

INTRODUCTION TO BASIC PROVISIONS AND KEY CONCEPTS OF EU SEX-EQUALITY LAW¹

1. Introduction / outline

Some 2000 years ago Aristotle defined equality as: treating like cases alike, and unlike cases unlike, in proportion to their difference.

The first part, treating like cases alike, coincides with a formal approach to equality. When two cases – or two people – are alike, they should be treated the same.

The obvious problem is obviously to decide when cases are alike and when they are not. Are women alike to men? is a pregnant person alike to a non-pregnant person? It all depends very much on context as well as on perspective.

The second part, treating unlike cases unlike in proportion to the difference, coincides with a substantive equality approach: the focus is not so much on the treatment itself, but on the effect of the treatment: the result should be equal: if that demands slightly or maybe very different treatment, than such treatment should be given.

Substantive equality takes differences between people into account, and it thus seems better able to realise genuine equality. However, here the question is how far one should go in accommodating difference and providing for equal results. This approach is open-ended in character.

An example: if people who are unable to work for whatever reason may be fired, than pregnant women will be fired during some stage of their pregnancy. On the one hand women can be regarded as a 'like case', being unable to work just like for instance ill colleagues. On the other hand, however, such practices imply that women have less possibilities to be gainfully employed and become a parent than men. A substantive approach therefore would require pregnancy leave for women.

The main question regarding substantive equality is how far one should go in accommodating differences and providing for equal results. This approach is open-ended in character.

¹ For this paper I have made ample use of the extremely accessible and helpful overview by Susanne Burri & Sacha Prechal, *EU Gender Equality Law update 2010*, published by the European Commission, DG for Justice, Unjit JUST/D/2, December 2010, available online.

Although EU sex-equality law focuses on equality of treatment, it goes some way in the direction of substantive equality. An example is the concept of indirect discrimination. But also the recent case of *Roca Álvarez*² on direct discrimination is a good example (see below, direct discrimination).

In this introduction I will first outline the most relevant treaty provisions and directives, and then I will discuss some key concepts, with a particular focus on discrimination. Sex discrimination in EU law is not limited to direct and indirect discrimination but has been extended to include harassment, sexual harassment and instruction to discriminate.

2. EU law general

The first treaty on the European Economic Community was adopted in 1957. Already this treaty contained a sex-equality provision: Article 119 (now 157 TFEU) provided for the right to equal pay regardless of sex.

Inclusion of this Article was not based on idealism, but on pragmatism. France, that had a similar provision, insisted on inclusion of a similar provision in the Treaty, because it felt that competition would be distorted if all countries could pay women workers less than men, except for France. Only in the 70s the provision started to play a role.

EU law can be divided in primary and secondary legislation: primary EU law consists of the treaties including the Charter. Directives belong to secondary legislation. They are binding as to the result to be achieved. Member States however, are free to choose the means to achieve that result. Treaty law has precedence over directives, and also ‘steers’ the interpretation of directives.

2.1 Treaty provisions

These days there are two treaties that form the basis of EU-law and both contain provisions on sex equality: the Treaty on the European Union – TEU and the Treaty on the Functioning of the European Union – TFEU (both as amended by the Treaty of Lisbon; they entered into force on 1 December 2009; OJ 2008, C 115).

One might say that the TEU provides the EU’s basic framework, introducing the aims of the Union, whereas the more extensive TFEU covers the issues in more details, spelling out competences etc.

The TEU explicitly refers to sex equality in several provisions.

Article 2 TEU pronounces sex equality as one of the Unions core values:

² ECJ 30 September 2010, case C-104/09, *Roca Álvarez*.

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

In Article 3(3) sex equality is identified as one of the aims of the EU: It provides that one of the aims of the EU is to ‘*combat social exclusion and discrimination, and [...] promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child*’.

Article 8 of the TFEU expressly provides that the Union must pursue the aim of sex equality in *all its activities*. This is the gender mainstreaming provision: Everything the Union does must first not be detrimental to the general project of sex equality, and secondly, activities in other areas must be used to further sex equality whenever possible.

The right to equal pay, regardless of sex, is included in Chapter X on social policy in Article 157. The Article initially focused on the issue of pay specifically. However, in 1999 (Treaty of Amsterdam) two new paragraphs were added. Paragraph 3 regards the possibility to adopt measures to ensure equal opportunities in matters of employment and occupation. Paragraph 4 allows for positive action.

The right to equal pay will be discussed in detail this afternoon by Silke Laskowski and the concept of positive action will be discussed later this morning by Colm O’Cinneide.

Moreover, in Article 21 of the *Charter of Fundamental Rights of the European Union* is provided that discrimination on *any* ground, including sex, is prohibited and in Article 23 a general right to gender equality is recognized, as is the possibility of positive action. Article 33 of the Charter guarantees the ‘right to paid maternity leave and to parental leave’.

The Charter is binding since 1 December 2009.

2.2 Directives:

Quite a number of directives relevant to combating sex discrimination have been adopted (see Annex for the list).

Roughly these directives can be divided in equality directives and directives focusing on the reconciliation of work and care / family life. The latter will be discussed tomorrow by Claire Bruton (protective measures for pregnant workers) and Maria do Rosário Ramalho (reconciliation).

I will therefore focus on the equality directives.

These directives mainly focus on employment, with the exception of Directive 2004/113/EC that addresses providers of goods and services. This directive will be discussed tomorrow by Elisabeth Holzleithner.

Most equality directives deal with sex equality. In 2000 however, two directives were adopted that deal with other suspect grounds. Directive 2000/43/EC deals with race discrimination, and Directive 2000/78/EC deals with discrimination on the basis of religion or belief, disability, age and sexual orientation.

As this meeting focuses on sex discrimination, these directives will not be discussed.

In 2006 a number of sex-equality directives were bundled into one new directive, the so-called Recast directive (2006/54). Some case law was incorporated, but generally, the directive does not add anything on the contents. The idea was to clarify the applicable rules and make them more accessible by combining them in one text. Mid 2009 the directives that were combined in the Recast directive were repealed.

The directive has four titles:

- 1) general provisions includes a provision on the aim of the directive and definitions of concepts. I will get back to these.
- 2) provisions on equal pay (ch. 1), on equal treatment in occupational and social security schemes (ch.2) and equal treatment regarding access to employment, vocation training and promotion and working conditions (ch.3).
- 3) again general provisions on e.g. prevention of discrimination and gender mainstreaming
- 4) provisions on remedies and penalties, burden of proof, victimisation etc. as well as some general provisions on for instance gender mainstreaming.

Two of these topics will be discussed this morning: the burden of proof by Cornelia Amon-Konrath and remedies and sanctions by Klaus Alenfelder. The equality bodies are the topic of the last lecture tomorrow, by Jenny Earle.

An important novelty was introduced in the preamble of the Recast Directive, in recital 3. Recital 3 reads:

The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

This means that the directive and all of its provisions apply equally to transgender persons. The exact scope however, is unclear: certain is that transsexual people undergoing gender reassignment are protected against employment discrimination. Some argue that it should be broadly interpreted so as to include gender identity.

I will not further discuss the issue of transgender rights, however important and interesting, due to time restraints.

For an accessible overview of the relevance of the recast directive to transgender rights see: ILGA Europe, *Transgender people and the gender recast directive. Implementation guidelines*, December 2009 (available online at www.ilga-europe.org)

3. Key concepts

Discrimination

Article 2 defines discrimination:

1. For the purposes of this Directive, the following definitions shall apply:

a) ‘direct discrimination’: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

b) ‘indirect discrimination’: where an apparently neutral provision, criterion or practice would put persons of one sex as 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;

c) ‘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;

d) ‘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;

.....

2. For the purposes of this Directive, discrimination includes:

a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct;

b) instruction to discriminate against persons on grounds of sex;

c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

This means that 'discrimination' can take 5 different forms: direct and indirect discrimination, harassment and sexual harassment as well as instruction to discriminate.

I will discuss these in turn.

Direct discrimination

1. a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

Direct discrimination occurs when someone is treated differently just because of his or her sex.

It is important to note that, despite the fact that EU sex-equality law is primarily aimed at combating discrimination of women, the equality provisions are formulated in a sex-neutral way. Not only discrimination of women is prohibited; discrimination of men is likewise forbidden.

The definition of direct discrimination has 3 important elements:

1- unequality of treatment, consisting of 'less favourable' treatment it may not always be clear when something is 'less favourable', opinions may be divided. For example: the (selective) prohibition of night work for women was – once – intended as a beneficial measure, to allow women to stay at home and look after their children and/or protect them against empty streets at night. However, not being able to work night shifts may also make women workers less attractive to employers. Moreover night shifts pay more. So, whether one regards such a provision as favourable or not, very much depends on one's perspective. 2- the difference in treatment must be on the ground of sex. In many cases this is easy; for instance: asking boys to pay an entrance fee to the disco but not girls is a clear case of direct sex discrimination (although one might argue about who is actually being discriminated here). However, sometimes it is not so clearcut. For instance: what has sexual harassment to do with 'discriminating on the ground of sex'? Is the harassment necessarily related to the sex of the victim? I will get back to that later.

An important difference between direct and indirect discrimination, is the fact that direct discrimination has a closed system of exceptions, i.e. direct discrimination is prohibited unless it comes within the scope of one of 3 exceptions. This is discussed below.

Finally: as said: the treatment may also be related to gender reassignment.
3- the comparison: So far, the ECJ has in most cases accepted that there was a (direct) discrimination, without engaging in comparisons (mainly because the issue was not raised by the referring national court). Important to note that an actual, real-life comparator is not necessary.

Indirect discrimination

b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

The landmark case on indirect discrimination is the *Bilka* case.³

This case concerned access to a pension scheme: part-timers could only access the scheme if they had worked at least 15 years full time over a total period of 20 years.

The Court found that *if* a lower proportion of women worked full time, the policy regarding part-timers would be contrary to Article 119 (now 157 TFEU), if that result could not be explained by factors other than discrimination on the ground of sex. However, the Court said, the practice could then nevertheless still be justified if the company could show that they addressed a real need of the company and were appropriate and necessary to address that need / to achieve that aim.

This latter part: a real need and an appropriate and necessary instrument, have now been included in the definition of indirect discrimination as included in the Recast directive. This is known as the objective justification test.

By including indirect discrimination within the scope of the prohibition, EU legislation goes some way in the direction of a substantive equality approach.

I will not go into the issue of proving indirect discrimination, as I assume that **Cornelia Amon-Konrath** will do that.

Intermezzo: closed system for direct discrimination

Important difference: Whereas indirect discrimination may be objectively justified, there is a closed system of exceptions for instances of direct discrimination. That is: direct discrimination is prohibited *per se*, unless one of the three exceptions provided for by the directive itself is applicable.

³ ECJ 13 May 1986, Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber vorn Hartz* [1986] ECR 1607.

These exceptions are:

Article 3 Recast on positive action (also: 157(4) TFEU):

Member States may maintain or adopt measures within the meaning of Article 141(4) [*157(4) TFEU!*] of the Treaty with a view to ensuring full equality in practice between men and women in working life.

An interesting case regarding this exception was the 2010 case of *Roca Álvarez*, already briefly mentioned. Young mothers have a right to some time off on a daily basis. Originally maybe to breastfeed, but it has been interpreted more broadly and also extended to fathers, provided that the mother of their child is an employee as well. Mr. Roca's wife was self-employed, therefore he did not qualify for the leave, whereas he would have if he had been a woman. The Court remarks that, because the leave is not linked to breastfeeding and has been extended to men, it is a policy to facilitate work and care. The Court also points out that the exception aims at substantive equality, not formal equality. This policy may further substantive equality by facilitating the reconciliation of work and care for women. However, the same policy may also strengthen the traditional division of roles, by not enabling men on an equal footing with women to look after their children. Therefore the exclusion of men whose wife is not an employee, cannot be justified with reference to the exception on positive action.

Colin O'Connell will explore the issue of positive action further.

The second exception is Article 14(2) on genuine and determining occupational requirements (nativity play: one may hire men for the role of the three kings, and one may even hire two white and one black men – *but one does not have to!*)

Member states may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

The third exception is Article 28(1) Recast which stipulates:

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

Thus: one may not treat a person less favourable for reasons of pregnancy or even related to pregnancy. (Further: Claire Bruton)

The exceptions must be interpreted strictly.

It is important to note that the Goods & Services directive (2004/113/EC) has no 'closed system', thus weakening the protection against discrimination: even direct discrimination may be objectively justified. (Further: Elisabeth Holzleitner)

Harassment & sexual harassment

c) '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;

d) '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;

There is an important difference between the two provisions. Harassment occurs when unwanted conduct results in violating the dignity of a person and creates an intimidating, hostile etc. environment.

These are cumulative requirements, and as such are rather hard to prove.

Sexual harassment on the other hand is less strictly defined: instead of requiring both the violation of someone's dignity and the creation of an intimidating environment, the violation of dignity suffices. The creation of a hostile environment is an extra, making the action even more rejectionable.

Another issue is the relation of these forms of treatment to sex as a suspect ground.

Harassment is construed as unwanted behaviour, based on the victim's sex. That is why it is regarded as a form of sex discrimination. So, stalking, bullying etc. is all prohibited if it is somehow related to the fact that someone is a man or a woman, or a transgender person undergoing gender reassignment.

The definition of sexual harassment, on the other hand, does not link the treatment to the sex of the victim. Thus, for example, sexually harassing someone because he has been (or not been) circumcised, might be interpreted as falling within the scope of the provision.

It is unclear whether the Court will demand a causal link or not.

Remarkable also is the fact that whereas harassment is recognized as a form of discrimination in both the Race and the Framework directives, these directives do not include sexual harassment. However, it is not so difficult to see that for instance racial discrimination, or – presumably even more - harassment on grounds of sexual orientation, might take the form of sexual harassment.

Although one may interpret harassment as including sexual harassment, the latter is much easier to prove than the former.

It remains to be seen what the Court will make of these provisions. There is no case law so far.

Lastly: it is important to note that one does not have to prove intent. If certain behaviour has a sexual connotation and is unwanted by the victim, and results in a violation of the dignity of the victim, the definition is fulfilled, *even if the perpetrator did not intend to violate or even harass the victim or treat him or her detrimentally.*

A case in point is a Dutch case (HR 10 July 2009, *JAR* 2009, 202, *Olsthoorn / Nederlandse Leprastichting en Braber*). At the occasion of the company's yearly Christmas dinner, the director had squeezed the butt of one of his male employees, when they entered the rather dark dining room, and had said something like 'hi, what are you doing here in this *dark room*'.

The employee sued, despite the well-established good relations between the two and despite any absence of intent by the director.

The Dutch High Court finds correctly that the subjective experience of the victim cannot in itself be the standard; that has to be objectified.

However, the Court also takes into account the fact that the director just wanted to make a joke, and had no intention whatsoever, to harass his employee.

This is problematic, because it should be the victim who decides which (physical) treatment to tolerate and which not. However, it must be clear for the perpetrator that his conduct is unwanted.

It has been suggested that one could distinguish between repeated unwanted behaviour, in which case the conduct is not necessarily very grave, but the repetition whilst knowing that it is unwanted turns the conduct into sexual harassment. On the other hand, for an incident, a one time conduct to amount to sexual harassment, the conduct needs to be more invasive.

If the Dutch High Court had applied this test, it might have decided in favour of the accused / the director, without undermining employees right to protection against sexual harassment.⁴

⁴ See: J.P. Zeilstra, 'Seksuele intimidatie: een geobjectiveerd begrip?', HR 10 juli 2009, *JAR* 2009, 202 (*Olsthoorn / Nederlandse Leprastichting en Braber*), *Arbeidsrechtelijke Annotaties* 2011, (10)2, p. 63-85

Instruction to discriminate

Finally the instruction to discriminate: this provision may be particularly useful when dealing with agencies supplying temporary workers and the like. It is very well conceivable that employers ask these agencies to send them 'a nice young lady' for instance. Thus, the agency will start looking for (young) women, and exclude men. This would definitely be a violation of the right to equal access to work.

An example of a Dutch case that involved both a company and a temp. agency, was the following: a trans woman, i.e. a male-to-female transsexual had asked a temp agency to send her out. The agency refused, and said that the woman would not 'fit' the company's demands. So, she sued both the agency and the company. It turned out however, that the company had not issued any instructions beyond the regular job specifications. The employee at the agency, however, thought that the woman might have a hard time in the mostly male environment of the company, and had wanted to protect her. That is a violation of sex-equality law.

I hope to have given you some idea of the basic provisions and key concepts of EU sex-equality law, at least enough to prepare you for the other lectures. Thank you.

Annex: selected Articles

Treaty on the European Union (TEU)

(Amended by the Treaty of Lisbon, entered into force on 1 December 2009)⁵

Article 2

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.

Article 3

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 6

(ex Article 6 TEU)

⁵ See Official Journal 2008, C 115.

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Selected Articles of the Treaty on the Functioning of the European Union

(entered into force on 1 December 2009, with the Treaty of Lisbon)⁶

Article 8

(ex Article 3(2) TEC) (1)

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 19

(ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

TITLE X

⁶ See Official Journal 2008, C 115.

SOCIAL POLICY

Article 151

(ex Article 136 TEC)

The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy. They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

Article 152

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.

Article 153

(ex Article 137 TEC)

1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

C 115/114 EN Official Journal of the European Union 9.5.2008

(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c).

2. To this end, the European Parliament and the Council:

(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

The European Parliament and the Council shall act in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee and the Committee of the Regions.

In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

The Council, acting unanimously on a proposal from the Commission, after consulting the European

Parliament, may decide to render the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).

3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.

In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed or implemented, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive or that decision.

4. The provisions adopted pursuant to this Article:

— shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,

— shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Article 154

(ex Article 138 TEC)

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 155

(ex Article 139 TEC)

1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.

The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).

Article 156

(ex Article 140 TEC)

With a view to achieving the objectives of Article 151 and without prejudice to the other provisions of the Treaties, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Chapter, particularly in matters relating

to:

- employment,
- labour law and working conditions,
- basic and advanced vocational training,
- social security,
- prevention of occupational accidents and diseases,
- occupational hygiene,
- the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies,

delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

Article 157

(ex Article 141 TEC)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
Equal pay without discrimination based on sex means:
 - (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
 - (b) that pay for work at time rates shall be the same for the same job.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Overview of directives

- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women *OJL* 45, 19-2-1975, p. 19-20

- (now included in the Recast Directive)
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJL* 39, 14-2-1976, p. 40-42
(replaced by 2002/73)
 - Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/2007/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocation training and promotion, and working conditions *OJL* 269, 5-10-2002, p. 15-20
(now included in the Recast Directive)
 - Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security *OJL* 6, 10-1-1979, p. 24-25
 - Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJL* 225, 12-8-1986, p. 40-42
(Replaced by 96/97)
 - Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes *OJL* 46, 17-2-1997, p. 20-24
(now in the Recast Directive)
 - Council Directive 86/613 of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity including ariculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood *OJL* 359, 19-12-1986, p. 56-58
(replaced by Directive 2010/41/EU)
 - Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) *OJL* 348, 28-11-1992, p. 1-8
 - Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC *OJL* 145, 19-6-1996, p. 4-9
(replaced by Directive 2010/18/EU)
 - Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *OJL* 373, 21-12-2004, p. 37-43
 - Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities

and equal treatment of men and women in matters of employment and occupation (recast) *OJL* 204, 26-7-2006, p. 23-36

- Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC *OJL* 68, 18-3-2010, p. 13-20
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC *OJL* 180, 15-7-2010, p. 1-6

The 'race' directive:

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *O* 2000, L 180/22

The 'framework directive':

Council Directive 2000/78/EC of 27 November establishing a legal framework for equal treatment in employment and occupation, *OJ* 2000, L 303/16.