*,....the aim of Article 119 is to avoid a situation in which undertakings established in states which have actually imlemented the principle of equal pay suffer a competive disadvantage in intar Community competion as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay. *Second*, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action to ensure social progress and seek the constant improvement of living and working condition of their peoples...This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.

In the years since the Treaty was drafted , social policy has come to play an increasing prominent role in practice. It has provided a useful mechanism by which to emphasize the human face of the Community, against a background of criticism that it was exclusive economic, capitalist, and uncaring. Social policy legislation has also been made more necessary because of economic recession and mass unemployment [64] The Social Action Program following the Paris Communiqué in 1972, aspired among other things, to create a "situation in which equality between man and women obtains in the labour market throughout the Community, through the improvement of economic and psychological conditions, and of the social

[62] Barnard, *EC Employment Law*, p. 198.
[63] Case 43/1975 *Defrenne v. Sabena* [1976] ECR 455.
[64] Ellis, *EC Sex Equality Law*, p. 60-61.

and educational infrastructure".[65] Three important Directives were passed as a result:

> Directive 75/117/EEC on equal pay for male and female workers, enshrining the principle of "equal pay for equal work" laid down in Article 119 and introducing the concept of "equal pay for work of equal value.
> Directive 76/207/EEC on equal treatment with regard to access to employment, vocational training, promotion, and working conditions, aimed at elimination of all discrimination, both direct and indirect, in the world of work and providing an opportunity for positive measures. The Directive was amended by Directive 2002/73/EC.
> Directive 79/7/EEC on the progressive implementation of equal treatment with regard to statutory securtity schems.

In the 1980s two specific Directives were adopted on equality:

> Directive 86/378/EEC on implementation of equal treatment in occupational schemes of social security. The Directive was amended by Directive 96/97/EC.
> Directive 86/613/EEC on equal treatment for men and women carrying out a self-employed activity, including agriculture.

The Social Action Programme[66] implementing the Community Social Charter 1989 led to the enactment, on the basis of Article 118a EC (new Article 137), of a Directive on pregnancy:

> Directive 92/85/EC improving the health and safety of workers who are pregnant or have recently given birth.

The Social Policy Agreement (SPA) annexed to the Treaty on European Union (the Maastricht Treaty), led to the enactment of two further measures:

> Directive 96/34/EC on reconciling family and working life (parental leave). This was the first Directive adopted under the new procedure provided for by the SPA, allowing the Social Partners to negotiate a framework agreement which was then extended to all workers by a Directive.
> Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. Under the terms of this Directive, the onus is on the defendants accused of discrimination at work to prove that the principle of equal treatment has not been violated.

[65] Council Resolution of 21. Jan. 1974 concerning a Social Action Programm [1974] OJ L14/10.
[66] COM (89) 568.

There has additional been a considerable amount of political statements in the area of equal treatment, with the adoption of memorandums, resolutions, and recommendations on a range of equal opportunities issues. For example on sexual harassment,[67] child care,[68]the balanced participation of women and men in decision-making[69] and mainstreaming equal opportunities for men and women in the European Structural Funds.[70]

The *Treaty of Amsterdam* of 1997 explicitly introduced equality between men and women as one of the tasks (Article 2) and activities (Article 3) of the Community. In addition, it introduced a new Article 13 allowing the Council, acting unanimously on a proposal from the Commission, to take action to combat any form of discrimination, including that based on sex. Elsewhere, Article 119 (new Article 141) on equal pay was amended significantly. The new Article 141 (3) has finally provided an express legal basis for the Council to adopt measures, in accordance with the Article 251 co-decision procedure, "to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value." Before more general enabling provisions had to be utilized for the enactment of secondary legislation in this area. Finally the new Article 141(4) allows Member States to adopt or maintain positive-action measures for the under-represented sex of professional careers.

As discussed in previous chapter, although not legally binding, the *Charter of Fundamental Rights of the European Union* also contains a number of provision relating to gender equality.

Institutional support for the realization of equality has also been provided in the EC. There are special committees concerning women's issues in the European Parliament and within the European Commission. The Equal Opportunities Working Party of Members of the Commission examines and monitors the integration of the gender dimension in to all relevant policies and programs. At its own instigation the Commission adopted, on 21 February 1996, a communication on incorporating equal opportunities for women and men into all Community policies and activities.[71] Futhermore, the Commission has made efforts to promote specific measures aimed at improving the situation of women in practice, practiculary with regard to employment, through *multi-annual action programmes* designed and implemented in partnership with the Member States. Five action programs has been mounted covering the periods 1982-5, 1986-90, 1991-5, 1996-

[67] Commission recommendation 92/131 and Code [1992] OJ L49/1, and the Commission communications on the consultations of management and labour on the prevention of sexual harassment at work, COM (96) 373 and SEC (97) 568.
[68] Council Recommendation 92/241 [1992] OJ L123/16
[69] Council Recommendation 96/694 [1996] OJ L319.
[70] Council Recommendation [1996] OJ C386
[71] COM (96) 67 and the Commission's Progress Report COM (98) 122. The *gender mainstreaming* approach integrates the gender equality objective into the policies that have direct or indirect impact on the live of women and men.

2000 and 2001-5. According to the latest action program[72] future work towards gender equality will take the form of a comprehensive strategy, which will embrace all Community policies in its efforts to promote gender equality, either by adjusting its policies (pro-active intervention: gender mainstreaming) and/or by implementing concrete actions designed to improve the situation of women in society (reactive intervention: specific actions). The new approach will raise the profile of the wide range of existing Community activities for the promotion of gender equality, ensure their global consistency by identifying overlaps thus optimizing their efficiency and rendering them visible inside and outside the Commission. A framework global strategy will also ensure that results can be monitored and disseminated better. Finally since 1996 the Commission has adopted *annual reports* on equal opportunities for women and men in the European Union. The reports reviews progress with regard to equality at Member State and Union level and represents an instrument for monitoring equal opportunities policies.

[72] COM (2000) 335 final.

6 EQUAL PAY

6.1. INTRODUCTION

Article 141 (1) and (2) (formerly 119) provides:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or *work of equal value* [73]is applied.
2. For the purpose of this Article "pay" means the ordinary basic or minimum wage or salary or 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 rates shall be calculated on the basis of the same unit of measurement;
   (b) that pay for work at time rate shall be the same for the same job.

The significance of Article 119 first became apparent in the case of *Defrenne II*[74] Defrenne was an air hostess employed by Sabena Airlines. Although she did identical work to a male cabin steward she was paid less than her male counterpart. She claimed that she was discriminated against contrary to Article 119. The Court recognizing that the principle of equal pay forms part of the "foundations of the Community" decided, despite strong objections by the Member States, that Article 119 was "directly applicable" both horizontally and vertically and "may thus give rises to individual rights which the courts may protect".[75]

The Equal Pay Directive was passed in 1975, in an effort to harmonize the laws of the Member States in relation to equal pay. As the events turned out, the need for the Directive was greatly reduced very shortly after its enactment, when the Court ruled in the abovementioned case *Defrenne II* that Article 119 itself was directly effective.[76]

6.2. THE DEFINITION OF PAY

Article 141(1) defines "pay" broadly. It refers to the "ordinary basic minimum wage or salary" , which includes pay received as piece rates[77] or time rates, "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". The Court has said that pay can be "immediate or future" provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. Thus in *Garland*[78] the Court found that concessionary travel facilities granted voluntarily to ex-employees fell

[73] Added by the Treaty of Amsterdam.
[74] Case 43/75 *Defrenne v. Sabena* [1976] ECR 455.
[75] Barnard, *EC Employment Law*, p. 227.
[76] Ellis, *EC Sex Equal Law*, p. 147.
[77] Case C-400/93 *Dansk Industri* [1995] ECR I-1275.
[78] Case C-12/81 *Garland v. Brithis Railways Board* [1982] ECR 359.

within the scope of Article 119. The legal nature of the facilities is not important. They can be granted under a contract of employment, a collective agreement, as a result of legislative provision, with the exception of social security to which Directive 79/7 applies, or made *ex gratia* by the employer provided that they are granted in respect of employment. Therefore, the Court has ruled that sick pay, redundancy payment, unfair dismissal compensation, occupational pension, survivor's benefits, bridging pensions, maternity benefits, special bonus payments, concessionary train fares and severance grant payable on the termination of an employment relationship all constitute pay within the meaning of Article 141. [79]

The Courts wide definition of the term "pay" has caused some confusion in regards to the apparent overlap between pay and social security. In this context it is important to keep in mind that social security is not covered by Article 141, but primarily Directive 79/7. It is clearly in the employee's interest that benefits are classified as pay rather than social security, given that Article 141, unlike Directive 79/7, is directly effective both against the state and against private employers.[80]

6.3. THE MEANING OF EQUAL WORK

Article 141 expressly mandates equal pay where women and men perform "equal work". The clearest and most obvious case where equal work is performed, is of course where, as in *Defrenne II*,[81] a man and woman perform identical jobs for the same employer in a single establishment.[82] It is also clear that "equal work" embraces at least the concept of equal pay for the same or similar work even if the applicant's work and her comparator is not performed contemporaneously.[83] Thus, in *McCarthy's*[84] the plaintiff successfully brought an action based on Article 119 against her employers claiming that she had been discriminated against on the grounds of her sex. She worked as a warehouse manager, earning £ 50 a week. Her predecessor, a man, had earned £ 60 a week. According to the Court, an assessment of whether the work was equal was "entirely qualitative in character in that is exclusively concerned with the nature of the service in question". It did not matter that the man and woman did not work at the same time, since the Court said that the scope of Article 119 "may not be restricted by the introduction of a requirement of contemporaneity".

On the other hand, the Court ruled in *Wiener Gebietskrankekasse*[85]that the term "the same work" does not apply "where the same activities are performed over a considerable length of time by persons the basis of whose

[79] Barnard, *EC Employment Law*, p. 228-229.
[80] See on this Craig and de Búrca, *EU Law*, p. 865-884, where they discuss the Court's case law in this area in details.
[81] Case 43/75 *Defrenne v. Sabena* [1976] ECR 455.
[82] Ellis, *EC Sex Equal Law*, p. 102.
[83] Barnard, *EC Employment Law*, p. 230.
[84] Case 129/79 [1980] ECR 1275.
[85] Case C-309/97, judgement of 11 May 1999.

qualification to exercise their profession are different". Therefore, graduate psychologists, most of whom were women, could not claim equal pay with medical doctors who were paid 50 percent more, even though both groups worked as psychotherapists and the patient were charged the same irrespective of whether they were treated by a psychologist or a doctor.[86]

The Court has not yet decided on the question of how equal in value the men's and women's work must be to receive equal pay. Since the Court has insisted that "equal work must be remunerated with equal pay"[87] this suggests that only work of exactly equal value should receive equal pay. But it is clear that Article 141(1) covers the situation where a woman is doing work of greater value than a man, is being paid less than the man, and wishes to be paid the same as the man.[88] This was the situation in *Murphy*[89]where the Court said that since the principle of equal pay forbids women engaged in work of equal value to men from being paid less than men on the ground of sex, *a fortiori* it prohibits a difference in pay where the woman in engaged in work of higher value. To adopt a contrary interpretation would be "tantamount to rendering the principle of equal pay ineffective and nugatory" since an employer could circumvent the principle by assigning additional duties to women who could then be paid a lower wage.

It remains the case, however that claimant whose work is assessed as having marginally less value than that of the better-paid comparators falls outside the scope of the Community rules, even though the difference in pay is out of proportion to the difference in the value of their respective jobs. This weakness has been said to illustrate the limitations of the concept of equality, and its reliance on the so-called male norm, in redressing the chronically depressed level of womens'pay.[90] Equality, argues MacKinnon, conceals "the substantive way in which man has become the measure of all things."[91] In the area of equal pay, job segregation means that low paid woman will frequently be unable to find a male comparator doing equivalent work in her establishment. For example a cleaner or a secretary is likely to find her self in an all-female workforce or in an establishment where the only men are in managerial positions and therefore not useful comparators.[92]

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[86] Barnard, *EC Employment Law*, p. 230.
[87] Case 237/85 *Rummler* [1986] ECR 2101.
[88] Barnard, *EC Employment Law*, p. 232.
[89] Case 157/86 *Murphy v. Bord Telecomm Eirann* [1989] ECR 4311.
[90] Arnull, *The European Union and its Court of Justice*, p. 466.
[91] MacKinnon, *Feminist Unmodified* (1987) p. 34, as quoted in Fredman, *Discrimination Law*, p. 9.
[92] Fredman, *Discrimination Law*, p. 9-10.

6.4. THE REALITY

Although the principle of equal pay has be enshrined in the Treaty since 1957, women still earn, on average, less than men. Eurostat has conducted some research into the gross hourly earnings of females as a percentage of average gross hourly earnings of male. The results is that in the year of 1999 women in the 15 Member States earned 84 per cent of male's earnings. [93] The pay gap is due to variety of factors. First, women are segregated in both terms of occupation and establishment. Women working in predominantly female occupations attract consistently lower rates of pay than men. This is particularly the case where women work part-time. The second explanation for the difference in pay is that even where men and women are doing the same kind of work in the same organizations women tend to attract lower pay because they are concentrated in lower paying specialisms, they occupy lower status jobs, and the method of remuneration impacts differently on men and women (by, for example rewarding seniority or flexibility). Furthermore, women's skills are often undervalued.[94]

[93] www.euruope.eu.int/comm/eurostat/public/datashop (last visited 17.04.2003).
[94] Barnard, *EC Employment Law*, p. 237.

7 EQUAL TREATMENT

7.1. THE EQUAL TREATMENT DIRECTIVE

The Equal Pay Directive 75/117/EEC, relating to the application of the principle of equal pay for men and women, was first in a series of directives on equal treatment for men and women. The equal pay principle was complemented by the Equal Treatment Directive 76/207/EEC which introduces the principle of equal treatment in regards to access to employment, vocational training, promotion and working conditions.

The principle of equal treatment is defined in Article 2 (1) of the Directive which state that:

> For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

The Equal Treatment Directive is distinctive, however, in that, unlike the equal-pay provision, it permits exceptions to the equal-treatment principle. There are exceptions where sex is a determining factor of a particular job (Article 2 (2)) and where there are special provision protecting women during pregnancy and maternity (Article 2 (3)) or measures taken to secure positive action (Article 2 (4)).

According to Articles 3, 4 and 4 of the Directive the application of the principle of equal treatment means that there shall be no discrimination in the conditions, including selection criteria, for access to all jobs or posts at all levels of the hierarchy. The principle shall apply to access to all types and all levels of vocational guidance, basic and advanced vocational training and retraining. Application of the principle to working conditions, including conditions governing dismissal, means that men and women shall be guaranteed the same conditions. Articles 6 and 7 impose an obligation upon the Member States to ensure that employees have access to the judicial process to assert their rights under the Directive. Article 8 imposes an obligation upon the Member States to ensure that employees are aware of their rights under the Directive. Social security matters were left out of the scope of the Directive.

The Equal Treatment Directive has now been *amended* by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.[95] According to the Commission[96] the aim was to update the 25-year old provisions contained in the Directive, taking into account of the case

[95] OJ L 269/15, 5.10.2002.
[96] COM (2000) 334.

law of the ECJ and two directives on non-discrimination, which were adopted in 2000.[97]. The amended Equal Treatment Directive *inter alia*:

- requires Member States to provide for equal treatment when formulating and implementing laws and policies in order to ensure that gender mainstreaming is applied at all levels of policy making ,
- defines sexual harassment as a discrimination based on sex at the work place
- includes a definition of a indirect discrimination,
- clarifies the scope for derogations by obliging Member States to justify bans on employing women for specific jobs,
- provides for the adoption of measures to promote equality between men and women.

The Member States shall implement Directive 2002/76/EC by 5 October 2005 at the latest.

7.2. EXCEPTIONS FROM THE EQUAL TREATMENT PRINCIPLE

Article 2 of the Equal Treatment Directive contains three exceptions from the principle of equal treatment but it follows from the system of the Directive that the provisions in the Article are formulated as exceptions or derogations from the general principle of equality.[98] There are exceptions where sex is a determining factor of a particular job and where there are special provision protecting women during pregnancy and maternity or measures taken to secure positive action. These Articles provides for exceptions from the equal treatment principle in the case of direct discrimination, based on the sex of the worker. Although the Member States retain a reasonable margin of discretion as to the detailed arrangements for the implementation of this exception, the list of exceptions is exhaustive, as the ECJ made clear in *Johnston.*[99]

As stated in the introduction chapter this is the most controversial field of EC equality law and it is therefore important to examine, in some details, the case law in this field. The case law concern the principle of equal treatment, although it is sorted under different exceptions in this chapter. This is done because the defendants, when they are accused of violating the principle, try to justify their measures in question by referring to different exceptions in their defence.

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[97] Directive 2000/143/EC on the principle of equal treatment irrespective of racial or ethnic origin and Directive 2000/78/EC on the establishing a general framework for equal treatment in employment and occupation.

[98] ”Exception” is also the concept used by authors, see e.g. Ellis, *EC Sex Equality Law*, p. 232 and Barnard, *EC Employment Law*, p. 239, other authors use the concept ”Derogation”, see e.g. Wyatt and Dashwood, *European Union Law*, p. 766 and Steiner and Wood, *Textbook on EC Law*, p. 416. Both concepts are used by the Court, see e.g. Case C-450/93, *Kalanke v. Freie und Hansestad Bremen* [1995] ECR I-3051, para. 21-22.

[99] Case 222/84, J*ohnston v. Chief Constable of the Royal Ulster Constabulary*.

7.2.1. SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR

Article 2(2) of the Directive provides:

> 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 context in which they are carried out, the sex of the worker constitutes a determining factor.

Article 2 (2) does not oblige Member States to exclude certain occupational activities form the scope of the directive, nor does it require Member States to exercise the power of derogation in a particular manner.[100] Certain clearly defined occupations such a singing, acting, dancing and artistic or fashion modelling fall within this heading.[101]

Article 2(2) was considered by the ECJ in *Commission v. UK*[102] where the Court found that it was lawful to limit access by man to the post of midwife in view of the "personal sensitivities" which may play "an important role in relations between midwife and patient". This conclusion is rather conservative in the view of that men have for long time worked as gynaecologists, but it should be mentioned that this UK policy has now been amended so as to remove the restrictions on male midwifes.

Article 2 (2) was also raised as a defence in the case of *Johnston*[103], which concerned the legality of the Chef Constable's refusal to renew a female officer's contract as a member of the Royal Ulster Constabulary full-time reserve or to permit her to be trained in the use of firearms. The ECJ accepted unquestioningly that the justification for this policy was that:

> [i]n a situation characterised by serious internal disturbance the carrying of fire-arms by police women might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.[104]

The Court did, however, insist that Member States had a duty to assess their activities periodically in order to decide whether, in light of social developments, the derogation from the general scheme of the Directive should be maintained. In addition, the Court recognised that it was for the national court to ensure that the principle of proportionality would be maintained.

The *Sidar*[105] case concerned the exclusion of female chef from the Royal Marines (British Army), because of her sex. Having ruled that Community

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[100] Case 248/83, *Commission v. Germany,* [1985] ECHR 1459.
[101] Barnard, *EC Employment Law,* p. 240.
[102] Case 165/82, [1983] ECR I 3125
[103] Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.
[104] Para. 36.
[105] Case C-273/97, *Sidar v. Secretary of State for Defence* [1999] ECR I-7403.

law in principle applies to the case, since there was no general exception from Community law covering all measures taken for reason of public security, the Court considered the application of the Article 2 (2) derogation to see whether the measures have "the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim." The Court said that it was clear from the documents and the findings of the national court that the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the "point of the arrow head". They are a small force and are intended to be the first in line of attack. It has been established that, within these corps, chefs are indeed also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment. In such circumstances, the competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and without abusing the principle of proportionality, to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male. The main conclusion of the Court was therefore that :

> [t]he exclusion of women from service in special combat units such as the Royal Marines *may be justified* under Article 2(2) of the Directive by reason of the nature of the activities in question and the context in which they are carried out. [106]

Barnard[107] maintains that "in the light of *Johnston* the outcome of this case is unsurprising. It does, however reveal how easy it is for a Member State (condoned by the Court) to use the derogations as a shield for gender stereotyping and untested assumptions about male soldier's attitudes to women." However, the limited nature of exclusion of women in *Sidar* was emphasised in the Court in *Kreil*[108]. It reiterated the point already made in *Johnston* and *Sidar* that the principle of proportionality had to be observed in determining the scope of any derogation.

The *Kreil* case concerned the exclusion of women from nearly all military jobs of the German army, but the exclusion was based upon Article 12 of the German constitution. The Court noted that in view of its scope, such an exclusion, which applies to almost all military posts cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. However, the derogations provided for in Article 2(2) of the Directive can apply only to specific activities. Having regard to the very nature of armed forces, the fact that persons serving in those forces may be called on to use arms cannot in itself justify the exclusion of women from access to military posts. The Court concluded that.

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[106] Para. 32. Emphasis supplied.
[107] Barnard, *EC Employment Law*, p. 242.
[108] Case C-285/98, *Tanja Kreil v. Bundesreplublik Deutschland*, 2002 , I-66.

In those circumstances, even taking account of the discretion which they have as regards the possibility of maintaining the exclusion in question, the national authorities could not, without contravening the *principle of proportionality*, adopt the general position that the composition of all armed units in the Bundeswehr had to remain exclusively male.[109]

The Equal Treatment Directive therfore precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.

The main conclusion which can be drawn from the jurisprudence of the Court is that the "certain degree of discretion" enjoyed by Member States to exclude some occupational activities from the scope of the Directive is subject to strict scrutiny. First, the exclusion can only concern specific posts. Secondly, Member States are under the obligation to reassess periodically the legitimacy of the exclusion. In accordance with the case law, where a difference of treatment, which relates to a genuine occupational qualification exists, it is not to be considered as discrimination. The term "genuine occupational qualification" should be construed narrowly to cover only those occupational requirements where a particular sex is necessary for the performance of the activities concerned. Thus, these cases of difference of treatment on grounds of sex should be exceptional.[110]

Directive 2002/76/EC replace Article 2 (2) of the Equal Treatment Directive by the following:

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 the objective is legitimate and the requirement is proportionate.

7.2.2. PREGNANCY AND MATERNITY

Article 2 (3) of the Equal Treatment Directive provides:

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

While Article 2(3) can be used to justify special *protection* of women where their conditions requires it, the derogation cannot be used to justify a total of women from an occupation, such as the police force, because the public opinion demands that women be given greater protection than men against risks which affect men and women in the same way[111] Similarly, as the

[109] Para. 27-29. Emphasis supplied.
[110] COM (2000) 334 , final.Para. 24-29.
[111] Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651and C-285/98, *Kreil*, [2000] ECR I-69.

Court held in *Stockel,*[112] women cannot be excluded from night work where the risk relation to night work are common to men and women. [113]

The ECJ has dealt with legal issues concerning pregnancy or maternity in a number of cases. The facts in *Hoffmann*[114] were that Mr. Hoffmann obtained unpaid leave from his employer in order for care for his new-born child. The period of time he requested was that between the expiry of the statutory eight-week following childbirth available to mother, during which German legislation provided that women may not work, and the date the child reached six months of age. The law provided that mothers were entitled to maternity leave from the end of the mandatory eight-week "protective period" until the child was six months old. Since the mother in this case had not taken maternity leave after the eight-month period, and Hoffmann had cared for the child from that time on, he challenged the refusal to grant him payment during the period of maternity leave provided by law for women only. The Court held that special provision for maternity leave was permissible under Article 2 (3), which was concerned to protect both the biological conditions of women during and after pregnancy and the relationship between mother and a child during the period following pregnancy and birth. Thus the Court ruled that the Directive did not require Member States to grant leave to fathers, even where parents had decided differently. It was "not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents."[115]

This judgement has been heavily criticised. Critics have pointed out that this case shows clearly that the Community action to promote sex equality has been predominantly concerned with the position of women and men in the employment market. But even though, the Court was in this case not concerned with the very factors which may inhibit women from exercising their rights to equality in that market.[116] The Court decision is in fact based on outdated notions of parental role-playing within families.[117] In choosing a broad interpretation of the exception in Article 2 (3), the Court was supporting the continuation of the role of the mother as a primacy carer, and

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[112] Case 345/89, *Criminal proceedings against Alfred Stoeckel,* [1991] ECR-I 4047.
[113] Barnard, *EC Employment Law*, p. 243.
[114] Case 184/83 *Hofmann v. Barner Ersatzkasse,* [1984] ECR 3047.
[115] Para. 24.
[116] McGlynn, *EC Sex Equality Law: Towards Human Right Fondation*, p. 241-243. See also the article *Ideologies of Motherhood in European Community Sex Equality Law* by the same author. There she argues that in a series of cases the ECJ has reproduced, and therby legitimated, a traditional vision of motherhood and the role of women in the familiy, and in society generally. This vision, characterised as the "dominat ideology of motherhood", limits the potential of the Community's sex equality legislation to bring about real improvements in the lives of women. Accordingly, far from alleviating discrimination aginst women, the Court's jurisprundence is renforcing traditional assuptions which inhibit womens progress. She argues tha the Court should reject the dominat ideology of motherhood and utilise its interpretative space to pursue a more progressive and liberating rendering of women and men's relationships and obligations to each other and their childre.
[117] Ellis, *EC Sex Equality Law*, p. 242.

which, by protecting "the special relationship between the woman and the child", deprives the father of the opportunity to choose of who shall take the leave. The Court and the Advocate General appear to assume that, even after the eight-week period, a mother was in an objectively different position from a father, in bearing other burdens and responsibilities, yet if the extended period of leave were open to either father or mother, if the parents so wished, could take on the multiple burdens of household and caring duties.[118]

However, there have been some step taken in the Community legislature to grant rights to mother and fathers. The Parental Leave Directive[119] grants three months of unpaid leave to mothers and fathers on the birth or adoption of a child. McGlynn[120] maintains that this Directive is of symbolic importance in that it aims to encourage greater participation by men in child caring. However, it will achieve little while leave remains unpaid and while the Court's interpretation of Community sex law in general, and the possible interpretation of the Directive in due course, remains premised on the dominant ideology of motherhood. In addition, it is only in Ireland, Luxembourg and the UK that the directive will have any impact as in all other Member States there is already greater provision for parental leave.

Although the exceptions in the Directive *permit* Member States to maintain protective provisions which favour women in relation to pregnancy and maternity, it was not clear for some years whether it also *prohibited* measures which discriminated against women on grounds of pregnancy.[121] In *Dekker*[122] the employer decided not to appoint the applicant who was pregnant, even though she was considered the best person for the job, on the ground that the employer's insurers refused to cover the cost for her maternity leave. Despite the fact that all other candidates for the job were women (and therefore no male comparator) , the Court ruled that as employment can be refused because of pregnancy only to a woman, refusal to appoint a woman on the ground of her pregnancy constitutes direct discrimination on the ground of sex, contrary to Articles 2(1) and 3(1) of the Directive.

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[118] Craig and de Burca, *EU Law*, p. 900. See in this context also the case Case 163/82 *Commission v. Italy*, *Commission v. Italy* [1983] ECR 3273, concerning national laws given compulsory maternity leave to the mother of an adopted child under 6 years of age, but not the father. It is a an even clearer example of the reinforcement, through the interpretation of Article 2(3), of the view that only mothers does or should develop a special relationship with a child after birth. The ECJ accepted Italy's "legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family during the very delicate initial period."

[119] Council Directive 96/34.

[120] McGlynn, *Ideologies of Motherhood in European Community Sex Equality Law*, p. 44.

[121] Craig and de Búrca, *EU Law*, p. 902.

[122] Case 177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941.

In this context attention should be brought to *Council Directive 92/85/EEC* (The Pregnancy Directive) 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. This directive is intended in particular, to protect these workers against the risk of dismissal for reasons associated with their condition, which could have harmful effects on their physical and mental state. The Directive includes the right to maternity leave of least 14 weeks and time off for antenatal examinations. Women on maternity leave are guaranteed their contractual employment rights, apart for those relating to pay and they are also entitled to a payment of allowance which is at least equivalent to statutory sick pay in the Member States concerned. The original draft of the Directive would have provided for full pay to be maintained during the 14 week's leave but an agreement to that was not reached. Therefore in practice the utility of the Directive is undermined.

Directive 76/2002/EC replace Article 2 (3) of the Equal Treatment Directive by the following:

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

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.

This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC and of 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). It is also without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

7.2.3. POSITIVE ACTION

Article 2(4) of Directive 76/207/EEC provides that
This Directive shall be without prejudice to promote equal opportunity for men and women, in particular by removing existing inequalities, which affect women's opportunities in areas referred to in Article 1 (1).

Article 141 (4) as amended by the Amsterdam Treaty provides:
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 States from maintaining or adopting measures providing for specific advantages in order or make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

In contrast to Article 2(4) of the Equal Treatment Directive, this provision does not refer explicitly to *women*, but to the underrepresented sex in a gender neautral way. However, it is clear that women are an underrepresented sex in employment throughout the Community.

As the Commission stated in its proposal for the amendment of the Directive the possibility for Member States to maintain or adopt positive action measures is now enshrined in Article 141(4) of the Amsterdam Treaty. This Treaty provision makes the existing Article 2(4) of the Directive redundant.[123] Article 2 (4) was therefore deleted when Directive 2002/76/EC was adopted and replaced by the following:

On the basis of the information provided by Member States pursuant to Article 9, the Commission will adopt and publish every three years a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141(4) of the Treaty.

Positive action, also known as positive discrimination, reverse discrimination, affirmative action, preferential treatment or temporary special measures, refers to measures that specifically favour a particular category of people in order to make up for their consistent under-representation in society. Examples of positive action include specific training for women to help them to move forward in their career, measures relating to flexible working hours, child care facilities and measures to re-integrate women after a career break. It can also include setting a specific number or quota of women to specific jobs or posts.

According to Ellis[124] quotas are clearly most at odds with the notion of equality of opportunity as between individuals and they overtly sacrifice the principle of individual merit to that of the grater good. It is arguable that they constitute an effective tool for putting into place and accustoming the public to non-traditional role models and for ensuring that representatives of a disadvantaged group achieve strategically important positions. Conversely however, quotas are objectionable on number of grounds, most importantly

[123] COM (2000) 334.
[124] Ellis, *EC Sex Equality Law*, p. 251.

that they constitute too crude form of compensation to be just since it is by no means necessarily the victim of discrimination who derive any direct benefit from them; in addition, they can be viewed as patronising and they tend to result in the undervaluing of the qualities of those who do benefit directly, since observers conclude that they have not achieved their position on the basis of their individual qualities.

On the *international level* the ICCPR Committee has held that governments have an obligation to undertake affirmative action designed to ensure equal enjoyment of rights, that is, laws, policies, measures or actions needed to redress *de facto* inequalities. "When aimed at redressing inequalities differential treatment is necessary and therefore is a case of legitimate differentiation."[125] The CEDAW Committee has also noted that while significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to implement fully the Convention by introducing measures to promote *de facto* equality between men and women. Recalling Article 4.1 of the Convention, the Committee recommends that States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment's.[126]

Promotion for positive action has been on the Community agenda for many years. A Recommendation on the Promotion of Positive Action for Women was adopted by the Council in December 1984.[127] Being only a Recommendation, the instrument contains no sanctions for non-compliance. Article 1 of the Recommendation urges the Member States:

...to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practice, while fully respecting the spheres of competence of the two sides of industry, ignored.

(a) 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;

(b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.

The Commission was obliged by the instrument to report to the Council within three years on the progress achieved in the implementation of the Recommendations: its consequent report in 1988 concluded that in general

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[125] Human Rights Committee-General Comment No. 4 [13] (1989).

[126] Committee on the Elimination of Discrimination Against Women-General Comment No. 5 (1989). See also General Comment No. 23 (1997), para. 15, where the Committee states that "[t]he introduction of temporary special measures to encourage the equal participation of both women and men in the public life of their societies are essential prerequisites for true equality in political life."

[127] Recommendation 84/635, OJ [1984] L331/34.

the Member States had begun to introduce positive action programmes although their methodology varied widely.[128] The Commission also pledged itself to present to the Council, the Member States, the two sides of the industry, and potential promoters of positive action plans, a Code of Practice to assist and inform them on the implementation of such schemes. This promise was full filled in 1988 in *Positive Action-Equal Opportunities form Women in Employment-A Guide.*[129] In answer to the question "What exactly is positive action?" the Guide replies:

> Positive action aims to complement legislation on equal treatment and includes any measure contributing to the elimination of inequalities in practice.
> The setting up of a positive action programme allows an organisation to identify and eliminate any discrimination in its employment policies and practice, and to put right the effects of past discrimination.
> Thus a positive action programme is a type of management approach which an employer can adopt with a view to achieving a more balanced representation of men and women throughout the organisation's workforce and thus a better use of available skills and talents.

The Community's Third Medium-Term Programme on Equal Opportunities (1991-5)[130] also underlined the need for positive action and, in the Forth Action Programme (1996-2000)[131] sex desecration of the labour market is expressed as one of the objectives which is to be pursued *inter alia* by positive action.

It was against that background that the case of *Kalanke*[132] was referred to ECJ. The case concerned the Bremen law on positive discrimination, which gave female candidates priority for a job or promotions in sectors where women were under-represented. This would be the case where women did not make up a least half of the staff in the individual salary brackets in the relevant personnel group within a department. The Bremen law did not involve a system of strict quotas because a woman was not accorded priority unless her qualifications were equivalent to those of the male candidate for the same post. A male candidate with better qualifications would not therefore be affected by it.[133] The applicant in the case, a man, was one of the two candidates short listed for a post in Bremen Parks Department. The applicant, unhappy with that decision, brought proceeding against the City of Bremen and they were in due course referred to the ECJ by the Bundesarbeitsgericht, which sought guidance on the scope of the derogations from the principle of equal treatment set out in Article 2 (4) of the Directive. The question, which the Court was asked, was:

> Is a national legislation under which women are given priority in recruitment and/or in obtaining promotion provided that they have the same qualifications as the male applicants and that women are under-represented-in so far as they don not constitute one half of the personnel-in the individual remuneration brackets in the relevant personnel group,

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[128] COM (88) 370 final.
[129] Commission of the European Communities (1988) CB-48-87-525-En-C.
[130] OJ [1991] C142/1.
[131] OJ [1995] L335.
[132] Case C-450/93 *Kalanke v. Freie und Hansestad Bremen*, [1995] ECR I-3051.
[133] This type of positive action is called "binding preferential rules".

compatible with the principle of equal treatment for men and women laid down by the relevant Community legislation? In other words, does a system of quotas in favour of women, even if it is dependent on the conditions...just described, embody sex discrimination contrary to Community law or does it constitute permitted positive action inasmuch as it is designed to promote effective equal opportunities in the world of work?

Advocate General Tesauro did not think that Article 2 (4) could be used to justify legislation such as that in issue before the referring court. In his view, since the expressed aim of Article 2 (4) is the promotion of *equal opportunity*, it is essential to define that term and keep it uppermost in mind when determining the limits of Article 2 (4). In particular , does it refer to equality "with respect to starting point or respect to the point of arrival". He declared:

To my mind, giving *equal opportunities* can only mean putting people in a position to attain equal results and hence restoring conditions of equality as between member of the two sexes as regards to starting points...Positive action must therefore be directed at removing the obstacles preventing women from having equal opportunities by, tackling for example, educational guidance and vocational training. In contrast, positive action may not be directed towards guaranteeing women *equal results* form occupying a job, that is to say, at points of arrival, by way of compensation for historical discriminations. In sum, positive action may not be regarded, even less employed, as a means of remedying, through discriminatory measures situation of impaired inequality in the past.[134]

In a brief judgement the Court agreed. Article 2(4) it said, permitted "national measures relating to access to employment, including promotion, which give a specific advantages to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men."[135] However, as *derogation* from an individual right laid down in the directive, Article 2 (4) was to be interpreted strictly. In concluding that the system such as that in operation in Bremen contravened the Directive, it held:

National rules which guaranteed women "*absolute and unconditional* priority for appointment or promotion go beyond the promotion of equal opportunities and fell outside the scope of Article 2 (4).

Furthermore, in so far as it seek to achieve equal representation of men an women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2 (4) the result which is only to be arrived at by providing equality of opportunity."[136]

The Court's ruling promoted a flood of criticism and comments, not only from women's interest groups and from academic and practising lawyers, but also from the European Commission itself, which issued a communication on the interpretation of the judgement in which it suggested that it was limited to national rules which gave women an absolute and unconditional right to appointment or promotion: "The Commission therefore takes the view that quota systems which fall short of the degree of

[134] [1995] ECR I-3053 , para. 13 and para. 19, emphasis supplied.
[135] Para. 19.
[136] Para. 22-23, emphasis supplied.

rigidity and automaticity provided for by the Bremen law have not be touched by the Court's judgement and are, in consequence, to be regarded as lawful.[137] The Commission also submitted to the Council in 1996 proposal amending Directive.[138] The proposal made by the Commission in 2000, which took into account the new Treaty developments and had a wider objective, made obsolete the this proposal.[139]

Macini and O'Leary[140] observes that the most powerful criticism of the *Kalanke* decision levelled at the ruling were of twofold nature:

> In the first place, the position of the Court was regarded as being at odds with it previous jurisprudence. By proscribing indirect discrimination the Court had already penetrated into the province of substantive equality. Thus, when it had to deal with seemingly sex-neutral classifications between part-time and full-time workers pursuant to which the former, who were preponderantly women, were paid at lower hourly rate than their full-time colleagues or were excluded from pension schemes or additional pension benefits, its ruling clearly relied on a view of equality as a *collective rights* since the unequal treatment is defined by a measure's impact on *groups* and is essentially proved by *statistics.* Having entered so far, it is arguable that the Court would have easily covered the not too large conceptual distance separating indirect discrimination from the form of discrimination which affirmative action programmes seek to overcome. Quotas for female workers are a case in point. Weather rigid or soft, they are, like the provision impugned in *Kalanke,* "linked" to group membership and they constitute legally differentiated treatment intended to redress factual inequalities and to arrive at equality in fact.
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> The second line of critics pointed to the Court's inability to discriminate between discriminations, as it were. One ought perhaps to make allowances for the uneasiness wish judges who have delivered dozens of rulings bases on notions such as the irrelevance of sex and the invidiousness of its use in the allocation of benefits might feel when admitting to that the same use may serve remedial objectives and could on this ground be legitimated. Yet it takes a highly aseptic view of justice as value independent of the socio-political context in which it is administers or, more likely, a strong ideological bias (such as, for example, primacy of the individual and of merits or blindness of the state to the disparities between its citizens) not to appreciate the simple fact what really matters is the purpose of discrimination.

The ECJ, seized the first opportunity to clarify and modify it stance. The opportunity came in the *Marschall*[141]case, another reference from Germany. A schoolteacher had been denied promotion because of a law providing for a preference to be given to an equally qualified female candidate where there were fewer women than men in the grade in question; the relevant legislation, however, contained a saving clause and laid down the rule preferring women only where "reasons specific to another candidate" did not predominate. Jacobs AG submitted that this national law, like in *Kalanke*, involved discrimination prohibited by the Directive and that it was not saved by Article 2 (4). However the Court disagreed and distinguished

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[137] COM (96) 88 final.
[138] OJ C 179, 22. 6.1996, p. 8.
[139] COM(2000) 334 final. Now Directive 2002/73/EC.
[140] Macini and O'Leary, *The new frontiers of sex equality law in the European Union,* page 342-43.
[141] Case C-409/95 *Marschall v. Land Nordrhein-Westfalen,* [1997] ECR I-6363.

Kalanke on the basis that there had been no saving clause there. It went on to state:

...it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.

For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.

It follows that a national rule in terms of which, subject to the application of the *saving clause*, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.[142]

The Court ruled that

A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service, and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of the Directive, provided that:

-in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and

-such criteria are not such as to discriminate against the female candidates.

The broader approach of the Court in *Marschall* is also reflected in *Badeck.*[143] The question was raised whether, following *Kalanke*, the Hessen law on equal rights for women and men and the removal of discrimination against women the public administration contravened EC law. At issue was a national legislation where binding targets were set for the proportion of women in appointments and promotions. The Court found that such a rule that gave priority to equally qualified women in a sector where women are under-represented, if no reasons of greater legal weight were opposed, and subject to an objective assessment of all candidates, fell within the scope of Article 2(4) of the Directive. The Court further indicated that in assessing the qualifications of candidates, certain positive and negative criteria could be used, which, while formulated in gender neutral terms, were intended to

[142] Para. 29-31, emphasis supplied.
[143] Case C-158/1997, *Badeck v. Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof Landes Hessen*, [2000] ECR I-1875.

reduce gender inequalities that occur in practice in social life. Among such criteria were capabilities and experiences acquired by carrying out family work. Negative criteria that should not detract from assessment of qualifications included part-time work, leaves and delays as a result of family work. Family status and partner's income should be viewed as immaterial and seniority, age and date of last promotion should not be given undue weight.[144] The Court held that a regime prescribing that posts in the academic service are to be filled with at least the same proportion of women as the proportion of women among the graduates and the holders of higher degrees in the discipline in question is compatible with the Directive. The Court thereby followed Advocate General Saggio's Opinion according to which such a system does not fix an absolute ceiling, but fixes one by reference to the number of persons who have received appropriate training, which amounts to using an actual fact as a quantitative criterion for giving preference to women.[145] The Court further accepted a rule according to which women are to be taken into account to the extent of at least one half in allocating training places in trained occupations in which women are under-represented. The Court found that the allocation of training places to women did not entail total inflexibility. The state did not have a monopoly on training places, as they were also available in the private sector. No male was therefore definitely excluded.[146]

In *Abrahamson*[147] the Court considered a Swedish statutory provision under which a candidate for a professorship who belongs to the under-represented gender and possesses sufficient qualifications for that post may be chosen in preference to a candidate of the opposite gender who would otherwise have been appointed, where this would be necessary to secure the appointment of a candidate of the under-represented gender, and the difference between the respective merits of the candidates would not be so great as to give rise to a breach of the requirement of objectivity in making appointments. It was found that this provision was incompatible with Article 2(1) and (4) of the Directive. The portent of the savings clause relating to the requirement of objectivity could not be precisely determined, implying that the selection would ultimately be based on the mere fact of belonging to the under-represented gender. This case was decided after the Amsterdam Treaty entered into force and the Court therefore also examined if the Swedish legislation could be justified by Article 141 (4). The Court pointed out that even though Article 141 (4) allowed the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it could not be inferred from this that it allowed a selection method of the kind at issue in the main proceedings which appears, on any view to be disproportionate to the aim pursued. Therefore the Court decided Article 141 (4) precluded the

[144] Para. 31-32
[145] Para. 42-43.
[146] Para. 51 og 52.
[147] Case C-407/98, *Abrahamson and Anderson v. Fogelqvist,* 2000] ECR I-5539.

legislation in question, but the Court gave no guidance on the scope of the Article.

As stated above the ICCPR Committee has held that governments have an obligation to undertake affirmative action designed to ensure equal enjoyment of rights and the CEDAW Committee has also recalling Article 4.1 of the Convention recommended that States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employments. In cases for the ECJ it dose not appear that the authorities which were justifying their measures in question referred to their obligations under international law. It is therefore interesting to mention a case which was recently dealt with by the EFTA Court.[148] By an application lodged at the Court the EFTA Surveillance Authority brought an action for a declaration that, by maintaining in force a rule which reserves a number of academic posts exclusively for women, Norway has failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2(4) and 3(1) of Directive 76/207/EEC. Norway tried to justify its measures by referring to its international obligations. The EFTA Court did not accept this argument and concluded that:

> The Defendant cannot justify the measures in question by reference to its obligations under international law. CEDAW, which has been invoked by the Defendant, was in force for Community Member States at the time when the Court of Justice of the European Communities rendered the relevant judgements concerning the Directive. Moreover, the provisions of international conventions dealing with affirmative action measures in various circumstances are clearly permissive rather than mandatory. Therefore they cannot be relied on for derogations from obligations under EEA law. [149]

It is true that CEDAW was in force when the ECJ renedered the relevant judgments, but the facts remaines that the authorites did not try to justify their actions with a reference to CEDAW. From a legal strategy point of view the EFTA Court should have taken that into account.

The EFTA Court accepted the applicants claim that Norway had failed to fulfil its obligations under Articles 7 and 70 of the EEA Agreement and Articles 2(1), 2 (4) and 3 (1) of the Equal Treatment Directive. The Court thougt that the Norwegian legislation in question had to be regarded as going beyond the scope of Article 2(4) of the Directive, insofar as it permits earmarking of certain positions for persons of the under-represented gender. As the legislation was applied by the University of Oslo it gave absolute and unconditional priority to female candidates. There was no provision for flexibility, and the outcome is determined automatically in favour of a female candidate.

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[148] Case 1/2002, *EFTA Surveillance Authority v. The Kingdom of Norway*, of 24 January 2003.
[149] Para. 58.

Postive action has also been tested by the ECJ in other context than appointments and promotions. In the case of *Lommers*[150], the ECJ upheld the compatibility with Article 2(1) and (4) of a scheme set up within a national ministry to tackel the exstensive under-repsentaion of women, in a situation "characterised by proven insuffiency of proper, affordable child-care facilities". Under the scheme, the ministry made available a limited number of subsidized nursery places to its staff, and reserved those for female staff alone, while permitting male officials access only in inidividual case of emergency. The ECJ ruled that this scheme would be acceptable on condition that the emeregency exception was constructed as allowing any male officials who took care of their children by themselves to have access to the nursery palcaes on the same conditions as female officials.[151]

From this case-law on positive action, some conclusions can be drawn:[152]
-the possibility to adopt positive action measures is to be regarded as an exception to the principle of equal treatment;
– the exception is specifically and exclusively designed to allow for measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life;
– automatic priority to women, as regards access to employment or promotion, in sectors where they are under-represented cannot be justified;
– conversely, such a priority is justified, if it is not automatic and if the national measure in question guarantees equally qualified male candidates that their situation will be the subject of an objective assessment which take into account all criteria specific to the candidates, whatever their gender.

[150] Case C-476/99, *H. Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, judgment of 19 March 2002.
[151] See also Case 312/86 *Commission v. France* [1988] ECR 6315, where Article 2(4) was narrovly read by the Court, so that provision of French law which permited collective agreements to provide special rights for women-including shorter working hours for older women, the obtaining of leave when a child was ill, the granting of extra days of leave in respect of children-was not justified under the provision.
[152] COM(2000) 334 final.

8 INDIRECT DISCRIMINATION

8.1. INTRODUCTION

Discrimination is a concept encountered elsewhere in the EC Treaty, in particular in relation to nationality. In that context the Court has defined it as: " T he application of different rules to comparable situations or the application of the same rule to different situations."[153] It is also a concept which has been considerably refined in the national laws of the Member States. From both these sources it is clear that there are essentially two forms which discrimination can take. The first is commonly known as *direct discrimination*. This occurs where, on the grounds of sex, one person is treated differently or less favourably from another person. The more subtle form of discrimination, the *indirect* kind, is encountered where some requirement is demanded, some practice is applied or some other action is taken which produces an "adverse impact" for on sex. [154]

8.2. INDIRECT DISCRIMINATION

It was initially the ECJ which introduced a notion of indirect discrimination, through its interpretation of the equal treatment principle. There was no statutory underpinning until 1997, when a definition of indirect sex discrimination was included in the Burden of Proof Directive.[155] This Directive defines indirect discrimination as:

an apparent neutral provision, criterion or practice [which] disadvantages a substantially higher proportion of them members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

The Equal Treatment Directive originally did not define the concepts of direct or indirect discrimination. On the basis of Article 13 of the Treaty, the Council adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation which define direct and indirect discrimination. Thus when amendending the Equal Treatment Directive by Directive 2002/73/EC it was consider to be appropriate to insert definitions consistent with these Directives in respect of sex. In Directive 2002/73/EC following provison can be found:

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. For the purposes of this Directive, the following definitions shall apply:

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[153] Case C-279/93 *Finanzampt Koln-Alstad v. Schumacker* 1996 ECHR-I225, at. 259.
[154] Ellis, *EC Sex Equality Law*, p. 190.
[155] Directive 97/80/EC on the burden of proof in cases of discrimination based on sex.

- direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,
- indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

The notion of indirect discrimination is designed to target those measures which are discriminatory in effect. At first the Court had some difficulty in appreciating the full ambit of indirect discrimination. In *Jenkins*[156], a case where a part-time workers received a lower hourly rate that full-time workers, the Court looked at the employer's intention to see whether discrimination had occurred. Confining indirect discrimination to intentional acts only would have significantly limited its effectiveness.[157] In the landmark case of *Bilka-Kaufhaus*,[158] however the Court recognized that the prohibition on discrimination also included unintentional indirect discrimination, where the employer does not intend to discriminate but the effects of any policy are discriminatory. The case concerned the exclusion of part-time worker from the pension scheme of a large department store. Mrs. Weber challenged exclusionary practice on the basis of the right to equal pay as enshrined in EC law. Through the policy was in itself sex neutral (both male and female part-time worker excluded) it adversely affected much more women that men as the greater part of part-time workers are female. As Mrs. Weber pointed out the pension scheme worked to the detriment of women's workers because they were more likely than their male colleagues to have to opt for part-time work because of their family and child-care commitments. The ECJ held that the right to equal pay "is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion effects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectely justified factors unrelated to any discrimination on grounds of sex."

The concept of indirect discrimination has been developed by the Court on the basis initially of American and British legislative provisions. However according to Hepple[159] the Court has in some decisions has gone well beyond those models. Particular important in this respect was the *Enderby*[160] decision, in which the Court held that where statistic disclose an appreciable difference in pay between jobs, one carried out almost exclusively by women and other predominantly by men, Article 141

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[156] Case C-96/80 1981 ECH- 911. The employer, who had previously paid men and women at different rates, changed his system so that he paid part-timers, the majority of whow were women, less than fulltimers. There was a concern that the employer had replaced directly discrimination system by an intentionally indirectly discriminatory system.
[157] Barnard, *EC Employment Law*, p. 209.
[158] Case 170/84,*Bilka Kaufhaus v. Weber von Harts*, 1986 ECR 1607.
[159] Hepple; *The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform*, p. 146.
[160] Case C-127/92, *Enderby v. Frenchay Healt Authority*, [1993] E.C.R. I-5535.

requires justified factors unrelated to sex discrimination. The Court was willing to infer *prima facie* indirect discrimination from the mere fact that the woman belonged to an almost exclusively female occupation or profession. The Court appears to have agreed with the Advocate General that attention should be directed less to the requirement or barrier by means of which women suffer disadvantage and more to the discriminatory result.[161]

Loenen[162] maintains that conceptually speaking, the notion of indirect discrimination is potentially very far-reaching indeed, as implies an important step away form an formal equality approach towards a more substantive notion. A *formal* conception of equal treatment focuses on people being treated the same, irrespective of race, sex, sexual orientation or whatever other suspect of sensitive grounds. As long as the treatment is the same, there can be no problem of equality or discrimination. Unequal outcome resulting from treating people the same are irrelevant. A *substantive* equality approach, on the other hand, takes unequal results as its starting points. Unequal outcomes raises question of equality and discrimination regardless whether these result form difference in treatment or from the same treatment. The concept of *indirect discrimination* similarly starts form the presumption that any disparate impact on certain group raises a question of equality and discrimination. Disparate effects in themselves warrant taking a closer look at the treatment which is responsible for such results. In this way, the concept of indirect discrimination can direct attention the myriad ways in which dominant standards and more systemic forms of discrimination in our society, which are at face value neutral, tend to disadvantage or exclude members of less powerful groups.

Notwithstanding its potential, as a concept the notion of indirect discrimination clearly has its limits. Though the concept makes the negative consequences of social, economic and other differences between identifiable groups in society visible as problems of equality, the underlying inequalities themselves are not necessarily addressed. It may be unlawful to treat part-time workers worse than full time workers, or ignore the care responsibilities of workers, but this itself does not alter the underlying, problematic division of labour between men and women as regards paid work and care and the problems involved in combining the two. Though the concept of indirect discrimination can *challenge* the negative consequences for women and men and other structurally disadvantaged groups of all kinds in society, even a successful claim will not necessarily *change* those standards in themselves.[163]

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[161] Hepple; *The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform*, p. 146.
[162] Tita Loenen, *Indirect Discrimination: Oscillating Between Containment and Revolution*, p. 198-199.
[163] Ibid. at p. 204.

8.3. DEFENCES AND JUSTIFICATIONS

According to the orthodoxy there is no defence to a claim of *direct* discrimination unless an express exception is provided.[164] In the case of *indirect* discrimination, by contrast, the discriminatory conduct may be objectively justified on grounds of sex.[165] In the case of *Bilka-Kaufhaus*[166] the Court laid down a three-stage test for justification for the national court to apply in respect of indirectly discriminatory conduct by employers; the measures chosen must "correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end". In subsequent cases the Court has provided some guidance on the meaning of this test by declaring certain grounds of justification to be too general and indicating that others may be suffience. It has said that objective justifications may take account of economic factors relating to the needs and objectives of the undertaking.[167] This may include permitting the employer to pay full-timers more than part timers in order to encourage full time work,[168] and paying certain jobs more in order to attract candidates when market indicates that such workers are in short supply.[169] It dose not include paying job-sharers less solely on the ground that avoidance of such discrimination would involve increased cost.[170]

On the other hand generalizations about certain categories of workers, such as the belief that part-time workers are not as integrated in, or as dependent upon, the undertaking employing them as full-time workers, do not constitute objectively justified grounds.[171] The Court is also suspicious of justifications based on mobility and training. In *Danfoss*[172] it recognized that a criterion for awarding a pay increase to reward employees mobility, their adaptability to variable hours and places of work, may work to the disadvantage of female employees who, because of household and family duties, are not as able as men to organize their working time with such flexibility. Similarly, the criterion of training may work to the disadvantage

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[164] Such as in the Equal Tretment Directive 76/207. There are no equalvalents derogations in the field of pay. However, there have been some discussion in the litterature whether direct pay discrimination can be 'objectievly justified'. See on this *EU Law* by Craig and de Búrca where they point out at p. 864, that while the ECJ has never actually ruled to this effect, it has none less in an number of cases consider in more detail whether men and women who appear *prima facie* to be paid differently for performing similar work or work of equal value my actually be 'differently situated' such that the unequal pay does not in fact amount to discrimination.

[165] Barnard, *EC Employment Law*; p. 213.

[166] Case 170/84, *Bilka Kaufhaus v. Weber von Harts*, 1986 ECR 1607.

[167] Case 96/80, *Jenkins* [1981] ECR 911.

[168] Case 170/84, *Bilka Kaufhaus v. Weber von Harts*, 1986 ECR 1607.

[169] Case C-127/92, *Enderby v. Frenchay Healt Authority* [1993] ECR I-5535.

[170] Case 243/95 *Hill and Stapleton v. Revenue Commisioners and Department of Finance*, [1998] ECR I-3739.

[171] Case 171/88 *Rinner-Kühn* [1989] ECR 2743.

[172] Case 109/88 [1989] ECR I-3199.

of women in so far as they have had less opportunity than men for training or have taken less advantage of that opportunity. In both cases the employer may only justify the remuneration of such adaptability or training by showing it is of importance for the performance of specific tasks entrusted to the employee.[173] A common justification raised by employers is seniority. In *Nimz*[174] the Court held that "[a]lthough experience goes in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances of in particular case, and in particular on the relationship between the nature of the work performed and the experience gained for the performance of the work upon completions of a certain number of working hours."

Craig and de Búrca[175] argues that what *exactly* can constitute objective justification remains unclear. The ECJ often leaves the matter for the national court to decide, which raises the likelihood of differences amongst the tribunals of the various Member States whether an indirectly discrimination is justified. In spite of the ECJ guidance on the meaning of the test, problems of inconsistency and uncertainty remain, contributing to the volume of expensive and possibly duplicated litigation in different Member States. Further, even if such disparity amongst the different national courts and authorities on the issues of objective justification may cause problems, it is also clear that Article 234[176] reference procedures does not necessarily provided the best forum for assessing an employer's or a state's proffered justification, unless the factual information supplied to the ECJ is very thorough.

The Courts case law shows that the test of objective justification is weak when it is applied to the justification of a statutory social security provision. Thus, in the judgements of *Nolte*[177] and *Megner and Scheffel*[178] the Court stressed that social policy are matter for Member States. Consequently, Member States must be given a "broad margin of discretion" in deciding

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[173] Barnard, *EC Employment Law*; p. 214-215.
[174] Case C-184/89, *Nimz*, [1991] ECR I-297.
[175] Craig and de Búrca, *EU Law*, p. 855-856.
[176] Article 234 (ex Article 177), which contains the preliminary ruling procedure, is important in shaping both Community law and the relationship between the national law and Community legal systems. According to the Article the ECJ shall have jurisdiction to give preliminary rulings concerning a) the interpretation of the Treaty, b)the validity and interpretation of acts of the institutions of the Community and c) the interpretation of acts of the institutions of the statutes of bodies established by an act of the Council, where those statues so provide. Where such a question is raised before by any court of a Member State, that court or tribunal may, if it consider that a decision on the question is necessary to enable it to give judgement, request the ECJ to give a ruling thereon. The relationship between the national court and the ECJ is reference-based. It is not an appellate system. No individual has a right of appeal to the ECJ. It is for the national court to make the decision to refer. The ECJ will rule on the issues referred to it, and then the case will sent back to the national courts, which will apply the Community law to the case at hand.
[177] Case C-317/93, *Nolte v Landesversicherunganstalt Hannover*, [1995] ECR I-4625.
[178] Case C-444/93, *Megner and Scheffel v. Innungskrankenkasse Vorderplaz*, [1994] ECR-I-4741.

which measures will achieve that. These decision held that the exclusion of low-paid part time workers form the German statutory social security scheme is justified, even though considerably more women than men are adversely affected. The German government successfully contended that there is a social demand for "minor employment" which could only be fostered by excluding it form compulsory social insurance and that such coverage would lead to an increase in unlawful employment and circumventing devices. The Court held that this was a legitimate aim and was objectively unrelated to any discrimination on grounds of sex. The national legislature, in exercising its competence, was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim.[179]

It can be stated that there is a hierarchy of test for the justification of indirect discrimination. The strict test for indirectly discriminatory *conduct of employers* and less strict test in context of *discriminatory legislation* (both social employment legislation and social security legislation).[180]

The shortcomings of the indirect discrimination/objective justification test in the endeavour to promote equality in employment for women has been critically noted by many, given the *male norm* on which the concept of discrimination used is based, and given the relative ease with which the *commercial objectives* of the undertakings or employer can defeat a claim of indirect discrimination.[181]

[179]Heppel has argued that the test of objective justification developed since *Bilka-Kaufhaus* has been significantly weakened, see Hepple; *The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform*, p. 146-147.
[180] See more on this in Barnard, *EC Employment Law*, p. 218 and Ellis, *The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality Law*, p. 1410.
[181] Craig and de Búrca, *EU Law*, p. 863.

9 ENFORCEMENT OF EC GENDER EQUALITY LAW

9.1. DIRECT EFFECT

As we have seen, the Court made it clear in *Defrenne II*[182] that *Article 119 (new Article 141)* was "directly applicable" and could thus give rise to individual rights which that courts must protect. This means that the prohibition of discrimination applies "not only to the actions of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as contracts between individuals". Thus, Article 141 has both vertical and horizontal direct effect.

It is well established in EU law that provisions of a *directive* which are unconditional and sufficiently precise and which have not been implemented correctly or at all can have vertical direct effect. This means that an individual may, after the expiry of the period prescribed for implementation relay on a such provision directly against the Member State in fault. This prevents Member States from taking advantage of their own failure to comply with Community law to deny rights to individuals. The same argument dose not apply to private individuals.[183] As the Court explained in *Marshall I*[184], since the binding nature of a directive exist only in relation to "each Member State to which it is addressed...it follows that a Directive may not of itself impose obligation on individual and that a provision of a Directive may not be relied upon as such against such person".[185] Consequently, clear an unambiguous provisions of an unimplemented or incorrectly implemented directive cannot have horizontal direct effect.[186]

As to the Directive 76/207 (The Equal Treatment Directive) the Court said in *Marshall I* that the applicant was able to relay on the principle of equal treatment laid down in Article 2(1), as applied to conditions governing dismissal referred to in Article 5(1), which were directly effective, to complain against her state of employer of a discriminatory dismissal. In *Marshall II*[187] the Court said that the combined provisions of Article 5 and 6 of the Directive conferred rights on a victims of a discriminatory dismissal which that person must be able to rely upon before the national courts

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[182] Case 43/75, Defrenne v. Sabena [1976] ECr 455.
[183] Barnard, *EC Employment Law,* p. 254.
[184] Case 152/84 *Marshall (No. 1)* [1986] ECR 723.
[185] Para. 48.
[186] Case 43/75, Defrenne v. Sabena [1976] ECr 455.
[186] Barnard, *EC Employment Law,* p. 254.
[187] Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority (No. 2)* [1993] ECR I-4367.

against the State. Therefore, it seems that Article 6, when read in conjunction with Article 3 and 4, will also be directly (vertical) effective.[188]

The Court has taken three steps to address the hardship caused by the distinction between horizontal and vertical direct effect.[189] First, it has given a broad definition to the term "State". In *Foster*[190] the Court defined "State" as "organisations or bodies which were subject to the authority and control of the state or had special powers beyond those which results form the normal rules applicable to relations between individuals". Secondly, in *Von Colson and Marleasing*[191] the Court imposed a broad obligation on all state institutions, especially the national courts, arising from both Directive 76/207 and Article 10 of the Treaty (ex Article 5), to interpret national law, as far as possible, in conformity with the requirements of Community law, subject to the general principles of law, especially the principles of legal certainty and non-retroactivity (this is also known as the doctrine of indirect effect). Therefore, in *Von Colson* the national court was obliged to interpret the national rules on compensations in the light of Directive 76/207. The third step taken by the Court was to introduce the principle of state liability in *Francovich*,[192] saying that the Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive.

9.2. BURDEN OF PROOF

Directive 97/80 on the burden of proof lays down minimum standards which apply to situations covered by Article 141, the Directives on Equal Pay and Equal Treatment and, in so far as discrimination based on sex is concerned, the Directive on Pregnant Worker's and Parental Leave. It applies to any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to Article 141 and the Equality Directives. The central provision is Article 4. This provides that Member States shall take such measures as necessary, in accordance with their national judicial system, to ensure that:

> when person 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 form 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.

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[188] Barnard, *EC Employment Law,* p. 255.
[189] Ibid. at p. 255-257.
[190] Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313. para. 18.
[191] Cases 14/83 Von Colson and Kamann v. Land Nordhein-Westfalen [1984] ECR 1891 and C-106/89 Marleasing SA. v. La Comercial International de Alimentacion [1990] – *4135.*
[192] Joined cases C-6 and C-9/90 *Francovich and Bonifaci v. Italian State* [1991] 5357.

Before Directive 97/80 was adopted there was some case law, allowing a partial reversal of the burden of proof.[193]

9.3. JUDICIAL REMEDIES

It is a long established principle of Community law that under the duty of co-operation laid down in Article 10 of the Treaty (ex Article 5) the Member States must ensure the legal protection which individuals derive form the direct effect of Community law. In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding individuals.[194]

The question of the adequacy of national remedies has been of central importance to the procedural protection conferred by the Equality Directives. Article 6 of the Equal Pay Directive 75/117 requires the Member States to ensure that the principle of equal pay is applied and that effective means are available to ensure that the principle is observed. In addition, Article 2 of the Directive requires Member States to allow those who consider themselves wronged by the failure to apply the principle of equal pay to pursue their claims by judicial process. The Directive also provides some protection against victimisation of those who have sought to enforce their rights, but under Article 5 Member States must protects employees against dismissal as a result of making a complaint or starting legal proceeding to seek equal pay. The Equal Treatment Directive 76/207 contains equivalent provision in respect of equal treatment.

The Court has, however, circumscribed the Member States' discretion as to the remedies for sex discrimination.[195] First, as the Court ruled in *Johnston*[196], Member States cannot exclude judicial control altogether. There the Court added that Article 6 of the Equal Treatment Directive "reflects a general principle of law which underlies the constitutional traditions common to the Member States, including Articles 6 and 13 of the ECHR".[197] The second are in which the Court has limited Member States' discretion is that it has insisted that any sanctions provided for by the national system must be such as to "guarantee real and effective judicial

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[193] Case C-109/88 *Danfoss* [1989] ECR I-3199 and Case C-127/92 *Enderby* [1993] ECR I-5535.
[194] Barnard, *EC Employment Law*, p. 259.
[195] Ibid. at p. 260.
[196] Case 222/84 [1986] ECR 1651.
[197] See also Case C-185/97 *Coote* [1998] ECR I-5199 where the Court said the requirement laid down by Art. 6 that recourse be available to the courts reflects a general principle of law which underlines the constitutional traditions common to the Member States and which is also enshrined in Art. 6 of the ECHR. It added that by virtue of Art. 6 of the Directive, interpreted in the light of the general principle,all persons have the right to obtain an effective remedy in an competent court against measures which they considered to interfere with the equal treatment of men and women laid down in the Directive.

protection...it must also have a real deterrent effect on the employer".[198] Therefore, if the Member State choose to penalize the discrimination by the award of compensation that compensation must be adequate in relation to the damage sustained. Most cases on effective remedies concern compensations.[199]

[198] Case 14/83 *Von Colson* [1984] ECR 1891, para. 23.
[199] Case 14/83 *Von Colson* [1984] ECR 1891 and Case 79/83 *Harz* [1984] ECR 1921 the compensations was limited to a purely nominal amount, the reimbursement of the travelling expences incurred. The Court considered that this would not satisfy the requirements of Article 6. Similary, the Court held in Case C-271/91*Marshall II* [1993] tha the imposition of an upper limit on the amount of compensation received and the exclusion of an award of interest did not constitute proper implementation of Article 6.

10 Conclusions

It is evident form the issues discussed in previous chapters that it is not an easy task to evaluate the "quality" of EC gender equality law. It is a complex field of law where different views compete, but as stated in the beginning there are competing priorities of the economic and the social objectives of the EC. However, an attempt has to be made. The content of previous chapters will not be repeated, the meaning is just to point out the main negative and positive aspects.

10.1. NEGATIVE ASPECTS

The main drawback is that the law are limited in scope. It is an essential focus on the employment- related discrimination. This limitation of the law lies in their dominant concern with the employment market, resulting from the essential economic basis and objectives of the Community. The emphasis on employment status can most clearly be seen in the Court's *Hoffmann*[200]decision, where the Court held that the Equal Treatment Directive was not "designed to settle question concerning the organisation of the family or to alter the division of responsibility between parents"

Another limitation lies in the concept of non-discrimination, as the equality clauses in EC gender equality law are drafted in terms of prohibition.[201] According to Ellis[202] the concept is only designed to produce like consequences for those placed in like situations, or the so-called Aristotelian notion of discrimination. It can do nothing of it self to remedy the status of a person whose disadvantage state cannot be compared with that of a similarly situated members of the opposite sex.

The Court's case law in the field of positive action is unclear. Although, some conclusions can be drawn[203], the cases have been concerned with what is *not allowed* rather than what *is allowed*. For example, in *Abrahamson*[204] the Court decided that Article 2(4) of the Equal Treatment Directive and Article 141 (4) of the Treaty precluded the Swedish legislation in question, but it gave no guidance on the scope of the Articles. Bearing in mind that the Court has held that Article 2(4) of the Equal Treatment Directive constitutes a derogation from the principle of equal treatment and thus must be strictly interpreted[205] it is necessary that it is clarified what is allowed. Formal equality in treatment is not sufficient to achieve substantive

[200] Case 170/83 *Hoffmann v. Bramer Ersatzkasse* [1984] ECR 3047. Discussed in chapter 7.2.2.
[201] See chapter 4.1.
[202] Ellis, EC Sex Equality Law, p. 322.
[203] See end of chapter 7.3.3.
[204] Case C-407/98, *Abrahamson and Anderson v. Fogelqvist,* 2000] ECR I-5539.
[205] Case C-450/93 *Kalanke v. Freie und Hansestad Bremen,* [1995] ECR I-3051

equality, therfore and measures to promote equality are necessary. If using such measures involve a risk of infringement of the law it is obvious that many employers will refrain from using them. The approach of the Court is also not consistent with the view of various human rights actors, for example the CEDAW Committee which has recommended that States Parties to the CEDAW Convention should make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment's.[206] Finally it is a question if the Court has taken sufficiently into consideration the "principle of subsidiarity"[207] by not allowing Member States to decide for themself the use of positive actions, since after all they are not obligated to use these measures to promote equality.

10.2. POSITIVE ASPECTS

Because of "the supranational" character of the European Union, as an international institution, the principle of equal treatment of men and women in EC law is more effective compared to the majority of other international treaties. Through the doctrine of "direct effect" provision of binding EC law, which are clear, precise, and unconditional enough to be considered justiciable can be invoked and relied upon by individuals in national courts.[208] It should be remembered that Article 141 of the Treaty has both vertical and horizontal direct effect. Through the doctrine of "supremacy" nationals courts are required to give immediate effect to the provision of directly effective EC law in cases which arise before them, and to ignore or to set aside any national law which could impede the application of EC law.[209]

Although, in some cases individuals can bring their cases to an international court or another monitoring body, it is beyond reasonable doubt that it is far more feasible, quicker and cheaper for them to bring their cases before their own national courts. It is not an easy choice for individuals to bring a case against their own government, let alone on the international level, and even though they choose to do that, the findings of the monitoring body in

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[206] Committee on the Elimination of Discrimination Against Women-General Comment No. 5 (1989).

[207] This principle is acknowledged in Article 5 of the Treaty which states that:
"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

[208] Carig and de Búrca, *EU law*, p. 178.

[209] Carig and de Búrca, *EU law*, p. 275.

question are not always binding. The only international monitoring body which can take a binding decisions in cases of individuals against a State is the European Court of Human Right and currently the ECHR is limited in scope as there is not yet in force an independent self-standing guarantee of equality.

Another positive aspect is the use of indirect discrimination as used in EC law has, at least potentially, significantly broadened the scope of the traditional, strictly formal, concept of non-discrimination. This has especially been a great help to strengthen the status of part-time workers, which are mainly women.

Finally, although it is not an enforceable right, the gender mainstreaming method has had some influence in promoting gender equality in the EC. The method, which is intended to integrate the gender equality objective into the policies that have direct or indirect impact on the live of women and men, has widen the principle of gender equality and brought more attention to the subject. After all, law alone can't change the way we think.

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