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Gender Equality in the Case Law of the European Court of Justice

Agata Brzezińska

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ABSTRACT

The principle of gender equality forms a part of the EU's social policy and serves equally men and women. So far, fourteen directives concerning gender equality have been adopted in the EU, with the New Equal Treatment Directive as the latest one. The EU has developed different models to promote gender equality: equal treatment, positive action and most recently gender mainstreaming. The equal treatment model is primarily concerned with formal equality and it unfortunately prevails in the ECJ's rulings. Indeed, this paper argues that so far, the ECJ has not managed to develop a firm and consistent case law on gender equality, nor to stretch it coherently to positive action and gender mainstreaming. It seems that in spite of some progress in promoting the position of women, the ECJ's case law has recently taken a step backwards with its conservative judgments in e.g. the Cadman case. Overall, this paper aims at summing up and evaluating the most important cases of the ECJ on gender equality.

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1 INTRODUCTION TO GENDER EQUALITY

The notion of gender equality dates back to the 19th century feminist movements. Feminism as a collection of social theories, political movements and moral philosophies principally was aimed at the liberation of women from their subordination to men.¹ The belief in the equality of genders is often expressed as "gender equity", "gender equality", or "gender egalitarianism".²

Gender equality is a fundamental principle of the modern democracy and, most importantly, a human right. "Equality" extends beyond the limited concept of non-discrimination. It is not only concerned with the mere denial of equality, but also includes the active promotion of equal rights.³ Moreover, gender equality is not exclusively a tool for the emancipation of women. Because the position of women has historically been inferior to that of men, equality has in the contemporary societies aimed at improving the situation of women. The concept of gender equality does, however, include also the promotion of men's rights.

Equality between men and women is very important. It is necessary for global stability, growth and social cohesion. The economic growth and competitiveness of a country depends, to a notable extent, on the proper implementation of gender equality.⁴ In an ageing society, the significance of women as a great potential labour force increases further. For all these reasons, one of the main goals of the European Union (EU) has always been the non-discrimination of women, in particular in the field of employment.

The idea of gender equality has greatly evolved since the establishment of the European Community. Achieving equality between women and men in various fields such as the economy, decision-making as well as social, cultural and civil life has become one of the key tasks of the EU.⁵ Today, non-discrimination forms a part of EU's wider strategy for economic growth, formulated in 2000 in Lisbon⁶ and revamped in the 2005 Lisbon Strategy for growth and jobs. Unfortunately, in spite of the efforts at the European and national levels, inequalities still persist, both at home and at work.⁷

Gender equality policy has - or at least should have - an impact on various other policies. Equality in the field of employment is of the great importance, since it is linked to the EU's internal market project. The main goal of this paper is to analyze the concept of gender equality in the European Union's labour market from a legal perspective by evaluating the

¹ Kravetz and Marecek 2002, 459.

² Fitzpatrick 2006, 379-80.

It must be also noted that in sociology, *gender* is differentiated from *sex*. Although these two terms are often used interchangeably, *sex* refers to the biological distinction between male, female or hermaphrodite, whereas *gender* is usually used for culturally imposed behavioral and temperamental traits that are socially attributable to the sexes (Lenz 2005, 37).

³ McCrudden 2003, 2.

⁴ European Commission 08.2005, 9.

⁵ Ibid.

⁶ Lisbon European Council of March 2000. During this summit, the European Council invited the Commission and the Member States to further all aspects of equal opportunities in employment policies, including reducing occupational segregation and helping to reconcile working and family life (European Parliament 2000)

⁷ Communication 2005, 24, on Working together for growth and jobs.

most important case law of the European Court of Justice (ECJ). The protection of women in EU level labour legislation, i.e. in the New Equal Treatment Directive⁸ and Parental Leave Directive⁹ seems to be satisfactory, apart from some minor shortcomings. The main focus of this paper is therefore on the analysis of gender equality protection in the judgments of the ECJ. The social or behavioural sides of the problem, albeit important, are thus not going to be described or evaluated in this work.

The main purpose of this paper is to identify from a legal perspective issues in ECJ's case-law where changes are necessary, and to suggest solutions to the identified problems. The claim made is that the inconsistent and sometimes conservative decisions of the ECJ have prevented gender equality from developing to its fullest. Although the ECJ has shaped and furthered gender equality within the Union, the Court's case law does not reflect the needs of our constantly transforming society. The Court should take a more proactive stance, and better use and further the possibilities that stem from the new European legislation.

This paper is divided into three parts. First, a general part (Chapter 2) describes and analyzes briefly the three main approaches on gender equality issues in the EU, namely 1) equal treatment, 2) positive action and the recently introduced 3) *gender mainstreaming*. The paper explains the main definitions and concepts, such as direct and indirect discrimination and formal and substantial understanding of equality. It does so on the basis of the relevant ECJ case law. Subsequently, the main part (Chapter 3) describes recent developments in the case-law regarding gender equality in the employment field, i.e. equal access to employment, equal pay, promotions and dismissals. The paper examines in depth the European legal framework in these fields, and evaluates the ECJ's contribution to them. Each of the analyzed cases are described in more detail in the footnotes of this paper when they are referred to for the first time in the text. Finally, the paper critically evaluates the Court's current approach in gender related issues. It looks into the future, into the way forward for the ECJ in the EU gender equality policy (Chapter 4).

⁸ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁹ 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.

2 FROM EQUAL TREATMENT TO GENDER MAINSTREAMING

In the course of the years, the EU has adopted three main approaches for improving the situation of women in the society. To understand the recent developments, both in legislation and in the case law, it is essential to examine briefly these approaches, as well as the definitions and tools implemented to operate them.

There are two basic notions of equality - *formal* and *substantive*, which serve as a basis for understanding the three main approaches towards gender equality, as well as the related concepts.

Formal equality, following the Aristotelian model, is to be understood as “treating the like as like”. Its main disadvantage is that it presumes that women and men are alike, which is not true in the pregnancy cases for instance. Another significant shortcoming of this model in the context of gender discrimination is that it works only when women are equal in *all* aspects to men. In other words, the point of reference - the norm for equality - usually is man. For instance, a *formal equality* model would favour the notion of “worker” based on the male norm. This means a person, who with no other “outside” obligations is committed permanently to an employer. The workers who do not fulfil these criteria are “atypical workers”. As follows, only typical workers of both genders can be treated equally. Yet women, more often than men, are actually atypical workers.

On the other hand, *substantive equality* admits male dominance and, to counterbalance it, allows for means of a special, active protection of women. Most importantly, *substantive equality* acknowledges the differences between the genders and accords women different treatment where appropriate. It ensures equality as sameness of treatment. This system also has some disadvantages. The taking into account of the differences may lead to the creation of prejudices towards genders. The difference between the *formal* and *substantive* models has significance for an analysis of the case law, in particular in the “indirect discrimination” cases, and for positive action measures. Regrettably, even if it seems that the ECJ has recognized also the *substantive equality* model, it has not been consistent in its approach nor in its reactions on the competing models of equality.¹⁰

As far as a substantive model of gender equality and positive actions are concerned, it is important to notice that the right to non-discrimination can also be attributed to collective groups. The Convention on the Elimination of All Forms of Discrimination Against Women¹¹ acknowledged that tackling the special needs or situations of an entire group (women) may be a *precondition* to the realization of the “universal” human rights of the people who constitute that group.¹² However, the rights attributable to groups of people tend to be *individualised*.¹³ This is dangerous, since it is the individual and not the collective rights that tend to become marginalised. Moreover, personal rights are usually protected by prohibitions rather than by a positive definition of interests and values.¹⁴ At the EU level,

¹⁰ Hervey and Shaw 1998, 49.

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

¹² Knop 2004, 49.

¹³ In other words, the point of reference to the gender equality is a single human being (a man or a woman) instead of a group of women or men.

¹⁴ Knop 2004, 38.

the ECJ cases often refer to individual equality.¹⁵ This approach will limit the scope of possible positive actions in Member States.¹⁶

2.1 Equal Treatment

The European Economic Community (EEC) has been principally concerned with the creation of a common market by removing barriers on the mobility of goods and labour, capital and services. Gender equality issues did not find much space in the initial framework of EEC. Nevertheless, the principle of equal pay for equal work was included in the social policy section in Art. 119 of the Treaty of Rome.¹⁷ This principle is based on the equal treatment approach and later on, starting from 1975, a series of directives have been adopted to clarify and broaden the principle in the EEC law.¹⁸ The old directives as well as the new legislation are predominately based on “non-discrimination”, i.e. the equal treatment model for combating inequalities.¹⁹

Discrimination exists when two parties that are in the same position are treated differently, or when the same treatment is applied to parties that are in different situations.²⁰ According to the rulings of the ECJ in *Defrenne*²¹ and *Bilka*²² cases, anti-discriminatory measures include the prohibition of both direct and indirect discrimination. They consist of two elements: harm and causation due to detrimental treatment on the basis of sex.²³ The equal treatment approach, which focuses primarily on the labour market, has been strongly criticized for overlooking inequality in other social spheres of life. Moreover, the case law has proved that while successful in altering behaviour and preventing overt forms of discrimination, this approach fails to provide fair protection in cases of indirect discrimination. The equal treatment approach tends to maintain the existing practices of “oppressive power relations”. As such, it promotes the view that

¹⁵ See ECJ, *Neath*, Case C-152/91 and ECJ, *Kalanke*, Case 450/93.

¹⁶ Caruso 2002, 1-5.

¹⁷ France argued that it was necessary to include the principle of equal pay for women and men in order to avoid distortions in competitiveness between Member States (Ostner 2000, 25).

¹⁸ Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; 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; Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security schemes; Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

¹⁹ O’Cinneide 2006, 352.

²⁰ Mathijsen 2004, 192.

²¹ ECJ, *G. Defrenne v. Belgian State*, Case 80/70. The Belgian state airline Sabena’s employment contract of air hostess Gabriele Defrenne required her to retire at the age of 40, while males employed on the same duties could continue working up to the age of 55. She pleaded that she was protected by (ex.) Art. 119 of the Treaty of Rome, which guarantees the principle that women and men shall receive equal pay for equal work. The ECJ established the direct effect of the Art. 119, and that Ms. Defrenne suffered as a female worker discrimination in terms of pay as compared with her male colleagues in the same work of a “cabin steward”.

²² ECJ, *Bilka-Kaufhaus GmbH*, Case C-170/84. This case concerned a situation where a department store - Bilka GmbH - refused to pay pensions to part-time employees. Ms Weber challenged the practice arguing that the occupational pension scheme was contrary to the principle of equal pay (ex. Art. 119 TEC). She asserted that the requirement of a minimum period of full-time employment for the payment of an occupational pension was disadvantageous to female workers, who more often than their male colleagues work in part-time jobs so as to be able to fulfil family duties.

²³ Ellis 1998, 393.

“equal treatment” law is merely concerned with the incorrect behaviour of some intolerant individuals, rather than with achieving social transformations of a larger scope.²⁴

2.1.1 Direct Discrimination

Direct discrimination occurs

“... where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”²⁵.

Direct discrimination occurs, in other words, when two conditions are satisfied: the cause of inequality is sex (*causa*), and the treatment received by a person is less favourable than that received by a comparably situated member of the opposite sex (harm).²⁶

2.1.2 Indirect Discrimination

Bilka case²⁷ was the first case in which the Court found indirect discrimination on the grounds of gender. The Court stated that the policy to grant only full-time workers an occupational pension is contrary to Art. 119 of the Treaty of Rome. A much lower proportion of women than of men work full-time and the measure cannot be explained by factors that would exclude discrimination on the grounds of sex. According to the Court, only objectively justified economic grounds fall within the scope of the factors that could be used to justify discrimination.

Currently, the definition of indirect discrimination may be found in Art. 2.2b of the New Equal Treatment Directive. The article states that indirect discrimination occurs in a situation

“...where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”

The ECJ has established several tests in order to find such objectively justifiable provisions, criteria or practices. According to the ruling in *Bilka*,²⁸ the criteria of an objective justification to the disadvantageous practices of an *individual employer* are satisfied where the measures taken by the employer correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end. The means chosen for achieving that policy must not aim at the discrimination of women.

*Seymour-Smith*²⁹ test is valid, not in cases of individual discriminatory practices by employers as was the case in *Bilka*, but rather for *statutory employment provisions* of

²⁴ Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women (New Equal Treatment Directive) Art. 2.2a. See also O’Cinneide 2006, 352.

²⁵ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

²⁶ Ellis 1994, 395.

²⁷ ECJ, *Bilka Kaufhaus GmbH v. Vewebr von Hartz*, Case C-170/84.

²⁸ *Ibid.*

²⁹ ECJ, *Seymour-Smith*, Case C-167/97. The case concerned Ms Seymour-Smith, who started to work as a secretary but was dismissed unfairly by her employer. She claimed for compensation on the basis

Member States. The *Seymour-Smith* test is more relaxed than that of *Bilka*. It allows for a greater leeway for countries to choose and adopt rules that, although disadvantageous to women, fulfil the legitimate aims of i.e. social policy. In other words, the test is already satisfied when the unfavourable legislative provisions reflect a necessary aim of the social policy and are suitable and necessary for achieving that aim. However, social policy is a matter for the Member States. The Member States thus retain a broad margin of discretion as long as their provisions do not have the effect of frustrating the implementation of the fundamental principle of Community law: equal pay for men and women.³⁰

Nonetheless, the Court does not always apply the *Bilka* test consistently with respect to objective justifications. As the following chapter will indicate, in several cases some of the measures taken by the employer arguably did not have to be justified; thus, the strict *Bilka* test was avoided.

2.2 Positive Action

The anti-discrimination approach has been criticised globally for a long time already. The public opinion has started to advocate the *substantive equality* model on gender issues. In the early 1970s, EC Member States widely recognised the need for a more comprehensive model on gender equality than the simple non-discrimination approach. They stressed the need for “positive” intervention, also in the fields beyond the labour market.³¹ As a result, the Equal Treatment Directive³² in Art. 2.4 included the first provision in EU legislation in the field of gender-based positive action measures.

According to Teresa Rees, equal treatment “implies that no individual should have fewer human rights or opportunities than any other”,³³ whereas *active promotion* (in other words *positive action*) “involves the adoption of specific actions on behalf of women, in order to overcome their unequal starting positions in a patriarchal society”. Positive action in the extreme form may take the shape of *positive discrimination*, which seeks to increase the participation of women by using affirmative-action preferences or quotas.³⁴

The gradual movement from a simple *equal treatment* to a *positive action* approach has been visible, apart from the “soft” policy instruments of the Commission, in the judgments of the ECJ in cases such as *Marschall*.³⁵ In *Marschall*, the ECJ stated that:

“... even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates

of unfair dismissal. The claim was refused because she did not meet the criterion of two years’ employment, required by a national provision. The provision affected more women than men.

³⁰ Ellis 2000, 1409.

³¹ Mazey 2001, 25. “Positive action programmes” created exclusively to protect women complemented the Directives from the 1970s. These programmes sought to promote equality beyond the workplace by highlighting the image of women portrayed in media, encouraging equal division of house duties, and advocating greater participation of women in politics.

³² 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.

³³ Rees 2000, 433.

³⁴ *Ibid.*

³⁵ ECJ, *Marschall*, Case C-409/95. Mr Marschall worked as a tenured teacher and applied for a promotion. However, a female candidate was chosen for the position. He challenged the provision that the female candidate must necessarily be appointed to the position, when both candidates are equally qualified, and if at the time when the post was advertised there are fewer women than men employed on these posts, unless reasons specific to an individual [male] candidate tilted the balance in his favor.

particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, and the fear, for example, that women will interrupt their careers more frequently, that, owing to household and family duties, they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chance”.

The ECJ thus confirmed in *Marschall* the right for the Member States to take *positive action* measures. The principle has been affirmed by the Amsterdam Treaty:³⁶ the Member States’ right to adopt positive action measures is enshrined in Arts 3.2 and 141.4 TEC. Currently, also the New Equal Treatment Directive³⁷ allows for positive actions by Member States. It contains the following provision:

“Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life”.

In contrast to the equal treatment approach, in the *positive action* model “the emphasis shifts from equality of access to creating conditions more likely to result in equality of outcome”,³⁸ according to Rees. As was indicated above, positive action includes any form of action, which is designed to promote and benefit a disadvantaged group. This covers a vast range of policies and initiatives, which in the most extreme form could transform into *positive discrimination* or *preferential treatment* that is also allowed in some circumstances in the USA in the framework of so-called *affirmative actions*. In contrast to positive actions, affirmative actions encompass a wider range of measures, and also in some cases allow for an infringement of the principle of equality. These measures are more decisive and result-oriented than those of positive action. They for these reasons create conditions more favourable to the disadvantaged groups.³⁹

In the EU so far, there has been room for *positive actions* in their constrained meaning, only. The actions “aim at levelling the field for all players” and favour “traditionally discriminated categories of individuals by allowing them to compete on an equal footing, but [do] not promise them victory”.⁴⁰

The positive action approach consists of a number of techniques, such as special training and educational opportunities. These are not invasive techniques and are closer to the goal of *substantive equality*: the unequal situation will be corrected, yet without placing individuals outside of the protected groups in a worse situation.⁴¹

However, there are few problems in the application of the positive action approach. The first problem is that the use of its mechanisms is only possible if the legal framework allows for it. As regards national and EC law, it indeed seems that the still predominant equal

³⁶ Treaty of Amsterdam, 1997.

³⁷ Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women (New Equal Treatment Directive) Art. 3.

³⁸ Rees 2000, 433.

³⁹ *Ibid.*

⁴⁰ See ECJ, *Abrahamsson et al.*, Case C-407/98, and Lenaerts 2005, 131.

⁴¹ Caruso 2002, 8.

treatment approach has constrained the positive action model from being widely applied.⁴² The second problem is that the level and scope of actions taken in various Member States is uneven. In other words, the scope and application of one of EU's main principles vary throughout the Member States. Third, positive actions take various shapes of "soft" as well as "hard" measures. This makes the approach unclear. The lack of a firm stance in allowing for positive actions is also recognisable in the judgments of the ECJ as will be described in chapter 3.2 below.

2.3 Gender Mainstreaming

In the EU, gender equality includes also *gender mainstreaming*.⁴³ This approach was introduced by the Amsterdam Treaty in 1999. It is a very important technical tool in helping to develop and transfer the idea of gender equality to the fields beyond labour market. However, because the ECJ not so far taken a stance on gender mainstreaming, this paper includes only a brief explanation of this approach.

Indeed, the status of gender mainstreaming in the EU is not clear. Some consider it as one of the tools of the positive action approach, while others recognize it as a third, distinct approach.⁴⁴ It is the most far-reaching approach in the equality strategy of the EU.⁴⁵ In the broad sense, the gender mainstreaming approach is a holistic and long-term strategy for achieving gender equality by "engendering" the policy-making process.⁴⁶ Instead of creating a separate policy for gender equality, the gender perspective is introduced from the beginning horizontally into all other policies, programmes and procedures.⁴⁷

Generally speaking, the relationship between mainstreaming and other legal and constitutional principles, such as equal treatment, is unclear. Gender mainstreaming measures are *per se* "softer" and more general than the "hard" provisions of anti-discrimination. Some fear that in the long term, this approach is going to water down the already relatively weak concepts in present equality law.⁴⁸ On the other hand, because *gender mainstreaming* identifies problems on gender equality in various policies, it can then be followed by more decisive measures, measures that will address the negative effects of such policies.

⁴² O'Conneide 2006, 355.

⁴³ Defined by the Communication (96) 67, final on Incorporating equal opportunities for women and men into all Community policies and activities: "... the systematic integration of the respective situations, priorities and needs of women in all policies and with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation".

⁴⁴ See Schmidt 2005, 34.

⁴⁵ "...take gender equality issues into the mainstream of society, the mainstream consisting of the directions organizations and ideas which make decisions about the policy and the resources regarding general or specific policies" (Council of Europe 1998).

⁴⁶ Mazey 2001, 9.

⁴⁷ Elson 2003, 1.

⁴⁸ Shaw 2001, 3-5.

3 GENDER EQUALITY IN THE LABOUR MARKET

Employment is a field of paramount importance to gender equality. It was indeed the first target of gender equality law in European legislation. Currently in the EU, there are many directives, ECJ's judgments and "soft law" measures that concern gender issues in the labour market. The covered issues include, for example, equal pay, access to employment, equal treatment, parental leave and working conditions.

In 2006, the New Equal Treatment Directive, adopted by the European Parliament and the Council, simplified and updated existing Community law on the equal treatment of women and men at work. This Directive brought together, in a single text, "the main provisions existing in [the field of gender equality] as well as certain developments arising out of the case law of the Court of Justice".⁴⁹ The purpose of this directive is to simplify the abundant legislation on the equal treatment of men and women, and to facilitate a better regulation of the matter. It joins in a single, coherent instrument the Equal Pay, the Equal Treatment, the Occupational Security and the Burden of Proof Directives.

The New Equal Treatment Directive plays an important role in the development of gender equality in access to employment, self-employment or occupation, including the selection criteria and recruitment conditions. The directive applies to all levels of employment, including vocational training, promotions, dismissals and working conditions. Moreover, it prohibits discrimination as regards membership and involvement in workers' or employers' organizations.⁵⁰ It covers all types of employment contracts, including those on atypical work, which is very important for women. It does, however, exclude self-employed persons.⁵¹

Employment has a big impact on the daily life of men and women. For this reason, in order to assure the equal treatment of men and women, employment must be a priority in the reform agenda. Much has been done already. The changes can be observed easily in the recent surveys conducted by Eurostat.⁵² In 2006, the employment rate of women amounted to 57.3 %, an increase of 3.5 points from the 2000 level.⁵³ If this trend continues, there will be a chance to meet the Lisbon criterion of 60 % by 2010.⁵⁴

The labour market is largely divided in respect to gender. In other words, it is easy to find typically feminized sectors such as public administration, education and health care. Moreover, women tend to occupy lower and medium level posts, whereas there are only few women hired on the highest managerial levels of employment in e.g. political and economic sectors.⁵⁵ This situation may be a result of the inability to reconcile the

⁴⁹ Directive on Gender Equality, Preamble para. 1.

⁵⁰ Art. 14.1d.

⁵¹ Art. 8.

⁵² The increase of working women in the labour market is steady, although not rapid. The rate of employment of women in working age still lags behind that of men and from the economic perspective, the labour potential that could boost the European market is not fully used. At the same time, women are exposed to a higher risk of poverty and social exclusion, particularly in older age. For this reason, the elimination of the so-called employment gap is both an economic and social challenge for the EU (European Commission, 18).

⁵³ Eurostat.

⁵⁴ Commission Report on equality between women and men. COM (2007) 49 final, 6.

⁵⁵ Ibid, 6-7.

professional and private lives, and of an unequal division of home and family duties. It is important to recall that the employment rate of young and middle-aged women who have children dropped recently, whereas that of men increased. The steadily growing demand for flexible work force - i.e. personnel that is ready to work on changing shifts, on-call or to go on business trips - is unfavourable to women, since they are often obliged to fulfil also various tasks at home. In 2006, nearly 32,9 % of women worked part-time, while this figure for men amounted to 7,7 %, only.⁵⁶

The following sub-chapters of this article will tackle, on the basis of ECJ case law, gender equality issues such as: 1) equal access to employment with an analysis of acceptable exceptions and an evaluation of the admissible scope of the positive action measures (sub-chapter 3.2), 2) equal pay and exceptions to this principle (sub-chapter 3.3) and 3) promotions and dismissals (sub-chapter 3.4).

3.1 The Scope of Gender Equality Law

Egalitarianism is a part of EU's social policy. So-called "negative harmonisation" has been used in social policy in completing the EU common market. This kind of integration aims at enhancing the mobility of goods, labour, capital and services by abolishing unnecessary barriers within the single market. The "negative harmonization" measures may therefore be assumed to be minimalistic in their nature.⁵⁷ Moreover, the "subsidiary principle" (Art. 5 of TEC), allows for Community actions only in cases where the objective cannot be better attained at the national level by national authorities. For these reasons already, legislation and any other actions in favour of gender equality are constrained at the Community level.

On the other hand, while the European gender equality law complements national legislations, it is also supportive of higher standards. For instance, Article 27 of the New Equal Treatment Directive allows Member States to introduce or maintain provisions, which are more favourable to the protection of the principle of equal treatment than those set in the directive in question. However, the directive also requires that Member States take all necessary measures to ensure compliance with the directive's provisions.⁵⁸

In spite of the wide scope of gender equality law in the EU, it does not cover the areas where the women have been discriminated against the most, namely contract law, criminal law and family law.⁵⁹ Moreover, although the directives protect women with regards to employment, they do not guarantee equal treatment in closely related fields, such as e.g. education. The principle of equal treatment will not be complete in labour law without adequate regulation in all of the above-mentioned fields.

It must also be noted that the European legislator has included pregnancy related problems in gender equality law. Pregnancy applies obviously to women only, and for this reason it could have been out of the reach of the gender equality principle, which is a fundamental human right applicable to *both* sexes.

⁵⁶ Ibid.

⁵⁷ Ostner 2000, 27.

⁵⁸ Even when a directive is neither transposed nor sufficiently clear, a national court is obliged to interpret national law in the light of such directive (ECJ, *Von Colson and Kaman*, Case 14/83).

⁵⁹ Hervey 2005, 310.

3.2 Equal Access to Employment

The principle of equal access to employment was introduced to EU law already in 1976 in the Equal Treatment Directive. The directive was amended in 2002, as explained above. It has been said that this directive pursues a *substantive* model of equality.⁶⁰

Nowadays, the preamble of the New Equal Treatment Directive states⁶¹ that ensuring equal access to employment and vocational training is fundamental to the application of the principle of equal treatment. However, some exceptions to equal treatment are permitted, providing that the principle of proportionality is respected, that the aim is legitimate and that the exceptions are justified by reasons of a particular nature, or that the context of the work is such that the work can be carried out by one sex only.⁶²

3.2.1 Access and Positive Action Measures

As was mentioned above, the New Equal Treatment Directive follows its predecessors in that it allows Member States to adopt measures that provide for specific advantages to make it easier for the under-represented sex to pursue a vocational activity. However, the scope of these actions is strictly constrained by the ECJ's rulings.

Since the very first cases based on the Equal Treatment Directive's art. 2.4, the ECJ has recognised that positive action measures, "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".⁶³

Nonetheless, later on, German and Swedish laws, very favourable to women, were declared incompatible with Community law in cases *Kalanke* and *Abrahamsson*.⁶⁴ In the cases, the German and Swedish measures favoured the "tie-break" principle: where male and female applicants for a job were equally qualified, the female was to be appointed in preference to the male, in case fewer than half of the employees in the sector in question were female.⁶⁵ Yet, the Court denied the application of this rule:

"... national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities (...)".⁶⁶

Marschall case⁶⁷ involved a situation where women were not granted unconditional and absolute priority: female candidates were to be employed only in case there were no particular reasons, specific to an equally qualified male candidate, that would have made him more suitable for a job. The Court ruled as follows:

⁶⁰ ECJ, *Thibault*, Case C-136/95.

⁶¹ Preamble para. 19.

⁶² See *Johnston*, Case C-222/84. The renewal of Ms Johnston's work contract as an armed member of a police reserve force was denied because of changes in the policy of the employer regarding the participation of female officers in such service.

⁶³ ECJ, *Commission v. France*, Case C-312/86.

⁶⁴ ECJ, *Abrahamsson*, Case C-407/98. The Court was called to judge on a Swedish scheme aimed at promoting university positions for female candidates over male candidates. The ECJ rejected the scheme, *inter alia* because the preferential treatment of female candidates was not based on "clear and unambiguous criteria such as to prevent or compensate for disadvantages in the professional career of members of the under-represented sex".

⁶⁵ Ellis 1998, 404.

⁶⁶ ECJ, *Kalanke*, Case C-450/93, par. 22.

⁶⁷ ECJ, *Marschall*, Case C-409/95.

“...a national rule in terms of which, subject to the application of the saving clause [that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour], female candidates for promotion who are [sic] as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) [of Equal Treatment Directive] if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour (...) and thus reduce actual instances of inequality which may exist in the real world”.⁶⁸

Clearly, the Court allowed to give priority to female workers where there was room for an individual assessment of every applicant. The Court followed this line in *Badeck*.⁶⁹ National rules that prescribed minimum quota systems that gave preference to the selection of female candidates were admissible under the following conditions:

“...the [Equal Treatment] Directive does not preclude a national rule which, in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates”.⁷⁰

In spite of its recent, more flexible approach, in this judgment the ECJ upheld the approach it had adopted in *Kalanke*: it excluded any possibility of positive action from the part of Member States that would have given *automatic* preference to women, even when highly justified.⁷¹

In addition to access to employment, discrimination on grounds of gender must be prohibited regarding access to all types and levels of vocational guidance, training, and retraining, practical work experience included.

3.2.2 Exceptions to Equal Access to Employment

Article 14 of the New Equal Treatment Directive prohibits discrimination at all levels of employment in the public as well as the private sector. The prohibition of discrimination encompasses the conditions for access to employment, which includes the selection criteria and the recruitment conditions. Nevertheless, exceptions to this principle are allowed. In the *Johnston*⁷² case, the Court ruled that although the principle of equal treatment of men and women is not subject to any general reservations as regards measures taken on the grounds of the protection of public safety⁷³, it is possible for a Member State, when taking into account public safety and its internal situation, to restrict the access of women to particular fields of employment. This is the case when, by reason of the context of the

⁶⁸ Ibid., par. 31.

⁶⁹ ECJ, *Badeck and Others*, Case C-158/97. Advancement plans relating to the conditions of access and promotion for women and their working conditions, with binding targets were adopted in Germany and challenged by Mr. Badeck. In each woman's advancement plan, more than half of the posts in a sector in which women were under-represented were to be designated for women.

⁷⁰ Ibid., par. 38.

⁷¹ Cf. ECJ, *Abrahamsson et al. v. Fogelqvist*, Case C-407/98.

⁷² ECJ, *Johnston*, Case 222/84. The justification was public security.

⁷³ As in the case of Arts 30, 39, 46, TEC.

activities, the sex of the employee constitutes a determining factor for that occupational activity. Nevertheless, it is a duty of the Member States to assess periodically whether, in the light of social developments, the derogation from the general scheme of the equal treatment law may still be maintained. The measures must always be in conformity with the principles of proportionality.

In a subsequent case, *Commission v Austria*,⁷⁴ the ECJ established that women cannot:

“... be excluded from a certain type of employment solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women’s specific need of protection (...) nor may women be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment”.

It is clear that in order to protect genuinely equal access to employment, the exceptions must be limited only to those, which are objectively and narrowly constructed. In other words, an exception may only be justified by reasons applicable to a particular situation and when it is appropriate and necessary for achieving a legitimate aim. The national governments have certain degree of discretion in adopting measures which they consider necessary for guaranteeing public security.⁷⁵ For example, although women cannot generally be excluded from military service, they can be prevented from performing specific activities in the armed forces of a Member State.⁷⁶

3.2.3 Evaluation of the ECJ Stance

One cannot underestimate the positive impact that the ECJ has had on the access of women to employment. Nevertheless, even though the ruling of the *Kalanke* case has been relaxed by subsequent cases, it clearly shows that the scope of positive actions, as already indicated in Chapter 3, is limited by the rigid approach of the Court. Undisputedly, women are not in an equal position with men. Women have worse access to employment because, e.g., they are socially obliged to perform duties not related to their jobs. Therefore, a woman trying to access employment should not be compared to a man. The attempt of the Court to compare men and women as individuals is therefore not adequate. From this perspective, it seems that the best solution is to treat gender equality as a collective right that protects women as a disadvantaged group in the *substantive* equality meaning. This would give more leeway for Member States’ pro-female regulation, including more decisive positive action. The amended Art. 141 of TEC that permits positive action measures does not limit their scope. So if only the ECJ relaxed its case law, the Member States could start introducing measures such as quotas in employment. It is for the ECJ to adapt its reasoning to social needs and to fully follow the *substantive* model of equality. The Advocates-General have already recognised in several opinions that otherwise equality between men and women in the procedure of selecting employees remains a fiction.⁷⁷

⁷⁴ ECJ, *Commission*, C-203/03.

⁷⁵ See ECJ, *Sirdar*, Case C-273/97.

⁷⁶ See ECJ, *Kreil*, Case C-285/98.

⁷⁷ See Opinion of Advocate General Saggio, 16 November, 1999, ECJ, *Abrahamsson*, Case C-407/98. ECR I-05539

3.3 Equal Pay

The Roadmap 2006-2010⁷⁸ indicates that there still is a pay gap between men and women. Female workers tend to earn 15 % less than their male colleagues and this gap is decreasing at a much slower pace than the gender employment gap. The principle of equal pay greatly influences the progress on the implementation of gender equality in employment. One of the means to facilitate the mentioned Lisbon criterion of women's participation in labour is to ensure that employees of both genders receive the same pay.

As mentioned above, a substantial part of the EU gender equality law owes its existence to the equal pay principle, originally included in the Treaty of Rome.⁷⁹ The Court has reminded that:

“...the economic aim of Article [141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different member states, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right”.⁸⁰

3.3.1 Principle of Equal Pay

For the first time the Court had to rule on this principle in 1978 in *Defrenne*. In this historical case, it acknowledged the direct effect of the ex. Art. 119 of the Treaty of Rome (now Art. 141 TEC) and opted for a wide interpretation of the concept of pay. The ECJ held that the insertion into the employment contract of an air hostess of a clause bringing the contract to an end when she reaches the age of 40 years, whereas there was no such limitation in the contracts of male cabin attendants who carried out the same work, constituted discrimination prohibited by the principle of equal pay for equal work. In the following case, the Court recognized that the prohibition of discrimination on the grounds of sex in the scope of equal pay covers both direct and indirect discrimination.⁸¹ Moreover, as is stated in Art. 141 TEC, work of equal value must be remunerated in the same way, whether it is performed by a man or a woman.⁸² The words used in Art. 141 TEC have the same meaning as Art. 1 of the former Equal Pay Directive,⁸³ and now also the provisions of the New Equal Treatment Directive.

The prohibition of discrimination between men and women applies to agreements of the public authorities, which are intended to regulate paid labour collectively, as well as to contracts between private individuals. Moreover, it is of no consequence to the principle whether the work is carried out in a private or public establishment or service.⁸⁴

- **Definition of Pay**

Article 2.1e of the New Equal Treatment Directive repeats the wording of Art. 141 of TEC and provides that “pay” is:

⁷⁸ Communication (2006) 92, final, on A Roadmap for equality between women and men.

⁷⁹ Ellis 2000, 1403.

⁸⁰ ECJ, *Deutsche Telekom*, Case C-50/96.

⁸¹ ECJ, *Macarthys*, Case 129/79.

⁸² ECJ, *Lawrence and Others*, Case C-320/00.

⁸³ See ECJ, *Barber*, Case C-262/88.

⁸⁴ ECJ, *Lawrence and Others*, Case C-320/00.

“...the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her reemployment from his/her employer.”

The concept of pay should be interpreted broadly in order to fully fulfil the purpose of the Art. 141 of TEC.⁸⁵ It follows from case law of the Court⁸⁶ that Art. 119 of the Treaty of Rome (now Art. 141 TEC) has direct effect.

- **Definition of Equal Work and Work of Equal Value**

The Court in *Brunnhofner* interpreted other elements of the principle of equal pay, that is “equal work” and “equal value”. The Court contested that terms “equal work” and “equal value” are entirely qualitative in character in that they would be exclusively concerned with the nature of the work actually performed. In order to ascertain that employees can be considered to be in a comparable situation it is vital to take account of a number of factors such as the nature of the work, the training requirements, and the working conditions. In other words, the sole ground that the work is classified in the same category under the collective agreement applicable to their employment is not sufficient.⁸⁷ The ECJ has sometimes had difficulties in clearly defining these concepts, as e.g. the *Angestelltenbetriebsrat*⁸⁸ case proves.

3.3.2 Exceptions to the Equal Pay Principle

It is well known that Art. 141 of TEC requires that men and women receive equal pay for equal work or for work of equal value. Until now, the Court has consistently held that there must be no discrimination over pay on the grounds of gender. Discrimination takes place when there is unequal pay and the *causa* is different gender.⁸⁹ In other words, where a man and a woman perform equal work but do not receive equal pay, treatment would be lawful only if the employer is able to justify the inequality on grounds other than gender.⁹⁰ The above introduced *Bilka* test for objective justification is satisfied, if the adopted pay system meets a real need of the employer, and if it is effective, necessary and appropriate with a view to achieving that need.

- **Qualifications**

First condition that justifies the *inequality* of work that in fact consists of the same duties was recognized in the case *Angestelltenbetriebsrat* and concerns qualifications. The Court was asked whether the different qualifications of the professions concerned meant that

⁸⁵ Within this concept fall for instance compensations; paid to a worker on termination of the employment relationship (ECJ, *Kowalska*, Case C-33/89); in the form of paid leave or overtime pay for attendance of training courses providing the knowledge necessary for working on staff councils (ECJ, *Bötel*, Case C-360/90); for unfair dismissal (ECJ, *Seymour-Smith*, Case C-167/97); benefits to women on maternity leave (ECJ, *Gillespie*, Case C-342/93); supplements (ECJ, *Brunnhofner*, Case C-381/99); retirement benefits (ECJ, *Worringham and Humphreys*, Case 69/80); pay during the sick leave (ECJ, *Rinner-Kühn*, Case 171/88); and even some benefits paid to a worker in connection with his redundancy (ECJ, *Barber*, case C-262/88).

⁸⁶ ECJ, *Defrenne II*, Case 43/75.

⁸⁷ In the ECJ, *Brunnhofner* Case C-381/99 a female employee and a male comparator were classified in the same job category under a collective employment agreement. This proved not to be conclusive proof that they were performing the same work or work of equal value.

⁸⁸ ECJ, *Angestelltenbetriebsrat*, Case C-309/97. In this case, two professions: doctors and graduate psychologists - the latter are predominantly women - performed the same activity and nevertheless received a different pay.

⁸⁹ Ellis 2000, 1404.

⁹⁰ ECJ, *Defrenne II*, Case 43/75.

they were not engaged in equal work for the purposes of Art. 141 of TEC. The easiest answer for this question would have been that even if the work is of equal value, the reason for the different pay is not the sex of the employee.⁹¹ Nevertheless, the Court chose a different and quite awkward approach to this matter. It held that qualifications implicate a work performed; in other words the same occupation performed by people of different qualifications is in fact a different work. As follows, doctors and graduate psychologists cannot perform equal work but *seemingly identical* activities. This way, the ECJ blurred the definition of equal work or work of equal value. Nevertheless, this blurring of lines has not adversely affected subsequent gender equality cases.

A year later, in *Örebro*,⁹² the Court nevertheless did not follow the logic of *Angestelltenbetriebsrat*. The Court in this case divided the global package of pay of two groups performing the same activity but having different professions and said that each of the elements of the salary must be compared. In other words, it said that the basic monthly salary of female workers should be compared with the basic monthly salary of male workers who perform the same activities. What is most important in this case, is that the ECJ went back to the old principle that equal pay is breached only if the inequality is related to discrimination on the grounds of sex. It did not find that different qualifications could justify the difference in pay; it seemed that it paid attention only to the different working hours, which could not justify inequality.

- ***Mobility, seniority, training and length of service***

Secondly, the Court had in *Danfoss*⁹³ answered the question whether the differentiation in pay of supplements on the grounds of mobility, seniority and training constitutes objective criteria that preclude discrimination on the grounds of gender. The Court said that each of these criteria must be considered separately. The criterion of mobility is wholly neutral from the point of view of gender. However, the employer cannot justify applying the criterion of mobility, where its application proves to work systematically to the disadvantage of women. Nevertheless, as ruled already in *Bilka*, if the employer is able to prove that remuneration is justified by the reason of adaptability, which is of special importance for the performance of specific tasks, then mobility falls within the objective criteria. The Court adopted the same line of reasoning for the training criterion. However, in the case of length of service, it stated that:

“... since *length of service goes hand in hand with experience* [emphasis added] and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish

⁹¹ Ellis 2000, 1404.

⁹² ECJ, *Örebro*, Case C-236/98. The Swedish Equal Opportunity Ombudsman had brought a claim on behalf of two female midwives who had the same job as a clinical technician, but received a smaller pay than he did. The main problem in this case was that the midwives received a lower basic monthly salary. However, because of their shift system of work, they were granted the inconvenient-hour supplement that comparators did not receive and worked slightly shorter weeks. If everything was taken into account, the remuneration of midwives would be the same as that of a clinical technician.

⁹³ ECJ, *Danfoss*, Case 109/88. A Danish national collective agreement for staff workers established a basic rate for different grades of workers, but permitted individual increments on the basis of flexibility, vocational training and seniority. Flexibility was assessed on the basis of quality of work, volume of work and the employee's sense of initiative. However, employees had no knowledge of how these criteria were applied to them and so could not compare how their pay was made up. Male employees received on average 6.85 % higher pay than female employees. The system of individual wage increases meant that a woman could not prove sex discrimination as she could not identify the reasons for any differences in pay.

the importance it has for the performance of specific tasks entrusted to the employee”.

Clearly, employers can justify the differentiation in pay or supplements with the criterion of experience, even though it would systematically work to the disadvantage of women. It also seemed that the Court in this case associated experience with the length of work. It appears that men have more opportunities to gather experience than women, not only because of easier access to work, but also because of the pregnancy leaves and the fact that fewer men than women take a parental leave. This stance of the ECJ is hard to defend, and is likely to constrain the development of gender equality in Europe.

On the other hand, in *Hill and Stapleton*,⁹⁴ the Court appeared to apply the *Bilka* test with regard to the length of service. In this case the main question was whether there was discrimination when workers who converted from job-sharing to full-time work regressed on the incremental salary scale, because the employer only calculated service by the length of time actually worked in a post. The Court admitted that job-sharers acquire the same experience as full-time employees and that the only difference between a job-sharer and a colleague working full-time lies in the period actually worked while job-sharing. Clearly, in this case, the ECJ disconnected experience from the length of service. It stated that employers that calculated service by the actual length of time worked in a post had to justify it by objective criteria unrelated to any discrimination on grounds of sex. Moreover, the Court recognized that

“...Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognised by Community law.”

Most recently Ms Cadman, a full-time employee, faced a problem similar to that explained above concerning the reward for the length of service.⁹⁵ The Court did not follow the opinion of Advocate-General Maduro, who followed *Hill and Stapleton*, but reverted to its previous judgment in *Danfoss*, instead. The Court said that the employer is free to reward length of service without having to establish the importance the length has for the performance of specific tasks entrusted to the employee. Further in the judgment, it did, however, not preclude that the employer must provide detailed justification of the criterion of length of service. This would be the case where the worker provides evidence that raises serious doubts as to whether recourse to the criterion of length of service is appropriate to attain the employer’s objective. Moreover, in the words of the ECJ “It is in such circumstances for the employer to prove that that [sic!] which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better”, applies in the case of the employer in

⁹⁴ ECJ, *Hill and Stapleton*, Case C-243/95. The case concerned two civil servants shared equally one full-time job, such that the benefits were shared equally by both persons concerned and the costs of the post to the administration remained the same.

⁹⁵ ECJ, *Cadman*, Case C-17/05. In this case, four of the claimant’s male colleagues, even though they worked in the same band 2 as inspectors, received a substantially higher pay than she did. Since women in band 2 had in average shorter service than men, the use of length of service as a determinant of pay had a disproportionate impact on them. Moreover, in this case it was admitted that throughout the European Union the length of service of female workers, taken as a whole, is shorter than that of male workers.

question. The employee on the other hand had the burden of providing evidence that was capable of raising serious doubts on the appropriateness of the criterion. This case undoubtedly constitutes a step backwards in the ECJ's case law on the matter. It also seems to be contrary to the New Equal Treatment Directive, which imposes the burden of proof on the employer.⁹⁶

- **Maternity leave**

Thirdly, the line of reasoning of the Court in the case *Gillespie*,⁹⁷ which concerned pay during maternity leave, is also unsatisfactory. The ECJ held that there was no breach of the equal pay principle where women received lower than normal pay during maternity leave according to national legislation on maternity leave. They were in a special position, which required them to be afforded special protection, but which was not comparable with that of men, or with that of women actually at work. For this reason, it would be sufficient for their maternity pay to be "adequate". This justification shows that the Court took a completely different approach on equal pay than that on similar cases concerning equal-treatment. If the ECJ followed the line of *Dekker*, *Aldi* or *Webb v EMO (Air Cargo)* cases⁹⁸ and established direct discrimination, the women in question would be able to successfully claim equal pay treatment. The reason behind the different approaches is not clear. Currently, this matter is dealt with in Art. 2.2c of the New Equal Treatment Directive, which explicitly says that discrimination on the grounds of gender is

"... any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Pregnancy Directive."

3.3.3 Evaluation of the ECJ Stance

As these cases indicate, the approach of the Court towards the principle of equal pay is not as satisfactory as could be expected. The oldest, and most widely established and recognised of the equality principles does not receive sufficient support from the ECJ. Although it was the Court of Justice itself that developed and strengthened the idea of equal pay, the analysed cases clearly show that this principle needs further strengthening and clarification.

The Advisory Committee on Equal Opportunities for Women and Men issued an opinion on gender pay gap on 22 March 2007.⁹⁹ In this opinion, the Committee enumerated many factors, which if taken into account in legislation or in "soft" measures, could have an impact on or substantially reduce the pay gap. Obviously, the principle of equal pay is infringed by factors that are directly connected to the pay, such as wage structure and the composition of pay, or differences between part-time and full-time jobs. To eliminate this problem entirely, however, changes would have to go beyond the labour sector, and apply to e.g. education, training and family life.

The equal pay principle will not develop without a proper involvement of the ECJ. It is therefore essential that the Court change its line of reasoning in these cases. As explained above, in the recent *Cadman* case¹⁰⁰ the Court failed to provide sufficient protection from

⁹⁶ Art. 19.1.

⁹⁷ A group of nurses complained of discrimination because their maternity leave pay was substantially lower than their "normal" remuneration. Moreover, they did not receive a pay increase granted to other workers when on maternity leave because of the different way of calculating their pay.

⁹⁸ ECJ, *Dekker*, Case C-177/88; ECJ, *Aldi*, Case 179/88; ECJ, *Webb v. EMO (Air Cargo)*, Case C-32/93.

⁹⁹ Advisory Committee on Equal Opportunities Between Women and Men 2007.

¹⁰⁰ ECJ, *Cadman*, Case C-17/05.

the arbitrary measures of an employer. Moreover, the Court burdened the employee with the duty to provide proof. If the Court had followed the logic from *Hill and Stapleton* or the Advocate General's opinion, the principle of equal pay would have been protected. The necessary legal provisions already exist, both in the Treaty and in the relevant directives. There is no urgent need for further legislation in support of the equal pay principle. What is required is a more consistent and more supportive interpretation of the established concepts and principles by the Court. To be sure, any factors that can create obstacles or hinder the equal opportunities of women in employment should be allowed under strict conditions only, on the basis of proper and objective justifications.

3.4 Promotions and Dismissals

In addition to the above described access to work and equal pay situations, there is one further important area where female workers receive different treatment than their male colleagues: promotions and dismissals. The situation of pregnant employees is especially acute and difficult. The inability of pregnant women to perform some duties or their absence from work due to some pregnancy-related health complications usually impacts the ability to work and hence to receive benefits at work. Usually such situations are the main reasons for female workers' dismissals. In spite of the fact that the Court has in many occasions explicitly prohibited discrimination on the grounds of pregnancy, it still takes place in practice.

3.4.1 Promotions

*Thibault*¹⁰¹ case concerned the right to promotions. The Court acknowledged the Member States' right to rule on maternity leaves, but concluded that this cannot "serve as a basis for unfavourable treatment of a woman regarding her working conditions". The Court advanced a hypothesis that if in the *Thibault* case, the concerned woman had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed, and could have qualified for a promotion. In other words, in this case the ECJ did not avoid the comparison of pregnant women to their working colleagues.

Another case that related to the discrimination of pregnant women by the employer concerned the right to full pay during an absence at work that resulted from a pathological condition connected to pregnancy and that started before the maternity leave.¹⁰² Such a right was granted to employees on a "normal" sick leave, attested by a medical certificate. The Court maintained the line from *Brown v Rentokil*,¹⁰³ which concerned a dismissal:

"... the fact that a women is deprived, before the beginning of her maternity leave, of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory".

The Court acknowledged also that the infringement of gender equality law could take place when the employer refuses to provide references when asked by an employee. This

¹⁰¹ Ms Thibault was denied the right of an annual assessment of her performance during the year 1983 that would lead to promotion because of her prolonged absence at work that amounted to 7 months. According to French law, one of the conditions that allows for an assessment of performance is at least six months' presence at work. It was clear that Ms Thibault would have satisfied all the conditions of French law, if she had not taken a maternity leave during this year.

¹⁰² ECJ, *Pedersen*, Case C-66/96.

¹⁰³ ECJ, *Brown*, Case C-394/96.

situation in case *Coote*¹⁰⁴ has particular importance, since the alleged discrimination took place *after* the employment relationship had ended due to a pregnancy-related dismissal.

3.4.2 Dismissals

The Court has in many cases stated that the term “dismissal” must be given a wide meaning.¹⁰⁵ In the case *Brown v Rentokil*,¹⁰⁶ the Court reasoned that pregnancy is a special condition, during which a woman is susceptible to complications and other disorders; therefore, pregnant workers would require special protection. The dismissal of a pregnant worker for a pregnancy-related illness must be regarded as based on pregnancy. Moreover, since this situation can only affect women, it constitutes automatically prohibited direct discrimination. The scope of this judgment is very broad, since it encompasses any kind of situation where a pregnant woman is treated detrimentally for a reason that may be associated with the pregnancy.¹⁰⁷ In spite of this, as mentioned earlier in chapter 2.1.1, in *Aldi* the Court stated that dismissals resulting from an illness, which occurs after the delivery of a baby and the end of the maternity leave, even though related to pregnancy, are not forbidden. Moreover, in the following case *Larsson*, the Court held that the treatment received by a woman, dismissed for illness arising out of pregnancy but continuing after the end of maternity leave, could be compared with that received by a sick male colleague. The Court went on to say:

“... male and female workers are equally exposed to illness. Although certain disorders are (...) specific to one of other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex...”¹⁰⁸

Nowadays, the conditions of dismissal of pregnant women are regulated in Art. 10 of the Pregnancy Directive. Generally, it prohibits the dismissal of workers that are pregnant or on maternity leave. In exceptional cases not connected to the condition of such workers, however, it allows for dismissals that are permitted under national legislation or practice, provided that the competent authority has given its consent. Moreover, the employer must cite duly substantiated grounds for such a dismissal in writing. Because a lot of case law was decided before the entry into force of the Pregnancy Directive and the New Equal Treatment Directive, the legislator had a chance to include some of principles of the Court’s decisions in the mentioned acts. Currently, Art. 8 of Pregnancy Directive invites Member States to take all necessary measures to provide for a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement. The New Equal Treatment Directive provides women on maternity leave with a right to return to their job or an equivalent post on terms and conditions no less favourable than those they would have been entitled to during their absence.¹⁰⁹ Moreover, it explicitly says that less

¹⁰⁴ ECJ, *Coote*, Case C-185/97.

¹⁰⁵ See ECJ, *Joan Roberts*, Case 151/84.

¹⁰⁶ Ms Brown was dismissed because of her absence at work. Her employment contract included a provision that allowed her employer to terminate her contract in case of a continuous absence of more than 26 weeks. Because of a medical condition resulting from pregnancy, Ms Brown was absent from work and was automatically dismissed when her 26 weeks’ leave was up. The interesting issue in this case was that Ms Brown had been treated in exactly the same way as her male colleagues, if no specific consideration was given to the pregnancy.

¹⁰⁷ Ellis 1994, 14-18.

¹⁰⁸ ECJ, *Larsson*, Case C-400/95.

¹⁰⁹ Art. 15.

favourable treatment of pregnant women or women on maternity leave is within the meaning of discrimination.¹¹⁰

In case *Melgar*¹¹¹ the ECJ acknowledged the direct effect of the provisions of this directive and ruled that the provisions apply both to indefinite and fixed-term contracts. The Court said that Member States are not obliged to draw up a specific list of the reasons for dismissal, which exceptionally would be allowed in the case of pregnant workers.¹¹² In another case decided on the basis of the Pregnancy Directive, the ECJ faced the question whether the dismissal of a pregnant woman can be justified by the reason that she was hired for a fixed period, and that she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded and she was unable to work during a substantial part of the term of that contract because of her pregnancy.¹¹³ The Court answered all these questions in the negative, but did not reject the rationale of the justification as such.

3.4.3 Evaluation of the ECJ Stance

As mentioned in Chapter 2 on direct discrimination, in cases of pregnancy, the ECJ seems to acknowledge the possibility of certain objective justifications. This weakens the protection of pregnant women against dismissals and other detrimental treatment.

The limited scope of protection for women, who have pregnancy-related complications after their maternity leave, is unsatisfactory. Such women are deprived of protection and exposed to unfavourable measures.

The judgments of the ECJ in cases that concern pregnant women are especially inconsistent and difficult to follow. On many occasions the Court clearly stated that comparison of pregnant workers to male workers is not allowed. Yet, there are judgements where in fact such comparison is applied. Again, if the Court followed a *substantive* model of equality, a comparison between men and women would no longer be necessary.

¹¹⁰ Art. 2.2c.

¹¹¹ ECJ, *Melgar*, Case C-438/99.

¹¹² Also who recently gave birth or are breastfeeding.

¹¹³ See ECJ, *TeleDanmark*, Case C-109/00.

4 SUMMARY WITH EVALUATION

The principle of gender equality has successfully become a part of the top agenda of the European Union. Unfortunately, the developments have not reached a happy-ending yet. To the contrary, it seems that the firm promotion of women has recently weakened. There still are not enough incentives nor favourable interpretations to complement a formal equality approach. The situation has clearly not followed the rapid and buoyant developments of anti-discrimination law in race, religion, and other sectors.

Discrimination of women may take place in all parts of life. For this reason, European law on gender equality cannot be restricted to the labour market, only. The legislator must make the most out of the potential of Article 13 TEC, and broaden the scope of gender equality law to fields such as media, education and taxation. The most recent tool - *gender mainstreaming* - has considerably improved the situation in the mentioned fields.

While EU law promotes gender equality in many ways, there are also certain limitations, mainly as a consequence of the principles of “conferred powers”, “subsidiarity” and “proportionality”. Yet, what this paper has set out to establish is to discuss the limitations that derive from the inconsistent, rigid and constrained case law of the ECJ.

4.1 Positive action

Initially, the zeal for *positive action* measures was diluted by the reluctant approach of the ECJ in cases such as *Kalanke*. In the *Badeck* case, it looked for a moment as if the ECJ was ready to take a stance that is more flexible and more supportive of gender equality. Alas, this approach has not been confirmed in e.g. *Abrahamsson*, where the ECJ upheld its view of gender equality as an individualist right. To be sure, Member States are in general not ready for a novel and more demanding concept of collective rights. But clinging firmly on to the old and inadequate theories will hinder the necessary developments. The ECJ has to calculate the pros and cons of adopting new attitudes. At stake is the economy of the EU, which in times of an ageing population and reluctance to further enlargements will eventually decline due to an insufficient labour force. Moderate positive action measures could prevent this type of a dark scenario. The ECJ should finally stop trying to compare the incomparable, and promote a greater participation of women in the labour market. Women should have preferred access to employment in justified circumstances.

4.2 Equal Pay

As regards some concepts of gender equality, the judgments of the ECJ have been inconsistent. The first problem relates to the equal pay principle, the second to pregnancy related absences, benefits granted and dismissals at work.

The equal pay principle—the bedrock of gender equality—has not protected women against indirect discrimination in recent cases. The *Cadman* case is an example of the unpredictability of the ECJ’s decisions. The ECJ failed to apply the equal pay principle against employers who tried to evade it through experience-related criteria. Experience and other criteria like mobility and flexibility are factors that improve the value of an employee, and are therefore of unquestionable importance. It is nonetheless strange that

they may be used as grounds to alter the scope of pay without proving any objectively justified reasons. The reasoning of *Hill and Stapleton*, although it applied to a job-sharer, could be applied to full-time workers. Another issue is the calculation of pay during maternity leave. The protection of pregnant women as regards the working conditions is well established, as is their protection from discrimination. Yet this did not prevent the Court from allowing lower pays during maternity leaves in *Gillespie*.

4.3 Promotions and dismissals

With regard to promotions and dismissals, major inconsistencies can be observed in the protection of women who are absent from work due to pregnancy-related health problems. Although protection is granted to female workers *during* their pregnancy and maternity leave, in *Aldi* the Court refused to provide the same protection for women beyond the time of their leave. This means that only women with unproblematic pregnancies are fully protected, whilst those who suffer from medical complications—in other words those who need the protection the most—may be deprived of safeguards.

As the deficiencies in positive actions, equal pay and working conditions such as promotions and dismissals clearly show, gender equality needs to be further promoted. In fact, the rejected European Constitution was intended to make some progress. It not only retained all the existing provisions on equality between women and men, but provided also for a number of improvements. In Article 1a of the Lisbon Treaty equality is mentioned among the Union's values and as one of the characteristics of the European societal model. The Charter of Fundamental Rights¹¹⁴ will eventually become legally binding. By abolishing the EU's pillar structure, gender mainstreaming will also cover the field of Foreign and Security Policy, as well as Justice and Home Affairs.

However, the most immediate hope for improvement rests with the New Equal Treatment Directive. This instrument will combine the most important gender equality acts, and will improve the transparency and clarity—and thereby the implementation—of the principle of equality between genders in the Member States. Next, similar legislation for the fields beyond the labour market is called for.

¹¹⁴ Charter of Fundamental Rights of the European Union 2000.

Table 1. Important cases in favor of gender equality.

| Name of a case | Number of a case | Description |
|---------------------------|---|---|
| <i>Defrenne</i> | Case 80/70, [1976], ECR 00445 | The ECJ admitted a direct effect of the Art. 119 and that she suffered as a female worker <u>discrimination (considerably lower retirement age)</u> in terms of pay as compared with male colleagues who were doing the same work as “cabin steward” |
| <i>Bilka</i> | Case C-170/84, [1986], ECR I-7637 | The Court stated that the policy to grant only full-time workers an occupational pension is contrary to Art. 119 of the Treaty of Rome. A much lower proportion of women than of men work full-time and the measure cannot be explained by factors that would exclude discrimination on the grounds of sex. <u>The ECJ recognised indirectly discriminatory measures.</u> |
| <i>Marschall</i> | Case C-409/95 | The ECJ created a way for <u>positive action</u> measures of Member States, which resulted in the affirmation in the Amsterdam Treaty ¹¹⁵ (Arts 3.2 and 141.4 hereinafter referred to as TEC) of the Member States’ right to adopt positive action measures |
| <i>Badeck</i> | Case C-158/97 | The Court allowed for giving <u>priority</u> to female workers <u>where</u> there was room for an <u>individual assessment of every applicant</u> |
| <i>Hill and Stapleton</i> | Case C-243/95 | The Court admitted that <u>job-sharers acquire the same experience as full-time</u> employees and that the only difference between a job-sharer and a colleague working full-time lies in the <u>period actually worked</u> while job-sharing. Clearly, in this case, the ECJ disconnected experience from the length of service. It stated that employers that calculated service by the actual length of time worked in a post had to justify it by objective criteria unrelated to any discrimination on grounds of sex. |
| <i>Brown v. Rentokil</i> | | Ms Brown, was dismissed because of her absence at work. Because of a medical condition resulting from pregnancy, Ms Brown was absent from work and as a result automatically dismissed when her 26 weeks’ leave was up. The interesting issue in this case was that Ms Brown had been treated in exactly the same way as her male colleagues if no |

| | | |
|--|--|--|
| | | <p>special importance was attached to pregnancy.</p> <p>The Court reasoned that <u>pregnancy is a special condition</u>, during which a woman is susceptible to complications and other disorders; therefore, pregnant workers would require special protection. The <u>dismissal of a pregnant worker for a pregnancy-related illness must be regarded as based on pregnancy</u>.</p> |
|--|--|--|

Table 2. Important cases that hinder the development of gender equality.

| Name of a case | Number of a case | Description |
|------------------|------------------|---|
| <i>Kalanke</i> | Case 450/93 | <u>Excluded</u> any possibility of <u>positive action</u> from the part of Member States <u>that would have given <i>automatic</i> preference to women</u> , even when highly justified |
| <i>Danfoss</i> | Case 109/88 | In the case of <u>length of service</u> the Court stated that the employer is <u>free to reward it without having to establish the importance</u> it has for the performance of specific tasks entrusted to the employee. |
| <i>Cadman</i> | Case C-17/05 | The Court said that the employer is <u>free to reward length of service without having to establish the importance the length</u> has for the performance of specific tasks entrusted to the employee. |
| <i>Gillespie</i> | Case C-342/93 | The ECJ held that there was <u>no breach</u> of the equal pay principle where women received <u>lower than normal pay during maternity leave</u> according to national legislation on maternity leave. They were in a special position, which required them to be afforded special protection, but which was not comparable with that of men, or with that of women actually at work. For this reason, it would be <u>sufficient for their maternity pay to be "adequate"</u> . |

| | | |
|-----------------|---------------|--|
| <i>Thibault</i> | Case C-136/95 | The Court acknowledged the Member States' right to rule on <u>maternity leaves</u> , but concluded that <u>this cannot "serve as a basis for unfavourable treatment of a woman regarding her working conditions"</u> . The Court advanced a hypothesis that if in the Thibault case, the concerned woman had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed, and could have qualified for a promotion. In other words, in this case the ECJ did not avoid the comparison of pregnant women to their working colleagues. |
| <i>Aldi</i> | Case 179/88 | The Court stated that dismissals resulting from an illness, which occurs <u>after the delivery of a baby and the end of the maternity leave</u> , even though <u>related to pregnancy</u> , are <i>not</i> forbidden. |
| <i>Larsson</i> | Case C-400/95 | The Court held that the treatment received by a woman, dismissed for illness arising out of pregnancy but continuing after the end of maternity leave, could be compared with that received by a sick male colleague. |

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