

Deliberating Difference: Gender and EU Decision-Making

Sara Clavero and Yvonne Galligan

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Abstract

The gendered nature of democratic decision-making in the EU is the focus of this paper. It outlines a theoretical model of democracy that looks at public decision-making processes through a gender lens, gender democracy. It then takes two instances of democratic decision-making in the European Union relevant to gender equality: the Goods and Services Directive and the Recast Equality Directive. Using the concept 'gender democracy', the paper illuminates the contingent treatment of gender interests in democratic politics at EU level.

Key words: European Union, gender democracy, gender equality, equal opportunities

Introduction

The European Union plays an important role in promoting gender equality across the member states and in its external relations in three ways. First, equality between women and men is recognised as a fundamental human right in various EU treaties. Second, it constitutes a 'common value' on which European Union decision-making is based. Third, it informs the framing of policies and actions designed to eliminate gender inequalities.¹ In the course of 50 years, gender equality has moved from being a provision in the Treaty of Rome (Article 119) designed to discourage anti-competitive labour practices to constituting a significant Union commitment. This has resulted in a sizeable and disparate corpus of laws, policies, actions and other measures that seek to eliminate gender-based discrimination in employment, employment-related and social fields. In addition, and as a consequence of the Treaty of Amsterdam, the EU promotes gender equality in a positive manner. It does this through a gender-sensitive scrutiny of all policies (gender mainstreaming), legislating for positive action in relation to the 'underrepresented sex', and taking initiatives

¹ For recent commitments in this regard, see the *Women's Charter* – a political declaration setting out five key action areas from 2010 onwards: <http://ec.europa.eu/social/main.jsp?catId=418> (last accessed 5 May 2010)

beyond the employment arena, such as a concern with human trafficking and a commitment to combat gender-based violence.

This impressive commitment to gender equality, which provokes feelings of “EU envy”² among feminist scholars from other world regions, is the work of many institutions and individuals. Among them are committed feminist bureaucrats within the Commission, individual gender equality experts, equality-promoting Commissioners, Council members, MEPs, women’s and equality-seeking organisations, and case findings of the European Court of Justice. Charting the achievements of gender equality from a modest equal pay provision in 1975 to the multi-faceted policy field it is today has been a focus of extensive research since Catherine Hoskyns seminal work on women, law and politics in the European Union (1996). Today, scholars such as Anna Van der Vleuten (2007) offer careful analyses of the evolution of EU gender equality policy since the treaty of Rome, examining the role of national, subnational and supra-national actors in facilitating or hindering its development, while others explore the interaction of academic experts, activists and bureaucrats that has created ‘velvet triangles’ of highly effective policy actors at the supranational (EU) level (Woodward 2004). Another strand of literature focuses on the theme of Europeanisation from a gender perspective, understood in terms of frame convergence (eg Liebert, 2003), implementation of EU policy across member states (eg Falkner et al 2005) or impact of the EU on national or subnational policy (Lombardo and Forest 2011). Yet another strand of scholarship discusses the interaction of EU equality policies and welfare states (eg Lewis 1992, Lewis and Ostner 1995, Young 2000, Walby 2004), assessing both its positive and negative effects. A recent thematic addition to this corpus of research focuses on the connections between EU governance, transnational civil society, and democratic legitimacy (Hoffmann and van der Vleuten 2007, Hoskyns 1999), linking the theoretical insights of international relations and feminist politics. This work interrogates, from a gender perspective, the democratic deficit arising from governance beyond the nation state.

Following this recent line of research, this paper explores what the decision-making around gender equality in the EU tells us about the quality of democracy ‘beyond the state’ (Lord and Harris 2006, 175-198). Yet, in contrast to the interest in the EU as a regional democratic player in a global world order, the present study focuses on the extent and quality of gender-sensitive democracy within the EU polity. In doing so, the research questions posed in this paper are two-fold. First, to what extent do decision-making processes on gender equality in the EU conform to the democratic principles of popular control with political equality? And, second, what are the main advantages and limitations of the EU’s institutional arrangements for the democratisation of EU gender governance? One of the main

² This phrase was coined by Professor Marian Sawer, Australian National University, in discussion with one of the authors.

challenges of this study has been to conceptualise the theoretical idea of gender justice in empirical terms in order to ask how democratic are EU decision-making processes on gender equality matters. The discussion is structured as follows: first, the theoretical basis of the study- gender democracy- as well as the methodology deployed in carrying out the empirical analysis, are outlined. The next section provides an overview of legislative processes on gender equality in the EU, before turning to a summary description of the processes around the two case studies– the Goods and Services Directive and the Recast Equal Treatment Directive, respectively.³ The third section considers the processes in the light of gender democracy indicators, before concluding with reflections on the gendered imprint of EU democratic decision-making.

Gender Democracy: Concept and Methods

There is now a substantial body of literature revealing, through theoretical and empirical investigation, that democracy has a gendered imprint (Pateman 1989, Phillips 1993, Hoskyns 1996, Craske and Molyneux 2002, Siim 2000). This finding carries important consequences for the study of democratic processes, institutions and practices. It questions the construction of the sexless ‘majority’ in democratic theory and practice, and interrogates the gender-blind representation of interests in empirically-grounded studies. Research exploring the gendered nature of democracy is extensive, but fragmented. It generally investigates particular aspects of the democratic process in depth (such as social movement activity, policy making), but in relative isolation from other elements of a political system. This corpus of work offers well-honed analyses of political behaviour and decision-making focused on institutional arrangements (parties, legislatures, bureaucracies), or on addressing normative elements of democracy (such as feminism, citizenship, power). The comprehensiveness of this body of work is now such that it is possible to think in terms of devising an overarching concept that embraces each of these, and other, dimensions of democratic process and practice, while also giving due weight to the institutional context. This concept is ‘gender democracy’. It is a term capturing the notion that democracy is imprinted by gendered assumptions influencing processes and practices that go unquestioned in the course of decision-making in any given political environment.

Although the term ‘gender democracy’ has been around for some time (Cockburn 1996; Sarvasy and Siim 1994), it has not to date been utilized by scholars as a theoretical approach for analysing decision-making processes.⁴

However, the deliberative turn in democratic theory has assisted in the reconceptualisation of gender democracy as a

³ Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Directive 2006/54/EC of the 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 (recast).

⁴ Gender democracy has been adopted by the Heinrich Böll Foundation as a “socio-political vision and organisational principle” for its activist work in promoting gender equality, see www.boell.or.ke/web/52.html (last consulted 11 Nov 2010).

framework for assessing the legitimacy of political decision-making (Galligan and Clavero 2008). Although there are varying emphases among deliberative democracy proponents as to what constitutes deliberation, there is agreement on some of the basic features of a deliberative process. This is one in which qualified and affected members of the community offer reasoned and justified opinions as they attempt to resolve disagreement on a collective problem through coming to a shared understanding that leads to a legitimate decision. This reason-giving examination of a public matter requires that, ideally, all who participate in the process are equals. The expectation of political equality is thus important in considering gender politics and policies, in that in an ideal gender democracy, women would be endowed with resources (economic, social, personal and political) equal to those of men so as to enable them join with men as equal peers in exerting popular rule of a polity (Fraser 1998; Young 2000). In sum, the principle of political equality requires an equal empowerment of women with men along two major dimensions – material and resource equity - so as to enable them join as equals in exerting popular rule of the polity and respect for gender-based differences. Indeed, critical theorists such as Seyla Benhabib (1994) and Lynn Sanders (1997) point out that the deliberative emphasis on reasoning, with its intimation of an impartial, objective and emotionally distant exchanges, excludes women on the double from participating in public debates – one because of the dominance of the male gender, the other because of the “rational” tenor of the discussion that supposedly leads to a consensus on the resolution of a common problem. In this regard, the historical marginalisation of women and other under-represented groups is explained by Fraser (1997:78) as follows:

[D]iscursive interaction within the bourgeois public sphere was governed by protocols of style and decorum that were themselves correlates and markers of status inequality. These functioned informally to marginalize women, people of color and members of the plebeian classes and to prevent them from participating as peers. Here we are talking about informal impediments of participatory parity that can persist even after everyone is formally and legally licensed to participate.

The second principle underpinning gender democracy is that of popular control. While the majority of feminist research places the spotlight on political equality, Anne Phillips (1995: 24-29) is particularly concerned with popular control as expressed in the term ‘government of the people’. For Phillips, this element addresses the extent to which decision-making processes incorporate, and are influenced by, women’s perspectives. She argues that a politics of presence, as expressed in equal numerical representation of women and men, is not sufficient to ensure gender democracy. Nor is she convinced that policies designed to represent women’s interests can suffice to ensure gender justice. What is additionally required, she argues, is the incorporation of women’s interests, views, and perspectives into the decision-making process so as to produce gender-just outcomes. In other words, a politics of presence requires that representatives are accountable to women for the decisions they take in women’s name.

These two principles, political equality and popular control, have a number of overlapping dimensions that are revealed when examined through the lens of gender democracy. They share the elements of inclusion, accountability and recognition, from which democratic legitimacy is derived. For those who study gender politics, ideas about representation encompass formal (ie numerical) and substantive (policy) aspects. Accountability carries an expectation that those elected to represent as well as civil society representatives involved in decision-making, will be accountable to the public or constituency on whose behalf they speak. Accountability mechanisms include not only regular elections but also other mechanisms of public control, such as public debates and meetings, media reporting and investigations, and quasi-judicial forms of public investigation into representatives' actions and behaviour. Under the banner of accountability, feminist scholars also expect there to be some transparency about the decision-making process in which these spokespersons, formal and informal, engage. Without this element of transparency, accountability is diminished, since closed, opaque decision-making perpetuates women's disadvantage in, and exclusion from, public affairs. The issue of recognition is a touchstone for feminist politics, as it brings the standing of equality between women and men to the fore. It is, as Jill Sanders notes, more than the formal right of access to, and engagement in, decision-making. In her words, it is about 'equality in "epistemological authority", in the capacity to evoke acknowledgment of one's argument' (1997: 349). Thus the egalitarian nature of the communicative exchanges between participants, and the extent to which there is a willingness on the part of men to listen, recognise, respect and be responsive to women's testimonies, voices and claims shows the extent to which the decision-making process is marked by the gendered sharing of power.

Our investigations, then, seek to evaluate the gender quality of democracy along the criteria of inclusion, accountability and recognition, informed by feminist scholarship. We consider that this melding of critical perspectives allows us to take the concept of gender democracy and invest it with substantive meaning and analytical power. However, the three criteria above need further elaboration in order for them to be applied with some rigour in an empirical context. This specification of the criteria comes in the form of indicators (formulated in a question format) that, when applied in a particular context, illuminate the gendered imprint of democratic institutions and practices (Galligan and Clavero 2009, 140-149). Each indicator is sensitive to a particular dimension of gender democracy and is used as an analytical prism with which to determine the receptivity of the process to gender-specified demands.

Table 1 Indicators of gender democracy

Indicators of gender democracy	Inclusion	To what extent did representatives of women's interests participate in the process under examination? (INC1) To what extent were women's interests and perspectives included in the deliberative agenda? (INC2)
	Accountability	How accessible were deliberative sites to women organisations seeking to influence decision-making? (ACC1) Did women's representatives and equality-seeking civil society organisations have access to information relevant to the decision making process? (ACC2) Were the positions of key actors involved in the process explained through a reason-giving exercise? (ACC3)
	Recognition	To what extent did participants in deliberation show understanding of women's positions? (REC1) To what extent were women representatives and women's positions accorded respect by other actors? (REC2)

Using these indicators, the empirical assessment of the decision-making processes on the two equal opportunities directives entailed a process-tracing approach that produced a large amount of data – chiefly from documentary sources and interviews – to reconstruct the sequence of events from declaration of intent to adoption stage. Though most of the material was readily available on the websites of the institutions and actors participating in those processes⁵, other material had to be explicitly requested in order to fill information gaps. Additional information was gathered from personal email communication with selected actors, newspaper articles relating to particular events that arose during the process time-frame, and interviews with key actors.

Our interviews were conducted in May 2011 both face-to-face and by telephone. Our initial intention was to use interview data to fill in gaps of information which could not be filled by documentary research. However, given the short institutional memory in the EU, it was virtually impossible to find officials and politicians who were involved in the decision-making process leading to these directives and available for interview. Given this, the questions posed to them were more general in nature, about aspects of legislative processes on gender equality in the EU concerned with the democratic principles of inclusion, accountability and recognition.

The results of the analysis capture the complexities of democratic practice in the European Union.

⁵ These include: the European Parliament, the European Commission, the Council, the Committee of Regions, the Economic and Social Committee, the Advisory Committee on Equal Opportunities between Women and Men, the European Women's Lobby and the European Women Lawyers' Association.

Legislative processes on gender equality in the EU

Until the signing of the Amsterdam Treaty the only legal provision explicitly allowing the EU to legislate on matters of gender equality was article 119 on equal pay in the Treaty of Rome (now article 141).⁶ The Amsterdam Treaty significantly increased the powers of the EU to legislate in matters of gender equality. First, it broadened the scope of existing EU legislation regarding gender equality in employment as the new article 13 allowed the Council to take action against all forms of discrimination outside the field of employment, including discrimination based on sex or sexual orientation. Second, article 141 allowed the EU to act not only in the area of equal pay but also in the wider area of equal opportunities and equal treatment in matters of employment and occupation, as well as authorizing positive action in favour of women. Third, the Treaty of Amsterdam imposed a general obligation on the EU in all of its activities to eliminate inequalities (article 3.2) and to promote equality between women and men (article 2). Even though these last two articles do not create legally enforceable rights for European women, they do represent a Treaty-based political commitment to gender mainstreaming which the Commission could cite as both legal authority and political cover for its subsequent proposals. And last, but not least, under the new article 141, the Treaty also provided for qualified majority voting in the Council and co-decision with the European Parliament for future equal opportunities legislation.

This is an important development, because the enhanced powers of the European Parliament -especially given the strong advocacy of women's interests by the Committee on Women's Rights and Gender Equality- offered a greater prospect of far-reaching gender equality policies in the future. In all, the Amsterdam Treaty marks a positive development in the framing of Europe's gender order extending the principle of gender equal opportunities well beyond that of employment.

Three gender equality directives were introduced subsequent to the Amsterdam Treaty: the amended directive 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 (2002/73/EC); the goods and services directive (2004/113/EC); and the recast directive on the implementation of the principle of equal opportunities and equal treatment in matters of employment and education (2006/54/EC). In this study we analyse the democratic quality of the two last directives, one pertaining to the domain of employment and therefore reached following the co-decision procedure and the other

⁶ Nonetheless, the directives on equal pay, equal treatment, equal treatment in matters of social security, equal treatment in occupational social security schemes, equal treatment for the self-employed, pregnant workers and parental leave were not provided on the basis of article 119 on equal pay, but on the basis of articles 308 (ex article 235, on supplementary powers); 94 (ex article 100, on the approximation of laws); 137 (ex article 118, on workers' health and safety); and the agreement on social policy, article 4(2).

pertaining to matters of gender equality outside employment, following the consultation procedure. In what follows, we provide a brief description of the main features of processes leading to each of these directives, before proceeding to a detailed analysis in the next section.

Goods and Services Directive

The enactment of the Race Equality Directive in 2000⁷ marked the first extension of EU equality policy in areas outside of employment, and this prompted interest in providing something similar for gender equality specifically. Up to that point, the EU had enacted nine gender equality directives in employment and employment-related fields. A Council agreement in 2000 to proceed with what was initially called a Gender Equality Directive began an intensive consultative process between the Commission and relevant economic and social interests, various EU committees and advisory bodies, and the Parliament. From the very start of the process, the European Women's Lobby (EWL) sought to influence its scope by including ten areas such as gender parity in decision-making, access to and supply of goods and services, and violence against women.⁸ During this time, the EWL worked closely with the European Commission's Advisory Committee on Equal Opportunities between Women and Men, who were tasked with preparing an opinion for the Commission on this matter.⁹

Despite the creation of a consensus between women's civic and bureaucratic representatives around the content of the proposed directive, the Commission circulated an unofficial, internal draft that offered a more narrowly-defined directive addressing access to and supply of goods and services including education, taxation, advertising, and the media – all areas included in the Race Directive. However, this early draft provoked a strong reaction from the insurance and media industries. Media representatives launched a hostile campaign in which they argued that the intention of the proposed directive to ban gender stereotypes in media and advertising represented 'an extraordinary move towards censorship' which would clash with the principle of freedom of expression.¹⁰ On the other hand, the

⁷ This was made possible by Article 13 EC in the Treaty of Amsterdam, which empowered the Community to take action to combat discrimination on a range of grounds, including racial and ethnic origin, outside the field of employment (Masselot 2007: 153).

⁸ The ten areas for inclusion advocated by the EWL were 1) parity participation of men and women in decision-making; 2) access to and supply of goods and services; 3) taxation; 4) right to reconcile family and working life; 5) social protection, social security, social benefits and non-occupational healthcare and the fight against social exclusion; 6) education, training and research; 7) family and society-based violence against women; 8) health; 9) the images of women and men portrayed in advertising and the media, 10) the surname.

⁹ This opinion, issued in February 2002, was very much in keeping with EWL demands. The full range of areas for inclusion advocated in the Advisory Commission report were 1) decision-making; 2) access to and supply of goods, services and facilities (including taxation and social protection); 3) health; 4) education and training; 5) violence against women; 6) sexual harassment; 7) commercial advertising and the media, 8) and membership of associations. The Advisory Committee on Equal Opportunities for Women and Men assists the Commission in formulating and implementing the EU activities aimed at promoting equality between women and men. The Committee fosters ongoing exchanges of experiences, policies and practices between Member States and the various parties involved. To achieve these aims the Committee delivers opinions to the Commission on issues of relevance to the promotion of gender equality in the EU. It comprises representatives of Member States, social partners at EU level and NGOs. The Committee was created in 1981 by [Commission Decision 82/43/EEC](#).

¹⁰ This campaign included sexist attacks in the print media directed against the Commissioner for Employment and Social Affairs, Anna Diamantopoulou. Financial Times, 'EU plan for law against sexism draws fire', 24 June 2003. Articles had titles such as 'Big sister is watching you:'

insurance industry argued that the proposal to eliminate sex differences as a factor in the calculation of insurance premiums and benefits would have serious repercussions for the sector, as well as for consumers, since it would result in increased premiums.¹¹ In addition to the objections of these interest groups, some Member States, as well as a number of key Commissioners¹² also expressed their opposition to the Commission early draft.

In this adverse context, women's organisations within the EU institutional framework¹³, in collaboration with MEPs and 'femocrats' within the Commission, continued to lobby in favour of a directive that preserved some of their demands: equality in insurance premiums and benefits, taxation, education, and advertising and the media.¹⁴ Yet, despite their lobbying efforts, the proposal finally issued by the Commission was further diluted from the earlier draft, since its scope was limited to access to and supply of goods and services only. The Commission cited Article 13 of the Treaty of the European Union as the legal basis of this proposed measure, enabling the European Council to take appropriate action to combat discrimination based on sex¹⁵. This meant that the legislative process leading to this directive followed the consultation, rather than the co-decision, procedure. This revised proposal was a major disappointment for women's advocates, social and political, who claimed not to have been properly informed, let alone consulted, about these changes.¹⁶ The narrow scope of the proposal was also criticised by the Committee of the Regions (CoM) and the Economic and Social Committee (EESC).

Once in the European Parliament, the proposal was first considered by the Committee on Women's Rights (FEMM), which suggested 34 amendments to it.¹⁷ The report was approved by the FEMM Committee on 16th March 2004, with 29 votes in favour and 3 votes against – indicating a consensus across political groups. It was later voted in a plenary session of the European Parliament (EP), on 30th March, with 313 votes for, 141 against and 47 abstentions – a

Feminist Eurocrat who wants to ban "sexist" TV shows and adverts'. MEPs across political groups involved in the EP Women's Rights and Gender Equality Committee (FEMM) signed a declaration of solidarity with Commissioner Diamantopoulou, stating that the sexist attacks against her 'put into great danger the adoption of a new proposal for a directive aiming to eliminate sex discrimination'.

¹¹ The views of the insurance sector on the proposal are described in the Commission's document SEC(2003) 1213: Commission Staff Working Paper: *Proposal for a Council Directive Implementing the Principle of Equal Treatment between Women and Men in the Access to and Supply of Goods and Services - Extended Impact Assessment*

¹² A number of Commissioners expressed deep concerns about the proposal, including the Internal Market Commissioner, Frits Bolkestein; the Trade Commissioner, Pascal Lamy; and the Competition Commissioner Mario Monti (Financial Times, 'EU plan for law against sexism draws fire', 24 June 2003).

¹³ EWL: European Women's Lobby; EWLA: European Women Lawyers' Association; AFEM: Association of Women of Southern Europe.

¹⁴ The Commission received statements from the following women's organisations supporting a broad directive that included education, taxation and the media as well as goods and services: EWL (9 July 2003), EWLA (5 September 2003) and AFEM (7 September 2003).

¹⁵ Article 13 of the Treaty of the European Union which enables the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. When the Council acts on the basis of Article 13, it does so unanimously on a proposal from the Commission and after consulting the European Parliament.

¹⁶ EWL, Annual Report 2003 (available at www.womenlobby.org)

¹⁷ Among them there was an amendment that shortened the transitional period for the implementation of gender-neutrality in actuarial factors from six to four years (amendment 22)

strong majority which, once again, crossed political lines.¹⁸ However, during the plenary debate in the EP, the Commission refused to accept any of the amendments tabled. Furthermore, none of these amendments were considered during deliberations in the Council. Council discussion on this directive mostly focused on the insurance element: application of the principle of equal treatment to the use of sex-based actuarial factors in the calculation of premiums and benefits in the insurance and related industries¹⁹. A small number of member states²⁰ voiced dissent on the narrow scope of the proposal, echoing the concerns of women actors. The actuarial provisions provoked much stronger polarisation among member state representatives, with some arguing that using sex as an actuarial factor was discriminatory, others concerned with the costs to consumers and industry if sex were removed from the calculations of premiums and annuities. The issue was resolved with an agreement that allowed Member States to permit the use of sex as an actuarial factor provided that this practice was *objectively justified*. Although the German representative did not accept this arrangement, he decided to abstain in order to avoid blocking the directive. The directive was finally adopted on 13th December 2004.²¹ The final version outlawed discrimination based on sex in access to and the supply of goods and services to the public²², such as housing, transport, banking and other financial and insurance services (IP/08/1014). It allowed the insurance sector an extended transitional period of six years for the implementation of the directive, beyond the general transposition period of two years.²³

The Recast Equal Treatment Directive

While the Goods and Services directive was marked by a long and divisive pre-proposal stage, the proposal-drafting period for the Recast Equal Treatment Directive was relatively short and straightforward. Its origins can be traced to the European Commission's legislative programme for 2003, which included a 'recasting of gender equality directives'.²⁴ The impetus for this move came from the perceived need to take account of European Court of Justice judgments that had clarified and developed the concept of equality (SEC (2004) 482:2). A Commission communication on 'updating and simplifying the community acquis'²⁵ to provide a single text on equal opportunities directives was

¹⁸ European Women's Lobby, 'New European Directive on Gender Equality in the Area of Goods and Services Adopted in December 2004', available at: www.womenlobby.org

¹⁹ Article 4 of the Commission's proposal

²⁰ These member states were: Belgium, Finland, Luxembourg, Malta, The Netherlands, Portugal and Sweden.

²¹ The political agreement is outlined in Council document 13369. France entered a note expressing concern about competition-distorting practices of the insurance industry in other member states.

²² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>, (accessed 11 May 2010)

²³ COM (2003) 657 final.

²⁴ COM(2002)590 final

²⁵ COM (2003)71 final

issued in February 2003, setting out three different strategies for simplifying and updating equal treatment legislation – consolidation, codification and recasting.²⁶

The proposal-drafting process began with a web-based consultation of member states, interested stakeholders and individual citizens, in which the Commission presented the codification and recasting methods as the most viable options for simplifying equal treatment legislation. Codification was discussed as a technical exercise with no substantial changes to existing equal treatment legislation. Two recasting options were presented, one which would integrate six previous equal treatment directives into a single directive²⁷ while the alternative recasting option incorporated the employment-related provisions of the pregnant workers' directive, thus involving additional substantial changes in existing legislation. However, this extended recasting option did not consider the inclusion of the health and safety provisions of the pregnant workers directive, nor did it consider the inclusion of the parental leave directive. In addition to the discussion above, the Commission consultation paper stated a preference for Article 141 EC as the legal basis for this directive, entailing that the adoption procedure to be followed was that of co-decision rather than consultation, in contrast with the process followed in the case of the 'Goods and Services' directive.

There were thirty responses to the Commission's web-based consultation. While employers preferred the relatively straightforward codification option, governments' responses were divided between codification and a limited recasting.²⁸ Trade unions, women's organisations and other civil society organisations favoured either the more extended recasting option or a new, more far-reaching recast to include the parental leave directive. The participation of women's organisations in the overall pre-proposal process was relatively low, as only a handful of women's organisations submitted an opinion to the consultation paper while the EWL decided not to participate in this process. The Advisory Committee on Equal Opportunities Between Women and Men issued a majority opinion in October 2003 that favoured an extended recast directive. It also called for the inclusion of the health and safety provisions of the pregnant workers directive, as well as some provisions in the directive on equal treatment for the self-employed. This opinion only represented the views of trade unions and national gender equality bodies while employers issued a minority position that clearly favoured a codified directive. In arguing for this minority position, employers stated that no further modification to the existing legislation was necessary, that further amendments to existing legislation would

²⁶ Consolidation integrates in a single (non-binding) text the provisions of the original instrument with all subsequent amendments made to it. It does not seek clarification so complexities and ambiguities are not resolved. Codification clarifies the law by bringing together all provisions of an act and subsequent amendments, harmonising terms and definitions. This is a textual exercise which maintains the body of the *acquis* intact, without developing it. Recasting codifies a pre-existing legal act and subsequent amendments while at the same time allows for the possibility of substantial modification and development of pre-existing law. In addition, it also allows the integration on the body of ECJ jurisprudence into the new instrument.

²⁷ These directives were: equal pay, equal treatment in employment (as amended in 2002); equal treatment in occupational security schemes (as amended in 1996) and the burden of proof in cases of sex discrimination.

²⁸ One exception is Portugal, as it proposed a more far-reaching option than those presented in the Commission document.

involve costly changes at the national level, and that anything additional to a simple codification would put an unfair burden on employers in acceding countries.²⁹ The disagreement between employers and trade unions during the consultation process was also evident in an informal meeting organised by the Commission with representatives of social partners at EU level, though divergences of opinion also existed among member states, as became clear in another meeting with the Commission during the pre-proposal stage.³⁰

The Commission finally published its proposal in April 2004.³¹ It covered the six directives laid out in the integrative recast option, omitting the directives on maternity protection, parental leave, social security and the self-employed. In addition, the proposal incorporated the extensive case-law of the European Court of Justice. The document was welcomed by the EESC in its opinion of December 2004³² although it called attention to the need to revise and update the directive on the self-employed which, in its view, did not provide sufficient protection for women.

The Commission's proposal gave rise to a lively debate in the FEMM Committee³³ that focused on three issues: inclusion of a reference to parental leave in the recast directive; the elimination of distinctions between women and men in occupational pension schemes and the introduction of unisex tariffs; and the need to put more pressure on Member States and social partners to promote gender equality. Deliberations in the FEMM Committee considered the proposal in three separate sessions at the end of which a report containing 93 amendments, was adopted.³⁴ The main amendments related to maternity/parental leave and the reconciliation of work and family life.³⁵ However, support for this report did not cross the political spectrum as evidenced by the large number of abstentions during its adoption in the Committee.³⁶ The report of the FEMM Committee was adopted by the EP in its plenary session of 5th July 2005. However, the Commission announced in this session that it could not accept a number of these amendments. Of particular note is its rejection of an amendment proposing a review clause for the parental leave directive as parental leave did not fall within the scope of the recast directive.

²⁹ Both the Advisory Committee's opinion and the employers minority position can be found at: http://ec.europa.eu/employment_social/gender_equality/gender_mainstreaming/gender_advcom_en.html

³⁰ Information about the consultation process is included in the Impact Assessment Report annexed to the Commission's proposal, SEC (2004) 482

³¹ COM (2004) 279 final

³² 2005/C 157/ 14

³³ These were the words used to describe the deliberations in the FEMM Committee by MEP Joachim Wuermeling, speaking on behalf of rapporteur Angelika Niebler, during the plenary session on 5/7/05.

³⁴ The report was prepared by Angelika Niebler (EPP). A6-0176/2005 Final, adopted in Committee on 26/05/05.

³⁵ These amendments included: to clarify that parental leave is an individual right for every parent; to ensure that any less favourable treatment of a woman who is pregnant or on maternity leave is also deemed discriminatory; to require member states to encourage dialogue among social partners to promote flexible working arrangements with the aim to facilitate reconciliation of work and family life; to ensure that member states conduct awareness campaigns for employers and the public in general on equal opportunities issues.

³⁶ The results of the vote were 9 in favour, 1 against and 22 abstentions.

The amendment relating to parental leave became the main point of disagreement between the EP on the one hand, and the Commission and Council, on the other, during the inter-institutional deliberations. After tripartite negotiations, a political agreement was reached in which both the Council and the Commission made a commitment to put parental leave on top of their gender equality agendas. The recast directive was finally adopted one year later, on 5th July 2006, although the input of the EO in the final text was minimal. Thus, out of the 93 amendments proposed by the EP, the Council only accepted 37, of which 24 related to titles and 10 were already included in the Council general guidelines. In other words, the EP secured only 3 substantial amendments to the directive.

Analysis of Gender Democracy

In this section, we return to the three principles of gender democracy to elucidate the nature of the processes described above.

Inclusion

Our analysis of inclusion is concerned with the extent to which women's representatives participate (descriptive representation), and their interests are taken into account (substantive representation) in the EU decision-making processes. Given the institutional heterogeneity of the EU and the complexity of its legislative processes, applying these indicators requires that we look at a variety of deliberations taking place within and across a multiplicity representative institutions, networks and organisations.

INC 1: To what extent did representatives of women's interests participate in the processes under examination?

The involvement of representatives of women's interests in the process leading to the adoption of the Goods and Services directive was strong. From the pre-proposal stage, different transnational organisations actively lobbied different EU institutions (especially the Commission and the European Parliament) depending on the stage of the legislative process. Apart from this, transnational organisations, MEPs, femocrats and gender experts formed a solid advocacy network, with consensus around the main issues they wished to see included in the Directive. The solidity of this network was illustrated not only by their high level of institutional involvement in the deliberative arenas that they were granted access to, but also by their ability to adopt a common position and to speak with one voice. In this context, it is instructive to note the role played by organisations such as the EWL, EWLA and AFEM – supported by other organisations such as the Federation Europeenne des Retraites et Personnes Agees (FERPA) and the European Disability Forum, all of which sent statements to the Commission during the pre-proposal stage of a similar

content. The EWL in particular played a prominent role throughout the whole process, as it took the lead in a lobbying campaign for a wide-scoped directive by drafting a shadow directive at the pre-proposal stage, and it continued campaigning through to the later stages of the process.

The involvement of women's transnational groups in the process leading to the Goods and Services directive was supported by femocrats, experts and MEPs. Experts at the European Commission's Advisory Committee on Equal Opportunities for Women and Men worked in close cooperation with the EWL in preparing an opinion for the Commission, the content of which was very much in line with that of the EWL shadow directive. On the other hand, the FEMM Committee also played an important role in enhancing dialogue and awareness among actors representing diverging interests and the wider public, by way of organising a public hearing during the pre-proposal stage where the main issues involved in the directive were discussed among a variety of key stakeholders (insurance industry, media industry, women's organisations, national women policy agencies, and others). MEPs of the FEMM Committee also expressed public solidarity with the Commissioner for Employment and Social Affairs when she became the target of an aggressive campaign against the Commission's draft proposal.

However, women's advocacy networks did not have access to Council deliberations, a key stage of the decision-making process given its legal basis, which entailed that it was a Council directive where the EP only had a consultation role. The absence of women's advocacy networks at the later stages of the legislative process was confirmed by a Council official during an interview. He stated that strict rules about how the Council conducts its work preclude the possibility of direct lobbying, since these rules restrict access to Council deliberations to representatives of Member States and the Commission only. Thus, the main channel opened to women's organisations to influence a Council decision at this stage of the process was via the national level, by lobbying their own governments.

In contrast to the Goods and Services directive, the level of involvement of women's organisations during the process leading to the adoption of the Recast directive was relatively weak. The public web-based consultation launched by the Commission during the pre-proposal stage resulted in thirty responses, only seven of which came from women's organisations and related groups.³⁷ The European Women's Lobby did not participate in the process leading to this directive and the only trans-national women's organisation providing an input into this process was the European Women Lawyers Association (EWLA) at the stage when the Commission's proposal was being deliberated in the EP's FEMM Committee. One explanation of the lack of involvement of women's organisations in the recast process could

³⁷ These were: The Clara Wichman Instituut, the Estonian Women's Associations Roundtable; the European Equality and Diversity Forum; Justice (UK legal and human rights organisations); the German Women's Lawyers Association; the UK Discrimination Law Association; and the European Association of Public Sector Pension Institutions.

be the widespread perception that this directive mainly concerned technical, rather than political, issues. This was the main reason put forward by the policy director of the EWL when, in a personal email communication with the authors, she explained the reasons why the organisation did not participate in this particular legislative process.

At the time, it was mainly a question of workload and also the fact that this was a very technical/legal issue, more than a political issue, which resulted in the EWL not being very active during the adoption process of the recast directive, even if I agree that it would have been good to be more involved. Our understanding at the time was that it was more a technical exercise of putting together legislation than improving or revising it (EWL policy director, Nov 2008).

The lack of involvement of civil society organisations in the process leading to the Recast directive, with the exception of the European Women's Lawyers, may be due to the fact that this required high levels of legal expertise. Yet, this does not necessarily entail that the process only consisted of a technical exercise, as was the initial perception of the EWL. In fact, two of the three options presented in the Commission consultation paper entailed some level of revision of existing legislation, which opened the possibility for the politicisation of the main issues involved. This opportunity was seized by the European Women's Lawyers and then taken up by MEPs in the FEMM Committee, who put the issue of parental leave on the political agenda, drawing attention to the need for further revisions of the EU gender equality *acquis*.

Nonetheless, the absence of civil society organisations and their perception of the Recast directive as a technical process may not be a mere oversight on their part, but may rather point to a failure, on the part of the Commission, to communicate in a clear manner the implications of the recast strategy to all interested parties. On this point, Burrows and Robison (2007:188) argue that the Commission consultation paper is unclear as to the extent to which the recast technique can be used as a tool to modify existing EU legislation on gender equality. If this is true, then the recast process can serve as a good illustration of how a lack of transparency during the proposal drafting stage can have an impact on the democratic principle of inclusion, as civil society organisations opt to not participate in that process.

During interviews, we put this question to Commission representatives. When asked if a targeted consultation in this specific case (alongside an open-web one) may have resulted in a higher involvement of women's organisations, they defended the open-web consultation tool, claiming that it has become more and more standard in recent years. However, they emphasised that the Commission continues to use different consultation tools, depending on the specific case. While targeted consultations (e.g., with the EWL) bring better results in some cases, in other cases a mix of both open and targeted consultation, or just an open consultation, may be preferred. When asked specifically about their opinion as to why the EWL did not participate in the Recast directive process and, more particularly, if this

may be because they were not sufficiently informed, they claimed that the Commission is in close communication with the EWL about gender equality initiatives, so that their decision not to participate was deliberate rather than due to lack of awareness:

Maybe the EWL did not participate in the open consultation process because it was a recast and so they felt that there were not so many new elements... so they were not so much concerned

The low level of involvement on the part of representatives of women's interests in the Recast process was coupled with a lack of a common position, There were divisions at the Commission Advisory Committee on Equal Opportunities, the EESC, and MEPs at FEMM Committee – as evidenced by the high level of abstention among its members when the first reading of the proposal was put to vote.³⁸

INC 2: To what extent were women's interests and perspectives included in the deliberative agenda?

This indicator aims to assess the substantive representation of women, understood as the feminisation of the political agenda in EU legislative processes on gender equality. A comparison of this indicator between the two case studies under investigation reveals that, while in both cases the level of inclusion of women's interests clearly diminishes as the processes progress, the type of decision-making procedure that was followed in each case had a significant influence on the overall results.

An examination of the process leading to the enactment of the Goods and Services directive from its beginnings to its adoption reveals that the level of inclusion of women's interests and perspectives into the deliberative agenda gradually diminished from 'partial inclusion' to 'no inclusion'. As a result of this, the final directive that was adopted by the Council barely resembled the shadow proposal that was submitted by the EWL during the pre-proposal stage. The dilution of this directive began in the very early stages of the process, when the Commission decided during the pre-proposal stage that inclusion in the directive of certain areas advocated by representatives of women's interests (such as parity participation) were to be removed from the deliberative agenda and, therefore, not to be considered in subsequent deliberations. During this stage, the proposal was diluted once again when, following pressure from other stakeholders, important areas for women such as education, taxation and advertising and the media were removed by the Commission from the scope of the proposal. Given the agenda-setting role of Commission, this action had a significant effect on the level of inclusion of women's interests during the remainder of the legislative process. Nor

³⁸ The existence of diverging positions among members of the FEMM committee was reported by the Deputy rapporteur during the plenary session where the first EP reading of the Commission's proposal was debated.

were these issues re-entered, despite a large number of actors (women's organisations, MEPs in different EP Committees, the Committee of Regions and the Economic and Social Committee) expressing disappointment at the narrow scope of the proposal. Hence, the European Parliament did not adopt any substantial amendment regarding the scope of the directive (albeit some efforts to bring this issue back to the political agenda)³⁹ and, once the proposal reached the Council, deliberations in this institution did not even take the EP opinion into consideration. Instead, Council deliberations centred on the ban of using sex as an actuarial factor in the calculation of premiums and benefits – a provision included in the Commission proposal but on which a number of Member States had expressed reservations.

The case of the Goods and Services directive provides a good illustration of the power of the Member States, backed by powerful business groups, in shaping the final outcome of a directive. Interviews with Commission representatives carried out for this study revealed how the Commission has to invest a considerable amount of effort in raising awareness about gender equality among some 'reluctant' Member States. The interviews also revealed that, in preparing a gender equality directive proposal, one of the main challenges of the Commission is to make a 'business case' in order to 'sell' it to Member States. This means that any demands voiced by women's civil society groups which are not considered cost-effective will not be considered at all, or will be ruled-out eventually, at some stage of the process.

The power of Member States in EU decision-making – especially in legislative processes following the consultation procedure, imposes serious limitations on the power of supranational institutions (the EP, the Commission) and transnational women organisations to represent women's interests in any substantive sense. While in our interview with the Council it was emphasised a number of times that some Member States are clearly supportive of gender equality, these continue to be a minority.

The extent of women's substantive representation during the Recast process was, by comparison, relatively higher than in the case of the Goods and Services directive, especially during the inter-institutional process. During the pre-proposal process, however, women's interests were only partially included. Thus, neither the option to incorporate the maternity directive in the Recast – an option considered in the Commission's consultation paper – nor the option to incorporate the parental leave directive – an option discarded from the beginning but advocated by some women's organisations – were included in the proposal. Yet, even if the Commission finally opted for a directive that excluded

³⁹ Some political groups of the European Parliament tabled a number of amendments aimed at broadening the scope of the directive, but at the end these were not adopted by the plenary.

maternity as well as parental leave, once the inter-institutional process began, these issues continued to be on the political agenda until the adoption stage. In sum, the level of women's substantive representation during the inter-institutional process of the Recast directive was appreciably higher than in the Goods and Services directive.

It was the European Parliament, and most particularly the FEMM Committee, that ensured that issues of parental leave were kept on the political agenda during the Recast process. Not all political groups, however, supported the view that the Recast directive should include parental leave. While MEPs of the Socialist Group and the Greens supported this inclusion, members of European People's Party (EPP) took a more conservative position. EPP MEPs expressed the view that to bring the parental leave directive into the recast proposal would entail a significant modification to EU law, which they did not deem opportune at the time. The compromise reached in the EP was to introduce an amendment that urged Member States, social partners and other stakeholders to review the parental leave directive, with a view to 'improving the situation of women and men who find it difficult to reconcile family and work commitments'. Although this amendment was not incorporated into the final text of the directive (as neither the Council nor the Commission accepted it) a compromise between these three institutions was reached in which the Commission and the Council acknowledged the importance given by the European Parliament to parental leave issues and made a commitment to improve opportunities for reconciling of work and family life.

In summary, the above analysis reveals the important role played by the EP in ensuring representation, in descriptive and substantive terms, for women's groups and views during the processes leading to the Goods and Services directive and the Recast directive. What emerges from the comparison between the two cases is that the more decision-making power the EP has, the most likely it is that women's interests will be kept on the political agenda throughout the process. Thus, the fact that the Recast directive was adopted by the co-decision procedure appears to have been a determining factor in ensuring women's substantive representation. In the Goods and Services directive, by contrast, the issues raised by the EP and women's organisations completely disappeared from the political agenda once deliberations concentrated in the Council.

Our interviewees from both the EESC and civil society coincided in their view of the Council as a closed institution in terms of access to deliberations:

The Council is the body made up of Member State governments, and that means that they will not allow any member that is not government to be part in their discussions..... The Council is really a problem... Once an EESC opinion is adopted in plenary, we tend to forget about it. But the Council has been blocked to us, and so it is very difficult to follow it up. From the Council of Ministers, we never get feedback.

In contrast to this view of the Council, the EP was viewed as the most open institution in the EU to civil society interests. According one of our respondent from civil society, the reason for this is that it is a very diverse institution, so that it is easier to find partners in the inside who are willing to listen to a variety of demands from civil society groups and take them on board.

We used to have a close relation with the Commission but there is a trend now to move focus from the Commission to the Parliament [...] The European Parliament is becoming much more open. The truth is that if you look at the formality and the papers, the Commission seems to be putting a lot of effort in working with civil society and such. But when you look at it in reality, this dialogue is no more than two or three meetings per year in a room full of people where you hardly see decision-making.... therefore discussion is basically tokenist ... The Parliament is more open because it is much more diverse so, you know, there's competition among parliamentarians. On the other hand, you can achieve much more when you engage in dialogue with the MEPs themselves, the Committees, the political groups... so if you are able to identify partners who are interested in something that you want to say then you can produce good work out of it and get results.

Accountability

The principle of accountability entails that participants are answerable to a plurality of others with different experiences, interests and opinions. It also requires that participants explain their claims in ways that others can understand, putting forward reasons that others recognise could be accepted, even if they disagree with them.

Our three indicators of accountability are designed to measure the access to, and availability of, information about the positions of different actors in the process, the degree to which different positions were explained as well as availability of information about the processes.

ACC 1: How accessible were deliberative sites to women organisations seeking to influence decision-making?

The level of access of women's organisations to deliberative sites was similar in the two legislative processes under study. In both cases, we observe a differential institutional access, with restricted accessibility to the Commission, full accessibility to the European Parliament and divergent accessibility to the Council, because of the different rules under which each directive was processed.

During the pre-proposal stage leading to the adoption of the Goods and Services Directive, access to deliberative sites seems to have been limited to the main transnational women's organisations – i.e., those who are regularly engaged in dialogue with the Employment and Social Affairs Directorate – as there is no evidence of participation of smaller organisations operating at national, regional or local levels. Those transnational organisations submitted an opinion, and were kept informed of progress in the drafting of the Commission's proposal. In addition to this, the EWL had observer access to the meetings of the Advisory Committee on Equal Opportunities at the time that this body was

drafting of an opinion for the Commission. Nonetheless, when the Commission decided to change the content of its draft proposal due to criticisms from other stakeholders, women's organisations claimed that they were not informed about this change and implied that other actors, such as the media and advertising industries, were given preferential access.

In relation to this issue, Commission officials claimed:

The question there was to strike a balance between, on the one hand, the freedom of the media and gender equality, on the other hand. Both are important and you need to reach a compromise between the two.... But I can say that all the opinions are taken into consideration and analysed by the Commission, at least in my experience.

This statement, however, does not provide an answer to the question of whether the interests of the media industry were given preferential treatment in the case of the Goods and Services directive, which is the view put forward by transnational women's groups. At any rate, accessibility to the Commission during the consultation process was at best restricted, as women's organisations could only submit documentation in the form of opinions, statements or shadow proposals. Indeed, the main opportunity for them to speak during the pre-proposal stage was not provided by the Commission but by the EP; this was during a public hearing organised by the FEMM Committee where women's organisations and other stakeholders were invited to present their views on the directive. These contributions from civil society organisations formed the basis on which the FEMM Committee drafted its opinion.

After the Commission issued its proposal and the process entered the inter-institutional stage, the accessibility of deliberative sites to women's organisations became much more limited, if virtually non-existent. This is because Council deliberations were confined to member states and the Commission, and excluded the EP. An additional barrier for women's organisations (and non-governmental organisations in general) in exerting some influence during Council debates was that these groups did not have access to information about the content of those deliberations. This made it very difficult for non-governmental groups to participate at this vital decision-making stage in any meaningful way (Butler 2008).⁴⁰

Patterns of access for women's organisations to deliberative sites were not very different during the legislative process leading to the adoption of the Recast directive, though EP representatives were part of inter-institutional deliberations. During the pre-proposal stage, women's organisations had the opportunity to submit a written opinion. The open consultation engaged in by the Commission meant that access opportunities were broadened to a larger pool of

⁴⁰ Nonetheless, there are some potential indirect channels of information and influence through the Commission or through representatives of member states in the Council deliberations. As of now, we have no information as to whether, and the extent to which, these informal channels were pursued by women's organisations as this needs information can only be gathered through interviews.

potential contributors than was the case of the Goods and Services directive. Once again, women's organisations had more access to the deliberations conducted through the EP than other institutional settings. During this stage, the main participating organisation was the European Women's Lawyers' Association (EWLA) which presented an opinion statement at a meeting of the FEMM committee.⁴¹ As was the case in the Goods and Services directive, women's organisations did not have access to Council deliberations during the adoption stage of the Recast directive, though EP participants did advance gender equality arguments.

ACC 2: Did women's organisations and the public have access to information relevant to the decision-making process (background and policy documents, minutes and reports of sessions, open sessions?)

In recent years, the Commission has made important efforts to improve transparency during the pre-proposal stage by publishing extended impact assessment reports. These reports (which are annexed to the Commission's proposal) serve to enhance the transparency of the Community regulatory process by way of providing well-documented proposals. The reports contain information about the objectives of the legislation being proposed; the issues and problems involved; the policy options considered; the potential impact of each of those options; and the consultations conducted with relevant stakeholders in preparing the proposal.⁴² However, while these reports lend much more visibility to pre-proposal processes in the Commission, the information provided is sometimes vague. For example, in the impact assessment report annexed to the proposal for the Goods and Services directive, the Commission justified the exclusion of taxation, education and advertising and the media from the scope of the directive by claiming that the evidence of gender-based discrimination in these areas was less clear-cut than in the area of insurance "*or that it was not apparent that the difficulties could be resolved through legislative means*". It concludes that "*[T]he Commission has decided therefore that other means would be more appropriate to deal with these issues*".⁴³ However, no assessment of the potential impacts of this policy option (both positive and negative) is provided. These gaps of information were also found in the impact assessment accompanying the proposal for the Recast directive. In this case, the report did not provide a detailed record of the organisations responding to the consultation call, or a detailed description of the responses submitted by each of them. Instead, the information on the consultation process that is provided is quite general in nature.

Despite these developments, women's organisations still had to rely on informal channels of information during the pre-proposal stage, since impact assessment reports were only published towards the end of this stage, together with

⁴¹ On 6th March 2005

⁴² "Better Regulation Plan" -see documents COM(2002)278, COM (2002) 276, COM (2003) 657 final

⁴³ *Op. cit.*, p.15

the Commission proposal. The relative absence of documented official analysis during the relatively fluid discussion period meant that the level of transparency during the consultation process fluctuated, depending on how much information the Commission provided. It has already been mentioned how, during the pre-proposal stage of the Goods and Services directive, women's organisations were informed about developments in the drafting process, but only up to a point. While these organisations had access to an early, unofficial draft proposal, they claimed not to have been informed when the Commission planned to narrow its scope in significant ways. Yet, because these changes were of direct relevance to the interests represented by these organisations (and significant 'qualified and affected' members), the fact that the Commission did not inform them about these changes meant that they were effectively stripped of the opportunity to consider and issue a reply.

Turning to the information made available to women's organisations and the public during the inter-institutional and adoption stages, this is a matter which is highly regulated. As a result, there were no major differences found between the two case-studies. With respect to the quality of information provided by the European Parliament, the picture is more mixed. While there was public access to verbatim reports of plenary meetings, there was limited information about the content of debates taking place in Committees (as no verbatim reports were available at the time). Yet, it is in committee meetings of the European Parliament where real deliberation took place. In contrast, the EP plenary sessions were highly formal exercises, following the general practice for MEPs to write out their speeches and read them into the record (Footitt 2002: 36-7). Committee meetings were usually public, which meant that women's organisations and European citizens could sit in as observers.

The quality information provided by the Council was the poorest of the three EU institutions. Although the Council has a public register with access to meeting agendas and minutes, written records of deliberative sessions were not always available. In the case of the Goods and Services directive, reports are available of the deliberations that took place in the working groups, outlining the different positions taken by Member State representatives and the Commission on controversial issues such as the ban in the use of sex in actuarial factors. Yet, for the Recast directive, no written records were available on the important tripartite negotiations between the Council, the Commission and the European Parliament at the decision-making stage of the process.

In our interview with a Council representative we raised the issue of transparency. He emphasised that Council proceedings are becoming more and more open. Citizens do not only have access to Council documents but can also watch deliberations online. Nonetheless this statement was later qualified with the remark that whether Council deliberations are made public very much depends on the issue at stake.

In assessing the availability and quality information made available to the public, we also examined the information provided by the European Women's Lobby, with a view to ascertaining how transparent this organisation was with regard to its lobbying activities as well as its role in communicating EU law-making on gender equality to European women. The quality of this information was found to be of a high order.⁴⁴ First, it regularly published updated information on its website (though newsletters and annual reports) which explained the contents of the directive as well as progress made at every step of the process. Second, it made the documents that were submitted to the Commission during the consultation process (such as letters to the Commissioner, opinions and statements) available through its website. Third, it provided information describing how its opinions were drafted (i.e., 'Shadow Directive') detailing the range of internal consultations that were conducted as well as the expertise that was sought out in order to aid that drafting process.

In sum, the availability of information on the decision-making processes under investigation varied depending on the institution in question and the stage of the process. While the Commission provided partial access to information on deliberations to women's organisations and the public, the level of access allowed by the Council was extremely restricted. As a result, important gaps in information were found both at the pre-proposal and the decision-making stages when this indicator accountability was applied to the two case-studies. Of all the EU institutions, the European Parliament was found to be the most transparent, with partial-to-full access to information on deliberations. Finally, the analysis highlighted the important role of women's organisations in enhancing the accountability of EU legislative processes on gender equality.

ACC 3 : Were the positions of key actors involved in the process sufficiently explained through a reason-giving exercise?

The principle of accountability not only requires that the public is informed about the objectives, contents and progress of the policies being developed, but also about the reasons that justify the positions of the actors involved in the decision-making process. This information lends transparency to EU policy-making as well as enhancing the accountability of the actors and institutions involved.

One characteristic feature of legislative processes at the EU level is the prominence of reason-giving practices throughout. Thus, the positions of the different institutions involved, as well as every course of action taken by them (e.g., amendments proposed by the European Parliament and their acceptance or rejection by the Commission and the Council) tend to be accompanied by reasoned justification of these positions. In analysing the processes leading

⁴⁴ This refers to information given on the Goods and Services directive only, as this organisation was not involved in the Recast Directive.

to the two directives under study, this feature was found to be especially marked in the Recast directive process, as co-decision procedures required that the Commission, the European Parliament and the Council engage in deliberative discussions aimed at reaching a consensus. In consultation procedures, by contrast, the Council is the only institution with decision-making powers and it is not required to provide justifications of its actions to the other EU institutions. Thus, in the case of the Goods and Services directive the Council did not explain why it adopted, rejected or ignored each of the amendments made by the EP. In this sense, the analysis lends support to the idea that the more inter-institutional in character EU decision-making processes are, the higher their democratic quality with respect to this indicator of accountability.

In sum, during the proposal drafting stage the level of transparency on the part of the Commission was limited in the case of both directives since the quality of information and justifications provided by the Commission for its actions in impact assessment reports were found to be only partial. In our interviews with Commission officials we asked them about this issue with particular regard to the information that MEPs have about the different drafts of a Commission proposal, they stated:

There is a sophisticated process of working together with the EP, so before a proposal goes to the EP, MEPs have already heard of the process. But at the initial drafting stage, when the Commission is only preparing something, this early preparation is for the Commission only. I don't mean that it is secret, but if you leave too much open at that stage, there is the risk that this will affect the process... It is better to organise a formal consultation rather than having too many informal discussions... because, at the end of the day, this is meant to be a Commission proposal. But, of course, after the Commission has issued a proposal there is a whole body of consultation processes, with the EP included. But only after that.... Yet there is a general communication on what the proposal is going to be so it never comes as a surprise.... MEPs have an idea of what it is going to be about.

This statement may provide an explanation as to why some members of the FEMM committee, while aware of the general content of the Goods and Services directive, were not aware of the important changes made to earlier Commission drafts as a result of pressure from the media and advertising industry. At any rate, the task of gathering information on the pre-proposal stage of the Goods and Services process was extremely difficult as this was a very opaque stage which could not be clarified either through documentary analysis or interviews.

After the Commission issued its proposal, the transparency of the inter-institutional processes was higher in the case of the Recast directive (as it followed the co-decision procedure) than in the case of the Goods and Services directive. processes was found to be quite high at the inter-institutional stages of the process, the same cannot be said when we turn our attention to pre-proposal stages. Finally, it is important to note the vital role that Member States in the Council can play in enhancing or obstructing the transparency of EU legislative processes, especially in the cases when such processes follow the consultation procedure. In our interview with a Council official, he highlighted that Council

decisions such as the Goods and Service directive are Council led operations and thus there is no obligation on the Council to justify a decision or the rejection of an amendment introduced by the EP. In this regard, he made a contrast with co-decision processes where the communication between the EP and the Council he labelled as '*intensive*' and where all Council rejections of amendments are justified. In sum, the noted lack of transparency of Council deliberations in the Goods and Services directive is an aspect that limited the accountability of the Member States to their citizens. The widespread perception of the EU as an opaque political entity usually has the Commission as its focus. The problem, however, extends to the Council, as national governments seem less open to having their positions scrutinised than either the Commission or the EP.

Recognition

The principle of recognition dictates that participants come to a discussion with an open mind. They express a willingness to listen to other participants, treating them and their views with respect. They do not assert their own interests above all others or insist that their views cannot be subject to revision. On the contrary, in the context of disagreement or dissent, they show a disposition to understand other participants' interests and opinions through a process of argumentation (e.g., asking questions, providing reasons.) and are ready to change their initial interests if these are shown to be incorrect or inappropriate (McLaverty and Halpin 2008, 197-214). Although deliberation will not necessarily end in agreement, participants enter the discussion with the aim of reaching consensus.

REC 1: To what extent did participants in deliberation show understanding of women's positions?

REC 2: To what extent were women representatives and women's positions accorded respect by other actors?

There is little material available from which to assess levels of recognition of women's claims throughout the process, since the most reliable sources of information are verbatim reports of deliberative sessions. With the exception of the European Parliament plenary sessions, it is impossible to assess responsiveness in other settings such as the Commission or the Council and hence the information gaps for this indicator are significant. Three plenary reports of debates in the European Parliament were analysed: one for the Goods and Services Directive (on 29th March 2004) and two for the Recast Directive (on 5th July 2005 and on 1st June 2006).

These reports show that the majority of participants showed recognition for the different groups affected by the decision. No negative remarks about the groups representing the variety of interests involved were made. Recognition and respect cut across the political spectrum, although political groups on the left tended to put more emphasis on

inequality between women and men and the need to reverse this state of affairs. Although the research found no evidence of a violation of respect in deliberations in EU institutions, there is evidence of a violation of this aspect in the wider public sphere – more particularly in the context of a campaign against the Commission proposal launched by the media, which included sexist attacks in the media of Commissioner for Employment and Social Affairs, Anna Diamantopoulou.

During the debate on the Goods and Services directive in the EP all of the political groups made reference to the prevalence of gender-based discrimination in society. The main point of disagreement between these groups was whether the use of sex as an actuarial factor constituted discrimination, and therefore whether its banning represented a positive step towards a more gender equal society. Even speakers from the European Peoples Party, the group most supportive of the removal of this ban, began their speeches by expressing their wholehearted support to ending gender inequalities, as the extract from MEP Astrid Lulling (EPP) typifies:

Mr President, as long ago as the 1960s, I was fighting for equality between women and men and against discrimination based on sex. I have been fighting since 1963 for equal treatment and opportunities between men and women, in women's organisations, at national and at European level, and most of the time as president. I cannot, therefore, be accused of not promoting the implementation of the principle of equality between women and men by directives covering all fields. I also therefore believe that there is a real legal and moral obligation to support this proposal for a directive establishing equal treatment in the access to and supply of goods and services. In politics, however nobody is forced to do what is impossible or absurd

At the same time, conservative political groups tended to highlight also the difficulties that the insurance industry would have to face in trying to comply with the new directive, although there were some speakers from other sides of the spectrum who also explicitly acknowledged this point, such as MEP Elspeth Attwool (ELDR):

I can understand the concerns of the insurance industry. The proposal will bring considerable changes to its practices and at present it is uncertain as to how to go about implementing these changes. Understandably industry never likes uncertainty. However, I do not understand industry's argument that the current use of gender to differentiate premiums and benefits is not discriminatory because it is based on objective factors.

It should be highlighted that recognition of the concerns of the insurance industry was also voiced by other women's and equality advocates such as Commissioner Diamantopoulou and the Equal Opportunities Commission of Great Britain.

Turning to the analysis of debates on the Recast directive, the findings are very similar. Thus, there was also disagreement among political groups on the content of the Commission's proposal – though arguably less than in the debates on the Goods and Services directive. While MEPs from the centre-left side of the spectrum 'deplored' the absence of the directive on equal treatment of the self-employed and the parental leave directive, MEPs on the centre-

right remained silent about this and instead emphasised the need to respect the principle of subsidiarity which leaves Member States the option to decide on measures aimed at reconciling work and family life. Conservative MEPs warmly welcomed the FEMM Commission proposal, while MEPs from the Socialist Group did not make any explicit comment on it. Despite these differences, all participants in the debate clearly showed recognition for the groups affected by the new measure, citing specific problems needing urgent attention such as pay differentials between women and men or the reconciliation of work and family life.

Nonetheless, despite formal respect for the demands of women's interest groups, a question needs to be raised about the extent to which the principle of recognition is fulfilled when deliberation mainly focuses on the interests of business while gender equality interests are ignored altogether. The reports of the meetings of working groups in the Council during decision-making prior the adoption of the Goods and Services show clear evidence of this. Thus, Council debates on this directive were mainly focused on whether the use of sex as an actuarial factor constituted de facto discrimination and the economic impacts resulting from prohibiting the use of sex in actuarial calculations. In sum, the deliberative agenda focused on the concerns of the insurance industry, while the concerns of gender equality groups were not even considered. Moreover, the failure – on the part of the Council- to provide justificatory reasons for rejecting such concerns gives a clear sign of a breach of the principle of recognition in this particular case.

When asked about the principle of recognition and respect and the extent to which inter-institutional deliberations abide by this principle our interviewees strongly agreed with the statement: “The quality of inter-institutional deliberations during the decision-making stage is high in terms of recognition of, and respect for, different interests”. Our respondent at the Council made the point that the fact that this principle is so deeply ingrained in deliberations at the EU level comes from a tradition of international diplomacy. In his view, arriving at an agreement among different participants requires high dosages of good will and hence there is a sophisticated code of practice aimed at ensuring respectfulness across the board.

Concluding Reflections: Lessons for democracy

This paper presented the early findings of an analysis of the democratic quality of EU legislative processes on gender equality. For comparative purposes, two case-studies were selected: the processes leading to the adoption of Goods and Services directive and the Recast Equal Treatment directive.

The findings reveal that the quality of democracy of these processes – measured in terms of inclusion, accountability and recognition – varied across EU institutions. This variation was shaped by the type of decision-making procedure

being followed, the degree of involvement of representatives of women's interests and the formation of strong women advocacy coalitions, as well as by the political salience of the issues involved.

First, different EU institutions allow for different degrees of inclusion, accountability and recognition in deliberative practices associated with legislative processes. Thus, findings from this research show that the gender-democratic quality of deliberative processes in the European Parliament was noticeably higher than in the Council, while the democratic quality of deliberation orchestrated by the Commission sat somewhere in between. This institutional pattern could be found for the two case studies, despite the fact that the gender-democratic quality of deliberative practices in each of those institutions was also shaped by other factors.

Second, the type of decision-making procedure being followed was found to be an important factor when assessing the quality of democracy from a gender point of view. The results show that the co-decision procedure (now officially known as the 'ordinary legislative procedure') enhanced the overall level of inclusion since, by giving decision-making powers to the European Parliament, it allows the involvement of a powerful advocate of women's interests (the EP FEMM Committee) from the early stages of the process until the very end. However, the absence of civil society gender representatives from this process must be considered a deficit of this deliberation. By contrast, in the consultation procedure followed in the adoption of the Goods and Services directive, the participation of representatives of women's interests during deliberations at the adoption stage was nil. Furthermore, the fact that the opinion of the European Parliament did not need to be considered by the Council meant that this latter institution could ignore the EP's amendments, excluding them from the discussion. Finally in the consultation procedure the level and quality of justifications of the different positions was of a lower order than in co-decision procedure.

Third, the study found that the involvement of representatives of women's interests and the formation of strong advocacy coalitions between MEPs, women's organisations, femocrats and gender experts during the process leading to the Goods and Services Directive (particularly at the pre-proposal stage) acted to enhance the overall democratic quality of the process, in relation to the three principles of democratic quality. This stood in contrast to a very low involvement of advocates of women's interests during the drafting of the Recast directive. It is clear that in the Goods and Services directive there were other intervening variables at play which offset the impact of a high level of participation of women's advocates on the overall democratic quality of the process. The analysis further suggests that the level of involvement of women advocates in EU legislative processes depends of the political salience of the issues at hand. This means that legislative processes involving issues that are perceived as 'technical' are likely to

attract lower participative levels and may therefore be poorer in terms of democratic quality, if in fact more successful from the point of view of actual gender equality outcomes.

Fourth, our research found that in both types of decision-making procedures, the justifications provided by the Commission and the Council followed a utilitarian logic rather than an equality-seeking one. In other words, economic considerations regarding the costs of a measure prevailed over considerations related to gender justice. This feature of EU decision-making on gender equality undermines the democratic quality of these processes, insofar as 'costly' demands advocated by women's groups in civil society are ruled out of the deliberative agenda *tout-court*.

Fifth, despite ongoing progress in enhancing the transparency of EU decision-making processes across all institutions, the research uncovered significant deficiencies in this regard. This turned out to be a thorny issue during our interviews, as respondents from both the Commission and the Council expressed the view (more or less explicitly) that in order to preserve the quality of deliberative processes, certain limits to the principle of transparency needed to be imposed. In their view, giving too much publicity to internal Commission deliberations at the early stages of a proposal, or to Council deliberations at the adoption stage, can erode the quality of those deliberations, understood in terms of 'expert' opinion. In addition to this, the research found important deficiencies with regards to the transparency of lobbying practices and access to information on decision-making process. Thus, while equality of access may be formally granted to a diversity of lobby groups, it is clear that, in practice, powerful business lobbies have preferential access against gender equality lobbies, as was revealed by the case-study of the Goods and Services directive.

Sixth, while our respondents emphasised an overall lack of awareness with regard to gender justice and equality in the EU, they all 'strongly agreed' with the view that both intra and inter-institutional deliberations adhere to the principle of recognition to a high degree, since this is a principle enshrined in formal decision-making procedures in the EU. Indeed, consensus politics in this supranational arena where such a wide variety of interests, ideas and identities coexist would be impossible if deliberation did not follow a strict code of practice. Despite this, our interviews uncovered a widespread concern and uncertainty about the impact of the current economic crisis on the principle of recognition, as gender interests are pushed to the back of the political agenda. While the two legislative processes examined in this study took place before the onset of the crisis, the principle of recognition understood in purely formalistic terms looks rather hollow in the current climate.

In sum, the picture that emerges from our analysis of gender democracy in EU legislative processes is mixed. On the one hand, the research exposed a number of democratic virtues of the EU decision-making process, especially in

relation to its deliberative, reason-giving elements that indicated a degree of responsiveness to women's, and gender equality, voices and perspectives. Also marked is the potential for consensus-building on an equality agenda between political actors and civil society. On the other hand, deficiencies in access and inclusion of gender equality advocates (including the EP) at critical points of decision-making, along with restrictive procedural processes and the priority accorded to economic interests by the Council and Commission combined to limit the possibilities of realising gender democracy. However, given the powers of Member State governments in EU decision-making leading to gender equality directives, a full assessment of their democratic quality requires an investigation into the role of national political actors and institutions in those processes. Yet, if there is one lesson to be learned from this study it is that, in order to improve gender democracy in the EU, substantial institutional changes geared towards the further democratisation of supranational institutions are required. These include, on the one hand, the establishment of mechanisms aimed at improving transparency and accountability at all stages of the decision-making process, with a particular emphasis on the adoption stage- that is, when a proposal is being deliberated in the Council. On the other hand, accountability and transparency could be improved by way enhancing the quality of inter-institutional dialogue between the Commission, the European Parliament, the European Economic and Social Council and the Committee of Regions. This could be achieved through the introduction of procedures that gave these institutions (particularly the EP, the EESC and the Committee of Regions) the opportunity to follow up an opinion, recommendation or amendment after this has been submitted. Apart from these changes, however, more substantial institutional changes are required in order to enhance gender democracy in the EU. Thus, without an extension of the actual cluster of legal initiatives on gender equality which follow the co-decision procedure (i.e., employment directives with a legal basis on article 141 of the Treaty) it is not clear how gender democracy in Europe can be advanced.

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List of interviewees

Interviewees 1 and 2 European Commission, DG Justice, Gender Equality Unit

Interviewee 3 European Commission, Bureau of European Policy Advisers

Interviewees 4 and 5 European Economic and Social Council

Interviewee 6 International European Movement

Interviewee 7 European Council- COREPER