Sex Equality Law under the Treaty of Amsterdam*

Christa Tobler**

A. Introduction

A revision of the Maastricht Treaty[1] was agreed upon by the European Union Member States in the course of the intergovernmental conference which took place in Amsterdam, on 16 and 17 June 1997. The Treaty of Amsterdam (ToA) signed in Amsterdam on 2 October 1997 consists of three parts. First, the changes of the existing Treaty law,[2] second, provisions on the simplification of the Treaties[3] and, third, general and final provisions.[4] The Treaty of Amsterdam entered into force on 1 May 1999.[5]

This article specifically addresses the changes in EC law regarding sex equality of men and women. The ToA contains a few substantive changes, namely two on the level of the general principles and the important amendments to Article 119 EC. However, the main changes concern the new and complicated mechanisms for adopting secondary legislation. They are mainly the result of the integration of the

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** Leiden University, the Netherlands (EC law) and Basel University, Switzerland (gender law)

1 The term 'Maastricht Treaty' refers to the Treaty on European Union (TEU) as concluded in 1992 in Maastricht. The Treaty establishing the European Community (the EC Treaty, before Maastricht the Treaty establishing the European Economic Community, EEC) which is of specific relevance for the purposes of this article, is one of the subparts of the European Union.

2 Arts. 1–5 ToA. Art. 1 ToA deals with the changes of the Treaty on European Union (TEU), Art. 2 with the changes of the Treaty establishing the European Community (EC Treaty), Art. 3 with the changes of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) and Art. 4 with the changes of the Treaty establishing the European Atomic Energy Community (Euratom Treaty). Art. 5 concerns amendments to the Act concerning the election of representatives of the European Parliament of 1976.

3 Arts. 6–11 ToA.

4 Arts. 12–15 ToA.

5 *See* Art. 14(1) ToA.

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Social Agreement into the EC Treaty. In this article, I shall limit myself to the Treaty provisions dealing specifically with sex equality. I will therefore not discuss more general aspects of the Treaty revision which might have an indirect influence on sex equality law, such as the new principle of transparency and the new objectives regarding employment.[6] As for the wider framework of human and social rights, let it suffice to state that the ToA does not contain a list of such rights. Instead, the Treaty refers to other legal instruments.[7]

Finally, a remark regarding the numbering of the ToA. The Member States' decision to simplify and consolidate the Treaties causes a change in the numbering of almost all existing Treaty provisions. In addition, the letters used so far to identify the provisions of the TEU (Art. A, B, C, ...) will be replaced by numbers. In this article, I shall refer to the new numbering according to the consolidated (simplified) Treaties and mention the old numbers in brackets (meaning either the numbers in the old Treaties or, where there are no such numbers because the relevant provision is new, the numbers indicated in the unconsolidated version of the ToA). Both the text of the ToA as decided upon in June 1997 and signed in Amsterdam in October 1997, and the consolidated texts of the TEU and the EC Treaty have been published in the EU's Official Journal.[8]

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[6] In that regard *see* more general articles on the Treaty revision, in English for instance René Barents, 'Some Observations on the Treaty of Amsterdam' in (1997) *Maastricht Journal of European and Comparative Law* pp. 33–345; Sally Langrish, 'The Treaty of Amsterdam: Selected Highlights' in (1998) 23 *European Law Review* pp. 3–19, and Philippe Manin, 'The Treaty of Amsterdam' in (1998) 1 *The Columbia Journal of European Law* pp. 1–26.

[7] The first two sections of Art. 6 TEU (formerly Art. F TEU) provide:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

According to Art. 49 TEU (formerly Art. 9 TEU) only European States which respect the principles set out in Art. 6(1) may apply to become a member of the Union. In case of a serious and persistent breach by a Member State of these principles, the European Council can decide to suspend certain rights of the Member State under the Treaty (Art. 7 TEU, Art. F.1. of the Draft Treaty). In regard to social rights, there will be a new forth indent in the TEU's preamble in which the Member States confirm 'their attachment to fundamental and social rights as defined 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'. Both the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter are legal instruments adopted by the Council of Europe, an organization independent from the European Union.

[8] The following texts are published in the Official Journal:

- Notice no. 97/C 340/01: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ 1997, C 340/1 (the Draft Treaty)

B. Principles

In a way similar to the old law, the general provisions of the revised TEU (Title I on common provisions and Title VIII – formerly Title VII – on final provisions) will not contain any specific rules on sex equality. Such provisions can be found in the EC Treaty only. In the Treaty's first part on principles, the first change concerns Article 2 EC (numbering unchanged). This provision states the objectives of the EC, now also expressly including the promotion of 'equality between men and women'.

The second change concerns Article 3 EC (numbering unchanged) which lists the EC policy areas later to be reflected in the various subparts of the Treaty (among them social policy, in which context Article 119 EC – so far the only substantive provision on sex equality law in the Treaty – can be found). A new second section of Article 3 EC states: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.' It is noteworthy that the provision does not speak of 'equal treatment' like the sex equality directives. This can be seen as a signal indicating that in the future, the concept of sex equality shall be a less formal one than it has been up to now. The new provision gives the EC the task to engage in an overarching sex equality policy: sex equality will be an aspect to be considered in all policy areas (in German aptly termed a *Querschnittaufgabe*). At present, a similar provision exists on the level of soft law only (the fourth action on equal opportunities[9]). The new formal Community duty is most welcome indeed. However, whether it will have positive effects in the various policy areas depends on the way the institutions fulfil their duties. In the context of legislation, if the Commission takes its task seriously, every new proposal for legislation will have to be submitted to a process of 'gender auditing'.[10] But the task of furthering sex

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- Notice no. 97/C 340/02: Consolidated version of the Treaty on European Union, OJ 1997, C 340/145
- Notice no. 97/C 340/03: Consolidated version of the Treaty establishing the European Community, OJ 1997, C 340/173
- Notice no. 97/C 340/04, Minutes of the signing of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 1997, C 340/307
- Notice no. 97/C 340/05, Declarations on Article K.7 of the Treaty on European Union as amended by the Treaty of Amsterdam, OJ 1997, C 340/308.

[9] Council Decision 95/593/EG of 22 December 1995 on a medium-term Community action programme on equal opportunities for men and women (1996–2000), OJ 1995, L 335/37; see Art. 2.

[10] Fiona Beveridge and Sue Nott, 'Gender Auditing – Making the Community Work for Women' in Tamara K. Hervey, David O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley 1996, pp. 383–398) at p. 391 et seq. Here, gender auditing is defined as 'a way

equality is not limited to the adoption of new secondary legislation.There are also the possibilities of useful soft law measures such as recommendations and opinions and budget decisions on financing information campaigns and academic research. Another new provision in the first part of the EC Treay will be Article 13 (Art. 6a according to Art. 2(6) ToA). This is a legal basis provision and will be dealt with later in this article (see below D.II.1).

C. Substantive Provisions

I. General Remarks

It is important to note that the provisions just mentioned under part B only contain principles. Thus, individual citizens cannot derive rights from them. This is in contrast with the provisions in later parts of the Treaty. It is well known that under the old law (pre-Amsterdam) there is only one substantive provision on sex equality, namely Article 119 EC on equal pay for men and women. Other substantive provisions could (and still can) be found at the level of secondary law, that is in various directives. There was also Article 6 of the Social Agreement on equal pay and positive action in favour of women. However, this provision was not binding on the UK. The Social Agreement was based on the Social Protocol which was attached to the EC Treaty as Protocol No. 14 in the framework of the revisions of Maastricht. The Protocol made it possible for the Member States, with the exception of the UK, to opt for an integration approach going further than the one the UK would have been willing to agree to at the time in the area of social policy. Under the new Labour government, the UK gave up its resistance to the Social Agreement. Therefore, it was decided in Amsterdam in 1997 to integrate the Social Agreement into the Treaty. On a substantive level the result is sections (1), (2) and (4) of Article 141 EC (s. (3) is a legal basis provision which will be dealt with below together with other elements of the Social Agreement which have found their way into the Treaty; see D.II.2(A)). Article 141 is an amended version of the old Article 119, containing important elements of Article 6 Social Agreement. As a consequence of these changes, both the Agreement and the Protocol will be abolished. Also under the new law, Article 141 EC will be the only substantive provision on sex equality at the Treaty level.

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of measuring social impact'. It has been pointed out that in order to be useful, this test needs to be performed by specialists on sex equality issues; see L.S. Groenman, C.E. van Vleuten, R. Holtmaat, T.E. van Dijk, J.H.H. de Wildt, *Het Vrouwenverdrag in Nederland anno 1997. Verslag van de commissie voor de eerste nationale rapportage over de implementatie in Nederland van het Internatinaal Verdrag tegen Discriminatie van Vrouwen* (VUGA, 1997) at p. 57.

II. The Principle of Equal Pay for the Same Work or Work of the Same Value

The first two sections of Article 141 EC (formerly Art. 119) introduce the right to equal pay for men and women. They are identical to those of Article 6 Social Agreement. The only relevant change regards the wording 'the principle of equal pay for male and female workers for equal work *or work of equal value*' (emphasis added). However, in fact this does not bring about any substantive change. Under the old law, the right to equal pay for work of equal value is already provided for in the equal pay directive.[11] In addition, the ECJ has held in its judgment *Jenkins* that Article 1 of the directive merely 'restates' the principle of equal pay already set out in Article 119 EC and therefore 'in no way alters the content or scope of that principle as defined in the Treaty'.[12] This means that even under the old law citizens could, before a national court and based on Article 119 EC, rely on the right to equal pay for work of equal value against the state as well as against other individuals (vertical and horizontal direct effect).[13]

III. Positive action

Article 141(4) is new and states:

> 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 under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

This wording strongly resembles Article 6(3) Social Agreement. However, there is one major difference: Article 6(3) talks about 'women', while Article 141(4) is neutral. The neutral term 'under-represented sex' in the new provision has its origin in a Commission proposal for a revision of the Equal Treatment Directive.[14] The proposal was the

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[11] Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 1975, L 45/19.

[12] Case 96/80 *Jenkins v. Kingsgate* [1981] ECR 911, paras. 21 and 22.

[13] It is well known that directives are incapable of being directly effective at the horizontal level; *see especially* the decisions *Marshall I* (Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723) and *Faccini Dori* (Case C–91/92 *Faccini Dori v. Recreb* [1994] ECR I–3325). As regards Art. 119, the Court has stated in its judgments *Defrenne II* (Case 43/75 *Defrenne v. SABENA*, [1976] ECR 455) and *Jenkins* (see above, note 12) that this provision is both vertically and horizontally directly effective.

[14] Directive 76/207 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, OJ 1976, L 39/40. Art. 2(4) provides: 'This Directive shall be without prejudice to measure to promote equal opportunity for men and women, in particular by removing existing inequalities which affect womens' opportunities in the areas referred to in Article 1(1).'

Commission's reaction on the ECJ judgment *Kalanke*.[15] In that judgment the ECJ had declared national rules 'which guarantee women absolute and unconditional priority for promotion' to go beyond the promotion of equal opportunities in the sense of Article 2(4) of the directive and therefore to go beyond what was acceptable under that provision.[16] This narrow approach to preferential treatment of women was criticized by many academic writers[17] and disliked by the Commission who tried to limit the damage by proposing a change to the relevant directive. It is in that proposal that the term 'under-represented sex' can be found.[18] Article 141(4) EC therefore appears to be a combination of Article 6(3) Social Agreement and the proposal mentioned.

With Article 141(4) EC there is now a provision on positive action in the Treaty itself, rather than only in a directive. The depth of its scope at present remains an open question. The answer depends on whether the ECJ will interprete the new provision differently from, or in the same way as, it has been interpreting Article 2(4) of the directive. In this context the *Marschall* judgment[19] needs to be mentioned. Acknowledging the unequal positions of men and women in the labour market,[20] the

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[15] Case C-450/93 *Kalanke v. Freie und Hansestadt Bremen* [1995] ECR I–3051.

[16] Para. 22 of the judgment.

[17] Among others *see* Astrid Epiney and Nora Refaeil, 'Chancengleichheit: ein teilbarer Begriff? Zur Zulässigkeit von 'Bevorzugungsregeln' im Anschluss an das Urteil des EuGH in der Rs. 450/93 – Kalanke' in (1996) *Aktuelle Juristische Praxis* pp. 179–187; Marie-Thérèse Lanquetin, 'De l'égalité des chances. A propos de l'arrêt Kalanke, CJCE 17 octobre 1995' in (1996) *Droit Social* pp. 494–501; Titia Loenen and Albertine Veldman, 'Van voor naar achter, van links naar rechts? Voorkeursbehandeling na Kalanke' in (1995) *Nederlands Juristenblad* nr. 12, pp. 1521–1527; Sacha Prechal, 'Annotation: Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*' in (1996) *Common Market Law Review* pp. 1245–1259; Stefania Scarponi, 'Pari opportunità e Frauenquoten davanti alla Corte di Guistizia' in (1995) *Rivista di diritto europeo* pp. 717–737; Dagmar Schiek, 'Positive Action in Community Law. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen'* in (1996) *Industrial Law Journal* nr. 25, pp. 239–246; Linda Senden, 'Positive Action in the EU Put to the Test. A Negative Score? Case C-450/93, *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I–3051' in (1996) *Maastricht Journal of European and Comparative Law* pp. 146–164; Christa Tobler, 'Quoten und das Verständnis der Rechtsgleichheit der Geschlechter im schweizerischen Verfassungsrecht, unter vergleichender Berücksichtigung der EuGH-Entscheidung Kalanke', in Kathrin Arioli (ed.), *Frauenförderung durch Quoten* (Helbing & Lichtenhahn 1997) at pp. 49–134.

[18] The proposal can be found in COM96 (93) fin. It provided that Art. 2(4) of the Equal Treatment Directive should be replaced by the following text: This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Art. 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.

[19] Case C-4089/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I–6363.

[20] In contrast to AG Tesauro and the judgment in *Kalanke*, the Court in *Marschall* emphasizes that 'it appears that even where male and female candidates are equally qualified, male

ECJ held in this important decision that preferential treatment of women 'may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world'[21] (note that in other languages the wording is more affirmative[22]).The Court reiterated that such a measure may not give absolute and unconditional preference to women, but added that this can be avoided by a so-called savings clause which

> in each individual case ... provides for male candidates who are equally qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate.

However, such a clause must not discriminate against women.[23] After *Kalanke* this is a very positive judgment, though it remains unclear which criteria may lead to a preference of the male candidate while at the same time excluding discrimination of women and what will be the consequences of this case law on the interpretation of the new Article 141(4) EC. One of the problems of the new provision is that it will make positive action possible in favour of women *and* men. This disregards the fact that in practice the problem is discrimination of women, not men. This fact should lead to an asymmetric concept of sex equality.[24] It is true that the Member States have attached a declaration in favour

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candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities or women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth or breastfeeding'; *see* para. 29 of the judgment.

21 Para. 31 of the judgment.

22 The conditional 'if' in the English version is the much more assertive '*dès lors'* in the Court's French working language ('dès lors qu'une telle règle peut contribuer à faire contrepoids ...') respectively '*nu*' in the Dutch translation ('nu een dergelijke regeling kan bijdragen tot het vormen van een tegenwicht ...') and '*denn*' in German ('denn eine solche Regelung kann dazu beitragen, ein Gegengewicht zu schaffen'). In English, these words correspond to 'since' rather than 'if'. Therefore, it would seem that the English translation is too weak.

23 Para. 35 of the judgment. Note that the necessity of a savings clause is also mentioned in the Commission's proposal mentioned above, note 18.

24 As advocated, for instance, by Titia Loenen, *Verschil in Gelijkheid. De conceptualisering van het juridische gelijkheidsbeginsel met betrekking tot vrouwen en mannen in Nederland en de Verenigde Staten* (Tjeenk Willink 1992) at p. 244, and Dagmar Schiek, 'Sex Equality Law After Kalanke and Marschall' In (1998) *European Law Journal* 4 at pp. 148–166, on pp. 161 and 162 .

of women to Article 141 EC,[25] but it is doubtful that such a declaration can have more than a political effect.

Under the directive, it is Article 2(1) of the Equal Treatment Directive – the prohibition of discrimination – which is directly effective.[26] Article 2(4) on positive action does not have direct effect on its own, but nevertheless is used for the interpretation of section 1. Under the new law, where this provision can be found in a different wording in the Treaty itself, the question arises whether Article 141(4) EC can have direct effect independently. This issue points to the rather strange construction of Article 141. In contrast with the old law, the new provision not only deals with equal pay, but also with positive action on a more general level. However, there is still no general, substantive prohibition of sex discrimination at Treaty level, though it has been proposed.[27] In fact, nowhere in the Treaty is the 'principle of equal treatment' referred to in section 4, mentioned expressly. As under the old law,[28] there is now an unwritten general principle of equal treatment only. The result is that Article 141(4) EC elaborates on a principle which can be found in an express form only on the level of directives. It is unclear (at least to this writer) what all of this will mean for the question of direct effect of Article 141(4) EC.

IV. The Barber Protocol

Since its adoption in the framework of the Maastricht revisions, the so-called Barber Protocol (Protocol No. 2, attached to the EC Treaty) has lost its meaning through a revision of the fourth sex equality law directive.[29] This revision is the consequence of the ECJ's *Barber* decision.[30] It codifies that decision and the case law that followed

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[25] Declaration 28 as accepted by the Conference: 'When adopting measures referred to in Article 119(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.' This declaration is part of the Draft Treaty and can be found on p. 136 of OJ 1997, C 340.

[26] Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* (*Marshall I*) [1986] ECR 723. *See also* P.J.G. Kapteyn, P. VerLoren van Themaat, L.A. Geelhoud, C.W.A. Timmermans, *Inleiding tot het recht van de Europese Gemeenschappen na Maastricht*, *vijfde, geheel herziene druk* (Kluwer 1995) at p. 627.

[27] *See* for instance the far reaching proposal presented by the Europe Institute of Basel University, Switzerland, Art. 6: 'Frauen und Männer sind gleichberechtigt, insbesondere im Berufsleben, im Bildungs- und Ausbildungswesen, in der Familie und im Bereich des sozialen Schutzes.' *Basler Thesen für die künftige Verfassung Europas. Ergebnisse eines Seminars*, Basler Schriften zur Europäischen Integration, nr. 18, Europa Institut an der Universität Basel 1995.

[28] See the *Defrenne III* judgment, Case 149/77, *Defrenne v. SABENA* [1978] ECR 1365.

[29] Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986, L 225/40.

[30] Case C-262/88 *Barber v. Guardian Royal Exchange* [1990] ECR I–1889.

it.[31] Consequently, the Barber Protocol is not mentioned in the list of protocols attached to the ToA.

D. Legal Basis Provisions

The revision of the Maastricht Treaty at Amsterdam, especially the integration of the Social Agreement into the Treaty, brought about quite substantial changes at the level of provisions that can serve as a legal basis for the adoption of secondary legislation in the area of sex equality law. Before discussing these changes, I will first recall the legal basis provisions that have been used so far for the adoption of secondary sex equality law.

I. The Relevant Legal Basis Provisions Before the ToA

Under the old law, there was no one specific legal basis provision regarding sex equality law. Consequently, the EC had to rely on general legal basis provisions, especially Articles 100 (now Art. 94 EC;[32] Art. 100a was not relevant since it excluded from its scope matters relating to the rights and interests of employed persons) and 235 EC (now Art. 308).[33] In the framework of the protection of workers' health and safety there was also Article 118a EC (now Art. 138).[34] The sex equality directives based on these provisions were binding on all Member States.

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[31] Directive 96/97, OJ 1997, L 46/20. The period for implementation of the change has expired on 1 July 1997.

[32] The following directives are based on this provision:
- the first directive on equal treatment (equal pay): Directive 75/117, OJ 1975, L 45/19
- the fourth directive on equal treatment (occupational social security schemes): richtlijn 86/378, Pb 1986, L 225/40. This directive is simultaneoulsly based on Art. 235. The changes following the *Barber* judgment in Directive 96/97, OJ 1997, L 46/20, are based on Art. 100 only.
- the fifth directive on equal treatment (self-employed persons): Directive 86/613/EEC, OJ 1986, L 359/56. This directive is also based on Art. 235.

[33] The following directives are based on this provision:
- the second directive on equal treatment (equal treatment in general): Directive 76/207, OJ 1976, L 39/40;
- the third directive on equal treatment (social security): Directive 79/7, OJ 1979, L 6/24;
- the fourth directive on equal treatment (occupational pensions): Directive 86/378, OJ 1986, L 225/40. This directive is also based on Art. 100; see above, note 31.
- the fifth directive on equal treatment (self-employed persons): Directive 86/613/EEC, OJ 1986, L 359/56. This directive is also based on Art. 100; see above, note 31.

[34] This provision is the legal basis for the pregnancy directive: Directive 92/85, OJ 1992, L 348/1. The close connection of this directive with sex equality issues is confirmed in the preamble of the fourth action programme on equal opportunities for men and women (1996–2000), OJ 1995, L 335/37.

There were more possibilities for the adoption of secondary legislation within the framework of the Social Agreement. The relevant legal basis provisions were Article 2(2)[35] and (3), and Article 4(2).[36] However, such secondary law was then not binding on the UK.

The legislative possibilities under these provisions vary,[37] first, with regard to the types of measures that can be adopted. Article 235 EC allows the adoption of 'measures' in general (that is, in the context of legislation, regulations or directives), while the other provisions can only be used for the adoption of directives. In practice, all secondary legislation on sex equality issues is in the form of directives. A second issue is the degree of harmonization to be achieved by the measures. Normally, this is not defined in the legal basis provisions. However, Article 118a EC and Articles 2 and 4 Social Agreement specify that it must be minimum harmonization. Thirdly, under the various provisions the procedures differ, especially regarding the involvement of the various institutions and regarding the voting requirements. Articles 100 and 235 EC provide for the consultation procedure under which the Parliament must be consulted for its opinion on the Commission's proposal. When adopting the measures, the Council must vote unanimously. Since Maastricht, Article 118a EC provided for the co-decision procedure (see Art. 189b EC which will become Art. 251 EC). Here, the Parliament has a good deal of influence on the adoption of the measure (possibility of a veto). Council decisions have to be taken by a qualified majority of the votes. Article 2(2) Social Agreement provides for the co-operation procedure (see Art. 189c EC in the Amsterdam version now Art. 252 EC) under which the Parliament enjoys a certain, though limited influence (not as much as under Art. 189b EC but more than in the case of mere consultation). In this case, Council decisions have to be taken by a qualified majority of the votes, unless they fall in an area mentioned in Article 2(3) Social Agreement (including, among others, social security and the protection of workers in the case of dismissal). In that case, the adoption of the directive requires unanimity. An altogether different procedure is provided for by Article 4(2) Social Agreement. The Commission,

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[35] This is the legal basis provision for the directive on the burden of proof: Directive 97/80, OJ 1998, L 14/6. According to Art. 7 of the directive, the implementation period will expire on 1 January 2001.

[36] The following directives have been based on this provision:
- the directive on parental leave: Directive 96/34, OJ 1996, L 145/4. The implementation period expired on 3 June 1998;
- the directive on part-time work: directive 97/81, OJ 1998, L 14/9. According to Art. 2(1) of the Directive, the implementation period runs until 20 January 2000.

[37] *See* Piet Jan Slot, 'Harmonization of Law' in (1996) *European Law Review* 21 at pp. 378–397 and, more specifically with regard to sex equality law, Christa Tobler, 'Harmonisierung im EG-Recht am Beispiel des Mutterschaftsurlaubes. Von einem Bermuda-Dreieck im EG-Recht', in François Baur and Georges Baur (eds.), *Aktuelle Rechtsfragen 1996. Liber amicorum zum sechzigsten Geburtstag von Theodor Bühler*, (Schulthess 1996) at pp. 127–148.

based on an agreement concluded by the social partners, makes a proposal for a directive which, if falling in an area mentioned in Article 2(2) Social Agreement, will have to be adopted by the Council with a qualified majority vote and, if falling in an area mentioned under Article 2(3), unanimously. The Parliament is not involved at all in this procedure. Against this background, the ToA has brought about changes not only regarding the possible legal basis provisions, but also regarding the procedures that have to be followed.[38]

II. Legal Basis Provisions in the ToA

Under the revised Treaty law, there are no less than four new legal basis provisions specifically for, among others, sex equality law issues. As regards their field of applications, one of them is of a general nature while the others are more specific. It would appear that thereby the formerly relevant general provisions, Arts. 100 and 235 EC, have lost their relevance in that area. Article 118a EC is revised and will, in its changed form, continue to exist. The provisions of the Social Agreement have been integrated into the Treaty and combined with existing and new provisions. These provisions will be discussed in the following paragraphs. In addition, it should be mentioned that the ToA provides for the possibility of 'closer co-operation' of two or more Member States. This has to be seen in the context of the much discussed keyword of 'flexibility' (Art. 11 EC, before Art. 5a according to Art. 2(5) ToA).

1. General New Basis Provision: Article 13 EC

The first new legal basis provision can be found in the first part of the EC Treaty which deals with 'principles'. Article 13 EC (Art. 6a EC according to Art. 2(7) ToA) is new. It states:

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

The mere wording of this provision shows that this is not a substantive provision granting rights to individuals. Rather, it empowers the Community to take legislative action regarding discrimination. Further, it is of a subsidiary nature: like Article 12 EC (before Maastricht Art. 7 and thereafter Art. 6), the comparable provision in the field of discrimination on grounds of nationality, this provision can only be used if there is no

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[38] Regarding the decision making procedures in general, *see* Niels Blokker, 'Decision-making in the European Union and in other international organizations – Amsterdam and beyond', (1997) *elsa Selected Papers on European Law* (elsa SPEL), nr 2, pp. 169–179.

specific provision in a given area.[39] Regarding sex equality, such specific provisions can be found only in the chapter on social policy (see below part 2). This means that Article 13 EC can be used as legal basis for all other policy areas covered by the Treaty, such as, for instance, tax law, public health, research and development, culture and consumer protection (areas such as criminal law or family law do not fall within the ambit of EC law). This corresponds with the EC's new mainstreaming task of eliminating discrimination and promoting equality which has already been mentioned.[40]

2. *Specific new legal basis provisions*

(A) ARTICLE 137(2) AND (3) EC

The first new legal basis can be found in Article 137 EC (Art. 118 EC according to Art. 2(22) ToA). This provision appears to be a combination of the old Article 118a EC and Article 2 Social Agreement. According to section 1 of this latter provision, the Community shall support and complement the activities of the Member States in certain fields, among them 'improvement in particular of the working environment to protect workers' health and safety' (a concern also expressed in Art. 118a EC) and 'equality between men and women with regard to labour market opportunities and treatment at work'. This is reiterated in the new Article 137(1). Section 2 is also taken from Article 2 Social Agreement and is similar to Article 118a EC. It states:

> To this end, the Council may adopt, 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. [. . .]

What has changed, compared to both the Social Agreement and Article 118 EC, is the procedure: the co-operation procedure provided for in those provisions is replaced by the co-decision procedure (more influence for the Parliament).[41] Article 137(3) EC is again taken from the Social Agreement. It provides for unanimous voting in certain fields such as social security and the protection of workers in the case of dismissal. Section 4 – again, taken from the Social Agreement – provides that a Member State 'may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3'. Section 5

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[39] Regarding Art. 6 EC, *see* for instance Case C-295/90 *Parliament v. Council* (Students' residence rights) [1992] ECR I–4193.

[40] *See above* part B.

[41] Under the ToA, this procedure is somewhat simplified by abolishing the third reading, see Art. 251 EC, formerly 189b; it replaces the co-operation procedure in most areas.

(taken from both Art. 118a EC and Art. 2 Social Agreement) states that 'the provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or intoducing more stringent protective measures compatible with this Treaty'. This is logical – and therefore in fact superfluous – in the case of minimum harmonization. Finally, section 6 (taken from Art. 2 Social Agreement) provides that the new Article 137 shall not apply, among others, to pay.

(B) ARTICLE 139(2) EC

The second specific provision is Article 139(2) EC (Art. 118b EC according to Art. 2(22) ToA). It is almost identical to Article 4(2) Social Agreement and needs to be read in context with Article 138 (Art. 118a according to Art. 2(22) ToA, taken from Art. 3 Social Agreement). Section (1) of this provision assigns to the Commission the task of promoting the consultation of management and labour at the Community level (s. 1).[42] The Commission shall consult management and labour on the possible direction of Community action (s. 2). If the Commission comes to the conclusion that Community action is advisable, it will have to consult the social partners on the content of the envisaged proposal (s. 3). The social partners then 'may inform the Commission of their wish to initiate the process provided for in Article 139'. This dialogue procedure can take up to nine months; prolongation is possible (s. 4).

Article 139(2) EC, the new legal basis provision, is relevant in cases where the dialogue just mentioned leads to an agreement in a field mentioned in Article 137. For such cases, Article 139(2) EC provides for the possibility of Community implementation:

> Agreements concluded at Community 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 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.
>
> The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall be unanimously.

In the wider framework of Community law, this is an atypical legislative procedure: the contents of the legislation are – at least initially – not proposed by the Commission. Further, as under the old version in the Social Agreement, Parliament is not involved in this procedure.

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[42] The term 'management and labour at Community level' refers to the social partners existing on Community level, such as, for instance, the European Trade Union Confederation (ETUC), The Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME; all acrynoms refer to the French names of these organizations).

(C) ARTICLE 141(3) EC

The third legal basis provision is Article 141(3) EC (Art. 119(3) EC according to Art. 2(22) ToA). It provides:

> The Council, acting in accordance with the procedure referred to in Article 251, 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.

This provision is entirely new. As for the procedure, Article 251 EC concerns the co-decision procedure (formerly Art. 189b EC).

3. Mutual Relationship of the Specific Provisions

Considering the three new specific legal basis provisions, it is unclear what should be their mutual relationship.

(A) FIELD OF APPLICATION OF THE PROVISIONS

There seems to be an overlap between the fields of application of Articles 137(2) and (3) and 139(2) EC on the one hand and Article 141(3) EC on the other hand. Articles 137 and 139 have to be seen in the context of the Community's task to 'support and complement the activities of the Member States' in, among others, the field of 'equality between men and women with regard to labour market opportunities and treatment at work'.[43] Article 141(3) is about ensuring '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'. Clearly, it will not be possible to base legislation on pay on Article 137, since it is expressly excluded from the scope of application of that provision by its section 6. However, apart from that, it is entirely unclear what would be the correct legal basis for a given issue. It seems possible that a directive will have to be based on more than one article. This is possible where the articles provide for the same procedure.[44] As for issues falling under Article 137(3), it seems quite conceivable that they could also fall within the field of application of Article 141(3) EC. In that case, due to the differences in the procedure, this would mean that a choice would have to be made for one or the other legal basis provision.[45]

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[43] Art. 139 EC itself does not specify a field of application. However, the relevance of the field mentioned in Art. 137 seems to be indicated by the references in Art. 139–137 regarding the voting requirements.

[44] Regarding the problem of more than one legal basis see the *Titanium dioxide* judgment, Case C-300/89 *Commission v. Council* [1991] ECR I–2867.

[45] *See*, again, *Titanium dioxide*, note 44.

(B) INVOLVEMENT OF THE SOCIAL PARTNERS

The role of the social partners in adopting legislation gives rise to questions. As a starting point, it seems that at least in all cases falling within the field of application of Article 137 EC, the Commission will have to consult with the social partners before making a proposal for a new directive. It will have to do this both with regard to the possible general direction of legislative action and, as a second step, with regard to the substance of a planned proposal. This view seems to be confirmed by the recent judgment *UEAPME v. Council*.[46] However, it is unclear (at least to this author) how the duty to consult with the social partners also applies to matters which could fall both under Article 137 and under Article 141(3) EC. Further, the wording of the Article 138(4) EC gives the impression that whenever the social partners wish it, they must be given the possibility to be in dialogue for at least nine months. Contractual relationships resulting from this dialogue will lead to Community implementation only if the matter falls under Article 137 EC and if the social partners request such an action. Possibly this means that the Community can act independently only if the social partners either do not wish to enter into dialogue at all or if they do, but cannot agree on a result within the prescribed time limits. It remains unclear what the situation is if the social partners enter into contractual relationships but do not ask for Community implementation. It is obvious that this whole construction is an expression of the principle of subsidiarity (see Art. 5 EC, formerly Art. 3b, and the new Protocol on Subsidiarity[47]), or even of 'double subsidiarity', as a councellor to the Commission has called it.[48]

A specific problem stems from the fact that the European Parliament enjoys no influence at all on such legislation. In fact, it seems that in the relevant matters the Parliament will have less influence than at present on the Community level (not less, however, than now in the framework of the Social Agreement). This is in sharp contrast to the changes brought about by the ToA in almost all other policy areas. However, in its judgment *UEAPME v. Council*, the Court of First Instance of the EC took the view that the democratic legitimacy of directives adopted in the framework of this specific procedure consist precisely in the participation of the social partners.[49]

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[46] Case T-135/96 *Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council* [1998] ECR 11–2335. This decision refers to the provisions of the Social Agreement. Comparing the procedures under Art. 2(2) and under Art. 4(2) Social Agreement, the Court calls the consulation of the social partners by the Commission according to Art. 3(2) and (3) a 'common initial phase'.

[47] Protocol on the application of the principles of subsidiarity and proportionality. The Protocol can be found in OJ 1997, C 340/105.

[48] The expression was used by Mr Patrick Venturini, Counsellor, DG V, Commission, in the framework of a presentation made at the Fordham Conference on 'The European Union and the United States: Constitutional Systems in Evolution' (26–28 February 1998 in New York).

[49] Para. 89 of the judgment: 'However, the principle of democracy on which the Union is founded requires – in the absence of participation of the European Parliament in the

Finally, the quality of legislation adopted based on an agreement concluded by the social partners (rather than by political institutions) and its binding effect might lead to problems. The latter point is especially due to the fact that the relevant provisions of the Treaty do not specify which social partners must be consulted and then may participate in the social dialogue.[50] Under the old law (Social Agreement), the directive on parental leave can serve as an example for such difficulties. The directive had been adopted by the Council on the basis of Article 4(2) Social Agreement, upon a Commission proposal which was based upon, and included, a framework agreement concluded by three big European social partners. UEAPME, a European union of medium and small enterprises (hencefoth SME) did not agree with the provisions and therefore contested its validity in an action under Article 173 EC.[51] UEAPME complained of the fact that while it had been consulted in the framework of the initial phase of the legislative procedure (Art. 3 Social Agreement), it had not been allowed to participate in the collective bargaining process (Art. 4(1) Social Agreement) which led to the adoption of the directive under Article 4(2) Social Agreement. The Council as the defendent argued that the action was inadmissible due to lack of standing of UEAPME under Article 173(4) EC. Very importantly from a procedural point of view, the Court acknowledged the possibility of standing of social partners in the present context, namely if the relevant social partner's participation in the negotiations would have been necessary in the interest of cumulative representativity of the social partners involved in the negotiations. The Court based its finding on the special nature of the legislative procedure at issue: social partners can be directly and individually concerned by directives adopted in the framework of the Article 4(2) Social Agreement procedure because – as already mentioned – the involvement of the social partners represents the democratic element in this procedure.[52] In the particular case the Court declared the action inadmissible,

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legislative process – that the participation of people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council ... with a legislative foundation at Community level.'

[50] In this context and under the old law (Social Agreement), the Commission has published a communication on the implementation of the Social Protocol in which it sets out criteria for social partners to be seen as relevant in the context of Art. 3 Social Agreement. The communication can be found in COM(93) 600 fin.

[51] 'SMEs and crafts businesses contend that directive on parental leave does not apply in their case', AGENCE EUROPE 1 November 1996, p. 14. For the judgment, *UEAPME v. Council*, *see above*, note 46.

[52] Paras. 83 subs. of the judgment (*see above*, note 46). Before coming to this reasoning, the Court, in line with its principle that substance prevails over form, examined whether the directive on parental leave was in fact a decision addressed to UEAPME (which would have given UEAPME standing immediately). However, it concluded that the directive was indeed a true legislative measure (paras. 63 subs.). In such a case, standing of an individual presupposes that the individual is directly and individually concerned by the measure.

finding that the Commission and the Council had fulfilled their obligation to verify the cumulative representativity of the social partners who had actually participated in the collective bargaining process. Further, the Court found that the interests of SME's had been adequately represented.[53] Therefore, since UEAPME's participation was not necessary in the interest of cumulative representativity, this organization is not directly and individually concerned by the directive and therefore does not have standing under Article 173 (4) EC. It is to be noted that the Court did not accept UEAPME's argument that it had a legal right to participate in the negotiations under the provisions of the Social Agreement. According to the Court, there is no such right for social partners in general since, according to the provisions of the Social Agreement, participation in the negotiation process depends on the social partners' own willingness to engage in them and their own action to that end. There is also no specific right of participation of a social partner which acts in the interest of SME's based on Article 2(2) Social Agreement.[54] Cases of that type are also quite likely to come up under the new Amsterdam law.

(C) GENERAL CONSEQUENCES FLOWING FROM THE NEW PROVISIONS

There are at least two important consequences flowing from the above mentioned changes in the legal basis provisions. To begin with, the new Treaty provides for the possibility of Community legislation in more areas. Further, the adoption of such legislation will be easier thanks to the new rules on voting (qualified majority in more cases). However, it remains unclear how the Community's legislative possibilities will be limited by the social partners' rights to dialogue. Further, the changes also affect existing or proposed legislation on the basis of the Social Agreement. Directives already adopted on the basis of the Social Agreement and those which may be adopted before the entry into force of the Amsterdam Treaty have been made binding upon the UK by means of special directives.[55]

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[53] Paras. 91 subs. of the judgment (*see above*, note 46). UEAMPE lodged an appeal for annulment of the judgment (*see* AGENCE EUROPE 9 October 1998, p. 11) which it later withdrew.

[54] This provision provides that directives adopted by the Council under the procedure prescribed in that provision '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 Court states that this provision 'lays down a substantive obligation, compliance with which is subject to review by the Community judicative as the instance of any interested party which brings the appropriate action, and not exclusively on application for annulment of a measure pursuant to Art. 173, fourth paragraph, of the Treaty. Accordingly, no cross-industry organization representinng the SMUs, whatever its purported level of representativity, can infer from Art. 2(2), first subparagraph, of the Agreement a right to participate in such negotiations'. See paragraphs 68 subs. of the judgment (above, note 46), and specifically para. 80. In the same context, the Court also rejected UEAPME's argument that the effectiveness of certain substantive provisions requires certain procedural consequences; *see* para. 81 of the judgment.

[55] *See* Frija ten Velde/Alieke Koopman, 'Gelijke kansen van mannen en vrouwen tijdens het

E. Final remarks

Instead of legal equality of the sexes in the traditional sense, feminist writers sometimes advocate social citizenship. They plead for a radical widening of the concept of Union citizenship (Arts. 8 subs. EC, after the renumbering Arts. 17 subs.) and, specifically, for a 'transformation from State citizenship to social citizenship'.[56] The idea is to integrate a gender perspective into the law by the use of such a concept. Its implementation would have far reaching consequences indeed, among them a new definition of the term 'work', taking into account the differences between the sexes, quota regulations and other affirmative action measures in favour of women, redistribution of unpaid work and measures in favour of the combination of care work and paid work. It is well known that so far the Court of Justice has refused to take the latter two points into account, taking the view that such issues are outside the scope of application of EC law.[57] Clearly, the Amsterdam Treaty is not based on a proper gender approach as described above any more than the Maastricht Treaty. Nevertheless, the new provisions give the institutions the task to do more than ever before. For instance, the much needed concrete measures in the context of redistribution of unpaid work and the combination of care work and paid work (such as the creation of sufficient, good quality child care facilities, better regulation of working time and greater flexibility regarding physical presence of a worker at his or her workplace) can be adopted on the basis of the new provisions. It is to be hoped that the institutions and the Member States – and ultimately the courts – will make good use of the new possibilities. In this context, a statement made by Commission President Santer on the occasion of a Conference held in Brussels on 21 September 1998 is a hopeful signal:

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Nederlands voorzitterschap' in (1997) *Nemesis* 13 actualiteitenkatern, pp. 28–30, especially p. 28. There are now directives extending these directives to the UK. *See* Directive 97/75/EC, OJ 1998 L 10/24 (parental leave), Directive 98/23/EC OJ 1998 L 131/10 (part-time work) and Directive 98/52/EC, OJ 1998 L 205/66 (burden of proof).

[56] *See*, for instance, Brian Bercusson, Simon Deakin, Pertti Koistinen, Yota Kravaritou, Ulrich Mückenberger, Alain Supiot, Bruno Veneziani, *A Manifesto for Social Europe*, p. 95 and 105 subs.

[57] *See* the decisions *Bilka* (Case 170/84 *Bilka v. Weber von Hartz* [1986] ECR 1607) and *Hofmann* (Case 184/83, *Hofmann v. Barmer Ersatzkasse* [1984] ECR 3047). *See* for instance the discussion in the framework of the European Forum 1994/1995 on 'Gender and the Use of Time' at the European University Institute in Florence, Italy whose results have been published in a yearbook, and therein especially Annie Junter-Loiseau and Christa Tobler, 'Reconciliation of Domestic and Care Work with Paid Work. Approaches in International Legislation and Policy Instruments and in the Scientific Discourse', in Olwen Hufton and Yota Kravariton (eds) *Gender and the Use of Time. Gender et Emploi du Temps* (Kluwer Law International 1999) at pp. 341–369. *See also* the report on the Forum conference entitled 'The Regulation of Working Time in the European Union – Gender Approach' (held in Florence on 27–29 April 1995 – this publication is still awaited).

Equality is the future. It is not only a necessity and an obligation that is imposed upon us. It is also a fundamental ambition to which the Commission gives its full support and which it hopes to pursue without respite.[58]

[58] Agence Europe 24 September 1998, pp. 13 and 14.