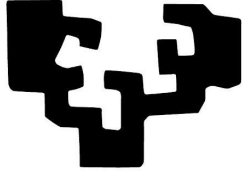


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**EUROPEAN PILLAR OF SOCIAL RIGHTS:  
AN ANALYSIS FROM A CONSTITUTIONAL  
GENDER PERSPECTIVE**

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**End of Degree Project in Law**

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## **ABBREVIATIONS**

**CFREU:** Charter of Fundamental Rights of the European Union

**CJEU:** Court of Justice of the European Union

**EEC:** European Economic Community

**EIGE:** European Institute for Gender Equality

**EMPL:** Committee on Employment and Social Affairs

**EMU:** Economic and Monetary Union

**ERA:** European Research Area

**EP:** European Parliament

**EPSR:** European Pillar of Social Rights

**EU:** European Union

**FEMM:** Committee on Women's Rights and Gender Equality

**GAP:** Gender Action Plan

**GEI:** Gender Equality Index

**MFF:** Multiannual Financial Framework

**MMSS:** Member States

**R&I:** Research and Innovation

**TEC:** Treaty establishing the European Community

**TEU:** Treaty on European Union

**TFEU:** Treaty on the Functioning of the European Union

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## **I. Introduction**

The objective of this work is to analyse the European Pillar of Social Rights (EPSR), jointly proclaimed by the Council of the European Union, the European Commission and the European Parliament (EP) on 17 November 2017 at the Gothenburg Social Summit for Fair Jobs and Growth and, in particular, its contribution to the fight for gender equality.

On this basis, the different sections that make up this research will, in the first place, briefly outline the current state of the gender issue within the European Union (EU), by means of the 2021 Gender Equality Index (GEI) edition. In particular, the purpose of this section is to give an insight into the reality of the many inequalities that women face in the areas of work, money, knowledge, time, power and health solely because of their gender. This will help us understand why there is a need not only for EU gender equality policies, but also for including a gender perspective in all EU policies, in order to achieve the much desired and necessary goal of a EU in which there is no place for gender inequalities, in any form.

Secondly, it will consider the connection between the EPSR and the gender dimension in the European legal order. To this end, in this section it will trace the history of EU gender equality policies, from the Constitutive treaties to the Treaty of Lisbon, which will allow us to understand the EU's approach to the gender issue throughout the years. In the following, it will make a compilation of the most relevant current regulation on gender equality at European level, dividing the social *acquis* into three groups: secondary law, non-legislative acts and financial framework. And to conclude this section, it will also analyse the activism of the European judge in guaranteeing the principle of gender equality throughout its history, for which it will compile the most relevant judgements in this regard and explain how each and every one of them has contributed to the case law in this area.

Thirdly, it will reflect the validity of the EPSR as a supranational policy response to the devastating effect of the financial crisis on the European social dimension, and in particular, on gender equality. As to do so, it will first explain the origins of the Pillar, referring to the rationale for its genesis and the process of its creation, and introducing some brief notes on its structure and content, as well as a quick mention of the recently adopted EPSR Action Plan. Next, it will make a compilation of both the current actions taken to implement the EPSR in relation to gender equality and the actions proposed by the Action Plan to further implement the principle. Then, it will assess the Pillar's approach to gender equality, arguing that the EPSR simply reaffirms rights already present in the EU social *acquis*, also with regard to equality between women and men, without bringing any substantial novelty, with the main aim of overcoming the effects of the financial crisis on the Economic and Monetary Union (EMU). Furthermore, as one of the first deliverables on the Pillar, it will also review the new Work-Life Balance Directive, pointing out all of its weaknesses.

Lastly, in the conclusions section, it has drawn up a brief summary of the most important parts of the work, especially regarding the weaknesses of the main EU policies' gender approaches. All of this will help to illustrate the thesis defended throughout this paper: the Pillar cannot be considered as a response that contributes to the achievement of gender equality, as it does not provide any substantial novelty in terms of social rights, and therefore neither in terms of gender equality, thus contributing to perpetuate the functional relationship between the economic and social spheres, and the situation of inequality between women and men.

## II. Current state of the gender issue

Gender equality is a fundamental value and one of the principles of the EU, enshrined in the Treaties. In this regard, the European Institute for Gender Equality (EIGE) monitors progress towards gender equality in the EU through its GEI. The latest results show that measures taken at EU and national level have led to advances, as the overall score for the EU-27 in 2021 is 68.0 points out of 100<sup>1</sup>.

Nonetheless, despite EU commitments to strengthen gender equality, progress has been slow, as the 2021 score is only 0.6 points higher than in 2020, and 4.9 points higher than in 2010<sup>2</sup>. At this rate, with gender equality inching forward by only 1 point every 2 years, it will take almost three generations to achieve gender parity, and even that projection is threatened by COVID-19, not only slowing the progress, but also rolling back gains since 2010<sup>3</sup>. Therefore, gender gaps can still be found in all EU Member States (MMSS) across the six core areas of the GEI: work, money, knowledge, time, power and health<sup>4</sup>. The one with the greatest gender inequalities is the domain of power, with a score of 55.0 points, even though this domain is advancing faster than others, as its score has risen by 1.9 points in 1 year and by 13.1 points since 2010.

The second lowest score goes to the domain of knowledge, with 62.7 points and a 0.1-point decrease since 2020. Its score has improved by only 2.9 points since 2010, reflecting the fact that gender segregation in some fields of education is entrenched. The domain of time, with 65.7 points, holds the third lowest score, and becomes the only domain regressing to below 2010 levels by dropping by 0.3 points since 2010. This reveals persistent and growing gender inequalities in time spent in caring. Despite having the third highest score, 71.6 points, the domain of work continues to show gender inequalities in employment, along with deep gender divides in some economic sectors and occupations, with its score increasing by 0.2 points in 1 year and by only 1.9 points since 2010.

With the second highest score, 82.4 points, the domain of money has seen an improvement of 0.9 points since 2020 and of 3.3 points since 2010. However, in some areas, such as reducing the risk of poverty and equalising income distribution among women and men, progress has been negative since 2010. The highest score of all six domains goes to the domain of health, with 87.8 points. Nevertheless, progress has been very slow since 2010, with an increase of just 1.1 points and similarly marginal improvements for the subdomains of access to health services (increase of 2 points) and health status (increase of 1.7 points).

Taking all this into account, women remain under-represented in several sectors, specially in decision-making positions, and continue to do a disproportionate share of unpaid care and domestic work, which contributes to their lower labour market participation and to the persistent gender pay gap, which, in turn, have negative impacts

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<sup>1</sup> European Institute for Gender Equality (2021). Gender Equality Index 2021, p. 23. Available at: <https://eige.europa.eu/publications/gender-equality-index-2021-health>.

<sup>2</sup> Ibidem, p. 13.

<sup>3</sup> Ibidem, p. 23.

<sup>4</sup> Ibidem, p. 13-16.

on women's financial situation, including a higher risk of poverty, as well as being associated with inequalities in health<sup>5</sup>.

Moreover, both EIGE and Eurofound<sup>6</sup> have pointed out that the ongoing health, social and economic crisis is having different impacts on women and men, and that it is necessary and urgent to implement policies that, with a gender-sensitive approach, respond to this inequality between women and men<sup>7</sup>. As a matter of fact, during the pandemic, women have been more likely to suffer cuts in working hours, lose their jobs or drop out of the labour market, mainly because they remain over-represented in badly hit sectors, have fewer employment-related entitlements and are experiencing more work-life conflict during lockdowns<sup>8</sup>. The pandemic has also revealed the inadequacy of support systems for victims of gender-based violence, as well as the under-valuing of care work and under-investment in care infrastructure<sup>9</sup>.

These are all areas where targeted policy responses could make a significant difference and where the EU and the MMSS could further develop actions<sup>10</sup>. It is in this context where it will be analysed if the EPSR can be an opportunity for the EU to implement gender-specific policies that can facilitate closing gender gaps and therefore achieving a fairer society.

### **III. The connection between the Pillar and the gender dimension in the European legal order**

#### *1. Gender and the European project: from the Constitutive Treaties to the Treaty of Lisbon*

The EU is considered to be one of the most advanced political systems regarding the promotion of gender equality<sup>11</sup>. Indeed, equal treatment of women and men is a fundamental principle of the EU that has been present in European social policy since the Treaty establishing the European Economic Community<sup>12</sup> (better known as the Treaty of Rome) was signed in March 1957 during the establishment of the European Economic Community and the European Atomic Energy Community between the states

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<sup>5</sup> Shreeves, R. (2021). Achieving gender equality in the face of the pandemic and existing challenges. European Parliamentary Research Service, p. 1. Available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_ATA\(2021\)659440](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2021)659440).

<sup>6</sup> The tripartite EU agency providing knowledge to assist in the development of better social, employment and work-related policies: <https://www.eurofound.europa.eu/>.

<sup>7</sup> Shreeves, R. (2021). Achieving gender equality..., op. cit., p. 2.

<sup>8</sup> European Parliament (2020). Recent trends in female employment, p. 3. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659307/EPRS\\_BRI\(2020\)659307\\_EN.pdf#page=3](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659307/EPRS_BRI(2020)659307_EN.pdf#page=3).

<sup>9</sup> Shreeves, R. (2021). Achieving gender equality..., op. cit., p. 2.

<sup>10</sup> Ibidem, p. 2.

<sup>11</sup> Jacquot, S. (2020). European Union Gender Equality Policies Since 1957. Encyclopédie d'histoire numérique de l'Europe [online], p. 1. Available at: <https://ehne.fr/en/node/12435>.

<sup>12</sup> Treaty establishing the European Economic Community (1957). 349p. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11957E%2FTXT>. Last access: 1 March 2022.

that had previously signed the Treaty of Paris establishing the European Coal and Steel Community<sup>13</sup>.

Thus, the first reference to gender equality can be found in Article 119 of the Treaty of Rome<sup>14</sup>, now Article 157<sup>15</sup> of the Treaty on the Functioning of the European Union (TFEU)<sup>16</sup>, that refers to equal pay for equal work between men and women. However, the history of the EU's equality policies can be divided into three periods<sup>17</sup>:

During the first phase of EU gender equality politics the purpose was to achieve “equality between sexes” in employment, as Article 119 of the Treaty of Rome stipulated equal pay for equal work regardless of sex. In fact, in 1957, the development of an European initiative to achieve gender equality was not an aim within an Economic Community founded on the implementation of a single market<sup>18</sup>. The negotiators of the Treaty of Rome believed that European construction would imply economic progress, which would naturally bring social progress. Therefore, the interventions of the European Economic Community (EEC) in the social domain needed to be justified by economic reasons. In particular, at the time of the drafting of the Treaty, France had just introduced equal pay legislation at national level, and was fearful that the absence of such legislation in other MMSS would put the French market at a competitive disadvantage<sup>19</sup>. This also shows that equality of sexes was then defined in an employment context, which pre-determined the site and the means through which gender equality could be achieved<sup>20</sup>.

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<sup>13</sup> Treaty establishing the European Coal and Steel Community (1951). 193p. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11951K%2FTXT>. Last access: 1 March 2022.

<sup>14</sup> «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».

<sup>15</sup> «1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers».

<sup>16</sup> Treaty on the functioning of the European Union (2012). OJ C 326, 26.10.2012, p. 47–390.

<sup>17</sup> Petö, A., Manners, I. (2006). The European Union and the value of gender equality. In: Manners, I., Lucarelli, S. Values and Principles in European Union Foreign Policy, p. 164-170. Routledge: London & New York.

<sup>18</sup> Jacquot, S. (2020). European Union Gender..., op. cit., p. 1.

<sup>19</sup> Guerrina, R. (2003). Gender, Mainstreaming and the EU Charter of Fundamental Rights. Policy and Society, Volume 22, Issue 1, p. 99. Available at: [https://doi.org/10.1016/S1449-4035\(03\)70015-0](https://doi.org/10.1016/S1449-4035(03)70015-0).

<sup>20</sup> Petö, A., Manners, I. (2006). The European Union..., op. cit., p. 165-166.

In addition, during this time, statist feminism in Eastern Europe developed an equality policy based on “*de jure*” equality of sexes, which led to the achievement of equal opportunities in the labour market and in education, extensive and accessible family- and child-care institutions, encouragement and active participation in the political and public spheres. As a consequence, statist feminism rejected the concept of positive discrimination, and this influenced the first phase of EU gender equality policies, as the rejection involved defining women as mothers through biological difference which implied a challenge to the concept of gender equality since it essentialised gender differences.

The second phase of EU gender equality politics brought broad policy change as, by the 1980s, it became clear that women’s equality based on a policy of individual rights for equal treatment was difficult to achieve, since gender equality as equality of opportunity did not bring “real equality”<sup>21</sup>. Therefore, a new policy frame was born in the shape of the protection of women’s rights as a group, demanding positive action for women and using positive discrimination to implement change in systems of gender inequality. This led to the endorsement of a series of directives on equal pay and equal treatment in order to expand the principle of equality<sup>22</sup>.

Nevertheless, the concept of “equality” in this context still harboured connotations of “difference based on biological difference”, just as in the previous phase, and the definition of equal opportunity as equal treatment meant that public policy was gender neutral. Furthermore, the apparent difference between “*de facto*” and “*de jure*” equality of women during the 1980s, along with the difficulty to differentiate between discrimination and personal life style choices, and in particular the many interpretations of the term “equality” (justice, fairness, autonomy, etc.), led to the third phase of EU gender equality policy: the birth of “gender mainstreaming”, a policy focused on transforming the systems and structures of discrimination taking gender into account in all European policies, instead of promoting individual or group rights, and therefore challenging gender neutrality.

On the other hand, the main basis for European activity in gender equality for all of those years was Article 119 of the Treaty of Rome. In particular, the policy for combating inequality and promoting gender equality consisted of a series of different instruments<sup>23</sup>:

Firstly, a series of financial mechanisms made it possible to extend the field of action for gender equality beyond the labour market, as well as financing various programs (e.g., DAPHNE program<sup>24</sup>).

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<sup>21</sup> Ibidem, p. 167.

<sup>22</sup> Guerrina, R. (2003). Gender, Mainstreaming..., op. cit., p. 99.

<sup>23</sup> Jacquot, S. (2020). European Union Gender..., op. cit., p. 2.

<sup>24</sup> On 24 January 2000, the European Parliament and the EU Council adopted the first Daphne programme (2000-2003), based on the Daphne initiative, to prevent and combat violence against children, young people and women. Decision n° 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women. OJ L 34, 9.2.2000, p. 1-5.



Secondly, a series of “soft law” instruments, that is, non-binding law, along with the Women’s Charter<sup>25</sup>, the European Pact for Gender Equality<sup>26</sup>, and the different Gender Action Plans (the current being the Action Plan on Gender Equality and Women’s Empowerment in External Action<sup>27</sup>), among others. Moreover, the EIGE<sup>28</sup>, based in Vilnius, was created in 2007.

Thirdly and most importantly, a series of both legislative acts (treaties and directives) and jurisprudence guaranteed both equal pay and equal treatment in the workplace and in the labour market. They also guaranteed the elimination of any type of discrimination in social security systems, minimum requirements for parental and maternity leave and protection of pregnant workers and young mothers, among others. Relating to discrimination, both direct or indirect discrimination were equally prohibited, harassment became a form of discrimination, an inversion of the burden of proof took place, the possibility of affirmative action “for the underrepresented sex” was recognised, and equal treatment for women and men in the access to and supply of goods and services was guaranteed. Hence, from a legal perspective, advancing in gender equality became one of the main targets within Social Europe.

In particular, from the mid-1970s, the gender dimension of social policy was dealt with by directives, that is, secondary law became the weapon to strengthen the social domain. Legislative acts include Directive 75/117/EEC<sup>29</sup>, which developed the concept of equal pay for men and women (it extends the concept of “equal work” to “work of equal value”, including all approvable work, while also establishing that job classification systems must be based on criteria common to both sexes, in order to avoid discrimination) and Directive 76/207/EEC<sup>30</sup> 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. The purpose of these directives was to expand the scope of equality provisions at the European level, and to bring back on the agenda the issue of equality between women and men, prompting further developments in the field<sup>31</sup>.

The 1990s marked an important shift in this area, as the majority of directives endorsed during this decade introduced a new concept that broadened the principle of

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<sup>25</sup> European Commission. (2010). Communication from the Commission. A Strengthened Commitment to Equality between Women and Men. A Women’s Charter Declaration by the European Commission on the occasion of the 2010 International Women’s Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women. COM(2010)78 final, 5p.

<sup>26</sup> Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020). OJ C 155, 25.5.2011, p. 10–13.

<sup>27</sup> European Commission. (2020). Joint communication to the European Parliament and the Council. EU Gender Action Plan (GAP) III - An ambitious agenda for gender equality and women’s empowerment in EU external action. JOIN(2020) 17 final, 28 p.

<sup>28</sup> Regulation (EC) N° 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality. OJ L 403, 30.12.2006, p. 9–17.

<sup>29</sup> Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. OJ L 45, 19.2.1975, p. 19–20.

<sup>30</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. OJ L 39, 14.2.1976, p. 40–42.

<sup>31</sup> Guerrina, R. (2003). Gender, Mainstreaming..., op. cit., p. 100.

equality: reconciliation between work and family life<sup>32</sup>. These directives include, among others, the Pregnant Workers Directive<sup>33</sup>, the Working Time Directive<sup>34</sup> and the Parental Leave Directive<sup>35</sup>.

Meanwhile, during the mid-1990s, international gender policies started introducing the mainstreaming principle, which led to the European Commission's Communication on Incorporating Equal Opportunities for Men and Women into all Community Policies and Activities<sup>36</sup>. As will be explained below, within the EU, the principle of gender mainstreaming was officially introduced via the Treaty of Amsterdam.

Returning to original Law, on 7 February 1992, the Treaty on European Union (TEU)<sup>37</sup> was signed, better known as the Treaty of Maastricht, which amended all of the treaties that had established the European Communities in the 1950s and created the EU. The EU was specifically given certain powers, for which realisation MMS transferred sovereignty in areas governed by the Treaty to be exercised by the Community institutions<sup>38</sup>.

Furthermore, Article 2(1) of its Protocol on social policy<sup>39</sup>, in relation with Article 1, promoted equality between men and women regarding labour market opportunities and treatment at work.

Five years later, in 1997, the signing of the Treaty of Amsterdam<sup>40</sup> took place, amending the TEU, the Treaties establishing the European Communities and certain related acts. This new framework allowed to implement strategies, measures and actions for the elimination of gender inequalities in a more systematic and long-term manner

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<sup>32</sup> Ibidem, p. 100.

<sup>33</sup> Council of the Council European Communities. (1992). Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 348, 28.11.1992, p. 0001 - 0008.

<sup>34</sup> European Parliament and Council of the European Union. (2003). Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. OJ L 299, 18.11.2003, p. 9–19.

<sup>35</sup> Council of the European Union. (2010). Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance). OJ L 68, 18.3.2010, p. 13–20.

<sup>36</sup> Commission of the European Communities. (1996). Communication from the Commission "Incorporating equal opportunities for women and men into all Community policies and activities". COM(96) 67 final, 24p.

<sup>37</sup> Treaty on European Union (1992). OJ C 191, 29.7.1992, p. 1–112.

<sup>38</sup> European Parliament (2021). Fact Sheets on the European Union. The Maastricht and Amsterdam Treaties. p.1. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/3/the-maastricht-and-amsterdam-treaties>.

<sup>39</sup> «1. With a view to achieving the objectives of Article 1, the Community shall support and complement the activities of the Member States in the following fields: (...) equality between men and women with regard to labour market opportunities and treatment at work (...).

<sup>40</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997). OJ C 340, 10.11.1997, p. 1–144.

under the principle of gender mainstreaming<sup>41</sup>. Therefore, Articles 2<sup>42</sup> and 3<sup>43</sup> of the Treaty of Rome, which officially changed its name from the Treaty establishing the European Economic Community to the Treaty establishing the European Community (TEC), were amended to include equality between men and women as one of the objectives of European integration, and Article 119 was amended by Article 141<sup>44</sup>, as well as including paragraphs 3 and 4 that develop gender equality more broadly.

The importance of the Treaty of Amsterdam compared to Article 119 of the Treaty of Rome lies in the extension of what was only a recognition of equal pay to real equality in all areas of gender relations, including in this concept of equality the possibility for MMSS to freely adopt positive action measures<sup>45</sup>. Thus, the Treaty of Amsterdam marked a turning point in European gender equality policy, as it expressly acknowledged gender mainstreaming, making that, no longer as a recommendation, but as a principle, gender mainstreaming was integrated in all the European Commission's policy developments<sup>46</sup>. As a consequence of this new regulation, Directive 76/207/EEC was modified by Directive 2002/73/EC<sup>47</sup> (later modified by Directive 2006/54/EC<sup>48</sup>), which implements the provisions of Article 141(3) of the Treaty.

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<sup>41</sup> Arroyo, A., Correa, E. (2009). Políticas de equidad de género: Unión Europea. In: Girón, A. (2009). Género y globalización, p. 274. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales - CLACSO.

<sup>42</sup> «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 3a, 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».

<sup>43</sup> «(...)2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women».

<sup>44</sup> «1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job. 3. The Council, acting in accordance with the procedure referred to in Article 189b, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers».

<sup>45</sup> Balaguer Callejón, M.L. (2005). La Constitución Europea y la igualdad de género. *Revista de Derecho Constitucional Europeo*, nº 3, p. 279.

<sup>46</sup> Petö, A., Manners, I. (2006). *The European Union...*, op. cit., p. 168.

<sup>47</sup> European Parliament and Council of the European Union. (2002). 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. OJ L 269, 5.10.2002, p. 15–20.

<sup>48</sup> European Parliament and Council of the European Union. (2006). Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ L 204, 26.7.2006, p. 23–36.

The next step in the development of gender equality came in 2001 with the signing of the Treaty of Nice<sup>49</sup> amending both the TEU and the TEC, alongside which the non-binding Charter of Fundamental Rights of the European Union (CFREU)<sup>50</sup> was proclaimed. Article 21 of the Charter<sup>51</sup> prohibits discrimination on any ground, including sex; Article 23<sup>52</sup> includes equality between men and women and recognizes the right to gender equality in all areas and the necessity of positive action for its promotion; and Article 33<sup>53</sup> proclaims rights related to family protection and gender equality.

Finally, the Treaty of Lisbon<sup>54</sup> was signed in 2007, amending both the TEU as well as the TEC, known in updated form as the TFEU. It also amends the attached treaty protocols as well as the Treaty establishing the European Atomic Energy Community. This treaty does not directly incorporate the CFREU<sup>55</sup>, but it acquires a legally binding character through Article 6(1)<sup>56</sup>, which gives the Charter the same legal value as the Treaties.

This Treaty emphasises the commitment on gender equality incorporated in the Treaty of Amsterdam, as Article 8<sup>57</sup> gives the EU the task of eliminating inequalities and promoting equality between men and women in all of its activities (that is, gender mainstreaming), and Article 19<sup>58</sup> provides for the adoption of legislation to combat all

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<sup>49</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. (2001). OJ C 80, 10.3.2001, p. 1–87.

<sup>50</sup> Charter of Fundamental Rights of the European Union. (2007). OJ C 326, 26.10.2012, p. 391–407.

<sup>51</sup> «1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited».

<sup>52</sup> «Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex».

<sup>53</sup> «1. The family shall enjoy legal, economic and social protection. 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child».

<sup>54</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. (2007). OJ C 306, 17.12.2007, p. 1–271.

<sup>55</sup> Charter of Fundamental Rights of the European Union (2000). OJ C 326, 26.10.2012, p. 391–407.

<sup>56</sup> «1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions».

<sup>57</sup> «In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women».

<sup>58</sup> «1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1».

forms of discrimination, including on the basis of sex. In addition, Article 153<sup>59</sup> allows the EU to act in the wider area of equal opportunities and equal treatment in employment matters, and within this framework, Article 157, apart from ensuring equal pay for equal work between men and women, authorises positive action to empower women. Furthermore, both Articles 79<sup>60</sup> and 83<sup>61</sup> have allowed the adoption of legislation against trafficking in human beings, in particular women and children. In this regard, a wide variety of measures contributing to the eradication of violence against women, such as the former Rights, Equality and Citizenship programme<sup>62</sup> (repealed by the Citizens, Equality, Rights and Values Programme<sup>63</sup>), have been adopted on the basis of Article 168<sup>64</sup>. Additionally, in December 2021, the European Commission put forward a proposal<sup>65</sup> to include hate speech and hate crime, including the one based on sex and sexual orientation, within Article 83(1) of the TFEU.

## *2. Current regulation on gender equality at European level*

In this section, I will try to set out, firstly, the modifications that the secondary law in the area of gender equality has undergone, pointing out the directives currently in force in each area; secondly, the non-legislative texts, that is, the texts lacking legal force (i.e. soft law) relating to gender equality; and thirdly, the financial instruments that the EU has used and still uses to promote equality between women and men. Nevertheless, in none of the three sub-sections will I proceed to analyse each of the

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<sup>59</sup> «1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (...) (i) equality between men and women with regard to labour market opportunities and treatment at work (...)».

<sup>60</sup> «1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (...) (d) combating trafficking in persons, in particular women and children».

<sup>61</sup> «1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime (...)».

<sup>62</sup> Regulation (EU) N° 1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020. OJ L 354, 28.12.2013, p. 62–72.

<sup>63</sup> Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) N° 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) N° 390/2014. OJ L 156, 5.5.2021, p. 1–20.

<sup>64</sup> «1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health (...)».

<sup>65</sup> European Commission. (2021). Communication from the Commission to the European Parliament and the Council. A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime. COM(2021) 777 final, 20 p.

referenced documents one by one, as they all fall within the same context already examined in the previous section (the Treaties).

## 2.1. Secondary law

Regarding the principle of equal pay for equal work, Council Directive 76/207/EEC of 9 February 1976 was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, which, at the same time, was modified by the currently in force Directive 2006/54/EC. In this respect, it can also be mentioned Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security<sup>66</sup>.

With regard to the burden of the proof in cases of discrimination, it has already been stated that it used to be applicable the Council Directive 97/80/EC of 15 December 1997, which was repealed by Directive 2006/54/EC, even though its Article 19 mostly replicates the contents of Article 4 of Directive 97/80/EC.

The EU has also developed extensive gender equality legislation on other areas, such as Directive 2010/41/EU<sup>67</sup> on self-employment (repealing Council Directive 86/613/EEC<sup>68</sup>); Directive 2000/78/EC<sup>69</sup> on equal treatment in employment and occupation; and Directives 92/85/EEC<sup>70</sup> and 2010/18/EU<sup>71</sup> (which repealed Directive 96/34/EC<sup>72</sup>), guaranteeing rights to maternity and parental leave.

Putting aside the field of employment, Directive 2004/113/EC on equal access to goods and services and Directives 2011/36/EU<sup>73</sup> and 2012/29/EU<sup>74</sup> regarding protection for victims of trafficking and crime must be mentioned.

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<sup>66</sup> Council of the European Communities. (1979). Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. OJ L 6, 10.1.1979, p. 24–25.

<sup>67</sup> European Parliament and Council of the European Union. (2010). Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. OJ L 180, 15.7.2010, p. 1–6.

<sup>68</sup> Council of the European Communities. (1986). Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood. OJ L 359, 19.12.1986, p. 56–58.

<sup>69</sup> Council of the European Union. (2000). Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, p. 16–22.

<sup>70</sup> Council of the European Communities. (1992). Council Directive 92/85/EEC..., op. cit.

<sup>71</sup> Council of the European Union. (2010). Council Directive 2010/18/EU..., op. cit.

<sup>72</sup> Council of the European Union. (1996). Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. OJ L 145, 19.6.1996, p. 4–9.

<sup>73</sup> European Parliament and of the Council of the European Union. (2011). Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. OJ L 101, 15.4.2011, p. 1–11.

<sup>74</sup> European Parliament and of the Council of the European Union. (2012). Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. OJ L 315, 14.11.2012, p. 57–73.

Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers<sup>75</sup> was also adopted by the EP and the Council in June 2019, repealing Council Directive 2010/18/EU.

In addition, among the currently proposed directives we can find the Equal Treatment Directive<sup>76</sup>, which proposal was presented by the Commission in 2008, and still remains blocked since unanimity has not yet been reached in the Council of the EU. This Directive will implement the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, aiming to extend the protection against discrimination through a horizontal approach<sup>77</sup>. The Gender Balance on Boards Directive<sup>78</sup> must also be mentioned, proposed by the European Commission in 2012 but still in discussions within the Council<sup>79</sup>. It addresses the considerable imbalance between women and men in economic decision-making at the highest level<sup>80</sup>.

Moreover, in October 2020, the European Commission submitted a proposal<sup>81</sup> for a Directive to ensure that the workers in the EU are protected by adequate minimum wages, since adequate minimum wages can also help reduce the gender pay gap due to the fact that the ones earning the minimum wage are mostly women<sup>82</sup>.

Relating to pay transparency, the European Commission presented on 4th March 2021 a Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms<sup>83</sup>, although it is still being discussed within the Women's Rights and Gender Equality (FEMM) and the Employment and Social Affairs (EMPL) Committees. The proposal is based on Article 157(3) of the TFEU, which enables the EU to adopt measures to ensure the application of the principle of

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<sup>75</sup> European Parliament and Council of the European Union. (2019). Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. OJ L 188, 12.7.2019, p. 79–93.

<sup>76</sup> Commission of the European Communities. (2008). Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. COM(2008) 426 final, 24p.

<sup>77</sup> Shreeves, R., Jurviste, Ü. (2022). Anti-Discrimination Directive. European Parliament, Legislative train, 7 Area of Justice and Fundamental Rights / Up to €7BN, p. 1. Available at: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive>.

<sup>78</sup> European Commission. (2012). Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. COM(2012) 614 final, 28p.

<sup>79</sup> Council of the European Union. (2022). Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges, and related measures - General approach. ST 6468 2022 INIT, 40p.

<sup>80</sup> Shreeves, R., Jurviste, Ü. (2022). Gender Balance on Boards. European Parliament, Legislative train, 7 Area of Justice and Fundamental Rights / Up to €7BN, p. 1. Available at: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards#:~:text=The%20proposal%20set%20the%20aim,established%2C%20clear%20and%20neutral%20criteria>.

<sup>81</sup> European Commission. (2020). Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union. COM(2020) 682 final, 29p.

<sup>82</sup> Ibidem, p.10.

<sup>83</sup> European Commission. (2021). Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. COM(2021) 93 final, 45p.

“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”.

Finally, the European Commission is currently working on a legislative proposal to prevent and combat specific forms of gender-based violence<sup>84</sup>. The directive will set standards for prevention, protection and access to justice for victims, and criminalisation of specific forms of violence against women, to the extent of EU competence<sup>85</sup>. It will take a victim-centred and intersectional approach and go beyond the Istanbul Convention by addressing both online and offline forms of violence<sup>86</sup>.

## 2.2. Non-legislative acts

Apart from legislation, a range of non-legislative measures for achieving equality between women and men have been set out in comprehensive multi-annual policy programmes. Thus, in the history of the EU, there have been a total of three Gender Action Plans:

The first ever Gender Action Plan<sup>87</sup> (GAP I), in the 2010-2015 period, was designed to translate the commitment to gender equality into practice, setting out clear plans for implementation. However, despite its innovative nature, its success was limited<sup>88</sup>.

The second Gender Action Plan<sup>89</sup> (GAP II), in the 2015-2020 period, extended its reach to all areas of external action, rather than just development cooperation. As it was adopted in 2015, a year in which the Paris Agreement on Climate Change<sup>90</sup> and the 2030 Agenda<sup>91</sup> (along with its Sustainable Development Goals) were concluded, both texts greatly influence the way in which efforts to promote gender equality are framed.

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<sup>84</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2021: A Union of vitality in a world of fragility. COM(2020) 690 final. p.7.

<sup>85</sup> Shreeves, R., Jurviste, Ü. (2022). Legislative proposal to prevent and combat certain forms of gender based violence. European Parliament, Legislative train, 6 A new push for European democracy, p. 1. Available at: <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-legislative-proposal-on-gender-based-violence>.

<sup>86</sup> Ibidem, p. 2.

<sup>87</sup> European Commission. (2010). Commission staff working document. EU Plan of Action on Gender Equality and Women’s Empowerment in Development 2010-2015. SEC(2010) 265 final.

<sup>88</sup> Ioannides, I. (2018). EU Gender Action Plan 2016-2020 at year one: European implementation assessment. European Parliament, Directorate-General for Parliamentary Research Services. p. 24-26. Available at: <https://data.europa.eu/doi/10.2861/75103>.

<sup>89</sup> European Commission. (2015). Joint staff working document. Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020. SWD(2015) 182 final.

<sup>90</sup> United Nations. (2015). Paris Agreement. 27p. Available at: [http://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf).

<sup>91</sup> United Nations. (2015). The 2020 Agenda for Sustainable Development. A/RES/70/1. 41p. Available at: <https://sdgs.un.org/sites/default/files/publications/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>.



The current Gender Action Plan (GAP III), also known as the Action Plan on Gender Equality and Women's Empowerment in External Action<sup>92</sup>, in the 2021-2025 period, aims to accelerate progress on empowering women and girls, as well as safeguarding gains made on gender equality during the 25 years since the adoption of the Beijing Declaration and its Platform for Action<sup>93</sup>. The new GAP III provides the EU with a policy framework with five pillars of action<sup>94</sup>: it makes the promotion of gender equality a priority of all external policies and actions; offers a roadmap for working together with stakeholders at national, regional and multilateral levels; steps up action in strategic thematic areas; calls for the institutions to lead by example, and; ensures the transparency of the results.

The GAP III strongly supports and will promote the participation and leadership of girls and women<sup>95</sup>. It will also promote a transformative and intersectional approach, mainstreaming gender in all policies and actions<sup>96</sup>. It aims to address structural causes of gender inequality and gender-based discrimination<sup>97</sup>. Finally, it seeks to tackle all intersecting dimensions of discrimination, paying specific attention to particularly vulnerable groups such as women with disabilities, migrant women, and discrimination based on age or sexual orientation<sup>98</sup>.

In fact, the GAP III reflects the objectives of the EU Gender Equality Strategy<sup>99</sup>, adopted as a Commission communication in March 2020, which presents ambitious policy objectives and actions to make progress by 2025 towards a gender-equal Europe<sup>100</sup>. As one of the first deliverables of both the Strategy and the GAP III, the European Commission presented in March 2021 the above mentioned Proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, along with its also aforementioned intention to propose a directive to prevent and combat specific forms of gender-based violence.

Apart from that, the above mentioned Women's Charter<sup>101</sup> embodies the principles of equal economic independence, equal pay for equal work and work of equal value, equality in decision making, dignity, integrity and an end to gender-based violence, as well as gender equality beyond the EU. Moreover, it reaffirms the EU's commitment to equality between women and men.

The European Pact for Gender Equality<sup>102</sup> also reasserted commitments to close gender gaps in employment and social protection, promote better work-life balance for

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<sup>92</sup> European Commission. (2020)... JOIN(2020) 17 final..., op. cit., 28p.

<sup>93</sup> United Nations. (1995). Beijing Declaration and Platform for Action. 132p. Available at: <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

<sup>94</sup> European Commission. (2020)... JOIN(2020) 17 final..., op. cit., p. 3.

<sup>95</sup> Ibidem, p. 8-9.

<sup>96</sup> Ibidem, p. 5-6.

<sup>97</sup> Ibidem, p. 4.

<sup>98</sup> Ibidem, p. 4.

<sup>99</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Union of Equality: Gender Equality Strategy 2020-2025. COM(2020) 152 final, 20p.

<sup>100</sup> Ibidem, p. 2.

<sup>101</sup> European Commission. (2010)...COM(2010)78 final..., op. cit., 5p.

<sup>102</sup> Council of the European Union. (2011). Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020)..., op. cit.

women and men and combat all forms of violence against women, by urging specified action at both national and EU level.

Furthermore, in the area of gender-based violence, in 2020, the European Commission adopted the first ever EU victims' rights strategy<sup>103</sup>, further stepping up the fight against gender-based violence. Besides, its work programme for 2022 includes an initiative to support MMSS in preventing and tackling harmful practices against women and girls<sup>104</sup>.

In this regard, EU's accession to the Convention on preventing and combating violence against women and domestic violence<sup>105</sup> (better known as the Istanbul Convention) must also be mentioned. Certainly, although all MMSS have signed the Convention and 21<sup>106</sup> have already ratified it<sup>107</sup>, it also provides for EU accession<sup>108</sup>. It is for this reason that the EU Commissioner for Justice, Consumers and Gender Equality signed the Convention on behalf of the EU on 13 June 2017<sup>109</sup>. This was the first step in the process of the EU acceding to the Convention, as accession requires the adoption of Council decisions to conclude the process, which will ultimately have to be supported by the EP<sup>110</sup>.

Lastly, as will be explained in more detail below, in March 2021, an Action Plan to implement the EPSR<sup>111</sup> was adopted by the EC, putting gender equality at its core, as well as establishing ambitious targets for women's participation in the labour market and the provision of early childhood education and care, among other objectives.

### 2.3. Financial framework

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<sup>103</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Strategy on victims' rights (2020-2025). COM(2020) 258 final, 24p.

<sup>104</sup> European Commission. (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission work programme 2022. COM(2021) 645 final, p. 10.

<sup>105</sup> Council of Europe. (2011). Council of Europe Convention on preventing and combating violence against women and domestic violence. 25p. Available at: <https://rm.coe.int/168008482e>. Last access: 3 March 2022.

<sup>106</sup> Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden.

<sup>107</sup> Jürviste, U., Shreeves, R. (2021). The Istanbul Convention: A tool for combating violence against women and girls. European Parliamentary Research Service, p. 2. Available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_ATA\(2021\)698801](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2021)698801).

<sup>108</sup> Ibidem, p. 2.

<sup>109</sup> Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters. OJ L 131, 20.5.2017, p. 11–12.

<sup>110</sup> Shreeves, R., Jürviste, U. (2022). EU accession to the Council Of Europe Convention on Preventing and Combating Violence Against Women (Istanbul Convention') / 2016-3. European Parliament, Legislative Train, 7 Area of Justice and Fundamental Rights / up to €7BN. p. 1. Available at: <https://www.europarl.europa.eu/legislative-train/carriage/eu-accession-to-the-istanbul-convention/report?sid=04-2022>.

<sup>111</sup> European Commission. (2021). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Pillar of Social Rights Action Plan. COM(2021) 102 final, 33p.

As the EU Gender Equality Strategy for 2020-2025 states, the European Commission's proposals for the Multiannual Financial Framework (MFF) ensure the integration of a gender dimension throughout the financial framework, through a range of EU funding instruments, such as the European Social Fund Plus, the European Regional Development Fund, Creative Europe, the European Maritime and Fisheries Fund, the Cohesion Fund and the InvestEU Programme<sup>112</sup>. These programs are set to support actions to promote women's labour market participation and work-life balance, invest in care facilities, support female entrepreneurship, combat gender segregation in certain professions and address the imbalanced representation of girls and boys in some sectors of education and training<sup>113</sup>.

In this regard, in December 2020, the Council adopted the regulation laying down the EU's MFF for the years 2021 to 2027<sup>114</sup>, which covers seven spending areas and provides the framework for the funding of almost forty EU spending programmes, while giving greater priority to gender mainstreaming in the EU budget<sup>115</sup>. The NextGenerationEU recovery instrument also pays specific attention to gender equality, as national recovery and resilience plans financed by the Recovery and Resilience Facility should specify how they will contribute to promoting gender equality and equal opportunities for all<sup>116</sup>.

Therefore, in April 2021, as part of the current EU financial framework, the Council and the EP adopted the Justice, Rights and Values Fund, which will help to further promote, strengthen and protect justice, rights and EU values, and consists of two programmes: on the one hand, the Citizens, Equality, Rights and Values programme<sup>117</sup> specifically covers the allocation of funds to civil society organisations working to promote gender equality and combating violence against women and girls within the EU; on the other hand, the Justice programme<sup>118</sup> will provide funding to support judicial cooperation in civil and criminal matters and effective access to justice for all citizens.

### *3. The activism of the European judge in guaranteeing gender equality*

The case law of the Court of Justice of the European Union (CJEU) on women's equality has evolved from the concept of equal pay, as an element of equalisation between women and men, to the possibility of introducing positive actions in the legislation of the MMSS as a legitimate means of eradicating gender inequality, as well

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<sup>112</sup> European Commission. (2020)...COM(2020) 152 final..., op. cit., p. 16.

<sup>113</sup> Ibidem, p. 16.

<sup>114</sup> Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027. OJ L 433I, 22.12.2020, p. 11–22.

<sup>115</sup> Press office - General Secretariat of the Council. (2020). Multiannual Financial Framework 2021-2027 and Next Generation EU (Commitments in 2018 prices). Available at: [https://ec.europa.eu/info/publications/multiannual-financial-framework-2021-2027-commitments\\_es](https://ec.europa.eu/info/publications/multiannual-financial-framework-2021-2027-commitments_es).

<sup>116</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Europe's moment: Repair and Prepare for the Next Generation. COM(2020) 456 final, 18p.

<sup>117</sup> Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) N° 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) N° 390/2014. OJ L 156, 5.5.2021, p. 1–20.

<sup>118</sup> Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) N° 1382/2013. OJ L 156, 5.5.2021, p. 21–38.

as systematising certain concepts, such as indirect discrimination or hidden discrimination, to enable the Luxembourg Court to detect inequality over and above apparent equality<sup>119</sup>. In doing so, the Court adopts a gender perspective through which it verifies whether an apparently neutral rule systematically produces negative effects on women's equality.

This evolution has been very significant, especially since the second half of the 1990s, when the Court had to rule on positive action measures carried out by some MMSS, which created criteria for the awarding of jobs with measures favouring women<sup>120</sup>. The Defrenne II judgement of 1976<sup>121</sup> shows that MMSS had failed to implement within national legislation the equality provisions, thus finding themselves in violation of European law. In particular, the Court recognised the direct effect of the principle of equal pay for men and women and ruled that the principle not only applied to the action of public authorities, but also extended to all agreements which are intended to collectively regulate paid labour. As a matter of fact, the Defrenne cases were the first on the matter of equality brought in front of the Luxembourg Court.

For the first few years, the Court only had to rule on equal treatment of women and men as regards pay<sup>122</sup>, generally considering that, in application of Directive 76/207/EEC and former Article 119 of the Treaty of Rome, the concept of "pay" covered all benefits, paid or not, and that the only exceptions to equality were those necessary for the financial equilibrium of the States<sup>123</sup>. Thus, in the Barber judgement of 1990 the Court decided that all forms of occupational pension constituted pay for the purposes of former Article 119, and that the principle of equal treatment therefore applied to them. The Court ruled that men should be able to exercise their pension rights or survivor's pension rights at the same age as their female colleagues.

Nonetheless, the need for broader interpretations of Article 119 soon became clear, especially with regard to maternity-related issues. The case law of the Court in this area establishes that women's equality requires the protection of their employment and welfare rights, so that maternity does not constitute an obstacle to their entry and permanence in the labour market<sup>124</sup>. In this regard, the Court has affirmed that the only differentiating facts between women and men are precisely maternity and the circumstances that derive from it (pregnancy, breastfeeding, etc.). This affirmation is of great importance, as it remarks the impossibility for MMSS to maintain any other differentiating factor between women and men, other than that derived from this biological circumstance<sup>125</sup>.

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<sup>119</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op.cit., p. 280.

<sup>120</sup> *Ibidem*.

<sup>121</sup> Court of Justice of the European Union. Judgement of 8 April 1976, Defrenne, Case 43-75. EU:C:1976:56.

<sup>122</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op.cit., p. 281.

<sup>123</sup> Court of Justice of the European Union. Judgement of 24 February 1994, M. A. De Weerd, née Roks, and others. Case C-343/92. EU:C:1994:71; Judgement of 9 February 1982, Garland, Case 12/81. EU:C:1982:44; Judgement of 8 April 1976, Defrenne, Case 43-75. EU:C:1976:56.

<sup>124</sup> Court of Justice of the European Union. Judgement of 30 June 1998, Brown, Case C-394/96. EU:C:1998:331.

<sup>125</sup> Among others: Court of Justice of the European Union. Judgement of 8 November 1990, Dekker, Case C-177/88. EU:C:1990:383; Judgement of 30 June 1998, Brown, Case C-394/96. EU:C:1998:331; Judgement of 4 October 2001, Tele Danmark A/S, Case C-109/00. EU:C:2001:513.

This interpretation of Article 2(3) of Directive 76/207/EEC<sup>126</sup>, in the most restrictive way possible (referring exclusively to the specific women's qualities of maternity, pregnancy and breastfeeding), allows the Court to open up the prohibition of gender discrimination in a very broad way, and to rule on the impossibility of discriminating against women for any circumstance relating to working conditions or the job<sup>127</sup>. Once it has been affirmed that women and men have no biological differentiation other than maternity, it becomes impossible to allow certain professions to be taken away from women.

Moreover, in order to protect gender equality, the CJEU has added a number of techniques to its jurisprudence, among them:

a) Indirect discrimination

By hidden or indirect discrimination<sup>128</sup> we mean all those measures that appear to be in accordance with the law, but in reality have a discriminatory effect on women. Currently, the CJEU case law includes any impact of gender in order to consider indirect discrimination to exist<sup>129</sup>. In this regard, in the *Bilka* judgement of 1986, the Court ruled that a measure excluding part-time employees from an occupational pension scheme constituted "indirect discrimination", and was therefore contrary to former Article 119 of the Treaty of Rome if it affected a far greater number of women than men, unless it could be shown that the exclusion was based on objectively justified factors unrelated to any discrimination on grounds of sex. In order to determine whether or not a certain piece of information, fact or situation constitutes a cause of indirect discrimination, it must first be analysed if it affects women in the majority, and once it has been established that it does, the rule will be declared discriminatory for contradicting Articles 13 and 141 of the TEC, as well as all the Community Directives against discrimination between women and men<sup>130</sup>. This analysis is objective, regardless of whether the State has intentionally or unintentionally brought about the situation, meaning that what is legally relevant is the discriminatory result itself<sup>131</sup>.

Nevertheless, the CJEU has on some occasions nuanced the analysis of indirect discrimination, leaving open the possibility for MMSS to justify measures on the basis of their budgetary policies or through criteria for assessing the impact of withstanding such rulings on MMSS<sup>132</sup>.

b) Reversal of burden of proof

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<sup>126</sup> «3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity».

<sup>127</sup> Court of Justice of the European Union. Judgement of 25 July 1991, *Stoeckel*, Case C-345/89. EU:C:1991:324.

<sup>128</sup> Among others: Court of Justice of the European Union. Judgement of 13 May 1986, *Bilka - Kaufhaus GmbH*, Case 170/84. EU:C:1986:204; Judgement of 27 June 1990, *Kowalska*, Case C-33/89. EU:C:1990:265.

<sup>129</sup> Court of Justice of the European Union. Judgement of 23 October 2003, *Schönheit and Becker*, Joined Cases C-4/02 and C-5/02. EU:C:2003:583.

<sup>130</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op. cit., p. 283.

<sup>131</sup> *Ibidem*.

<sup>132</sup> Court of Justice of the European Union. Judgement of 14 December 1995, *Ursula Megner and Hildegard Scheffel*, Case C-444/93. EU:C:1995:442.

In cases of direct discrimination, the burden of proof is not a major problem, as it implies a clear violation of a fundamental right; however, in cases of indirect discrimination, due to its nature, it is very difficult for the plaintiff in the procedure to prove the intentionality of the discrimination<sup>133</sup>. In these cases, Article 4(1)<sup>134</sup> of the Council Directive 97/80/EC<sup>135</sup> used to be applicable. In application of this regulation, the Court considered that if it is proven that a measure is mainly prejudicial to women, in the case of public companies, the burden of proof of its objective justification falls on the State<sup>136</sup>, while in the case of private companies, this burden of proof will fall on the employer, and the national judge will be competent to assess the apparent discrimination<sup>137</sup>.

Directive 97/80/EC was repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Nonetheless, Article 19 of Directive 2006/54/EC<sup>138</sup> maintains, for the most part, the contents of Article 4 of Directive 97/80/EC<sup>139</sup> relating to the burden of proof, with the only difference that it includes a fourth paragraph, which specifies the scope of application of the article.

#### c) Positive action measures

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<sup>133</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op. cit., p. 284.

<sup>134</sup> «Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment».

<sup>135</sup> Council of the European Union. (1997). Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. OJ L 14, 20.1.1998, p. 6–8.

<sup>136</sup> Court of Justice of the European Union. Judgement of 13 May 1986, *Bilka - Kaufhaus GmbH*, Case 170/84. EU:C:1986:204.

<sup>137</sup> Court of Justice of the European Union. Judgement of 27 October 1993, *Enderby*, Case C-127/92. EU:C:1993:859.

<sup>138</sup> «1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. 2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. 3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case. 4. Paragraphs 1, 2 and 3 shall also apply to: (a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC; (b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law. 5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States».

<sup>139</sup> «1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. 2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs. 3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case».

As MMSS introduced positive action measures in their legislation, the CJEU was obliged to rule on such measures. Initially, the Court did not consider legislation that prioritised the recruitment of women on equal terms to be in conformity with EU law<sup>140</sup>. In the Kalanke case<sup>141</sup>, automatic preference in favour of women on the grounds of under-representation in a particular job is not permitted. However, doctrine was quite critical of this judgement and, contrary to the criterion of the CJEU, an attempt was made to establish a guideline of proportionality of such measures, due to their need to overcome the historical inequality of women.

Thus, in the Marschall judgement of 1997<sup>142</sup>, the Court changed this inflexible criterion on the impossibility of favouring one sex over the other when there is equal access to a job, and considered that MMSS may establish positive action measures for women under certain conditions, that is, positive discrimination. This jurisprudence is upheld in the Badeck<sup>143</sup> and Lommers<sup>144</sup> cases, among others.

Apart from these techniques, and in relation to the latest rulings of the CJEU in the field of gender equality, the Test Achats judgement of 2011<sup>145</sup> must be mentioned, in which the Court declared Article 5(2) of Council Directive 2004/113/EC<sup>146</sup> invalid on the grounds that it was contrary to the principle of equal treatment between men and women in the access to and supply of goods and services; as well as the Korwin-Mikke judgements of 2018<sup>147</sup>, in which the Court ruled in favour of annulling the penalties imposed by the EP on Polish far-right MEP Janusz Korwin-Mikke.

All of that been said, it becomes clear that gender equality in European law has advanced significantly thanks to the case law of the CJEU, as EU law has, most of the time, come to recognise its rulings on matters such as the reversal of the burden of proof, indirect discrimination or positive action.

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<sup>140</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op. cit., p. 285.

<sup>141</sup> Court of Justice of the European Union. Judgement of 17 October 1995, Kalanke, Case C-450/93. EU:C:1995:322.

<sup>142</sup> Court of Justice of the European Union. Judgement of 11 November 1997, Marschall, Case C-409/95. EU:C:1997:533.

<sup>143</sup> Court of Justice of the European Union. Judgement of 28 March 2000, Badeck and Others, Case C-158/97. EU:C:2000:163.

<sup>144</sup> Court of Justice of the European Union. Judgement of 19 March 2002, Lommers, Case C-476/99. EU:C:2002:183.

<sup>145</sup> Court of Justice of the European Union. Judgement of 1 March 2011, Association Belge des Consommateurs Test-Achats ASBL and Others, Case C-236/09. EU:C:2011:100.

<sup>146</sup> Council of the European Union. (2004). Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L 373, 21.12.2004, p. 37–43.

<sup>147</sup> Court of Justice of the European Union. Judgement of 31 May 2018, Korwin-Mikke, Case T-770/16. EU:T:2018:320; Judgement of 31 May 2018, Korwin-Mikke, Case T-352/17. EU:T:2018:319.

## **IV. The financial crisis and the European social dimension: the EPSR as a supranational policy response**

### *1. Origins of the Pillar*

The EPSR arose as a consequence of the economic measures adopted to alleviate the financial crisis during the 2010-2015 period. In particular, southern European countries were the most affected by the measures to contain public spending and reduce public deficits: the stabilisation plans and structural reforms that these countries had to undertake, with greater intensity than the rest, led to high rates of unemployment, poverty and social exclusion. Thus, the financial crisis highlighted the imbalance and the need to restructure the EU's economic and social constitution<sup>148</sup>. It was therefore necessary to overcome the crisis and renew the European social model by creating a new European political framework in which fundamental social rights were taken into account<sup>149</sup>.

As a result, on 9 September 2015, the former President of the European Commission, Jean-Claude Juncker, in his first State of the Union speech<sup>150</sup> at the EP, announced his intention to develop an EPSR.

To this end, on 8 March 2016, the European Commission launched a public consultation on the EU social acquis and its alignment with new employment and social trends<sup>151</sup>, accompanied by a first preliminary outline of the EPSR<sup>152</sup> and several working documents (one on the EU social acquis<sup>153</sup> and one on the key economic, employment and social trends<sup>154</sup>). Through the consultation, which continued until 31 December 2016, the European Commission invited social partners, citizens and authorities of MMSS to discuss the future development of the EPSR<sup>155</sup>. Feedback was also gathered through three groups responsible for organising national and international events to deepen the reflection on the EPSR. At the end of June 2016, each steering group

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<sup>148</sup> Calatrava Lesmes, O. (2018). Is the European Social Model an issue?. *Revista de Derecho UNED* (23), pp. 299-300.

<sup>149</sup> *Ibidem*, p. 291.

<sup>150</sup> Juncker, J. (2015). State of the Union 2015: Time for honesty, unity and solidarity. European Commission. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_15\\_5614](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5614).

<sup>151</sup> European Commission. (2016). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on a European Pillar of Social Rights. COM(2016) 127 final, 11p.

<sup>152</sup> European Commission. (2016). Annex. First preliminary outline of a European Pillar of Social Rights. Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on a European Pillar of Social Rights. COM(2016) 127 final, 19p.

<sup>153</sup> European Commission. (2016). Commission Staff Working Document. The EU social acquis. Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on a European Pillar of Social Rights. SWD(2016) 50 final, 17p.

<sup>154</sup> European Commission. (2016). Commission Staff Working Document. Key economic, employment and social trends behind a European Pillar of Social Rights. Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Launching a consultation on a European Pillar of Social Rights. SWD(2016) 51 final, 17p.

<sup>155</sup> Pacolet, J., Op de Beeck, L., De Wispelaere, F. (2018). European Pillar of Social Rights – Quo Vadis? The Overwhelming Ambition for a Social Europe. *European Centre for Worker's Questions*. p. 90.



prepared a report, with the final report (November 2016) being used to support the EPSR declaration<sup>156</sup>.

In January 2017, a debate on the broad outlines of the EPSR took place in the EP, where all the contributions were discussed, drawing up an own-initiative report<sup>157</sup> and feeding into the final construction of the Pillar<sup>158</sup>. The consultation was concluded on 23 January 2017 at a high-level European Conference on the EPSR in Brussels, with more than 600 participants representing authorities of MMSS, EU institutions, social partners and civil society.

Thus, with the information gathered over the two previous years, on 26 April 2017, the European Commission presented its recommendation on the EPSR<sup>159</sup>, along with a communication<sup>160</sup> presenting the EPSR and outlining a way forward for its implementation via a number of legislative and non-legislative initiatives related to work-life balance, information for workers, access to social protection and working time. The European Commission also published a variety of working papers accompanying the recommendation document the same day (one with the results of the public consultation<sup>161</sup>, one detailing the contents of the Pillar<sup>162</sup> and one on the Social Scoreboard<sup>163</sup>). The recommendation was then debated in both the EP and the European Council, resulting in the Commission's final proposal for an interinstitutional proclamation of the EPSR<sup>164</sup>.

This led, following the approval of the proposal by the Employment, Social Policy, Health and Consumer Affairs Council at its meeting on 23 October 2017<sup>165</sup>, to

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<sup>156</sup> Ibidem, p. 91.

<sup>157</sup> European Parliament. (2017). A European Pillar of Social Rights. P8\_TA(2017)0010, 22p. Available at: [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0010\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0010_EN.html).

<sup>158</sup> Pacolet, J., Op de Beeck, L., De Wispelaere, F. (2018). European Pillar of Social Rights..., op. cit., p. 91.

<sup>159</sup> European Commission. (2017). Commission Recommendation (EU) 2017/761 of 26 April 2017 on the European Pillar of Social Rights. OJ L 113, 29.4.2017, p. 56–61.

<sup>160</sup> European Commission. (2017). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights. COM(2017) 250 final, 10p.

<sup>161</sup> European Commission. (2017). Commission Staff Working Document. Report of the public consultation Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights. SWD(2017) 206 final, 53p.

<sup>162</sup> European Commission. (2017). Commission Staff Working Document. Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights. SWD(2017) 201 final, 78p.

<sup>163</sup> European Commission. (2017). Commission Staff Working Document. Social Scoreboard Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Establishing a European Pillar of Social Rights. SWD(2017) 200 final, 6p.

<sup>164</sup> European Commission. (2017). Proposal for a Interinstitutional Proclamation on the European Pillar of Social Rights. COM(2017) 251 final, 9p. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0251>.

<sup>165</sup> Council of the European Union. (2017). Pillar of Social Rights: Council gives green light for proclamation by the institutions. Press release 9/17, 1p. Available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/10/23/pillar-of-social-rights-council-gives-green-light-for-proclamation-by-the-institutions/>.

the signature and solemn Interinstitutional Proclamation of the EPSR<sup>166</sup> jointly by the EP, the Council and the European Commission at the Social Summit for Fair Jobs and Growth celebrated in Gothenburg on 17 November 2017<sup>167</sup>. Through this joint proclamation, the EPSR became a commitment of both European and national institutions<sup>168</sup>.

The EPSR is structured in three chapters and a total of twenty principles and rights, addressing active employment policies, economic dimension of work, and exogenous elements of labour markets such as homelessness, poverty and social exclusion<sup>169</sup>. Some of them reaffirm rights already present in the Union *acquis*, while others set clear objectives for the path ahead, as the EU addresses the challenges arising from societal, technological and economic developments<sup>170</sup>.

Concerning the effective implementation of the EPSR, most measures are in the hands of the MMSS, as they are mainly responsible for employment, skills and social policies<sup>171</sup>. In particular, the application of the EPSR is in the hands of the eurozone countries, since that is the principal field of application of the Pillar, even though other MMSS are allowed to join if they want to<sup>172</sup>. However, not all initiatives announced within the Pillar are intended just for the euro area, as the Work-Life Balance Directive is intended for the whole EU, which shows that some elements of the EPSR are intended for all MMSS, and others just for the eurozone<sup>173</sup>.

Moreover, EU-level actions can complement national actions. Thus, as a contribution to the implementation of the EPSR, on 4 March 2021, the European Commission presented the EPSR Action Plan<sup>174</sup>. Within this document, the European Commission displays the 20 principles of the Pillar as a “beacon guiding us towards a strong Social Europe (...), expressing principles and rights essential for fair and well-functioning labour markets and welfare systems in 21<sup>st</sup> century Europe”<sup>175</sup>.

The Action Plan is based on a consultation launched on 14 January 2020 by the EC<sup>176</sup>, which, by 30 November 2020, had received more than 1000 contributions from citizens, EU institutions and bodies, MMSS, regional and local authorities, social

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<sup>166</sup> European Parliament, Council of the European Union and European Commission. (2017). Interinstitutional Proclamation on the European Pillar of Social Rights. OJ C 428, 13.12.2017, p. 10–15.

<sup>167</sup> European Commission and Government Offices of Sweden. (2017). Social Summit for Fair Jobs and Growth Concluding Report. Available at: [https://ec.europa.eu/info/publications/concluding-report-social-summit-fair-jobs-and-growth\\_en](https://ec.europa.eu/info/publications/concluding-report-social-summit-fair-jobs-and-growth_en).

<sup>168</sup> Pacolet, J., Op de Beeck, L., De Wispelaere, F. (2018). European Pillar of Social Rights..., op. cit., p. 92.

<sup>169</sup> Lasa López, A. (2019). Shaping the Social Model of the Post-Brexit Europe: Perspectives and Ongoing Actions. *Deusto Journal of European Studies*, N°. 60, p. 292.

<sup>170</sup> European Commission. (2017). Commission Recommendation (EU) 2017/761..., op. cit., Recital 14.

<sup>171</sup> Casado Casado, L. (2019). The new European Pillar of Social Rights: towards a real strengthening of the social dimension of the European Union?. *Journal of Constitutional Research*, vol. 6, n. 2, p. 399.

<sup>172</sup> Juncker, J. (2015). State of the Union 2015..., op. cit., p. 18.

<sup>173</sup> Plomien, A. (2018). EU Social and Gender Policy beyond Brexit: Towards the European Pillar of Social Rights. *Social Policy and Society*, 17(2), p. 289.

<sup>174</sup> European Commission. (2021)...COM(2021) 102 final..., op. cit., 33p.

<sup>175</sup> *Ibidem*, p. 4.

<sup>176</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Strong Social Europe for Just Transitions. COM/2020/14 final. 16p.

partners and civil society organisations<sup>177</sup>. It sets out concrete actions that the European Commission is committed to take during its current mandate to further implement the 20 principles of the Pillar<sup>178</sup>, as well as describing the actions already taken since its proclamation in the Working Document accompanying the Action Plan<sup>179</sup>.

Therefore, the EPSR Action Plan constitutes a framework to update the actual “social rulebook”, proposing headline targets to be achieved by 2030 to significantly reform employment, skills and social protection at EU-level in the light of the EU’s social, digital and green agendas, as well as to implement the UN’s Sustainable Development Goals and the plans for a healthy recovery of societies and economies greatly impacted by COVID-19, all of this with the ultimate aim of enhancing social rights and strengthening the European social dimension across all policies of the Union as enshrined in the Treaties<sup>180</sup> (Article 3 of the TEU<sup>181</sup> and Article 9 of the TFEU<sup>182</sup>).

The Action Plan was given political impetus on 7 May 2021 at the Porto Social Summit, organised by the at the time Portuguese Presidency of the Council of the EU, during which a commitment<sup>183</sup> (The Porto Social Commitment) was signed by the President of the Commission, the President of the EP, the Portuguese Prime Minister (holding the Presidency of the Council of the EU), European social partners and civil society. In the commitment, signatories not only welcomed the EPSR Action Plan, but also promised to do their utmost to build a more inclusive and social EU, while strengthening the commitment to transform the principles of the EPSR into action to set in motion a strong, fair and job-rich recovery<sup>184</sup>.

## *2. Deliverables on the Pillar*

As previously explained, on 4 March 2021, along with the Communication on the Action Plan to implement the EPSR<sup>185</sup>, the European Commission published a working paper<sup>186</sup> providing a summary of the broad consultation process carried out from 14 January to 30 November 2020, information on action taken to implement the EPSR at EU level since its proclamation and background information on actions proposed to monitor progress in implementing the Action Plan. In particular, among the ongoing actions to implement the EPSR with regard to gender equality we can find:

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<sup>177</sup> European Commission. (2021). Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Pillar of Social Rights Action Plan. SWD(2021) 46 final, p. 3-48.

<sup>178</sup> European Commission. (2021)...COM(2021) 102 final..., op. cit., p. 4.

<sup>179</sup> European Commission. (2021)...SWD(2021) 46 final..., op. cit., p. 51-100.

<sup>180</sup> Ibidem, p. 33.

<sup>181</sup> «3.The Union shall establish an internal market. (...) It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child».

<sup>182</sup> «In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health».

<sup>183</sup> Council of the European Union. (2021). Porto Social Commitment. Available at: <https://www.2021portugal.eu/en/porto-social-summit/porto-social-commitment>. Last access: 4 March 2022.

<sup>184</sup> Ibidem.

<sup>185</sup> European Commission. (2021)...COM(2021) 102 final..., op. cit., 33p.

<sup>186</sup> European Commission. (2021)...SWD(2021) 46 final..., op. cit., 126p.

Firstly, the EU Gender Equality Strategy 2020-2025<sup>187</sup>, adopted by the European Commission on 5 March 2020, which frames the Commission's work on gender equality and sets out the objectives and key actions for the 2020-2025 period: ending gender-based violence, challenging gender stereotypes, closing gender gaps in the labour market, achieving equal participation across different sectors of the economy, addressing the gender pay and pension gaps, closing the gender care gap and achieving gender balance in decision making and politics. The implementation of the Strategy is based on the dual approach of key actions to achieve gender equality combined with strengthening the integration of a gender perspective in all EU policies and major initiatives, that is, gender mainstreaming<sup>188</sup>. The European Commission also compromises to regularly update, supplement, and monitor the implementation of the key actions, as well as reporting their progress on an annual basis, via data from Eurostat, Eurofound and EIGE's annual GEI<sup>189</sup>.

Secondly, the European Commission adopted the EU Action Plan on Tackling the gender pay gap<sup>190</sup> in November 2017, establishing a total of 24 action points, which by October 2019 had almost been completed. Thus, in March 2020, the Commission published an implementation report on the Action Plan<sup>191</sup>, which also included an evaluation of the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC). That led, in March 2021, to a Commission proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms<sup>192</sup>, even though no directive has yet been adopted.

Thirdly, regarding women in Research and Innovation (R&I), the European Commission's new Framework Programme for R&I, Horizon Europe (proposed<sup>193</sup> as part of the EU's new MFF), sets Gender Equality Plans as an eligibility criterion for those applying to the Programme, increasing the target for gender balance to 50% women in all Horizon Europe related decision-making bodies and evaluators, and making the integration of the gender dimension into R&I content a requirement by default<sup>194</sup>. Moreover, in the Communication "A new ERA for Research and Innovation"<sup>195</sup> the European Commission proposes, within the European Research Area (ERA) and in line with the Horizon Europe programme objectives, the development of

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<sup>187</sup> European Commission. (2020)...COM(2020) 152 final..., op. cit., 20p.

<sup>188</sup> European Commission. (2020)...COM(2020) 152 final..., op. cit., p. 3-15.

<sup>189</sup> European Commission. (2020)...COM(2020) 152 final..., op. cit., p. 19.

<sup>190</sup> European Commission. (2017). Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. EU Action Plan 2017-2019: Tackling the gender pay gap. COM(2017) 678 final, 14p.

<sup>191</sup> European Commission. (2020). Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the EU Action Plan 2017-2019 on tackling the gender pay gap. COM(2020) 101 final, 13p.

<sup>192</sup> European Commission. (2021)...COM(2021) 93 final..., op. cit., 45p.

<sup>193</sup> European Commission. (2018). Proposal for a Regulation of the European Parliament and of the Council establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination. COM(2018) 435 final, 57p.

<sup>194</sup> European Commission, Directorate-General for Research and Innovation. (2021). Horizon Europe: gender equality: a strengthened commitment in Horizon Europe. Publications Office. Available at: <https://data.europa.eu/doi/10.2777/439683>.

<sup>195</sup> European Commission. (2020). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A new ERA for Research and Innovation. COM(2020) 628 final, 22p.

inclusive gender equality plans addressing three different levels: intersectionality with other social factors such as ethnicity, disability or sexual orientation; geographical inclusiveness; and better inclusion of the private sector. All of that with the final aim of promoting gender equality in R&I.

Fourthly, in 2017, the European Economic and Social Committee in cooperation with the European Commission set up the “Women in Transport – EU Platform for change”<sup>196</sup> along with the “Declaration on equal opportunities for women and men in the transport sector”<sup>197</sup>, addressing the gender gap in the transport sector and the lack of attractiveness of transport professions for both young people and women, as well as aiming to increase female employment and equal opportunities in this sector. All important EU associations covering all transport modes have joined the platform and by the end of 2020, 19 different actions had been put forward.

On the other hand, the EPSR Action Plan sets out a series of concrete actions that the European Commission is committed to take during its current mandate to further implement the 20 principles of the Pillar. In particular, in relation to the implementation of the principle of gender equality, the Commission undertakes to:

Firstly, publish a report in 2021 on the application of the Employment Equality Directive<sup>198</sup> to determine best practices in its implementation and main challenges ahead. Furthermore, the European Commission also commits to present, by 2022, any legislation required to address shortcomings. In this regard, it should be noted that, as above mentioned, the Commission has proposed a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms<sup>199</sup>.

Secondly, present a revision of the Barcelona targets on early childhood education and care<sup>200</sup> in 2022, with the aim of further convergence between MMSS, as the availability of affordable and high quality early childhood education and care as well as long-term care of good quality both have strong impact on the employment situation of parents, and in particular women, becoming an important determinant of the gender pay and pension gap.

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<sup>196</sup> European Economic and Social Committee and European Commission. (2017). Women in Transport – EU Platform for change. Available at: [https://transport.ec.europa.eu/transport-themes/social-issues/women-transport/women-transport-eu-platform-change\\_en](https://transport.ec.europa.eu/transport-themes/social-issues/women-transport/women-transport-eu-platform-change_en).

<sup>197</sup> European Economic and Social Committee and European Commission. (2017). Declaration on equal opportunities for women and men in the transport sector. Available at: <https://www.etf-europe.org/resource/eu-declaration-on-equal-opportunities-for-women-and-men-in-the-transport-sector/>.

<sup>198</sup> European Commission. (2021). Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’). COM(2021) 139 final, 27p.

<sup>199</sup> European Commission. (2021)...COM(2021) 93 final... op. cit., 45p.

<sup>200</sup> European Commission: Press and Communication Service. (2002). Presidency conclusions: Barcelona European Council 15 and 16 March 2002. Available at: [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/71025.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/71025.pdf).

Thirdly, propose in 2021 legislation to combat gender-based violence against women. In this regard, in its 2021 work programme<sup>201</sup>, the European Commission undertook to present a legislative proposal to prevent and combat specific forms of gender-based violence. However, the Commission has still not put forward any proposals in this matter<sup>202</sup>.

Furthermore, the Action Plan also encourages MMSS, firstly, to advance and conclude the negotiations on the proposal for the Equal Treatment Directive<sup>203</sup>. Secondly, to have the Work-Life Balance Directive<sup>204</sup> completely transposed by August 2022. Thirdly, to advance and conclude the negotiations on the 2012 proposal for a Gender Balance on Boards Directive<sup>205</sup>. Lastly, the Commission urges companies to implement mechanisms to combat discriminatory practices in recruitment, selection and promotion, as well as to promote diversity within the workplace.

### *3. Nature and scope of the gender approach in the Pillar principles*

Gender equality has an explicit status in the list of principles and rights of the EPSR<sup>206</sup>. In particular, the Pillar includes gender equality as its second principle<sup>207</sup>, within its first Chapter (“Equal opportunities and access to the labour market”). Nevertheless, after analysing the treatment of the gender equality principle within the EPSR, it becomes clear that the Pillar does not create nor redefine new European social rights, it simply reaffirms rights already present in the EU social acquis (as interpreted by the CJEU) and complements them to take account of new realities<sup>208</sup>, without bringing any substantial novelty<sup>209</sup>. In other words, the EPSR does not increase the EU’s competences or modify the European social acquis, but rather reaffirms existing ones with some interpretative improvements, as well as an attempt at systematisation<sup>210</sup>.

Thus, its aim was not to create new rights (since social policies fall within the competence of the MMSS, and the EU therefore acts with respect for the principle of subsidiarity), but to consolidate and modernise existing ones, so that the EPSR would overcome the financial crisis and move towards a deeper and fairer EMU<sup>211</sup>. It is therefore clear that, also with regard to gender equality, the EPSR is limited to

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<sup>201</sup> European Commission. (2020)...COM(2020) 690 final..., op. cit., p.7.

<sup>202</sup> Shreeves, R., Jurviste, Ü. (2022). Legislative proposal..., op. cit., p. 2.

<sup>203</sup> Commission of the European Communities. (2008)...COM(2008) 426 final..., op. cit., 24p.

<sup>204</sup> European Parliament and Council of the European Union. (2019). Directive (EU) 2019/1158..., op. cit., p. 79–93.

<sup>205</sup> European Commission. (2012)...COM(2012) 614 final..., op. cit., 28p.

<sup>206</sup> Plomien, A. (2018). EU Social and Gender Policy..., op. cit., p. 289.

<sup>207</sup> «2. Gender equality: a. Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression. b. Women and men have the right to equal pay for work of equal value».

<sup>208</sup> Lasa López, A. (2019). Potencialidades del Pilar Europeo De Derechos Sociales en la praxis jurisprudencial del Juez de Estrasburgo: entre la heterarquía vínculo social-vínculo económico y la disfuncionalidad. UNED. Teoría y Realidad Constitucional (42), p. 619.

<sup>209</sup> Lasa López, A. (2019). The European Pillar of Social Rights: an analysis from the coordinates of European market constitutionalism. Revista de Derecho Comunitario Europeo, 62, p. 140.

<sup>210</sup> Casado Casado, L. (2019). The new European Pillar of Social Rights... op. cit. p. 392.

<sup>211</sup> Rojo Torrecilla, E. (2017). La construcción del Pilar Europeo de Derechos Sociales. De la propuesta Juncker (9.9.2015) a la Recomendación de la Comisión Europea (26.4.2017). ¿Más Europa social o reordenación del marco normativo vigente? Revista Gallega de Derecho Social (RGDS) - 2ª etapa, 3, p. 24.

compiling the existing *acquis* on the subject and the Luxembourg case law, that is, there are no new developments in terms of the existing treatment to date; it is rather a matter of emphasising the achievements made through the existing regulation and case law.

Consequently, this document suffers from exactly the same weaknesses as its predecessors, which is why in this section I will compile the shortcomings of the gender approach of all the main European policies, previously analysed, and illustrate the thesis defended throughout this paper: the EPSR has failed to introduce any new developments in the field of gender equality, as it has limited itself to reaffirming the existing social *acquis* in relation to gender equality, along with all its deficiencies, only introducing an attempt at systematisation and adjustment to current social conflicts.

In the first place, and starting with the first milestone in the history of the EU, it has already been mentioned that the first reference to gender equality can be found in Article 119 of the Treaty of Rome, now Article 157 of the TFEU, that refers to equal pay for equal work between men and women. That is, during the first phase of EU equality politics gender equality was defined in an employment context, mainly because France had just introduced equal pay regardless of sex and was fearful that the absence of such legislation in other States would put its market at a competitive disadvantage.

Therefore, the real aim of Article 119 was not to assert the principle of gender equality or to achieve social justice, but to avoid social dumping in sectors where women were the main employees, such as textiles<sup>212</sup>. That is, Article 119 reflects an economic interest rather than a real commitment to women's rights and the principle of equality<sup>213</sup>, which shows that, at that time, all EU interventions in the social domain (thus also in the area of gender equality) needed to be justified by economic reasons, as it was not an aim within an Economic Community founded on the implementation of a single market. What's more, Article 119 being the main basis for European activity in gender equality for many years to come meant that all secondary law from then onwards suffered from the same weaknesses. In fact, it wasn't until the 1990s when an important shift in this area was made, as the majority of directives endorsed during this decade (Pregnant Workers Directive, Working Time Directive, Parental Leave Directive, etc.) introduced the right to reconciliation between work and family life.

Nonetheless, despite the importance of their development and the gender neutrality of their language, in reality, they are all aimed at women, since nowhere in these policies can be found a reassessment of the impact of gender dynamics on employment structures. They do not challenge the male bias of the public sphere, thus reasserting women's role as primary carers; and what ultimately transpires from their focus on the official labour market is that reconciliation between work and family life does not seek to challenge gender divisions of labour in the private sphere, on the contrary, equality is conceived as having an equal right to participate in the official labour market. Therefore, these policies continue to support formal equality rather than substantive equality.

Moreover, all EU equal rights policies during this decade suffered from the same weaknesses as Article 199 of the Treaty of Rome, since they were still focused mainly on employment as the introduction of the principle of equality, making that, in Europe,

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<sup>212</sup> Jacquot, S. (2020). *European Union Gender...*, op. cit., p. 1.

<sup>213</sup> Guerrina, R. (2003). *Gender, Mainstreaming...*, op. cit., p. 99.

women acquired equality as workers rather than citizens. This focus on employment was due to the primacy of economics in the process of European integration and it was through this process that public rights and formal equality became the norm, thus reinforcing the public-private dichotomy, which shaped the relationship between family and employment structures and contributed to women's exclusion from the full benefits of citizenship<sup>214</sup>.

The next milestone in the EU's gender equality policies' history came with the signing of the Treaty of Amsterdam, which Articles 2 and 3 included equality between men and women as one of the objectives of European integration, apart from officially introducing the principle of gender mainstreaming. However, a closer look at these Articles highlights the weaknesses of the approach: they are located in Part 1 of the Treaty, where the main principles underpinning the future development of European integration can be found, which summarises the aims of the EU and the position of equality within the organisation. In other words, even though the inclusion of the principle of equality between women and men as one of the aims of the EU was an important development, the pre-eminence of the economic domain in all EU policies still constrained the scope of action in the area of equal rights. In actual fact, the pre-eminence of the economic domain being present in all social (and gender) provisions within the Treaties shows that they were included in order to ensure the functioning of the single market, rather than as a way to foster a more cohesive society; that is, the reason for their inclusion was primarily economic<sup>215</sup>.

In addition, experts have also criticised that gender mainstreaming fails to acknowledge differences among women, such as race, ethnicity and class; that national policy makers remain unresponsive to the concept of gender mainstreaming; and the fragility of EU institutional enforcement mechanisms, which can be divided into the neo-liberal argument, that resists any outside regulatory intervention at national level, as well as the interventionist argument, which demands more fulfilment of the social mission<sup>216</sup>.

The next step in the development of gender equality came in 2001 with the CFREU, which Article 21 prohibits discrimination on any ground, including sex. Nevertheless, it introduces a negative right rather than a positive affirmation of the importance of equality as a fundamental right, and, although the introduction of a right to nondiscrimination may have greater legal authority than a general right to equality, it means that a formal approach to equality will drive any future development in the area of equal opportunities, rather than substantive one, as this article provides the basis for equality in the Charter<sup>217</sup>. It must also be noted that Article 23, that includes equality between men and women and recognizes the right to gender equality in all areas and the necessity of positive action for its promotion, does not contribute to the expansion of the EU equal rights legislation (e.g. the Parental Leave Directive and the Working Time Directive), which is left to Article 33. Besides, within this last Article, no mention is made of gender divisions of labour or the impact of gender power hierarchies on women's participation in the public sphere, so it cannot be regarded as a significant contribution to the achievement of substantive equality<sup>218</sup>.

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<sup>214</sup> Ibidem, p. 101.

<sup>215</sup> Ibidem, p. 102-104.

<sup>216</sup> Petö, A., Manners, I. (2006). *The European Union...*, op. cit., p. 169.

<sup>217</sup> Guerrina, R. (2003). *Gender, Mainstreaming...*, op. cit., p. 109.

<sup>218</sup> Ibidem, p. 110.



Doctrine also warns about the real effectiveness of the Charter regarding gender equality due to the absence of some rights of key importance to women such as contraception and abortion rights, and the weak formulation of some fundamental rights and the principle of gender mainstreaming that were stronger in previous EU legislation<sup>219</sup>. In addition, experts consider that the Charter lowers the level of recognition of equality in the case law of the CJEU, because it does not establish that equality is a fundamental right that can be exercised at a court by means of a direct procedural action<sup>220</sup>. For all these reasons, it can be said that although gender equality is included within the Charter, it does not permeate the whole document, so despite its apparent benefits regarding women's rights, it failed to mainstream gender in EU politics<sup>221</sup>.

Finally, the latest EU treaty, the Treaty of Lisbon, refers to gender equality and to the prohibition of discrimination in several of its Articles, as above mentioned. Nonetheless, gender was not effectively mainstreamed into the whole Treaty, as it is absent from areas such as culture, education, health, finance, foreign or security policy. Besides, by the time of the negotiations of the Treaty of Lisbon, several experts had already warned about the inefficient implementation of the principle of gender mainstreaming, previously introduced via the Treaty of Amsterdam, and the need for innovative solutions, but the new Treaty did not undertake notable modifications in this area. Therefore, even though it enhanced the democratic processes and structures of the EU and included gender equality as an EU value and fundamental right, the democratic framework provided by the Treaty of Lisbon still has weaknesses and could be improved<sup>222</sup>.

#### *4. The Pillar and the Work-life balance principle*

Apart from the specific mention of gender equality, work-life balance is also included within the ninth principle of the EPSR<sup>223</sup>, which led to the European Commission's 2019 Directive to support work-life balance for working parents and carers<sup>224</sup>. As one of the first measures adopted to implement the principles of the EPSR, the Directive came at a time when, after nearly a decade of austerity policies following the 2008 financial crisis, there was a clear emphasis on developing a stronger EU social dimension in order to improve working and living conditions for citizens and, in particular, for women, as the legislator was well aware that because of caring responsibilities, women remain underrepresented in the employment market and are still paid considerably less than men<sup>225</sup>.

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<sup>219</sup> Irigoien, A. (2021). The Treaty of Lisbon and the gender-blind responses to the EU crises: impact on the quality of European democracy. *Política y Sociedad* 58(1), p. 5.

<sup>220</sup> Balaguer Callejón, M.L. (2005). *La Constitución Europea...*, op. cit., p. 288.

<sup>221</sup> Guerrina, R. (2003). *Gender, Mainstreaming...*, op. cit., p. 110.

<sup>222</sup> Irigoien, A. (2021). *The Treaty of Lisbon...*, op.cit., p. 5.

<sup>223</sup> «9. Work-life balance: Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way».

<sup>224</sup> European Parliament and Council of the European Union. (2019). Directive (EU) 2019/1158..., op. cit., p. 73.

<sup>225</sup> Caracciolo di Torella, E. (2020). One more step along the way: the 2019 Work Life Balance Directive, *Revue de droit comparé du travail et de la sécurité sociale*, 4, p. 72.

Certainly, work-life balance is a measure that addresses not only women's under-representation on the labour market and the insufficient support available for their career advancement, but also their unequal treatment and opportunities in the labour market, encouraging the strengthening of men's roles as carers in the family, thereby promoting non-discrimination and fostering gender equality<sup>226</sup>. Indeed, the gender employment gap in the labour market is most acute for people with caring responsibilities and that overwhelmingly affects women, as they are far more likely to work part-time due to caring responsibilities, which also contributes to the gender pay gap and the gender pension gap, rendering women more vulnerable to social exclusion and poverty.

Consequently, the new Directive is strongly linked to the implementation of the principles of the EPSR, particularly those focusing on gender equality, equal opportunities, work-life balance, childcare and support to children, and long-term care. In particular, it addresses a comprehensive approach to the issues of work-life balance, non-transferability of parental leave, paid paternity leave and the gender pay gap<sup>227</sup>. Therefore, the Directive provides for individual rights related to paternity leave, parental leave, carers' leave and flexible working arrangements for workers who are parents or carers<sup>228</sup>. As a result, it not only repeals the existing Parental Leave Directive<sup>229</sup> but also expands and builds upon existing rights, introducing two flagship rights (paternity and carers' leave), and strengthening two further rights (parental leave and the right to request flexible working arrangements)<sup>230</sup>.

Regarding the purpose of the Directive, Recital 6 states that it "(...) lays down minimum requirements related to paternity leave, parental leave and carers' leave, and to flexible working arrangements for workers who are parents, or carers. By facilitating the reconciliation of work and family life for such parents and carers, this Directive should contribute to the Treaty-based goals of equality between women and men with regard to labour market opportunities, equal treatment at work and the promotion of a high level of employment in the Union". Moreover, this goal is also mentioned within Article 1: "This Directive lays down minimum requirements designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers"<sup>231</sup>. However, despite the fact that the Work-Life Balance Directive will have a great impact in some MMSS (as before the Directive, 11 MMSS did not provide for paternity leave of two weeks and few MMSS provided for parental leave that is both paid and includes at least two non-transferable months), it sets only minimum common standards, and in some MMSS, there already are work-life balance measures that go beyond some or all of its provisions<sup>232</sup>.

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<sup>226</sup> Milotay, N. (2019). A new directive on work-life balance. European Parliamentary Research Service. p. 2. Available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2018\)614708](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2018)614708).

<sup>227</sup> Ibidem, p. 6.

<sup>228</sup> European Parliament and Council of the European Union. (2019). Directive (EU) 2019/1158..., op. cit., p. 85.

<sup>229</sup> Council of the European Union. (2010). Council Directive 2010/18/EU..., op. cit.

<sup>230</sup> Caracciolo di Torella, E. (2020). One more step along the way..., op. cit, p. 74.

<sup>231</sup> Ibidem, pp. 81-85.

<sup>232</sup> ETUI contributors. (2022). Reshaping the Work-Life Balance Directive with Covid-19 lessons in mind. In: ETUI, The European Trade Union Institute, p. 11. Available at: <https://www.etui.org/publications/reshaping-work-life-balance-directive-covid-19-lessons-mind>.

Focusing on the substantive rights included within the Directive, first of all, Paternity leave is expressly provided in Article 4(1), granting a right to take at least 10 working days in connection with the birth of the child<sup>233</sup>. Although many MMSS already provide this right, it is the first time that the EU legislator recognises it as an individual right<sup>234</sup>. Nonetheless, Article 4 could have gone further, specifying that in certain cases, such as when the father does not live with the mother or the mother is a single parent, she could nominate a friend or a relative who lives close by for the purpose of using the leave<sup>235</sup>.

In addition, Article 5 provides for an individual right to parental leave<sup>236</sup>. While it is not new, the Directive seeks to strengthen the right in order to encourage fathers to be more involved in the care of their children and therefore contribute to equal distribution of care between women and men. In this regard, Recital 29 states that so as to incentivise workers, men in particular, to take the periods of leave, the payment or allowance should be set at an “adequate level”<sup>237</sup>. Nevertheless, the Directive does not further specify this limit and leaves the final decision to the MMSS, which could lead to creating disparities between them and might not encourage fathers to take advantage of the leave. Thus, it is unfortunate that Article 5 is not more specific, and it will be crucial to see how this requirement will be interpreted by the CJEU.

Moreover, Article 6(1) recognizes an individual right for workers to take carers’ leave for five working days per year<sup>238</sup> and Article 6(2) suggests that MMSS may extend its duration by reference to the person in need of care or support<sup>239</sup>. Recital 27 further highlights the scope of this right so as to provide women and men with greater opportunities to remain in the workforce<sup>240</sup>. In this regard, even though it is the first time

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<sup>233</sup> «1. Member States shall take the necessary measures to ensure that fathers or, where and insofar as recognised by national law, equivalent second parents, have the right to paternity leave of 10 working days that is to be taken on the occasion of the birth of the worker’s child. Member States may determine whether to allow paternity leave to be taken partly before or only after the birth of the child and whether to allow such leave to be taken in flexible ways».

<sup>234</sup> Caracciolo di Torella, E. (2020). One more step along the way..., op. cit, p. 76.

<sup>235</sup> Ibidem, p. 76.

<sup>236</sup> «1. Member States shall take the necessary measures to ensure that each worker has an individual right to parental leave of four months that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement. That age shall be determined with a view to ensuring that each parent is able to exercise their right to parental leave effectively and on an equal basis (...).».

<sup>237</sup> «To increase incentives to workers who are parents, and to men in particular, to take the periods of leave provided for in this Directive, workers should be provided with a right to an adequate allowance while on leave».

<sup>238</sup> «1. Member States shall take the necessary measures to ensure that each worker has the right to carers’ leave of five working days per year. Member States may determine additional details regarding the scope and conditions of carers’ leave in accordance with national law or practice. The use of that right may be subject to appropriate substantiation, in accordance with national law or practice».

<sup>239</sup> «2. Member States may allocate carers’ leave on the basis of a reference period other than a year, per person in need of care or support, or per case».

<sup>240</sup> «In order to provide men and women with caring responsibilities with greater opportunities to remain in the workforce, each worker should have the right to carers’ leave of five working days per year. Member States may decide that such leave can be taken in periods of one or more working days per case. In order to take account of divergent national systems, Member States should be able to allocate carers’ leave on the basis of a period other than a year, by reference to the person in need of care or support, or by case. A continued rise in care needs is predicted, because of an ageing population and, consequently, the concomitant increase in the prevalence of age-related impairments. The rise in care needs should be taken into account by Member States when they develop their care policies, including with regard to carers’ leave. Member States are encouraged to make the right to carers’ leave available with regard to additional

that the EU legislator caters for the needs of working carers, other than parents, in practice, this provision is unlikely to introduce major changes in the lives of most carers, as many domestic legal orders already contain such provision<sup>241</sup>. Furthermore, Article 6 has some specific weaknesses: it relies on a very restrictive definition of carer (Article 3 d and e)<sup>242</sup>; although Recital 27 encourages MMSS to make the right available to additional relatives, it is not suited to cover all situations where care is needed; the limited duration of the right will be insufficient for those who have on-going responsibilities to care on a regular basis; and the fact that the right is unpaid will not encourage men and will therefore make it unlikely that they use the leave, reiterating the *status quo*. Consequently, it cannot be said that Article 6 provides for a policy framework on care, let alone a right to care.

Further, Article 9 strengthens the provisions of flexible working arrangements<sup>243</sup>. The Article goes a step further than the Parental Leave Directive<sup>244</sup>, which already granted parents returning from parental leave the right to request flexible working arrangements, and links flexibility to the concept of work-life balance<sup>245</sup>. However, it is questionable whether Article 9 can support parents and carers: it does not create a strong and enforceable legal entitlement, as it remains a right to request a change to working arrangements, rather than a right to obtain it; moreover, the Article mainly addresses the needs of professional workers, so workers with little control over their work, such as cleaners and nurses, might not be able to negotiate the changes they need in their working patterns and are unlikely to be in the position of using teleworking or reducing their working hours without a financial cost.

Apart from the four rights introduced above, the Directive also ensures their effectiveness: Article 10 states that the rights already enjoyed by a worker at the point when leave starts are maintained, and that a worker has the right to return to the same job, or to an equivalent post, at the end of the leave<sup>246</sup>; Article 11 prohibits less favourable treatment on the ground that a worker has applied for or made use of the

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relatives, such as grandparents and siblings. Member States can require prior medical certification of the need for significant care or support for a serious medical reason».

<sup>241</sup> Caracciolo di Torella, E. (2020). One more step along the way..., op. cit., p. 77.

<sup>242</sup> «1. For the purposes of this Directive, the following definitions apply: (...) (d) ‘carer’ means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State; (e) ‘relative’ means a worker’s son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership (...)».

<sup>243</sup> «1. Member States shall take the necessary measures to ensure that workers with children up to a specified age, which shall be at least eight years, and carers, have the right to request flexible working arrangements for caring purposes. The duration of such flexible working arrangements may be subject to a reasonable limitation (...)».

<sup>244</sup> Council of the European Union. (2010). Council Directive 2010/18/EU..., op. cit.

<sup>245</sup> Caracciolo di Torella, E. (2020). One more step along the way..., op. cit., p. 78.

<sup>246</sup> «1. Rights that have been acquired or that are in the process of being acquired by workers on the date on which leave provided for in Articles 4, 5 and 6 or time off from work provided for in Article 7 starts shall be maintained until the end of such leave or time off from work. At the end of such leave or time off from work, those rights, including any changes arising from national law, collective agreements or practice, shall apply. 2. Member States shall ensure that, at the end of leave provided for in Articles 4, 5 and 6, workers are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave (...)».

rights included the Directive<sup>247</sup>; and Article 12 prohibits both dismissal and all preparations for dismissal of a worker on the grounds that he or she has applied for or taken any of the rights of the Directive<sup>248</sup>. Although such provisions are welcomed, they remain insufficient to remove the difficulties individuals face because of caring responsibilities and to fulfil the aims of the Directive. In order to do so, workers should be protected not only against discrimination and dismissals for using the leaves and the rights but also from being discriminated because of caring responsibilities.

In addition, the Directive has two further weaknesses: on the one hand, it does not address the position of mothers. Any instrument on work-life balance can hardly be complete without contemplating mothers, so it is difficult to think of the Directive as anything other than a missed opportunity to address this matter: it could have included specific provisions regarding increasingly common situations such as in vitro fertilisation and surrogacy, as well improved dismissal protection for women returning from maternity leave. On the other hand, although both paternity and parental leave seem to lay the foundations for a stronger legislative framework in relation to men and care, a closer look shows that mothers are still regarded as the main carers.

Moreover, the COVID-19 pandemic has not revealed anything not known about the existing inequalities between women and men at the time that the Work-Life Balance Directive came into force, but the trends emerging during the pandemic in respect of gender equality provide various reasons for its re-evaluation<sup>249</sup>:

First, reports suggest that the increase in unpaid care work and related effects during the pandemic could have long-lasting negative implications for gender equality, as the fact that women have often reduced their working hours or given up work could affect their earnings in the short term, but could also affect their ability to re-enter the labour market or go back to full-time work, which would therefore not only affect earnings in the longer run, but also reinforce the unequal distribution of care responsibilities, and widen gender gaps in pay, pensions and employment. The proliferation of telework could also amplify challenges to gender equality and work-life balance, since it is often associated with increased availability, longer working hours, intensification of work and blurring of boundaries between work and private life, which could lead to entrenching gender stereotypes and inequalities in the distribution of care work, and even to an increased double workload for women. Second, by amplifying existing inequalities in unpaid care, the pandemic has made them even more visible: it has been a reminder of the fact that care work continues to be performed predominantly by women and that it is either not economically rewarded or poorly remunerated. Third, the pandemic has also drawn attention to other long-standing systemic issues, such as inequalities in pay, particularly in essential, female-dominated professions like the care sector.

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<sup>247</sup> «Member States shall take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6 or time off from work provided for in Article 7, or that they have exercised the rights provided for in Article 9».

<sup>248</sup> «1. Member States shall take the necessary measures to prohibit the dismissal and all preparations for the dismissal of workers, on the grounds that they have applied for, or have taken, leave provided for in Articles 4, 5 and 6, or have exercised the right to request flexible working arrangements referred to in Article 9 (...)».

<sup>249</sup> ETUI contributors. (2022). *Reshaping...*, op. cit., p. 15.

For all these reasons, it can be said that the COVID-19 pandemic has shifted the context, as compared with the time that the Directive was concluded, since it has exacerbated gender inequalities and underscored the need to take further steps to promote gender equality. It is therefore necessary to strengthen efforts to address gender inequalities in unpaid care and their consequences through both work-life balance and gender equality measures. And it is in this scenario where the Work–Life Balance Directive, as the central EU legislative instrument in the area, deserves renewed attention and reinforcement<sup>250</sup>.

## V. Conclusions

The EU considers itself “a global leader in gender equality”<sup>251</sup>, even while gender inequalities clearly persist in all its MMSS. As a matter of fact, the 2021 GEI edition shows that even though advances have been made over the past decade, progress has been very slow and there are still significant differences between countries, meaning that the gender gap, in all of its forms, remains<sup>252</sup>. Results also show that gender division of labour and unequal time spent on unpaid domestic work and care are currently among the main obstacles to gender equality<sup>253</sup>. Indeed, even though labour force participation across the EU has risen, with 79% of men and 67.3% of women employed in 2019 (albeit with a 0.9 points decrease in 2020 due to COVID-19, making it 66.2% women employed within the EU<sup>254</sup>), economic security for women has not, mainly because non-standard forms of work are more frequent among women, who are more likely than men to be in temporary employment, apart from the fact that women bear a significantly greater burden than men do when it comes to unpaid domestic work and care<sup>255</sup> (in 2020, 13.8% of women, as opposed to 1.2% of men, were inactive because they were looking after children or incapacitated adults<sup>256</sup>). All of that gender division of labour and employment related differences result in earning inequalities (with a 13% gender pay gap in 2020, only a 0.7 points decrease since 2019<sup>257</sup>), which at the same time lead to pension inequalities<sup>258</sup>, perpetuating the situation of inequality in which women find themselves. In this regard, throughout this paper, I have analysed the treatment of the principle of gender equality within the EU ever since its foundation, along with the weaknesses of each of the approaches.

By way of summary, since 1957, when Article 119 of the Treaty of Rome first established the principle that men and women should receive equal pay for equal work, equality between women and men has been very much present in the EU policy area, as shown in this work. From then onwards, the initial focus on pay and employment equality has evolved to include other areas of economic and social policy. At the same

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<sup>250</sup> Ibidem, p. 17.

<sup>251</sup> European Commission. (2020)...COM(2020) 152 final..., op. cit., 20p.

<sup>252</sup> European Institute for Gender Equality (2021). Gender Equality Index 2021, op. cit., p. 13.

<sup>253</sup> Ibidem, p. 33-36.

<sup>254</sup> European Commission. (2022). Commission Staff Working Document. 2022 Report on gender equality in the EU. SWD(2022) 54 final, p. 15.

<sup>255</sup> European Commission, Directorate-General for Justice and Consumers. (2021). 2021 Report on gender equality in the EU, Publications Office, p. 19-35. Available at: <https://data.europa.eu/doi/10.2838/04403>.

<sup>256</sup> European Commission. (2022)...SWD(2022) 54 final..., op. cit., p. 15.

<sup>257</sup> Ibidem, p. 24.

<sup>258</sup> European Commission, Directorate-General for Justice and Consumers. (2021). 2021 Report..., op. cit., p. 19-35.

time, the approach has shifted from legal protection against discrimination based on sex to include more proactive measures, such as gender mainstreaming or positive discrimination actions. Therefore, it cannot be denied that EU institutions have engaged in gender policy-making.

However, neither can it be overlooked that, ever since its inception, the EU's gender and social policies have been conceived as ancillary to the economic project of market integration, rather than as an independent target. That is, economic and social domains have always had an unequal status within the EU, as economic goals have taken precedence over social goals, which have been included primarily to ensure the functioning of the single market, rather than as a way to foster a more cohesive society.

Certainly, as demonstrated throughout this paper, the pre-eminence of the economic domain during the first years of the EEC meant that any intervention on other areas needed to be justified by economic reasons. Thus, it becomes clear that the aim of Article 119 was not to introduce the principle of gender equality, but to avoid social dumping. That is, it was a matter of economic interest, rather than a commitment to gender equality and women's rights, and it is exactly this approach that has marked the history of all EU gender equality policy making. This preference for economic goals was followed by the Treaty of Amsterdam, that included gender equality as one of the principles underpinning the future development of European integration, summarising the position of gender equality within the EU at the time: it remained just a principle necessary for the development of the economic integration project, which still constrained the scope of action in the area of equal rights.

Besides, as the primacy of economics in the process of European integration led to the introduction of the principle of equality of sexes for the first time in an employment context, this pre-determined both the site of gender equality and the means for its achievement, meaning that, within the EU, women acquired equality as workers rather than citizens. As a result, the focus of EU gender equality policies has historically been placed on the official labour market, turning a blind eye to the hardships women face in the private sphere relating to work-life balance and therefore perpetuating their role as primary carers without challenging gender divisions of labour in the private sphere.

The primacy of formal equality (at the expense of substantive equality) within the EU continued to be perpetuated by the CFREU, which Articles 21 and 33 mainly provided for the basis for gender equality within the Charter and for any future developments, even if, as analysed, several weaknesses can be pointed out not only in relation to its introduction of the gender equality principle and the right to work-life balance, but also regarding the absence of some rights of key importance to women such as contraception and abortion rights; the weak formulation of some fundamental rights; the cut in the level of recognition of gender equality within the case law of the CJEU; and the failure to mainstream gender in all EU policies.

Regarding gender mainstreaming, officially introduced via the Treaty of Amsterdam, it has already been mentioned that by the time of the negotiations of the Treaty of Lisbon its inefficient implementation and the need for a more effective approach to correct the weaknesses of the EU framework in this area were clear. Nevertheless, this Treaty equally failed to mainstream gender effectively, as it remained

absent from a number of key areas such as culture, education, health, finance, foreign or security policy, among others.

Taking into account all of the above, in this paper, it has ultimately been analysed whether the EPSR can be considered as a tool to modify the existing European acquis on gender equality and therefore achieve the much needed equality between men and women. Nonetheless, it has come to the conclusion that the Pillar merely takes up social policies already existing in the EU social acquis without introducing any substantial new features, thus reiterating the historical functionality of social and gender policies with respect to the economic project of market integration, and certainly not contributing to the achievement of real gender equality.

In the light of all of this, it can be observed that to accomplish social and gender progress the EU needs to really commit to the goal of gender equality through a clearer action relating to all gender inequalities, both in the public and in the private spheres.

Consequently, through this paper, the reflection calls for the need to develop a brand new policy framework that not only improves the current gender perspective of the EU's legislation, but also introduces an effective and comprehensive approach to gender mainstreaming in all EU policies.

Hence, to this end, it is considered that the EU should, first of all, proceed to reformulate its vision of the relationship between the economic and social domains in order to remove the functional link between the two, for only once true parity between the economic and social spheres has been reached will we have the basis for developing policies that actually contribute to achieving equality between women and men.



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