ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

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THE HORIZONTAL EQUALITY CLAUSES (ARTS 8 & 10 TFEU) AND THEIR CONTRIBUTION TO THE COURSE OF EU EQUALITY LAW: STILL AN EMPTY VESSEL?

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ABSTRACT: About 15 years ago, Jo Shaw asserted that what is the current art. 10 TFEU was "largely an empty vessel". Several years down the road, the present *Article* takes Shaw's statement as a starting point to examine the two articles of the current EU Treaties that are most commonly associated with the idea of equality mainstreaming in contemporary EU law: art. 8 TFEU and art. 10 TFEU (section I). It is argued that these articles rather than fulfilling a new function, actually primarily illustrate and give visibility to a political will to use existing tools to enhance the protection of equal treatment in EU law. We will explain first why these articles taken in isolation can still be considered an empty vessel (section II). Yet, although the horizontal clauses have not had much added value, they have actually been used. We therefore subsequently explore how the clauses have been employed, both in ECJ case-law and in

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a broader EU governance context (section III). By way of concluding comments, we investigate the existence of other possible avenues for improving the equality agenda in the EU legal order (section IV).

KEYWORDS: equality mainstreaming – art. 8 TFEU – art. 10 TFEU – equal treatment – horizontal clauses – equality agenda.

I. INTRODUCTION

About 15 years ago, Jo Shaw, in an article entitled "Mainstreaming Equality and Diversity in European Law and Policy", asserted that art. III-118 of the Draft Treaty establishing a Constitution for Europe, which is the current art. 10 of the TFEU, was "largely an *empty vessel*".[1] Several years down the road, and more than a decade after the latest major revision of the EU Treaty framework (Treaty of Lisbon, 2009), the present *Article* takes Shaw's statement as a starting point to examine the two articles of the current EU Treaties that are most commonly associated to the idea of equality mainstreaming in contemporary EU law: art. 8 TFEU on the elimination of inequalities and promotion of equality between men and women (hereafter: "horizontal gender equality clause"), which states as follows: "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women"; and art. 10 TFEU on aiming to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (hereafter: "horizontal gender equality clause"), which states as follows: "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". These articles are part of Title II of the TFEU on provisions having general application. In this title, a number of articles are included that indeed aim to draw attention to given values or interests in all activities of the Union.

Can these two articles (still) be considered an empty vessel for the purpose of enhancing the protection and the promotion of equality in the EU legal order? As we will illustrate, the said clauses have not played roles of much significance. As Shaw herself had noted, this may be related to the "crowded" nature of EU equality law, which leaves a horizontal equality clause with little added value. Her observation on the multitude of legal provisions fleshing out either the right to equality and non-discrimination in EU law itself, or the competences of the EU to further do so, is no less true today than it was at the time.

Indeed, equality is an old principle of law that performs several prominent functions in the EU legal order. First and foremost, equality is a *founding principle* of the EU legal order. This is noticeable among others from the wording of art. 4(2) of the Treaty on European Union (hereafter: the TEU) on equality between Member States, as well as that of art. 18 TFEU on equality between citizens of the Member States or art. 157 TFEU on equal pay for equal work or work of equal value between men and women. On a related note, combatting

[1] J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' (2005) CLP 289, emphasis added.

discrimination and promoting equality between men and women are *objectives* of the Union (art. 3(3) para. 1 TEU), and equality is a *value* on which the Union is founded and which is common to the Member States (art. 2 TEU). The EU has gained *competence* to flesh out EU equality policies, independently from the dynamics of the internal market. This is visible in particular from art. 157(3) TFEU, which enables the adoption of legislative acts on equal treatment between men and women in matters of employment and occupation, and art. 19 TFEU, which makes it possible for the EU legislator to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[2] Last but not least, equality and non-discrimination are *fundamental rights* in the EU legal order, as is particularly clear today from the wording of several provisions of the Charter of Fundamental Rights (hereafter: the Charter): art. 20 on equality before the law, art. 21 on non-discrimination on the basis of an open-ended list of grounds and art. 23 on equality between men and women.[3]

In this rather crowded environment, it is legitimate to ask what role(s) arts 8 and 10 TFEU can, do, or even could, play in the EU legal order. A preliminary observation relates to the specific structure of this legal order and the wording of the clauses under scrutiny. The EU legal order is articulated on the basis of conferred competences,[4] which covers a broad range of policy areas including competences specifically devoted to equal treatment as just noted. EU competences in matters of equal treatment enable EU institutions to "take appropriate action to combat discrimination" or "to ensure the application of equal opportunities and equal treatment".[5] However, these enabling provisions do not create any obligation on EU institutions to exercise these competences, or to exercise them in a specific direction. In contrast, arts 8 and 10 TFEU do not enable EU organs to act; instead, they do give directions for EU action, "to promote equality between men and women" and "to combat discrimination". Rather than referring to arts 8 and 10 TFEU as "mainstreaming clauses",[6] which could be perceived as limiting their function to the integration of equality concerns in policy development in areas of EU competences *other* than

[2] See also art. 153(1)(i) TFEU. These legal bases were inserted by the Treaty of Amsterdam. Before that, EU legislation on equal treatment between men and women was adopted on the basis of Treaty provisions enabling legislative intervention with a view to improve the functioning of the internal market (see arts 100 and 235 TEEC).

[3] One could also look back at the *Defrenne* judgment, where the ECJ acknowledged the direct and horizontal effect of the right to equal pay between men and women as it was then enshrined in the Treaty (case C-43/75 *Defrenne* ECLI:EU:C:1976:56); or also look at the far-reaching effects of the general principle of equal treatment (case C-144/04 *Mangold* ECLI:EU:C:2005:709; case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21).

[4] Arts 4(1) and 5(1-2) TEU.

[5] See arts 19(1) and 157(3) TFEU.

[6] For the use of the terminology "mainstreaming clauses" when referring to the horizontal equality clauses, see *e.g.* F Ippolito, 'Mainstreaming Equality in the EU Legal Order: More than a Cinderella Provision?' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019).

EU equality law, this *Article* will now refer to them as "horizontal equality clauses". This choice of words makes it possible to show that the clauses may not only contribute to the analysis of policy and law-making on matters not explicitly related to equality but may also inform our understanding of EU equality law itself.

In human rights law thinking, the idea of mainstreaming rights is to integrate a human rights perspective into the very first stages of policy development.[7] By making sure that human rights considerations are taken into account during the process of policy-making, violations of human rights can be prevented and policies can be improved. Importing this approach to mainstreaming in the functioning of the EU legal order is most welcome in the pursuit of the objectives of the EU of combatting discrimination and promoting gender equality.[8] Yet, there is nothing in the wording of arts 8 and 10 TFEU to suggest that the function of these clauses should be "limited" to this specific understanding of mainstreaming. A critical examination of the "horizontal equality clauses" ought thus to explore not only their potential in terms of mainstreaming as just defined but also their broader contribution to the functioning of the EU legal order and the specificities of EU equality law in particular.

Throughout this *Article*, it is argued that these horizontal equality clauses, rather than fulfilling a wholly new function compared to other provisions of EU law on equality, actually primarily illustrate and give visibility to a political will to use existing tools to enhance the protection of equal treatment in EU law. In that sense, the clauses are best understood as giving direction to EU (equality) law. We explain first why these articles taken in isolation can (still) be considered an empty vessel (section II). Yet, although the horizontal clauses have not had much added value, they have actually been used. We therefore explore how the clauses have been utilized both in the case-law of the Court of Justice of the EU (hereafter: the ECJ) and in a broader EU governance context (section III). For that purpose, the research is based on systematic database searches in the case-law of the ECJ and other EU legal documentation.[9] As the ECJ case-law shows, these clauses do not *per se* impose legal obligations on EU authorities, but this has not prevented EU authorities from integrating equality into their activities to various degrees. By way of concluding comments (section IV), we query whether there are other avenues for improving the equality agenda in the "crowded" EU legal order.

[7] M Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 49.

[8] Art. 3(3) TEU.

[9] The authors conducted systematic research for horizontal equality clauses in ECJ case-law and documents of the EU institutions using the following keywords "Article 8 TFEU" and "Article 10 TFEU" respectively on CURIA for ECJ case law and on EUR-Lex for documents of the EU institutions. The authors also carried out systematic searches for other horizontal clauses (notably arts 7, 9, 11, 12 and 13 TFEU). We would like to thank Maksymilian Michal Kuzmicz for his valuable assistance in carrying out this research.

II. Individual horizontal clauses as an empty vessel

Scholars have observed that horizontal equality clauses are often bypassed in law. This preliminary negative assessment of the added value of the horizontal equality clauses is not only to be found in Shaw's work but in more contemporary analyses as well.[10] This disappointment is commonly attributed to the wording of the horizontal clauses. Indeed, the use of vague legal terms in these provisions has led to some confusion as to the degree of obligation created by these clauses as well as their normative quality and their normative implications.[11]

However, this is not the only explanation for the reluctance to regard these clauses as having significantly strengthened the protection of equality within the EU legal order. In this section, we highlight two other considerations. First, the incorporation of equality concerns in EU decision-making was already an important theme before the introduction of the horizontal equality clauses (section II.1). Second, the horizontal equality clauses do not perform a clear and distinct legal function in the EU legal order (section II.2).

II.1. Equality concerns incorporated in EU law-making before the horizontal clauses

To start with, it shall be recalled that, even if the horizontal equality clauses have been inserted in the TFEU fairly recently, the possibility to incorporate equality considerations in EU law-making existed before, and is thus in many ways independent from these clauses.

a) Protection of non-market values as an integral part of EU internal law-making

Equal treatment considerations are reflected in the legislative process and output of the EU well before the insertion into the TFEU of any horizontal clauses, or in fact of any specific legal basis explicitly creating EU competences on matters of equality and non-discrimination. The adoption of EU legislation for the protection of gender equality was initially channelled through internal market law-making. In the first EU Directive on equal pay between men and women (1975) for instance, which was adopted on the basis of earlier equivalent to today's art. 114 TFEU, the principle that men and women should receive equal pay was understood as forming an "integral part of the establishment and functioning of the common market".[12] In a bolder move, a year later, the preamble of the Directive on gender equality at the workplace (1976) acknowledged that, although the Treaty did not confer specific powers for the EU to legislate in this field, "equal treatment for male and female

[10] See *e.g.* B de Witte, 'Conclusions: Integration Clauses – a Comparative Epilogue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 184.

[11] F Ippolito, ME Bartoloni and M Condinanzi, 'Introduction: Integration Clauses – A Prologue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 5.

[12] Directive 75/117/EEC of the Council of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, preamble recital (1).

workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered". As a result, the Directive could be adopted on the basis of the flexibility clause which, as it was worded at the time, enabled necessary action "pour réaliser, dans le fonctionnement du marché commun, l'un des objets de la Communauté, sans que le présent Traité ait prévu les pouvoirs d'action requis à cet effet".[13]

In more general terms, Bruno de Witte has convincingly shown that the broad scope of the legal basis for the adoption of EU legislation to establish or facilitate the functioning of the internal market (thus art. 114 TFEU, or its earlier versions) enables the protection of "non-economic common objectives".[14] This possibility does not depend on whether there is an explicit requirement to integrate a specific value or objective in the text of the EU Treaties, as done by the horizontal equality clauses. Nothing prevents the Member States from deciding that they want to achieve a common objective, independently of its economic benefit.[15] For instance, the Directive on the Posting of Workers in the internal market, in its original version and thus before the horizontal equality clauses were inserted in the EU Treaties, included "equality of treatment between men and women *and other provisions on non-discrimination*" as part of the "hard core" guarantees that must be available to posted workers in the host state.[16] More recently, the EU adopted, on the basis of art. 114 TFEU, the EU Accessibility Act which seeks to promote the rights of persons with disabilities.[17] The latter mainstreams the protection of persons with disabilities in EU internal market law to give effect to the UN Convention on the Rights of Persons with Disabilities.[18]

b) Looking back at equality mainstreaming in EU-law making

Next to the possibility of incorporating equality considerations in EU legislation, the concern for adjusting the internal functioning of EU organs as well as the greater use of existing general EU policies to incorporate equality considerations in EU law-making – thus constituting "mainstreaming" as defined in the introduction – has also preceded the adoption of the horizontal equality clauses.

[13] Art. 235 TEEC; Directive 76/207/EEC of the Council of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preamble (3).

[14] B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 62.

[15] *Ibid*. See also V Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 22; C Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2016) ILJ 208.

[16] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, preamble (14) and art. 3(1)(g), emphasis added.

[17] Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, preamble (103).

[18] *Ibid*. preamble (12-17).

c) Mainstreaming gender equality

The horizontal clause on gender equality, the current art. 8 TFEU, was inserted by the Treaty of Amsterdam.[19] However, the fact that this clause appeared in the late 1990s does not mean that gender mainstreaming was not already a major concern at the European level by then. Indeed, gender mainstreaming is the fruit of a long history and was notably reflected in the work of the United Nations Third World Conference on Women in 1985.[20] At the EU level, gender mainstreaming became particularly visible ten years later, in 1995.[21] The *Santer* Commission came in with a new Commissioners' Group on Equal Opportunities and a strong commitment to the equality agenda.[22] Furthermore, the Commission contributed decisively to the preparations of the United Nations Fourth World Conference on Women in 1995, which culminated in the Beijing Platform for Action, in which gender mainstreaming figured prominently.[23]

This decisive year was followed by the drafting of two key documents on gender mainstreaming by the Commission, namely the fourth Community action programme on equal opportunities for women and men[24] and the Communication on Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities.[25] While the former strongly endorsed gender mainstreaming, the latter provided the first definition of gender mainstreaming at the EU level, which reads as follows: "mobilising all general policies and measures specifically to achieve equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation".[26]

This strong commitment towards gender mainstreaming in the 1990s did not emerge in a vacuum. The issue of gender mainstreaming was also high on the agenda of the

[19] Art. 3(2) TEC. This provision was also enshrined in art. III-116 of the Treaty establishing a Constitution for Europe. Hence, this horizontal clause came chronologically after the one on environmental protection, the oldest horizontal clause, which was already enshrined in art. 130(R)2 of Single European Act.

[20] C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities?' (2002) European Journal of Women's Studies 430; J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 260.

[21] M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) Journal of European Public Policy 435. It should also be noted that gender mainstreaming was included in the Third Community Action Programme (1991-1996). See E di Torella, 'The Principle of Gender Mainstreaming: Possibilities and Challenges' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 48.

[22] M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' cit. 435-436.

[23] C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union' cit. 438; E di Torella, 'The Principle of Gender Mainstreaming Possibilities and Challenges' cit. 48-49.

[24] Proposal for a Council Decision COM(95) 381 final from the Commission of 19 July 1995 on the Fourth Medium-Term Community Action Programme on Equal Opportunities for Women and Men (1996–2000).

[25] Communication COM(96) 67 final from the Commission of 21 February 1996 on Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities.

[26] *Ibid*. 2.

Council of Europe at that time. The Council of Europe provided one of the still leading definitions of the concept of gender mainstreaming in 1998, which is the following: "reorganization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels at all stages, by the actors normally involved in policymaking".[27]

The gender mainstreaming strategy of the EU developed in coincidence with global interest in this concept, specifically among human rights scholars. However, there are some differences between the approach to mainstreaming taken by the EU and the Council of Europe. Looking at the two different definitions of gender mainstreaming identified above it is striking how much broader the definition of the Council of Europe is. The EU definition, for example, asks for intervention at the planning stage, while the Council of Europe definition asks for a reorganization at all levels and stages of policy-making. Moreover, the EU definition requires to identify different effects of a policy measure on men and women, while the Council of Europe definition demands for the broader integration of a "gender equality perspective" into policy. Concretely, the EU definition does not explicitly cover the ex-post evaluation of policy processes. In addition, the explicit reference to men and women excludes individuals whose gender identity does not fit the binary. Hence, as the above illustrates, the gender equality horizontal clause included in the Treaty of Amsterdam, rather than a wholly innovative concept, was built upon existing practices and commitments of the EU institutions towards gender mainstreaming.[28]

d) Mainstreaming equality on other grounds

A rather similar story of formalisation of existing practices occurred with regard to the other horizontal equality clause, which was enshrined in art. 10 TFEU by the Lisbon Treaty. This provision was first inscribed in art. III-118 of the Treaty establishing a Constitution for Europe. Nevertheless, the preparatory works of the Convention on the future of Europe hardly touched upon the matter. The most noteworthy document on this issue would appear to be the Final report of working group XI "Social Europe" of 4 February 2003, where a comprehensive horizontal clause regarding social values was proposed.[29]

Before the Lisbon Treaty, however, the idea of mainstreaming equality on these specific grounds had already found its way into the EU's institutional practice and discourse, particularly in relation to disability and racism. Firstly, the Commission had advocated

[27] Final Report of Activities EG-S-MS (98) 2 from the Group of Specialists on Mainstreaming for the Council of Europe of May 1998 on Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices.

[28] See in this vein, *e.g.* C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union' cit. 443.

[29] Final Report CONV 516/1/03 from Working Group XI 'Social Europe' to the Members of the European Convention of 4 February 2003, available at www.cvce.eu.

mainstreaming non-discrimination of people with disabilities in 1996[30] and had strengthened its discourse over the years.[31] Secondly, mainstreaming non-discrimination on the basis of race was prominent in the 1997 European Year against Racism and the 1998 Action Plan Against Racism.[32] In a report of 2000 on mainstreaming anti-racism, the Commission even referred to the possibility of extending the concept of mainstreaming to all grounds of discrimination covered by art. 13 TEC.[33]

II.2. No autonomous function for horizontal equality clauses

A second important set of reasons for the reluctance to regard the horizontal clauses as having significantly strengthened the protection of equality within the EU legal order is that these clauses have not been attributed – nor do they perform – any autonomous function in the EU legal order. It is thus unsurprising to observe, along with other scholars, that the horizontal clauses have played a very modest role in the ECJ's case-law.[34]

a) No new competences

First and foremost, the horizontal equality clauses have not resulted in the creation of competences for the EU legislator in the field of equality law. Although there is no explicit case-law concerning the horizontal equality clauses on the matter, a relevant example may be found with regard to another horizontal clause, namely the one on environmental protection, in *Antarctic MPAs*. In this judgment of 2018, the ECJ implied that this clause was not sufficient as such to create competence in the field of environment.[35] On a related note, the horizontal equality clauses cannot be used to extend the scope of application of the Charter, which is set out in its art. 51, as noted by AG Jaaskinen in *FOA*.[36]

For most of the horizontal clauses, there is in fact no need for them to create competences as the EU Treaties provide for specific competences in the areas concerned. This is the case for equality law as noted in the introduction. By way of illustration, while

[30] Communication COM(1996) 406 final from the Commission of 30 July 1996 on Equality of Opportunity for People with Disabilities, A New European Community Disability Strategy.

[31] See in particular Communication COM(2003) 650 final from the Commission of 30 October 2003 on Equal Opportunities for People with Disabilities: a European Action Plan where the Commission advocated for reinforcing mainstreaming of disability issues in Community policies. In this vein, F Ippolito, 'Mainstreaming equality in the EU legal order' cit. 61.

[32] Communication COM (1998) 183 final from the Commission of 25 March 1998 on An Action Plan Against Racism, p. 3; see for instance "The Commission will continue to take full account of the principles of non-discrimination in its own recruitment and promotion policies". See also J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 300.

[33] J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 264.

[34] See *e.g.* P Vieille, 'How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming' in N Bruun, K Lorcher and I Schomann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 119; B de Witte, 'Conclusions: Integration Clauses' cit. 186-187.

[35] Case C-626/15 *Commission v Council (Antartic MPAs)* ECLI:EU:C:2018:925 para. 71.

[36] Case C-354/13 *FOA* ECLI:EU:C:2014:2463, opinion of AG Jaaskinen, para. 23.

the recent Commission proposal for a Pay Transparency Directive refers to art. 8 TFEU, the proposed legal basis is art. 157(3) TFEU.[37]

b) No grounds for review

A second function that has not been filled by the horizontal equality clauses is that, in principle, they do not constitute a ground for judicial review. In this respect, however, it should be noted that a distinct approach was suggested, with some ambiguity, by two Advocates General in *Soukupova*[38] and *Z*.[39] In the first case, AG Jaaskinen appears to include arts 8 and 10 TFEU as potential grounds for reviewing the application by the Member States of Regulation n.1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF).[40] In the second case, AG Wahl adopts a fairly ambivalent approach. As a first step, the AG seems to argue that art. 8 TFEU can serve as a basis for reviewing EU secondary legislation: "it is clear that, in tandem with the general principle of equal treatment, [Article 3 TEU, Article 8 TFEU and Article 157 TFEU as well as Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union] may operate as a basis for the review of EU secondary legislation".[41]

Nevertheless, in a second step, the AG takes an opposite view concerning art. 10 TFEU. According to the AG:

> "[art.] 10 TFEU contains a general clause which articulates a particular policy aim to which the European Union is committed. It sets out the aim of combating discrimination based on, among other reasons, disability: an aim furthered by Directive 2000/78 in the field of employment and occupation. It is my understanding that that provision of primary law does not lay down any precise rights or obligations which might call into question the validity of Directive 2000/78".[42]

The latter approach is in line with the ECJ case-law on horizontal clauses, as well as with what can be expected from such clauses. For instance, in *Front Polisario*, the General

[37] Proposal for a Directive COM/2021/93 final of the European Parliament and of the Council of 4 March 2021 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, p. 3-4.

[38] Case C-401/11 *Soukupová* ECLI:EU:C:2012:658, opinion of AG Jaaskinen.

[39] Case C-363/12 *Z* ECLI:EU:C:2013:604, opinion of AG Wahl.

[40] *Soukupova*, opinion of AG Jaaskinen, cit. para. 51. In this paragraph, the AG argues that, while Member States are able to determine the normal retirement age in national legislation, this legislation may not breach the prohibition on discrimination based on sex. The AG explains this prohibition as being contained in arts 8 and 10 TFEU among other sources (case-law, arts 2 and 3 TEU and arts 21 and 23 of the Charter). Thereby, the AG indirectly uses the horizontal equality clauses as a standard (non-discrimination) against which the application of the Directive can be examined. However, it is important to note that arts 8 and 10 TFEU are quoted by the AG among other sources of EU equality law and not used independently.

[41] *Z*, opinion of AG Wahl, cit. paras 69-70.

[42] *Ibid*. para. 112.

Court suggested that art. 7 TFEU, the horizontal consistency clause,[43] is not a ground for judicial review and that, in any case, there exist other proxies in EU law that can fulfil this function.[44] For equality law, such proxies may for example be arts 21 and 23 of the Charter, as well as art. 157(1) TFEU.

c) No autonomous substantive legal obligations

More generally, the horizontal equality clauses do not generate substantive legal obligations for either the EU institutions or the Member States.[45] Perhaps the strongest statement in this regard is to be found in *DG v ENISA* concerning the horizontal social clause. In this case, concerning a civil servant dispute, the former Civil Service Tribunal held that: "So far as concerns Article 9 TFEU, that provision does not lay down any specific obligations. It cannot be inferred from it that, in a case such as that presently before the Tribunal, there is necessarily a prior obligation on ENISA to examine the possibility of redeploying the member of staff".[46]

However, it should be noted that the ECJ has sent some mixed signals on this matter, notably in *Pillbox*[47] and in *Poland v Parliament and Council*. In the latter case, the Court indeed ruled that: "It cannot [...] be concluded from the above that, when coordinating such rules, the EU legislature is not also bound to ensure respect for the general interest, pursued by the various Member States, and for the objectives, laid down in Article 9 TFEU, that the Union must take into account in the definition and implementation of all its policies and measures".[48]

Interestingly, and as will be discussed below, AG Geelhoed in *Austria v Parliament and Council* suggested that the horizontal clauses could be violated if one of the interests protected by these clauses was completely disregarded by the EU legislator in the decision-making process.[49]

III. The contribution of horizontal clauses to the crossing

While the above echoes disenchantment on the horizontal clauses, the story of the added value of these clauses deserves to be more nuanced. Despite this preliminary negative assessment, it must be noted that the horizontal clauses are being used in practice. On the one hand, the horizontal equality clauses enable the Court to support attention given

[43] See on the horizontal consistency clause, NN Shuibhne, 'Deconstructing and Reconstructing Article 7 TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 160-180.

[44] Case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 153.

[45] In this vein, M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' cit. 437.

[46] Case F-109/13 *DG v ENISA* ECLI:EU:F:2014:259 para. 60.

[47] Case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324, see in particular para. 116.

[48] Case C-626/18 *Poland v Council* ECLI:EU:C:2020:1000 para. 51, see also para. 46. Further elaborating in favour of a progressive reading of this approach see E Psychogiopoulou, 'The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice' (2022) European Papers 1357.

[49] Case C-161/04 *Austria v Parliament and Council* ECLI:EU:C:2006:66, opinion of AG Geelhoed, para. 59.

to the related interest or value (section III.1). Yet, in the field of EU equality law, the function thereby performed by the clauses can also be fulfilled by other tools of EU law. On the other hand, and perhaps more interestingly, the benefits of these clauses may be more visible when they are considered in terms of broader European governance (section III.2). In this context, the horizontal clauses fit into a general trend towards more engagement of the EU with the principle of equal treatment.

III.1. An aid in the case-law of the ECJ

In certain cases, the horizontal equality clauses have been used as interpretative tools by the ECJ and they could also serve to support the legitimacy of an interest to restrict the internal market or a fundamental right. In such contexts and as will be explained below, the horizontal equality clauses have prominent proxies within EU equality law.

a) Interpretative tools

The most significant role of the horizontal equality clauses in the case-law of the ECJ is arguably that they have been embraced as interpretative tools. Indeed, this function has been acknowledged by both the ECJ[50] and Advocates General. A telling illustration can be found in the Opinion of AG Stux-Hackl in *Dory*, which concerned a German measure that limited compulsory military service to men. Although the AG deemed that EU law did not preclude such a measure, he emphatically asserted the interpretative value of the "horizontal gender equality clause" as regards the material scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions:

> "The above considerations do not, however, justify the conclusion that any purported subject-matter of a national measure would be capable of removing altogether from review by reference to Directive 76/207 a measure which merely has the effect of thus producing sex-specific disadvantages in access to the labour market. That is because, in my opinion, in interpreting the scope of Directive 76/207, Article 3(2) EC [today: Article 8 TFEU] must now also be taken into account. That provision of primary law was not yet in force at the time when the directive was drawn up. However, the Community is now expressly required by that provision actively to promote equality between men and women".[51]

Another example is provided more recently by the Opinion of AG Tanchev in *Egenberger*. The AG put forward that the horizontal equality clause should be taken into account when interpreting EU primary law. In particular, arts 17(1) and (2) of the TFEU, which are about the respect of the status of churches and religious associations or communities in the Member States under national law, and of philosophical and non-confessional organisations.[52]

[50] See *e.g.* case C-463/19 *Syndicat CFTC* ECLI:EU:C:2020:932 para. 43.
[51] Case C-186/01 *Dory* ECLI:EU:C:2002:718, opinion of AG Stix-Hackl, para. 101.
[52] Case C-414/16 *Egenberger* ECLI:EU:C:2017:851, opinion of AG Tanchev, para. 93.

b) Supporting the legitimacy of restrictions to EU rights

More specifically, the horizontal equality clauses can be used to support the legitimacy of an interest that is used to restrict an EU right. This holds true both for a restriction of EU fundamental freedoms and of fundamental rights. While there is as yet no case-law on this subject concerning the horizontal equality clauses, there is a wealth of case-law concerning the social horizontal clause (art. 9 TFEU), whose similarities with the former have been highlighted in the literature.[53] For instance, in *Deutsches Weintor*, the ECJ held that the protection of public health, which is covered by art. 9 TFEU, could constitute an objective of general interest justifying a restriction of fundamental freedoms.[54]

Similarly, with regard to a restriction of a fundamental right, the ECJ deemed in *Neptune distribution* that a high level of human health protection and consumer protection, also protected by art. 9 TFEU, are legitimate objectives of general interest which may, under certain circumstances, justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business.[55] Interestingly, it seems that horizontal clauses may not only play a role in identifying a legitimate interest, but also in assessing the proportionality of a restrictive measure, as alluded to by the ECJ in *Philip Morris Brands and others*.[56]

c) Horizontal equality clauses and their proxies: contrasting with animal welfare

Yet, the added value of the horizontal equality clauses in relation to both the interpretative function and the more specific identification of a legitimate interest must be tempered. Indeed, it is most likely that these functions could be performed by other instruments belonging to the EU's equality law palette identified in the introduction, such as the Charter equality rights. This is in stark contrast to the horizontal animal welfare clause (art. 13 TFEU) for which there is limited proxy in EU law.

For example, in the recent *One Voice and Ligue pour la protection des oiseaux* case, the ECJ relied heavily on art. 13 TFEU to interpret restrictively art. 9(1)(c) of the Directive 2009/147/EC on the conservation of wild birds, so that it opposes a national regulation which authorises a catching method which results in by-catches, when these by-catches, even if small in volume and for a limited period of time, are likely to cause other than negligible damage to the non-target species caught.[57] The animal welfare clause has also served as an objective of general interest to restrict a fundamental right and in particular the right to freedom of thought, conscience and religion enshrined in art. 10 of the Charter, as illustrated in the *Centraal Israëlitisch Consistorie van België* case.[58]

[53] P Vieille, 'How the Horizontal Social Clause Can Be Made to Work' cit. 108.

[54] Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526 para. 49.

[55] Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823 paras 73-74.

[56] Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325 para. 153.

[57] Case C-900/19 *One Voice and Ligue pour la protection des oiseaux* ECLI:EU:C:2021:211 paras 39, 65 and 71.

[58] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031 para. 63.

III.2. An aid in the broader context of EU governance

Looking only at the ECJ case-law to assess the added value of the horizontal equality clauses would not do them justice. After all, the fact that they have a modest role in the ECJ case-law is not so surprising since, as rightly observed by di Torella, the horizontal clauses are primarily addressed to policymakers and legislators at the stages of the policy-making process.[59] Therefore, it is necessary to also examine their contribution to the wider process of EU governance to better understand the role they play in the EU legal order. The equality agenda appears to be increasingly embedded into the EU policy machinery. While it is difficult to assess the degree to which this is the result of the insertion of the horizontal equality clauses in the EU Treaties, these clauses do illustrate a political willingness to diversify the forms of protection and promotion of equality within the EU legal order.

a) Horizontal equality clauses in the Commission's impact assessments

In this respect, perhaps the most natural way to evaluate the integration of equality concerns into the EU decision-making process is to look at the mechanisms by which particular interests are taken into account within that process. Here, the Commission's impact assessments are taken as our focal point as they represent the main tool to screen horizontally all major EU policy initiatives in light of specific interests.[60] The picture that arises from an analysis of the horizontal equality clauses in the impact assessments is a mixed one, which concurs with the occasionally positive attitude of some authors,[61] and the more sceptical stance of others.[62]

First and foremost, it is striking that the equality grounds protected by the horizontal equality clauses are hardly mentioned in the Commission's better regulation documents. Indeed, the main document where these grounds appear, without express reference to the horizontal equality clauses, is the Better Regulation "Toolbox", which complements the Better Regulation Guideline.[63] More specifically, this document lists a number of questions regarding equality that need to be assessed qualitatively and, if possible, quantitatively for all Commission initiatives.

[59] E di Torella, 'The Principle of Gender Mainstreaming Possibilities and Challenges' cit. 49. See also, V Kosta, 'Fundamental Rights Mainstreaming in the EU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 17; O De Schutter, 'Mainstreaming Human Rights in the European Union' in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005) 44.

[60] See also V Kosta, 'Fundamental Rights Mainstreaming in the EU' cit. 22 ff.

[61] F Ippolito, 'Mainstreaming Equality in the EU Legal Order' cit. 65 ff.

[62] S Smismans and R Minto, 'Are Integrated Impact Assessments the Way Forward for Mainstreaming in the European Union?' (2017) Regulation and Governance 231.

[63] See Staff Working Document SWD(2021) 305 final from the Commission of 3 November 2021, Better Regulation Guidelines and the complementary Staff Working Document from the Commission of 25 November 2021, Better Regulation 'Toolbox', available at commission.europa.eu. More specifically, the list of questions is mentioned under the tool 19 'Identification/Screening of Impacts'.

Three observations may be made when considering this list of questions. Firstly, one can observe a certain imbalance between the weight given to the grounds protected by arts 8 and 10 TFEU, since the questions mainly target gender equality, and far less the grounds protected by art. 10 TFEU. Secondly, the list related to equality appears to be just one among many lists, which cover a great variety of subjects, such as the impacts on operating and business costs, on consumers and households, or on third countries and international relations. Thirdly, and perhaps most importantly, the logic behind these questions is that of a tick-box, and thus distances itself from a vision that would consist in giving a positive reading of equality, by actively promoting it.[64]

Besides, references to the horizontal equality clauses are to a large extent at the discretion of the Commission, with no guarantee of a consistent and systematic integration. This is reflected in the practice of the impact assessments carried out by the Commission. As the qualitative study of Smismans and Minto shows, impact assessments do not systematically evaluate whether a policy initiative is likely to have a negative or positive impact on the interests protected by the horizontal clauses.[65] This is especially true for the horizontal equality clauses, and gender equality is the area where the gap between – institutional guidance and practice seems to be the widest.[66]

This somewhat mixed picture has led to calls for the strengthening of equality mainstreaming, including suggestions to impose a procedural guarantee to ensure that mainstreaming takes place systematically throughout the decision-making process.[67] Can the horizontal clauses offer a solution in this regard? As noted above, AG Geelhoed in *Austria v Parliament and Council* has suggested that the horizontal clauses could be breached if one of the interests protected by these clauses was disregarded in the decision-making process. That being said, no ECJ case-law has so far confirmed this view, and it seems difficult to argue that EU institutions are obliged to integrate the concerns enshrined in the horizontal equality clauses during the decision-making process, although they retain the option to do so.

b) Incorporating equality concerns across EU activities with no reference to horizontal clauses

Along the same lines, and for a more positive image, a frequent phenomenon in the practice of EU institutions is that equality is integrated into the decision-making process, while no references to horizontal equality clauses are made. This is particularly apparent in the field of external relations. As de Witte observed, the EU's external relations are one area where there is a strong presence of horizontal concerns without the "mainstreaming flag".[68]

[64] In this vein, S Smismans and R Minto, 'Are Integrated Impact Assessments the Way Forward for Mainstreaming in the European Union?' cit. 235-239.

[65] *Ibid*. 245-246.

[66] *Ibid*. 242.

[67] *Ibid*. 245-246.

[68] B de Witte, 'Conclusions: Integration Clauses' cit. 184. See also A Thies, 'The EU's Law and Policy Framework for the Promotion of Gender Equality in the World' in T Giegerich (ed.), *The European Union as Protector and Promoter of Equality* (Springer 2020) 429-454.

For instance, the 2020 joint communication from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament and the Council "EU gender equality action plan (GAP) III" includes concrete objectives for paying attention to gender equality in the context of external relations but does not refer to the "horizontal gender equality clause", art. 8 TFEU.[69] Another telling example is the Commission Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, namely the Istanbul Convention, where art. 8 TFEU is only mentioned in passing.[70] This may seem particularly surprising in the light of Declaration no. 19 to the TFEU on art. 8 TFEU, which states that the Union will aim in its various policies to combat all forms of domestic violence, which is one of the core subjects of the Istanbul Convention.[71]

In addition to external relations, EU funding is another place in the EU architecture where equality concerns appear to be important. Gender equality concerns in EU funds have already shown their presence in decisions from the early 2000s,[72] and are also present in most recent decisions.[73] In this regard, we should distinguish two situations. On the one hand, there are specific budgets that directly target the enhancement of equality, such as the Rights and Values programme.[74] On the other hand, some funds are not directly related to equality, but where the equality dimension will be integrated into a

[69] Joint Communication JOIN/2020/17 final from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament and the Council of 25 November 2020 on Gender Action Plan (GAP) III – An Ambitious Vision on Gender Equality and Women's Empowerment for EU External Action.

[70] Proposal for a Council Decision COM/2016/0111 final – 2016/063 (NLE) from the Commission of 4 March 2016 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[71] Declaration n. 19 on art. 8 TFEU.

[72] See *e.g.* Decision 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, point 3 of the annex.

[73] It is of note that in the context of the Recovery and Resilience Facility, Member States are required to include in their Recovery and Resilience Plan "an explanation of how the measures in the recovery and resilience plan are expected to contribute to gender equality and equal opportunities for all and the mainstreaming of those objectives (…)" (art. 18(4)(o) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility). See more on the reporting on gender equality in the Report COM(2022) 383 final from the Commission to the European Parliament and the Council of 29 July 2022, Review report on the implementation of the Recovery and Resilience Facility, 23-24. See also the Draft Council Conclusions (2022) 12067 from the General Secretariat of the Council of 30 September 2022 on Gender equality in disrupted economies: focus on the young generation which highlights the need to integrate a gender perspective into national recovery and resilience plans, and more broadly in the responses to the socio-economic challenges caused by the Covid-19 pandemic and the war in Ukraine.

[74] See Regulation 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014, in particular arts 2(2)(b) and 4.

number of provisions of EU funds. A prime example of the latter is the Regulation establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020), which included a specific clause to integrate gender equality in the context of research and innovation in strategies, programmes and projects.[75]

Yet, what stands out from the examination of these instruments related to EU funding is that there is a disparate and non-uniform approach to what aspect of equality should be integrated or to what extent it should be integrated. For example, some funding regulations only refer to gender equality concerns,[76] while others also include concerns for equality on other grounds.[77] Similarly, some contain a more generic reference to the fact that equality must be promoted throughout the preparation, implementation, monitoring and evaluation of programmes, whereas others also include a specific monitoring clause.[78] As another example, the reference to equality concerns is sometimes placed only in the preamble of the text.[79]

Despite the diversity of approaches, it shall be stressed that some of the instruments of EU secondary law on funding contain their own horizontal equality clauses; and these may be included in a legal construct giving them legal bite. It is of note for instance that the Commission has relied on the horizontal equality clause formulated in the EU Regulation laying down common provisions on several EU Funds[80] to cut funds in the context

[75] Regulation 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision 1982/2006/EC, preamble (25) and art. 16. Note that the new version of the Regulation now refers to art. 8 TFEU (Regulation 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination and repealing Regulations (EU) 1290/2013 and (EU) 1291/2013, *e.g*. preamble (53) and art. 7(6)). The preamble of Regulation 2021/695 also provides that "the activities under the Programme should aim to eliminate inequalities and promote equality and diversity in all aspects of R&I with regard to age, disability, race and ethnicity, religion or belief, and sexual orientation" (preamble (53)).

[76] See in particular Regulation 1291/2013 cit.

[77] *E.g*. Regulation 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, art. 9(3).

[78] *E.g*. Regulation 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation ("EaSI") and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion Text with EEA relevance, art. 12.

[79] *E.g*. Regulation 2021/695 cit., where gender equality is mentioned both in preamble (53) and art. 7(6), while equality on grounds of age, disability, race and ethnicity, religion or belief, and sexual orientation is mentioned in preamble (53) but there is no specific provision for incorporating equality on these grounds.

[80] Regulation 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the

of the "LGBTIQ-ideology free zones" declarations, statements or resolutions made by Polish regional authorities.[81] The Commission noted as follows:

> "In accordance with Article 30(1) of the Regulation [...] requests for any amendment of a programme shall always take into account the respect of horizontal principles set out in [inter alia Article 7 on the 'Promotion of equality between men and women and non-discrimination'] of this Regulation. The actions of your regional authorities, which adopted declarations, statements or resolutions branding LGBTIQ community postulates as 'an ideology' and declaring their territories LGBTIQ-unwelcome, put into question the capacity of regional managing authorities to ensure compliance with the horizontal principle of non-discrimination in the implementation of ESIF programmes".[82]

c) Looking forward

To conclude this section, it is worth noting that the latest Commission documents show the latter's willingness to intensify the inclusion of concerns for equality across EU law- and policy-making, which could herald a new era for references to the horizontal equality clauses. Hence, in its Communication "A Union of Equality: Gender Equality Strategy 2020-2025 (2020)", the Commission has affirmed that it will integrate a gender perspective in all major Commission initiatives, such as the European Green Deal, the EU Beating Cancer Plan and the EU Drugs Agenda 2021-2015.[83] In the same vein, in its Communication "A Union of equality: EU anti-racism action plan 2020-2025 (2020)", the Commission has stated that: "the Commission will seek to ensure that the fight against discrimination on specific grounds and their intersections with other grounds of discrimination, such as sex, disability, age, religion or sexual orientation is integrated into all EU policies, legislation and funding programmes".[84]

This renewed commitment should be supported by the establishment of a new Equality Task Force, composed of representatives from all Commission services and the European External Action Service, which will support the integration of an equality

European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, art. 7 on gender equality. Note that the new Regulation laying down common provisions on several EU Funds (Regulation 2021/1060 cit.) also refers to gender equality (art. 9(2)).

[81] See letter of the Commission of 3 October 2021 to Polish regional Managing Authorities, Responsibilities of the regional Managing Authorities to provide comprehensive answers to the letter of formal notice of 14 July 2021 and to undertake corrective measures, available at roztocze.net.

[82] *Ibid*. 2.

[83] Communication COM(2020) 152 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 5 March 2020 on 'A Union of Equality: Gender Equality Strategy 2020-2025'.

[84] Communication COM(2020) 565 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 18 September 2020 on 'A Union of Equality: EU Anti-racism Action Plan 2020-2025'.

perspective in all major EU policies and initiatives.[85] It remains however to be seen to what extent this commitment will be translated into the practice of the EU institutions. It can already be observed that there is a certain imbalance in the references to the various grounds of discrimination referred to by arts 8 and 10 TFEU. Indeed, while some grounds are the subject of specific strategies, such as the LGBTIQ Equality Strategy 2020-2025,[86] the EU Roma Policy Framework[87] and the above-mentioned Gender Equality Strategy 2020-2025, this is not the case for other grounds.

IV. Where is the vessel heading? The quest for the effectiveness of the principle of equal treatment in EU law

The conclusion that the horizontal equality clauses have a modest added value may originate in the preliminary assumption on which references to the EU "mainstreaming clauses" is based. Equality mainstreaming is premised on the idea that other means of combatting discrimination, such as legislation, litigation or positive action, are too limited in their ability to actually change underlying patterns of discrimination.[88] Gender mainstreaming in particular has been claimed to have the potential to "transform" the law-making process so that gender biases are eliminated.[89] Moreover, equality mainstreaming flows from the perception that concerns on non-discrimination, particularly the position of vulnerable groups or minorities, are easily overlooked or side-lined.[90] Equality mainstreaming is intended to ensure more consistent attention to the position of these groups.[91] Yet, overall, mainstreaming has proven to be more successful in theory than in practice.[92] The transformation of policy-making procedures is not easy and proper consideration of equality considerations requires quite a lot of expertise, which is not always present at all levels of

[85] See Statement from the European Commission of 22 December 2020 on Union of Equality: The First Year of Actions and Achievements. We would like to thank Gillian More for drawing our attention to this point.

[86] Communication COM(2020) 698 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 12 November 2020 on 'Union of Equality: LGBTIQ Equality Strategy 2020-2025'.

[87] Communication COM(2020) 620 final from the Commission to the European Parliament and the Council of 7 October 2020 on 'A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030'.

[88] C McCrudden, 'Mainstreaming Human Rights' (2004) University of Michigan School of Law Public Law & Legal Theory Research Paper Series 1, 5; J Squires, 'Is Gender Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) Social Politics 366, 369; M Verloo, 'Another Velvet Revolution? Gender Mainstreaming and the Politics of Implementation' (IWM Working Paper 5-2001) 1, 6.

[89] M Daly, 'Gender Mainstreaming in Theory and Practice' (2005) Social Politics 442.

[90] C McCrudden, 'Mainstreaming Human Rights' cit. 13.

[91] E Hafner-Burton E and M Pollack, 'Gender Mainstreaming and Global Governance' (2002) Feminist Legal Studies 287.

[92] M Daly, 'Gender Mainstreaming in Theory and Practice' cit. 433.

government.[93] In the context of EU law, the horizontal equality clauses taken in isolation do not have much added value and indeed so far largely remain an empty vessel.

As noted in the introduction though, the horizontal equality clauses do not have to be set aside from other instruments of EU equality law, and could instead be further used as interpretative aids adding to those already giving the latter direction.[94] Despite their lack of autonomous legal functions as evidenced above, they can indeed inform our understanding of EU equality law itself. When examined as one element among others of EU equality law and governance then, references to the clauses spread across EU instruments illustrate the recurrence – even if imperfect and not consistent – of the principle of equal treatment in the policy agenda of the EU. In this context, visible change is more likely to result from the operation of legal instruments which co-exist with the horizontal equality clauses and that might be read in conjunction with them. This modest observation acts as a reminder that progress in combatting discrimination and promoting equal treatment can only result from a coexistence of tools.

Let us thus return, by way of concluding comment, to the traditional legal instruments of EU equality law and reflect on where there is still room for improvement. Perhaps the old age of provisions on EU equality law shall not be equated with a loss of vitality. We first turn to EU equality legislation. Long-standing instruments can be revised, their scope extended[95] and the instruments for equality governance contained therein modernized. One may for instance point at the recent opening by the Commission of a consultation procedure on strengthening equality bodies by setting minimum standards for their functioning in all grounds and fields covered by the EU Equality Directives.[96]

Furthermore, following up on the solemn proclamation of the European Pillar of Social Rights by the Parliament, the Council and the Commission in 1997,[97] which includes references to gender equality and equal treatment and opportunities on other grounds, several important new legislative initiatives were taken. The work-life balance directive for instance contributes to gender equality as well as to the better protection of persons with disabilities

[93] E Hafner-Burton E and M Pollack, 'Gender Mainstreaming and Global Governance' cit. 288.

[94] See section I and III.1 sub-section *a)* in this *Article*.

[95] See Proposal for a Council Directive COM(2008) 426 final from the Commission of the European Communities of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Although progress on this specific file is still on hold after more than a decade: see Proposal for a Council Directive (2021) 14046 from the Council of 23 November 2021 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

[96] Consultation period 10 December 2021 – 18 March 2022, more information at Equality bodies – binding standards available at europa.eu.

[97] See also the latest version of the related Action Plan: European Commission, *The European Pillar of Social Rights Action Plan* (4 March 2021) europa.eu. See further: S Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) CYELS 21.

and their careers.[98] The Commission has also now tabled a proposal for a Directive to further strengthen equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.[99] For another example, the President of the Commission, as well as the French Presidency of the Council,[100] seem hopeful about the prompt adoption of a directive on improving gender balance on company boards that has been on the negotiation table since 2012.[101] There is thus interesting legislative activity in recent years on matters of equal treatment at the EU level.

The second set of developments related to traditional prongs of EU equality law that is worthy of attention relates to their judicial interpretation. The doctrine of effectiveness of EU law, applied to EU equality, has provided a fertile ground for strengthening equality protection in the EU legal order. The Court of Justice just reiterated its attachment to the "effectiveness" of art. 157 TFEU and asserted its horizontal direct effect, irrespective of whether the principle of equal pay for male and female workers is relied upon in respect of "equal work" or of "work of equal value".[102]

Furthermore, within the area of EU competences, and where such competences have been exercised by the EU legislator, the Court of Justice of the EU gains interpretative jurisdiction with respect to both the legislative instrument and the related provisions of the Charter. Recent case law illustrates the far-reaching implications of judicial interpretation driven by the concern to ensure effective protection of the principle of equal treatment in such a setting. A first example relates to the horizontal direct effect of equal treatment clauses enshrined in the Charter, as triggered by the applicability of a directive on equal treatment. This may enable to fill in important individual gaps in protection. In *Cresco*, for instance, the Court concluded that "until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to

[98] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and careers, p. 79–93. See further L Waddington and M Bell, 'Similar, Yet Different: The Work-life Balance Directive and the Expanding Frontiers of EU Non-Discrimination Law' (2021) CMLRev 1401; L Waddington and M Bell, 'The Right to Request Flexible Working Arrangements under the Work-life Balance Directive: A Comparative Perspective' (2021) European Labour Law Journal 508.

[99] Proposal for a Directive COM/2021/93 final of the European Parliament and the Council of 4 March 2021 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms; the proposed directive would be based on art. 157(3) TFEU.

[100] S Fleming and E Solomon, 'Von del Leyen Expects EU Deal on Rules for Women in Boardrooms' (12 January 2022) Financial Times www.ft.com.

[101] Proposal for a Directive COM(2012/) 614 final of the European Parliament and of the Council of 14 November 2012 on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. As this *Article* was being processed for publication, a political agreement was indeed reached on the text. See M Brion, 'EU-Listed Companies Should Aim to Have at Least 40% of their Non-Executive Director Positions Held by Women Starting mid-2026' (8 June 2022) Agence Europe agenceurope.eu.

[102] Case C-624/19 *Tesco Stores* ECLI:EU:C:2021:429 para. 35.

employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday".[103]

Yet a possibly more promising development, with broader structural and thus societal implications, relates to the procedural spillover effects of obligations contained in EU equality legislation. In *CCOO*, related to the neighbouring area of EU law on working time, the Court of Justice has interpreted the provisions of the Working Time Directive[104] as well as of art. 31(2) of the Charter on working time in light of the principle of effectiveness. This resulted in a far-reaching duty imposed on employers to actually set up a system enabling the duration of time worked each day by each worker to be measured.[105] The Court noted, "in order to ensure the effectiveness of those rights provided for in [the Working Time Directive] *and* of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured".[106] Although such a system is not mentioned anywhere in the related piece of EU legislation, its creation will unquestionably contribute to the realisation of the rights protected by EU law across the EU.

The combination of a dynamic legislative agenda, including more attention being paid to enforcement of the rights therein, as well as an effectiveness-based reading of EU legislation giving expression to fundamental rights protection in the Charter, may at the moment carry more promises for EU equality law than the horizontal equality clauses taken in isolation.[107] A comparison has been set between the effectiveness based reading of EU legislation giving expression to fundamental rights and forms of "positive obligations", a concept which does not (yet) exist in EU law.[108] There may, therefore, be more

[103] Case C-193/17 *Cresco Investigation* ECLI:EU:C:2019:43 para. 89.

[104] Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, p. 9–19 .

[105] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:402. The legislative act must be read in light of the corresponding provision of the Charter (paras 30-32); the legislative act ought to be read so as to ensure its full effectivity (paras 40 ff).

[106] *Federación de Servicios de Comisiones Obreras (CCOO)* cit. para. 60. Emphasis is added herein as it is remarkable that the Court of Justice seeks to ensure the effectiveness not only of EU legislation – whereby the EU exercises its competences – but also of the Charter itself.

[107] For a recent illustration in the context of EU equality law, see case C-30/19 *Braathens Regional Aviation* ECLI:EU:C:2021:269, in particular paras 44 ff. Initiating a broader reflection on the topic see: T Plat, 'L'effectivité des directives sociales à travers la Charte des droits fondamentaux de l'Union européenne', Mémoire présenté pour le Diplôme d'Etudes Juridiques Européennes du Collège d'Europe (Bruges 2021-2022); available at the library of the said institution.

[108] See B de Witte, 'The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights' in G de Búrca, *The EU Charter of Fundamental Rights and Freedoms at 20* (Quaderni costituzionali 2020) 854-857. See also the cautious reference to positive obligations that "may" derive from the Charter, with reference to equivalent provisions in the ECHR, and in response to preliminary questions on that point by

need in the coming years for us to draw parallels between EU and human rights law, as the present exercise on mainstreaming invites, while acknowledging the nuances between their dynamics.

the Belgian Constitutional Court: joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net* ECLI:EU:C:2020:791 paras 126-128 and 145-146.