EU Gender Equality in a Fast Changing Legal Framework: has it reached its zenith?∗

**Introduction: the general legal framework**

Gender Equality is traditionally regarded as one of the success stories of EU Law. Since the timid incorporation of the principle of equal pay for equal work into Article 119 of the Treaty of Rome, gender equality has consistently been held to be a “fundamental” and “basic” principle of EU law. This principle was implemented and gradually realised by means of an intricate array of hard and soft law. Furthermore, on many occasions, legislation was prompted and influenced by the case law of the European Court of Justice (the Court or the ECJ). Through this complex normative web, the concept of gender equality emerged and developed as a cornerstone and a unique feature of EU law.

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One of the most important steps in this process was the adoption of the Treaty of Amsterdam in 1998. Drawing from the previous achievements, the Treaty of Amsterdam made it clear that gender equality was more than an “aim” and a “task” (Article 2 EC) for EU law as it also codified the important principles of gender mainstreaming (Article 3 EC) and positive action (Article 141(4) EC). In doing so, it emphasized the “proactive” rather than the “reactive” nature element of gender equality. Moreover, it added new and more specific legal bases to this area, namely Articles 13, 137 and the amended version of Article 141 EC. While Articles 137 and 141 EC reinforce gender equality within the workplace by addressing the causes of labour market inequalities as well as acts of discrimination, Article 13 EC - which has recently been described as a “a quantum leap forward in the fight against discrimination” – brings non-discrimination beyond the workplace. Hence, the Treaty of Amsterdam created a remarkable constitutional framework the potential of which was soon to be tested; indeed, within five years of the entry into force of the Treaty of Amsterdam, two new Directives based on Article 13 EC were adopted.

Prima facie, the constitutional framework established by the Treaty of Amsterdam was further strengthened by the EU Charter on Fundamental Rights (the EU Charter) and the Treaty establishing a Constitution for the European Union (the EU Constitution) as gender equality expressly achieves the status of a “constitutional principle”. However, in spite of these successes, the process toward the full realisation of gender equality is far from being completed. The recent flurry of activity, especially at legislative level, in this area confirms it. Indeed, in a very short

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period of time three legislative instruments were proposed: Directive 2002/73 (the “amended Equal Treatment Directive”),\textsuperscript{15} the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (the “Recast Directive”)\textsuperscript{16} and the Directive on Goods and Services.\textsuperscript{17}

This chapter explores the latest legislative developments in the area of gender equality. While the author acknowledges that these developments should be analysed in a holistic manner, the main focus of this chapter is on the amended Equal Treatment Directive. This chapter also discusses the Recast Directive but does not address the Goods and Services Directive. The reasons for this approach are twofold. The first reason relates to the very similar aim of the first two Directives which is to amend and improve the existing legislation. The amended Equal Treatment Directive replaces one of the “traditional” legislative instruments in this area, namely Directive 76/207 on equal treatment in employment. This new instrument seeks to codify and take further important principles established by both the legislation and case law over the past three decades. The Recast Directive is part of an ambitious programme\textsuperscript{18} intended to streamline EU legislation on gender equality with a view to making it more accessible to citizens. Conversely, the Goods and Services Directive, as the title suggests, introduces new areas into gender equality legislation. The second reason relates to the legal base; both the amended Equal Treatment Directive and the Recast Directive are based on Article 141 (3) EC which operates in areas of equal opportunities and equal treatment in matters of employment and occupation, whilst the Goods and Services Directive is based on Article 13 EC which is a more social oriented provision.\textsuperscript{19} Interestingly the use of the very same legal base has led to two different outcomes. Furthermore, a detailed analysis of the third legislative instrument is addressed elsewhere in this volume.\textsuperscript{20}

After having analysed the content of the amended Equal Treatment Directive and its relation with the Recast Directive, this chapter reflects on the contribution – if any – of these instruments towards the full implementation of the principle of gender equality. Ultimately this chapter aims to assess the role and the future of the principle

\textsuperscript{15} OJ L 269, 2.10.2002 ADOPTED


of gender equality in the EU. It concludes that the development of the concept of gender equality may be divided into two main phases. The first phase stretches from the Treaty of Rome to the Treaty of Amsterdam and the second one from the Treaty of Amsterdam to the present time. It argues that both phases have witnessed a remarkable degree of activism in the area of gender equality. However, whilst the first phase was marked by a gradual realisation of the principle of gender equality, arguably this process stalled in the second phase in favour of the enhancement of a more general concept of equality. This seems to be confirmed by the new developments in the area, inter alia, amended Equal Treatment Directive and the Recast Directive.

The amended Equal Treatment Directive

Directive 2002/73\(^{21}\) amends Directive 76/207 on equal treatment.\(^{22}\) The idea for such a Directive has been on the agenda of the Commission for a long time: indeed it originated in discussions following the *Kalanke* case\(^ {23}\) in the mid 1990s which highlighted the shortcomings of the original equal treatment provisions. The Directive was eventually jointly adopted by the EU Parliament and the Council on 17 April 2002 and it will be implemented by 5\(^{th}\) October 2005. The legal basis of the Directive is Article 141 (3) that required resort to the co-decision procedure, and therefore involved the European Parliament. This proved crucial. Indeed thanks to the contribution of the European Parliament, the original – and rather cautious\(^ {24}\) - proposal of the Commission\(^ {25}\) was substantially improved. The amended Equal Treatment Directive codifies thirty years of case law as well the relevant secondary legislation.\(^ {26}\)

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The preamble to the Directive acknowledges that equality is a “universal” (para 2) and a “fundamental” (para 3) right. Furthermore, it refers to a wide range of EC and international instruments, such as the EU Charter and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). These references are important for two reasons. Firstly, at the time when Directive 2002/73 was drafted, the EU Charter was not mentioned by other EU institutions, and in particular the ECJ. Secondly, the international instruments in question cover a broad range of areas not dealt with by the Directive, but which are nonetheless ancillary to a full implementation of the concept of equality. In light of this promising Preamble, it is particularly disappointing that Directive 2002/73, as Directive 76/207 EEC before it, persists in referring to the prohibition of discrimination on grounds of sex rather than the wider concept of gender.

Against this background, Directive 2002/73 introduces substantive and procedural amendments to the previous legislation. The substantive changes oscillate between laudable intentions and missed opportunities. Directive 2002/73 defines important concepts, a task thus far left to the enthusiastic activism of the ECJ or to soft law. The Directive also attempts to incorporate important principles such as gender mainstreaming and positive action and seeks to regulate the issue of pregnancy and maternity as well as introduce the concept of reconciliation of professional and family life. In doing so the Directive is prima facie a progressive instrument when compared to its predecessor. Yet, how far have these developments really gone?

The amended Equal Treatment Directive defines and thus codifies the concepts of discrimination, both direct and indirect, harassment and sexual harassment. Such a codification, in particular for two reasons. Firstly, these concepts are core features of EU law, as developed over the years. Indirect discrimination has a distinctive and valuable potential; indeed, by focusing on the treatment rather than on the comparator, it can bridge the gap between formal and substantive equality. Indirect discrimination is defined very generously as “an apparently neutral provision, criterion or practice that 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”.

Provisions on harassment and sexual harassment can also contribute to bridging this gap as they are specific, yet often overlooked, forms of discrimination. For this


31 Article 2(3).
purpose, Article 2(3) provides that “there is harassment where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment” and that “there is sexual harassment where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. Both harassment and sexual harassment are considered to amount to sex discrimination prohibited by the Directive. In particular the inclusion of sexual harassment is described as “one of the key reforms” in the Annual Equal Opportunities Report.\(^{32}\) Secondly the introduction of these definitions brings uniformity amongst the equality Directives. These concepts were in fact already defined in the Equality Directives adopted under Article 13 EC, namely the Race and the Framework Employment Directive. It is important to finally have consistent definitions also as part of the gender equality legislation. Furthermore, the amended Equal Treatment specifies that “an instruction to discriminate against persons on grounds of sex” is also to be regarded as discriminatory treatment.

With that said, there are a number of shortcomings. Direct discrimination for example 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”. The main problem with this definition is its sole focus on the concepts of “comparable situation” and “comparator”. As such it omits to discuss situations where individuals are treated in the same way but are in different situations.\(^{33}\) Furthermore, it provides for hypothetical comparisons in case of race, ethnic origin, religion or belief, disability, age, sexual orientation as well as matters of equal pay. Yet, secondary legislation not necessarily affects the case law under Article 141 where the rejection of the hypothetical comparison was originally provided. Thus, it has been questioned whether this will not cause a clash between primary and secondary provisions.\(^{34}\) Furthermore, it seems that the Directive fails to link the concept of non-discrimination with the broader concept of equality. As such it falls short of the *aquis* developed by the Court.

Amongst the achievements of the Treaty of Amsterdam were the incorporation of the concepts of gender mainstreaming and positive action. As these are crucial to the effective implementation of full equality it is vital that they are reiterated in the secondary legislation. This is indeed what happened in the Directives adopted under Article 13 EC, in particular the Race Directive. But is this the case in the amended Equal Treatment Directive?

As for positive action, Article 8(e) states that Member States “might introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment”. This, arguably weak, formula reflects the idea that positive action is


an exception to the principle of equality.\(^{35}\) As such it falls short of the more recent *acquis communautaire* where the ECJ moved from a strict interpretation of this concept to an application of the proportionality principle.\(^{36}\) It equally falls short of the principle introduced in Article 141 (4) EC which expressly links positive action to the aim of “full equality in practice”.

A clear binding provision on gender mainstreaming is also still lacking. Article 1a in fact merely requires Member States to “actively take into account the objectives when formulating and implementing laws, regulations, administrative provisions, policies and activities”.\(^{37}\) This is a much weaker provision than the obligation “to eliminate inequalities and to promote equality between men and women [in all the activities referred to in this Article]” expressed in Article 3 EC.

A further cause of concern arises from Article 2(6) which addresses the possible exceptions to the Directive. In the case “of the particular occupational activities concerned or the context in which they are carried out”, Member States might provide that a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This provision does not clarify the issue at stake. On the contrary, other legislative instruments in the area of equality, such as Article 4 of the Race Directive expressly uses the words “in individual cases”.

Directive 2002/73 also attempts to regulate more comprehensively than its predecessor the delicate issue of pregnancy and maternity. However, the extent to which it achieves this is unclear. To start with, the Directive fails to address the delicate relationship between pregnancy/maternity and equal treatment. The cryptic formula of Directive 76/207, notably that “this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity”, that led to confusion in the past\(^{38}\), has been codified in the amended Directive by Article 2(7) rather than amended or clarified. The re-introduction of this formula is disappointing because it reinforces the idea that pregnancy and maternity rights are exceptions to rather than part of the concept of equality. Moreover, exceptions must normally be interpreted strictly. Therefore it appears that the European legislator has missed a good opportunity to define and balance the needs of the market on the one hand and those of gender equality and human rights on the other. Despite this unsatisfactory start, however, Article 2(7) goes further to provide for the right of a woman on maternity leave to return to her job or to an equivalent post after the end of her period of maternity leave. This provision is particularly


\(^{37}\) Emphasis added.

welcome since, before the adoption of Directive 2002/73, the right to return to the same or a similar work was guaranteed only after parental leave\(^{39}\) and not after maternity leave. Not surprisingly the lack of such provision caused a plethora of litigation in the Member States.\(^{40}\)

Another partial success of Directive 2002/73 is the almost full implementation of the Dekker principle.\(^{41}\) Indeed, it states that less favourable treatment on the grounds of pregnancy or maternity is to be regarded as sex discrimination. However, unlike Dekker, Article 2(7) does not state that discrimination on the grounds of pregnancy and maternity constitutes direct discrimination. This could potentially lead to support for the argument that unfavourable treatment of an employee on the ground of her pregnancy or maternity amounts to indirect discrimination and therefore may be objectively justifiable.\(^{42}\)

In addition to the provisions addressing pregnancy and maternity, Article 2(7) incorporates the wider concept of reconciliation between work and family life into the Equal Treatment Directive. In fact, it guarantees the application of the Parental Leave Directive and provisions on paternity leave. However the latter is guaranteed only where Member States have already introduced such rules and it fails to explicitly prohibit discrimination against fathers as well as mothers for exercising rights related to the reconciliation of family and professional life.

Arguably the most successful changes brought about by Directive 2002/73 to the Equal Treatment Directive are procedural. Under Article 8a, Member States are under an obligation to create bodies for the promotion, analysis, monitoring and support of equal treatment. The aim of these bodies is to facilitate the application of the principle of equal treatment by providing independent assistance to victims of discrimination in pursuing their complaints; conducting independent surveys concerning discrimination; and publishing independent reports and making recommendations on any issue relating to such discrimination. Member States are also required to take measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices (Article 8b). In this context, employers should be encouraged to apply equal treatment and to provide at appropriate and regular intervals employees with appropriate information on equal treatment for men and women in the undertaking (Article 8b(3-4)). Finally Member States are encouraged

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\(^{41}\) Case 177/88 Dekker, [1990] ECR I-3941.

to have dialogue with non-governmental organisations (NGOs) that have a legitimate interest in contributing to the fight against discrimination on the grounds of sex with a view to promoting the principle of equal treatment (Article 8c). Furthermore, the Directive now provides for better access to courts and remedies, and a number of preventive measures against discriminatory situations. It generally reinforces the legal protection against victims of discrimination.

Member States must ensure that judicial and/or administrative procedures (these can include conciliation procedures) for the enforcement of equal treatment are available to all persons who consider themselves discriminated against on the grounds of sex (new Article 6(1)). Member States have the obligation to introduce into their national legal system measures to ensure real and effective compensation or reparation. Compensation and reparation measures must be dissuasive and proportionate to the damage suffered (Article 6(2)). Furthermore, in accordance with the ECJ case law, compensation or reparation may not be restricted by the fixing of a prior upper limit (Article 6(2)). Finally, associations, organisations or other legal entities that have a legitimate interest in equal treatment between men and women may engage, either on behalf of or in support of the complainants, in any judicial and/or administrative procedures (Article 6(3)).

Overall Directive 2002/73 is a mixed bag. It seeks to take on board the developments originating in the Treaty of Amsterdam, but fails to fully build on its provisions, in particular when compared to other recent instruments such as the Race Directive. Directive 2002/73 also mirrors the developments achieved by the Court in the past thirty years; yet it does it in such a way as to almost nullify their importance.

However, since Directive 2002/73 was incorporated into the Recast Directive, it was hoped that these shortcomings would shortly be addressed.

The Recast Directive
In August 2004 the Commission adopted the proposed Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The aim of this proposal is to produce a single instrument implementing the principle of equality in matters of employment and occupation. This Directive streamlines the implementation of the principle of equality as well as improve the relevant acquis by integrating the case law of the Court. In so doing it should reflect the desire to make the Union “more open, understandable and relevant to daily life”. To that end, it, inter alia, amalgamates several Equality Directives. In that respect, the primary issue related to the selection of the Directives to be involved. Eventually the choice in question was guided by the legal basis. As the amended Equal Treatment Directive, the Recast Directive is based on Article 141(3)EC which empowers the Community to adopt measures to ensure the

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43 In particular, Case C-180/95 Draehmpaehl [1997] ECR I-2195.


application of the principle of equal treatment between men and women in matters of employment and occupation. However, in the case of the Recast Directive, the choice of this legal basis proved problematic. In order to ensure consistency, only Directives using the same legal base were, included in the proposal. These are the “traditional” gender equality Directives. The choice of Directives however is questionable, especially in light of the overall aim of consistency. If the aim were to amalgamate all the Directives on matters of employment, why not include Directives such as the Pregnant Workers Directive or the Parental Leave Directive, both of them having a clear effect on employment and occupation? The same can be said of the proposed Goods and Services Directive. To fail to include these Directives could jeopardise the coherency of the overall framework.

In the specific areas of equal treatment, the Recast Directive reiterates the concepts introduced by the amended Equal Treatment Directive, *inter alia* the codification of certain “clarifications”, such as the definitions of direct and indirect discrimination and the complex issues relating to pregnancy, maternity and reconciliation of professional and family life as well as the procedural amendments. In so doing, however, the Recast Directive fails to further build upon these concepts. Therefore it does little to fill the gaps left open by Directive 2002/73 and unfortunately it also entrenches some of the problems.

**Conclusions: the two phases of gender equality law**

There are no doubts that the concept of gender equality has gone a long way since the scant framework laid down in the Treaty of Rome. Equally there are no doubts that the EC relevant provisions have enhanced the position of gender equality in the majority of the Member States. Thanks to the driving impetus of EC law, women can now enter the employment market without the fear of being discriminated against, they are entitled to the same pay for the same work, they can participate in pension schemes on the same terms as men and are now in the position to take time off work to look after their young family without jeopardising their career. It is true that some of these principles still have not been fully implemented in all the EU Member States; to quote a few the gender pay gap, although reduced, still exists and women continue to be the main providers of informal care. However, it is important to emphasise that, not only have these principles been established and thus recognised as part of the EU constitutional framework, they also have met a large consensus. Problems, however, are inevitable because of differences in the Member States’ cultural and legal background. The recent enlargement is likely to exacerbate rather than diminish these differences. Furthermore, as in any ongoing processes, steps forward are followed by setbacks.

With that said there are reasons to look at the most recent steps forwards in a critical manner. Indeed it appears that gender equality is taking a turn for the worst. In order to assess the changes that have taken place in recent years, this chapter suggests dividing the development of the principle of gender equality into two phases. The first phase started with the Treaty of Rome in 1957. During this period the concept of

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equality was gradually constructed.\textsuperscript{47} It reached its apex with the Treaty of Amsterdam that can be regarded as the “golden area” of gender equality.

The second phase started with the Treaty of Amsterdam. As mentioned above the remarkable constitutional structure set by the Treaty of Amsterdam was followed by the EU Charter, the EU Constitution as well as several legislative initiatives, \textit{inter alia}, the amended Equal Treatment Directive and the Recast Directive. This second phase could have offered the possibility to substantially further the gender equality dimension of the EU. Yet, it seems that the process has lost the impetus that characterised the first phase. Paradoxically, this second phase was triggered by one of the main achievement of the Treaty of Amsterdam, namely the introduction of Article 13 EC which states that:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat \textit{discrimination}\textsuperscript{48} based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

On the specific ground of sex, this Article is indeed “a quantum leap forward in the fight against \textit{discrimination}”.\textsuperscript{49} It has the welcome potential to extend the principle of non discrimination to other grounds and beyond the workplace. Yet, its effect on gender equality is rather mixed. On a conceptual level, its main limitation lays in the fact that it merely refers to the concept of “non discrimination” and it does not link it to that of “equality”. In so doing, it is a step backward from the relevant \textit{acquis} established, in particular, after the Treaty of Amsterdam; the latter made it clear that equality and discrimination were two intrinsically entwined concepts that could not exist separately. A further problem with Article 13 EC is that it does not differentiate amongst the eight grounds it mentions.

Article 13, and in particular its emphasis on non discrimination rather than equality, has had two consequences: the creation of a hierarchy of equalities where gender equality is losing ground and the move towards a general concept of equality to detriment of that of gender equality.

The first of these consequences became apparent with the adoption of the first two Directives adopted using Article 13 EC as a legal base. These, in particular the Race Directive, are more comprehensive than the existing gender Directives in terms of material scope, definition of discrimination and enforcement mechanism. Thus this has created a distinction (and a hierarchy) between the different types of equalities:

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\textsuperscript{48} Emphasis added.


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the new grounds in Article 13 on the one hand, and the more traditional, such as gender equality on the other hand. The EU legislator’s attempt to modernise the gender equality provisions so as to address this discrepancy resulted in, *inter alia*, the amended Equal Treatment and the Recast Directives. This chapter has sought to demonstrate that unfortunately there are many shortcomings to both Directives. Although they have incorporated the enforcement mechanism and the definition of discrimination, they still lack the breadth of the two Directives adopted under Article 13 EC.

The second consequences is the move towards a general concept of equality. Although this intent is laudable, the practical result has been to watering down the specific principle of *gender* equality. Unfortunately, this inherent limitation of Article 13 EC is reflected in the most recent constitutional instruments such as the EU Charter and the EU Constitution. It also appears in the latest soft law initiatives such as the Green Paper on Equality and Non Discrimination in an Enlarged European Union\(^{50}\) as well as in the approach of the recently adopted Directives, namely the amended Equal Treatment Directive, the Recast Directive and the Goods and Services Directive.

Conversely this chapter submits that each of these forms of equality and non discrimination has evolved in the EU legal order following different agendas and priorities, each of them thus creating a specific *acquis communautaire*. Accordingly, they need to be analysed individually and different approaches are required for different forms of discrimination. A common approach might merely result in fewer competencies and resources.

There is evidence that over the past years there has been an increasing willingness to further the principle of gender equality.\(^{51}\) This commitment is *prima facie* reinforced by the recent developments, *inter alia*, the fact that the EU Constitution has elevated gender equality to a constitutional principle and the flurry of legislative activities in this area. Yet, this chapter has suggested that these development should be critically scrutinised: indeed it has argued that *gender* equality has reached its zenith.

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