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“Towards a new European approach on positive
action within gender mainstreaming?”

The impact of the Beijing declaration on EU
policies and law.

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Abstract:

The European gender equality approach is a developing, multifaceted concept, based on economic-centred principles of equal treatment between men and women in employment. Furthermore, since 1995 has the European gender equality approach been determined by the international concept of gender mainstreaming having at its core the substantive idea of interventions to achieve gender equality by means of positive action. Looking retrospectively at the general development of European equality laws from 1951 to 1995, there has been a shift towards fundamental human rights in the field of gender equality law as a general principle of European law. The principle of gender equality was for a long time limited to the field of employment-related sex discrimination, until a newly adopted systematic approach, namely gender mainstreaming and the strengthening of the legal basis for positive action measures within EU-antidiscrimination law, were introduced. Moreover, the former purely market unifying European legal system went through considerable changes towards a regime that recognises and incorporates a human rights dimension. During, the development of European law, became the principle of equal treatment and gender equality constitutionalized as general principles of community law and recognized as part of its human rights dimension. Turning to gender mainstreaming and the new approach on positive action measures within gender equality law, the Union made since 1951 considerable progress in that field, recognising as the essential community method “gender neutral” legislation and optional positive action measures to tackle gender equality within the community. Thus, the EU has started to take on its extended competences and the duty to apply these newly established human rights dimension and to eliminate any discrimination based on gender within the community. The research design is based on a descriptive literature review within the research area of gender mainstreaming. The research concentrated on the development of the legal framework of the European Union from 1951-2010 and one intervention, namely the Beijing Conference in 1995.

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Table of Abbreviations

<i>Abbrev.</i>	<i>Full name</i>
AGG	Allgemeines Gleichstellungsgesetz, The General Act on Equal Treatment
BE	Belgium
BGleiG	Bundesgleichstellungsgesetz
CDEAW	Convention on the Elimination of all Forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
COM	European Commission
DK	Denmark
EEC	Treaty of Rome
EC	Treaty of Amsterdam
ECOSOC	United Nations Economic and Social Council
ECJ	European Court of Justice
EU	European Union
FR	France
GER	Germany
GM	Gender Mainstreaming
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
IMG GM	Inter-Ministry Working Group on Gender mainstreaming
MS	Member States
NL	Netherlands
SEA	Single European Act
SEM	Single European Market
SEW	Sweden
SPA	Social Policy Agreement
SPP	Social Policy Protocol
TEU	Maastricht Treaty, Treaty on the European Union
TFEU/ TEU	Lisbon Treaty, Treaty on the functioning of the European Union, Treaty establishing the European Union
UK	United Kingdom
UN	United Nations
UNCFHR	United Nations Charter on Fundamental Human Rights
UDHR	Universal Declaration of Human Rights
QMV	Qualified Majority Voting

1. Introduction

This study will be a comparative trend study about the possible influences of the "Fourth World Women Conference in Beijing 1995" within Europe by evaluating possible gender perspective changes within the European Union (EU) legal system. Turning towards the question if "gender mainstreaming" (GM) firstly defined in Beijing, has yet arrived within the political, legal and daily regime of the EU in form of positive discrimination?

When defining gender mainstreaming as a concept, it has to be seen as a dual approach: GM, is a policy instrument to achieve gender equality, introduced for the first time at the UN Fourth World Conference on Women in Beijing in 1995 (Hafner-Burton & Pollack, 2009, p. 105). Additionally, GM is a multidisciplinary discipline, pursuing to implement gender-sensitive practices and norms in the structures, processes and environment of public policy making, in order to achieve substantive gender equality (Daly, 2005, p. 435). In this sense gender mainstreaming has to be understood as the process to achieve a certain end, namely to achieve gender equality, development and peace, which are equivalent to the targets defined by the Beijing Declaration (Brownlie & Goodwin-Gill, 2006, pp. 205-219).

Moreover, the peculiarity of GM is that it presents itself as a means, an instrument to achieve a broad goal, namely human rights the very fundament for non-discrimination and equality of all human beings without distinction in the world. The concept of GM lies within the theory of human rights. Fundamental is in this context the Universal Declaration of Human rights 1948 (UDHR), which seeks to ensure non-discrimination and equal treatment of men and women throughout the world. Various policy approaches like gender mainstreaming were introduced to fulfill the objectives of the UDHR, these aims are for example defined in Article 1 and 7 UDHR¹(Brownlie & Goodwin-Gill, 2006, pp. 23-26);

Positive action or positive discrimination measures were firstly mentioned on an international level in Article 2.2 in the Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in 1966². Followed by the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), in 1979 and thereby in Article 3³ and Article 4(1)⁴ (Russell & O Cinneide, 2003, pp. 587-588). Therefore, positive action, positive discrimination or affirmative action measures can be seen as evolving and progressing instruments to achieve GM as a long-term policy goal within the international community.

¹ **UDHR 1948, Article 1** "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (Brownlie & Goodwin-Gill, 2006, p. 24)".**Article 7** "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination on violation of this Declaration and against any incitement to such discrimination (Brownlie & Goodwin-Gill, 2006, p. 25)."

² **Article 2.2 ICERD 1966**;"States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measure to ensure the adequate development and protection of certain racial groups or individual belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objective for which they were taken have been achieved."(Brownlie & Goodwin-Gill, 2006, p. 23)

³ **Article 3 CEDAW 1979**:"States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."(Brownlie & Goodwin-Gill, 2006, p. 64)

⁴ **Article 4(1) CEDAW 1979**:"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards, these standards shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."(Brownlie & Goodwin-Gill, 2006, p. 65)

Furthermore, this study seeks to evaluate the development of the EU's legal framework through a descriptive and comparative study. The analytical framework analysis (as shown in diagram 1.1 in the Annex) will be focusing upon the possible changes in the development before and after the introduction of the Beijing Declaration in 1995. This can be used to make trend indications if there has been a change in the development of European law towards greater gender sensitivity and equality in Europe (True, 2003, p. 378). Gender sensitivity is the practice of implementing gender equality through gender-sensitive practices and norms in the structures, processes and environment of public policy, taking into account a perspective of gender awareness by reflecting a gender solution towards gender equality conscious policy making (Daly, 2005, p. 435).

The justification and reasons for conducting this study rest on the question whether the various commitments made by the EU and its members to fulfill the Beijing targets, to achieve the basis for human rights and to take on their responsibility to achieve a gender perspective reflected within their legal frameworks, are achieved.

The general research area will be "gender mainstreaming", thereby focusing upon this specific instrument introduced by the Beijing Conference in 1995. The process of incorporation of human rights into the legal framework of the EU will be highlighted, namely laws, directives, regulations and case law regarding non-discrimination and positive actions measures to achieve gender equality within the Union. Turning towards the focal point if there has been a change of agenda after 1995 until 2010, centering upon the central question;

"Has gender mainstreaming reached European law by means of positive action,
15 years after the Beijing Conference?"

Also, posing the first sub question of this paper:

"To what extent did the European legal system change from a purely market based legal system
to a legal regime which has incorporated a fundamental human rights dimension?"

The emphasis will be upon the development of the legal framework of the EU starting in 1951, focusing on the extent of incorporation of the principles of equal treatment, opportunities, basic human rights matters, and thereby concentrating on one specific instrument in particular, namely positive action. This instrument was chosen in order to evaluate to what extent equality as a human rights dimension and the notion of non-discrimination has been incorporated not just *formally* into the legal system of the Union, but also *substantially* as an action measure in practice.

The research design of this study will be based on a descriptive dual analysis of the *de jure* and *de facto* development of gender equality law in the EU. Firstly, mentioning the theories and concepts serving as the basis of this study. Secondly, starting in 1951 until 2010, a descriptive analysis of European legal documents, case law, Directives and Treaties will be done, which will be the *de jure* analysis of the paper to assess the development of sex-discrimination and gender equality laws in the EU. Thirdly, this analysis will be split into two parts of legal evaluation, to compare the legal framework development of the European Union with regards to its gender equality laws. Furthermore, the Beijing Conference and the introduction of policy concept of GM are taken into account as a point of intervention.

All in all, this paper seeks to compare the legal development of European gender equality law before and after the introduction of the Beijing Declaration in 1995 and the possible influence of the policy concept of GM with regard to the EU's perspective towards gender equality and basic human rights. Moreover, there will be a *de facto* analysis looking at the extent to which the gender mainstreaming approach of the European Union in case law and the ruling of the European Court of Justice has changed the gender perspective in a society, in a country specific case namely in Germany.

1.1 Justification of the study- the importance of gender equality, positive action measures and gender mainstreaming within the EU

This study seeks to evaluate to what extent gender mainstreaming has reached European law in form of positive actions. In the focus is the Beijing Conference in 1995, raising the question if this conference changed the European perspective from a sex equality dimension toward gender sensitive agenda?

Turning towards the main targets of the Beijing Declaration, these are the achievement of equal rights, equal opportunities and economic equality. Therefore, the declaration calls upon actions for equality to achieve development and peace worldwide (Brownlie & Goodwin-Gill, 2006, p. 203). One of the possible policy instruments to achieve these targets are positive action measures, which can be used to achieve substantive equality.

However, one might pose the question why the stated research question in the field of GM and positive action is of relevance? Why is it of relevance to take a closer look at the development of European equality law, or more specifically whether or not positive action measures are incorporated in the legal framework of the EU? Gender equality is the fundamental basis of a non-discriminatory society, to enable people to live in dignity and respectively acknowledging their human rights. The Beijing Conference commits signatory governments to ensure gender equality. Nevertheless, the question remains whether change towards gender equality and non-discrimination in the legal framework of the EU really occurred due to their commitments made at the Beijing Conference or if basic equality laws were already in place and no reform-oriented measures were taken?

This poses afresh the question on whether the EU has taken on its responsibilities and whether the EU has progressively transformed its legal framework towards a more human rights based regime, recognising a gender sensitive framework to achieve gender equality? Or has there been no change regarding the possibility of positive action measures and a human rights dimension aside the Community essential role as a market unifier?

Therefore, the general development of EU law from 1951 to 1995 will be retrospectively described with the focus on equality laws, to get a basic understanding what the EU had achieved in that field of law. Furthermore, assessing to what extent positive action measures already reached the aforementioned European legal framework? The focus on positive action measures was chosen, despite the contested nature of the concept, it describes substantive measures to achieve equality. Thus, the degree to which these measures were used to support and foster gender equality can be analysed and evaluated, in order to estimate the extent of change and commitment made by the EU in the field of gender equality and human rights.

If there has been a transformation process of the legal framework, one would expect that it become visible in changes and alterations of the European legal framework to allow for positive actions as well as in ECJ case law with favourable rulings regarding gender equality (Brzezińska, 2009, p. 30).

2. Concepts and Theories

In this section the basis theories and concepts of the study will be defined, elaborated and assessed, which are forming the conceptual framework of this study. Firstly, the term of human rights will be defined, as it is to be understood on an international level defined by the Universal Declaration of Human rights. Furthermore, the European community dimension of human rights development will shortly be illustrated.

Secondly, social movement theory will be an important element of this study. Social movement involvements in the field of gender equality, human rights and economic demands are elemental for the understanding of the general development of the concept of gender mainstreaming and the evolvement of European equality law. Thirdly, the European equality approach towards gender equality will be defined. This approach is based on a multifaceted policy agenda, defined by the principle of equal treatment, non-discrimination and the use of the policy measure called positive action in order to achieve formal and substantive equality.

Fourthly, the newest systematic policy approach on the European equality agenda, namely gender mainstreaming as it is to be understood within the EU, will be defined and explained extensively as it is the area of research this study will focus on.

Summing up, these theories and concepts will serve as the conceptual framework on which this studies elaboration and analysis will be based.

2.1 The Human Rights Dimension

Firstly, the term of human rights will be defined, and the European community dimension of human rights development will shortly be illustrated. Looking closely at the extent to which the European market unifying system changed during the past towards a legal regime with a human rights dimension. This will be an ever-reoccurring focus throughout this study.

The international definition on human rights is founded on the basic assumption that equality and non-discrimination of the sexes is a necessary end to achieve universal human rights.

Quoting Article 2 of the Universal Declaration of Human Rights “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex [...] or other status” (Brownlie & Goodwin-Gill, 2006, p. 24).

Accordingly, human rights and fundamental freedoms are inherent elements of the foundation of the European Union. These are the fundamental values of the Union, supporting pluralism, non-discrimination, tolerance, justice and equality between women and men.

Although the original EC treaties did not provide for a human rights dimension, the preamble of the Treaty of Rome 1957 refers to the United Nations Charter on Fundamental Human Rights. The growing centrality of human rights developments in the European legal order started in the late 1960s. The European legal order’s purpose was of a functional matter, in order to act as a market unifying system. Therefore, the European legal system was rather seen as an instrumental tool for political and social change, towards a common European integrated economic system (Von Bogdandy, 2000, pp. 1307-1308).

Human rights were gradually introduced over time, on the one hand, at the core of the supranational order and, on the other hand, also as a founding function in itself for the whole of the European legal order. Human rights within the process of the European law development gave a new dimension to the legal system, namely giving the supranational and national legal orders a constitutional type of relationship through direct effect and supremacy (Von Bogdandy, 2000, p. 1333). As an example, see the ruling by the ECJ in the *case Van Gend en Loos* (European Court of Justice, 1962), which will be elaborated later in this study. These developments towards human rights law were pursued in general on the basis of Treaties laying down the EU competences, which were fairly weak prior to the Amsterdam Treaty of 1997.

In 2000, the introduced Charter of Fundamental Rights of the European Union was drafted, transforming the Unions legal system. The CFREU is nowadays often taken into account by the ECJ as an authoritative source of fundamental rights that must be respected by the EU. This Charter has become a binding catalogue of fundamental rights in the European Union since the entry into force of the Lisbon Treaty, Article 6 (1) TEU⁵ (Prechal & Burri, 2008, p. 5) All in all, one can witness that the European law system went through considerable changes from a purely market unifying system, towards a regime that recognizes and respects human rights⁶. Having at its core the principle of non-discrimination, equal treatment and gender equality constitutionalized as fundamental human rights and hence being nowadays-general principles of community. These instruments give the universality of human rights, the basis of equality regarding all people⁷ (Smith, 2010, pp. 189-193).

2.2 Social movement theory

Secondly, social movement theory will be an important element of this study. Social movement involvements in the field of gender equality, human rights and economic demands are elemental for the understanding of the general development of the concept of gender mainstreaming and the evolvement of European equality law.

Social movement theory conceptualizes social formations through which collectives give expression to their specific interests and concerns, regarding their rights, social demands, or the well-being of others. The principle of social movement summarizes these actions as the engagement of these collective actions as important vehicles for articulating and pressing of these collective interests and claims. Most of the significant developments and changes throughout human history in Europe, such as the reformation, revolutions, democracy and the human rights movement were motivated through the working and influence of social movements. Social movements are one form of collective actions, goal-oriented joint actions that are pursuing a common objective and in general seeking a change of the status quo by challenging the existing authority (Snow, Soule, & Kriesi, 2008, pp. 6-8).

Gender mainstreaming in this sense is an international policy that was developed within the international women's movement through feminists working in the area of women rights and development (Carney, 2002, p. 19). GM policies are meant to re-address the inequalities that result from the social construction of gender following a feminist agenda. However, GM does not simply seek to emancipate women, but change the existing social structure to an extent at which point it does not disadvantage anyone, neither female nor male (Carney, 2002, p. 20). Furthermore, within the theory of feminism, gender mainstreaming can be understood within three feminist political strategies (social movement theories), namely inclusion based upon the principle of equality, the strategy of reversal based on the principle of difference and the strategy of displacement based in the principle of diversity (Verloo, 2005, pp. 2-3).

The European Union agenda on equality is, nowadays, not solely centering on equal pay and treatment in an economic sense, but is aiming towards an equal opportunities agenda. This gender

⁵ Lisbon Treaty (**Article 6 (1) TEU**); 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 (Busby & Smith, 2009).

⁶ The extent to which the European legal order has changed from a purely market unifying system towards a regime with a human rights dimension, will further be discussed and evaluated throughout this study. This section was meant to give a short illustration of the basic development of the human rights dimension with the European legal system. This will be further elaborated, for example, in section 4.6, 5.8 and 5.9 of this study.

⁷ **Art.1 UDHR**, "Free and equal in dignity and rights", non-discrimination on any grounds is key to ensure equal enjoyment of those rights and freedoms for every human being (Brownlie & Goodwin-Gill, 2006, p. 16).

mainstreaming agenda is based upon social movement theory stemming from political opportunities, mobilizing structures and strategic framing by T. Rees (Pollack & Hafner-Burton, 2000, pp. 432-434).

2.3 The gender equality approach in the EU

Thirdly, the European equality approach towards gender equality will be defined. This approach is based on a multifaceted policy agenda, defined by the principle of equal treatment, non-discrimination and the use of the policy measure called positive action in order to achieve formal and substantive equality.

Gender equality in the EU has greatly evolved in various fields of the economy, decision making as well as social and civil life, incorporated into the principle of non-discrimination. Gender equality forms an integral part of the European strategy for economic growth and development. Hence, gender equality defined by the principle of equal treatment in the EU. This notion is defined as the equal access to employment, equal pay for equal work, promotions and dismissals the field of employment (Brzezińska, 2009, pp. 6-8).

Thus, nowadays the EU tries to achieve gender equality within its competence in the field of social policy through three main approaches. Firstly, through the principle of equal treatment, secondly, positive action and, thirdly, through the newest concept namely gender mainstreaming. The main objectives of the European equality approach is to improve the situation of women in society (Brzezińska, 2009, p. 8).

Furthermore, gender equality is a cornerstone of any democratic state. Equality, for example, of persons before the law or equality of access to education is expanding especially towards principle of non-discrimination on any grounds. However, equality will not necessarily result in equality *de facto*. Therefore, also if *de jure* equality before the law is ensured, it is often depending on action of positive discrimination policies, where discrimination in favor of the person or group in a poorer situation is allowed, like women quota in the EU (Smith, 2010, p. 190).

There are two basic forms of equality from a policy perspective of view, which are *formal* and *substantive*, respectively. Formal equality presumes that women and men are alike, but does not recognize that there are substantive differences between men and women. Substantive equality recognizes male dominance and tries to counterbalance it and allows for special positive actions measures. Significant is that this concept acknowledges the differences between the genders and accords women special treatment where appropriate, thus, ensures equality as sameness of treatment (Brzezińska, 2009, p. 7). There are, moreover, the notions of *formal* equality in law and *substantive* equality in practice. The notion of *formal* equality means from a legal perspective the recognition of the presumed equality of men and women before the law. While, *substantive* equality refers to the assessable equality between men and women in society moreover their statistically measurable equality in practice.

The notion of sex discrimination laws was pushed forward by feminist movements in the 1970s so that there are today in the EU several bodies established for the promotion of gender equality like the Advisory Committee for Women and Men and the European Institute for gender equality. The law on sex equality developed, firstly, in the field of soft law (Craig & Búrca, 2007, pp. 843-845) since the member states were very reluctant in the 80-90s to give the EU further competences in the field of equality. These soft law measures were based on EU equality objectives, formulated as guidelines, declarations and opinions issued by the European Union to the member states.

However, soft law measures in contrast to directives, regulations and decisions are not binding, but soft law can nevertheless generate selective⁸ legal effects (Eurofound, 2011). The motivation by the Union changed in the mid 90's the Union as it wanted to show that it was not merely about achieving economic goals. Furthermore, extended the ECJ its scope in the field of sex equality law⁹ (Chalmers et al., 2010, p. 12).

2.3.1 Equal treatment & Non-discrimination

Turning towards the first two cornerstones of the European Unions approach to achieve gender equality namely the principle of equal treatment and nondiscrimination.

Firstly, the principle of equal treatment has in general a “market unifying” role in the European Union for the first time codified in the Treaty of Rome former Article 119 EEC nowadays Article 141(1) TEU (Craig & Bùrca, 2007, p. 518), noting in relation to equality rights that “[e]ach member state shall ensure that the principle of equal pay for male and female workers for equal work of equal value is applied”¹⁰.

Moreover, the principle of equal treatment, grown into a fully-fledged constitutional principle of the EU legal order with regard to citizen's rights, gender equality rights and underlined by the economic objectives of the Union. The notion of the right of equal treatment was used by the ECJ to develop a range of citizen's rights accompanying the free movement rights. The principle has especially been used to achieve gender equality in field of employment.¹¹ One has to note that the community approach towards gender equality was founded on the believe that social progress would be achieved through the creation of a common market generating development and that this would be underpinned by the maxim of non-discrimination¹².

Therefore, can the principle of equal treatment¹³ be interpreted rather flexible and in context to the common market guiding objectives, determined by three categories; 1. formally discriminatory, 2. indirectly discriminatory, and 3. restrictions which impose a double burden on the imported product and services (Craig & Bùrca, 2007, p. 523).

Hence, the principle of equal treatment has a “regulatory” role as an intervention mechanism within the market, the Community legislator is obliged to act in accordance with the principle of equal treatment. This principle is applied to prevent arbitrary distinction being made by competing producers and its application can, thus, be understood as a means of ensuring equal conditions of competition in the single market for men and women (Craig & Bùrca, 2007, p. 524).

⁸ Even so, soft law does not have a legally binding effect, it can have a selective legal effect. Thus, soft laws can be used for the interpretation of law and the development of policies in practice. Hence, soft law can only exercises a rather informal “soft” influence, but for example, as an illustration of possibilities it can have a “selective” effect in certain legal fields and on policy developments. Therefore, is soft law a more flexible instrument to achieve policy objectives, as well as it of interpretative assistance for the interpretation of legal texts for the ECJ (Eurofound, 2011).

⁹ Case *Defrenne v Sabena* the Court of Justice (ECJ) hold that Article 157 TFEU had direct effect on the ground of discrimination. Transsexuals discrimination in the case P v S and Cornwall Country Council (European Court of Justice, 1996b) as an infringement of the Equal treatment Directive 2006/54/EC was found by the ECJ (Chalmers, Davis, & Monti, 2010, pp. 547-549).

¹⁰ Treaty of Rome: **Article 141(1) EEC**; 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 (Busby & Smith, 2009).

¹¹ Treaty of Amsterdam **Article 13** (1997) “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”(Busby & Smith, 2009).

¹² Treaty of Rome **Article 7 (EEC)** (now 12)“Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination”(Busby & Smith, 2009).

¹³ 1978, *Cassis de Dijon Case*, (Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein) C-120/78, case regards the principles of non-discrimination, equal treatment and market access (European Court of Justice, 1979a).

Secondly, in relation to the principle of non-discrimination laid down in the Treaty of Rome in 1957, provided limited grounds for the development of equal opportunity law or the extension of this equal treatment concept (Chalmers et al., 2010, p. 10). Stating that any characteristic of all individuals or groups irrespectively may not be used to deny access to the market or may produce effects that systematically disadvantage persons possessing those characteristics to take up employment, this definition refers to the equal treatment and non-discrimination principle.

The objectives to achieve the European common market are founded on the principles of equal access¹⁴, equal treatment and equal pay¹⁵. Therefore, prohibiting any national measures that are both directly and indirectly discriminatory with regard to the four freedoms. Furthermore, any measure that is substantially hinder access to the common market, with regard to non national good and services as defined in the *Bilka case*¹⁶ falls also under the prohibition of the non-discrimination concept (Barnard, 2007, p. 536).

The principle of non-discrimination is the essential basis for establishment of a Single European Market (SEM). EU law nowadays, additionally, regulates non-discrimination on the grounds of sex, gender, race, ethnic origin religion or belief, sexual orientation and so forth incorporated in Article 13¹⁷ EC (Chalmers et al., 2010, p. 23).

Thus, this notion of non-discrimination underlines the creation of the unified market and is applied to facilitate the rights of equality and equal access to products, services and persons regardless of their national origin in the EU and hence can be used to apply gender equality rights (Chalmers et al., 2010, pp. 10-13).

2.3.2 Positive Action

The third cornerstone of the EU to achieve gender equality is through positive action measures. This concept of positive action measures must not be misunderstood as an equivalent to the concept of positive discrimination, affirmative action or reverse discrimination.

Positive discrimination can be defined as an extreme form of positive action, which seeks to increase the participation of women by means of preferential treatment, for example though the use of quotas.

Positive discrimination emphasizes a shift in contrary to positive action, from equality of access to the creation of preferential treatment for women, which is more likely to result in substantive equality as an outcome. Another extreme form of positive action measures are affirmative actions, which include a vast range of measures, and allow for the infringement of the principle of equality. In sum, those measures are more result-oriented than positive action measures, in order to achieve substantial equality. Positive discrimination and affirmative action, just like positive action measures, were created in order to benefit an underrepresented group, justified as countering the effects of past discrimination for example through quotas regarding guaranteed employment in certain fields or in universities (Brzezińska, 2009, p. 15).

¹⁴ Treaty of Rome **Article 67 (1) (EEC)**; During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested (Busby & Smith, 2009).

¹⁵ Treaty of Rome **Article 56 (1) (EEC)**; The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health (Busby & Smith, 2009).

¹⁶ *Bilka Case*-170/84, ECJ found that the case was contrary to Article 119 EEC, and recognised indirectly discriminatory measures (European Court of Justice, 1986).

¹⁷ Treaty of Amsterdam **Article 13 (EC)**; Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Chalmers et al., 2010, p. 26).

The aforementioned measures are to be distinguished from reverse discrimination, which is an exception to the rule of equal treatment in cases where no common markets rights are invoked and the competences for that matter lie not outside the scope of community law¹⁸. Cases of reserve discrimination, as in the case *Cassis de Dijon*¹⁹ or *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (European Court of Justice, 1979b) are defined where individuals are only subject to national law and member states are therefore, entitled to apply higher standards to their own nationals, but no one else living in their jurisdiction (Craig & Búrca, 2007, p. 528).

Turning to the measure in question, positive actions is an active promotion to support minority groups which are in general weaker position than the dominant group in society (Smith, 2010, p. 190). Therefore, involve positive actions the adoption of specific measures on behalf of the disadvantaged group, in order to overcome their unequal position in society, such as system of quotas (Rees, 2005, p. 561). Starting in the early 1970s, the member states recognized the need for a more coherent model on gender equality reaching further than sole non-discrimination measures. Hence, the invention of positive intervention beyond the scope of the labour market²⁰ resulted in the first Equal treatment Directive 76/207/EEC, laying down in article 2.4 the first possible provision for EU legislation in the field of gender based positive actions (Brzezińska, 2009, p. 11).

The ECJ as well as the Human Rights Committee have confirmed that positive action policies are compatible with international human rights law. Positive action measures seek, in general, discriminate the dominant group, but to equalize the standing for the poorer group to that of the dominating. One can see this approach for example in the case of *Marshall* (European Court of Justice, 1997)²¹ (Smith, 2010, p. 192). The principle of positive action does not seek to give the “minority” a better legal or societal position, compared to that of the dominant group but to achieve an adjustment of rights, to equalize these groups (Kang & Banaji, 2006, pp. 1064-1065).

Important to note is the shift from the prior *formal* equality rights approach through the principle of equal treatment towards a model of *substantive* positive action measures. This changed approach is determined by the policy concept of gender mainstreaming which has been shifting the perspective of the gender equality agenda in the EU. The former *formal* legal approach is gradually combined and shifting towards a *substantive* positive action model changing the equality approach throughout the European Union (Krizsán et al., 2011, pp. 36-40).

In the past foremost equality and non-discrimination was pursued through the equality of access. Nowadays, there has been a shift towards fundamental conditions, which are more likely to achieve the goal of gender equality designed to promote and benefit the disadvantaged group. Positive action measures in the EU are constrained mechanisms and can only be used if the legal framework allows for its. However, in contrast to the affirmative action model is the European

¹⁸ *Case Morson & Jhanjan v. Netherlands* (1982) (European Court of Justice, 1987), (Craig & Búrca, 2007, p. 528).

¹⁹ *Cassis de Dijon* Case- 120-78 (*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*), this is case is an example of the possibility of reserve discrimination, which is defined that individuals or in this case products of the nationality of the concerned member state can face higher standards than non-nationals or non-national products. However, applying the principle of mutual recognition of standards, member states are not entitled to apply these higher standards do non-national products, which leads to possibility of reserve discrimination of national products in return (European Court of Justice, 1979b).

²⁰ “Positive action programmes” created exclusively to protect women complemented the Directives from the 1970s. These programmes sought to promote equality beyond the workplace by highlighting the image of women portrayed in media, encouraging equal division of house duties, and advocating greater participation of women in politics (Mazey, 2002, p. 8).

²¹ The ECJ created a way for positive action measures of the European member states using Article 3(2) of the Treaty of Amsterdam, the right to adopt positive action measures referring to the Marshall Case in 1997 (Smith, 2010, p. 192).

positive action approach striving towards the achievement of gender equality without placing the dominant group in a worsen position (Brzezińska, 2009, p. 6).

2.3.4 Gender mainstreaming in the EU

Gender mainstreaming is the newest systematic policy approach on the European Community equality agenda. The concept was defined at the Beijing Conference in 1995, and has since than been taken on by the EU as its newest policy concept and as an end to achieve gender equality.

Gender mainstreaming was firstly defined in 1995 at the Fourth World Women Conference in Beijing. Furthermore, the Beijing Declaration was drafted and therefrom onwards broadly committing the international community to a systematic incorporation of a gender perspective into public policy making.

In accordance with this is the third approach of the EU to achieve gender equality through the concept of gender mainstreaming as policy instrument and policy end. This concepts seeks to incorporate gender sensitive practices throughout all governmental institutions and policies (Hafner-Burton & Pollack, 2009, p. 434). Since the UN conference, gender mainstreaming has been adopted by the EU as the basis for its gender policy, which has become more wide-ranging since the Treaty of Amsterdam (1997) (Walby, 2004, p. 454).

The European Commission in 1996 adopted a formal commitment and defined gender mainstreaming as, “[t]he systematic integration of respective situations, priorities and needs of women and men in all policies and with a view of promoting equality [...] implementing, monitoring and evaluation” (European Commission, 2001). In connection with this, the European Commission launched the Fourth Action Program on equal opportunities for women and men in 1996²² (Pollack & Hafner-Burton, 2000, p. 434). Followed by the fifth Action Program on Equal opportunities (2001-2006)²³ and the roadmap for equality between women and men (2006-2010), six priority areas for gender equality were identified. Namely, equal economic independence for women and men, the reconciliation of private and professional life, equal representation in decision-making, the eradication of all forms of gender-based violence, the elimination of gender stereotypes and the promotion of gender equality in third world countries (European Commission, 2010).

Furthermore, gender mainstreaming is a concept within the EU based upon a technocratic understanding that is interwoven with the concepts of displacement²⁴ and empowerment²⁵. In an international context, gender mainstreaming is to be understood as the supranational goal of

²² **Commission (95) 381 final**; The Fourth Action Program on equal opportunities for men and women were based on a wide six objectives: 1. promoting equality in the economy, 2. The reconciliation of working and family life, 3. A better balance in decision-making process, 4. Promoting the active exercise of citizenship right by women who are nationals or resident in the EU, 5. Mainstreaming 6. Supporting implementing, monitoring and assessment of the Action Program (European Commission, 1995).

²³ **Council Decision 2001/51/EC**; establishing the fifth action program on equal opportunities relating to the community framework strategy on gender equality covering three objectives namely; 1. To promote and disseminate the values and practices underlying gender equality, 2. To improve understanding of issues related to gender equality, including direct and indirect gender discrimination and multiple discrimination against women, 3. To develop the capacity of players to promote gender equality effectively in particular through support for the exchange of information and good practice and networking at community level (Council of the European Union, 2000).

²⁴ The concept of displacement is an integral part of gender mainstreaming, describing the on-going struggle in the process to enable women to break free from their societal role models in modern society based on biological sex (Verloo, 2005, p. 361).

²⁵ Empowerment, is a strategy within the concept of gender mainstreaming, addressing the gender hierarchies and tries to engender women as subjects suited for certain role models in society. Empowerment is understood in the sense that women should be enabled with the understanding and empowers, to enable them to establish counter measures related to the understanding of the multi-layered power dynamics which lead to gender inequalities (Verloo, 2005, p. 361).

gender equality (Krizsán et al., 2011, pp. 36-40), while being comprised of a dual approach to enable and constrain through positive actions (Smith, 2010, p. 193). Due to its nature, gender mainstreaming can be seen as a transforming strategy and the leading concept towards gender equality in society (Hafner-Burton & Pollack, 2009, pp. 433-435).

Summing up the European gender equality approach is a developing three-folded concept based on the economic centered principle of equal treatment, the substantive equality idea of interventions through positive actions and the international concept of gender mainstreaming.

3. Methodology

This study will be based on a descriptive literature review within the research area of gender mainstreaming. The research will be concentrated on the sharpening and development of the legal framework of the European Union from 1951-2010 and one intervention, namely the introduction of the Beijing Declaration in 1995. The general research question of this study is:

1. *“Has gender mainstreaming reached European law by means of positive action, 15 years after the Beijing Conference?”*

It is thereby focused on, one case in particular, namely the development and progress of positive action measures and its legal foundation with regard to the goal of gender mainstreaming, explicitly gender equality. Moreover, introducing the first sub-question of this study:

1.1 *“To what extent has the European law system changed from a market unifier to fundamental human rights regime (Chalmers et al., 2010, p. 228)?”*

This subquestion aims to evaluate the claim of the EU that human rights and gender equality have become one of their integral policy principles and are, therefore, reflected on a legal basis. Consequently, the question remains if the policy end towards gender equality has reached European Law yet by means of established human rights? Looking further at one national case of European influence in particular, namely Germany. Stating the question:

1.2 *“Has European law developments in the field of positive action influenced national legislation in one selected case, namely Germany?”*

Turning to the conduction of this study, firstly, this study will emphasize as a non-experimental or observational study on the possible changes in the EU legal system after the introduction of the Beijing Declaration in 1995 with regard to gender equality, positive action and gender mainstreaming. This will be done through the description of the development of the European legal system before the Beijing Conference, from 1951 to 1995.

This is followed by a comparative trend analysis, evaluating from 1995 to 2010 possible changes after the introduction of the Beijing Declaration. Furthermore, the study will be based on various concepts and theories like gender mainstreaming, gender equality, social movement, human rights theory and positive action as mentioned above (Shadish, Cook, & Campbell, 2002, p. 175).

The analyzing framework will be based on descriptive materials like legal documents (treaties, Directives, regulations), case law from the ECJ, academic articles and literature reviews. This will be subject to evaluation as to what extent gender mainstreaming by means of positive action measures has developed within the legal framework of the EU (Shadish et al., 2002, pp. 10-11). Moreover, this study will primarily focus on the legal dimension of the EU gender equality approach within the field of GM, regarding positive actions as one measure indicating that there are various explanations why gender equality sensitivity changes in policy and law might have occurred within Europe.

4. 1951-1995 The development of EU sex equality in law and policies

4.1 The Treaty of Rome and the four freedoms 1951-1965

The establishment of the European Union has its roots within the context of historical developments, which shattered the European continent until 1945. Therefore, the urge to establish an association that would tie the political communities together in order to secure peace and economical growth was inherent at that point in time (Chalmers et al., 2010, p. 4). This idea formed the basis of the Treaty of Paris in 1951, establishing the European Coal and Steel Community.

In 1956, the Spaak report laid the foundation for the Treaty establishing the European Economic Community, the Treaties of Rome (EEC Treaty) in 1957 (Chalmers et al., 2010, pp. 9-10). This report established the idea of a supranational decision-making framework in order to achieve the proper functioning of the common market and the compliance by the MS. The aim of the EEC treaty was to establish a common market through a custom union, common external tariffs and - most importantly - through the establishment of the *four freedoms* (Barnard, 2007, p. 27). So that restrictions on the movement of workers, goods, services and capital were from thereon onwards prohibited by the EEC treaty (Chalmers et al., 2010, pp. 12-13).

Furthermore, the EEC treaty laid down the legal foundation for the common market by establishing the European Court of Justice and a two folded approach through *negative integration* prohibiting discrimination, on the one hand, and, on the other hand, through *positive integration* in form of harmonization of national laws, in order to ensure the proper functioning of the market (Bernard & Scott, 2002, pp. 1-3)²⁶. Also, the EEC Treaty contained a limited social policy, the establishment of an equal pay principle for equal work of equal value for men and women (Chalmers et al., 2010, pp. 13-14).

When the community was originally modelled, its objectives were to create a common market build on the four freedoms, in order to ensure the best possible allocation of resources and economic growth and hence an optimise the social system (Craig & Búrca, 2007, p. 483). Consequently, social policies and protection were not within the scope of the EU legal order, because the member states considered social policies as an inherent part of their sovereign rights.

4.2 1960's Feminist movement within the EU

Although, the preamble of the EEC mentions economic and social process (Craig & Búrca, 2007, p. 485) a change of direction did not occur until the 1960's feminist women's movements. These social movements actively involved themselves into national campaigns for gender equality, central to this has been the demand for equal wages for men and women for the same job based on Article ex. 119 EEC²⁷ nowadays Article 141 TEU (Brzezińska, 2009, p. 8).

Conversely, it became evident that the community lacked a social dimension and that effective economic integration needed legislation to tackle social inequalities and consequences. Gender equality in the field of employment has been of greatest importance to the EU since it is linked to the fulfilment of the internal market project. The European feminist movement served as the mobilizing structure for collective women's interests and actions. This transnational women's

²⁶ The treaty of Rome dealt with that in two forms in **Article. 47 EEC**, by mutual recognition of qualifications in order to facilitate freedom of establishment. Article. 94; to enable Directives which would support the functioning of the common market (Bernard & Scott, 2002, p. 6).

²⁷ **Article 119 EEC** (now 141) 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 (Busby & Smith, 2009, p. 63).

networks served in a catalytic role towards the development of EC equal opportunities legislation during the 1970's (Brzezińska, 2009, p. 10).

Nonetheless, national legislators were rather uninterested at that time, which led to the motivation of domestic women's movements to merge into a European feminist movement. Nevertheless, hindered by the dominant understanding and values of women's standing within the labour market at that time. "Powerful socio-economic interest groups including male-dominated trade union and employers were reluctant to revise their view of the labour market value of women employees" (Mazey, 2000, p. 229). It can be witnessed that European law comprises competing priorities of economic and social objectives (Craig & Bùrca, 2007, p. 486).

4.3 *Sui generis* and positive action 1962-1970

Important to note is, that in the field of sex equality rights the evolving acknowledgement of a civil rights dimension within community law.

The ruling by the ECJ in the *case Van Gend en Loos* (European Court of Justice, 1962) marked a central moment for European community law with regard to its civil rights competences. The ruling stated that European law constitutes a new legal order of international law giving it direct effect. Hence, the ruling by the ECJ gave European community law a unique standing, which led interchangeably to an alternative version of the political community.

Therein from, European community law was a new form of legal order and considered to have the competence to constitute a supranational legal framework. The characteristics of the EU legal system widened, by limiting the sovereign rights of the member states. Therefore, giving the Union the competences of international legal primacy over national law with regard to civil rights law²⁸.

This meant in practice that the European community constitutes a new legal order of international law limiting sovereign rights of the member states over their own citizens, albeit within a partial field of civil rights (Chalmers et al., 2010, p. 15). The justification of this system can be found in the Treaties, which exist not only to benefit the governments but also the people of Europe. The characteristics of the EU legal framework is wider and a more plural legal community than other international legal communities. The case is of *sui generis* since traditional legal systems govern only the conduct between states, the EU law recognises other subjects, private parties, like the EU citizens, non-EU nationals or corporations, the so-called primacy of EU law. These have a direct relationships with EU law through its conferring both rights and obligations to them (Chalmers et al., 2010, p. 15).

4.4 The anti-discrimination Directives 1970-1979

Therefore, in the mid 1970's the ECJ and the legislator of the community began to develop the principle of gender equality in the workplace (Caruso, 2003, pp. 4-5) in form of extensive legislation. Directives were adopted in the field of sex discrimination by means of the Directive 75/117 on equal pay of 1975, Directive 76/207 on equal treatment of 1975 (Caruso, 2003, p. 5), and Directive 79/7 on equal treatment in social security of 1979. Gender equality and positive actions were acknowledged as a precondition to realize the "universal" human rights of the people, as collective rights also based on the Convention on the Elimination of All Forms and Discrimination Against Women in 1979 (Brownlie & Goodwin-Gill, 2006, p. 389). In addition, the Equal Treatment Directive 76/207 allowed for "positive action measures by the member

²⁸ *Van Gend & loos v Netherlands Inland Revenue Administration* Case 26-62 reference whether article 12 of the EEC Treaty has direct application with the territory of a Member sates, if there is a claim to individual rights which the court must protect (European Court of Justice, 1962).

states” by removing existing inequalities to allow for equal access to employment (Caruso, 2003, p. 20). At the EU level, however, the ECJ case ruling often refers to individual equality rights, which is threatening to the rights itself, since the individual and not the collective rights tend to become marginalized (Knop, 2002, pp. 4-8).

Furthermore, the field of sex equality gained further importance with the ruling of the EJC in the *Defrenne case*²⁹ (European Court of Justice, 1971b), which led to the decision by the ECJ that Article 119 TEC was directly applicable. Also the “open” pluralistic nature of the EU encouraged women’s movements and women MEP’s to place women’s rights on the EC policy agenda (Brzezińska, 2009, p. 18). Furthermore, the EC policy makers were influenced by the fact that both the International Labour Organization Convention on Equality of Treatment from 1962 and the UN’s Universal Declaration of Human Rights of 1948 contained a commitment to the principle of equal pay between men and women. Furthermore, a special action program was drafted at the Paris Summit in 1972, which was adopted in 1974. It was aimed at the achievement of equality between men and women towards equal access to employment and vocational training (Brzezińska, 2009, p. 36).

In 1984, the Council of Ministers issued a non-binding document encouraging member states “to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life” (Caruso, 2003, pp. 34-35). This laid down the first approach towards positive action measures within the EU also referring to the Equal Treatment Directive 76/207/EEC 1976. These developments towards sex equality were pursued in general on the basis of treaties laying down the EU competences, which were initially fairly weak prior to the Amsterdam Treaty of 1997. Even so Article 119 EEC, today’s Article 141 TEU build the necessary foundation for secondary legislation (Brzezińska, 2009, p. 15), the Commission had a fairly limited scope to propose EC legislation (Article 100, 235 and 118 in the case Pregnant Workers Directive 92/85/EEC 1992).

4.5 The Maastricht Treaty and the promotion of equal opportunities 1986-1996

Furthermore, in 1986 council resolution (86/C203/02) on the promotion of equal opportunities for women was announced and the community got a wider social dimension also with the signing of the community Charter of Fundamental Social Rights in 1989. After, the ratification of the Single European Act (SEA) the objective of the internal market became the propeller for a number of measures that changed the legislative and political culture of the Union (Chalmers et al., 2010, p. 19). In the SEA of 1986, the roadmap to the internal market was started; two reforms marked the SEA as the most substantial institutional reforms by that time.

Firstly, the commitment to establish the internal market which was to be achieved by 1992. Secondly, the institutional reformation of the EU in order to fulfil the objectives of the SEA, for example new legislative procedures were introduced which provided for qualified majority voting (QMV) (Chalmers et al., 2010, p. 21). Much in the SEA was giving formal recognition to pre-existing policies and institutions as well as provisions were made to widen competences in the fields of health, safety and work, and economic and social cohesion, research and development

²⁹ *Defrenne v Sabena; C-149/77*. The airline company Sabena, which is registered in Brussels, employed Mrs Defrenne as an airhostess. Mrs Defrenne’s contract states that she would have to retire at the age of 40. Mrs Defrenne brought an action before the Belgian Tribunal du Travail on the basis of Article 119 EEC seeking: compensation for the discrimination that she had suffered as a woman since she had been paid less than her male colleagues and regarding her pension. The Court recognised that the elimination of discrimination between men and women forms part of the fundamental human rights protected and promoted by community law. The court states however that from this they could not recognise the existence of a general principle of community law against discrimination between men and women referring to Art. 119 EEC (European Court of Justice, 1971b).

(Craig & Búrca, 2007, p. 483). All in all changed the SEA the former political and legislative culture of the Union (Chalmers et al., 2010, p. 21).

The Maastricht Treaty, the treaty on the European Union (TEU) and its incorporated social chapters (the Social Policy Agreement (SPA) and the Social Policy Protocol (SPP)), this followed this in 1993. With the entry into force of the new treaties the EU adopted, the Parental Leave Directive 96/34/EC was based upon the SPA. Giving these developments the Commission was enforced to assess the future direction of the social policy approach in the community, in the light of a socio-economic changes brought by high unemployment (Craig & Búrca, 2007, p. 485) and the dynamic interaction of interest groups, social movements and institutions (Mazur & Pollack, 2009, pp. 1-2).

Summing up, from 1951-1995 onwards on the Commission extended its legislative efforts and stimulated therefore, the political debate by means of “soft” policy instruments, recommendations and positive action programmes. Although the measures taken were not legally binding upon the member states, one can see that -interwoven with the social movement and political changes- greater awareness of sex discrimination in the field of employment, equal treatment and access was achieved. This enabled the Commission to broaden its political agenda, which in retrospective initiated the possibility for positive actions and gender mainstreaming (Brzezińska, 2009, p. 26). These aspects of the development of the EU law are vital to an understanding of its equality laws; these developments were the starting point and fundament for its social provisions, especially those protecting fundamental human rights and sex equality rights (Jacobs, 2012).

4.6 Conclusion - 1951 to 1995 the development of the Equal Treatment Principle as a Fundamental Right - gender equality rights?

The first significant provision regarding equality law in community law was introduced with the Treaty of Rome, referring to the introduction of the principle of the equal treatment as stated in article 119 EEC on equal pay for equal work (Craig & Búrca, 2007, p. 509). This specific article was not considered at that time as a real social policy aim, but rather within the context of the community objectives driven by a functionalist economical approach to achieve the community aim, to establish free trade between the member states (Craig & Búrca, 2007, p. 493). These fundamental economic objectives were the essence on which the community was founded (Chalmers et al., 2010, p. 4).

However, in order to prevent social consequences due to unhindered free trade and open market access, social dumping laws beyond economic considerations had to be included, keeping in mind also the influence of social movements and interests groups (Verloo, 2005, pp. 4-6), which led eventually to social objectives (Brzezińska, 2009, p. 12). These social objectives were aimed at community inequalities especially in the fields of employment between men and women, as it was within the scope of the community. However, these social objectives were still within the narrow economic scope of the community within the reasoning of its own comprehensive economic framework agenda, these objectives were pursued in order to fully implement a common market based on free trade (Radloff, 2011, pp. 1-4).

In the 1970's, Social Positive Action were firstly mentioned which led effectively to three important Directives (Caruso, 2003, pp. 4-5). The objectives of these Directives were to achieve equality between men and women in employment that should be obtained throughout the Union by improving not only the economic but also the social circumstances of men and women in society. Firstly, the Directive 75/117 prohibiting sex discrimination in relation to pay, secondly Directive 76/207 on equal treatment regarding access to employment affecting women's

opportunities in areas of access to employment and, thirdly, Directive 79/7 concerning elimination of inequalities between men and women concerning social security schemes.

These Directives prohibited indirect and direct discrimination aiming at the achievement of formal equality according to Art. 2(4) Directive 76/207. This Directive explicitly provides for the possibility to take positive action in order to achieve fundamental equality between men and women in practice³⁰ (Council of the European Union, 1976). Turning to the ruling of the ECJ in this regard, in 1976 in the *Defrenne* case (European Court of Justice, 1971a) the ECJ made an revolutionary ruling. The ECJ decided to give article 119 EEC direct effect, which meant in consequence that individuals could before national courts thereafter enforce European law (Brzezińska, 2009, p. 8).

Therefrom, the principle of equal treatment became a fundamental right and with respect to gender equality consequently a general principle of community law. In that aspect, the EU had from then on the duty to ensure these fundamental rights and to harmonize national law in order to eliminate discrimination based on sex (Radloff, 2011, p. 2).

5. 1995-2010 Beijing Declaration and the EU

5.1 Analysis of the Beijing Declaration

The fourth World Conference on Women, the so-called Beijing Conference in, 1995 was a landmark in policy terms, setting a global policy framework to advance gender equality. The term of gender mainstreaming was firstly introduced as a global strategy to equalize the standing of men and women (Duschl, 2009, p. 3).

The term gender mainstreaming (GM) was defined by the United Nations as the following: “*process of assessing the implications for men and for women on any planned action, including legislation, policies or programmes in all areas and at all levels. It is a strategy for making women’s as well as men’s concern and experience an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.*” (United Nations, 1997).

The Beijing Declaration, drafted in 1995, states that the goal of the declaration is to ensure that the participating governments pursue the policy objectives to warrant gender equality, development and peace for all women. The emphasis was especially to erase inequalities between women and men, which remain an obstacle for the wellbeing of all people (Duschl, 2009, pp. 3-4). As well as to take action for the empowerment of women, the fulfilment of the UN Charter and the Universal Declaration of Human rights and other international human rights instruments, had to be ensured.

This declaration calls especially for the achievement of equality between men and women, to achieve equal rights, treatment and access, by taking into account gender-sensitive policies and programmes and encouraging men to participate fully in all actions towards gender equality³¹. The Beijing Declaration takes note of the diversity of women, poverty affecting particular women and children, and calls for the empowerment of women including participation on the decision-making process and access to power, as the fundament for the achievement of equality,

³⁰ **Articel 2(4)** Directive 76/207; This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1) (Council of the European Union, 1976).

³¹ Beijing Declaration 1995, **No. 25**; Encourage men to participate fully in all actions towards equality (United Nations, 1995).

development and peace³² (United Nations, 1995). One of the main goals of the Declaration is also to achieve the eradication of violence against women, their access to resources, people-centred sustainable development and the implementation of a platform of action.

There is a high emphasis set on economic aspects like the right to development and economic independence for women. The Beijing Declaration takes also the Convention on the Elimination of All Forms of Discrimination against Women (CEADAW) into account, where article 2 provides for the possibility of positive action in order to eliminate all forms of discrimination³³(Brownlie & Goodwin-Gill, 2006, p. 389).

5.1.2 Gender mainstreaming and the Beijing Conference

The idea of gender mainstreaming was created in order to achieve the targets and the long-term goal of gender equality of the Beijing Conference throughout the world. The United Nations defines GM as a global strategy for the promotion of gender equality. GM is although an end in itself and a strategy, an approach, a means to achieve the goal of gender equality by ensuring that gender perspectives and attention to the goal of gender equality are fundamental to all societal activities. Like policy drafting, development, research, advocacy, legislation, resource allocation, and planning, implementing and monitoring of programmes and projects are cornerstones of the strategy (UN Women, 2012).

The Platform for Action established under the Beijing Declaration in 1995 tries to ensure that gender perspectives are incorporated in all societal areas to promote gender equality. The United Nations Economic and Social Council (ECOSOC) Agreed Conclusion 1997/2 (UN Women, 2000) set forth overall principles for gender mainstreaming as well as the Secretary General's letter in 1997 provided further concrete Directives (United Nations & Women, 2001) which were developed by the United Nations Office of the special Adviser on Gender issues and Advancement of Women.

Putting forward gender equality as equal rights responsibilities and opportunities for women and men, equality between women and men is seen as a human right as well as a precondition for, and an indicator of sustainable people-centred development (WMO, 2012) referring to the UN general assembly resolution 52/100³⁴ and the Millennium Development Goals were also set forth to promote gender equality and empower women.

Moreover, due to the Beijing conference in 1995, “gender mainstreaming”, “women empowerment” and “equal opportunities for the access of power in the decision-making process” were put forward for the first time on an international level. The Beijing Conference asked

³² Beijing Declaration 1995 **No. 13**; Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace (United Nations, 1995).

³³ **CDEAW, Article 2**; States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take *all appropriate measures* to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women (Brownlie & Goodwin-Gill, 2006).

³⁴ **UN general assembly resolution 52/100**- follows up to the Fourth World Conference on Women and full implementation of the Beijing declaration and the Platform of Action (United Nations, 1995).

participating governments to recognize and guarantee equal opportunities in the access to political institutions and the importance of women's mobilization in the participation of the decision-making process (United Nations, 2009).

5.2 Sex and gender

Before turning to the general development and possible influences of the Beijing Conference on the European legal development, one has to take a look at the evolution from the term "sex" to "gender" in policies and law related to equality and non-discrimination. Policies and laws with a focus on women and men had been defined in the biological term of "sex" the fundament of the past gender concept that separated in consequence men and women into their societal modelled roles. These binary gender structures were seen as an on-going accomplishment that was hammered into societal structures.

Therefore, an approach was needed which would bring on a new sex-gender relation, that was no longer defining the biological "sex" which determined humans as men and women leading to gender differences. Gender mainstreaming or the term "gender" denies a gender-concept which separates the sexes, but instead incorporates them both into one (Duschl, 2009, p. 73). As one can see in the Beijing Declaration in relation to inequalities, there are no more references or phrases including the term "sex" but instead using the word gender (United Nations, 1995). Important to note is as well that the term gender is broader and comprises also social differences between women and men, such as their roles in society (Burri, Prechal, & Unit, 2008, p. 15).

5.3 Gender mainstreaming and positive action in the European Union Law development, influences of Beijing from 1995-2010?

Since the Beijing Conference in 1995, gender mainstreaming has been adopted by the European Union as basis of its gender policy (Walby, 2005, pp. 453-454). Therefore, one might assume that the greater inclusion of gender inequality issues were fostered through the Beijing Conference and the attempt by the EU to fulfil its commitments with regard to the Beijing Declaration targets 1995.

5.3. The Scandinavian effect 1995

However, some scholars suggest that there is an alternative explanation to the change in gender perspective in law and policies in the EU, through the so-called Scandinavian effect. Due to the enlargement round in 1995, which was at the same time as the Beijing Conference, the Scandinavian countries joined the EU and they have "a strong, existing commitment to equal opportunities, and with considerable experience in mainstreaming gender in their own public policies" (Pollack & Hafner-Burton, 2000, p. 436). These countries have a strong interest in equality matters and also prior experience in gender mainstreaming, and because those countries have a long-standing tradition of gender sensitive policy agendas, thus the Scandinavian effect was introduced as a term to describe the possible effects that the new Scandinavian member states had on the new internal community drive against gender blindness and gender sensitive legislation and legal developments (Mazey, 2000, p. 11). Hence, when looking at the development of community law with regard to equality law, one has to keep in mind the possible effects of the Beijing Conference as well as the so-called Scandinavian effect.

5.3. International and European Women Social Movements 1990's

Furthermore, there was considerable process and judicial activism due to the ECJ rulings with respect to Article 119 EEC and the introduced equality Directives. The European women's movement increasingly criticized in the late 1980s and 1990's the community legal framework with regard to women's rights. Due to the diffuse implementation process as well as the diverse level of development and standing towards women's rights and gender equality, there has been a very diverse impact of European equality legislation on its member states (Mazey, 2000, p. 4). Also one could witness the reluctance of the ECJ to further pursue sex-equality laws since domestic economic recession and the potential costs of compliance, which therefore resulted in a setback in the field of gender equality and positive action.

The ECJ took the unstable financial situation of the MS into consideration, with regard to cost of compliance adoption and harmonization which would have been an as an extra burden on the MS in the time of economic recession (Egan, 1998, p. 24). Moreover, it was argued that European law was only concerned with employment law and therefore economic interest. Hence, EU law lacked a social rights dimension for its citizens as individuals. Social women's movements heavily pushed forward an expansion of the community's equality scope into the fields such as poverty, health, childcare, violence against women and families. Still, only article 119 EEC which had been once an institutional opportunity of the EU to widen its scope had now become a constraint, that created, in combination with wide-ranging resistance of the member states, a grid-lock for further social legislation at the community level (Mazey, 2000, p. 11).

This changed when international women movements formed and got involved with the UN women's system, strengthening the networking of women's rights as human rights. This interconnection of rights led to a powerful association, which was also recognized by the Beijing Declaration Article 14; "that women's rights are human rights". Accordingly, the concept of gender mainstreaming became effectively legitimized also through the recognition of the Fourth Platform of Action, which was set up by the Beijing Declaration in 1995. Correspondingly, gender mainstreaming was formally introduced in the EU policy agenda. This policy concept was seen as an easily feasible policy approach, which acquired its legitimization through its inter connectedness to achieve a basic human rights. Importantly to note is the greater acceptance by the member states since the concept applied to men and women interchangeably.

As well as GM seemed at least in short-terms cost-free as it seemed only to be a redirection of existing policy approaches with the addition of the incorporating of a gender sensitive perspective (Mazey, 2000, p. 6).

5.4 Institutional development in the EU- Treaty of Amsterdam 1995-2000

"Institutional development in the late 1990's contributed to the expansion of the EU equality policies by creating more favourable political opportunity structure for women's policy demands" (Mazey, 2000, p. 11). The Treaty of Amsterdam (EC), signed in 1997, incorporated gender mainstreaming and placed it within the scope of community gender equality law. Gender mainstreaming was used as a technical policy tool to support and foster the transfer of gender equality approaches into the development of community law.

Hence, it moved beyond the scope of economic objectives, and reached, therefore the labour market (Brzezińska, 2009, p. 12). Furthermore, with the entry into force of the Treaty of Amsterdam, the scope for the promotion of gender equality in the European community got widened and, by referring to Article 2 EC and Article 3(2) EC³⁵, and essential task of the EU.

³⁵ **Article 2 EC**; "The community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote

The European community aimed at the elimination of inequalities, and to promote gender equality in all fields listed under article 3 EC (Burri et al., 2008, p. 4). This can be recognised in the Parental Leave Directive from 1996 (96/34), which allows men and women workers to leave for at least three month after the birth of the child (Craig & Búrca, 2007, p. 492).

Also Article 13³⁶ of the Amsterdam Treaty, enacts a general legislative approach to tackle a broad range of discrimination (McCrudden & Prechal, 2011, pp. 5-6). Additionally, since 1999 or the entry of the Amsterdam Treaty, the community got the necessary competences to take appropriate measures to tackle discrimination based on sex, racial or ethnic origins or belief, disability, and age or sexual orientation as stated in article 13 EC (McCrudden & Prechal, 2011, p. 4).

Important to note in between the time frame of 1995-2000, are the introduced Directive 2000/113/EC on equal treatment between men and women giving access to and the supply of goods and services. Furthermore, made the EC an amendment to the former article 119 EEC now 141 EC³⁷, in which the EC restates the principle of non-discrimination in stronger terms. Additionally two new provisions were modified in the EC treaty-amending article 2 and 3³⁸.

The Treaty of Amsterdam made the elimination of gender inequalities a central community goal and an obligation to all member states (Vos, 2007, p. 23). Thus, a renewed active approach to gender equality could be witnessed in the modified Article 141 EC (former 119 EEC), and 141(4)³⁹ which explicitly refers to positive action, although the article does not only take gender discrimination into account. The article emphasises that equality should be ensured fully ensured in practice, which sets the focus on a substantive model rather than just a formal one. Central is the concept of “equal opportunities” and the achievement of “full equality in practice”, referring to article 2(4) of the Equal Treatment Directive and to uphold the decisions made by the ECJ in the *Kalanke* and *Marschall* case (Vos, 2007, p. 24).

However, it was not clear whether positive action should really be an exception to the principle of equal treatment by means of an independent element to achieve real equality of opportunity (Bernard & Scott, 2002, p. 5). The emphasis of the ECJ ruling has defined positive action as merely the re-movement of existing barriers by admitting positive measures being “preventive or compensatory”. Although article 141(4) EC seemed to have widened the scope for an applicability of positive action within the community, the ECJ has so far only addressed the new Article 141(4) indirectly as *obiter dictum* (not binding, implicitly), which has not resulted in a clear and unambiguous position of the Court.

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” (Busby & Smith, 2009).

Article 3(2) EC; “In all the activities referred to in this Article, the community shall aim to eliminate inequalities, and to promote equality, between men and women” (Busby & Smith, 2009).

³⁶ **Article 13 EC;** 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, when the Council adopts community incentive measures, excluding any harmonization 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, it shall act in accordance with the procedure referred to in Article 251 (Busby & Smith, 2009).

³⁷ **Article 141 EC** (ex Article 119) Treaty of Amsterdam: lays down the principle of non-discrimination between men and women, though only as far as equal pay is concerned. The Treaty of Amsterdam restates the principle of non-discrimination in stronger terms, adding two new provisions to the EC Treaty (Busby & Smith, 2009).

³⁸ Amendment of **Article 2 EC:** The list of tasks facing the Commission will include the promotion of equality between men and women. Amendment of **Article 3 EC:** 1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with community law (Busby & Smith, 2009).

³⁹ A new paragraph has been added, reading as follows: “In all the other activities referred to in this Article, the community shall aim to eliminate inequalities, and to promote equality, between men and women.” (Vos, 2007, p. 24)

5.5 The Charter of Fundamental Rights of the European Union 2000-2002

To be emphasised is also the Charter of Fundamental Rights of the European Union (CFREU) in 2000, which prohibits discrimination on any ground, including gender (Article 21⁴⁰). Furthermore, the Charter recognized gender rights and equality not just on economic grounds, but also in all areas of society (McCrudden & Prechal, 2011, p. 6). Thus, not only the economic sector and employment are recognised within its scope but, furthermore, also the necessity for positive action to promote and foster gender equality (Article 23 TEU). Thus, the CFREU is often taken into account by the ECJ, as an authoritative source of fundamental rights that must be respected by the EU. This Charter has become a binding catalogue of fundamental rights in the European Union since the entry into force of the Lisbon Treaty Article 6 (1) TEU⁴¹ (Prechal & Burri, 2008, p. 5).

5.6 Directive 2002, positive action and the proportionality test 2002-2006

Directive 2002/73/EC authorises the member states to maintain and introduce positive action measures in accordance with Article 141(4) EC. This directive aims at the fulfilment of equality in practice between men and women as mentioned in Article 2(8) EC. If member states decide to introduce positive action measures, they have to report about those measures to the Commission every four years. In these reports it must be stated that the positive action measures taken are in accordance with European law and with the overall European community objectives in consideration to improve the situation of women in working life.

Considering the ECJ decision on that topic, there seems to be a general proportionality standard by which the ECJ permits measures directed at removing obstacles preventing equal opportunities. However, the ECJ showed reluctance to re-consider its current framework, allowing for measures designed to ensure equality of representation and/or results (European Commission, 2005).

Turning to *Commission v. France*⁴² (European Court of Justice, 1988), the ECJ made a general gender statement to the effect of positive action. The ECJ stated that measures, although discriminatory in appearance, which are intended to eliminate or reduce instances of inequality can be national measures relating to access to employment. These can include promotions, giving specific advantage to women with the view to improve their ability to compete at the labour market and pursue their career on an equal footing as men (European Commission, 2005). However according to the European Commission, the Republic of France failed to adopt within the required period of time the Equal Treatment Directive 76/207/EEC and hence the set requirements put forward by the community on the matter of positive action measures.

⁴⁰ **Article 21 CFREU**; Non-discrimination; 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. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited (Brownlie & Goodwin-Gill, 2006).

⁴¹ Lisbon Treaty (**Article 6 (1) TEU**); 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 (Busby & Smith, 2009).

⁴² **Commission v. France Case 312/86**; Application for a declaration that France failed to adopt within the described period Council Directive 76/207/EEC, the French republic failed to fulfil its obligations under the Treaty (European Court of Justice, 1988).

In the case *Abrahamsson*⁴³ (European Court of Justice, 2000a) and *Briheche*⁴⁴ (European Court of Justice, 2004) the Court added that the aim of positive actions, in accordance to the provisions of article 141(4) EC and Article 2(8) of the Directive 2002/73/EC, need to achieve substantive equality rather than formal. Formal equality is in this sense is to be understood as the notion of formal legal equality, *de jure*, whereas substantive equality refers to equality in practice, to be reflected in *de facto* equality. Therefore, positive action measures need to reduce inequality *de facto* (in real life and practice) following closely Article 141(4) EC, to give women the opportunity to prevent or compensate for their disadvantages in professional career choices in modern society based on biological sex.

In practice, only very few positive action measures have been found permissible by the Court, which were designed to remedy specific disadvantages faced by women in the labour market. The ECJ applied the principle of proportionality, which requires that derogation must remain within the limit of what is appropriate and necessary to achieve the aim in accordance with the principle of equal treatment (European Commission, 2005). Thus, positive action measures must be proportionate, necessary and appropriate, with regard to their objectives and overall aims, in order to be accepted as permissible by the ECJ under the principle of proportionality and equal treatment.

The principle of proportionality and the proportionality test with regard to positive action were defined by the ECJ to determine the substantive limits of the original Equal treatment Directive positive action provisions of the Equal Treatment Directive (Vos, 2007, p. 18). In the case *Commission v. France* (European Court of Justice, 1988) the ECJ followed a very restrictive approach, which demanded positive discrimination to be only allowed in cases to eliminate or reduce actual inequality *de facto*. This approach was further defined by the *Kalanke* case (European Court of Justice, 1995a), regarding the German quota system, this quota system did allow for automatic preference of women. Hence, this German quota system was not in accordance with the provisions of EU law, as it was decided by the ECJ. In the cases of *Marshall* (European Court of Justice, 1997) and *Badeck*⁴⁵ (European Court of Justice, 2000b), the ECJ allowed for positive action and favouring of equally qualified women.

However, the positive action approach needed to be as individualistic as possible in its extent. Consequently, allowing for individual decisions within positive action measures which are thus to be justified in proportion to the decrease of group inequalities. Therefore, automatic preference is a form of discrimination against men (contrary to the principle of equal treatment art. 119 EEC now 141 TEU), although referring to the Marshall Case in 1997 (European Court of Justice, 1997), positive action is lawful if the employer had a “saving clause” taking into account objective factors rather than discrimination of neither men nor women (European Court of Justice, 1997). This ruling by the EJC reflects the general understanding of the EU’s standing towards positive action, that it is meant to achieve equality between men in women, although without directly disadvantaging effects on either gender (Brzezińska, 2009, p. 10).

⁴³ *Abrahamsson Case* 407/98; Preliminary ruling on the meaning of Article 177 of the EC Treaty (now Article 234 EC), social policy, men and women regarding access to employment and working conditions, with regard to the principle of Equal Treatment, in order to determine if positive action is permissible under Article 2(1) and (4) of Directive 76/207 Equal Treatment Directive. It is so if the competitor of the opposite sex possesses equivalent or substantially equivalent merits, candidates need to be assessed objectively, taking into account specific personal situations. (European Court of Justice, 2000a).

⁴⁴ *Briheche Case* 319/03; With regard to Article 3(1) and 2/4) of Directive 76/207 on the principle of equal treatment for men and women. To give automatic preference to women in the public sector is contrary to the provisions in the Directive, excluding men automatically is unjust (*European Court of Justice, 2004*).

⁴⁵ *Badeck Case* 158/97, regarding Equal Opportunities and equal pay for equal work. Council Directive 76/207, Equal Treatment Directive, and Article 119 Treaty of Rome. The ECJ ruled that if there is a difference in pay between two groups, and if the substantially higher proportion of women is in the disadvantaged group, Article 119 EEC requires to justify the difference by objective factors, which are unrelated to any discrimination on grounds of sex (European Court of Justice, 2000b).

The two mentioned cases can be regarded as the illustration of the proportionality test, in the case *Briheche* (*European Court of Justice, 2004*) the ECJ stated again that it rejects positive discrimination that gives automatic and unconditional priority to certain categories of women (Vos, 2007, p. 23).

5.7 The New Equal Treatment Directive 2006-2007

In 2006, was the New Equal Treatment Directive 2006/54/EC was adopted which aimed at the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This Directive was introduced to simplify and update existing community law with regard to the equal treatment of women and men at work. This Directive combined past Directives and the main provisions existing in the field of gender equality and major ECJ rulings regarding this policy field. The aim was to simplify the legislation of equal treatment of men and women and to facilitate a better regulation of the issue. The New equal treatment Directive combines therefore, as a coherent instrument the Equal Pay Directive 75/117, the “old” Equal Treatment Directive 76/207, the Occupational Security Directive 2000/78/EC establishing a framework for equal treatment in employment and occupation and the Burden of Proof Directive 97/80/EC in cases of discrimination based on sex (Vos, 2007, p. 38).

The New Equal Treatment Directive is of crucial importance with regard to the development of gender equality law, since it guaranteed access to employment, self-employment or occupation, including the selection of criteria and recruitment conditions (Vos, 2007, p. 38). Thereby, the Directive is covering all areas of employment, like vocational training, promotions, dismissals and working conditions. Also, the Directive covers all types of employment contracts, especially those, which are atypical meaning those for part-time work, this was of immense importance for women, since they are often affected by those contracts (European Commission, 2005, p. 11)

5.8 Treaty of Lisbon 2007-2010

Nevertheless, the European Constitution was intended to foster the process gender equality, while not just simply incorporating all existing provisions on gender equality but putting forward numerous improvements. However, the Constitution of Europe was rejected and instead the Lisbon Treaty (TFEU, TEU) got introduced in 2007. The new Treaty of Lisbon, therefore amended the Treaty on European Union and the Treaty Establishing the EC and by incorporating the Charter of Fundamental rights into EU law which made it legally enforceable (McCrudden & Prechal, 2011, p. 6). The Treaty of Lisbon confirms the position taken earlier by the EU and in the EC Treaty, like in Article 13⁴⁶ and 141 EC⁴⁷. The Articles were adopted without changes,

⁴⁶ **Article 13 EC:** 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Busby & Smith, 2009).

⁴⁷ **Article 141 EC:** 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 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value. 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

reaffirming the importance of gender equality law in the Union. Thus, equality between men and women in Article 2 TEU⁴⁸ is a common value on which the Union has been founded.

These common values are the basis on which possible candidate countries are assessed. They, must incorporate these values in their legal framework in accordance to Article 49 TEU (Burri et al., 2008, p. 7). These common values were also the criteria stated in the Treaty of Amsterdam but less explicit. Therefore, the Treaty of Lisbon affirms the importance of gender equality in the EU. Furthermore, is the promotion of equality between men and women listed among the tasks of the Union under Article 3(3) TEU⁴⁹ together with article 8 TFEU⁵⁰, stating the obligation of the Union to eliminate inequalities and to promote equality in all the Union's activities. In this context, the Lisbon Treaty clearly restates the responsibilities and obligations with regard to the taken policy approach of gender mainstreaming for the EU as well as for its member states (Burri et al., 2008, pp. 7-8).

The TEU (Treaty on the European Union) as well as the TFEU (Treaty on the Functioning of the EU) are important for the future development of the legal framework of the EU gender equality approach, as it will serve as a basis for the adoption of future legislation and other gender equality measures. They summarize the core legal fundament of the EU putting forward European values, tasks and general obligations, which are often the guiding principle of the ECJ when interpreting existing Treaties and case rulings (Burri et al., 2008, p. 10).

Summing up, the EU uses gender mainstreaming as a policy tool to deliver international and national targets to achieve gender equality, fostered on the one hand by international demands like the Beijing Conference 1995 and on the other hand by national demands. Thus, referring to the Scandinavian effect and social movement pressure coming from the European women's movement, these forces acted as a catalyst towards gender equality in the EU. The EU's approach focused mainly on gender equality through equal treatment and mainstreaming in all community areas and especially in the member states. Therefore, positive action as a fundamental policy measure is nowadays used in European law explicitly to achieve gender mainstreaming (Rees, 2005, p. 9).

the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (Busby & Smith, 2009).

⁴⁸ **Article 2 TEU**; The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty, to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17, to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union, to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime, to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European community (Busby & Smith, 2009).

⁴⁹ **Article 3(3) TEU**; The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance (Busby & Smith, 2009).

⁵⁰ **Article 8 TFEU** (ex Article 3(2) TEC); In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women (Busby & Smith, 2009).

5.9 Conclusion; Gender mainstreaming and positive action after Beijing 1995-2010?

Gender mainstreaming was introduced by the Beijing Conference in 1995 and has since then become the major policy framework to implement the principle of gender equality. However, community law can promote gender equality only to a certain extent. Despite the fact that the scope of the community law has been widened due to the developing community law on gender equality, there are still limitations and constraints to the community law and rulings of the ECJ as a consequence to the principles of “conferred power” “subsidiarity” and “proportionality principle” (Brzezińska, 2009, p. 29).

With regard to positive action in the development of community law since 1995, it is a multi-layered legal framework, which combines elements of international law, European human rights law, and European community law. These sources together form the legal body of equality law and for positive action measures. Interesting to note is the fact that the possibility for positive action measures existed before the approach of gender mainstreaming, but the scope to achieve gender equality through positive action measures was widened with Article 141(4) TEC (ex. Article 119 EEC) and the New Equal Treatment Directive 2006/54/EC (European Commission, 2005).

Although, the ECJ has not used these provisions so far to widen the scope of community law and to go beyond the principle of proportionality (i.e. the proportionality test) to allow for positive action to become a form of positive discrimination (Vos, 2007, p. 66). Furthermore, the ECJ defined a proportionality to specific cases of positive action; these standards are defined by the following terms, that any form of positive action needs to be in accordance with the principle of proportionality and within in the limits of appropriate and necessary targets in order to fulfil the principle of equal treatment. Furthermore, positive action measures need to be objective, transparent and cannot result in automatic and unconditional preferential treatment (Vos, 2007, p. 67).

The international human rights standards call for positive action measures. However, the European community law on equality and positive action with regard to the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (Chalmers et al., 2010, p. 260) rather tolerate positive actions measure but does not necessarily requires positive action in the substantive application of non-discrimination. European law somewhat prohibits direct and indirect discrimination rather than calling for national measures to eliminate existing differences. Moreover, international human rights standards regard positive actions as a temporary “special measure” which is seen as an integral part to achieve substantive equality between the genders.

These international human rights objectives focus more on compensatory positive actions to achieve the set international targets in contrast to the formulated European community optional standards. Positive discrimination measures would cross the neutrality approach of the European community with regard to its gender sensitive policy-making. Since 1995, there has been a shift of the European community legal perspective on gender equality law. Through the introduction of the concept of gender mainstreaming, positive actions have been allowed not just to achieve formal equality but also substantial equality within the EU, however without the use of positive discrimination measures (Vos, 2007, pp. 68-69).

Therefore, one can conclude that since 1995 gender mainstreaming has reached European law by means of optional, positive action measures due to the introduction of the Treaty of Amsterdam Article 141 and especially 141(4) of the Treaty of Amsterdam (Chalmers et al., 2010). These newly introduced provisions after 1995 imposed a legislative obligation on the community to adopt measures in the area of equal opportunities and equal treatment of men and women related to work and going beyond the field of equal pay, making equal treatment of men and women at work and in the labour market an area of supportive community actions. The principle of gender

equality was largely limited to the field of employment-related sex discrimination, until through the Treaty of Amsterdam, the Charter on Fundamental Rights and the Treaty of Lisbon. These legal provisions have brought a change towards a systematic approach within community law in order to erase gender equality through gender mainstreaming and furthermore, the widening and maturation of the field of EU- antidiscrimination law, and the strengthening of the legal basis for positive action measures (Craig & Bùrca, 2007, pp. 933-934).

Furthermore, one can witness that also the European law system made a considerable change from a purely market unifier to a system that recognizes and incorporates human rights. With respect to the principle of equal treatment and gender equality became constitutionalized as human rights and hence a general principle of community law. Thus, the community has started to take on its duties to ensure the application of the now incorporated human rights and to harmonize national law in order to eliminate any discrimination based on gender (Craig & Bùrca, 2007, p. 843).

6. The case of Germany

6.1 “Have European law developments in the field of positive action and gender equality influenced national legislation in one selected case, namely Germany?”

This study is based on a dual analysis. Firstly, a descriptive analysis of legal documents, case law, Directives and treaties was done, the de jure analysis of the legal framework development of the EU in this paper which can be seen above. Secondly, this will be the de facto analysis looking at the extent to which the gender mainstreaming approach of the European Union, in legal Directives, treaties and in case law by the ruling of the European Court of Justice has changed the gender perspective in a society, namely in Germany.

The development of gender mainstreaming (GM) in the Federal Republic of Germany started in 1999, when the Federal government acknowledged gender equality as a universal guiding principle (which is in unity with the Treaty of Amsterdam, Article 2 EC and Article 3(2) EC). In accordance with the aim of the Beijing Declaration of 1995, to achieve equality between men and women as a universal guiding principle, the government of Germany put forward a program called “Modern State-Modern Administration”, to achieve a modern administrative management establishing gender mainstreaming as the guiding principle (Humboldt Universität zu Berlin, 2012). In 2000, an Inter-Ministry working group was established on GM (IMA GM) set up under the Secretariat of the Federal Ministry for Family, Senior Citizens, Women and Youth under the coordination of the Gender mainstreaming/ Equal treatment laws department (Humboldt Universität zu Berlin, 2012) Again, one can find the link to the European community principle of equal treatment and non-discrimination by means of Article 119 EEC on equal pay for equal work (Craig & Búrca, 2007, p. 518).

In 2001, the “Bundesgleichstellungsgesetz (BGleiG)” (Federal Equal Treatment Act) came into force with the aim to achieve equality between men and women in accordance with their family life and occupation (Bundesministerium für Familie, Senioren, & Jugend, 2012). This law incorporates for the public sector a quota for women as civil servants, since then women are positively discriminated when having the same qualifications as their male colleagues, in case of promotion or job offers if underrepresented in that sector. While keeping in mind the ruling of the ECJ in 1995, the ECJ decided in the *Kalanke* case (GER) (European Court of Justice, 1995b) questioning the “§4 *Landesgleichstellungsgesetz Bremen*”, that women quota or other forms of positive discrimination need to be in accordance with strict criteria (European Court of Justice, 1995b). The ECJ ruled that possible positive action that would give automatic preference to women, is excluded from the Article 2(4) Equal Treatment Directive 76/207 (European Court of Justice, 1995b).

In 2006, Germany implemented the “*Allgemeines Gleichstellungsgesetz* (the General Act on Equal Treatment, AAG)” (Bundesministerium der Justiz, 2006) which is in accordance to the central concepts of the EU’s gender mainstreaming and gender discrimination laws. One can witness that the central aspects of European anti-discrimination and equal treatment law were incorporated into the AGG, by defining four concepts of discrimination- direct or indirect harassment and direct or indirect sexual harassment- which are defined with the same wording as the three European anti-discrimination Directives (Directive 76/207 on equal treatment and positive action, Directive 75/117 prohibiting sex discrimination and Directive 79/7 social security (Prechal & Burri, 2008, pp. 58-60).

The Federal Constitutional Court explicitly recognized the European concept of indirect gender discrimination, which is also applicable now under German constitutional law. Turning towards the concept of positive action, which is permitted in Germany to achieve equality of the genders, it applies to the area of employment as well as to goods and services (in accordance to EU laws, equal treatment and access art. 119 EC now 141 TEU). The public entities are even under duty to increase women's representation, to hire and promote women instead of equally qualified men, unless as defined in the *Marshall case* (*European Court of Justice, 1997*) there are exceptional reasons (which is again closely linked to ECJ ruling (Smith, 2010, pp. 192-193). However, there are no general federal equality laws or women quotas in place, which oblige private enterprises to promote women's equality (Prechal & Burri, 2008, pp. 55-56). Thus, the German AGG law reflects the current European law on equality especially Directive on equal treatment amending Directive 76/207, covering positive action and differential treatment based on sex. The AGG prohibits any form of gender discrimination in respect to pay as understood in the context of the principle to grant equal pay for equal work (Art. 119 EC. now 141 TEU). The German constitutional court follows the case law of the ECJ closely in this accord; however, there is no obligation in Germany that employees salaries needs to be published (Prechal & Burri, 2008, pp. 58-60). Therefore, realizing the principle of equal pay is challenging since it is not clear whether there is gender pay discrimination within a company, thus the German system is lacking transparency. With regard to pregnancy, maternity protection, and parental leave goes beyond the established European Directives in German law (Parental Leave Directive 96/34/EC, Pregnant Workers Directive 92/85/EEC) (European Union, 2007).

German law on the protection of mothers is far more extensive as it grants pregnant women and future mothers a right to a fully paid six weeks leave before and eight weeks after childbirth, whereas in the Gillespie case 342/93 (*European Court of Justice, 1996a*) the ECJ rules that the payment received during maternity leave must only be "adequate" (*European Court of Justice, 1996a*). Furthermore, pregnant women may not be dismissed four month after child birth, although the ECJ ruled in the Larsson case 400/95 that dismissal after maternity leave is lawful and not discriminatory (Wheat, 1998). Thus, parental leave is available for parents up to three years after birth, and can be taken by both parents; also during parental leave employees cannot be dismissed. These laws go well beyond the European requirements by providing 67% of the average salary of parental leave allowance to parents. Additionally, since 2006 there is a general anti-discrimination authority on the federal level (*Antidiskriminierungsstelle des Bundes*) whose scope of power is determined by the European anti-discrimination Directives. However, at the federal *Länder* level no such bodies exist (*Antidiskriminierungsstelle des Bundes, 2012*).

Overall Germany's implementation of the European gender equality approach *de facto*, with regard to positive action is in accordance with the community legal objectives, or beyond. One can clearly witness the close link and influence of European law development in the area of gender equality law and positive actions on German domestic federal law. The German legal foundations is phrased in accordance to European community law and takes it into account as a basis as well as it is developed beyond the community objectives by means of extensive maternity protection laws. However, even so the federal courts take EU law and case law into consideration, there is insufficient transposition of the obligations to carry out and provide for sanctions in cases of gender discrimination and employee dismissals based on gender discrimination, as one can see these were not included in the General Equality Act, as well as there is the issue of salary transparency. These *de facto* and legal (*de jure*) gaps are not in accordance with European laws as it requires unambiguous transposition of Directives into the domestic legal framework (Prechal & Burri, 2008, p. 59).

In sum, European law developments with regard to gender mainstreaming and the expansion of positive action as a possible policy measure to achieve gender equality have greatly influenced German national legislation in that field. Germany implemented *de jure* all European provisions to achieve gender equality and beyond, although there are some shortcomings *de facto* with regard to missing sanctions, transparency and a women quota which only exists in the public employment sector.

7. Conclusion - Before and after Beijing

This paper evaluated the development of gender equality law within the European Union starting in 1951 until 2010. The main focus of this paper was upon the impact of the Beijing Declaration in 1995 on EU equality policies and laws. This was done by looking at the possible impact of the concept of gender mainstreaming and the European approach on positive action measures within the field of sex-discrimination and gender inequalities.

Stating the main research question, “Has gender mainstreaming reached European law by means of positive action fifteen years after the Beijing conference?” and the sub-research question, “Did the European law system change from a market unifier to a fundamental human rights regime?”. To answer these questions, the paper has been structured in a two-folded manner.

Firstly, evaluated and displaying the development of community law with regard to sex-discrimination laws from 1951 to 1995 and, secondly, evaluating in the second part of the paper from 1995 to 2010 the possible influences of the Beijing Conference on community law development with regard to gender equality and human rights laws. The paper focused on the *de jure* development of community law specifying the development of equality laws and positive action and, furthermore, as an illustration on the *de facto* and *de jure* development in one case example, namely Germany. Thereby, looking at the harmonization and Europeanization process of community law with regard to equality law in one specific member state as an exemplification.

Summing up, the European Union started more than fifty years ago to establish the principle of equal treatment between men and women and around thirty years ago on the prohibition of sex discrimination in employment. The notion of sex-discrimination laws was pushed forward in the 1970s by European feminist movements. However, sex equality law firstly developed within community law in the field of soft laws (Craig & Búrca, 2007, pp. 843-845), since the European member states were very reluctant until the 90s to extent the competences of the community in the field of equality law. The first significant provision regarding equality law was introduced with the Treaty of Rome in 1957, through Article 11 EEC on the principle of equal treatment with regard to equal pay for equal work (Craig & Búrca, 2007, p. 509).

These provisions were in line of the past predominant community objectives with regard to equal treatment, which was driven by economic functionalist considerations to achieve an economic community, based on market unifying functions (Craig & Búrca, 2007, p. 493). One has to keep in mind that the European Union was founded on fundamental economic objectives and that social objectives were part of the member states sovereign rights. Furthermore, it was believed that social progress would be achieved through the creation of a common market underpinned by the maxim of non-discrimination.

However, it became evident that in order to counter the social consequences of unhindered free trade and open market access social, policies beyond economic consideration had to be included into the scope of community laws. Still, the social objective in community law were within the narrow economic scope of the community, and these objectives were pursued in order to fully implement a common market based on free trade (Radloff, 2011, pp. 1-4).

In the 1970's, Social Positive Action is mentioned for the first time as part of three important antidiscrimination Directives, which aimed at inequalities between men and women in employment. Interesting to note is the change of the EU's approach which was no longer purely economic oriented but also aimed to improve the social circumstances of men and women in society (Caruso, 2003, pp. 4-5). Directive 76/207 explicitly provides for the option to take positive action in order to achieve fundamental equality between men and women in practice (Council of the European Union, 1976). Another turning point with regard to the European law development was the *Defrenne* case in 1976, which led to a revolutionary ruling by the ECJ.

The ECJ decided to give Article 119 EEC “direct effect”, therefrom the principle of equal treatment became a fundamental right and with respect to gender equality law consequently a general principle of community law. Thus, the EU has from that point onwards the duty to ensure this fundamental human right and to harmonize national law in order to eliminate discrimination based on sex (Radloff, 2011, p. 2). These developments framed the status quo before the Beijing Conference in 1995. One can see that the European Union had already some legislation in place with regard to anti-discrimination laws based on sex, but the concept of gender mainstreaming was not yet defined, and no clear systematic approach existed with regard to gender equality laws and no clear definition or rules of application were given with regard to positive action measures. All in all, the scope of community law was still fairly limited and focused merely upon the achievement of economic goals.

Through international and national demands, a change in the Union’s motivation by the mid 90’s shows that it was not merely about achieving economic goals and market unifying functions, but that with its widened scope of community law and the introduction of gender mainstreaming the regime of the European Union changed slowly from a purely market unifying system to fundamental human rights system. Thus, the international community demands put forward by the Beijing Declaration and national demands stemming from the Scandinavian effect and social movement pressure within the EU, acted all together as a catalyst towards fundamental human rights within gender equality law in the EU.

Turning towards the implementation of gender mainstreaming as a systematic approach within the EU to achieve gender equality, one can see that it has at its core policy measure nowadays-positive action measures, used in the European law explicitly to achieve gender equality. However, important to note is the still optional use of positive action measures for the member states as well as the strict proportionality standards which were defined by the ECJ in order to use positive actions. Nevertheless, the scope to achieve gender equality through positive action has considerably widened and consists these days of a great variety of legal sources as the foundation for the use of positive actions, like elements of international law, European human rights laws and European community law. However, the ECJ has not used several newly introduced provisions to go beyond the principle of proportionality in order to allow for positive action to take a form of positive discrimination. Although, the possibilities are given, at the European approach is still determined by a *gender-neutral*⁵¹ policy attitude and an optional provision to use positive action in accordance with the test of proportionality (Vos, 2007, pp. 68-69).

Therefore, one can conclude that since 1995 gender mainstreaming has reached, amongst other measures, European law by means of optional, positive action measures due to the introduction of the Treaty of Amsterdam in particular Article 141 and especially 141(4) TEU (Chalmers et al., 2010). These newly introduced provisions after 1995 imposed a legislative obligation on the community to adopt measures in the area of equal opportunities and equal treatment of men and women related to work and going beyond the field of equal pay, making equal treatment of men and women at work and in the labour market an area of supportive community actions (Craig & Bùrca, 2007, pp. 933-934).

Nevertheless, besides the influential developments and incorporation of human rights law and gender equality law within the legal framework of the Union one has to keep in mind that the underlining objectives of the community are still based on narrow economic considerations.

⁵¹ The European gender equality approach is determined by a gender-neutral policy attitude, which describes the idea policies and law should be drafted in such a ways that it avoids a possible distinction of people by their gender. The concept was defined recognizing the possibility of discrimination arising from the impression that there are social roles for which one gender is more suited (Vos, 2007, pp. 68-69).

The scale of development with regard to positive action measures in order to achieve substantial gender equality are defined by the reluctant approach of the ECJ and the European member states to take more supportive measures with regard to gender equality rights.

Gender mainstreaming could be a transformative approach on gender equality rights within the Union. However, the European law on gender equality is still rather restricted to the labour market. The problem of gender discrimination and gender inequalities is however not. Although, gender equality law has greatly evolved and *substantive* gender equality could be achieved through positive action. Nonetheless, due to the absence of a clear definition and more flexible approach on positive action measures. Has consequently this otherwise very effective policy tool remained so far optional and inefficient within the European community. Moreover, the scope of positive action measures could have been broadened, with the New Equal Treatment Directive. Nevertheless, one could say that due to the rigid limitation and constraints of the rulings in the case law by the ECJ, this has been so far not been the case. The ECJ has until today not used the provisions of this Directive to go beyond the field of the labour market, this might change in the future but remains to be seen.

Turning to the example of Germany legal system with regard to the influences of European law developments in the field of gender mainstreaming and positive actions, one can witness, that the German legal foundation in that field has been phrased in accordance with European law. Furthermore, it not just takes European law into account, as a basis but has developed its own laws beyond the community objectives by means of extensive maternity protection laws (Prechal & Burri, 2008, p. 59). In sum, European law developments with regard to gender mainstreaming and the expansion of positive action as a possible policy measure to achieve gender equality have greatly influenced German national legislation in that field. Germany implemented *de jure* all European provisions to achieve gender equality and beyond, although there are some shortcomings *de facto* with regard to missing sanctions, transparency and a women quota which only exists in the public employment sector.

Furthermore, one can witness that also the European law system made a considerable change from a purely market unifier to a system that recognizes and incorporates human rights. With respect to the principle of equal treatment and gender equality became constitutionalized as human rights and hence a general principle of community law. Thus, the community has started to take on its duties to ensure the application of the now incorporated human rights and to harmonize national law in order to eliminate any discrimination based on gender.

8. Recommendation for future work

Finally, coming to the recommendation for future work of this study, one can witness that further research with regard to the future development of the European equality law is needed. Especially the New Equal Treatment Directive could evolve to have great influence on these developments, and might have the capacity to greatly extent the gender equality rights scope of the Union. Furthermore, with regard o policies in the field of positive action, which are fairly limited at this point in time, the ECJ could give it more efficiency and flexibility based on the New Equal treatment provisions, and hence extent community law and the effectiveness of this policy measure. It has to be assessed in future work how the community scope and the ECJ stand towards equality laws and positive action will evolve. One might expect a more flexible and progressive behavior by the ECJ towards effective positive action measure with the end of the economic recession and the Euro crisis. This remains to be seen for the future.

Moreover, even so the field of equality laws within the Union is fairly limited to the economic sector of employment and thus very narrow. Hence, the European Union is still loosing out due to gender inequalities on a great labor force and even highly specialized workers, which are already missed in the labor market and harm in reverse the economy. Thus, also great gender inequalities exist in the societies of the Union, and there are many reasons to tackle gender inequality, gaps in the labor market, reduced birth rates, and poverty among the elderly. All this could lead to an outcome with economic consequences, which might be if not for other reasons enough incentives for the member states and the EU to act and extent their capacities and efforts and to do more so in the future.

Therefore, more European member state cases need to be assessed and their harmonization process with community law has to be evaluated. So far, twenty-seven states are member of the EU. If all of them could be evaluated with respect to their pace and progress of Europeanization, a higher level of generalizability could be achieved with regard to the impact of the actions taken b the Union. Thereby, looking at gender equality rights, gender mainstreaming and positive action measures, one would have a great spectrum to compare and evaluate the gender trend patterns within the EU to get a overview of the extent to which community laws have effected the national legal frameworks of the member states.

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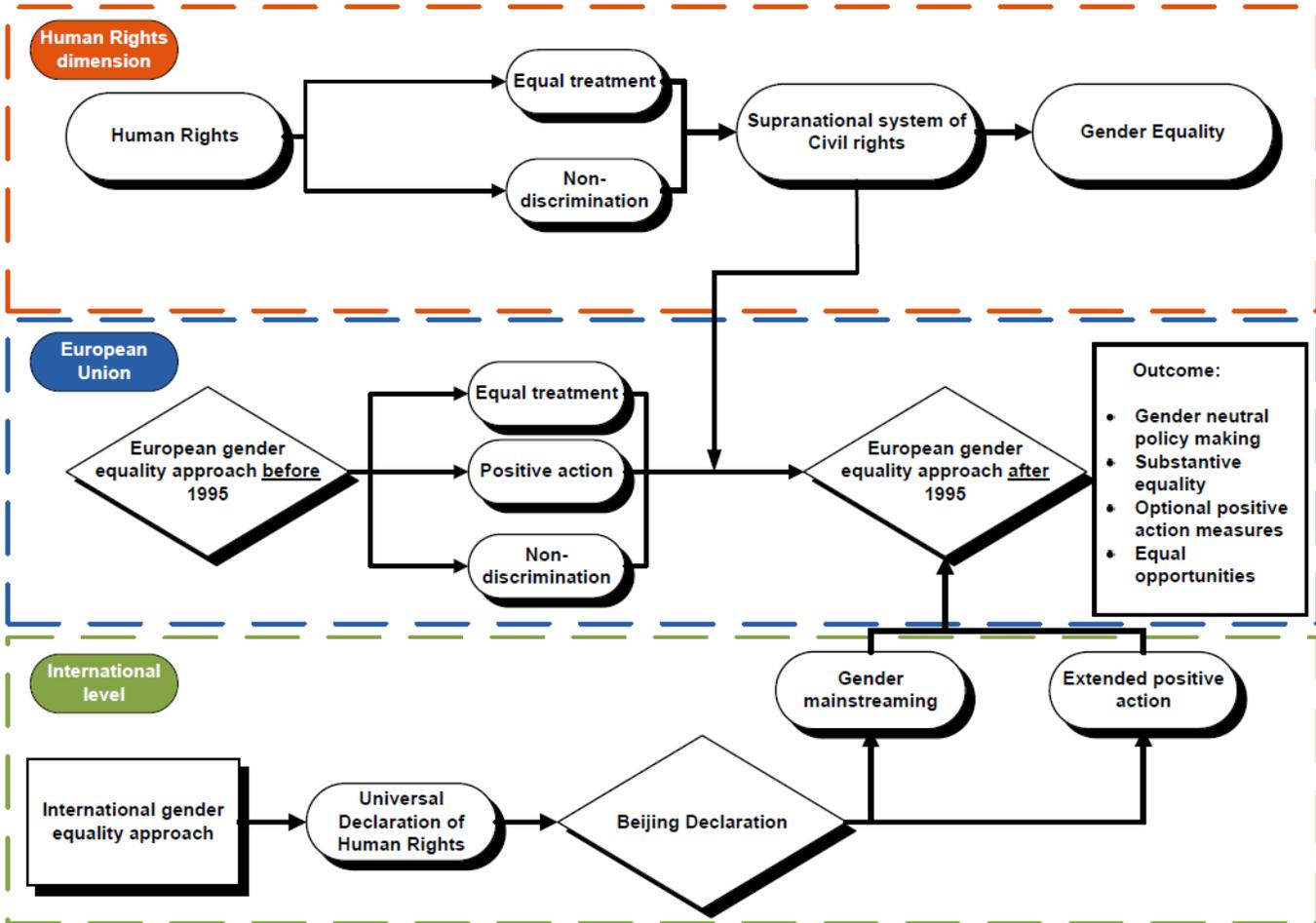
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10. Annex

10.1 Conceptual framework Diagram 1.1



10.2 Table 1.1 of Cases regarding Equality Law and Positive Actions

Year	Name and Number of the cases	Description of the content of the cases
1963	<i>Van Gend en Loos (NL)</i> C-26/62 ECR 1, CMLR 105	Landmark for the ECJ, which established that provisions of the Treaty of Rome were capable of creating legal rights, which could be enforced by both natural and legal persons before the national courts of the member states. The <u>principle of direct effect</u> was defined, this case is acknowledged as the most important for the development of the European Union law (European Court of Justice, 1962).
1976	<i>Defrenne Case (BE)</i> C-80/70, ECR 00445	The ECJ gave <u>Article 119</u> Treaty of Rome direct effect. They considered that the female worker suffered discrimination in terms of <u>equal pay</u> , compared with male colleagues (considerable lower retirement age for women). The male colleagues were doing the same work as “cabin stewards”(European Court of Justice,

		1971a).
1978	<i>Cassis de Dijon Case (GER)</i> C-120/78	The case regards the principles of non-discrimination, equal treatment and market access. The principle of equal treatment was defined as a rather flexible term, determined by three categories; 1. formally discriminatory, 2. indirectly discriminatory, and 3. restrictions which impose a double burden on the imported product/service (Craig & Bùrca, 2007, p. 523) (European Court of Justice, 1979a).
1980	<i>Turley Case (UK)</i> ICR 66	Discrimination due to pregnancy, against the equal treatment principle? The ECJ decided that since only women could become pregnant, the concept of discrimination could not apply to pregnancy, because only women could become pregnant and, therefore a comparison could not be made to men (Wheat, 1998).
1982	<i>Morson & Jhanjan v. Netherlands Case (NL)</i> C-147/87	Social security for migrant workers, regarding reserve discrimination. Reference to free movement of workers, denial to a member of a workers family of advantages granted to national worker. A worker cannot claim social advantages if that person has never exercised the right to freedom of movement within the community, cannot rely on regulation Nr. 1612/68, reference to Article 177 of the EEC Treaty (European Court of Justice, 1987).
1985	<i>Hayes Case (UK)</i> IC 703	The ECJ rejected its former concept of discrimination regarding pregnancy from the Turley Case. It was decided that the ruling regarding discrimination and pregnancy was to be compared to the treatment of that of as such men, still dismissal was under certain circumstances justified (Wheat, 1998).
1986	<i>Bilka-Kaufhaus GmbH Case (GER)</i> C-170/84 ECR 1607	This case falls under the category of EU labor law, setting the test for objectives justifying for <u>indirect discrimination</u> . The Court states that the policy to grant only fully time workers an occupational pension is contrary to Article 119 EEC, the measures cannot be explained by factory that would exclude discrimination on the grounds of sex (European Court of Justice, 1986).
1986	<i>Marshall case (UK)</i> C-152/83	Breach of Equal treatment Directive 1976, the UK had not properly implemented the Directive. (Souper, 2008)
1990	<i>Aldi Case Dansk Arbejdsgiverforening v Handels- of Kontorfunktionaerernes Forbund I Danmark (DK)</i> C-179/88	Regarding equal treatment for men and women, conditions governing dismissal due to absence due to illness attributable to pregnancy or confinement. Article 2(3) Directive 76/207/EEC and Article 5(1), the ECJ ruled that it does not preclude dismissals, which are the result of absence due to illness attributable to pregnancy or confinement. The ECJ ruled that after the maternity leave, even through related to pregnancy, dismissals are not forbidden due to illness (European Court of Justice, 1990).

1992	<i>Dekker Case (NL)</i> I-3941 ICR 325	Regarding pregnancy and treatment of women, the ECJ ruled that only women can be adversely treated on the ground of pregnancy. Such treatment constitutes direct discrimination, which cannot be justified. If a woman is discriminated due to pregnancy, this is directly discriminating (Wheat, 1998).
1994	<i>Webb Case (UK)</i> C-32/93 ECR I-3567	The ECJ ruled that, or confirmed respectively that a contract of employment cannot be avoided on account of a prohibition under national law of night work during pregnancy, and that a women recruited for an indefinite period and who is dismissed because of pregnancy because the national legislation prevents her from carrying out part of her work, is suffering direct discrimination. (positive measures are supported) (Wheat, 1998).
1995	<i>Kalanke Case (GER)</i> C-450/93 ECR 103051	Mr. Kalanke and a female worker were equally qualified, for a management position. If two candidates were equally qualified, the position was automatic given to the women as they were underrepresented in the sector. The ECJ ruled that possible <u>positive action</u> , that would give automatic preference to women, is <u>excluded</u> from the Article 2(4) Equal treatment Directive (European Court of Justice, 1995b).
1996	<i>Gillespie v Northern Health and Social Services Board (UK)</i> C-342/93	Regarding Equal treatment for men and women-maternity. Referring to Article 119 EEC and Council Directive 75/117. Case opened in 1993, the ECJ ruled that there was no breach of the equal pay and treatment Directive. Women who received during their maternity leave lower than normal pay, are indeed in a special position, which requires special protection. But which is not comparable with men, or with that of women actually working. Therefore the ECJ ruled that the maternity leave pay must only be “adequate” but not the same as the usual payment received (European Court of Justice, 1996a).
1996	<i>P v S Case (UK)</i> C-13/94	The applicant P. was a manager, and claimed that she had suffered from Gender Identity Disorder. In 1992 P. biological male, announced that she was going to undergo gender reassignment. She wrote to S to inform the principal. P was dismissed and given three-month notice while undergoing surgical treatment on sick leave. P was not prohibited from working in her female gender role. P claimed that she discriminated on the grounds of sex. The ECJ ruled that the scope of the Equal Treatment Directive was not to be narrowly construed and that the dismissal of a transsexual for a reason related to a gender reassignment must be regarded as contrary to Art. 5(1) of the Directive (European Court of Justice, 1996b).
1997	<i>Marshall Case (GER)</i> C-409/95 ECR 106363	Concerning positive action. Mr Marschall a teacher applied for promotion, but instead a woman got the position. The ECJ held that <u>positive action</u> was lawful

		if (1) the employer had a “saving clause” so it could take into account objective factors specific to an individual man. 2) the criteria in such a procedure did not discriminate against female candidates. Equal Treatment Directive 76/207/ EC Art 2(4) derogation could be triggered where positive action aimed to counteract the prejudicial effect on female candidates, of stereotypes attitudes about women at work. ECJ created a possibility for Member States to use positive action. This approach was incorporated in the Amsterdam Treaty (TEC) Article 3.2 and 141.4. So that the MS had thereafter the right to adopt positive action measures (European Court of Justice, 1997).
1997	<i>Larsson Case (DE)</i> C-400/95	Case started in 1993. Mrs Larsson did not return to work due to the result of pregnancy-related illness, therefore she was dismissed. ECJ referred to the Equal treatment Directive 76/207 and Article 119 Treaty of Rome Article 2(1) and 5(1) EEC. The ECJ states that pregnancy is not an illness; absence due to pregnancy and related illness cannot justify dismissal during maternity leave. However if the dismissal takes place after the maternity leave time, the ECJ refused to treat pregnancy-illness as a special case, and is therefore lawful and not discriminatory. (Wheat, 1998)
2000	<i>Badeck Case (GER)</i> C-158/97	This case regards Equal Opportunities and equal pay for equal work. Council Directive 76/207, Equal Treatment Directive, and Article 119 Treaty of Rome. The ECJ ruled that if there is a difference in pay between two groups, and if the substantially higher proportion of women is in the disadvantaged group, Article 119 EEC requires to justify the difference by objective factors, which are unrelated to any discrimination on grounds of sex (European Court of Justice, 2000b).
2000	<i>Abrahamsson Case (SWE)</i> C- 407/98	Preliminary ruling on the meaning of Article 177 EC (now Article 234 EC), social policy, men and women regarding access to employment and working conditions, with regard to the principle of Equal Treatment, in order to determine if positive action is permissible under Article 2(1) and (4) of Directive 76/207 Equal Treatment Directive. It is so if the competitor of the opposite sex possesses equivalent or substantially equivalent merits, candidates need to be assessed objectively, taking into account specific personal situations. (European Court of Justice, 2000a).
2004	<i>Bourgards Case (FR)</i> C-172/02	Art. 104(3), equal treatment for men and women in matters of social security, Directive 79/7/EEC, self-employed workers, early retirement reduction (Court of Justice of the European Communities, 2002)

10.3 Table 1.2 Legal Developments in the European Union

Year	Legal Document	Relevant Provisions
1957	Treaty of Rome (EEC)	The principle of the equal treatment and non-discrimination; Article 119 EEC on equal pay for equal work (Craig & Búrca, 2007).
1975	Equal Pay Directive Council Directive 75/117/EEC,	Directive on the approximation of the laws of the Members states relating to the application of the principle of equal pay for men and women.
1976	Equal Treatment Directive 76/207/EEC	On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training promotion, and working conditions. Art 2(4) Directive 76/207 allows for positive actions by the discretion of the Member states.
1978	Social Security Directive Council Directive 79/7/EEC	On the progressive implementation of the principle of equal treatment for men and women in matters of social security.
1986	Occupational Social security Directive 86/378/EEC 1986 amended in 1996	On the implementation of the principle of equal treatment for men and women in occupational social security schemes.
1986	Self-employment Directive 86/613/EEC	On the application of the 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.

1987	Single European Act (SEA)	The SEA mentions it in its preamble democracy and human rights. The various international commitments by the European Union member states are reflected within its legislation. Also a clear economic dimension, the very reason why the European Community was founded having at its core principle the notion of non-discrimination, which is a fundamental human rights instrument.
1992	Maastricht Treaty , Treaty of the European Union (TEU)	The TEU had incorporated the Social Policy Agreement (SPA) and the Social Policy Protocol (SPP).
1992	Pregnant Workers Directive 92/85/EEC	On the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and worker who recently given birth or are breastfeeding.
1996	Parental Leave Directive 96/34/EC	On the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
1996	Council Directive amending 96/97/EC	Amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.
1997	Burden of Proof Directive 97/80/EC	In cases of discrimination based on sex.
1999	Treaty of Amsterdam (EC)	Especially to note are Article 2 EC, Article 3(2) EC, and Article 141 EC (ex Article 119) Treaty of Amsterdam: lays down the principle of non-discrimination between men and women, though only as far as equal pay is

		concerned. The Treaty of Amsterdam restates the principle of non-discrimination in stronger terms, adding two new provisions to the EC Treaty (Busby & Smith, 2009).
2000	Charter of Fundamental Rights of the European Union (CFREU)	Chapter III, Equality Art 21, Non-discrimination, Art. 23, Equality between men and women.
2002	Equal Treatment in Employment Directive 76/207/EEC/2002	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. Directive 2002/73/EC of the European Parliament and of the Council amending.
2002	Recast Directive Equal Treatment in Employment and Occupation 06/54/EC	European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (European Union, 2007).
2002	Equal Treatment Directive 2002/73/EC	Directive 2002/73/EC - equal treatment 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.
2004	Good and Services Directive 113/EC /EC 2004	Implementing the principle of equal treatment between men and women in the access to and supply of goods and services
2006	New Equal Treatment Directive	The New Equal Treatment Directive, aimed at the

	2006/54/EC	implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
2009	Lisbon Treaty (TFEU)	Non-discrimination Art. 18-19. The Treaty of Lisbon confirms the position taken earlier by the EU and in the EC Treaty, like Article 13 and 141 EC.