ADVOCATING GENDER EQUALITY THROUGH THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

Biljana Chavkoska
Associate Professor, International Balkan University

Viktorija Chavkoska
PhD, Ministry for Foreign Affairs

Abstract

Gender equality has been on the EU Agenda since the founding years. The realization of the principle of equal pay for equal work between man and woman is the first legal article for gender equality in the European Union. Basically, when this article was applied it was not clear if it means only equal work or work of equal value. Amsterdam Treaty and the new article 141, secondary law and the case study of the European Court of Justice affirmed the thesis that not only the equal work but also the work of equal values is covered.

The authors aim to analyze the achievement of the Member States in the area of equal pay such as the positive case study of the European Court of Justice in advocating gender equality and non discrimination. The ECJ judgments have supranational character and are obligatory for the EU institutions and for the Member States, such as the legal and physical persons. This is very important for the Candidate countries in order to implement the principle of equality and to increase the living standards of the woman in the area of employment. The EU law and the ECJ case study in gender equality is analyzed as positive and affirmative way in advocating human rights.

1. Introduction

This article aims to analyze the achievement of the Member States in the area of gender equality such as the positive case study of the European Court of Justice in advocating gender
equality and non discrimination. The ECJ judgments have supranational character and are obligatory for the EU institutions and for the Member States, such as the legal and physical persons. This is very important for the Candidate countries in order to implement the principle of equality and to increase the living standards of the women in the area of employment. The EU law and the ECJ case study in gender equality is analyzed as positive and affirmative way in advocating human rights, equality and non-discrimination. The article is structured in three chapters and conclusions.

The first chapter addresses the legal regulation of the gender equality in the founding treaties of the European Union such as secondary regulations. The first binding article is article 119 regulating the equal payment between men and women, which was first amended with Amsterdam Treaty, many years later. The authors in this chapter conclude that EU has developed Anti-discrimination Law through the years based on the gender equality regulations since the beginning. EU has adopted 14 legal acts from the secondary legislation, Regulations and Directives regarding the gender equality particularly in the area of employment. The major improvement was made in 2006 when the Recast Directive was adopted thus combining the previous legal acts in one document.

In the second Chapter the authors analyze the case law of the European Court of Justice in practicing the gender equality. Most cases discussed are in the area of employment regarding gender discrimination in payment in Sabinne v. Defrenne, the including of the part time workers in the case of Bilka, in the case of Schroeder the ECJ interpreted that the principle of equality is the basic human right for the EU citizens, in the case of Danfoss the principle of transparency in payment was established. The authors in this chapter argue that ECJ played important role in interpreting the EU legal acts regarding gender equality thus setting the legal ground for further development of the antidiscrimination case law in the future.

In the third Chapter the authors analyze the role of the ECJ in interpreting the affirmative action. The positive actions are regulated with the article 141 (4) from the Amsterdam Treaty and article 2 (8) from the 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. One of the most important cases regarding this question was
the judgment in Kalanke. The Court interpreted that the positive actions aim to improve the position of the woman in the professional life.

2. Gender Equality In EU Legal Acts

The founding of the European Union started after the Second World War when more international organizations were created on the international scene. The European Union was first imagined as economic union but the EU expanded its powers over the human rights also. This area is regulated with the founding treaties and the treaties for amending the founding Treaties such as the secondary law and the case law of the European Court of Justice.\(^1\)

With the Treaties from Rome, the integrative processes in the socio-economic areas became the universal principles for economic development of the Member States.\(^2\) The first article on gender equality was article 119 on equal payment and improving the working conditions in Member States. Article 119 regulates that:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

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.

This article aims to eliminate the gender discrimination and the implementation varied from State to State. The realization of the equal pay for equal work is the first legal article regulating the gender equality in the European Union. In the beginning of the implementation of the article it was not clear what was covered by the article regarding the equal work or work of equal value. When the Amsterdam Treaty was adopted the article 119 was amended so the work of equal value was also legally covered by the Treaty.

The principle of equal pay guarantees that the payment for the work performed is not discriminatory based on gender. The EU Member States were obligated to implement the equal pay rules regarding the payment for equal work or work of equal value. The implementation of the

---

\(^1\) Frckovski L. (2005) International Law for Human Rights, Skopje

equal pay rules is obligatory for the public institutions but also applies to the contracts signed between private parties in the Member States. Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. The payment under article 119 covers regular wages or salary or other basic or minimum wage or salary and any other consideration, whether in cash or kind which the worker receives directly or indirectly, on the basis of employment from his employer.

The article 119 of the Treaty has double aim. First, the aim of article 119 is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition compared with undertakings which have not yet eliminated discrimination against women workers. Second, this provision is a part of the social objectives of the European Community, which is not only seen as economic union, but at the same time intends to ensure social progress and improvement of the living and working condition as emphasized in the Preamble of the Treaty.³

The ILO Convention No. 100 adopted by International Labor Organization defines the term payment in a similar way as other international related documents. The Directive 75/117/EEC was adopted to harmonize the equal payment rules in the Member States as a condition to improve the working and living conditions and to achieve social justice and economic benefit.⁴ The main task of this Directive is to eliminate gender discrimination regarding equal work or work of equal value and to create a system of non-discriminatory workplaces. Even more the Member States have to undertake effective measures to eliminate provisions in collective agreements, agreements on wage in individual contracts of workers which are contrary to the principle of equal pay. The Directive gave one year period for the Member States to harmonize the internal law with the Directive and to report the European Commission.⁵ Furthermore, the Member States should provide legal remedies for implementing the principle of equal pay such as to provide aware raising instruments.

With the Treaty for Founding the European Economic Union the European Social Fund was founded for financing the Member States in the employment area.⁶ In the European Economic

---

³ http://en.wikipedia.org/wiki/Defrenne_v_Sabena_%28No._2%29
⁵ Ibid article 8
Act the Member States agreed that promoting of the democracy based on the respecting of Human Rights is obligatory for all Member States and for the candidate countries. The Human Rights articles are regulated in the Constitutions of the Member States such as in the European Convention on Human Rights and Freedom\(^7\) and European Social Charter\(^8\). In the text the gender equality is not particularly mentioned but the freedom, equality and realization of the social justice, improving of the economic and social policy and functioning of the EU Institutions.

At the end of the 90ties the Maastricht Treaty was signed and the European Union was founded as sui generis entity on international scene. This Treaty was signed after the adopting of the European Social Charter and before the Fifth World Conference on Women held on Beijing in 1995.\(^9\) During the drafting and signing of the Maastricht Treaty, the Member States disagreed on important issues in the area of employment and social policy, particularly United Kingdom and Northern Ireland\(^10\) Regarding the gender equality the Treaty contains the same article 119 on the equal payment rules.

The biggest achievements for regulating equality and non discrimination were achieved with the Amsterdam Treaty. This Treaty in Article 2 defines that the equality between men and women would be one of the important goals of the Union.\(^11\)

**Article 2**

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

**Article 3** paragraph 2 sets that in all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women. The Treaty of

---

7 Instruments of the Council of Europe, (2000), Beogradski centar za ljudska prava, Beograd
9 The text of the Charter in the form of a declaration was adopted at the Strasbourg Summit of 9.12.1989 by all then EU member states with the exception of the UK that signed it after Tony Blair's election as prime minister.
10 However, Member States have made changes in national legal systems in the field of social policy. In the EU Treaty provisions on social issues are provided in Chapter 1 of Title VIII, Articles 117-124. The Commission has the role of contributing to closer cooperation between Member States in order to improve the living and working conditions of workers, as well as improving overall employment and working conditions.
11 The full title of the Treaty is as follows: Treaty to amend the Treaty on European Union, the Treaties establishing the European Communities and a series of acts related thereto. The agreement was officially signed on 2 October 1997 and entered into force on 1.5.1999.
Amsterdam includes article 13, antidiscrimination clause making legal progress in protecting equality and non discrimination. The Community is empowered to take measures to prevent discrimination on a completely new list of grounds. Thus, in addition to prohibiting discrimination based on sex, Article 13 includes racial or ethnic origin, religion or belief, age, disability and sexual orientation. The consensus on including these new bases is based on the Union's previous experience in the fight against gender discrimination. The Member States have confirmed that equal treatment and respect for diversity are of interest to the society as a whole in the direction of creating an integrated approach to the prevention of discrimination. With these legal changes, the European Union has one of the most developed models of non-discrimination law worldwide. The changes have caused changes in the national laws of the Member States, so for the first time regulating new legal grounds prohibiting discrimination.

The achievement of a high level of employment is an objective that should be taken into account in the preparation and implementation of Community policies and activities. In doing so, a high level of employment will not be achieved without reducing the unemployment rate of women, the difference in pay between men and women, reducing gender segregation in the labor market, taking measures for harmonizing the professional with private life, exercising more responsible functions and increasing the number of women-owned enterprises and women-managers.

With the Amsterdam Treaty, for the first time, Article 141 (former Article 119) has been significantly amended, in paragraph 1 extends the definition of equal pay and encompasses "the same work or work of the same value". Paragraph 3 of the same article explicitly provides for a legal obligation for the Council to adopt measures in order to ensure the application of the principle of equal opportunities and equal treatment for men and women in the field of employment and occupation. The article introduces a legal basis for undertaking affirmative actions in favor of women. Thus, paragraph 4 "in order to ensure full equality in practice between men and women in working life, the principle of equal treatment does not prevent a Member State from maintaining or adopting measures which provide special advantages in order to facilitate the exercise of the

---

12 On this basis, the Equal Treatment Directive, irrespective of racial or ethnic origin, was adopted by the O.J L180 of 19 July 2000 and the Directive on Equal Treatment in Employment and Occupation O.J L303 of 2 December 2000.
professional activity of the underrepresented gender, or to prevent or compensate for the shortcomings in professional careers.

Regarding the legal changes in the article 141, women are not referred to as direct entities for which states can implement affirmative actions, but the text mentions "the under-represented gender," which was widely criticized. The situation was resolved by the adoption of a declaration by the Member States clarifying that such terminology primarily concerns the improvement of the position of women in working life. This view gives Member States the opportunity to decide whether to implement positive actions, which means that the article do not legally obligate. The Amsterdam Treaty promotes the obligation of the European Union to achieve gender equality not only in the area of employment, but also in all policies and activities of the Union. The agreement provides an opportunity for Member States to provide affirmative action not only for access to employment, but also for other aspects of employment.

In the context of the meaning of the Amsterdam Treaty, it is important to mention that the Charter of Fundamental Social Rights of Workers is incorporated into the content of the agreement in the form of a protocol. Although the Charter is not binding on the Member States, its provisions have been operationalized through the adoption of directives by the Union's institutions and implemented by the Member States.

Article 16 of the Charter regulates the right to equal treatment of men and women, as well as taking measures in order to ensure equality of opportunity. This emphasizes the clear commitment in the Charter for equal treatment and equal opportunities for men and women as well as the need for accelerated implementation of the principle of gender equality in terms of access to employment, personal income, working conditions, social protection, vocational training and career advancement.

The greatest achievement in the protection of human rights and freedoms within the European Union was made with the adoption of the Charter of Fundamental Rights of the European Union in 2000. With this, the European Union efforts to create a legal system for the protection of human rights have become a reality, although the complex nature of the Charter remains in place. Regarding equality, the Charter reinforces the existing Community provisions and highlights the strain of the Union in promoting equity with an emphasis on the humanitarian rather than the economic interest.
The new Charter of Fundamental Rights and Freedoms in its Preamble provides that Member States:

"Aware of the spiritual and moral wealth, the Union is founded on the indivisible, universal value of human dignity, freedom, equality and solidarity; it is founded on the principle of democracy and the rule of law. The Union places the individual at the heart of its activities, through European citizenship and the creation of a free, safe and fair area."

The Charter was adopted at the Nice Summit. It has declaratory nature, therefore it is not legally binding for the Member States and does not constitute a source of hard law. Its purpose is to summarize in one act civil, political and social rights contained in international, European and national sources. It is a codification instrument and can be designated as Ius Commune Europaeum in the protection of Human Rights in Europe.

The Union expresses its determination to undertake further activities in order to achieve equality of all people in the light of social change, social progress, scientific and technological achievements. In terms of content, the rights that are envisaged as core in the Charter are contained in six titles: dignity, freedom, equality, solidarity, civil rights and justice, but the Charter also provides for economic and social rights, as well as protection of the environment and protection of consumers.  

The Charter is a good opportunity to modernize and expand the impact of the European Convention on Human Rights by systematizing universal rights such as the right to life and rights specific to the European Union, such as the right to vote in European elections.

In the Charter, in a linguistic sense, a distinction is made between rights, freedoms and principles. With respect to the protection of rights, freedoms and principles, the Charter provides for coordination between the European Court of Justice in Luxembourg and the Human Rights Court in Strasbourg in order to avoid a possible conflict and to maintain the level of international protection of human rights and freedoms.

---

15 At the time of the adoption of the Charter, legal theorists feared that it would not achieve its goal given that the Charter provides for new rights that were not previously contained in the acquis communautaire. For example, Article 13 of the Charter: "Art and scientific research must not be limited. Academic freedom should be respected."


17 Rights are understood to mean a clear and fully defined obligation of the state for the exercise of subjective rights, while the notion of principles is less certain, and before its implementation, measures for explanation and implementation will have to be adopted. Vukadinovic D. R (2006) "Law of the European Union", Kragujevac, p. 137-138
Equality in the Charter is provided with a special chapter entitled "Equality", which begins with Article 20: "Everyone is equal before the law." The next article of the Charter, equates it with the term of prohibition of discrimination and lists the list of grounds for discrimination

Article 21 of the Charter titled Non-discrimination states: Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, member of a national minority, property, birth, disability, age or sexual orientation will be prohibited

With this article, the Charter extends the list of grounds for discrimination under anti-discrimination clause in Article 13 of the Amsterdam Treaty.

Respecting the provisions of this Agreement and within the limits of its powers, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate measures to combat discrimination based on sex, race, or ethnic origin, religion or persuasion, disability, age or sexual orientation.

The article is contradictory with Article 51 (2) of the Charter, which does not create new powers or tasks for the Community or the Union, nor does it modify the powers and tasks defined in the Treaties.

Article 23 of the Charter provides for equality between men and women to be provided in all areas, including employment, work and salary. The principle of equality will not interfere with the adoption and retention of the measures provided for special convenience in favor of the less represented gender. With this, the Charter allows affirmative action to ensure a genuine equality of opportunity between men and women, especially in the field of employment.

In the fourth chapter entitled "Solidarity", the Charter regulates economic and social rights. For the purpose of achieving gender equality, reconciliation of the family with private life is foreseen, the right to protection from dismissal for reasons related to motherhood and the right to paid maternity leave and parental leave after the birth or adoption of a child. 18

The adoption of the Charter of Fundamental Rights contributes to certain benefits, but also difficulties. It is significant that despite the fact that equality is developing in the context of

18 The European women's lobby criticized the Charter for the unconscious use of sexist language, which according to them constitutes a form of gender discrimination, as well as a failure to take into account structural issues that define the gender hierarchy. In that sense, the Charter maintains the distinction between formal and real equality, as well as the division between public functions and private obligations. http://www.womanlobby.org
employment and employment rights, the Community today understands equality in the wider context of human right.  

3. Advocating Gender Equality Through The Case Law Of The ECJ

The gender equality articles in the EU treaties were implemented in practice with the rulings of the European Court of Justice. European Court of Justice has decided in important cases regarding the implementation of the equal pay principle thus advocating the gender equality. The Court judgments have supranational character and are obligatory throughout the Union for its institutions such as for the Member States, legal and private persons. Approximately half of the discrimination cases are related on implementing the principle of equal pay for equal work or work of equal value. The Court argued that the freedom of movement of people is one of the four freedoms of the Internal Market and should eliminate the differences in the labor conditions between Member States. The Court interpreted that article 119 has social but also economic aim in the case Defrenne v. Sabenne.

Mrs. Defrenne worked in the Belgian airline as flight attendant. She began a procedure before the Belgian courts seeking compensation for discrimination under article 119. The National Court in this case questioned the direct effect of the Article 119. The Court interpreted that article 119 has economic goals. The Member States have different social system schemes so the goal of the article 119 is to implement the equal pay rules in the enterprises and to eliminate the gender discrimination. Secondly, this article has also social goals, aiming to improve the living and working conditions of all citizens in the Union.

This double aim of the principle equal pay, the economic and social goals confirms that the equal pay articles are the basic of the EU law. The principle equal pay is core standard in the gender equality policy in the European Union. It is among the first conditions that the applicant country for membership should fulfill in the process of the harmonization of the internal law with

---

20 Article 244 and article 256 of the Treaty for establishing the European Community and article 164 of the EUROATOM Treaty
21 Case Defrenne v. Belgium (Defrenne I) 1971 ECR 445
22 Case 43/75, Defrenne v Sabena, 1976 ECR 455.
the EU law. Thus, important changes were made in the internal laws of the Member States such as in the candidate countries for membership especially when the negotiation process starts.\textsuperscript{23}

When the question of the direct effect of the article 119 aroused, Great Britain and Ireland interpreted that the article 119 does not fulfill the direct effect requirements.\textsuperscript{24} The arguments on this side were in the line with the fact that the equal pay is principle so additional measures are necessary for its implementation. So the article does not fulfill the requirements for direct effect such as to be clear, unconditional and not dependable on implementation on additional measures.\textsuperscript{25}

In contrary, the Court interpreted that the article has direct effect in the national laws and establishes individual rights that national courts must put in practice. Discrimination is forbidden not only for the public parties, but also applies to all agreements signed to regulate work payment, such as the agreements signed between individuals. Thus, article 119 has vertical and horizontal direct effect in the national laws of the Member States.\textsuperscript{26}

The fact that the article regulates the equal payment as principle does not mean that reduces the importance of the provision, but rather indicates its fundamental value for the Member States such as for the rights of individuals. The Court interpreted that in order to realize the principle of legal certainty direct effect is used only in already processed cases. The European Court of Justice also interpreted if the principle of equal pay applies to situations in which men and women perform the same work temporarily. Mrs. Smith proceed lawsuit for gender discrimination in payment regarding receiving 10 pounds less than male worker who worked the same job four months ago. National Court interpreted that national law on equal pay only restricts the principle of equal pay for in definite employment. The European Court of Justice ruled that the article 119 means that equal payment of men and women is applied for performing the same work so the requirement of temporality is not decisive factor. The principle of equal pay for equal work is not limited to situations where men and women perform the same work for a period of time for the same employee.\textsuperscript{27}

\textsuperscript{23} Monitoring the EU Accession Process: Equal Opportunities for Women and Men, Open society institute, 2002.
\textsuperscript{27} Case 129/79 Macarthur v Smith ECR 1980, 1275.
In the case Bilka Kaufhaus the female worker working part time was paid less than full time workers for the equal work. The European Court of Justice interpreted that the employer should confirm in his defense that the employer had objective justification for different payment.

The German national court in 1984 in the preliminary question procedure asked the European Court of Justice to rule in discrimination case. According the German law, the employer Bilka paid additional pensions to its employees and the only condition for this benefit was the 20 year engagement in the firm of which 15 years full time work. Miss Weber left the firm after 15 years of which 12 years full time work. The management of the company refused the request of the worker for additional pension. Miss Weber sues the company based on the claim that this plan discriminates the female workers. In general because of the family duties the woman workers are obligate to work part time most of the time in their professional careers. The employer in contrary argues that this pensions systems are introduced for economic reasons, the part time workers cost the company more compared with the full time workers. The company argues that paying the additional pension for part time workers would increase the costs of the company.

The Court ruled that the company acted in contrary with the article 119 because the part time workers were excluded from the pension system, when this means that more women than men were affected by the decision. This rule is not used in cases where the company confirms that the difference in pension system is made by objective non discriminatory factors. In that case the employer must prove that the measures are in compliance with the goal of the employer and principle of proportionality.

In the case Schroeder the European Court of Justice interpreted that the principle of equality between men and women and the non discrimination principle is the basic fundamental right for its citizens. The realization of the economic goals is equal to the realization of the social justice and the principle of non discrimination is a basic human right.

During the eighties the European Commission proceeds against Great Britain for not implementing the requirement for classification of the work places in compliance with the EU equal pay rules. The European Court of Justice ruled that if the principle of equal payment is not implemented in the national law, the workers must have right to appeal to the competent bodies.

---

29 Case 61/81, Commission v. UK 1982 ECR 2601.
In the case Brunhofer v. Osterreichischer Bank Postparkasse and Angesteltenbetriebsrat der Wiener Gebietskrankenkasse the Court ruled that the professional qualifications and the work performed must not be used by the employers to justify that workers are not performing the equal work or work of equal value. The Court interpreted that professional capacities and the workers qualities are important for payment of additional compensations. The Court interpreted that in particular situations the professional training can be used as valid criteria in determining if the workers perform same work. This judgment was criticized because according to the Court ruling the personal qualifications and the training is used as objective justification for receiving bigger salary no matter the fact that the work is performed by the workers who have lower qualifications.

The principle of transparency in work payment and the problems during the procedures in cases of gender discrimination can be seen in the case of Danfoss. The employer Danfoss paid equal payment to workers grouped by the salary payment, such as additional compensation based on mobility, training and experience.

The procedure was initiated by two female workers employed in the groups receiving different salary than male workers in the same groups. Industrial Arbitration Court used the preliminary rulings procedure before the European Court of Justice to ask for opinion in the concrete case. The ECJ ruled that the employer was not transparent regarding the payment system on additional compensations. The employer in the case didn’t make clear enough why the woman workers are paid less compared with the male workers. The questions forward before the European Court of Justice were regarding the compliance of the Directive for equal payment 75/117/EEC with the national laws. The Court based its ruling on the Case Commission v. France thus interpreting that the system of hiring workers which is not transparent is opposite of the principle of equal approach in the employment.

34Case 318/86, Commission v. France, 1988 ECR 3559, para.27.
4. Positive Actions in EU Legislation

Positive actions are regulated with the EU law and the implementation is harmonized in the Member States. Still in practice there is no compliance for the types of the legitimate measures or for the definition of the concept of the positive actions.

The positive actions are provided in the EU law for implementing the gender equality beginning with the Amsterdam Treaty. The positive actions are regulated with the article 141 (4) from the Amsterdam treaty and article 2 (8) from the 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.

Before adopting the Amsterdam treaty, positive actions were introduced with article 2 (4) from the Directive for equal treatment 76/207/EC and the Recommendation of the Council 84/635/EEC for promotion for positive actions for women. The Preamble of the Directive notifies that the legal articles for equal treatment in the EU law are not adequate for eliminating the differences. Thus, it is necessary additional actions to be used in the national states in the public and private sector. The aim of the affirmative action is eliminating the prejudice for the position of the women in the employment. With this document the Member States can implement additional measures regarding the inequality between genders in the working sector and to promote better balance in the area of employment. Adopting the affirmative action challenges the participation of the women in those sectors where there are less represented, particularly in sectors important for the future development of the society.

When Amsterdam treaty was adopted in article 141 new paragraph 4 was added regulating that 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.

This paragraph 4 of article 141 can be criticized for several reasons. First, the term women is not mentioned in the paragraph but the term less represented gender. Second, the term special beneficiaries are not concretely defined so it results in confusing situation in practice. Other problem is that national courts enjoy discretion rights to determine the implementation of the positive action case by case.

The Directive for the equal treatment 2002/73/EC with the new article 8 (a) obligates the Member States to create special bodies for promotion, analyze, monitor and support for the implementation of the equal treatment. The Member States every four year report the Commission on the national laws, regulations and administrative acts adopted in compliance with article 141 paragraphs 4. The European Commission regarding this report adopts general report on the comparative achievements in eliminating the discrimination of woman in the working place.

Positive actions can be used in compliance with the article 5 of the Directive 2000/43/EC for implementing the equal treatment no matter the racial or ethnic origin and article 7 of the Directive 2000/78/EC for the equality in employment. Thus Member States can adopt special measures for eliminating the inequalities in practice and realizing the principle of equality.

European Court of Justice implemented the positive actions in the area of gender discrimination on the work place which is understandable because the gender was the first legal base. The Court through the case law interpreted the concept of positive action giving certain directions for the national courts of the Member States.

The European Court of Justice was not certain if the positive action measures are bringing to legal particularization. One of the most important cases regarding this question was the judgment in Kalanke. The Court interpreted that the positive actions aim to improve the position of the woman in the professional life.

The Court interpreted that the Directive 76/207/EEC annuls the national rules that give priority of the female workers in the sectors where there is less man then women in the current situation. The Court interpreted that the national rule which guarantees absolutely and

---

38 O. J L 303 of 02/12/2000 p. 0016-0022
unconditionally priority for the female workers favorable approach for employment, promotion and professional achievement is not in compliance with the Community law.\textsuperscript{40}\textsuperscript{40} The Court ruled that the existing articles for equal treatment are not enough for eliminating the inequalities in the practice regarding the article 2 (4) of the Directive. This interpretation of the Court for the implementation of the positive actions is not in compliance with the general meaning of the positive actions.\textsuperscript{41}

After this judgment was adopted there was period of uncertainty in implementing the positive actions for the less represented gender in the area of employment.\textsuperscript{42}\textsuperscript{42} The Commission suggested amendments to the Directive 76/207/EC to further interpret the use of the quotes and other positive actions.

Two years later the Court in the case Marshall\textsuperscript{43}\textsuperscript{43} took more flexible opinion for the use of the positive actions.\textsuperscript{44}\textsuperscript{44} In this case the Court decided upon the national article of the German law regulating that in the case of two candidates with the same qualifications, but different gender, the employer should give priority to the female worker. Still, the standstill clause is used for determining the secondary criteria for employment, such as professional qualifications and personal characteristics of the candidate in question. Thus, this clause avoids discriminatory practice for male workers who apply for the work. The Court interpreted that this national article of the German law is in compliance with the Article 76/207/EEC because it gives opportunity for objective valuation of the candidates. The judgment in Marshall gives new direction in implementation of the positive actions because allows special treatment of the woman as less represented gender in the area of employment.\textsuperscript{45}\textsuperscript{45} This restrictive approach in interpreting the positive action is softened in the judgment Badeck.\textsuperscript{46}\textsuperscript{46} The Court ruled that the national law gives priority to the female candidates who have equal qualifications with men candidates regarding the approach of the employment, promotion and professional qualification in compliance with the EC law. This national rules aims to insure that all qualified women are interviewed which does not

\textsuperscript{40}General Advocate Thesauro opinion in Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995, ECR I-3051 (para 8).
\textsuperscript{45}Barnard C., EC Employment Law, Oxford, Oxford University Press, 2000, r. 249.
\textsuperscript{46}Case C-158/87, Georg Badeck and Others, interveners v.Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen, ECR, I-1877.
mean in the same time that there are selected for the place. Thus it motivates the participation of the women in the higher organizational structures in the companies such as representing bodies of the trade unions, manager and revisers bodies. European Court of Justice interprets that this rules does not create absolute and unconditional priority for the women because the candidates are selected through the process of objective valuation of their personal qualifications.

With this judgment the European Court of Justice adopts similar ruling as with the recent judgments but goes further in broadening the use of the positive actions. In the case Badeck, the Court identifies the need for the flexible clause in avoiding the discrimination of the men workers. Thus, the Court extensively defines the use of the positive actions in compliance with the equal treatment and equal opportunities of the men and women.

After the Treaty of Amsterdam was adopted, the ruling in Abrahamson was interpreted. The Court ruled that the article 141 and the Directive 76/207/EEC annuls the national rules who give the candidate of the less represented gender priority for the employment compared with the other candidates. The importance of this case is that the European Court of Justice interprets the paragraph 4 of the article 141 in compliance with the principle of proportionality. In this case the Court ruled that the men and the women candidates for the work must be equally qualified to be selected for the job.

A modern approach in interpreting the positive actions by the European Court of Justice was taken in the case of Lommers exclusively based on the principle of proportionality. This judgment changed the court practice in interpreting the positive actions if there are in compliance with the Community law. In this case, the Minister of Denmark prescribed special places in the kindergartens for the children of the administrative female workers and in particular cases for the children of the administrative male workers. The justification was the fact that this measure does not mean reserved places for employment but only for improving the working conditions and professional progress of the female workers.

The ECJ interpreted that the measures must be consistent with the principle of proportionality which means that the deviation from principle equal treatment of men and women is legitimate only if is appropriate and necessary in order to achieve the desired goal. Thus, the

---

47 Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, ECR I-5539.
European Court of Justice interpreted that the measures of the Dutch Minister subscribed are in relation with the principle of proportionality. This exemption allows for the male workers to have approach to the reserved places if they take care of the children. Finally in the case Briheche v Ministre de L’Interieur, Ministre de L’education nationale and minister de la justice\(^{50}\) the Court decided in the procedure of the preliminary ruling for approximation of the French law with the Community law. The Court ruled that in this case the national rules are contrary with the Community discrimination law. The national rules give automatically and unconditionally priority to the candidates of particular category which is forbidden by the Treaty of Amsterdam and the Directive 2002/73/EC.

**Conclusion**

The European Union has one of the best anti discriminatory law systems in the world. In the beginning the Union established the equal pay rules for equal work or work of equal values as the first binding legal article for gender equality. The European Court of Justice played important role in implementing the equal pay rules in the practice. It ruled in many cases and the positive case study was further use to broaden the antidiscrimination law with other basis for discrimination.


The European Court for Justice had a restrictive approach toward using the positive actions in practice. The Court created legal uncertainty when using the terms flexible quotes, fix quotes, standstill clause without further explanation. New trend of the Court rulings in implementation of the positive action measures is to use the principle of proportionality. That means that positive actions are legitimate only if there is no alternative measure less harmful for the people that are

---

\(^{50}\)Case C-319/03, Serge Briheche v Ministre de L’Interieur, Ministre de L’education nationale and minister de la justice 2004, ECR, I-8801.
affected. The role of the Court is restricted regarding the formal jurisdiction as implementer of the law and not the creator of the law. Still, the ECJ played important role in advocating the gender equality articles in practice and strengthening the legal system of the Member States regarding the discrimination law and policy. This is confirmed through the case law regarding gender equality through the years elaborated in the paper in the second Chapter.

REFERENCES
6. European employment law, Kluwer Law International
13. Ellis E. The Recent Jurisprudence of the Court of Justice in the Field of Sex equality, 2000, CML Rev. 1403
15. Instruments of the Council of Europe, (2000), Beogradski centar za ljudska prava, Beograd
18. McColgan, A. Discrimination law, text, cases and materials, Oxford and Portland, 2005
20. Treaty for establishing the European Community and article 164 of the EUROATOM Treaty


Case law

Case Defrenne v. Belgium (Defrenne I) 1971 ECR 445
Case Van Gend en Loos, Case 26/62, 1963 ECR 1.
Case 129/79 Macarthys Ltd v Smith ECR 1980, 1275.
Case 61/81, Commission v. UK 1982 ECR 2601.
Case 109/88, Handels- og Kontorfunktionsærernes Forbund I Danmark v. Danska Arbejdsgiverforerering, acting on behalf of Danfoss 1989 ECR 3199
Case 318/86, Commission v. France, 1988 ECR 3559, para.27.
Case C-200/91, Coloroll Pension Trustees Ltd. V. James Richard Russel 1994 ECR I-4389, paras. 103-104,
Case 96/80, Jenkins v. Kingsgate (Clothing Productions) Ltd. 1981 ECR 911
Case C- 400/93, Rojal Copenhagen 1995 ECR 1-1275.
Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, ECR I-5539.
Case C-319/03, Serge Briheche v Ministre de L’Interieur, Ministre de L’éducation nationale and minister de la justice 2004, ECR, I-8801