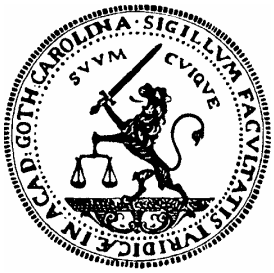


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# Formal or Substantive Equality? - Gender Equality in European Community law

**Abstract:** Through directive 76/207, the subsequent directives 2002/73 and 2006/54, the European Community has the ambition of fighting inequalities between the sexes as regards access to employment, vocational training and promotion and working conditions. The importance of the principle of Equal Opportunities has gradually grown on the general principle of Equal Treatment but the liberal idea of Formal Equality remains the rule. On a European Community level, the problem of conflicting principles and theories has not yet been considered to a satisfactory extent. In light of an exposition of the European Community development during more than three decades, as well 60 cases from the ECJ, I draw the conclusions that the approach chosen by the European Community is not likely to be of redistributive nature, but to uphold the hierarchical and sexual dichotomy. Thus, the European Community is part in the gender-role socialization.

Master thesis
30 credits

Supervisor: Professor Hans Henrik Lidgard

Field of study: EC Law

Spring 2009

# Contents

# Summary

Our conceptual understanding is a dual one, where opposing pairs define our world. This dualistic system is sexualised, hierarchical and normative when it comes to gender perceptions. In the liberal tradition of ideas, the meaning of Equality can be deduced from the concept developed by Aristotle: treat like cases as like, and treat different cases differently.

During more than three decades, the European Community has been legislating against inequalities between men and women. In the late seventies, the first directive on Gender Equality in relation to access to employment, vocational training and promotion, and working conditions was adopted. Since then, the ECJ has had to interpret the directive in a number of cases and two new directives have amended and recast the original directive.

Under Community law, the principle of Equal Treatment is the fundamental principle in relation to sex-inequalities and work and it springs from the liberal idea of Formal Equality. There are exemptions to this principle; a person's sex may be a determining factor in relation to the nature of the occupation, protective measures in relation to pregnancy or maternity and positive action-measures under the principle of Equal Opportunities. In the liberal tradition of ideas, positive action in some of its forms may be regarded as discrimination. However, under Cultural Feminism, positive action is a way of attaining Substantive Equality.

It is apparent that focus in European Community law has shifted over the years, starting out by the development of the principle of Equal Treatment and continuing by the embracing of positive action-methods. Nevertheless, the congruence of the two concepts has been continuously questioned and there is an inherent conflict between the concepts that the legislators and the ECJ have been unwilling to focus on.

Through European Community law, the principle of Equal Treatment is objectified and made the rule, whereas the concept of Equal Opportunities is subjectified and considered as an exception. There seems to be a jurisprudential confusion in respect of the central "sameness-difference" distinction. Gender Equality manifested through anti-discrimination laws including provisions on Equal Opportunities, as interpreted by the ECJ, cannot truly be of a substantive nature; where Formal Equality establishes male-norms, Substantive Equality risks having the effect of cementing stereotyped views on men and women. Greater demands on a more theoretic discussion on sex, gender and Equality must be made in relation to European Community law.

# Sammanfattning

Vår begreppsmässiga uppfattning är tvådelad; motsatta ordpar definierar vår världsuppfattning. När det kommer till vår uppfattning om kön, är detta dualistiska begreppssystem sexualiserat, hierarkiskt och normativt. Inom den liberala idétraditionen härrör begreppet *jämlikhet/jämställdhet* från Aristoteles föreställning: behandla lika situationer lika, och behandla olika situationer olika.

I över trettio år har den Europeiska Gemenskapen lagstiftat mot ojämlikhet mellan män och kvinnor. I slutet av sjuttiotalet antogs det första direktivet om jämställdhet mellan könen i förhållande till tillgång till anställning, yrkesutbildning och befordran samt arbetsvillkor. I ett flertal rättsfall har ECJ sedan dess fått tolka direktivet i förhållande till arbetsrelaterad diskriminering på grund av kön. Det ursprungliga direktivet har förändrats genom införandet av två nya direktiv.

Inom Gemenskapsrätten är principen om likabehandling den grundläggande principen i förhållande till arbetsrelaterade ojämlikheter mellan könen. Principen härstammar således från liberala idétraditionen om formell *jämlikhet/jämställdhet*. Det finns undantag från denna princip: en persons kön kan vara en avgörande faktor på grund av verksamhetens natur, bestämmelser till skydd vid graviditet och moderskap samt positiv särbehandling i enlighet med principen om lika möjligheter. Inom den liberala idétraditionen kan positiv särbehandling under visa former likställas med diskriminering. Enligt särartsfeministiska idéer är dock positiv särbehandling en metod för att uppnå reell jämställdhet.

Det är uppenbart att Gemenskapsrätten ändrat fokus över åren. Det började med att Gemenskapsrätten utvecklade likabehandlingsprincipen, för att därefter anamma principen om positiv särbehandling. Frågan om huruvida de två principerna är förenliga har länge debatterats; det finns en inneboende konflikt mellan principerna, en konflikt som lagstiftarna och ECJ varit ovilliga att fokusera på.

Inom Gemenskapsrätten är likabehandlingsprincipen objektifierad och gjord till huvudregel medan principen om lika möjligheter subjektifieras och uppfattas som undantag. Det verkar råda en rättsvetenskaplig förvirring i förhållande till den centrala distinktionen mellan ”lika-olika”. Mot bakgrund av hur ECJ tolkat lagstiftningen är det osannolikt att reell jämställdhet mellan könen uppnås genom anti-diskrimineringslagstiftningen, detta trots att principen om lika möjligheter inkorporerats. Genom principen om formell *jämlikhet/jämställdhet* upprätthålls manliga normer, genom principen om reell *jämlikhet/jämställdhet* finns en risk att den stereotypa synen på kön vidmakthålls. Det måste ställas större krav på en mer teoretisk EG-rättslig diskussion om kön, genus och *jämlikhet/jämställdhet*.

# Preface

”Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view.”[1] With this thesis, I hope to be able to contribute to the continuing dialogue on gender equality law. It is an exciting field of study, open to many different opinions.

My heartfelt thanks to Professor Hans Henrik Lidgard for guidance and, in particular, for setting the deadline.

All my love to Patrik and Sixten, simply for being part of my life.

Malmö, 2009-04-12.

[1] Robert Maynard Hutchins (1899-1977), educational philosopher, http://www.quotationspage.com/subjects/education/31.html and http://en.wikipedia.org/wiki/Robert_Maynard_Hutchins#Quotes

# Abbreviations

| | |
|---|---|
| COM | Commission communications |
| EC | European Community |
| ECJ | European Court of Justice |
| ECR | European Court Reports |
| EEC | European Economic Community |
| i.e. | that is |
| Ibid. | ibidem; the same place |
| OJ | Official Journal of the European Communities |
| p. | page |
| Para. | Paragraph |
| Paras. | Paragraphs |
| SFS | Svensk Författningssamling |

# 1 Introduction

On 17 April 2002, I took part in the conciliation committee procedure on the European Parliament report on Equal opportunities between women and men.[2] The outcome of that meeting was directive 2002/73, amending directive 76/207 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. Directive 2002/73 has been considered "an important milestone" in realizing gender equality all over society.[3]

Definitions on equality and the political will to combat discrimination are topics of ongoing interest, in the European Community as well as in Sweden.[4]

Departing from my knowledge of what took place during the conciliation meeting; my purpose is to question the somewhat routine-like application of the concept of Gender Equality.

Connecting lack of equality between the sexes to discrimination is not only widely accepted but also relatively uncontroversial. The prohibition on discrimination on grounds of sex is universally considered as a fundamental human right, enshrined in a major part of the international instruments on human rights.[5] In European Community law, equality between men and women is a fundamental principle, today present in the Treaty[6] as well as developed through case law by the ECJ. The ECJ has repeatedly held that the principle of Equal Treatment between men and women is a fundamental European Community principle and that the right not to be subjected to discrimination on grounds of sex is one of the fundamental personal human rights that has to be protected in European Community law.[7]

In the nineteen seventies, the European Community vigorously embarked upon the problem of inequality between the sexes by developing the principle of Equal Treatment. The first area regulated was equality in

[2] For the legislative procedure, please see http://www.europarl.europa.eu/oeil/file.jsp?id=197482

[3] European Parliament resolution of 15 January (2008/2039(INI)), recital C.

[4] See the recent all-embracing Swedish law against discrimination, SFS 2008:567, as well as the new community proposal to regulate a mandatory maternity leave, COM 2008/637.

[5] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 27-28.

[6] See for example articles 2, 3(2), 13, 137 and 141EC.

[7] Case 20/71 *Luisa Sabbatini, née Bertoni, v European Parliament* [1972] ECR 345, para. 3; Case 21/74 *Jeanne Airola v Commission of the European Communities* [1975] ECR 221, para. 9; Case 149/77 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, paras 26-27; Joined cases 75 and 117/82 *C. Razzouk et A. Beydoun v Commission of the European Communities* [1984] ECR 1509, para. 16; Case C-13/94 *P v S and Cornwall County Council* [1996] ECR 2143, paras 18-19; Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR 743, para. 56.

relation to pay[8], but soon followed a directive[9] making the principle of Equal Treatment more generally applicable to the working and employment situation as a whole. Along with one amending directive and one repealing and recasting directive 76/207, extensive case law during almost three decades has developed and clarified important key-issues in the understanding of the concept of Gender Equality.

The initial, formalistic approach to Gender Equality has been criticised for being too conservative and contradictory and, as will be seen, the prohibition on discrimination and the notion of Equal Treatment have gradually been complemented with a more substantive approach.[10] The relationship between the different approaches, as well as their relationships to different understandings of the true nature of the sexes, is essential when analysing the concept of Gender Equality.

## 1.1 Purpose

Law is not isolated from society; the law has its origin in general perceptions and generates consequences in people's daily life. Gender Equality is a concept, common and judicial, which importance gradually has grown in the European society as well as in European Community law. However, the concept is somewhat ambiguous in the sense that it is very broad and could be interpreted in different ways. The purpose of this essay is to unveil how legislation and case law on the conceptual meaning of Gender Equality on a European Community level have developed, and in particular the significance of Formal and Substantive Equality.

Extending the scope of this essay beyond giving an account of and interpreting a legal key concept, I intend to deal with the question of if and how law is part of the gender-creating process. Laws prohibiting sex-discrimination aims at ironing out the importance of which sex one person has. Does European Community law on Gender Equality really accomplish the goal of making sex irrelevant or does it simply ignore factual inequalities or even reinforce stereotyped roles?

My approach to the subject is not a new one.[11] As Judith Butler has put it:

[8] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19.2.1975, p. 19-20.
[9] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39 , 14.2.1976, p. 40-42.
[10] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008) p. 947.
[11] See for example Schömer, Eva, *Konstruktion av genus i rätten och samhället*, p. 39. Schömer assumes that social norms reflect in the application of law under pretext of being objective.

"Feminist critique ought also to understand how the category of 'women', the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought."[12]

## 1.2 Method and materials

My approach to the subject is partly a semantic one, examining the conceptual meaning of Gender Equality. In line with the approach, the exact wording used in law and jurisprudence are of special importance and hence, the use of direct quotes are sometimes inevitable in order to attain reliability. The methodology is a traditional dogmatic one, examining and comparing law, case law and doctrine, from the nineteen seventies until today. Primarily, I have turned to primary and secondary European Community legislative acts and case law from the ECJ. In some cases, the opinions by the General Advocates of the ECJ add additional interesting reasoning to the judgements, and therefore I have chosen to give an account of such opinions. Literature, not restricted to legal doctrine, has been an important source of knowledge and inspiration, as has the Internet.

However, the question of if and how gender is maintained or created in European Community law share common ground in different sciences. Putting law into a social context, parting from theories on gender and concluding in an attempt to explain how legal approaches towards equality are part of the gender-creating process, necessitates a wider methodological approach.

My main object is to study jurisprudence from a gender perspective and my way of applying key concepts are in accordance with how they have been applied in reference literature. However, even in literature, conceptual confusion prevails.[13].

## 1.3 Delimitations

Gender Equality is a vast concept with growing importance in the European Union discourse.[14] Treating all law, case law and doctrine concerning the development of the concept would not be feasible. It should not be taken for granted that the concept and perception of Gender Equality are the same in all European Community policy areas. However, I do believe that an in-depth study of the development of a concept in one judicial area can give guidance to and create an understanding of the very same concept in another judicial area.

[12] Butler, Judith, *Gender Trouble. Feminism and the Subversion of Identity*, p.5.
[13] For an account of a more philosophic debate on the concept of Equality, I refer the interested readers to the Master Thesis of Strand, Magnus, *The Formal Concept of Discrimination.*
[14] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008) p. 876.

The workplace could easily be seen as a context for social inequalities.[15] Regulating people's access to employment and promotion, vocational training and other working conditions is likely to have an important impact on the opportunities of men and women in other areas as well, such as the distribution of domestic work, the responsibility for childcare, economic consequences in social security schemes, levels of pay etc.

As the aim of achieving equality between men and women first appeared under the first pillar and article 119 EEC (now article 141 EC), "the spiritual parent of all the later equality legislation"[16], by addressing inequalities in pay, and as focus on Gender Equality in European Community legislation for a long time has been on discrimination related to employment,[17] I too will emphasise on the judicial development of the concept of Gender Equality in working related matters.

The distinction between paid and unpaid work, between market work and domestic work derives from industrialization.[18] Examining both kinds of work from a gender perspective would be tempting on account of the very gendered division between paid work and unpaid work. However, since this is an essay focusing on European Community legislation, and since the European Community has been and still is reluctant to legislate about the private sphere, I will focus on paid work.

The earliest and most general legislative act is directive 76/207.[19] Due to the limited space, I will focus on this directive and case law thereto related. The general applicability of the directive, the extensive amount of jurisprudence developed under it and the numerous amendments made to it whilst the subject matter remains the same are other reasons justifying the selection.

As the process of the conceptual development of Gender Equality is under examination, Directive 2002/73, amending the directive from 1976, as well as directive 2006/54 that repeals the earlier directives will also be scrutinized.[20] The three directives concerned, as well as case law, will only be discussed in respect of the conceptual meaning of Gender Equality. Consequently, questions about burden of proof, remedies etc will be put aside. Putting the two new, recent directives into context, I hope this essay

[15] Padavic, Irene; Reskin, Barbara, *Women and Men at Work*, p. 37.
[16] Ellis, Evelyn, *EC Sex Equality Law*, p. 322.
[17] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008) p. 874.
[18] Padavic, Irene; Reskin, Barbara, *Women and Men at Work*, p. 2.
[19] Council Directive 76/207/EEC, of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39 , 14.2.1976, p. 40-42.
[20] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5.10.2002, p. 15–20 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, p. 23–36.

will contribute to earlier attempts to dismantle the concept of Equality on a European Community-level.

By adopting this approach to the subject, by starting from the first regulative attempt and by focusing on a specific subject matter, I imagine I facilitate for the reader to follow the different recourses made by the legislators, the ECJ and in doctrine.

## 1.4 Structure

I believe it is of importance to the reader to be able to distinguish some main differences and features in gender theories, in order to put European Community law in its theoretical context. Consequently, in chapter 2, I give a brief account of some of these theories. In chapter 3, I attempt to characterize various key definitions. In chapter 4 the reader will be guided through the European Community legislation and case law at issue, initially through a brief outline of the legal development, and then by focusing on the original directive 76/207. Taking the general principle of Equal Treatment as a starting point in chapter 4.2.1, definitions of discrimination will follow. In 4.2.2 – 4.2.4 I guide the reader through the, by law, recognized exceptions to the general principle. In chapter 4.3, there is a possibility to a quick glance at directives 2002/73 and 2006/54. Being a dense chapter, there is a necessity to wind up chapter 4 with a summary. Analysing law and case law presented under chapter 4 is a major part of this essay; consequently, the analysis is afforded its own chapter. In chapter 5, I start by examining the relationship between different perceptions on Gender Equality as well as the special features of the issue of comparison. I then focus on dismantling legal perceptions on gender. My conclusions are set forth in chapter 6.

# 2 Theory

## 2.1 Normative dualism

Feminist theory is not a uniform theory but contains many different alignments. What unites feminist legal theorists is the idea of law not being separable from politics and that law, as a part of a male-dominated society, in itself is patriarchal.[21] Feminist scholars stress the interconnection between the "public" and productive economy and the "private" and reproductive work and consequently advocate that politics should not be separated from the "private sphere".[22]

Our conceptual understanding is ever since the antique Greece a dual one, where opposing pairs define our world: public/private, objective/subjective, rational/irrational, thought/feeling etc. This dualistic system is sexualised and hierarchical in the sense that half of each dualism is considered masculine and the other half feminine, where the masculine half is seen as superior to the feminine one. This system is not only descriptive but also normative when it comes to gender perceptions.[23]

> "Man for the field and woman for the hearth:
> Man for the sword and for the needle she:
> Man with the head and woman with the heart:
> Man to command and woman to obey;
> All else confusion."[24]

Another feature of the system is that law as such is identified with the male side.[25] Law is drafted, implemented and interpreted in situations were men are in majority and this, argues feminists, is reflected in law.[26]

> "Law is supposed to be rational, objective, abstract, and principled, as men claim they are; it is not supposed to be irrational, subjective, contextualized, or personalized, as men claim women are."[27]

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[21] McLeod, Ian, *Legal Theory*, p. 159
[22] Monk, Janice; Garcia-Ramon, Maria Dolors, *Placing women of the European Union* in *Women of the European Union, The Politics of Work and Daily Life*, p. 1.
[23] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 71-72 and Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 691.
[24] Alfred Lord Tennyson, *The Princess,* Part V
http://www.everypoet.com/Archive/poetry/Tennyson/tennyson_contents_the_princess_5.htm
[25] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique,* p. 691.
[26] Lerwall, Lotta *Förbud mot könsdiskriminering i internationell rätt* in *Lika inför lagen? Rätten ur ett genusperspektiv*, p. 10-11.
[27] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 692.

## 2.2 Sex or gender

The common notion of gender is that it, as opposed to just referring to sex and hence the biological differences between the sexes, takes into account the social and cultural differences between men and women. The differences change over time and differ from society to society. Gender is created and maintained by economical, social and cultural structures and men and women are assumed to have different responsibilities and features; characteristics that are valued differently.[28] Law and judicial bodies are part of the gender-creating process, they are part of the gender-role socialization.[29]

## 2.3 Sameness-difference, power and postmodernism

Many attempts have been made to classify the various categories of feminist theories. However, in order to simplify for the reader I distinguish four main branches of theories; liberal, cultural, radical and postmodern.

In the liberal tradition of ideas, the meaning of Equality can be deduced from the concept developed by Aristotle: treat like cases as like, and treat different cases differently.[30] Consequently, there is an important division in the contemporary feministic debate, the heart of the matter being the true nature of the sexes and whether women should be treated in the same way or differently from men. This schism of "sameness-difference" generates different solutions to the problem of sex-inequalities. If men and women are more or less alike, then law should focus on Formal Equality, i.e. men and women should be treated in the same, non-discriminatory way. If men and women, on the other hand, are different whatever the cause, sex equality law should focus on substance as well as form.[31]

### 2.3.1 Sameness-difference

#### 2.3.1.1 Liberal feminism, sameness and Formal Equality.

Liberal feminism assumes that women are no different from men and consequently it seeks to promote women's rights to those of men. In other terms, it rejects the sexualisation of the dualisms but not the

[28] Byrån för Europeiska gemenskapernas officiella publikationer, *100 Jämställdhetsord, En ordlista om jämställdhet mellan kvinnor och män*, p. 22 and Zollinger Giele, Janet; Stebbins, Leslie F, *Women and Equality in the Workplace,* p. 1-2.
[29] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 110 and Padavic, Irene; Reskin, Barbara, *Women and Men at Work,* p. 53.
[30] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 28; Strand, Magnus, *The Formal Concept of Discrimination*, p. 6. and http://plato.stanford.edu/entries/equality/,
[31] Ward, Ian, *A Critical Introduction to European Law,* p. 180.

hierarchization.[32] Returning to the opposing dualistic pairs presented in chapter 2.1, a liberal feminist would argue that objectivity should be more valued than subjectivity but that there is no reason to classify objectivity as a masculine quality and subjectivity as a feminine quality. This sameness-approach has generated the notion of Formal Equality and the principle of non-discrimination.[33] By focusing on Formal Equality and Equal Treatment, effectuated in judicial terms through anti-discrimination laws, liberal feminism has been subjected to criticism as to disregard the roots of inequalities as well as the result of Equal Treatment practices.[34]

#### 2.3.1.2 Cultural feminism, difference and Substantive Equality.

Cultural feminism, alternatively known as difference theory, acknowledges that there are true differences between the sexes, biologically, psychologically as well as socially but that female characteristics are undervalued.[35] Sexualisation but not hierarchization of dualism, argue these feminists.[36] To return to our previous example of objectivity and subjectivity, subjectivity may very well be regarded as a feminine characteristic but should be equally valued as objectivity. Cultural feminists claim that men and women are not only to be treated equally, but also differently, that the principle of Equal Treatment must be complemented with provisions affording specific conditions and rights to women since they, in some aspects, are different from men, biologically or even psychologically.[37] According to these feminists, Formal Equality does not have any neutral result.[38] There are two different approaches under the difference-theory; one perspective according to which women as a group are in need of special protection because of their inferiority to men and another according to which women must be given "special compensation or consideration" for having other tasks and burdens in life than men.[39] Provisions in law, referring to Equal Opportunities as an exception to the general principle of Equal Treatment are expressions in favour of granting such special treatment to one sex.[40] Substantive Equality does not hence only focus on the treatment but also on the "quality in result".[41] On the other hand, it could be that such differences between the sexes are cultural, in reality gendered, that they differ over time and that they, consequently,

[32] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 693.
[33] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 429.
[34] McLeod, Ian, *Legal Theory*, p. 155.
[35] Ibid. p. 155-156 and Zollinger Giele, Janet; Stebbins, Leslie F, *Women and Equality in the Workplace*, p. 56.
[36] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 695.
[37] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 34, 35.
[38] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 699.
[39] Zollinger Giele, Janet; Stebbins, Leslie F, *Women and Equality in the Workplace*, p. 58.
[40] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 115.
[41] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 429.

can be influenced by politics and law. If this is the case, treating women differently from men risk manifesting stereotyped roles.[42]

#### 2.3.1.3 Critique

A common critique against both liberal feminism and cultural feminism is that the use of a comparative method, when establishing whether a measure is discriminatory or not, which is the case in both Formal and Substantive Equality, results in, given that women in general are in an inferior position to men, maintaining and reinforcing the male norm.[43] To put it differently, the mere fact that anti-discrimination laws contain an element of comparison renders them subjective since they either favour the male side of the dualism, as in Formal Equality or reinforces stereotyped roles, as in Substantive Equality.[44] Moreover, the element of comparison requires knowledge of which cases are alike and which cases differ. Objective, static criteria of alikeness are hardly conceivable. Applying the principle of Equal Treatment to an unequal situation risks manifesting inequalities and vice versa.[45] The element of comparison has also been criticised for being paradoxical:

> "Socially, one tells a woman from a man by their difference from each other, but a woman is legally recognized to be discriminated against on the basis of sex only when she can first be said to be the same as a man."[46]

### 2.3.2 Radical feminism and powerstructures

Radical feminist reject the liberal idea of female assimilation into male norms and a male world because, argue radical feminist, women should not be defined by men but on their own terms. According to radical feminism, also known as dominance theory, the main problem is that women as a class is subjected to male domination and the main task is hence to change the underlying structures of oppression. Formal Equality is incapable of resulting in real, factual equality between men and women since women are in a subordinate position to men and since only women are capable of understanding the oppression affecting them.[47]

Consequently, the discussion on sameness-difference is rejected as of no significance since the preferential right of interpretation is a question of

[42] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 35 and Zollinger Giele, Janet; Stebbins, Leslie F, *Women and Equality in the Workplace*, p. 57.
[43] McLeod, Ian, *Legal Theory*, p. 155.
[44] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 699.
[45] Schömer, Eva, *Konstruktion av genus i rätten och samhället*, p. 355.
[46] MacKinnon, Catharine A, *Toward a Feminist Theory of the State*, p. 216.
[47] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 34.

power.[48] By claiming Equal Treatment or Equal Opportunities, women are approving a patriarchal social and judicial order.[49]

#### 2.3.2.1 Critique

Radical feminists have been criticised for victimizing women. If the road map towards true sex equality is to be drawn by women, then women through out history are accountable of being too passive and not succeeding in fighting oppression.[50]

### 2.3.3 Postmodernism and individualisation

Taking postmodernism as a starting point in feministic theory, results in the abandoning of unsolved matters of whether men and women are alike or different. The meaning of sex is dependent on and differs in different individual situations.[51] The post modernistic view questions the idea of women as a homogeneous group and the possibility of defining reality in objective terms. Gender categories are social constructions but women's experiences differ and there is no common solution to gender inequality that would benefit all women.[52] The dualistic depiction of men and women is questioned.[53]

#### 2.3.3.1 Critique

As individuals, men and women belong to a society and range under a normative set of rules affecting their lives. Since the very reason to legislate against discrimination must be the perception of a structural and systematic discrimination, resulting in individual consequences but affecting individuals only depending on to which category, men or women, that individual belongs; critics to the post modernistic view argue that it is imperative to generalise and make a comparative study of the conditions affecting the groups at issue.[54]

[48] McLeod, Ian, *Legal Theory*, p. 156-157.
[49] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 700.
[50] Zollinger Giele, Janet; Stebbins, Leslie F, *Women and Equality in the Workplace*, p. 182.
[51] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 37-38.
[52] McLeod, Ian, *Legal Theory*, p. 157-158.
[53] Olsen, Frances, *The Sex of Law* in *The Politics of Law, A Progressive Critique*, p. 697.
[54] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 213.

# 3 Terminology

## 3.1 Gender Equality

There are different perceptions of the meaning of Gender Equality. While some scholars say that Gender Equality translates into the absence of discrimination, or that equality and discrimination are each other's antithesis others claim that while Gender Equality is an extensive goal; prohibition on discrimination along with positive actions as well as other methods, such as gender mainstreaming, are appropriate tools in achieving that goal. The different perceptions originate in whether the concept of Gender Equality is understood as comprising Formal or Substantive Equality. Where Formal Equality acknowledges no special treatment on grounds of sex, Substantive Equality aims at equalizing the outcome, the result, and hence preferential treatment or even quotas in favour of one sex can be consistent with Substantive Equality.[55]

## 3.2 Sex Discrimination

Discrimination is "…the application of different rules to a comparable situation or the application of the same rule to different situations".[56]

A general definition of discrimination on grounds of sex consists of two premises: an "adverse treatment" and "the grounding of that treatment in sex".[57]

The original understanding of discrimination was that of direct discrimination; sex-discrimination occurs when a person of one sex, in a situation covered by a discrimination prohibition, can show that she has been treated differently than a person of the other sex in the same situation and that the person's sex is the very reason for that different treatment.[58]

Distinction must however be made between direct discrimination and indirect discrimination. When there is a direct connection between the adverse treatment and a person's sex, direct discrimination on grounds of sex is at place.[59] Under European Community law, such adverse treatment

[55] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 76.
[56] Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR 4185, para. 30 and Case C-342/93 *Gillespie and Others v Northern Health and Social Services Board and Others* [1996] ECR I-475, para. 16.
[57] Ellis, Evelyn, *EC Sex Equality Law*, p. 136.
[58] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 29
[59] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 134.

may however be justified under certain conditions.[60] The concept of direct discrimination has been criticised for being insufficient; formally gender neutral provisions can have discriminatory effects independent of whether there is a discriminatory intent or not.[61]

Consequently, the concept of indirect discrimination acknowledges the fact that gender-neutral provisions and practices can have discriminatory effects. If a person can prove that conditions that appear objective actually are easier to attain for a person of one sex than for a person of the other sex, and regardless of the intent, the burden of proof shifts to the defendant who must show that the conditions are gender neutral or there is indirect discrimination.[62] This broader understanding of discrimination was introduced in European Community law in the mid-nineteen seventies.[63]

## 3.3 Equal Treatment

The European Community principle of Equal Treatment refers to the first line in the Aristotelian notion of Equality: treat like cases alike. Consequently, the ECJ has held that "The principle of equal treatment can apply only to persons in comparable situations…"[64] Discrimination under Equal Treatment provisions can only be at stake when like cases are treated differently but not when different cases are treated equally. Discrimination provisions connected to Equal Treatment instruments are therefore clearly connected to liberal feminism and the notion of Formal Equality.[65]

## 3.4 Positive action, preferential treatment and quotas

Positive action, alternatively known as affirmative action, is actions of a wide range promoting substantive Gender Equality, under European Community law often referred to as the Principle of Equal Opportunities.[66] The principle of Equal Opportunities acknowledges special treatment in favour of an unfavoured group since it aims at combating existing inequalities in real life, recognizing that men and women do not have the same conditions of life or even the same opportunities. Contrary to the principle of Equal Treatment, the underlying understanding of positive

[60] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 431, for an account of the conditions, please see chapters 4.2.2-4.2.4.
[61] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 30, 31.
[62] Ibid.
[63] Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para. 18.
[64] Joined cases C-122/99 P and C-125/99 P *D and Kingdom of Sweden v Council of the European Union* [2001] ECR 4319, para. 48. The case was amongst other about interpretation of the principle of equal pay.
[65] For a more developed reasoning, please see Strand, Magnus, *The Formal Concept of Discrimination*, p. 11.
[66] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 435.

action is that equality cannot be attained by treating men and women in the exact same way since men and women, in some aspects, are different or that the expectations on men and women differs.

Under positive action, legislators and employers are given an incentive to actively strive for Substantive Equality, as opposed to their responsibility under non-discrimination laws of just ceasing to discriminate.[67] A narrower concept is preferential treatment, which stand for differential treatment on grounds of sex where the underrepresented sex is given advantages when compared to the other sex. Through quotas, priority is given to persons of the under-represented sex, until a certain number of places in a certain area are occupied. [68]

[67] Holzer, Harry, J.; Neumark, David *Equal Employment Opportunity and Affirmative Action* in *Handbook on the Economics of Discrimination*, p. 261.
[68] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 339, 435.

# 4 European Community law

Paying specific attention to the law of the market, regulating workers conditions is an important task for the European Community. Workers are, through European Community law and a policy area often referred to as "social law and policy", given specific rights, such as rights for women.[69] The European Community has nevertheless had problems in creating a coherent social policy since such a policy might interfere with market efficiency and because of the Member States unwillingness to delegate power in social policy matters to the European Community.[70]

There are different opinions on the raison d´être of the European Community legislation on Gender Equality. Some argue that striving for Equality is incompatible with the free market but that fighting inequalities must take priority over market efficiency. Others claim that regulating market conditions in order to attain Equality will actually render the market even more efficient.[71] Where the necessity of legislation on Gender Equality is debated, the true meaning of the concept of Gender Equality remains therefore somewhat ambiguous.

## 4.1 Developing the concepts

The first treaty provision relating to Gender Equality was article 119 EEC (now article 141 EC) of the Rome Treaty; the treaty establishing the European Community in 1957. The article introduced the principle of equal pay between men and women. The principle of equal pay had a twofold objective. One was economical since the prohibition on all Member States to discriminate women in pay was expected to improve intra-community competition in labour costs.[72] However, according to the ECJ, article 119 EEC also had a social objective, deriving from the Preamble of the Treaty, intending "…to ensure social progress…" and improve "…living and working conditions…"[73] In 2000, the ECJ established that the social aim, an "expression of a fundamental human right", was superior to the economic aim.[74]

The ECJ initially interpreted article 119 EEC restrictively and held that even if the elimination of sex discrimination was a general principle of European Community law, article 119 EEC did not cover other situations than those

[69] Ward, Ian, *A Critical Introduction to European Law* p. 173.
[70] Ibid. p. 174.
[71] Ibid. p. 180.
[72] Case 43/75, *Defrenne v. Sabena* [1976] ECR 455, para. 9.
[73] Ibid. para. 10.
[74] Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* [2000] ECR 743, para. 57.

relating to pay discrimination.[75] As opposed to the specific principle of equal pay, the fundamental and general principle of Equal Treatment was held not directly applicable due to the lack of explicit provision in the treaty. The principle had no direct effect, and required additional implementing legislations in order to grant people rights by which they could challenge discriminatory national legislation or employer practice.[76] In line with the lack of a treaty article prohibiting sex-discrimination in general, there was also no explicit legal base in the treaty for the adoption of a directive promoting Equal Treatment for men and women in regards to employment and occupation. Nevertheless, soon after the adoption of directive 75/117 on equal pay, the Council agreed on a directive on Equal Treatment in matters relating to employment: Directive76/207. Justifying the adoption, the Council refers to article 235 EEC, now article 308 EC[77], and points to its resolution of 21 January 1974 on a social action programme[78] where one of the priorities is to achieve equality between men and women in the area of access to employment, vocational training and promotion and working conditions. Moreover, the Council legitimizes the directive by stressing that Equal Treatment for male and female workers is one of the European Community objectives. In addition, one of the objectives of the directive is to harmonize living and working conditions.[79]

Ever since the adoption of directive 76/207, the principle of Equal Treatment has been the main rule in European Community Gender Equality legislation concerning employment related matters. However, initially, it was only a principle of secondary legislation. It was not until amendments made by the Treaty of Amsterdam in 1997 that article 119 EEC, now article 141 EC, actually extended the non-discrimination principle of Equal Treatment of men and women to "matters of employment and occupation" as well as granting competence to the European Community in those respects. Even though directive 76/207 contained a provision on Equal Opportunities[80], it was equally not until the Treaty of Amsterdam that the principle of Equal Treatment was supplemented with the principle of Equal Opportunities on a treaty level.[81] Through article 141(4) EC, the Member States responded to case law on quotas by establishing that Member States are allowed to maintain or adopt:

> "…measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a

[75] Case 149/77, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, para. 24.
[76] Ibid. paras. 30, 33.
[77] Article 308 EC delegates powers to the Community to attain a Community objective for which the Treaty has not provided necessary powers.
[78] Council Resolution of 21 January 1974 concerning a social action programme, OJ C 13, 12.02.1974, p. 1-4.
[79] Council Directive 76/207/EEC, preamble.
[80] Ibid. article 2(4).
[81] Article 141(3), 141(4) EC; Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008) p. 885.

> vocational activity or to prevent or compensate for disadvantages in professional careers."

The language is gender neutral but in a declaration appended to the treaty, it becomes clear that positive action measures mainly should aim at improving women's situations.[82] This derogation from the principle of Equal Treatment is, according to the treaty, in accordance with the strive to ensure equality in practice in working life.[83]

Even though the principle of Equal Opportunities has complemented the main principle of Equal Treatment ever since directive 76/207, there has been some resistance to making the concept of Gender Equality embracing positive action. In the early nineteen eighties, a proposal for a directive on positive action programmes was rejected, resulting in a non-binding recommendation.[84] One of the purposes of positive action was however commented on in a very clear manner:

> "…existing legal provisions on equal treatment […] are inadequate for the elimination of all existing inequalities…"[85] and parallel action must be taken in order "… 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…".[86]

It is apparent that focus has shifted over the years, starting out by developing the principle of Equal Treatment, continuing by embracing positive action-methods and acknowledging its coherence with the principle of Equal Opportunities.[87] Through the adoption of a gender mainstreaming approach in European Community policies where "… the Community shall aim to eliminate inequalities, and to promote equality, between men and women."[88] the importance of Gender Equality in European Community policies has grown.

The path chosen in the strive for Gender Equality is confirmed by The Charter of Fundamental Rights where discrimination in general, including discrimination on grounds of sex, is to be prohibited[89] and the principle of equality between men and women to be "ensured in all areas" without prejudice to measures providing for "…specific advantages in favour of the

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[82] Declaration on Article 119(4) of the Treaty establishing the European Community, OJ C 340, 10.11.1997, p. 136.
[83] Article 141(4) EC.
[84] Ellis, Evelyn, *EC Sex Equality Law*, p. 246.
[85] Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, OJ L 331, 19.12.1984, p. 34 – 35, seventh preamble.
[86] Ibid. article 1 (a).
[87] Hantrais, Linda *From Equal Pay to Reconciliation of Employment and Family Life* in *Gendered Policies in Europe, Reconciling Employment and Family Life*, p. 2.
[88] Article 3(2) EC.
[89] Charter of fundamental rights of the European Union, OJ C 364, 18.12.2000, p. 1–22, article 21.

under-represented sex".[90] According to the Lisbon Treaty, the European Community shall "…support and complement the activities of the Member States…" in creating "…equality between men and women with regard to labour market opportunities and treatment at work…"[91]

## 4.2 Directive 76/207

When compared to the subsequent directives 2002/73 and 2006/54, directive 76/207 contains little information. Many of the provisions are drafted similarly to those in directive 75/117 on equal pay, however, directive 76/207 exempts a number of situations from the general principle of Equal Treatment.[92]

The directive is of general application, and thus includes employment in the public sector.[93] Nevertheless, in *Alexander Dory*, the limited scope of the directive came at issue. German compulsory military service for men only was challenged for discriminating men on grounds of such a service often resulting in delayed carriers when compared to women. The ECJ agreed on the discriminatory nature but exempted the choice of military organization from the application of the directive and European Community law in general because decisions on organizations of armed forces under internal and external security policies are at the exclusive discretion of Member States.[94] This judgement should be seen in the light of the earlier judgements in *Kriel*[95] and *Sirdar*[96] where the ECJ applied European Community law to situations covering choices of military organizations.[97] To some extent, social security schemes fall outside the scope of the directive.[98] It is also clear that situations including discrimination in pay fall outside the scope of the directive.[99]

According to directive 76/207, the principle of Equal Treatment signifies the absence of discrimination on grounds of sex.[100] It is easy to interpret the

[90] Charter of fundamental rights of the European Union, OJ C 364, 18.12.2000, p. 1–22, article 23.
[91] Consolidated version of the Treaty on European Union and the Treaty on the functioning of the European Union OJ C 115, 9.5.2008, p. 1–388, article. 153, 1. (i).
[92] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2003), p. 886.
[93] Case 248/83 *Commission v Germany* [1985] ECR 1459, para.16.
[94] Case C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR 2479, paras. 36-42.
[95] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR 69.
[96] Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR 7403, para. 15.
[97] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 912.
[98] Article 1(2) and Ellis, Evelyn, *EC Sex Equality Law*, p. 192.
[99] Directive 76/207, second recital in preamble and Case C-342/93 *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR 475, para. 24.
[100] Article 2(1).

directive as only encompassing Formal Equality.[101] However, article 2(4) exempts measures promoting Equal Opportunities from the scope of the principle on Equal Treatment. Initially however, the ECJ interpreted the concept of Equal Opportunities restrictively.[102] Gradually, the ECJ has adopted a more allowing view on positive action measures and the conformity of the principle of Equal Opportunities with the principle of Equal Treatment. The introduction of article 141(4) EC cemented the compliance of the principle of Equal Opportunities with provisions on anti-discrimination. However, the congruence of the two concepts seems to have been continuously questioned.[103]

## 4.2.1 The principle of Equal Treatment

The principle of Equal Treatment is established, and given the meaning that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status".[104] Access to jobs, including selection criteria, any kinds of vocational training, working conditions as well as conditions relating to dismissal must not be discriminatory on grounds of sex.[105] While addressing both direct and indirect discrimination, the directive never actually defines the different terms, nor what separates them.

Three main areas are exempted from the general ban on discrimination; occupational activities and training leading thereto where the sex of the worker constitutes a determining factor[106], protection of women as regards pregnancy and maternity[107] and measures to promote Equal Opportunities[108]. Being exceptions from an individual right they must be interpreted restrictively and be subject to a proportionality assessment.[109] The exceptions will be more thoroughly elucidated in chapters 4.2.2 - 4.2.4.

### 4.2.1.1 Discrimination

#### 4.2.1.1.1 Direct discrimination

In *Dekker*, the ECJ distinguished direct discrimination for the first time as if "…the fundamental reason…" for a treatment "…applies exclusively to one

[101] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 80.
[102] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, para. 21.
[103] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 81-82.
[104] Article 2(1).
[105] Articles 3(1), 4 and 5(1).
[106] Article 2(2).
[107] Article 2(3).
[108] Article 2(4).
[109] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 36; Joined cases C-63/91 and C-64/91 *Sonia Jackson et Patricia Cresswell v Chief Adjudication Officer* [1992] ECR 4737, para. 26; Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, para. 21.

sex."[110] Consequently, the refusal of employing a pregnant woman constituted direct discrimination given the fact that "…only women can be refused employment on grounds of pregnancy…"[111]

When interpreting the scope of the principle of Equal Treatment, cases concerning national legislation on nighttime work have often been at issue. A common feature is that the approach of the ECJ is formalistic rather than substantive.

In *Stoeckel*, a general prohibition on women working night was held to be in breach of the principle of Equal Treatment. The ECJ rejected arguments that the fact that night working women were likely to be subject to attacks should result in such a drastic ban on night work. Other more proportionate measures would be more suitable.[112] Furthermore, the ECJ disagreed with the French government that a ban on night-work could be a way to compensate women for heavier domestic workload than men; the directive is not intended to deal with the organization or division of responsibilities in the family.[113]

In *Minne*, the prohibition on night work concerned both men and women. Derogations from the prohibition however applied differently to men and women. This difference in treatment was held to be in breach of article 5(1) and could not be justified under article 2(3) since the prohibition was of general application and article 2(3) only concerns women in situations of pregnancy or maternity.[114]

In a complex, recent case, a general staff regulation prescribed that every worker with a contract of indefinite duration was appointed as members of established staff. However, part-time working cleaners were exempted from that category and the post of cleaners was limited to women. According to the ECJ, the fact that only women could be hired for part-time work under an indefinite period, did not constitute direct discrimination. However, "…the subsequent exclusion of a possibility of appointment as an established member (…) to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination…"[115] The adverse, and not only differentiated treatment is consequently a necessary requirement under the concept of discrimination.

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[110] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus.* [1990] ECR I-3941, para. 10.
[111] Ibid. para. 12.
[112] Case C-345/89 *Criminal proceedings against Alfred Stoeckel* [1991] ECR 4047, paras. 14 and 16.
[113] Ibid. para. 17.
[114] Case C-13/93 *Office National de l'Emploi v Madeleine Minne* [1994] ECR 371, paras. 12-13.
[115] Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE* [2005] ECR 1789, para. 40.

#### 4.2.1.1.2 Indirect discrimination

Case law on indirect discrimination is, largely, about whether conditions unfavourable to part-time employees when compared to full-time employees are to be considered as indirect discrimination because a large part of the part-time working force in Europe consists of women. The contract as such is of secondary importance. Even contracts on employment that are not specified on working time or organization of work but are determined on a case-by-case basis by agreement between employee and employer are within the scope of the directive.[116]

According to settled case law, indirect discrimination is at stake when it can be concluded that a measure, even though formulated in gender-neutral terms, is of more disadvantage for one sex than the other.[117] But where direct discrimination knows no justifications or derogations apart from those situations explicitly mentioned in the directive, a presumption of indirect discrimination can be altered if the difference in treatment can be justified "…by objective reasons unrelated to any discrimination on grounds of sex…".[118] It is for the national court to assess whether such objective reasons exist.

Two questions become essential when assessing the significance of the notion of indirect discrimination: at what point does the presumption on indirect discrimination come into force and what kind of objective justifications are accepted?

In *Kirsammer-Hack*, the ECJ dismissed the argument that national law, being more advantageous towards full-time employees than those employees working part-time in situations of unfair dismissals, had indirect discriminatory effect on women even though 90% of the part-time working force was women. Even if there would be a presumption of indirect discrimination, the ECJ concluded by saying that such a differential treatment could be justified "…in so far as it is intended to alleviate the constraints weighing on small businesses."[119]

On the other hand, in the later *Steinicke*-case, on a national provision favorable to fulltime workers, there was prima facie evidence of indirect discrimination where 90% of the part-time working force consisted of women.[120]

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[116] Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG* [2004] ECR 9483, paras. 30-31.
[117] Case C-444/93 *Megner and Scheffel v Innungskrankenkasse Rheinhessen-Pfalz* [1995] ECR I-4741, para. 24; Case C-343/92 *De Weerd (née Roks) and Others* [1994] ECR I-571, para. 33.
[118] Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, para. 14; Case 170/84 *Bilka v Weber von Hartz* [1986] ECR 1607, para. 36; Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung* [1989] ECR 2743, para. 15; Case C-1/95, *Hellen Gerster v Freistaat Bayern*, [1997] ECR 5253, para. 35.
[119] Case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* [1993] ECR 6185, para. 35.
[120] Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit* [2003] ECR 9027, paras. 55-57.

Budgetary considerations as such can not justify indirect sex-discrimination but the Member States have a large margin of discretion to assess whether discrimination could be justified under a proportionate and legitimate social policy aim.[121] However, that large margin of discretion must not prejudice the implementation of fundamental European Community principles.[122] It is not possible to justify discrimination on grounds that eliminating the very same discrimination would be costly.[123] Moreover, justifications must be specific and the measure in question suitable for the aim pursued.[124]

### 4.2.2 The nature of the occupation

Member States may choose to exclude from the scope of the directive occupational activities and training that "by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."[125] Member States must, however, continuously "…in the light of social developments…" review "…whether there is justification for maintaining the exclusions concerned."[126]

What kind of occupational activities are excluded and on grounds of which determining factors?

In *Johnston* the ECJ emphasised that all derogations from an individual right, such as the principle of Equal Treatment of men and women, must be in accordance with the principle of proportionality and must be appropriate and necessary for achieving the aim.[127] However, even though stressing that article 2(2) should be interpreted restrictively, the ECJ accepted the argument that policewomen carrying firearms could create "…additional risks of their being assassinated and might therefore be contrary to the requirements of public safety." [128] No evidence of why women would create such additional risks was required.[129]

In the *Male Midwives*-case on national provisions prohibiting men from being midwives, the ECJ held national law to be in accordance with the directive, accepting the argument that "…at the present time personal sensitivities may play an important role in relations between midwife and

[121] Case C-226/98 *Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg* [2000] ECR 2447, para. 42; Case C-322/98 *Bärbel Kachelmann and Bankhaus Hermann Lampe KG* [2000] ECR 7505, para. 34.
[122] Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR 623, para. 75.
[123] Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit* [2003] ECR 9027, para. 68.
[124] Ibid. para. 64.
[125] Council Directive 76/207/EEC, article 2(2).
[126] Ibid. article 9(2).
[127] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 38.
[128] Ibid. para. 36.
[129] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 911.

patient."[130] The ECJ did not consider the arguments by the Commission or the Advocate General that simply giving the patient a choice between male and female midwifes could be a more proportionate way of dealing with personal sensitivities.[131]

When as to considering quotas based on sex for recruitment of police officers, the ECJ laid down that article 2(2) only applies to "specific activities" and that the French system in question was too general. Moreover, the system of recruitment was not sufficiently transparent and consequently contrary to the Directive.[132] As opposed to the ECJ, Advocate General Slynn commented on the alleged need to allot certain posts to a greater number of men than women:

> "It may well be that for some police activities (…) sex could be a determining factor not simply because on average men are bigger and stronger than women (…) but because potential delinquents regard men as more ready to use force, and perhaps because men are more willing to use force."[133]

In *Sirdar*, national law excluded women from service in the Royal Marine under the argument of women, as opposed to men, not being capable of fighting in a commando unit.[134] The ECJ denied that decisions on organisations of armed forces were entirely to the discretion of the Member States.[135] However, Member States enjoy discretion when adopting measures "…in order to guarantee public security…"[136] The ECJ concluded by pointing at the fact that "the specific conditions" of the Royal Marines justified only men taking part and deemed the treatment in accordance with the directive and the principle of proportionality.[137] In no way did the ECJ discuss why and how women could not manage under those specific conditions.

In *Kriel*, the ECJ reaffirmed once again that the directive may apply even to a national decision on how to organise armed forces.[138] National legislation excluding women from military service involving the use of firearms was, according to the ECJ, too general and un-proportionate to be in accordance with the exemption in article 2(2).[139]

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[130] Case 165/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1983] ECR 3431, para. 20.
[131] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 911.
[132] Case 318/86 *Commission of the European Communities v French Republic* [1988] ECR 3559, paras. 25-26 and 30.
[133] Opinion of Mr Advocate General Sir Gordon Slynn, delivered on 24 May 1988, on case 318/86 *Commission of the European Communities v French Republic* [1988] ECR 3559, premises 22.
[134] Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR 7403, para. 7.
[135] Ibid. para. 15.
[136] Ibid. para. 27.
[137] Ibid. para. 31.
[138] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR 69, para. 19.
[139] Case C-285/98 Tanja Kreil v Bundesrepublik Deutschland [2000] ECR 69, para. 29.

### 4.2.3 Pregnancy and maternity

Measures aiming at the protection of pregnant women or maternity are exempted from the application of the directive.[140] The intention behind article 2(3) was to avoid challenges on Equal Treatment grounds against national provisions granting pregnant women or women on maternity leave special rights.[141] Even though the wording in article 2(3) is somewhat unclear[142], it is obvious from case law that exceptions under the article can *only* be justified in situations of pregnancy and maternity.[143]

#### 4.2.3.1 Justifying protective measures

In *Hofmann* a man had been refused payment when he, instead of the mother, stayed at home during the, by national law, period of protected maternity leave. Hofmann challenged national law, arguing that Article 2(3) should be interpreted as only comprising a short-term protection of women, before and after childbirth. When taking care of a child on a longer term, as in this case, national rules should comply with the general principle of Equal Treatment.[144] European Community legislation on parental leave did not exist at the time of this judgement. Distinguishing situations that could be exempted under article 2(3), the ECJ disagreed with Mr Hofmann:

"…by reserving to Member States the right to retain, or introduce provisions which are intended to protect women in connection with `pregnancy and maternity´, the directive recognizes the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."[145]

Justifying the adverse treatment based on sex in respect of parental leave, the ECJ argued that:

"…such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."[146]

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[140] Council Directive 76/207/EEC, article 2(3).
[141] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 922.
[142] "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."
[143] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 310.
[144] Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] 3047, para. 12.
[145] Ibid. para. 25.
[146] Ibid. para. 26.

But by emphasising that "…the Directive is not designed to settle questions concerned with the organization of the family…"[147] the ECJ drew a line between the private sphere and the public sphere.

The reasoning in *Hofmann* was in line with an earlier judgement concerning adoption. Instead of looking at adoption leave as simply a way of fostering emotional ties, regardless of the sex of the parent, the ECJ stressed the importance of assimilating the conditions of an adopted child to those of when a newborn baby enters into the world during "the very delicate initial period". Consequently, national law granting women but not men adoption leave the first three months after the adoption was held in accordance with the directive.[148] The ECJ did not however expound on the imperative of an adoptive child being treated in the very same way as a biological baby, despite the fact that no fysio-biological differences between the sexes, such as pregnancy or breastfeeding were at issue.

It is clear from case law, that article 2(3) has been interpreted, in respect of the protection afforded on grounds of maternity, as comprising maternity leave but not paternity leave. It was not until 1992 that the European Community regulated and imposed maternity leave.[149] In 1996, a directive providing for a minimum level of individual parental leave was adopted.[150] Before this, parental leave was a national matter and the right to paternity leave did not exist in many countries. Parental leave is still to a large extent a matter for national considerations, European Community legislation imposing only minimum requirements.[151] A non-binding resolution from 2000 encourages Member States to examining their possibilities to introduce an individual and non-transferable right to paternity leave subsequent upon the birth or adoption of a child.[152] However, according to a proposal for a new directive, amending directive 92/85, a mandatory maternity leave allocated in connection with confinement is imposed.[153]

#### 4.2.3.2 Prohibiting discrimination

As has been given an account of, article 2(3) permits or allows Member States to protect women during pregnancy and maternity. Initially it was

[147] Ibid. para. 24.
[148] Case 163/82 *Commission of the European Communities v Italian Republic* [1983] ECR 3273, para. 16.
[149] 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, OJ L 348, 28.11.1992, p. 1–8.
[150] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, p. 4–9.
[151] Council Directive 96/34/EC, annex Framework Agreement on Parental Leave, Clause 2(3).
[152] Resolution of the Council and of the Ministers of Employment and Social Policy of 29 June 2000, OJ C 218, 31.7.2000, p. 5, article 2(b)(i).
[153] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM/2008/0637, article 1-2.

however unclear whether the directive also prohibited measures discriminating against pregnant women. It is now evident that the directive not only protects women's physical situation during pregnancy, but also protects them from being discriminated against because of pregnancy.[154]

#### 4.2.3.2.1 Formal or substantive aim?

The ECJ has tottered between defining adverse treatment of women on grounds of pregnancy or maternity as discrimination under the principle of Equal Treatment, thus not an exception to the principle but as an application of it, or as contrary to the substantive aim of the provision, an exception to the formal principle of Equal Treatment.

The ECJ has, in several cases, stressed the substantive aim of article 2(3).[155] In *Thibault*, a case where pregnancy reduced a woman's possibility to promotion, the ECJ held that:

> "…the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavorable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality."[156]

However, the ECJ went on by stating that:

> "It must therefore be held that a woman who is accorded unfavorable treatment regarding her working conditions (…) as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave. Such conduct constitutes discrimination based directly on grounds of sex within the meaning of the Directive."[157]

Equally repeating the substantive aim of article 2(3), the ECJ held in *Goméz* that a woman on maternity leave must have the right to take her annual leave during another period than during the very period of maternity leave.[158]

In *Tele Danmark*, the ECJ held arguments relating to economic loss for the under-taking incurred by a pregnancy as irrelevant to the essential issue; "…the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex…" and this irrespective of the form of the contract or the consequences for the employer.[159]

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[154] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 924.
[155] Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR 549, para. 26; Case C-342/01 *María Paz Merino Gómez v Continental Industrias del Caucho SA* [2004] ECR 2605, paras. 37-38.
[156] Case C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR 2011, para. 26.
[157] Ibid. para. 32.
[158] Case C-342/01 *María Paz Merino Gómez v Continental Industrias del Caucho SA* [2004] ECR 2605, paras. 37-38.
[159] Case C-109/00*Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR 6993, para. 31.

In *Paquay*, a female employee was dismissed from her work during the, by national law, protected period against dismissal. She was however notified only after the end of that protective period. According to the ECJ "The dismissal of a female worker during her pregnancy or during her maternity leave for reasons linked to the pregnancy and/or the birth of a child constitutes direct discrimination on the grounds of sex…", and this "…irrespective of the moment when that decision to dismiss is notified…"[160]

In the recent *Sass*-case a woman had been on maternity leave for 20 weeks but the prevailing collective agreement excluded from the qualifying period for a higher salary grade the period of leave which was longer than the period provided for by national legislation.[161] The 20 weeks were in accordance with the law under the German Democratic Republic but exceeded the 8 weeks of maternity leave provided for by the law of the Federal Republic of Germany. Following the German unification, the question arose on whether the exclusion of a part of the period of maternity leave was in breach of European Community law. Emphasizing the aim of article 2(3) the ECJ held that "… where the objectives and purpose of both periods of leave are the protection of women as regards pregnancy and maternity..." the directive precluded provisions not taking into account of the full period since the effect would be discriminatory. It was however for national courts to assess whether the objectives and purpose were to be considered the same.[162]

#### 4.2.3.2.2 The element of comparison

It seems as though the ECJ has not had any difficulties referring to the prohibiting side of article 2(3) as both substantive as well as an application of the formal principle of Equal Treatment. So, what is then discrimination under the principle of Equal Treatment in respect of pregnancy or maternity and what comparative element has the ECJ used?

In *Dekker*, a woman was refused employment because she was pregnant. Such a refusal constituted direct discrimination according to the ECJ because "…only women can be refused employment on grounds of pregnancy."[163] The Court reaffirmed its position in *Webb*, extending the prohibition on discrimination to dismissal on grounds of pregnancy, both in situations where the woman has a contract for an indefinite period and where the woman has a fixed term contract. [164] In *Hertz*, on the other hand,

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[160] Case C-460/06 *Nadine Paquay v Sociétés d´architectes Hoet + Minne SPRL* [2007] ECR 8511, paras. 40 and 42.
[161] Case C-284/02 *Land Brandenburg v Ursula Sass* [2004] ECR 11143, para. 22.
[162] Ibid. paras. 51 and 58-59.
[163] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR 3941**,** paras. 12 and 17.
[164] Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR 3567, para. 27; Case C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR 6993, para. 33.

a woman was dismissed on grounds of absence from work due to illness connected to pregnancy but manifested after the maternity leave, no direct discrimination was at stake. Even though the illness at issue was specific to women, men falling ill may also be dismissed and hence treated equally, according to the ECJ.[165] As a consequence, protection against discrimination of women on grounds of pregnancy or maternity only lasts during the nationally granted period of maternity leave.[166]

As to illnesses *during* pregnancy there seems to be no possible comparison to men and in *Brown*, the ECJ held that the Directive, articles 2(1) and 5(1), precluded "…dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy."[167]

However, in *Mayr*, the ECJ deemed the dismissal of a female employee on grounds of her undergoing an important stage of an in vitro fertilisation treatment as direct discrimination on grounds of sex. "It is true that workers of both sexes can be temporarily prevented from carrying out their work on account of the medical treatment they must receive. Nevertheless, the treatment in question … directly affects only women."[168]

In *Wiebke Busch*, the prohibition on discrimination was extended to include "…conditions applicable to employees' returning to work following parental leave."[169] A pregnant woman is under no obligation to inform the employer of a new pregnancy when returning from maternity leave.[170]

In the recent case of *Sarkatzis Herrero*, the calculation of the seniority of service of a woman on maternity leave, who was given a new job under the course of that maternity leave, did not comprise the leave and as a consequence, Sarkatzis Herrero argued that she was suffering adverse treatment, as regards conditions, when compared to other successful applicants under the same recruitment competition.[171] The ECJ agreed and emphasized once again the substantive aim of the directive and held it to be irrelevant whether the treatment at issue "…affects an existing employment relationship or a new employment relationship."[172]

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[165] Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR 3979, paras. 16-17.
[166] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 925.
[167] Case C-394/96 *Mary Brown v Rentokil Ltd* [1998] ECR 4185, para. 25.
[168] Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR 1017, para. 50.
[169] Case 320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs KG* [2003] ECR 2041, para. 38.
[170] Ibid. para. 40.
[171] Case C-294/04 *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imsalud)* [2006] ECR 1513, para. 12.
[172] Ibid. para. 41.

#### 4.2.3.2.3 Justifying discrimination

The ECJ has consistently rejected economic motives as justifying adverse treatment of pregnant women.[173]

> "…the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive."[174]

Not even national provisions deprive the employer from responsibility under the directive. In *Habermann-Beltermann* the dismissal of a pregnant woman, working without a fixed-term contract, on grounds of a national provision prohibiting pregnant women to work nights, was held to be contrary to the objective of protection in article 2(3). Justifying dismissal on grounds that the employee is not able to perform the work that she is contracted to do, risks depriving the Directive of its effectiveness.[175]

The ECJ has rejected many attempts to justify discrimination of women in general on grounds of their admittedly special status connected to pregnancy and maternity in article 2(3). In *Mahlburg*, the ECJ emphasized the substantive aim of the article: article 2(3) is not to be used as justifying unfavorable treatment of women enjoying the protection of the very same provision.[176]

In *Johnston*, article 2(3) was used to justify the exclusion of women from armed police-work because public opinion demanded greater protection for women than for men against risks affecting them equally. The ECJ maintained that the article should be interpreted as aiming at the protection of "a woman's biological condition" and her special relationship with her child.[177] This restrictive interpretation was reaffirmed by the ECJ in *Kriel*, concerning a general exclusion of women in armed military forces.[178]

Recently, the ECJ repeated the defined scope of article 2(3). In an action against Austria for failure to implement the principle of Equal Treatment, the Austrian authority argued that women in general could be denied access to the mining industry "…on account of the morphological differences to be found on average between men and women very strenuous physical labour

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[173] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 276-277.
[174] Case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR 3567, para. 26
[175] Case C-421/92 *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.*[1994] ECR 1657**,** para. 24.
[176] Case C-207/98 *Silke-Karin Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR 549, para. 26.
[177] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 44.
[178] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR 69, paras. 30-31.

in the underground mining industry exposes women to more risks, in contrast to the situation with respect, for example, to night work, which exposes women and men to the same stresses."[179] The ECJ rejected that argument, first pointing at the lack of clear connection with pregnancy and maternity, then discarded that consideration should be paid to general opinions of women being in need of more protective measures than men, concluding by mentioning the lack of regard to individual difference in physique.[180] Even though the legislation was contrary to the fundamental European Community principle of Equal Treatment, Austria, hanging on to an international agreement from 1937 was, according to article 307 EC, not in breach of European Community legislations.[181] Under Austrian law, women were also denied access to diving work and work involving high-pressure atmosphere. Once again, the ECJ rejected this general application of article 2(3). The Austrian Government justified the difference in treatment by claiming that "…women have lesser respiratory capacity and a lower red blood cell count…"[182] Not discussing the accuracy of this medical allegation, the ECJ turned to the need of individual assessment as opposed to generalized presumptions. The fact that a woman with higher respiratory capacity and higher blood cell count, when compared to a man, would be denied access to the occupation solely on grounds of being a woman constituted direct discrimination.[183]

### 4.2.4 The principle of Equal Opportunities

Measures promoting Equal Opportunities for men and women, "in particular by removing existing inequalities which affect women's opportunities" in areas covered by the Directive are exempted from the application of the Directive.[184] Article 2(4):

> "…is specifically and exclusively designed to allow 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."[185]

It is clear from case law that positive actions to some extent are recognized under European Community law. However, the scope of article 2(4) remains somewhat unclear, where some forms of quotas have been accepted other more general forms of preferential treatments have been rejected by the ECJ.[186]

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[179] Case C-203/03 *Commission of the European Communities v Republic of Austria* [2005] ECR 935, para. 40.
[180] Ibid. paras. 43-46.
[181] Ibid. para. 64.
[182] Ibid. para. 73.
[183] Ibid. para. 74.
[184] Council Directive 76/207/EEC, article 2(4).
[185] C-312/86 *Commission of the European Communities v French Republic* [1988] ECR 6315, para. 15.
[186] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 402.

#### 4.2.4.1 Preferential treatment in general

Article 2(4) is, according to the ECJ, to be interpreted restrictively, as well as all derogations from the individual right to Equal Treatment.[187] Hence, the ECJ has rejected generalised preservation of special rights for women.

In a case where women in general through collective agreements received special rights such as shortening of working hours, advancement of the retirement age, obtaining leave when a child is ill, additional days of annual leave in respect of each child etc., the ECJ held that it must be adequately shown that the generalized preservation of special rights for women "…reduce actual instance of inequality…" in social life.[188] Arguments that women as a group is experiencing a de facto inequality since they have more domestic responsibilities than men has no bearing under article 2(4).[189]

In *Schnorbus*, national provisions resulting in preferential treatment of men as regards access to practical legal training were considered. The fact that completed compulsory military or civilian service was a merit in the selection process and that men alone could be subject for such a service made the ECJ agree with the applicant that the national rules were indirectly discriminating women.[190] Under article 2(4) they were however justified "by a desire to counterbalance" the delay in education that men who had undergone compulsory military or civilian service were subject to.[191]

The ECJ has gradually adopted a more accepting attitude towards preferential treatment. In the *Lommers* case, subsidising nursery places reserved to only children of female staff as a mean of tackle the under-representation of female employees was held in accordance with European Community law as long as also allowing men "…who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials." [192] The condition of being a single parent did not, however, apply to women.

In *Abdoulaye*, the Court found that female workers enjoying their right to maternity could exclusively be entitled to a lump sum of payment if that payment was "…designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work." [193]

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[187] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, para. 21.
[188] C-312/86 *Commission of the European Communities v French Republic* [1988] ECR 6315, para. 15.
[189] Ibid. para. 11.
[190] Case C-79/99 *Julia Schnorbus v Land Hessen* [2000] ECR 10997, para. 39.
[191] Ibid. para. 47.
[192] Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR 2891, para. 50.
[193] Case C-218/98 *Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA.* [1999] ECR 5723, para. 22.

In the recent case of *Briheche*, national provisions prescribing different age-limits for recruitment of civil servants by competitive examination was at issue. The age-limit was fixed at 45 years but exempted from this requirement women who were obliged to work and had three or more children, were widows who had not remarried, were divorced but not remarried or legally separated or unmarried with at least one dependant child. Men were exempted from the age-requirement only if they were obliged to work, unmarried and had at least one dependant child.[194] The ECJ deemed that practice contrary to the directive on grounds of direct discrimination since Mr Briheche, who was an unmarried widower, did not enjoy the same rights as an unmarried widow.[195] The French government claimed that the differential treatment was necessary in order to facilitate the integration of women into work, supporting the argument by the fact of women taking on most of the housework.[196] The ECJ rejected such interpretation of article 2(4) stressing the non-compliance of the provision at issue with the prohibition of automatic and unconditional measures.[197] Furthermore, the ECJ required a proportionality assessment on grounds of positive action measures being a "…derogation from an individual right such as the equal treatment of men and women…"[198]

## 4.2.4.2 Quotas

### 4.2.4.2.1 Kalanke – an initial restrictive approach

In *Kalanke*[199], the ECJ considered for the first time a quota system in relation to article 2(4). In his opinion, Advocate General Tesauro distinguished between Formal and Substantive Equality as:

> "…what is under discussion above all is the significance of the principle of equal treatment, the contrast between formal equality, in the sense of equal treatment as between individuals belonging to different groups, and substantive equality, in the sense of equal treatment as between groups."[200]

And the Advocate General went on by sketching on a hierarchy:

> "…any specific action in favor of a minority or, in any event, weak category conflicts with the principle of equality in the formal sense."[201]
> "Unlike the principle of formal equality, which precludes basing unequal treatment of individuals on certain differentiating factors, such as sex, the principle of substantive equality refers to a positive concept by basing itself

[194] Case C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR 8807, paras. 8-9.
[195] Ibid. para. 20.
[196] Ibid. para. 26.
[197] Ibid. paras .27-28.
[198] Ibid. para. 24.
[199] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051.
[200] Opinion of Mr Advocat General Tesauro, delivered on 6 April 1995, on case C-450/93 [1995] ECR I-3051, para. 7(2).
[201] Ibid. para. 11(1).

precisely on the relevance of those different factors themselves in order to legitimize an unequal right, which is to be used in order to achieve equality as between persons who are regarded not as neutral but having regard to their differences."[202]

Advocate General Tesauro argued that existing inequalities lies, not in access to employment, but in the past and considered "educational guidance" and "vocational training" to be more suitable methods than quotas in order to obtain Equal Opportunities.[203]

"If it is assumed that under-representation of women in a given sector reflects existing inequality, such a measure tends merely to rebalance the numbers of men and women, but it will not remove the obstacles which brought about that situation."[204]

Not entering as deeply as the Advocate General about Equality theory but repeating that positive action is a derogation from the individual right to Equal Treatment and must therefore be interpreted strictly, the ECJ laid down that rules giving unconditional and absolute priority to women where candidates are equally qualified and in a sector where women are under-represented are not permissible under the directive.[205] The ECJ continued by distinguishing between equal representation and Equal Opportunities: a system of quota

"… substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity."[206]

In short, Equal Opportunities are not and must not be equality of result.

#### 4.2.4.2.2 Marschall – a pragmatic approach

The *Kalanke* judgement was subjected to much critique. Representatives from the European Women's Lobby, an umbrella organisation established by the European Commission, claimed the outcome a consequence of the sex composition of the ECJ.[207] It was not until 1999 that the first female judge entered into service in the ECJ.[208]

As an answer to the judgement, the Commission proposed to amend art 2(4) in order to allow certain quotas by giving preference to the underrepresented

[202] Opinion of Mr Advocat General Tesauro, delivered on 6 April 1995, on case C-450/93 [1995] ECR I-3051, para. 16(2).
[203] Ibid. para. 19(2).
[204] Ibid. para. 24 (2).
[205] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, paras 21-22.
[206] Ibid. para. 23.
[207] Stratigaki, Maria *The EU and the Equal Opportunities Process* in *Gendered Policies in Europe, Reconciling Employment and Family Life*, p. 34.
[208] Nyström, Birgitta *EU och arbetsrätten*, p. 206.

sex after individual assessment but the proposal was withdrawn in 2001 as an obsolete Commission proposal.[209]

Meantime, only two years after the *Kalanke* judgement, the ECJ had, in *Marschall*, to consider another system of quotas.[210] By limiting its position in *Kalanke*, the ECJ allowed quotas under art 2(4) where the assessment contained a "saving clause". This, in essence, means that national rules, giving preference to female candidates for promotion in sectors where they are under-represented, where the woman is equally as qualified as the male candidate, can be in accordance with article 2(4) if reasons specific to the male candidate do not tilt the balance in his favour. These specific reasons may not be of discriminatory kind.[211] There must therefore be an individual and objective assessment under all positive action measures. Both the ECJ and the Advocate General discusses the notion of Equal Opportunities but seem to take somewhat different standpoints.

Advocate General Jacobs, following in the trace of the *Kalanke* judgement distinguishes between equality of result and Equal Opportunities:

> "there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex…".[212]

The ECJ on the other hand, putting emphasis on the roots of unequal opportunities and not on the outcome, has a lucid line of reasoning:

> "…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."[213]

Equal qualification is therefore not synonymous with equal chances.[214] Some scholars assert that moving from the perception of positive action

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[209] Proposal for a Council Directive amending 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, COM/96/0093, OJ C 179, 22.6.1996, p. 8*;* Withdrawal of obsolete Commission proposals, OJ C 5, 9.1.2004, p. 2–33.
[210] Case C-409/95 *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997], ECR I-6363.
[211] Ibid. para. 33.
[212] Opinion of Mr Advocate General Jacobs delivered on 15 May 1997 on case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR 6363, para. 32.
[213] Case C-409/95 *Hellmut Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, para. 29.
[214] Ibid. para. 30.

only going as far as to providing Equal Opportunities, the ECJ by its judgement in *Marschall* accepts a wider range of actions.[215]

In *Badeck*, the ECJ reaffirmed its position in *Marschall* on quota-system, once again stressing the importance of an "objective assessment" of "specific personal situations".[216]

In *Abrahamsson*, the ECJ denominated national legislation on quotas as "positive discrimination". [217] As opposed to earlier quota-cases, the question at issue was whether national law giving preference to a candidate of the under-represented sex to a position under condition that she possesses *sufficient qualifications*, even though a candidate of the opposite sex has better qualifications, is in breach of article 2(1) and 2(4).[218] According to the ECJ, the selection method was not in accordance with article 2(4) since the selection criteria was "…ultimately based on the mere fact of belonging to the under-represented sex…" and the method did not comprise of an objective assessment "…taking account of the specific personal situations of all the candidates."[219]

## 4.3 Subsequent development

### 4.3.1 Directive 2002/73

The principle of Equal Treatment is defined in the very same way as in directive 76/207 and, in line with its predecessor but unlike the following recast directive, the only principle mentioned in the heading.[220] The relatively vague concept of discrimination, on the other hand, is developed through directive 2002/73. Consequently, and in the light of article 13 of the Treaty, two new directives on discrimination[221] and by consolidating case law, directive 2002/73 contains definitions on direct and indirect discrimination. "Where one person is treated less favourably on grounds of

[215] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 356-366.
[216] Case C-158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR 1875, para. 38.
[217] Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR 5539, para. 45.
[218] Ibid.
[219] Ibid. para. 53.
[220] Directive 2002/73/EC of the European Parliament and of the Council, article 1, para. 2(1).
[221] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

sex than another one is, has been or would be treated in a comparable situation…", there is direct discrimination.[222]

Indirect discrimination is defined as:

"…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…"[223]

Harassment and sexual harassment are deemed discrimination in the scope of the directive.[224] In 1990 as a response to a European Parliament resolution[225], the Council had adopted a non-binding resolution on the protection of the dignity of women and men at work, identifying sexual harassment as a serious problem and defining the concept of sexual harassment.[226] It was not until the early nineteen nineties that the Commission declared sexual harassment contrary to the principle of Equal Treatment in directive 76/207.[227] By directive 2002/73, however, the very first legally binding definitions on a European Community level of harassment and sexual harassment are introduced.

The exemption of certain sex specific occupational activities from the prohibition of discrimination, as contained in directive 76/207 is to be interpreted more restrictively. The characteristic related to sex must not only be determining but also a genuine occupational requirement, the objective sought must be legitimate and the requirement proportionate.[228]

Provisions concerning "…protection of women, particularly as regards pregnancy and maternity." are still exempted from the scope of the application of the directive.[229] The ambiguous wording, which has been at issue in several cases, remains but is supplemented by a prohibition of less favourable treatment of women on grounds of pregnancy or maternity, defining such treatment as discriminatory.[230] More over, codifying the jurisprudence of the ECJ, maternity leave may not result in loss of job or job of equivalent post, neither may it result in loss of possibility to benefit from improvements in working conditions to which that woman would have been

[222] Directive 2002/73/EC of the European Parliament and of the Council, article 1, para. 2(2), p. 1.
[223] Ibid. article 1, para. 2(2), p. 2.
[224] Ibid. article 1, para. 2(2), p. 3-4; article 1 para. 2(3).
[225] Parliament Resolution of 11 June 1986 on violence against women, OJ C 176, 14.07.1986, p. 73.
[226] Council Resolution of 29 May 1990 on the protection of the dignity of women and men at work, OJ C 157, 27.06.1990, p. 3-4.
[227] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2003), p. 911.
[228] Directive 2002/73/EC of the European Parliament and of the Council, article 1, para. 2(6).
[229] Ibid. article 1, para. 2(7), p. 1.
[230] Ibid. article 1, para 2(7), p. 3.

entitled to if not on maternity leave.[231] Paternity leave is recognized as a right contained in some legal orders of the Member States. The directive puts no obligation on Member States to introduce paternity leave but affords protection to men enjoying such right.[232]

Even though Equal Treatment and accordingly non-discrimination remain as main principles, the directive does not preclude measures within the meaning of article 141(4) EC; that is maintaining or adopting measures that allow specific advantages to the under-represented sex "with a view to ensuring full equality in practice between men and women."[233] As opposed to directive 76/207, but in line with the wording in article 141(4), the language is gender neutral. However, according to the Preamble of the Directive, the situation of women in working life is to be specifically highlighted and Member States are encouraged to start with improving women's conditions.[234]

### 4.3.2 Directive 2006/54

Only one year after directive 2002/73 coming into effect, directive 2006/54[235] was adopted, implementing the principle of Equal Opportunities as well as the principle of Equal Treatment of men and women in matters of employment, vocational training and promotion. Apart from that policy area, the directive consolidates three other European Community directives, and case law thereto related, on Equal Treatment between men and women in occupational social security schemes, the principle of equal pay and the burden of proof in cases of discrimination based on sex. With the intention of bringing clarity to the subject matter, directive 2006/54 repeals, amongst others, the directives from 1976 and 2002.[236]

As opposed to the earlier directives, this directive refers not only to the formal notion of equality but also to Equal Opportunities in the heading, despite the fact that no substantial amendments are made.[237] The provisions defining discrimination, direct and indirect, harassment as well as sexual harassment, do not differ from the ones in directive 2002/73.[238]

However, it has been suggested that where directive 76/207 contained three exceptions to the general principle of Equal Treatment, only one remains in the recasting directive from 2006: the provision on occupational

[231] Directive 2002/73/EC of the European Parliament and of the Council, article 1, para 2 (7), p. 2.
[232] Ibid. article 1, para 2(7), p. 4.
[233] Ibid. article 1, para 2(8).
[234] Directive 2002/73/EC of the European Parliament and of the Council, preamble, p. 14.
[235] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, p. 23–36.
[236] Ibid. recital (1); article 34(1).
[237] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 881.
[238] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, article 2(1) a-d.

qualifications.[239] As well as in directive 2002/73, Member States are given discretion to derogate from the principle of Equal Treatment when the sex of a person is a genuine and determining occupational requirement.[240]

Provisions on positive action as well as on pregnancy and maternity are "more affirmatively expressed".[241] Men on paternity leave, in those Member States recognizing such a right, are to be treated in the same way as a woman on maternity leave.[242] The right for Member States to adopt or maintain "positive action" measures under Article 141(4) EC is acknowledged.[243] However, where the earlier directives had referred to the principle of Equal Treatment as the general principle, and the promotion of Equal Opportunities through positive action as an exception, this directive goes a step further merging the rule and the exception into one all-embracing principle: the principle of Equal Opportunities and Equal Treatment of men and women.[244]

## 4.4 Summary

The ECJ has had to take a stand on the "sameness-difference" discussion in much of its case law on sex equality and, as will be more thoroughly discussed in chapter 5, its judgements have been subject to critique for being contradictory on this crucial point. In its early attempts to interpret article 119 EEC and discrimination, the ECJ seemed to lean towards the sameness-approach and Formal Equality. The ECJ, however, still paid specific attention to market efficiency and rejected arguments of indirect discrimination because of justifications that were "objective".[245]

It was not until the nineteen nineties that the ECJ had to set about a shift in approach by interpreting positive action measures, a legal concept originating from the idea of Equality as not only formal but also substantive. The initial standpoint of the ECJ was very restrictive towards positive action and more specifically quotas but only two years after the much criticized *Kalanke*-judgement, the ECJ acknowledged the fact that where men and women have the same qualifications they still might not have the same opportunities; i.e. Formal Equality does not always result in Substantive Equality.[246] Following the *Marschall* case, article 141 EC was amended to correspond to the political will of promoting positive action measures and

[239] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 910.
[240] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, article 14(2).
[241] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 910.
[242] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, article 16.
[243] Ibid. article 3.
[244] Ibid. article 1.
[245] Ward, Ian, *A Critical Introduction to European Law*, p. 181.
[246] Ibid. p. 184-185.

later case law of the ECJ shows a more favourable attitude towards positive action.[247]

The directives from the 21st century consolidate to a large extent the extensive case law developed under directive 76/207. Derogations from the principle of Equal Treatment are to be interpreted restrictively but remain after 30 years in essence the same. By case law on the conformity of positive action-measures with the principle of Equal Treatment, the notion of the principle of Equal Opportunities has gradually developed. By stressing the congruence between the principles, the legislators have accentuated the importance of the principle of Equal Opportunities. The issue of whether the principles are truly consistent has been discussed to some extent but the opinions thereon seem to differ.

[247] Ward, Ian, *A Critical Introduction to European Law,* p. 185.

# 5 Analysis

## 5.1 Rules and exceptions

After this exposition of European Community legislation and case law in relation to the directives 76/207, 2002/73 and 2006/54, let us return to the conceptual confusion; what is the true meaning of Gender Equality?

European Community policy on Gender Equality has a broad approach. Starting out with the concept of Equal Treatment and the principle of non-discrimination, the policy has gradually broadened, developing a notion of Equal Opportunities, which embraces positive action measures and gender mainstreaming. Evelyn Ellis makes a distinction between the initial, narrow discrimination-concept; an "individualised and essentially comparative concept" and the later, more generalised concepts of sex equality and equality of opportunities that refer to a standard of equal chances open equally for both sexes.[248]

### 5.1.1 Formal or Substantive Equality?

The formal approach to Gender Equality is characteristic to the directives adopted until the late nineteen eighties.[249] Through the introduction of article 141(4) EC, the developing case law on Equal Opportunities and specifically by distinguishing situations of legally accepted forms of positive action and through the two new directives consolidating case law on and amending and recasting directive 76/207, it is evident that the principle of Equal Opportunities has deepened and complemented the notion of Formal Equality and Equal Treatment. In this respect, European Community law has responded to the contemporary debate, expanding its perspective from a liberal approach on sex and sameness to recognizing the substantive side of Equality.

However, where employers are not to exploit the differences in social and material substance between men and women through discrimination, European Community law imposes no obligation on the Member States to promote Gender Equality through Substantive Equality, it only acknowledges the possibility.[250] Paradoxically then, the criticised dualistic system of opposing sexualised and hierarchic pairs continues to reflect in law. Where the instruments for the most part do not rank the different approaches, and where the principle of Equal Opportunities has grown in importance, the ECJ, through its jurisprudence, still tends to give precedence to Formal Equality. The principle of Equal Treatment is objectified and made the rule, whereas the concept of Equal Opportunities is

[248] Ellis, Evelyn, *EC Sex Equality Law*, p. 321.
[249] Ward, Ian, *A Critical Introduction to European Law*, p. 182-183.
[250] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2003), p. 896.

subjectified and considered as an exception.[251] By vigorously supervising compliance with the principle of Equal Treatment, explicitly prohibiting discrimination while leaving to the discretion of the Member States and employers to appraise the need of applying the principle of Equal Opportunities, the European Community, through its legislation and jurisprudence, has made formality the rule while substance remains an exception. It is likely that the interpretation of article 141(4) EC and the positive action provisions in directives 2002/73 and 2006/54 will be in line with the interpretation under article 2(4) of directive 76/207".[252] The fact that directive 2006/54 put the two principles on equal footing in the heading does not alter its material scope; Formal Equality is regulated by European Community law while Substantive Equality remains under the discretion of Member States as long as not infringing the principle of non-discrimination.[253] Positive action is regarded as an exception to the general principle of Equal Treatment, not as a part of if.[254]

Are the two principles of Equal Treatment and Equal Opportunities reconcilable? In *Kalanke*, the Advocate General Tesauro argued in favour of interpreting positive action as comprised of different measures, some of which, as opposed to quota systems, will not infringe the principle of Equal Treatment. Giving women incentives to choose traditionally male dominated work or measures aiming at a more balanced distribution of domestic work are such measures not violating the non-discrimination principle.[255]

Positive action measures become problematic when involving preferential treatment of one sex on the expense of the other sex, the extreme being cases of quotas. Under Substantive Equality, preferential treatment is not an exception from anti-discrimination rules, but an application of such rules. Under Formal Equality, preferential treatment may be regarded as "positive discrimination", an exception to the anti-discrimination rules that, as derogation from an individual right, must be interpreted restrictively. Can the principles of non-discrimination and preferential treatment co-exist under a general principle of Gender Equality without being in conflict? The wording in directive 76/207[256] and the wording in a number of judgements[257] where positive action is referred to as "a derogation from an individual right", seem to suggest positive action as sometimes being a

[251] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 418-419.
[252] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2003), p. 913.
[253] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, article 3.
[254] Burri, Susanne; Prechal, Sacha, *EU Gender Equality Law*, p. 10.
[255] Opinion of Mr Advocat General Tesauro, delivered on 6 April 1995, on case C-450/93 [1995] ECR I-3051, para. 9.
[256] According to Council Directive 76/207/EEC , article 2(4) is the Directive "...without prejudice to measures to promote equal opportunities…".
[257] See for example Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR 3051, paras 21-22; Case C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR 8807, para. 24.

necessary discriminatory way of attaining de facto equality by infringing the principle of non-discrimination. Accordingly, the ECJ has referred to quota systems as "positive discrimination".[258]

However, in the directives 2002/73 and 2006/54, referring to positive action through article 141(4) EC, positive action appears in the literal context of that the principle of Equal Treatment shall not prevent Member States from maintaining or adopting positive action measures. The fact that the language used in article 141(4) EC is gender-neutral might implicate that measures under the article are not to be regarded as discriminatory; such an important departure from the principle of non-discrimination not being defined enough to pinpoint the very specific group intended to receive protection; women.[259]

It has been pointed out that the relationship between Formal and Substantive Equality is not essential but to what extent and how the exception of Equal Opportunities is restricted.[260] The requirement of objective assessments connected to positive action measures is such a restriction. Once again, we see the rise of the dichotomy so apparent in equality law. Assuming objectivity as a just cause, European Community equality law defines itself against cultural, radical and post modernistic theory.

However, by examining an exception, a comparison of the principles, the rule and the exception, is more or less unavoidable. Eva Schömer considers that the application of preferential treatment of one sex at the expense of the other sex clearly is inconsistent with the principle of Equal Treatment.[261] Evelyn Ellis argues in favour of understanding positive action as in compliance with the principle of non-discrimination and Equal Treatment. It is possible, she claims, to consider even quotas, such as the one at issue in *Marschall*, as measures aiming at compensating for and cancelling out the negative and discriminatory prejudices women suffer in situations related to employment.[262] Hence, Evelyn Ellis does not directly focus on equality of result, but on the treatment as such being coloured by prejudices on sex and part of the gender-creating process. In other words, it could be said that men and women are in different, non-comparable situations in relations to employment; hence treating them differently is fully in accordance with both the second line of the Aristotelian notion of Equality as well as the prohibition on discrimination.

[258] Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR 5539, para. 45.
[259] Ellis, Evelyn, *EC Sex Equality Law*, p. 259-260.
[260] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 82.
[261] Schömer, Eva, *Konstruktionen av Genus i Rätten och Samhället*, p. 19.
[262] Ellis, Evelyn, *EC Sex Equality Law*, p. 255-260.

### 5.1.2 Direct and indirect discrimination

Where as the prohibition on direct discrimination, aiming at the treatment as such, is unconditional, apart from the few exceptions acknowledged in the directives, indirect discrimination may be justified by objective reasons and is subject to a proportionality assessment. It has been considered that there is a connection between direct discrimination and Formal Equality on one hand and indirect discrimination and Substantive Equality on the other hand. Where direct discrimination is about the treatment as such, indirect discrimination focuses, as well as Substantive Equality on when the outcome of apparently neutral conditions are unequal. However, this classification has been criticised. Direct and indirect discrimination are both concepts connected with the notion of Equal Treatment and thus equally part of the concept of Formal Equality.[263]

Even though the notions of direct discrimination and indirect discrimination are afforded equivalent importance in the three directives, the ECJ has through its case law seemed to attach more importance to distinguishing situations of direct discrimination and letting the notion of indirect discrimination be burdened with grater demands on proof.[264] The idea that direct discrimination is about discrimination of individuals while indirect discrimination focuses on discrimination as between groups[265], is not without critique. Even if indirect discrimination contains an element of comparison of how a measure affects different groups, it is ultimately a person that is affected by the very same discriminatory measure.[266]

As opposed to the principle of prohibition of direct discrimination to which there are legitimate exceptions on grounds of sex, the principle of indirect discrimination allows no exceptions related to sex but only exceptions justified by objective reasons.[267] Presumption of indirect discrimination requires a very high percentage of one sex being subjected to a treatment. The hierarcalisation of the dichotomy becomes evident under the Formal notion of discrimination; objective reasons are legally accepted while subjective reasons have no place in law.

### 5.1.3 The element of comparison

Discrimination in the context of this essay is, as has been stated, the "Aristotelian notion of discrimination"[268]; "…the application of different rules to a comparable situation or the application of the same rule to

[263] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 77.
[264] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 324-325.
[265] See for example the opinion of Mr Advocat General Tesauro, delivered on 6 April 1995, on case C-450/93 [1995] ECR I-3051, para. 7(2).
[266] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 32.
[267] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt,* p. 286-287.
[268] Ellis, Evelyn, *EC Sex Equality Law*, p. 321.

different situations".[269] A fundamental problem with the notion of Equal Treatment is that it is only applicable in comparable situations, it does not take into consideration that some situations are not comparable and as a result, European Community anti-discrimination law, relying solely on that definition, is not likely to be of a redistributive nature, tackling the causes of inequalities between the sexes.[270]

When interpreting adverse treatment of women in respect of pregnancy or maternity, the ECJ has displayed confusion in respect of the central "sameness-difference" distinction; in *Dekker* dismissal related to pregnancy was unlawful and discriminatory on grounds of only women being able to be pregnant. It seems as though by making the connection between discrimination on grounds of pregnancy and discrimination on grounds of sex, the ECJ avoids the element of impossible comparison between a pregnant woman and a pregnant man. In *Webb*, the ECJ reaffirmed its position in Dekker that dismissal related to pregnancy is discriminatory, despite the lack of comparable situations. This jurisprudential confusion highlights one significant problem with the notion of Equal Treatment and the concept of sameness: if women and men are the same it implicates that a comparison of situations is possible.[271]

In *Hertz* however, dismissal due to pregnancy-related illness was held to be in accordance with the directive and not discriminatory because, when it comes to illnesses, it is possible to make a male-female comparison. In *Mayr*, on the other hand, the medical treatment connected to an in vitro fertilisation was distinguished from other medical treatments in that it only affects women and a dismissal on grounds of such treatment deemed to be direct discrimination. It is incomprehensible why the ECJ justifies an adverse treatment on grounds of an illness directly connected to pregnancy and hence sex while deeming an adverse treatment on grounds of medical treatment directly connected to pregnancy and hence sex as direct discrimination.

In *Hoffman*, the ECJ brought the element of comparison and the formal notion of Equality to a head. Throwing itself into the debate and taking stand on whether men and women are different the ECJ opens up for critique, either of infringing the principle of Equal Treatment by treating men and women in the same comparable situation, parenthood, differently or by adhering to cultural feminism and difference theory with the risk of manifesting stereotyped roles. By extending the scope of article 2(3) in directive 76/207 to cover situations of motherhood after the limited period of pregnancy, confinement and breastfeeding, article 2(3) must, in a formalistic and liberal approach, be seen as a clear exception to the general principle of Equal Treatment. The protective side of article 2(3), prohibiting

[269] See chapter 3.2; Case C-394/96 Mary Brown v Rentokil Ltd [1998] ECR 4185, paragraph 30 and Case C-342/93 Gillespie and Others v Northern Health and Social Services Board and Others [1996] ECR I-475, paragraph 16.
[270] Ellis, Evelyn, *EC Sex Equality Law*, p. 322.
[271] Ward, Ian, *A Critical Introduction to European Law*, p. 183-184.

discrimination, could even be seen as deriving from the second line in the Aristotelian notion of Equality: treat different cases differently. It is apparent from case law, I claim, that this extensive interpretation of an exception to the individual right of Equal Treatment has been justified based on presumption on gender. Strikingly, such a presumption risks having clear effects on the organisation of the family, the very area that the ECJ in *Hofmann* distinguished as outside the scope of the Directive.

An acceptance of the impossibility of comparison of men and women in some situations such as pregnancy generates consequences under the European Community principle of Equal Treatment. The principle becomes ineffective and must be complemented with the second line in the Aristotelian notion of equality, "treat different cases differently".

By limiting the period of protection for women subject to illness caused by pregnancy, as done in *Hertz*[272], under the pretext of men also being subject to illness, the ECJ compared the situation of men and women. It could be argued that this comparison is asymmetrical and that the reasoning of the ECJ risk upholding the male norm of employees not giving birth since the effect of possible dismissal due to pregnancy-related illnesses only affects women by virtue of her sex.[273]

## 5.2 Equality and Gender

Whatever approach chosen to Equality, the same criticism of upholding or re-enforcing gender stereotypes applies; where Formal Equality establishes male-norms putting pressure on women to live up to those, Substantive Equality define women as a group as an exception "deserving of pity and the occasional legislative handout".[274]

The fact that discrimination even can be seen as "objectively justified", signify the inability to deal with the roots of sex-discrimination on a European Community level.[275] By leaving it for national courts to determine whether a measure having indirect discriminatory effect on one sex is justified by "objective reasons", the meaning of the term "indirect discrimination" becomes dependant on national and cultural differences. If the reason behind laws on anti-discrimination is the understanding of structural injustices and as legislation on direct discrimination is regarded as insufficient, then accepting that discrimination can be objectively justified has a manifest risk of putting an equal sign between objectivity and male-norms.[276]

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[272] Case C-179/88 *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR 3979.
[273] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 242-244.
[274] Ward, Ian, *A Critical Introduction to European Law*, p. 187.
[275] Ellis, Evelyn, *EC Sex Equality Law*, p. 323.
[276] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 417-418.

Moreover, the goal of Equal Treatment law is formulated in a positive way; "Equality", but the method in negative terms "prohibition on discrimination". This might limit the range of the application of the prohibition, through law or case law, with the effect of making all discriminatory measures not caught by the definitions legal in accordance with the principle of legality.[277] Exempting occupations and activities from the prohibition on discrimination where sex is a determining factor is such an example where the result may not only be allowing discrimination but also maintaining and reinforcing stereotyped views on men and women. In essence, law on Equal Treatment does not question gender, nor does it dismantle stereotyped perceptions and expectations of men and women.[278] Law is accordingly an essential part of the gender-system.

Consequently, directive 76/207, as well as the jurisprudence of the ECJ have been criticised for the exemptions in and interpretations of articles 2(2) and 2(3) from the general prohibition on discrimination.[279] It is evident, argues Karin Lundström, that the reach of the prohibition on direct discrimination in directive 76/207 has been restricted through case law. Not questioning gender roles, the ECJ, in many cases, adhered to a difference theory where women and men were assigned different characteristics. When interpreting the directive the relevant questions became those of to which differences importance should be attached.[280]

A differentiation in treatment directly related to sex due to occupational requirements, as a legitimate exception to the principle of Equal Treatment, is problematic. It is clear from case law that the occupational activities at issue are occupations which traditionally have been dominated either by men or by women. Throughout history, men and women have been assigned different tasks and work, but that sexual division of labour differs from society as well as time.[281] This potential of changeability is clearly recognized by European Community legislators but from case law it seems clear that even perceptions on gender may constitute such a "determining factor".[282] The socially constructed division of work is part of the gender-creating process and hence, by allowing differentiation in treatment if no real difference between the sexes justifies it, the judicial bodies are not only denying men and women Equality in the formal sense but also play an active role in upholding gender and stereotyped roles. By "protecting" women from certain aggressive occupations, which for example involves the use of firing arms, law reinforces the dualistic stereotype of women as weak

[277] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 216-217.
[278] Ellis, Evelyn, *EC Sex Equality Law*, p. 324.
[279] Ward, Ian, *A Critical Introduction to European Law*, p.183.
[280] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 285.
[281] Padavic, Irene; Reskin, Barbara, *Women and Men at Work*, p. 7, 17.
[282] Council Directive 76/207/EEC, article 9(2); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, article 31(3); Case 165/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1983] ECR 3431, para. 20.

as opposed to strong and irrational as opposed to rational. By accepting the female sex as an occupational requirement for being mid-wife, the law supports equally a gendered division of labour.

Nevertheless, there seems to be a slight shift towards a less tolerable approach to generalized assumptions on sex specific characteristics.[283] The requirement of individual assessment also seems to be in line with the more restrictive wording in directive 2002/73 and 2006/54.

In *Hoffman* the ECJ interpreted article 2(3) as not only aiming at the protection connected to the fysio-biological condition of pregnancy and breastfeeding, specific to women, but also on account of a woman's psychological health being un-normal during pregnancy. It seems unclear to what normality a pregnant woman is compared; a non-pregnant woman or a non-pregnant man. Moreover, in *Hoffman* the "special relationship" between a mother *and* a child was the object of protection. This must be seen as an extensive interpretation since article 2(3) only refers to the protection of women.[284] When it comes to parenthood, the only relevant biological difference between the sexes is the woman's ability to breastfeed. Nevertheless, whereas all pregnant women are in fact pregnant, not all mothers do exercise their capability or right to breastfeed. When expanding the notion of motherhood from "the biological processes of motherhood – pregnancy, delivery, breastfeeding…" to a concept of "political motherhood", jurisprudence becomes part of the gender creating process.[285] When extending the protection enjoyed under article 2(3) to situations of adoptions, the ECJ gave a clear hint of its perception of parenthood: only mothers are capable of handling the "delicate initial period".[286] The ECJ does not reflect on if also fathers could have an equally special relationship to their children if only they too would have the possibility to be on leave following childbirth. By its judgement in *Hoffman*, the ECJ has been accused of legitimating status quo, ensuring that women are the primary care-taker of children while men are the breadwinners.[287]

Positive action provisions might result in the reinforcement of traditional assumptions and gendered roles. In *Lommers* and *Abdoulaye*, where women were granted benefits by virtue of their sex, the ECJ, by not requiring equal treatment of men in the same situations as women (parental leave and access to childcare facilities, even if not a single parent), can be criticised for upholding a gendered system. The question is whether law should ignore the

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[283] See for example case C-203/03 *Commission of the European Communities v Republic of Austria* [2005] ECR 935.
[284] McGlynn, Clare, *Work, Family, and Parenthood: The European Union Agenda* in *Labour Law, Work, and Family*, p. 230.
[285] Duncan, Simon, *The Divers Worlds of European Patriarchy* in *Women of the European Union, The Politics of Work and Daily Life*, p. 81.
[286] Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 245-246.
[287] McGlynn, Clare, *Work, Family, and Parenthood: The European Union Agenda* in *Labour Law, Work, and Family*, p. 230; Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten, En feministisk analys*, p. 246-251.

disadvantage of being woman in respect of being man just in order to avoid reinforcing stereotyped roles.[288] Through the gradual adoption of a more favourable attitude towards positive action, European Community law seems to recognize that men and women have different points of departure in respect of access to employment. However, this recognition is still framed by requirements of objective criteria, proportionality and normative assessments. It is evident from case law that quotas are permitted if the merits of the candidates are practically equal. How much the merits of the candidates can differ in order to still be in accordance with European Community law remains to be settled and when valuating such specific situations there is a large margin of discretion.[289] The evaluation of merits risks being coloured through our reference to dichotomy. In essence, seeking Substantive Equality through positive action might not only risk manifesting stereotyped views on men and women, it is also impracticable as long as Equal Treatment and objectivity are its boundaries.

The new directives are not likely to bring about any change to the impact European Community law has on the creation of gender. It is true that the exception of sex-specific occupational requirements is restricted, but this, I argue, is just a codification of case law and in line with the general European Community principle of interpreting exceptions to fundamental rights restrictively. The essential problem remains, which is justifying discrimination on grounds of stereotyped views on the sexes. Women's situations are through law to be alleviated to the situation of men, men being the norm in society but men are not given incentive to change their lifestyles or to adopt traditionally female roles.[290] Women are assumed to be mothers and employees, men are assumed to be employees. Law upholds the male norm at the same time as it manifests stereotyped illusions about men and women.

> "Men will only demand the same treatment as women when women as a group are receiving better treatment in relation to a particular issue than men."[291]

## 5.3 In need for a change?

Despite more than three decades of European Community activity when as to combating discrimination, two thirds of the Union citizens are un-aware of their rights under the principle of Equal Treatment.[292] As has been shown, European Community equality law is complex and the question of whether law is capable of fundamentally changing sex-inequalities based on

[288] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 914.
[289] Lerwall, Lotta, *Könsdiskriminering, En analys av nationell och internationell rätt*, p. 390-391.
[290] Ellis, Evelyn, *EC Sex Equality Law*, p. 323.
[291] Ibid. p. 323-324.
[292] Council Resolution of 5 December 2007 on the follow-up of the European Year of Equal Opportunities for All, OJ C 308, 19.12.2007, p. 1–5, "Considering that:", para. 3.

stereotyped gendered roles is highly relevant.[293] According to a report on equality by the Commission, major gender gaps remain in the labour market to the disadvantage of women, despite the numerous attempts of combating sex-inequalities made by the legislators. Employment rates, unemployment rates, occupational, sectoral and educational segregation, persistent gender pay gap as well as the lesser number of women in decision-making positions when as compared to men are examples of such gender gaps identified by the Commission. Difficulties in reconciling professional and private life and inequalities in the division of domestic responsibilities are part of the problem. [294]

> "To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role. In so far as the law seeks to regulate relations in society, it must on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science."[295]

Legislative measures on Gender Equality are ineffective if they are not sensitive to changing attitudes towards gender or if they do not follow from structural changes. Hence, regulating Gender Equality in matters of employment and occupation is likely to be truly effective only if areas such as parental leave, parental insurance, access to child care services, access to school meals etc. are equally recognized.[296] Thus, preserving the "private" or "social" sphere for Member States to take action risk render the strive for Gender Equality on a European Community level ineffective. It might even be so that the legislator's unwillingness to regulate the private sphere has contributed to a situation of male dominance and female subservience.[297]

[293] Craig, Paul; De Burca, Grainne, *EU Law – Text, cases, and Materials*, (2008), p. 947.
[294] Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on equality between men and women – 2007, COM (2007) 49.
[295] Opinion of Mr Advocate General Tesauro in Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, para 9.
[296] Hedlund, Eva, *Kvinnornas Europa*, p. 182.
[297] Taube, Nadine; Schneider, Elizabeth M, *Women's Subordination and the Role of Law* in *Feminist Legal Theory Foundations*, p. 9-10

# 6 Conclusion

European Community law started out from a liberal perspective, assuming sameness between the sexes. Accordingly, the application of the principle of Equal Treatment was quite logical notwithstanding the fact that the legislators seem to have felt a necessity of safeguarding against possible situations where the idea of sameness could be questioned.

The exceptions to the general principle of Equal Treatment are, since directive 76/207 up to the present directive 2006/54, three in number. Exempting situations of pregnancy and maternity may, I assert, not necessarily be regarded as exceptions to the general principle, but as a logic consequence of the second Aristotelian line; treat different cases differently. If so, the reasoning by the ECJ is however confused, by on the one hand interpreting the provision extensively to cover situations other than biological differences between the sexes, and by the other hand being caught in the problem of comparison. Exempting sex specific occupations from the general principle must, on the other hand be considered as a true exception to the liberal tradition as long as it includes and acknowledges stereotyped views as legitimate reasons of derogation. This exception is restricted by subsequent legislation and through a gradually more restrictive case law, but it remains up to the present; signifying the legal inability to set progressive standards in striving for Equality.

Turning away from focusing only on sameness, the European Community has gradually started to acknowledge that attitudes reflected in views on sex might maintain and create inequalities between the sexes that non-discrimination laws cannot tackle. However, having problem to combine the principle of non-discrimination with the more all-embracing notion of Substantive Equality, the European Community seems to cling on to the formal sense of Equality. By limiting the scope of the principle of Equal Opportunities by requirements of objectivity and, in the cases of quotas, equal, comparable qualifications, the European Community turns a blind eye to true problems of inequality. By assuming objectivity as a just cause, European Community equality law defines itself against cultural, radical and post modernistic equality theory.

The European Community approach may be criticised of its assumption of equality as either in relation to sameness or in relation to differences between the sexes; whatever, a question of comparison. There is yet no covenant on the true psychological and physiological characteristics of the sexes as well as on which characteristics are attributed to a gender system. As long as there is no common opinion of how socially constructed characteristics should be treated, in the affirmative or by rejection, Gender Equality remains a theoretical objective with the risk of having only minor redistributive implications on a practical level. Thus, Gender Equality manifested through anti-discrimination laws including provisions on Equal

Opportunities, as interpreted by the ECJ, cannot truly be of a substantive nature. Greater demands on a more theorized discussion on sex, gender and Equality must be made.

Maybe it is time to abandon the Aristotelian notion of Equality since it does not alter any structures; it only puts some make-up on them. Treating women and men equally does not take into account inequalities inherited from mother to daughter, from father to son and from system to system. Moreover, the liberal method of fighting sex inequalities has a normative effect in establishing male-connected values. Treating men and women differently results in the maintaining of a gendered dualistic system. Positive action is doomed to have a very marginal effect as long as criterions of objectivity and non-discrimination prevail.

When Equal Opportunities truly exist, the need for anti-discrimination laws is exhausted. But, in order to arrive there - to a place and time where gender is not created or maintained, where a person's sex is as important as the colour of her eyes - is not equality of result a more effective approach than the problematic approaches chosen by the European Community? Is it impudent to assert that if the methods chosen do not end up in equality of result; then there is no point?

My attempt has been to examining the conceptual meaning of Gender Equality and I have come across some inconsistency as to the implication of the concept on a European Community level. Furthermore, I claim that the methods chosen, non-discrimination and/or positive action, are part of a gendered system, with the unfortunate result of either upholding the male norm or manifesting our gendered conception of the sexes.

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