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Review article

## AN ESSAY ON APPROACH TO GENDER EQUALITY IN THE EUROPEAN UNION

### *Abstract*

*This essay outlines the European Union's basic approaches to gender equality. Based on formal and substantive equality, the European Commission pursues a dual approach by integrating a gender perspective into contemporary social trends and by initiating specific measures. Gender mainstreaming is the integration of a gender equality perspective into every phase of the political process - design, implementation, monitoring and evaluation - in order to improve equality between women and men. This means assessing the impact of policies on women and men and, if necessary, taking steps to change policies. The goal is to make gender equality a reality and to improve the process of creating policies by bringing them closer to the needs of the citizens. The result of the systematic integration of the priorities and needs of women and men in all policies is in order to promote equality between women and men and to mobilize all general policies and specific measures to achieve equality and to actively and openly take into account planning phase their effects on the situation of women and men separately in implementation, monitoring and evaluation.*

**Keywords:** *formal equality, substantive equality, dual approach, gender mainstreaming, positive action*

### **Gender equality law in Europe**

Since the establishment, the European Union stands for equality between men and women, and gender equality is positioned as one of the fundamental principles which is incorporated in all treaties for the establishment of EU. The principle of gender equality has been improved through the decades of existence of EU with a tendency to achieve greater clarity and effects, and the principle of gender equality becomes the foundation of many legal acts, of which the most common are the directives. In EU member states, gender equality is legally regulated differently, and with the adoption of various acts on community level (EU), efforts are often made in order to regulate this issue in the most effective manner. The frequency and consistency in establishing a coherent system of directives as legal instruments is an indicator of the EU's commitment of promotion and realization of the principles of gender equality (European Commission *et al.* 2013).

There are two basic forms of equality from a policy perspective of view, which are formal and substantive, respectively. There are, moreover, the notions of formal equality in law and substantive equality in practice. The notion of formal equality means from a legal perspective the recognition of the presumed equality of men and women before the law. While, substantive equality refers to the assessable equality between men and women in society moreover their statistically measurable equality in practice. We should note that the notion of formal equality does not necessarily mean that a legal approach to gender equality is always a formal approach. If the legal perspective recognizes *de facto* gender inequality, then a formal perspective the legal approach recognizes substantive gender equality. Such is the history of European law on gender equality: from the formal approach of equal treatment to legal provisions on positive action.

The term 'EU gender equality Acquis' refers to all the relevant Treaty provisions, legislation and the case law of the CJEU in relation to gender equality. The Treaty of Rome in 1957 already included the principle of equal pay for equal work. (Article 119 EEC, then 141 EC, now Article 157 TFEU). In 1976, the Court of Justice of the European Union (CJEU) decided in the *Defrenne* case that Article 119 EEC had not only an economic but also a social aim. This judgement paved the way for modern European gender equality law (Foster 2021).

With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women became one of the essential tasks of the European Community (Article 2 EC). Since 1999, the EU has had the competence to take further action to combat discrimination based on gender (Article 13(1) EC, now 19(1) TFEU). This Article provided a legal basis for the Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (Directive 2004/113/EC). EU gender equality is also an integral part of the Charter of Fundamental Rights of the European Union, which prohibits discrimination on any grounds, including sex, (Article 21) and recognizes the right to gender equality in all areas and the necessity of positive action for its promotion (Article 23) (Miller 2011).

In 2009, the Treaty of Lisbon confirmed once again the importance of gender equality in the European Union. Equality between men and women features amongst the common values on which the European Union is founded (Article 2 TEU), which means, for instance, that it will be used as a yardstick for determining whether a European state can be a candidate for accession. The promotion of equality between men and women is also listed among the tasks of the Union (Article 3(3) TEU), together with the obligation to eliminate inequalities. The Lisbon Treaty thus clearly reiterates the obligation of ensuring gender equality for both the Union and the Member States. The development of EU gender equality law and its transposition into national law has been a step-by-step process, starting, at least for the 'oldest' EU Member States, in the early sixties. In 1957, the Treaty establishing the European Economic Community, which is the origin of the current EU, contained only one single provision (Article 119 EEC Treaty, ex Article 141 EC Treaty, now Article 157 TFEU) on gender

discrimination, namely the principle of equal pay between men and women for equal work (European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities, Burri & Prechal 2008).

Since then, however, many directives have been adopted which prohibit discrimination on the grounds of sex: the Directive on equal pay for men and women (75/117/EEC), the Directive on equal treatment of men and women in employment (76/207/EEC, amended by Directive 2002/73/EC), the Directive on equal treatment of men and women in statutory schemes of social security (79/7/EEC), the Directive on equal treatment of men and women in occupational social security schemes (86/378/EEC, amended by Directive 96/97/EC), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613/EEC, repealed by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC), the Parental Leave Directive (96/34/EEC, repealed by Directive 2010/18/EU), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113/EC) and, finally, the so-called Recast Directive (2006/54/EC) (European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities *et al.* 2008).

The central concepts of EU gender equality law are laid down in the respective directives and are often the subject of further interpretation by the CJEU. – Direct discrimination occurs where one person is treated less favoured on grounds of sex than another is, has been or would be treated in a comparable situation.' As a rule, direct discrimination is prohibited, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job, for example a male character in a film has to be a man. – Indirect discrimination occurs 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.' Indirect discrimination is very much concerned with the effects of a certain treatment and takes into account everyday social realities. For instance, less favourable treatment of part-time workers will often amount to indirect discrimination against women as long as women are mainly employed on part-time terms. Unlike in the case of direct discrimination, the possibilities for justification are much broader (European Commission. Directorate-General for Employment, Social Affairs and Equal Opportunities. Unit G.1. 2008).

The concept of positive action is defined in EU law as follows: 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 prevent or compensate for disadvantages in professional careers (European Commission. Directorate-General for Employment, Social Affairs and Equal

Opportunities. Unit G.1. 2008). Like indirect discrimination, positive action also takes into account everyday social realities but it goes much further, in the sense that it may require further steps to be taken in order to realize true, genuine equality in social conditions. The provisions permitted as positive action measures aim at eliminating or counteracting the detrimental effects on women in employment or in seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. Similarly, they should help to fight stereotypes. As an example of a positive action the following can be mentioned: the preferential treatment of female employees in the allocation of nursery places when the number of places, due to financial constraints, is rather limited or – even more far-reaching and controversial – female quotas in recruitment and promotion.

### **Toward dual approach of European gender equality policy**

Equal treatment laws are effective in combating overt discrimination but are not enough to ensure equality. Their starting point is that women and men should be treated the same. But as women and men do not start from the same position, equal treatment does not always lead to equal outcomes. Seemingly neutral policies can have biased results (Rossilli 2000).

Recognizing the shortcomings of equal treatment legislation when it comes to tackling inequalities between women and men, the EU co-financed specific actions for women especially in training and labour market activities through the ESF. The EU also adopted a series of recommendations and codes of good practice in areas such as education and training; childcare; combating sexual harassment; positive action; discrimination in the media; and improving women's access to decision-making positions by "Action Programmes on equal opportunities". But specific actions in favour of women also proved only to be a partial solution. They prepared women for operating in a male-dominated culture but did not challenge the structures and the culture of organizations, institutions or companies or seek underlying causes and solutions.

This led to a new strategy – gender mainstreaming – which shifted the focus to systems and structures themselves, to the relationship between women and men, and to their individual needs. This approach gained worldwide acceptance at the UN's Fourth World Conference on Women in Beijing, 1995. Gender mainstreaming recognizes that existing structures are not gender-neutral. The result of this is that apparently gender-neutral policies can in fact reinforce gendered divisions and inequality between women and men.

The European Commission follows the **dual approach** by both implementing gender mainstreaming and initiating specific measures. Gender mainstreaming is the integration of a gender equality perspective into every stage of policy process - design, implementation, monitoring and evaluation - with a view to promoting equality between women and men. It means assessing how

policies impact on women and men, and taking steps to change policies if necessary. The aim is to make gender equality a reality and to improve policy-making by bringing it closer to citizens' needs.

As part of the process, statistics, indicators and benchmarks are used to monitor progress in implementing the gender dimension in different policy fields, from employment to health, from research to education, to name just a few. In addition to the gender mainstreaming approach, the EU has used a wide **variety of specific measures**, such as legislation, awareness-raising campaigns or financial programmes. The aim of these measures is to tackle specific problems such as the gender pay gap or the persistent underrepresentation of women, particularly in the field of employment.

#### Positive action measures

The second cornerstone of the EU to achieve gender equality is through positive action measures. This concept of positive action measures must not be misunderstood as an equivalent to the concept of positive discrimination, affirmative action or reverse discrimination. Positive discrimination can be defined as an extreme form of positive action, which seeks to increase the participation of women by means of preferential treatment, for example through the use of quotas. Positive discrimination emphasizes a shift in contrary to positive action, from equality of access to the creation of preferential treatment for women, which is more likely to result in substantive equality as an outcome. Another extreme form of positive action measures are affirmative actions, which include a vast range of measures, and allow for the infringement of the principle of equality. In sum, those measures are more result-oriented than positive action measures, in order to achieve substantial equality. Positive discrimination and affirmative action, just like positive action measures, were created in order to benefit an underrepresented group, justified as countering the effects of past discrimination for example through quotas regarding guaranteed employment in certain fields or in universities (Verloo 2007).

A positive action is an active promotion to support minority groups which are in general weaker position than the dominant group in society. Therefore, involve positive actions the adoption of specific measures on behalf of the disadvantaged group, in order to overcome their unequal position in society, such as system of quotas. Starting in the early 1970s, the member states recognized the need for a more coherent model on gender equality reaching further than sole non-discrimination measures. Hence, the invention of positive intervention beyond the scope of the labour market resulted in the first Equal treatment Directive 76/207/EEC, laying down in article 2.4 the first possible provision for EU legislation in the field of gender based positive actions.

Positive action measures in the EU are constrained mechanisms and can only be used if the legal framework allows for it. However, in contrast to the affirmative action model is the European positive action approach striving towards the achievement of gender equality without placing the dominant group in a worsen position.

Important to note is the shift from the prior formal equality rights approach through the principle of equal treatment towards a model of substantive positive action measures. This changed approach is determined by the policy concept of gender mainstreaming which has been shifting the perspective of the gender equality agenda in the EU. The former formal legal approach is gradually combined and shifting towards a substantive positive action model changing the equality approach throughout the European Union. In the past foremost equality and non-discrimination was pursued through the equality of access. Nowadays, there has been a shift towards fundamental conditions, which are more likely to achieve the goal of gender equality designed to promote and benefit the disadvantaged group.

The ECJ as well as the Human Rights Committee have confirmed that positive action policies are compatible with international human rights law. Positive action measures seek, in general, to discriminate the dominant group, but to equalize the standing for the poorer group to that of the dominating. The principle of positive action does not seek to give the "minority" a better legal or societal position, compared to that of the dominant group but to achieve an adjustment of rights, to equalize these groups.

### **Gender mainstreaming**

Gender mainstreaming is the systematic policy approach on the European Community equality agenda. The concept was defined at the Beijing Conference in 1995, and has since then been taken on by the EU as its policy concept and as an end to achieve gender equality. Gender mainstreaming was firstly defined in 1995 at the Fourth World Women Conference in Beijing. Furthermore, the Beijing Declaration was drafted and therefrom onwards broadly committing the international community to a systematic incorporation of a gender perspective into public policy making. In accordance with this is the third approach of the EU to achieve gender equality through the concept of gender mainstreaming as policy instrument and policy end. This concept seeks to incorporate gender sensitive practices throughout all governmental institutions and policies (Stratigaki 2005).

Since the UN conference, gender mainstreaming has been adopted by the EU as the basis for its gender policy, which has become more wide-ranging since the Treaty of Amsterdam. The European Commission in 1996 adopted a formal commitment and defined gender mainstreaming and launched the Fourth Action Program on equal opportunities for women and men in 1996). Followed by the fifth Action Program on Equal opportunities (2001-2006) and the roadmap for equality between women and men (2006-2010), six priority areas for gender equality were identified. Namely, equal economic independence for women and men, the reconciliation of private and professional life, equal representation in decision-making, the eradication of all forms of gender-based violence, the elimination of gender stereotypes and the promotion of gender

equality in third world countries. The newest strategic engagement for gender equality 2016-2019 is a follow-up and prolongation of the Commission Strategy for equality between women and men 2010-2015.

As defined by the Commission gender mainstreaming is: The systematic integration of the respective situations, priorities and needs of women and men in all policies and with a view to promoting equality between women and men and mobilizing all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation (Pollack & Hafner-Burton 2000).

In 1997, the Treaty of Amsterdam confirmed the importance of promoting gender equality and formalized the commitment to gender mainstreaming. According to Article 2 of the Treaty, gender mainstreaming is one of the fundamental tasks to be actively promoted by the Community; Article 3 lays down the principle of gender mainstreaming by stating that in all its activities the Community shall aim to eliminate inequalities and to promote the equality of women and men; Article 13 provides for pro-active measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Articles 137 and 141 refer to gender equality in relation to the labour market. They stipulate equal opportunities and equal treatment at work and that 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. Over recent years a variety of manuals 'how to gender mainstream' have been developed, often focusing at specific areas and/or directed at certain target groups. Based on the literature and taking the specific area and stakeholders into account, a checklist for gender mainstreaming policies, is consisting of four steps:

Implementation and organization, and building awareness and ownership may be regarded as important preconditions of successful gender mainstreaming. Implementation and organization of gender mainstreaming refers to the process of providing a structural and cultural basis for equal opportunities. This includes formulation of objectives and targets, making a plan, drawing up a budget and defining responsibilities and accountability of the different actors involved. With regard to the budget, sufficient resources for implementation need to be made available. Moreover, the use of special (external) expertise might be considered. In addition, gender mainstreaming implies that all stakeholders involved in gender policy should take equal opportunities of men and women into account. In order to create a certain degree of gender awareness and expertise, training is essential. In addition, stakeholders should consider gender mainstreaming as part of their tasks and responsibilities. It is therefore important 'to build ownership' but different strategies may be adopted. In some cases all the team may be expected to take 'ownership' but where awareness levels are low it may be necessary initially to have a nominated person with specific knowledge and awareness within the policy making team or unit.

A next step in the process of gender mainstreaming is the collection of relevant data on the position of women and men. A description of the actual situation is essential in order to assess actual gender (in) equality and to prioritize areas for attention. In addition, monitoring of the situation over time provides information on the trends in gender (in) equality. The European Commission has identified in 1998 four dimensions to the assessment of gender inequality: participation, resources, norms and values and rights. It is important to consider the initial situation from a dynamic and not solely a static perspective.

Participation refers to the gender composition of the target group/population of the policy and implies the need to gather basic information such as the share of men and women in unemployment, among the disabled or among those with flexible contracts. Where policy measures specify particular groups of vulnerable persons, the possible differential impact on men and women should also be taken into account. Over recent years considerable progress has been made in improving the availability of gender segregated statistics, a development which facilitates this first step. Though statistics seem straightforward, it is also important to take measurement issues into account. For example, unemployment may be measured in several ways. Depending on the method, gender differences might vary from rather low to quite high.

Gender differences may also occur regarding the access to/distribution of resources such as time, space, information and money, political and economic power, qualifications, transport, use of public services etc. In particular the unequal division of care responsibilities has a major impact on the distribution of resources. For example, with respect to active labour market policies, the fact that women bear the main responsibility for raising children should be taken into account. Availability of childcare is, therefore, very important to enable, in particular, women to be participants in the programmes. In the field of reconciliation policies a relevant issue is whether leave arrangements are paid or unpaid. Women are also more likely to be concentrated in the area of the labour market most influenced by national minimum wages and are therefore disproportionately affected by decisions to raise the national minimum by more or by less than the average rate of growth in earnings.

Norms and values influence gender roles and the gender division of labour, and the attitudes and behaviour of women and men. They also account in part for the inequalities in the value attached to men and women or to masculine and feminine characteristics. It is essential to identify the role of policy measures in reinforcing social norms and values that maintain gender inequality. Tax and benefit policies are, for example, often based on the principle of a male breadwinner household model. The move towards more individualized models may, regardless of the impact on participation rates, have an important symbolic value. Along the same line, policy focusing on a more equal sharing of paid and unpaid work – with men explicitly in a role of a carer – might also contribute to a more equal set of norms and values.

Rights pertain to direct or indirect sex discrimination, human rights, and access to justice in the legal, political or socio-economic environment. For example, are active labour market schemes open to the inactive (returners, not just benefit claimants) as well as to the unemployed who are entitled to benefits? If not then women may be less able than men to claim support for re-entering employment. In this respect it should also be taken into account that even where women have formal rights on the same basis as men, lack of facilities may restrict women's ability to exercise their rights to take up these opportunities. Similarly formal rights for men to participate in reconciliation measures will not necessarily be sufficient to promote gender equality in care work.

The third step requires an assessment of the potential gender impact of the policy with reference to participation, resources, norms and values and rights. An important issue regarding participation is that both quantitative as well as qualitative aspects should be taken into account. For example, programmes to create jobs may in particular concern women. This may be assessed as positive from a gender equality point of view. When, however, the job quality is problematic (e.g. in terms of working hours and pay), such programmes might reinforce gender inequality. With respect to access to resources, it is critical to take into account not only the impact on household resources but also the impact on individual resources. On the level of social norms and values, reconciliation policies should address men's involvement in domestic labour. If only women make use of reconciliation policies the traditional unequal division of unpaid work between men and women will be reinforced, thereby potentially reinforcing social norms in this respect. With regard to rights it is relevant to include the right to care as well as to undertake employment. When assessing the impact of policy, it may be important to differentiate between particular groups of men and women such as ethnic minority groups, parents versus the childless, age groups, educational groups, regional groups etc. While measures to increase the participation rate might, for example, be effective for women from the dominant group, women from ethnic minority groups may require specific measures. In addition, a sound policy assessment should include indirect effects. Changes to gender relations outside as well as inside work may be one of the indirect effects to be looked for. A strong focus on part-time work could, for example, have the long term effect of reinforcing gender divisions of labour both in and outside work as women become more concentrated in sectors offering flexible employment. This example also illustrates the importance of distinguishing between short-term and long-term effects.

Where the policy is assessed to have a negative impact on gender equality or to be broadly gender neutral, it is essential to identify ways in which the policy could be redesigned to promote gender equality. The need for redesign is particularly strong where initial gender differences are high and have major impacts on women's life chances. Redesign does not necessarily imply fundamental changes. For example, regarding active labour market policies rather simple but effective measure is to extend eligibility to all inactive. Providing facilities

to support working parents also seems not too complicated. Other areas may be more complex. For example, reducing vertical and horizontal segregation calls for more extensive policies. Redesign may also require a multi-pronged approach involving more than one policy area or department. For example the public employment service may need to cooperate actively with the department responsible for the provision of childcare if women seeking employment are to have access to childcare to facilitate job search. Gender mainstreaming calls for a more joined up approach to policy design where employment policy is not developed in isolation from welfare provision and childcare services on one hand or tax and benefit policies on the other hand.

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