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EU sex equality law post Amsterdam

ANN NUMHAUSER-HENNING

Introduction

This chapter focuses on the development of sex equality law since the Amsterdam Treaty. The most important feature of the Amsterdam Treaty from the perspective of this book was of course the new Article 13, providing a legal basis for Community institutions to take action to combat discrimination not only on the grounds of sex but on a whole range of other grounds and within any area of Community activities. However, Article 2, as amended, Article 3(2) and Article 141 EC (see further below) are also of special interest to sex equality law, following the Amsterdam Treaty. It is also worth mentioning the new Title VIII (ex Title VIa) on employment introducing the 'open method of coordination' for employment guidelines now also extended to other areas of social cohesion. Finally, there is the inclusion of the Maastricht Social Protocol and the new rules on the Social Dialogue in Articles 137–139 EC. All of these new rules play an intrinsic role for the post-Amsterdam developments of sex equality law. To understand the development of sex equality law following the Amsterdam Treaty, its relationship with Article 13 EC and action taken on this basis it is, however, necessary to start with some remarks on the unique features of sex equality regulation in an EC law context and its roots pre-Amsterdam. After introducing these features, I will continue to describe the legal developments in the field of sex equality post Amsterdam only to end up in a discussion on the future implications of discrimination law developments in general for gender equality.

Among the issues addressed in this chapter is the convergence of discrimination concepts between different grounds. Is there a risk of erosion of the concepts of direct and indirect discrimination introducing a wider set of justifications? What are the implications for sex equality law of the new Article 13 Directives drawing upon a wider scope of *acquis communautaire* as regards the concept of indirect discrimination? Will

multiple non-discrimination grounds reinforce a formal equality approach as the common denominator or, on the contrary, draw our attention to the obvious need for proactive measures? There is also the issue of non-discrimination rights for workers and its implications for discrimination law in general, working conditions being the constituent of the groups to be protected. Does the more limited coverage of the new Article 13 Directive 2004/113/EC concerning sex equality and the access to and supply of goods and services as compared especially to the Race Directive 2000/43/EC imply a new hierarchy of equalities? And, there is also the issue of enlargement and sex equality.

Something should, however, first be said on *sex as a protected ground* for discrimination, i.e. discussing the concept as such. At first sight it is clearly symmetrical. Men and women are complementary – together they make up the whole world. A ground such as disability on the other hand is clearly asymmetrical. This is a reason why the concept of 'formal equality', paradoxically,[1] is so strong within sex equality law. Favourable treatment of one sex is always to the detriment of the other.[2] Here, too, developments post Amsterdam prove to interact in a complex way with sex equality law. Already before the adoption of the first Article 13 Directives we encountered a broadened gender concept – the European Court of Justice (ECJ) had confirmed transsexuality to be a matter of sex (and sexual orientation not to be).[3] Moreover, differential treatment on the grounds of pregnancy and mothering had, ever since *Dekker*,[4] been seen as intrinsically related to the female sex and thus constituting direct discrimination. These developments contrast not only to the rights of men generally, but also of non-pregnant women as well as fathers and require a line to be drawn in relation to parental rights.[5] Here social, cultural and demographical developments within the different Member States are of

[1] Compare what is said below about a proactive approach as a constitutional requirement regarding precisely sex equality law.

[2] Compare, however, for instance Holtmaat, who draws our attention to the fact that the CEDAW Convention is asymmetrical so as to prohibit precisely the discrimination against women, not sex in general: R. Holtmaat, *The possible impact of other instruments to combat discrimination against women (the case of the CEDAW Convention)*, paper to the 18–19 November 2004 Hague Conference 'Progressive Implementation: New Developments in European Union Gender Equality Law'.

[3] Cases C-13/94 *P* v. *S* [1996] ECR I-2143, C-249/96 *Grant* [1998] ECR I-621 and C-117/01 *K.B.* [2004] ECR I-541.

[4] Case C-177/88 *Dekker* [1990] ECR I-3941.

[5] Compare the Council's Resolution on the balanced participation of women and men in family and working life [2000] OJ C218, pp. 0005–0007. See also, for instance, R. Nielsen,

great concern. These issues also relate to the old sameness-difference and essentialist discourses in feminist theory and to the question of multiple/intersectional discrimination – at the heart of Article 13 EC.[6]

Unique features of sex equality regulation

One important feature is that sex equality law was part of Community Law from the very beginning

In the beginning there was only the principle of equal remuneration contained in Article 119 of the original Treaty of Rome (EEC Treaty). Gradually, as we all well know, the principle of equal treatment between men and women has gained a more general standing within Community law, as described in the introductory chapter by Helen Meenan. This background implies a double aim, still inherent in EU sex equality law, one linked to (internal) market arguments and one linked to the discourse on fundamental rights.[7]

There is a treaty based mainstreaming approach. Since 1996 the Commission's strategic approach to the question of equal opportunities between men and women is 'mainstreaming', i.e., to incorporate it into all community policies and activities,[8] a strategy now reflected in Article 3(2) EC. The mainstreaming approach has more recently spread to the new areas of non-discrimination.[9]

Gender Equality: In European Contract Law, DJF Publishing, Copenhagen (2004) and Case C-177/88 *Elisabeth Johanna Pacifica Dekker* v. *Stitching Vormingscetrum woor Jong Volwassenen (VJV Centrum) Plus*; Case C-179/88 *Handels- og Kontorsfunktionaerernas Forbund Danmark* v. *Dansk Arbejdsgiverforening*, *CMLR* 29 (1992) pp. 160–9.

[6] In her paper to the 18–19 November 2004 Hague Conference 'Progressive Implementation: New Developments in European Union Gender Equality Law' Dagmar Schiek argues for the use of the concept *gender* equality in the multidimensional equality strategy, see D. Schiek, *Broadening the scope and the norms of EU sex discrimination law – towards multidimensional equality law* (2004).

[7] However, the ECJ has stated that 'the economic aim is secondary to the social aim'; see Cases C-270/97 *Sievers* [2000] ECR I-933 and C-50/96 *Schröder* [2000] ECR I-774, para. 57 of both judgments. Compare also C. McCrudden, *Gender Equality in the European Constitution*, paper to the 18–19 November 2004 Hague Conference on 'Progressive Implementation: New Developments in European Union Gender Equality Law', p. 5.

[8] The European Commission's Communication incorporating equal opportunities for women and men into all Community policies and activities, COM(96) 67 final.

[9] See the 2000/750/EC Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination [2000] OJ L303/23. See also the Commission's Communications regarding the EQUAL Programme, COM (2000) 853 and COM(2003) 840 final, respectively.

The 'constitutional support' for sex equality is significantly more developed than it is for other non-discrimination grounds and the crucial articles have already been referred to above.[10] However, there have been important developments at the constitutional level also since Amsterdam such as, the adoption of the EU Charter of Fundamental Rights in 2000 and its later integration into, and the adoption of a New Constitution for the European Union now supplanted by a proposed Reform Treaty (see further below). Here equality between women and men can be said to be reinforced even more. The significance of these developments for the future of EU sex equality law remains, however, as uncertain as is the future of the New Constitution itself, at the time of writing.

Moreover, the Treaty rules on equality between men and women require a proactive approach. After Amsterdam, Community law can be said to have moved from formal to substantive gender equality.[11] The new Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to 'promote' it in all its activities.[12] Articulating the need for eliminating existing inequalities and for promoting equality between men and women, they may in fact be said to represent *a shift in the Community law gender equality approach, from a negative ban on discrimination to a positive and proactive approach to promote substantive gender equality.*[13] The wording of Article 3(2) EC in particular has been said to require a proactive approach in gender equality issues on behalf of the European Union institutions.[14] Furthermore, Article 141 EC (formerly Article 119) now provides the specific legal basis for equality of treatment between men and women not only with regard to remuneration but also in broader contexts. Article 141(4) also provides scope for positive action measures. These characteristics of sex equality law reflect the fact that it is mainly *argued in a (de facto) equality discourse*

[10] Article 2 and 3(2) as well as Art. 141 EC. See, for instance S. Koukoulis-Spiliotopoulos, *From Formal to Substantive Gender Equality, The Proposed Amendment of Directive 76/207, Comments and suggestions* (Athens, 2001).

[11] See, for instance, S. Koukoulis-Spiliotopoulos, ibid. See also A-G Christine Stix-Hackl, Opinion in Case C-186/01 *Dory* [2003] ECR I-2479, paras. 102–5.

[12] Articles 2 and 3(2) EC.

[13] Compare the Commission using the concept 'proactive' intervention in relation to the mainstreaming approach and 'reactive' intervention when addressing specific actions in favour of women, COM(2000) 335 final.

[14] 'In all activities the Community shall aim to eliminate inequalities and to promote equality between men and women.' However, compare R. Holtmaat (2004), who claims that there still is no clear and outright positive obligation for Member States to improve the de facto position of women.

in contrast to the other Article 13 grounds that are mainly argued within a non-discrimination framework.[15]

The importance paid to sex discrimination in working life is also reflected in the legal basis for adoption of such instruments. With regard to work-related issues, sex discrimination legislation *follows the qualified majority voting rules of Article 251* whereas Article 13 measures require unanimity. Article 13 is also argued in 'softer terms' to 'combat' discrimination. These differences may reveal precisely the double aim of sex equality law – market *and* fundamental rights interests – whereas Article 13 is more clearly within the area of human rights and social policy.

Key concepts and approaches of EC non-discrimination regulation were developed within sex equality law, such as the concepts of direct and indirect discrimination, the significant rules on the burden of proof in discrimination cases, the scope for positive action, requirements of equality plans as well as accompanying principles on direct effect, sanctions efficiency, etc.

Later action in the area of non-discrimination is – as is stated in the Green Paper on 'Equality and non-discrimination in an enlarged European Union' – built upon the EU's considerable experience of dealing with sex discrimination.[16] However, recent developments show that it also works the other way around – Article 13 developments also influence sex equality law. The current definitions of central concepts such as direct discrimination, indirect discrimination and harassment – introduced to sex equality law by Directive 2002/73 amending the Equal Treatment Directive – were articulated by the first two Article 13 Directives. The Recast Directive 2006/54/EC concerning sex equality law should also be mentioned as well as the adoption of a new Article 13 Directive 2004/113/EC (implementing the principle of equal treatment between men and women in the access to and supply of goods and services). *Due to the variable geometry*[17] *of the discrimination grounds new 'risks' now emerge as regards the application of fundamental concepts*, for instance, with regard to the justifications of direct discrimination (compare Article 6 on age discrimination in Directive 2000/78/EC), the 'test' to be met as regards indirect discrimination (compare inter alia Article 2(b)(ii)

[15] Compare, for instance, McCrudden, *Gender Equality*, p. 4. See, however, also S. Prechal, 'Equality of treatment, non-discrimination and social policy: Achievements in three themes', (2004) 41 *CMLR* pp. 533-51 at p. 543.

[16] The European Commission's Green Paper 'Equality and non-discrimination in an enlarged European Union', COM(2004) 379 final, p. 2.

[17] See further above on the concept of sex as a protected ground.

regarding disability in Directive 2000/78/EC), the scope for positive action and other 'fourth generation non-discrimination rights'.[18] Another aspect to be scrutinised in this context is the exemptions provided. A reason to be especially preoccupied with these general developments is the differences as regard the general aim of non-discrimination measures between the different grounds covered by Article 13 EC – to combat discrimination or to promote equality. In my opinion, there are fundamental differences here between, for instance, the regulation on sexual orientation as compared to the one concerning sex.

Post Amsterdam developments within sex equality law

In November 1997, at the Luxembourg Jobs Summit,[19] the European Employment Strategy (EES) was launched. The original guidelines revolved around four 'pillars', namely, employability, entrepreneurship, adaptability and equal opportunities. The last pillar included tackling the gender gap,[20] reconciling work and family life and facilitating the return to work after an absence, all crucial issues for *sex equality in employment.* A reform of the EES in 2003 brought the guidelines closer to the Lisbon strategy.[21] Here, gender equality is but one of ten guidelines related to the three overarching objectives: full employment, improving quality and productivity at work, and strengthening social cohesion and inclusion. Recent newly integrated guidelines are meant to achieve the Lisbon strategy in an even more efficient manner.[22] Of special interest here is Guideline 17, to promote a lifecycle approach to work, and Guideline 18, to ensure inclusive labour markets. Equal opportunities, combating discrimination

[18] S. Fredman, *The concept of Equality: A General Framework*, paper for a workshop in Brussels 6–7 November 2000 arranged by the Swedish Institute for Working Life.

[19] Presidency conclusions (Lisbon 23 and 24 March 2000) available at: http://europa.eu.int/ispo/docs/services/docs/2000/jan-march/doc_00_8_en.html.

[20] 'The gender gap' concept includes not only the gender *pay* gap issue but also the notorious gender gaps as regard employment as such, unemployment, the higher levels of education, family life organisation and poverty risks (including pensions).

[21] Council Decision 2003/578/EC of 22 July 2003 and the 2004 Employment guidelines [2004] OJ L326/45. The Lisbon Strategy ('to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion') involves the aim to increase the overall EU employment rate to 70 per cent and that among women to more than 60 per cent by 2010.

[22] Council Decision of 12 July 2005 on guidelines for the employment policies of the Member States [2005] OJ L205/21. Here the employment rate among women is identified as currently being 56.1 per cent (for EU 27).

and gender mainstreaming, are said to be essential for progress and special attention should be paid to tackling the persistent employment gaps between women and men (as well as the low employment rates of older workers and young people as part of a new inter-generational approach). Enterprises are required to respond to 'the increasing demand for job quality which is related to workers' personal preferences and family changes'. Despite this, gender equality seems to be less visible as a priority through these later developments of the EES.

In its Communication 'Towards a Community Framework Strategy on Gender Equality (2001–2005)'[23] the Commission stresses the issue of gender equality working towards an inclusive democracy and identifies five interrelated fields of intervention: economic life, equal participation and representation, social rights, civil life and gender roles and stereotypes. The Communication implies *a considerably broadened scope for gender equality*. The actions under 'equal participation and representation' address women's under-representation in, among other areas, politics, science and the Community institutions, characterised as a 'fundamental democratic deficit'.[24] The aim of promoting equality in 'civil life' is said to relate to 'the question of the full enjoyment of human rights and fundamental freedoms'[25] and addresses among other things the issue of violence against and trafficking in women. In this field important policy developments have taken place both before and after Amsterdam such as the STOP programme,[26] the DAPHNE programmes (2000–2003 and 2004–2008, respectively)[27] and the Council Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of action to facilitate illegal immigration, who co-operate with the competent authorities.[28] The framework strategy has so far been monitored through the adoption of annual work programmes and annual reports on gender equality.[29] In the 2005 equality between men and women report, the following challenges for gender equality were identified: strengthening the position of women in the labour market, increasing care facilities for children and other

[23] COM(2000) 335 final. There is a supporting programme to complement the framework strategy, Council Decision of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001–2005) [2001] OJ L17/22.

[24] COM(2000) 335 final, p. 7. [25] Ibid. p. 11.

[26] Joint Action of 29 November 1996 adopted by the Council [1996] OJ L322.

[27] http://ec.europa.eu.justice_home/funding/2004_2007/Daphne/ funding_daphne_en.htm.

[28] [2004] OJ L261/19.

[29] See, for instance, the 2005 Report on equality between women and men, COM(2005) 44 final, the first to cover all twenty-five then Member States.

dependants, addressing men in achieving gender equality, integration of the gender perspective into immigration and integration policies and monitoring developments towards gender equality. There is now a Community programme for employment and social solidarity, PROGRESS 2007–2013, to replace among others, the Community action programme to combat discrimination 2001–2006 and the Council's Decision of 20 December 2000 establishing a programme relating to the Community framework strategy on gender equality 2001–2005.[30] Based on Articles 141(3) and 13(2) EC there is still an advanced proposal on the creation of an Institute for Gender Equality.[31] The objective of the Institute is to 'assist the Community institutions, in particular the Commission, and the authorities of the Member States in the fight against discrimination based on sex and the promotion of gender equality and to raise the profile of such issues among EU citizens' (Article 2).

The fact that the Amsterdam Treaty has assigned a major role to the European social dialogue, giving the social partners substantial responsibilities and powers, was mentioned earlier. The first framework agreement resulting from these provisions in their original version later resulted in the Parental Leave Directive 96/34/EC.[32] This Directive, however, predates Amsterdam and will only be dealt with here indirectly in connection with the amended Equal Treatment Directive 2002/73/EC (ETD) and in relation to case law developments.[33] The two other framework agreements which were later adopted as Directives under the Treaty, the European Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work concluded by UNICE, CEEP and the ETUC[34] and Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP,[35] however, deserve to be addressed here. Despite not constituting parts of EC sex equality law as such, they certainly have gendered implications. Then came the amended ETD, the new Article 13 Directive and the Recast Directive.

[30] Proposal for a European Parliament and Council Decision establishing a Community Programme for Employment and social Solidarity, PROGRESS, COM(2004) 488.

[31] Proposal for a Regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality, COM(2005) 81 final.

[32] [1996] OJ L145/4.

[33] Also the Burden of Proof Directive 97/80/EC ([1998] OJ L14/6) was adopted under the Agreement on Social Policy, annexed to the Protocol (No. 14) on social policy, annexed to the Treaty establishing the European Community.

[34] [1998] OJ L14/9.

[35] [1998] OJ L14/9.

Constitutional developments post Amsterdam

Following the Cologne European Council in June 1999, the first 'Convention' was set up with the task of presenting a draft Charter of Fundamental Rights to the European Council in December 2000. The draft Charter was presented to and adopted by the Council at the Nice Summit in December 2000. Chapter III of the Charter addresses 'Equality'. Whereas Article 20 provides that 'everyone is equal before the law' and Article 21 includes a general ban on discrimination based inter alia on sex, Article 23 specifically addresses equality between men and women. According to its first paragraph, such equality 'must be ensured in all areas, including employment, work and pay'. The second paragraph makes room for positive action: 'The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.' It is also worth mentioning Article 33 (2) here. This concerns family and work reconciliation and states that everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

In the Commission's explanations[36] to the Charter, Article 23 is said to be based on the EC Treaty rules in Articles 2, 3(2) and 141. However, in particular, the rule on positive action has been given an apparently more narrow expression than the Treaty rule in Article 141(4). The Commission attempts to remove such doubts by referring to Article 51(2) of the Charter. Nevertheless, Article 23 can be criticised for embodying a less proactive approach even though it requires equality to be 'ensured in all areas' and the rule on 'positive measures' to reflect 'old views' of such measures as a matter of exception to non-discrimination.[37] The possible shortcomings of the Charter as regards sex equality law have been of minor importance so far, since the Charter as it stands today is not yet judicially binding but merely a 'solemnly proclaimed declaration' and the ECJ – but not so the Advocates General[38] – has displayed a considerable reluctance to refer to it.[39]

Needless to say, when and if the proposed Reform Treaty is agreed and ratified by all Member States, the exact way in which it regulates equality

[36] COM(2000) 559 final.

[37] For this line of argument and other critical views see further McCrudden, *Gender Equality*.

[38] See, for instance, A-G Tizzano in Case C-173/99 *BECTU* [2001]ECR I-4881.

[39] Not so the Administrative Court, see Case T-177/01 *Jégo-Quéré et Cie SA* v. *the Commission* [2002]. See also the case of the European Court of Human Rights, *Christine Goodwin* v. *The UK* (Judgment 11 July 2002).

between men and women – including the Charter of Fundamental Rights as previously integrated in Part II of the Constitution – will form the very basis for future sex equality law. This is not the place to go into the proposed Reform Treaty in detail.[40] I will discuss only the place of gender equality. Article I-2 of the unratified Constitutional Treaty that predated the Reform Treaty set out the Union's values in the following way: 'the union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' It is of course of particular importance that equality and specifically equality between women and men is present among the core values of the Union as expressed in the Constitution and it is now preserved by the proposed Reform Treaty. It was, however, not clear that this would always be the case. In the draft Constitutional Treaty presented to the Convention on 6 February 2003 by the Presidium equality was not included in the corresponding provision.[41]

Article I-3 of the Constitution set out the Union's objectives, and explicitly addressed promoting equality between women and men. 'When this provision is considered alongside two further provisions (Articles III-116 and III-118, sic), the mainstreaming of gender equality and non-discrimination in carrying out functions under Part III appears to become an obligation for Union institutions.'[42] The Reform Treaty, if agreed, would preserve this objective.

The Part-time Work and Fixed-term Work Directives

In general, labour-market developments have recently been perceived as forming a trend towards an increase in the peripheral and distanced workforce. This entails an increase in part-time work, fixed-term work, temporary agency work and other unstable employment relationships, i.e. flexible work as opposed to permanent, relatively secure, full-time traditional employment. These developments are of special concern to women (and thus sex equality) making up the majority of such 'flexible' workers.[43] The legitimate scope of such flexible work can be said to have been at the

[40] See instead further McCrudden, *Gender Equality*.
[41] CONV 528/03. [42] McCrudden, *Gender Equality*, p. 4.
[43] In EU 25 part-time employment in 2004 represented 17.7 per cent of total employment whereas it represented 31.4 per cent of female employment. The corresponding figures as

core of labour law discourse during the last few decades. Lately, though, there have been signs indicating that all 'sides' are yielding to the trend towards more flexible working arrangements, stressing increased quality and equality of working conditions despite the mode of employment. Even so, efforts have long been made on the part of the European Commission to regulate the scope of flexible work, especially fixed-term work. We now have the European Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work concluded by UNICE, CEEP and the ETUC[44] and Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by ETUC, UNICE and CEEP.[45] Whereas the Part-time Work Directive was adopted on the basis of the Agreement on Social Policy contained in Protocol No 14 on social policy, annexed to the Maastricht Treaty, the Fixed-term Work Directive was adopted on the basis of Article 139(2) EC post Amsterdam. The Part-time Work Agreement's purpose is to support and facilitate part-time work more generally. Whereas the purpose of the Fixed-term Work Agreement is twofold: it sets out to improve/guarantee the working conditions of fixed-term workers. At the same time it is meant to restrict the permitted use of fixed-term work by establishing a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. Both Directives, however, adhere to the principle of equal treatment or non-discrimination as a central means of improving the quality of part-time and fixed-term work, respectively.

The principle of non-discrimination (Clause 4 in the respective Agreements) is that in respect of employment conditions, part-time/fixed-term workers shall not be treated in a less favourable manner than comparable full-time/permanent workers *solely* because they have a part-time/fixed-term contract or relation, unless this is justified on objective grounds.

The application of the principle of non-discrimination to part-time/fixed-term work poses special problems – as compared to other, more traditional fields of application for the equal treatment principle such as sex and nationality. One problem consists of the fact that what is forbidden by the non-discrimination provision – differential treatment as regards employment conditions – is at the same time part of what

regards fixed-term employment was 13.7 per cent and 14.3 per cent, respectively. Source the 'Employment in Europe 2005' report.

[44] [1998] OJ L14/9. [45] [1998] OJ L14/9.

constitutes the groups that are to be compared. Different employment conditions pertaining to the mode of employment are a *sine qua non* even for distinguishing the protected group.[46] Moreover, Clause 4 prohibits differential treatment of part-time/fixed-term workers *solely* because of this contractual condition – that is, it forbids *direct discrimination* and not indirect discrimination. Furthermore, direct discrimination may be accepted if it is justified on objective grounds.[47] These conditions reflect in yet another way the restricted scope of the Fixed-term Work Directive/Framework Agreement; or, if we want to put it that way, the ambiguity as regards the use of fixed-term work. The existence of accepted different modes of employment where the most vital employment conditions are concerned – length of and rules on expiry of the employment contract – is a prerequisite for the regulation as such, and differential treatment is, also as regards other employment conditions, typically supposed to be objectively justified on occasion. This also reveals a somewhat limited ambition with respect to the equal treatment principle. Additionally, the principle of equal treatment is subject to the principle of *pro rata temporis*, which means that flexible employees are entitled to the same rights as permanent workers in proportion to the time for which they work.

Professor Brian Bercusson, at the VII European Regional Congress of Labour Law and Social Security held in Stockholm 4–6 September 2002, in his oral comments on the general reports, referred to these new instruments as a new right to equal treatment for workers 'turning discrimination law inside out. It is now all about the justification of differential treatment'. We will return to the implications of such a development in the last section. What is of special interest concerning the Part-time Work and the Fixed-term Work Directives in our context, however, is also the fact that there is a special relationship with sex equality law. Different working conditions for part-timers, being predominantly female, as compared to full-timers, were at the foundation of the concept of indirect discrimination as originally developed by the ECJ[48] and later case law on sex equality has concerned fixed-term work also. Both Directives include a direct statement that 'this agreement shall be without prejudice to any more specific Community provisions, and in particular

[46] See the judgment in Case C-313/02 *Wippel* and further below.

[47] This is usually not the case in other areas of discrimination law, with the exception of age discrimination: see further the discussion in the last section of this chapter.

[48] Compare Case 96/80 *Jenkins* [1981] ECR 911 and Case 170/84 *Bilka Kaufhaus* [1986] ECR 1607.

Community provisions concerning equal treatment of opportunities for men and women'.[49] The justification test may require a different standard within the realm of sex equality law, not least in cases of fixed-term work and pregnancy (equivalent to direct sex discrimination).[50]

The amended Equal Treatment Directive

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[51] (hereafter the Amended ETD and the ETD, respectively) was due for implementation by 5 October 2005. It was adopted in light of Article 6 of the Treaty on the European Union, addressing the fundamental rights as guaranteed by the European Convention and recognised by the Union Charter of Fundamental Rights, the new provisions under Articles 2, 3(2) and 141 of the EC Treaty, the ECJ's case law on discrimination on the grounds of sex, the new Article 13 Directives and Directive 97/80/EC on the Burden of Proof in Cases of Discrimination Based on Sex.

The Amended ETD is thus an initiative to implement among other things the new EC Treaty provisions on gender equality. The Directive now includes express definitions of the central concepts of direct and indirect discrimination (Article 2(2)) consistent with the corresponding concepts in the first two Article 13 Directives. The same can be said for the concept of harassment (Article 2(3)) and also instructions to discriminate as constituting a form of discrimination (Article 2.4). Moreover, the Directive includes express definitions of two types of harassment: 'harassment related to the sex of a person' and 'sexual harassment', respectively

[49] Clause 6(4) of the Part-time Work Agreement and Clause 8(2) of the Fixed-term Work Agreement, respectively.

[50] The recent cases C-196/02 *Nikoloudi* and C-285/02 *Elsner-Lakeberg* concerned part-time work and indirect sex discrimination whereas Case C-313/02 *Wippel*, refers to both the Part-time Work Directive and the ETD. See also Case C-109/00 *Tele Denmark A/S* v. *Handels- og Kontorfunktionærernes Forbund in Denmark* [2001] ECR I-6993 where the ECJ stated that the dismissal of a fixed-term-employed woman on grounds of pregnancy was in conflict with the Council's Directive 76/207/EEC (Art. 5.1, direct discrimination on grounds of sex) as well as with the Pregnant Workers Directive 92/85/EEC (Art. 10). According to the ECJ there is, according to those Directives, no reason for not treating different modes of employment equally (para. 33). See also Case C-173/99 *BECTU* on the right to vacation according to the Council's Directive 93/104/EC on Working Time.

[51] [2002] OJ L269/15.

(Article 2(2)). The Amended ETD also contains improved protection for pregnant women and maternity rights, basically adjusting the Directive to the case law of the ECJ. In light of Article 141(4) the ETD's rules on positive action in the former Article 2(4) were eliminated and replaced by a reference to the Treaty rule itself (Article 2(8)). The Amended ETD also includes rules on more effective monitoring, legal protection and remedies.

The Amended ETD has thus made use of some of the innovations introduced by the first two Article 13 Directives. The definition of direct discrimination introduces the comparison of the claimant with a hypothetical worker of the other sex, in line with the ECJ's judgment in *Dekker*. The concept of indirect discrimination had developed in case law[52] and was later expressly regulated in the Burden of Proof Directive 97/80/EC. There, it was articulated so that an apparently neutral criterion could be justified 'if adequate and necessary *and due to reasons unrelated to sex*'. However, according to Article 2(2) of the Amended ETD, the concept of indirect discrimination now reads that a treatment is justified if 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The words 'unrelated to sex' are now missing. According to the Amended Directive national law or practice may provide in particular for indirect discrimination to be established by 'any means including on the basis of statistical evidence'.[53] The express definition here draws upon the wording of the new Article 13 Directives rather than the Burden of Proof Directive,[54] and can be said to provide a somewhat wider scope for establishing a prima facie case of indirect discrimination.[55]

The new Article 3 articulates the ban on discrimination covering both public and private sectors (including public bodies) concerning '(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining,

[52] See cases *Jenkins* and *Bilka Kaufhaus*.

[53] The preamble, para. 10.

[54] '*would* put . . . at a particular disadvantage' as in Art. 2(2)(b) of the Article 13 Directives compared to '*disadvantages a substantially higher proportion* of the members of one sex' in Art. 2(2) of the Burden of Proof Directive. See also, for instance, S. Koukoulis-Spiliotopoulos (2001), p. 41.

[55] Compare also the Explanatory Memorandum, Ch. 5, Art. 2 to the Commission's Proposal for the Amended ETD, COM(2000) 334 final.

including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in the Equal Pay Directive 75/117/EEC; and (d) membership of, and involvement in, an organisation of workers or employees, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations'. The ban on discrimination regarding membership of, and involvement in, workers organisations, etc., apparently would put an end to such associations for only one sex. Separate women's organisations may still be accepted under Article 141(4) in the Treaty, though.[56]

Among the provisions of special importance regarding working conditions, are the new rules defining harassment since there was no EC 'hard law' on this matter.[57] There are also new provisions regarding pregnancy and maternity rights (the new Article 2(7)). Women on maternity leave will be entitled to return to the same or an equivalent job after pregnancy and maternity leave, with no less favourable working conditions, as well as to benefit from any improvement in working conditions to which they would have been entitled during their absence. While less favourable treatment of a woman related to pregnancy or maternity leave, constitutes discrimination within the meaning of the Amended ETD, these rules are without prejudice to the provisions of the Parental Leave Directive 96/34/EC and the Pregnant Workers Directive 92/85/EC,[58] respectively.

Moreover, the Amended Directive in Article 2(7) also provides an opportunity for the Member States to grant working men an individual right to paternity leave while maintaining their rights relating to employment, thus recognising distinct rights to paternity. However welcome such paternity rights may seem they can, in my opinion, also be criticised. While providing important social rights also for the fathers of small children, a different set of such paternity rights may turn out to perpetuate a distinction between maternity leave and paternity leave to the detriment of gender-neutral parental rights making their way into working life.

[56] Compare preamble 7 of the Amended ETD. See also R. Nielsen, 'Det nye ligebehandlingsdirektiv (2000/73/EF) – perspektiver for nordisk ret', *Arbeidsrett* 2 (2004) (Universitetsforlaget, Oslo), p. 78.

[57] Compare, however, the Commission Recommendation on the protection of the dignity of women and men at work, with an annexed Code of Practice on measures to combat sexual harassment, 92/131/EEC, [1992] OJ L49/1.

[58] [1992] OJ L348/1.

The Amended ETD contains a new rule on bona fide occupational qualifications (bfoq) defences in Article 2(6), referring to occupational activities which necessitate ('constitutes a genuine and determining occupational requirement') the employment of a person of one sex 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' provided that the objective sought is legitimate and subject to the principle of proportionality as laid down by the case law of the ECJ. The new writings suggest a stronger justification test than before and are a welcome elimination of the old 'derogation rule' in Article 2(2) of the 1976 ETD. This rule, too, is copied from the first two Article 13 Directives.

The remedies and enforcement rules also reflect great similarities with the Article 13 Directives – and especially the Race Directive 2000/43/EC. Thus the Amended ETD requires a special body or bodies to promote equal treatment but also with the competence to assist individual victims of discrimination pursuing their complaints of discrimination (Article 8a). It is worth mentioning the more far-reaching duty of Member States to encourage employers to promote equal treatment in the workplace 'in a planned and systematic way' (Article 8b(4)). Such equality planning has long since been a reality in Sweden, for instance, and is now spreading to other areas of non-discrimination through domestic legislation, although not required by the Article 13 Directives. The Amended ETD can be said to strengthen the general requirements as regards effective judicial protection involving effective access to court, effective judicial control and effective sanctions.[59]

Summing up, the Amended ETD means an adaptation of the concepts and the rules on remedies and enforcement to those in the Article 13 Directives. The Amended ETD extends the ban on discrimination to new situations (such as union membership) and defines harassment, instructions to discriminate and less favourable treatment related to pregnancy or maternity leave as discrimination.

A new Article 13 Directive

A significant post-Amsterdam development concerns the extension of EU sex equality law beyond the field of employment and related areas. In December 2004, the Council adopted Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.[60] The Commission announced

[59] See, for instance, R. Nielsen (2004), p. 85. [60] [2004] OJ L373/37.

its intention to put forward such a proposal in its Communication on the Social Policy Agenda,[61] as indicated above. The European Council at its meeting in Nice in December 2000 later called for such an initiative. The Directive is based on Article 13(1) EC and reference is made in the preamble, among others, to Article 6 of the TEU, Articles 21 and 23 of the Charter of Fundamental Rights and Articles 2 and 3(2) EC.[62] Discrimination based on sex and harassment in areas outside of the labour market is said to be 'equally damaging, acting as a barrier to the full and successful integration of women and men into economic and social life' and problems are said to be particularly apparent in the area of goods and services.[63] As it was based on Article 13, the Directive required unanimity within the Council for its adoption. At the first agreement on a common position within the Council (October 2004) the Directive only passed since Germany abstained from voting. Among the issues put forward by Germany were doubts concerning the compatibility of the contents of the Directive and the principle of freedom of contract as guaranteed by the German Constitution. On the 13 of December 2004, however, unanimity was reached and the Directive was finally adopted.

The Directive draws heavily upon, in particular, the Race Directive 2000/43/EC but also on the Amended ETD, now compatible with the earlier Article 13 Directives. The structure is basically the same: four Chapters dealing with general provisions, remedies and enforcement, bodies for the promotion of equal treatment and final provisions, respectively. The concepts of discrimination and harassment are the same, as are the rules on the burden of proof and the rules on remedies and procedure, there is also a requirement of a specialised body and for Member States to engage in a dialogue with NGOs, etc.

The purpose of the Directive is thus to lay down a framework for combating discrimination based on sex in access to and supply of goods and services (Article 1). The Directive, however, covers access to and supply of goods and services only when provided for remuneration and available to the public. Transactions within the private sphere, families and so on, are outside the scope of the Directive as are media, advertising and education (Article 3). The ban on discrimination does not preclude differences in treatment 'if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 4(5)). Whether

[61] COM(2000) 379 final.

[62] The European Parliament had examined the possibility of using Article 95 as a legal base for the Directive, see PE 337.25 final A5–0155/2004 (at 35).

[63] The preamble, recitals 8 and 9.

the Directive should apply also to insurance has been an issue of conflict. The main principle is now that Member States shall ensure that as regards contracts concluded after 21 December 2007, the use of sex as a factor in calculations shall not result in differences in individuals' premiums and benefits (Article 5(1)). However, the Directive leaves Member States a certain scope to continue to use sex as a determining factor when assessing insurance risks as long as this is based on relevant and accurate actuarial and statistical data also following December 2007. Such data must be regularly updated and made public. However, as regards insurance costs, specifically related to pregnancy and maternity they must be attributed equally to both men and women in order to provide a fairer distribution within society of such costs as of 21 December 2007 (although it is possible to extend the deadline further for two more years). The rules on insurance are to be evaluated within six years. Undoubtedly, due to societal developments such as increasing employment levels among women and the increasing use of private insurance to offset public expenditure, this is a really weak point as far as gender equality is concerned although the equality principle to a certain extent may work both ways. Whereas as regards annuities and pensions it will benefit women, as regards motor insurance it may be the other way around.

The Directive's coverage is thus limited. In the preparatory discussions it was suggested that it cover a much wider range of questions such as violence (including domestic) against women and participation in decision-making.[64] Also, early proposals by the Commission covered a number of other areas – now not covered by the Directive – such as social assistance, education, media, advertising and also taxes. Doubts regarding the legal competence of the Union in some of these areas and, possibly, extensive lobbying led to the much less extensive intervention reflected in the final Directive.[65]

The Directive is the first to bring the principle of sex equality beyond the workplace and as such, it undoubtedly represents significant progress.[66] However, drawing upon the earlier Article 13 Directives and especially the Race Directive 2000/43/EC, it is obvious that its coverage is significantly less extensive, something which has been considered as reinforcing the idea of a hierarchy of equalities where gender appears to be losing

[64] Compare the European Women's Lobby 'Shadow Directive on Achieving Equality of Women and Men outside the Field of Occupation and Employment' (June 2002).
[65] See, for instance, Prechal 'Equality of treatment'.
[66] Compare R. Nielsen (2004).

ground.[67] The poor scope of the Directive has also been questioned from a human rights point of view, not covering important issues such as equal treatment in the areas of media and education.[68] As regards the contents of the Directive, it is interesting to note that Article 4(5) provides for the justification of direct discrimination also. As stated by Eugenia Caracciolo di Torella, the effect of the Directive in 'real life' is likely to be a complicated mixture of gains and losses for both sexes.[69]

The Recast Directive

In 2006 the European Parliament and Council agreed a proposal for a Recast Directive bringing together some of the existing directives in a single text.[70] The Commission presented a proposal for such a Directive in 2004[71] and the Council adopted its general approach in December 2004.

The objective of the Recast Directive is to simplify, modernise and improve the Community law in the area of equal treatment between men and women by putting together in a single text provisions of Directives linked by their subject, in order to make Community legislation clearer and more effective.[72] Its legal basis is Article 141(3) EC, also the basis of the Directives amalgamated therein: the Equal Pay Directive 75/117/EEC Directive 86/378/EEC on occupational schemes as amended by Directive 96/97/EEC; the Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC; and the Burden of Proof Directive 97/80/EC as amended by Directive 98/52/EC.

The directive is structured in five titles. Title I, General Provisions, includes the core concept definitions taken from the Amended ETD (copying the Article 13 Directives) as well as the definition of pay from Article

[67] Compare E. Caracciolo di Torella at the 18–20 November 2004 Hague Conference on 'Progressive implementation; New developments in European Union Gender Equality Law' and her paper 'The Goods and Services Directive: A step forward or a missed opportunity'.

[68] Ibid. Caracciolo di Torella thus especially questions its compliance with Arts. 2, 5 and 10 in the United Nations Convention of the Elimination of all Forms of Discrimination against Women (CEDAW), already binding upon signing Member States.

[69] *Ibid.*

[70] Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006/54/EC, [2006] OJ L204 (to be implemented by 15 August 2008).

[71] 2004/0084/COD.

[72] Compare the Commission's Communication Updating and simplifying the Community *acquis*, COM(2003) 71 final.

141(2) EC and the definition of occupational social security schemes as modified by Directive 96/97/EC. Title II, Specific Provisions, comprises three chapters, concerning the principle of equal pay (Ch. 1), the principle of equal treatment in occupational social security schemes (Ch. 2) and the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions (Ch. 3), recasting the respective directives as amended. Chapter 1, Article 4, on the principle of equal pay, provides:[73] 'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.'[74] It also includes case law developments with regard to public servants' pension schemes as reflected in *Beuene* and *Niemi*.[75] Title III on horizontal provisions reflects the regulation of these matters introduced by Directive 2000/73/EC. It also relates to the contents of the Burden of Proof Directive, extending its application to the area of occupational social security schemes.

The Recast Directive can be said to signify only very moderate changes in order precisely to bring the *acquis* in line with new equality law instruments and case law developments. The ambitions to unify Community Equality Law spring clear from the Commission's explanatory memorandum: 'Legislation should . . . use the same concepts . . . in order to ensure legal and political coherence between pieces of legislation, which have similar objectives. It is therefore necessary to ensure coherence between secondary legislation on identical issues, such as the concept of indirect discrimination or the need for Member States to have bodies for the promotion of equal treatment.'[76]

Recasting a group of, often also amended, Directives into a single instrument must be regarded as an improvement. The Recast Directive will thus also provide a harmonised and coherent set of core concept definitions doing away with the current superseded definition of indirect discrimination in Article 2.2 in Directive 97/80/EC.

[73] An earlier version had included an interesting innovation with reference to the case. It referred to remuneration 'attributable to a single source'. Case C-320/00 *Lawrence and Others* [2002] ECR I-7325 and C-256/01 *Allonby* [2004] ECR I-873.

[74] In *Allonby*, Debra Allonby was not entitled to use as a comparator for equal pay purposes a male lecturer employed by her former employer once she herself was put to the use of her former employer through a temporary work agency.

[75] Cases C-7/93 *Beuene* [1994] ECR I-4471 and C-351/00 *Niemi* [2002] ECR I-7007.

[76] COM(2004) 279 final, p. 22.

Case law development

Community sex equality law is the basis of an impressive bulk of case law from the ECJ. It is, of course, altogether impossible to do justice to this important part of the *acquis communautaire* in such a limited space as this. On the contrary, it is my intention to discuss only the cases following Tamara Hervey's comprehensive report to the 2002 Stockholm regional European Congress on Labour Law.[77]

In her report Tamara Hervey focused on justifications of both direct and indirect discrimination on an 'uninterrupted scale'. Moreover, Hervey shows us in great detail how the strictness of the proportionality test applied by the ECJ varies according to the context. Justifications can be job-related, enterprise-related and public-interest related. The conclusion is that there are different levels of justification with regard to the concept of indirect discrimination. The Court was found to retain a relatively strong version of proportionality when assessing job-related justifications and enterprise-related justifications for indirect sex discrimination, especially when advanced by the employer. Broader public interest-related justifications advanced by a Member State are said to be subject only to a weaker, reasonableness-based proportionality test.

Hervey's line of argument fits well with Bercusson's overall comment that 'it is now all about justification', and we can expect even more diversified requirements in the future due to the impact of the new instruments on non-discrimination, ranging from the Part-time and Fixed-term Directives to the Article 13 Directives. To what extent can recent case law be said to confirm or inhibit such arguments?

First, direct discrimination has for a long time been subject to express legislative derogations in Article 2 ETD. In *Dory*, concerning compulsory military service in Germany only for men, the ECJ found Germany's choice of military organisation to be an issue outside the scope of the ETD altogether, despite the fact that the organisation of the armed forces could not be regarded *per se* to be excluded in their entirety from EC law. Community law thus does not preclude compulsory military service being reserved to men. In *Commission* v. *Austria*[78] the ECJ found, however, that Austria, by maintaining a general prohibition of the employment of

[77] T. Hervey, *EC law on Justifications for Sex Discrimination in Working Life*, available at the Congress website: http://www.labourlaw2002.org. Published in R. Blanpain (ed.), *Labour Law & Social Security and the European Integration, Bulletin of Comparative Labour Relations* (Kluwer Law International, 2003).

[78] Case C-203/03 *The Commission* v. *Austria* [2005] ECR I-935.

women in work in a high-pressure atmosphere and in diving work, had failed to fulfil its obligations under Articles 2 and 3 of the ETD. The ETD 'does not allow women to 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 women in the same way and which are distinct from women's specific needs 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'.[79] There is now the new rule on bfoq defences in Article 2(6) of the Amended ETD, as discussed above.

Article 2(3) of the old ETD (now Article 2(7)), despite the ban on discrimination, provides scope for provisions concerning the protection of women, particularly as regards pregnancy and maternity. However, the ECJ already ruled in *Dekker* that pregnancy and maternity are inseparable from the female sex as such and that any *inferior* treatment on these grounds amounts to direct discrimination and thus is protected by the equal treatment rule itself. This can, in fact, be regarded as the most potent protection for pregnant women and mothers. Also following important cases such as *Mahlburg*[80] and *Tele Danmark*[81] the ECJ has confirmed its fundamentalist approach in this respect. In the *Busch* case[82] the Court stated that it is an infringement of the equal treatment principle to require 'that an employee who, with the consent of her employer, wishes to return to work before the end of her parental leave must inform her employer that she is pregnant in the event that, because of certain legislative prohibitions, she will be unable to carry out all of her duties',[83] nor can the lack of such information form the basis of a decision to deny her such a re-entry. The Court reaffirmed in *Busch* that direct discrimination cannot be justified on grounds relating to the financial loss of an employer.[84] In *Merino Gómez*[85] the ECJ found that Article 5(1) of the ETD means that a worker must be able to take her annual leave – as guaranteed by Directive 93/104/EC on Working Time or the more beneficial rules in national law – during a

[79] Paras. 45–6 of the judgment. [80] C-207/98 *Mahlburg* [2000] ECR I-549.

[81] See also Cases C-179/88 *Hertz* [1990] ECR I-3979, C-421/92 *Webb* [1994] ECR I-3567 and C-438/99 *Melgar* [2001] ECR I-6915.

[82] C-320/01 *Busch* [2003] ECR I-2041. Mrs Busch had required an early return from her parental leave in order to, by the time of the birth of her second child, receive (the higher) maternity allowance instead of the allowance paid during parental leave and also some supplements to the maternity allowance.

[83] Para. 47 of the judgment. [84] Para. 44 of the judgment.

[85] C-342/01 *Merino Gómez* [2004] ECR I-2605.

period other than the period of her maternity leave and that this includes a case in which the period of maternity leave coincides with the general period of annual leave fixed by a collective agreement applicable to the entire workforce. The purpose of the entitlement to annual leave being different from that of the entitlement to maternity leave, allowing them to overlap would have entailed one of them being lost. The *Sass* case[86] regarded passage to a higher salary grade. Ursula Sass was not allowed to take into account the whole period of maternity leave (twenty weeks) taken under the legislation of the former GDR in calculating the qualifying period since the collective agreement applicable took into account only maternity leave (eight weeks) according to German federal rules. The ECJ, who found that 'a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave', held that 'Mrs Sass is in a worse position than a male colleague who started work in the former GDR on the same day as she did because, having taken maternity leave, she will not attain the higher salary grade until 12 weeks after he does'.[87] However, it was said to be for the national court to decide whether the twenty weeks' leave actually taken by Mrs Sass was of the kind protected as maternity leave by Article 2(3) of the ETD. In *Mayer*[88] the Occupational Pension Scheme Directive 86/378/EEC as amended by Directive 96/97/EC was at stake. The Directive was found to preclude national rules under which a worker does not acquire rights to an insurance annuity during statutory maternity leave, paid in part by her employer, because the acquisition of those rights is conditional upon the worker receiving taxable pay during the maternity leave.

However, the judgment in the *McKenna* case[89] departs from this route of assuring equal rights to women on maternity leave. The employer's sick-leave scheme provided that employees were entitled to 365 days of paid sick-leave in a period of four years. Moreover, 183 days of absence in a period of twelve months were paid at full pay and any additional sick days up to the limit of 365 days over four years at half pay only. Ms McKenna was on sick leave on account of a pregnancy-related illness, at first with full pay and then afterwards for 183 days with half pay. During maternity leave she received full pay again. When that leave expired Mrs McKenna was still sick and her pay was once again reduced to half pay. The ECJ

[86] C-284/02 *Sass* [2004] ECR I-11143.
[87] Paras. 35 and 37 of the judgment.
[88] C-356/03 *Mayer* [2005] ECR I-295.
[89] C-191/03 *North Western Health Board* v. *Margaret McKenna* [2005] ECR I-7631.

stated that sickness-related pay was an issue under Article 141 EC and the Equal Pay Directive, not the ETD, and that despite the fact that women were protected against dismissal during pregnancy and maternity leave there was no such thing as a protection of full wages during that same time. Women making use of maternity leave deserve special protection but cannot be compared with men who are actually working. According to Article 11(b) in Directive 92/85/EC they are only guaranteed reasonable compensation. Case C-220/02[90] concerned whether not taking parental leave (following upon the expiry of maternity leave) into account for calculating a termination payment amounted to indirect discrimination of women. A comparison was made with workers performing military service (mostly men) whose leave was indeed taken into account. The Court, however, found women (and men) taking parental leave not to be in a comparable situation with workers doing national service and indirect discrimination thus not to be at stake. The Court's backward declaration that the interests of the worker and family in the case of parental leave and 'the collective interests of the nation in the case of national service ... are of a different nature'[91] is worth drawing attention to.

The question whether direct discrimination is necessarily a 'closed class' outside the presence of express legislative derogations can be said to have been addressed also in relation to the old Article 2(4) of the ETD and the scope for positive action. In *Kalanke*, *Marschall* and *Badeck* – despite accepting the positive action measures at stake in the latter two cases – the ECJ had argued the scope for such measures in terms of an exception to the equal treatment principle.[92] However, in the cases of *Lommers* and *Briheche* the ECJ has argued somewhat differently: 'In determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.'[93] Sacha Prechal, at a conference on Women in Academia held

[90] C-220/02 *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907.

[91] Para. 64 of the judgment.

[92] Cases C-450/93 [1995] ECR I-3051, C-409/95 [1997] ECR I-6363 and C-158/97 [2000] ECR I-1875.

[93] See Cases C-476/99 *Lommers* [2002] ECR I-2891, 39 and C-319/03 *Briheche* [2004] ECR I-8807, 24. In *Lommers* the test fell out positive. It was not unjustifiable to limit a number of subsidised nursery places made available by the Ministry to its staff for female officials alone whilst male officials could have access to them only in cases of emergency provided

in Lund, 2–3 December 2004,[94] claimed that now 'it's all about proportionality', a claim very much in line with the ones referred to above made by Hervey and Bercusson.

With regard to indirect sex discrimination several cases recently have concerned flexible work. *Elsner-Lakeberg*[95] deals with the question of whether national measures providing that full-time and part-time teachers were obliged to work the same number of additional hours (three) before being entitled to remuneration constituted indirect discrimination against women teachers employed part-time. With reference to *Kowalska* and *Brunnhofer*[96] the ECJ held it necessary with a separate comparison in respect of the pay for regular hours and the pay for additional hours and continued: 'Although that pay may appear to be equal inasmuch as the entitlement to remuneration for additional hours is triggered only after three additional hours have been worked by part-time and full-time teachers, three additional hours is in fact a greater burden for part-time teachers than it is for full-time teachers' and they thus 'receive different treatment compared with full-time teachers as regards pay for additional teaching hours'.[97] It is for the national court to consider the eventual justification. The *Wippel* and *Nikoloudi* cases[98] also concerned part-time employment and indirect sex discrimination. Nicole Wippel was employed part-time on the basis of a contract of employment based on the principle of 'work on demand', i.e. without specifically stated hours of work and organisation of working time. The ECJ, which found both the ETD and the Part-time Work Directive 97/81/EC in principle applicable to such a worker (in the latter case provided the Member State had not excluded them wholly or partly from the benefit of the terms of that agreement), concluded that they did not preclude a contract such as the one at stake despite all the

those of them who did take care of their children by themselves had access to that nursery place scheme on the same conditions as did the female officials. In *Briheche* the outcome was negative. A provision such as the French in question, providing an exemption from the age limit for obtaining access to public sector employment, was regarded automatically and unconditionally to give priority to the candidatures of certain categories of women including widows who have not remarried who are obliged to work, while excluding widowers who have not remarried who are in the same situation.

[94] The proceedings are published in R. Blanpain and A. Numhauser-Henning (eds.), *Women in Academia* (Kluwer Law International, 2006).

[95] Case C-285/02 *Elsner-Lakeberg* v. *Land Nordrhein-Westfalen* [2004] ECR I-5861.

[96] Case C-33/89 *Kowalska* [1990] ECR I-2591 and C-381/99 *Brunnhofer* [2001] ECR I-4961.

[97] Para. 17 of the judgment. Compare, however, the joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig* [1994] ECR I-5727, where the ECJ held a different view.

[98] C-313/02 *Wippel* v. *Peek Cloppenburg Gmbht Co. KG* [2004] ECR 9483 and Case C-196/02 *Nikoloudi* v. *OTE* [2005] ECR I-1789.

contracts of employment of the other employees at the employer's making provision for the length and organisation of weekly working time. The principle of equality can apply only to persons in comparable situations and with reference to precisely the very conditions of the 'on demand contract'; the Court could not find any comparable worker. This case seems to confirm what was said above on the employment conditions being what constitute the very groups to be protected, as the weak point of non-discrimination of 'workers'. Ms Nikoloudi was a part-time cleaner at the public company OTE and for that reason was denied the possibility of appointment as an 'established staff member'. Established staff comprised full-time employees only. Part-time cleaners, although under contracts of indefinite duration, were regarded as 'temporary staff' and they were by definition 'female' according to the textual agreement. This amounts to direct discrimination violating the ETD. However, the Court also considered the possibility – argued by the employer – of there also being part-time employed men and conferred it upon the national court in such a case to decide whether the practice was in fact to the detriment of women and thus constituted indirect discrimination. Despite the fact that it is also for the national court to assess any eventual justification in such a case, the ECJ made some interesting remarks in that respect. Thus it ruled out the possibility that part-time work as such constitutes a sufficient reason to explain the difference in treatment. It also ruled out a public interest related justification according to which a national public utility undertaking should not bear excessive burdens, this being a mere generalisation. And, the Court continued: 'Although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes.'[99] In *Vergani*[100] a taxation rule providing that in order to encourage workers who had passed the age of fifty years in the case of women and fifty-five years in the case of men to take voluntary redundancy, the tax on the redundancy payment should be only half of the rate normally applied, was regarded as constituting a condition governing dismissal within the meaning of Article 5(1) ETD and amounted to discrimination. (The provision was found to be outside the scope of the exception provided for

[99] Para. 53 of the judgment. Compare Cases C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, C-343/92 *Roks and Others* [1994] ECR I-571 and C-77/02 *Steinicke* [2003] ECR I-9027.

[100] Case C-207/04 *Vergani* [2005] ECR I-7453.

in Article 7(1) of Directive 79/7/EEC.) The particularly interesting cases of *Lawrence* and *Allonby* have already been touched upon in connection with the Recast Directive and the provisions on equal pay.[101] In *Allonby*, however, there was also the issue of indirect discrimination enshrined in legislation: whether the requirement of being employed under a contract of employment as a precondition for membership of a legislated pension scheme for teachers could possibly amount to indirect discrimination provided it was shown that a clearly lower percentage of women than men were able to satisfy that condition and it is established that that condition is not objectively justified. This question was answered in the affirmative provided we were dealing with a worker within the meaning of Article 141(1) EC. It may be that public interest related justifications, as Hervey argues, are subject to a somewhat weaker proportionality test. However, case law developments show that the ECJ continuously scrutinises public legislation in quite disparate fields under the equal treatment regulation.[102]

Commenting on post-Amsterdam developments and pointing towards the future

As can be perceived from the foregoing, there are a number of important developments since Amsterdam in the field of sex equality law. The amended ETD and the Recast Directive may be said to signify important expressions of sex equality law developments proper. However, other important developments can be characterised, to quote Dagmar Schiek, as 'driven by the "other equalities"'.[103] This goes for the harmonisation of key concepts in the Amended ETD (and the Recast Directive) and, of course, for the new Article 13 Directive. 'The combating of discrimination is based on a hard core of rights and gives priority to synergy between all European instruments' states the Commission in its Communication on the Social Agenda 2005–2010.[104] Is this good or bad for the future of sex equality law?

[101] Case C-320/00 *Lawrence and Others* [2002] ECR I-7325 and C-256/01 *Allonby* [2004] ECR I-873.

[102] Compare also C-303/02 *Haackert* [2004] ECR I-2195, where the ECJ, however, accepted a pre-retirement scheme in Austria linked to unemployment and applicable to women at a lower age than men as a necessary consequence of there being a difference in normal pensionable age and thus permitted under Article 7(1)(a) of Directive 79/7/EEC.

[103] D. Schiek (2004). [104] COM(2005) 33 final.

The wording of the Article 13 Directives explicitly takes account of the original ETD and its interpretation by the ECJ of Directive 97/80/EC and of the overall experience of fighting gender discrimination and pursuing gender equality. The Article 13 Directives, however, are also inspired by the ECJ's case law on the free movement of workers; most notably its interpretation of the concept of indirect discrimination. The Article 13 Directives can thus be said to draw from a wider scope of *acquis communautaire* than Community gender equality regulation so far. In the free movement cases the ECJ has held that 'a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage, unless it is justified by objective considerations independent of the nationality of the workers concerned, and proportionate to the legitimate aim pursued by that law'.[105] It is thus enough to show risk. Updating gender equality regulations to this standard might actually be seen as 'building on strength' as regards gender equality, implying an instrumental and proactive approach. Sophia Koukoulis-Spiliotopoulos argues that this is precisely the approach adopted in the Amended ETD.[106] Everything would change should the ECJ accept the ban on indirect discrimination to be used instrumentally to promote substantive equality between the sexes in parallel with the use of the indirect discrimination concept in 'free movement cases'.[107] So far, however, we have seen little of this. Although the ECJ in, for instance, *Thibault* has recognised that the aim pursued by the ETD is substantive and not formal equality,[108] the 'single source argument' in *Lawrence*, confirmed in *Allonby*, seems to counteract any broader such development. This can be accredited to the 'individual complaint model' dominating EU sex equality law.[109] The test, instead of focusing on the perpetrator's guilt (a single source), could however focus on whether a rule or practice is based on the exclusion of women and is systematically detrimental to women's needs and interests – i.e. make

[105] Case C-237/94 *O'Flynn* [1996] ECR I-2417, para. 20.

[106] S. Koukoulis-Spiliotopoulos, *The Amended Equal Treatment Directive (2002/73) and the Constitutional Principle of Gender Equality*, paper to the 2004 Hague conference.

[107] See further A. Numhauser-Henning, 'Introduction, Equal Treatment – a Normative Challenge', in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer, 2001), p. 8.

[108] Case C136/95 [1998] ECR I-2011. Compare S. Prechal (2004), p. 537.

[109] S. Fredman, *Changing the norm: positive duties in equal treatment legislation*, paper to the 18–20 November 2004 Hague Conference on 'Progressive Implementation: New Developments in European Union Gender Equality Law'.

use of 'the dominance approach'.[110] But, then again there is the argument that EU sex equality law cannot become an entirely all-embracing 'human right' due to the limited competence of EU institutions.[111] However, the need for successful integration of women as part of the Lisbon strategy for the internal market and other policies should go a long way to this end.

The Race Directive has clearly paved the way for the new Article 13 Directive 2004/113/EC broadening the scope of sex equality law beyond the area of work and employment and no doubt for significant progress. However, the fact that this Directive is considerably more limited in scope than the Race Directive has been said to create a hierarchy in discrimination to the detriment of sex equality law, despite the considerable 'heritage' of the latter as spelt out earlier in this chapter.

Another worry has been the erosion of key concepts of discrimination law as a consequence of their overall harmonisation. As regard justifications, the traditional view is that direct discrimination can never be justified. However, in her report to the Stockholm Congress already referred to above, Tamara Hervey emphasised justifications of both direct and indirect discrimination on an 'uninterrupted scale' and argued that the former Article 2 rules of the ETD will be seen as justifications within the discrimination concept.[112] Recent developments add to this picture. 'It is now all about the justification of differential treatment' said Bercusson *à propos* the Part-time and Fixed-term Directives banning explicitly only direct discrimination and at the same time opening up the way for its justification. There is also the very extensive rule on acceptable differential treatment in the form of direct discrimination concerning age in the Framework Directive[113] and concerning the provision of goods and services exclusively or primarily to members of one sex when justified by a legitimate aim, appropriate and necessary according to the new Article 13 Directive.[114] Future influences from the human rights approach may

[110] C. MacKinnon, 'Difference and Dominance, On sex-discrimination', in: K. T. Bartlett and R. Kennedy (eds.), *Feminist Legal Theory, Readings in Law and Gender* (Westview Press, 1991), pp. 81–94.

[111] S. Prechal (2004), p. 551.

[112] T. Hervey, *EC law on Justifications for Sex Discrimination in Working Life*, available at the Congress website: www.juridicum.su.se/stockholmcongress2002. In her paper to the 18–20 November 2004 Hague conference, however, she does conclude that a core general principle of justification for direct sex discrimination to date has been resisted by the ECJ, see T. Hervey, *What has EU sex equality law brought us this far: Is the glass half full or half empty?*

[113] See Art. 6 the Framework Directive 2000/78/EC.

also lead in this direction since the European Court of Human Rights permits justifications in cases of direct gender discrimination.[115] There is thus the risk of erosion of the ECJ's fundamentalist approach to direct discrimination. I have myself argued for the benefits of such an ultimate proportionality-test approach in relation to positive action measures and substantive equality.[116] Nevertheless, there are also risks attached to such a development to consider.

Then there is the concept of indirect discrimination – of special interest when it comes to substantive equality and equally adequate working conditions. Whereas the ban on direct discrimination concentrates on what is to be regarded as alike[117] and not on the treatment as such – what I will call the reference norm – the concept of indirect discrimination has a special potential. An apparently neutral reference norm with detrimental effects for a protected group must be objectively justified by a legitimate aim, represent a necessary means and be proportionate to its purpose.[118] The new and harmonised definition of this concept now present in the Amended ETD (and the Recast Directive) has already been discussed from the angle of providing new options as regards how to prove discrimination. This is a good thing. However, there is also here *the risk of erosion of the concept of indirect discrimination.* The variable geometry of different grounds for discrimination bans may turn out to erode the concept. We can already discern a tendency to stress differences in recent case law not finding the situations at hand comparable.[119] As regard the disabled, the concept of reasonable accommodation makes room for economic arguments on behalf of the employers as justifications, something which may turn out to undermine other grounds of discrimination in the long run, also.

The potential of the concept of indirect discrimination has thus so far been hampered in the process of application. However, there are also some more positive lines of argument. Bercusson, at the Stockholm conference, recalled how the issue of justifications is related to managerial prerogatives at the heart of labour law. Discrimination law and the requirements

[114] See Art. 4(5) of the Directive 2004/113/EC.
[115] C. McCrudden (2004).
[116] See A. Numhauser-Henning, 'On Equal Treatment, Positive Action and the Significance of a Person's Sex', in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer, 2001).
[117] I.e. what are to be regarded as similar cases.
[118] On this line of argument, see A. Christensen 'Structural Aspects of Anti-Discriminatory Legislation' and 'Processes of Normative Change', both in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer, 2001).
[119] Compare S. Prechal (2004).

of justifications for differential treatment may well develop into a general duty for employers objectively to justify their managerial decisions.[120] Equal treatment law may also aim at formulating positive/substantial requirements on managerial decisions/working conditions. Marie-Ange Moreau, also at the Stockholm conference, presented the very interesting idea of a widened scope for the requirement on adjustment measures now applying to disabled people to all under-represented groups.[121] Such ideas relate in an interesting way to the Amended ETD's new rules on preventive measures, equality plans and special bodies to promote equality between men and women.[122] However, the special rights already in place for pregnant and breastfeeding women – and to some extent for fathers and parents in general – are perhaps the best examples of such accommodation outside the area of disability, so far.

Article 13 and the widened scope for the non-discrimination principle to cover a number of new groups, further expanded by the Union Charter on Fundamental Rights[123] and a number of Community law instruments as regards atypical employment, threaten, however, to weaken the ban on discriminatory treatment, reducing it to the notion of formal equality already at the heart of the ECJ's case law. There is, in my opinion, a considerable risk that an ever-growing number of groups to be protected against discrimination will incline the notion of discrimination even closer to the Aristotelian concept of formal equal treatment as the least common denominator than hitherto. The Article 13 Directives here build on weaker ground than gender equality due to the new provisions after the Amsterdam Treaty, which in the area of gender equality thus demand a positive and proactive approach. Such fears can, to some extent, be said to have been confirmed by the Commission's Green Paper on 'Equality and Non-discrimination in an Enlarged Union' which clearly focuses on Article 13 and the two Directives then adopted on this basis and articulated in

[120] See further, for instance, M. Rönnmar, 'The Right to Direct and Allocate Work – From Employer Prerogatives to Objective Grounds', in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer, 2001).

[121] M.-A. Moreau, 'Justifications of Discrimination', available at the Congress website: http://www.juridicum.su.se/stockholmcongress2002 published in R. Blanpain (ed.), *Labour Law & Social Security and the European Integration, Bulletin of Comparative Labour Relations* (Kluwer Law International, 2002).

[122] As regards this line of argument, see also A. Neal, 'Disability Discrimination at Work' in A. Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer, 2001).

[123] Article 21(1) of the Charter.

terms of non-discrimination to the detriment of the duty of the Union to promote equality in general and sex equality in particular.[124]

The situation in many of the new Member States – the post-communist countries – adds to this picture. To quote Csilla Kollonay Lehoczky: 'while conservatives favour "restoring classic family values" and this necessarily is a threat to already won labour market positions and social equality, liberals – in the name of private autonomy – feel reluctant to interfere with market freedom, and with the freedom of the owner (employer) in using their property.'[125] However, as formal equal treatment has proven ineffective or at least insufficient to come to terms with substantive differential treatment in the real world there is also the possibility that such a general development will open up for a more proactive approach to tackle the real problems of labour-market and society.[126] In a report on equal opportunities for women and men in the new Member States and accession countries from the Open Society Institute[127] it was clearly indicated that whereas the EU integration process had been a catalyst for improvements in the legislative framework on gender equality this legal change had not really made an impact on substantive equality in the daily lives of men and women. To this end the report recommends 'the European Commission should strengthen its role in monitoring the transposition and implementation of legislation', gender mainstreaming strategies should really be applied and relevant authorities should acquire a real commitment to equality between men and women.[128] As can be seen from a number of Community policy documents, the question of social inclusion – not least into the labour market – whether of women and the elderly, or of the citizens of new Member States or the disabled, must be considered a major concern for the future. The fundamental rights approach requires the scope of equality to be broadened further beyond the traditional area

[124] Compare E. Caracciolo di Torella at the 2004 Hague conference.

[125] C. Kollonay Lehoczky, *The significance of existing EC sex equality law for women in the new Member States. The case of Hungary*, paper to the 18–19 November 2004 Hague Conference.

[126] Compare the Commission's proposal on an Institute for Gender Equality, where the possibility to integrate sex equality matters in one Fundamental Rights Agency was rejected since it could imply that 'gender equality would remain a peripheral matter and would not receive the necessary attention and priority and as a result the impact would be very limited' (p. 5).

[127] Equal Opportunities for Women and Men, Monitoring law and practice in new member states and accession countries of the European Union, Network Women's Program, Open Society Institute 2005, see www.soros.org/initiatives/women/articles_publications/publications/equal_20050502.

[128] Ibid, at p. 53.

of the economically active not only with regard to women but also with regard to the other marginalised groups outside the Race Directive. The issue of political representation has not yet been addressed, nor has the monumental issue of domestic violence. To further such developments the Aristotelian concept of equality is clearly not enough but must be complemented by a plurality of different equality concepts and positive measures in the broadest definition.