



## Yearbook of the Institute of East-Central Europe (Rocznik Instytutu Europy Środkowo-Wschodniej)

Publication details, including instructions for authors:  
<http://www.iesw.lublin.pl/rocznik/index.php>

ISSN 1732-1395

### **Delivering Public Goods Through Law: The European Union as an Agent of change to Gender Equality Legislation in Poland**

Aleksandra Szczerba-Zawada<sup>a</sup>

<sup>a</sup> Jacob of Paradies University, Gorzów Wielkopolski

Published online: 4 Dec 2017

To cite this article: A. Szczerba-Zawada, 'Delivering Public Goods Through Law: the European Union as an Agent of change to Gender Equality Legislation in Poland', *Yearbook of the Institute of East-Central Europe*, Vol. 15, No. 4, 2017, pp. 81-101.

Yearbook of the Institute of East-Central Europe (Rocznik Instytutu Europy Środkowo-Wschodniej) is a quarterly, published in Polish and in English, listed in the European Reference Index for the Humanities (ERIH), Central and Eastern European Online Library (CEEOL) and IC Journal Master List (Index Copernicus International). In the most recent Ministry of Science and Higher Education ranking of journals published on the Polish market the Yearbook of the Institute of East-Central Europe received one of the highest scores, i.e. 14 points.



Aleksandra Szczerba-Zawada

# Delivering Public Goods Through Law: The European Union as an Agent of change to Gender Equality Legislation in Poland\*

**Abstract:** The aim of this paper is to outline the scope and character of the changes introduced to the Polish legal system with respect to gender equality as a result of the accession of the Republic of Poland to the European Union (EU) in 2004. Analysis concentrates on selected EU and Polish legal acts, as well as doctrine and statistical data. Reference is made to relevant case law of the Court of Justice of the EU and Polish courts. This paper seeks to draw out the fact that, if not for the nature of the EU as supranational organization that results in the legal obligation of its Member States to implement EU anti-discrimination law under the scrutiny of the competent international court (the CJEU), changes to the Polish legal system in the area of gender equality would have taken longer to implement, or may not have been made at all. The paper takes into consideration that the EU plays a key role in promoting gender equality as a public good, including beyond its borders, supporting third countries in achieving tangible gender equality results. In this respect, the EU's actions help to promote gender equality as "shared global priority."

**Keywords:** gender equality, non-discrimination, European Union, public goods

## Introduction

Equality between women and men is one of the EU objectives (Art. 3 TEU<sup>1</sup>), and a value upon which it was founded (art. 2 TEU). It is also the earliest case in which protection against discrimination was en-

\* This research was partially supported by the European Union's Erasmus+ Program under grant Jean Monnet Module "Inclusive Society Building Through EU Studies: Human Rights Protection in the European Union" (EUIncSo), project number 574570-EPP-1-2016-1-PL-EPPJMO-MODULE.

<sup>1</sup> Consolidated versions of the Treaty on European Union, Official Journal of the European Union, C 326, 26 October 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=pl> [2017-09-02].

forced in the EU, with Art. 119 TEEC<sup>2</sup> stipulating that each Member State should, in the course of the first stage (by 31 December 1961<sup>3</sup>), ensure and subsequently maintain the application of the principle of equal remuneration for equal work between male and female workers. Prohibition of wage discrimination was essential for the achievement of aims of economic integration, to avoid a situation in which undertakings established in those Member States which implemented the principle of equal pay suffered a competitive disadvantage in intra-community competition as compared with undertakings from those which did not eliminate pay discrimination. But the said provision also formed part of the social objectives of the EU, which is not, and was not at the time of its creation, merely an economic community, but is intended to ensure social progress and seek constant improvement of the living and working conditions of its Member States' peoples.<sup>4</sup> This double aim, economic and social at once, determined the fundamental character of the principle of equal pay in the EU and its Member States. Thanks to the case law of the CJEU, this has evolved into a general principle of EU law covering successive new areas of protection, new forms of prohibited unequal treatment, and the broader scope of personal protection.

Despite the legislative efforts of the EU to put the principle of gender equality into effect, the results cannot be considered to be satisfactory. In all Member States, including Poland, the situation is gradually improving because of the obligation to implement EU anti-discrimination provisions. Yet much still needs to be done. The table below illustrates the average state of gender (in)equalities for the EU-28 in the domains of employment, money, power and time, accord-

- 2 Treaty establishing the European Economic Community, paras. 10-11, [http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_3\\_antlasmalar/1\\_3\\_1\\_kurucu\\_antlasmalar/1957\\_treaty\\_establishing\\_eec.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf) [2017-09-02]
- 3 J. Maliszewska-Nienartowicz, 'Geneza i rozwój prawa antydyskryminacyjnego Unii Europejskiej', in: A. Zawadzka-Łojek, A. Szczerba-Zawada (eds), *Prawo antydyskryminacyjne Unii Europejskiej*, Warszawa: Instytut Wydawniczy EuroPrawo 2015, p. 23.
- 4 Judgment of the CJEU of 8 April 1976, C-43/75, Defrenne, EU:C:1976:56, <http://curia.europa.eu/juris/liste.jsf?pro=&lgrc=pl&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-43%252F75&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=647492> [2017-09-02].

ing to the Gender Equality Index 2015, where a score of 100 denotes full gender equality.

**Table 1: Gender Equality in the EU in Selected Areas**

Employment	Participation	FTE Employment (%)		Duration of Working Life (Years)	
	EU-28	EU-28-W	EU-28-M	EU-28-W	EU-28-M
	72.3	38.8	55.7	32.2	37.6
Money	Financial resources	Earnings (PPS)		Income (PPS)	
	EU-28	EU-28-W	EU-28-M	EU-28-W	EU-28-M
	58	2018	2528	15329	15997
Power	Political power	Parliamentary representation (%)		Regional assembly representation (%)	
	EU-28	EU-28-W	EU-28-M	EU-28-W	EU-28-M
	49.8	25	75	31	69
Time	Care	Childcare activities (%)		Domestic activities (%)	
	EU-28	EU-28-W	EU-28-M	EU-28-W	EU-28-M
	42.8	44.6	27.4	77.1	24

Source: Own elaboration on the basis of EIGE, "Gender Equality Index," <http://eige.europa.eu/gender-statistics/gender-equality-index> [2017-09-02].

The aim of this paper is to outline the scope and character of the changes introduced to the Polish legal system with respect to gender equality as a result of the accession of the Republic of Poland to the EU in 2004. Analysis concentrates on selected EU and Polish law, as well as doctrine, relevant case law of the CJEU and Polish courts and statistical data. This article seeks to draw out the fact that, if not for the nature of the EU as a supranational organization that results in the legal obligation of its Member States to implement EU anti-discrimination law under the scrutiny of the competent international court (the CJEU), changes to the Polish legal system in the area of gender equality would have taken longer to implement or may not have been made at all. Anti-discrimination legislation plays a very important role in establishing real equality between men and women, although to be fully effective it must be combined with educational, social, economic and political instruments, as gender equality is a multidimensional issue. This paper takes into consideration that the EU plays a key role in

promoting gender equality as a public good, including beyond its borders, supporting third countries in achieving tangible gender equality results. In this respect, promoting gender equality can be deemed as a “shared global priority,”<sup>5</sup> which can be promoted by collective action at the supranational level of the EU.

## 1. The European Union and Public Goods: Gender Equality

The EU is an international organization, with typical intergovernmental features. It was created by the sovereign decisions of its original Member States, the vertical balance of competences lies with the Member States, the dominant way of decision-making is consultative and governance procedures are based on consent rather than compulsion.<sup>6</sup> But the EU also supranational features. This *sui generis* nature of the EU is typified by its wide range of legal, political and financial autonomy, and results in the binding character of EU law, its primacy over national laws, and its direct applicability to national addressees, including individuals.<sup>7</sup> This was explained in more detail by the CJEU, which stated that the EU constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights and the subjects of which comprise not only the Member States but also their nationals. Upon entry into force, the EU Treaties became a compulsory, integral and binding part of the legal systems of the Member States. What’s more, the law stemming from the Treaties, an independent source of law, could not because of its special and original nature be overridden by domestic legal provisions, however framed, without being deprived of its character as EU law and without the legal basis of the Union itself being called into question.<sup>8</sup> This

- 5 C.M. Blackden, ‘Gender Equality and Global Public Goods: Some Reflections on Shared Priorities’, OECD, <https://www.oecd.org/dac/gender-development/43882963.pdf> [2017-09-14], p. 11.
- 6 J. McCormick, *Understanding the European Union. A Concise introduction*, London: Pelgrave Macmillan, 2017, p. 14.
- 7 More on the supranational nature of the EU see J. Neyer, *The Justification of Europe. A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012, N. Nugent, *The Government and Politics of the European Union*, London: Pelgrave Macmillan 2017 and M. Chamon, ‘Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty’, *Common Market Law Review* 2016, vol. 53, issue 6, pp. 1501-1543.
- 8 CJEU judgment of 15 July 1964, C-6/64, Costa, EU:C:1964:66, para. 3.

body of law binds Member States and individuals, imposing obligations and conferring rights (such as the right to equal treatment regardless of gender) upon the latter, leading to such rights becoming part of their legal heritage.<sup>9</sup>

The Member States decided to create the supranational EU legal system at the expense of their sovereign rights in order to achieve common aims. Among those aims in the promotion of EU values, one of which is gender equality, both internally and externally (Art. 3(1)(5) TUE). Through its activities to achieve this aim, the EU contributes to the protection and managing of gender equality as one of several public goods. The EU's engagement in enhancing equality between men and women, and in combating gender discrimination, is a Treaty obligation; in all its policies, the EU shall aim to eliminate inequalities, to promote equality between men and women and to combat discrimination based on sex (Art. 9 and 10 TFEU<sup>10</sup>). Gender equality should be promoted by the EU both in relations with its Member States (internally) and in relations with third countries and other international organizations (externally). With respect to the promotion of gender equality among Member States, EU anti-discrimination legislation seems to be the most effective instrument, as every Member State's primary obligation is to adapt all domestic legislation in any manner necessary to render it compliant with legally binding EU acts (art. 291 TFEU). Exercise of this duty is scrutinized by the EU institutions, the European Commission (EC) and the CJEU. The control mechanism described in Art. 258-260 of the TFEU determines that EU law is the most efficient means of influencing Member States with respect to gender equality. The EU's efforts to enhance equality between men and women are not limited, however, to its Member States. The EU tries to create the added value in the multilateral system of gender equality management through actions supporting partner countries in their attempts to establish a more enabling environment for the fulfillment of women's rights and to achieve tangible improvements in gender equality. In the 2016-2020, this is taking place within the

<sup>9</sup> CJEU judgment of 5 February 1963, C-26/62, van Gend & Loos, EU:C:1963:1, para. 3.

<sup>10</sup> Treaty on the Functioning of the European Union (consolidated versions), Official Journal of the European Union, C 326, 26 October 2012, p. 47.

framework of Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations. The changes are to be achieved in four pivotal areas:

- Ensuring girls' and women's physical and psychological integrity
- Promoting the economic and social rights/empowerment of girls and women
- Strengthening girls' and women's voice and participation
- Shifting the Commission services' and EEAS' institutional culture to more effectively deliver on EU commitments.<sup>11</sup>

The instruments of implementation (e.g. financial support) of the actions set by the new framework for achieving gender equality outside the EU and its control methodology (systematic reports, gender analysis, etc.) prove that, while the EU exercises its hard power in relations with Member States, internationally its rather a "quiet superpower specializing in civilian power instruments based on economic influence, international law, smart and soft power."<sup>12</sup> This is at one and the same time the EU's main strength (as it has no competence to impose legally binding gender equality obligations on third countries) and its weakness (as the hard, legal, measures are the most effective instruments of achieving gender equality aims).

## 2. EU Law on Gender Equality as an Instrument of Delivering a public Good

From the moment of each nation's accession to the EU, all organs of public authority (legislative, executive and judicial) is obliged to observe the gender equality principle to the extent required by EU law.<sup>13</sup> Therefore, the Polish legislative, executive and judiciary must abide by both primary and secondary sources of EU law that define the mate-

11 Joint Staff Working Document Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020, SWD(2015) 182 final, [https://ec.europa.eu/europeaid/sites/devco/files/staff-working-document-gender-2016-2020-20150922\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/staff-working-document-gender-2016-2020-20150922_en.pdf) [2017-09-05].

12 A. Moravcsik, 'Europe: Quietly Rising Superpower in a Bipolar World', in: A.S. Alexandroff, A.F. Cooper (eds), *Rising States, Rising Institutions Challenges for Global Governance*, Washington: Brookings Institution Press 2010, p. 158.

13 CJEU judgment of 30 September 2003, C224/01, Köbler, EU:C:2003:513, para. 32.



rial and personal scopes of the application of prohibition of gender discrimination, prohibited forms of unequal treatment, allowed exceptions to gender equality principles and the mechanism of enforcement of rights in discrimination cases.

When it comes to the Treaty provisions on gender equality, Art. 157 TFEU (ex Art. 119 TEEC and Art. 141 TEC) requires that each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. In this respect, equal pay without discrimination based on sex means, first, that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement, and second, that pay for work at time rates shall be the same for the same job. According to Art. 157 (4) TFEU, the Member States are entitled to maintain or adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (“affirmative actions”). Such measures, considered to be an exception to the concept of formal equality predominant in EU law,<sup>14</sup> will be addressed mainly to women as the disadvantaged group in terms of employment. As derogation of the right to equality,<sup>15</sup> the adoption of positive action measures in favor of women in order to correct for their objectively evidenced disadvantages in employment is justified as long as it conforms with the principle of proportionality and is temporary. This requires that the adopted measures should be necessary and appropriate to overcome discriminatory treatment, and should be applied until the situation of the disadvantaged group is improved.<sup>16</sup>

14 N. E. Ramos Martín, ‘Positive Action in EU Gender Equality Law’, *University of Amsterdam Working Paper* 2013, no. 139, p. 19, [http://archive.uva-aias.net/uploaded\\_files/publications/WP139-RamosMartin-1.pdf](http://archive.uva-aias.net/uploaded_files/publications/WP139-RamosMartin-1.pdf) [2017-09-06].

15 In the Author’s opinion positive actions should be qualified as instruments of substantive equality rather than exception to formal equality, as follows from the settled case law of the CJEU. See A. Szczerba-Zawada, ‘Działania pozytywne w prawie Unii Europejskiej – wyjątek od zasady równości czy narzędzie jej urzeczywistniania?’, in: J. Breczko, K. Karaskiewicz, T. Kozłowski, D. Stasi, M. Woch (eds), *Prawo naturalne – Prawo pozytywne. Konflikt w interpretacji praw człowieka*, Warsaw: EXPOL, 2016, pp. 149-164.

16 N. E. Ramos Martín, ‘Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision Making Positions’, *Spanish Labour Law and Employment Relations Journal*, vol. 3, issue 1-2, 2014, pp. 30-32. More on the concept of affirmative actions in EU law i.a. M. De Vos, ‘Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78/EC’, Luxembourg: Office for Official Publications of the European Communities 2007 and D. Caruso, ‘Limits of the classic

Under the Charter of Fundamental Rights of the European Union, which has the same legal weight as the Treaties (Art. 6 (1) TEU), everyone is equal before the law (Art. 20 of the CFR). The Charter also guarantees freedom from discrimination, stating that any discrimination based on any grounds, including sex, shall be prohibited (Art. 21 of the CFR). Art. 23 of the CFR states that equality between men and women must be ensured in all areas, including employment, work and pay, and confirms the entitlements of the addressees of the Charter to adopt positive actions. It should be emphasized that these anti-discriminatory clauses have to be construed in the light of the scope of the application of the Charter by the Member States, which are each obliged to abide by the provisions of this Charter only when they are implementing EU law (Art. 51 (1) of the CFR). This implies that the non-discrimination provisions of the Charter have to be interpreted and applied in accordance with EU equality law, both primary and secondary. The latter is typified mainly by directives.

EU gender equality directives include Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast),<sup>17</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC EU,<sup>18</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services,<sup>19</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security,<sup>20</sup> and Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and

method: Positive action in the European Union after the new equality directives', „Jean Monnet Working Paper" no. 10, 2002, <http://www.jeanmonnetprogram.org/archive/papers/02/021001.pdf> [2017-09-06].

17 Official Journal of the European Union, L 204, 26 July 2006.

18 Official Journal of the European Union L 180, 15 July 2010.

19 Official Journal of the European Union L 373, 21 December 2004.

20 Official Journal of the European Communities L 6, 10 January 1979.

health at work of pregnant workers and workers who have recently given birth or are breastfeeding.<sup>21</sup>

Member States are obliged to abide by the requirement for the prohibition of discrimination within the scope of the directives which cover matters of employment and occupation (Directive 2006/54/EC, Directive 2010/41/EU and Directive 91/85/EEC), self-employment (Directive 2010/41), access to and supply of goods and services (Directive 2004/113/EC) and social security (Directive 79/7/EEC). As follows from the above, EU law pays special attention to guarantee the equality of men and women in the labor market, which is reflected in the material scope of the application of the gender equality principle in the Polish legal system. As the Polish legislator has not decided to go beyond the minimum material requirements of protection set by the directives, prohibition of gender discrimination is binding in limited areas, mainly employment and self-employment.

The EU equality directives oblige all Member States to prohibit:

- Direct discrimination based on gender, i.e. a situation where one person is, on grounds of their gender, treated less favorably than another has been or would be treated in a comparable situation (e.g. Art. 2(a) of Directive 2004/113).
- Indirect discrimination, where an apparently neutral provision, criterion or practice would put persons of one gender at a particular disadvantage compared with others, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (e.g. Art. 2 (b) of Directive 2004/113).
- Harassment which occurs when unwanted conduct related to someone's gender takes place with the purpose or effect of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment, including sexual harassment, where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs with the said purpose (Art. 2(1)(c)(d)) as well as any less favorable treatment based on a person's rejection of or submission to such conduct.

21 Official Journal of the European Communities L 348, 28 November 1992.

- Instruction to discriminate against persons on grounds of sex and any less favorable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC (art. 2(2)(a)-(c) of Directive 2006/54).

Anyone claiming to be a victim of discrimination based on gender in the abovementioned spheres is obliged to adduce facts from which it may be presumed that there has been discrimination, and it is up to the defendant to prove that there has been no discriminatory treatment (“shared burden of proof,” e.g. Art. 29 of Directive 2006/54/EC). In regard to the personal scope of the application of protection against gender discrimination, it must be emphasized that it includes gender reassignment.<sup>22</sup>

It must be highlighted that the normative power of the EU as a promoter of gender equality as a public good is realized through sanctions imposed on Member States in the event of violation of gender equality law. Failure by Member States to fulfill their obligations, particularly with respect to law-making procedures, under gender equality *acquis*, may have a variety of consequences. In the Polish case, a complaint of infringement of EU law may be launched against the Republic of Poland in accordance with Art. 258-260 TFEU. The EC has in fact instigated the complaint procedure against Poland, under Art. 258 TFEU, alleging amongst other things the violation of Art. 157 TFEU and Directive 2006/54/EC by the Law amending the law on the organization of ordinary courts (July 2017),<sup>23</sup> failure to transpose EU rules prohibiting gender discrimination in access to and the supply of goods and services (Directive 2004/113/EC (May 2009))<sup>24</sup> and failure to communicate national legislation that aims to implement EU rules against gender discrimination in employment (Direc-

22 CJEU judgment of 30 April 1996, C-13/94, P v S, EU:C:1996:170.

23 European Commission at work, [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/index.cfm?lang\\_code=EN&r\\_dossier=&noncom=0&decision\\_date\\_from=&decision\\_date\\_to=&active\\_only=0&EM=PL&title=&submit=Search](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&EM=PL&title=&submit=Search), infringement number 20172119, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/11%20PK%20333-15-1.pdf> [2017-09-04].

24 EC, ‘Commission refers Poland to European Court of Justice on gender equality legislation’, Brussels, 14 May 2009, [http://europa.eu/rapid/press-release\\_IP-09-785\\_en.htm](http://europa.eu/rapid/press-release_IP-09-785_en.htm) [2017-09-04].

tive 2006/54/EC) (March 2010).<sup>25</sup> Another consequence of Member States failing to fulfill their obligations is potential liability for damage arising from a national court caused to an individual.<sup>26</sup>

### **3. Transposing Equality: the Principle of Gender Equality in the Polish Legal System**

The concept of prohibition of gender discrimination as set out in EU primary and secondary law must be implemented in the Polish legal system. As Member States must bring their legal systems in line with EU law, EU gender equality law has left its traces in the development of Polish anti-discrimination legislation. In Poland, the framework for gender equality has been provided mainly by two acts: the Polish Labor Code<sup>27</sup> and the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Anti-discrimination Act),<sup>28</sup> although gender equality is a constitutional principle in Polish law.

The Constitution of the Republic of Poland enshrines two anti-discrimination clauses. The first one, envisaged in Art. 32, stipulates that all persons shall be equal before the law and shall have the right to equal treatment by public authorities. Moreover, no-one shall be discriminated against in political, social or economic life for any reason (including gender). Article 33 refers exclusively to gender equality, stating “men and women shall have equal rights in family, political, social and economic life in the Republic of Poland. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honors and decorations.”

25 EC, 'Gender equality rules: European Commission sends final warnings to Austria, Belgium and Poland and closes case against Estonia' 18 March 2010, [http://europa.eu/rapid/press-release\\_IP-10-319\\_en.htm](http://europa.eu/rapid/press-release_IP-10-319_en.htm) [2017-09-04].

26 See i.a. A. Szczerba-Zawada, 'State responsibility for breach of EU principle of equal treatment', in: L. Vojáček, P. Salák, J. Valdhans, *DNY PRÁVA 2015 – DAYS OF LAW 2015. Část VI. Odpovědnost v právu*, Brno: Masarykova univerzita, 2016, pp. 226-239. On the Member States responsibility under EU law in general see P. Aalto, *Public Liability in EU law. Brasserie, Bergaderm and beyond*, Oxford and Portland/Oregon: Hart Publishing, 2011.

27 Act of 26 June 1974 The Labour Code, Journal of Laws from 1974 No. 24 item 141 as amended.

28 Journal of Laws from 2010 No. 245 item 1700 as amended.

These constitutional provisions are realized in the Polish Labor Code and Anti-discrimination Act, which were to bring the Polish legal system in line with the equality *acquis*.

Regarding the prohibition of gender discrimination in the Labor Code, considerable amendments were introduced in 2001 and 2004 to bring the law into line with EU gender equality legal standards.<sup>29</sup> As a result, Chapter IIa of the Labor Code (“Equal treatment in employment”) mainly implements Directive 2006/54/EC. It stipulates that employees, in particular regardless of their sex, should be treated equally in relation to establishing and terminating an employment relationship, employment conditions, promotion conditions and access to training in order to improve professional qualifications (Art. 18<sup>3a</sup> § 1). Importantly, the Polish Labor Code introduces a catalog of prohibited unequal treatment, highlighting the prohibition of gender discrimination as an exemplar of the requirements of EU law. This enhances the personal scope of protection against discrimination. In conformity with gender equality directives, the Polish Labor Code prohibits direct and indirect gender discrimination (Art. 18<sup>3a</sup> § 2). It is worth emphasizing that Polish regulations forbid discrimination in a hypothetical rather than concrete sense in relation to the situations in which it is required to prove discrimination, which is the result of a misunderstanding by the Polish legislator of the EU definition of direct discrimination.<sup>30</sup> The standard that exceeds the level of protection set by the equality directives (Art. 18<sup>3a</sup> § 5(1) of the Labor Code) is the qualification as “discriminatory” of any practice of encouraging another person to violate the principle of equal treatment (of men and women) in employment. Like Directive 2006/54/EC, the Polish Labor Code prohibits harassment, including sexual harassment, which means any form of unwanted conduct with the purpose or effect of violating the dignity of an employee, in particular when creating an intimidating, hostile, degrading, humiliating or offensive atmosphere regardless of the nature of the conduct. (Art. 18<sup>3a</sup> § 5 and 6). These forms of unequal treatment are prohibited with respect to establishing and terminating an employment relationship, employ-

29 D. Szelewa, ‘The policy on gender equality in Poland’, European Parliament, May 2011, pp. 11-12.

30 I. Boruta, ‘Zakaz dyskryminacji w zatrudnieniu – nowe pojęcie’, *Monitor Prawa Pracy*, no. 2, 2004, p. 36.

ment conditions, promotion conditions and access to training in order to improve professional qualifications (Art. 18<sup>3a</sup> § 1), in particular of terminating or rejecting the establishment of an employment relationship, establishing disadvantageous conditions of remuneration for work or other employment, not being selected for promotion or granted other work-related benefits, and not being chosen to participate in training organized to improve professional qualifications (Art. 18<sup>3b</sup> § 1). The Polish Labor Code does not address some areas covered *expressis verbis* by Directive 2006/54/EC, such as membership of and involvement in an organization of workers or employers, less favorable treatment of women in connection with pregnancy or maternity leave, and selection criteria and recruitment conditions. Also like in EU law, the Polish Labor Code stipulates (in separate provisions) the principle of equality of remuneration for the same work or for work of an identical value (Art. 18<sup>3c</sup> § 1). Unlike EU law (Art. 157 TFEU), the said requirement of equality of wages is not limited to gender equality, but covers all areas in which discrimination is prohibited. Directive 2006/54/CE and the Polish Labor Code both accept exceptions to gender equality in form of “genuine occupational qualifications” (Art. 18<sup>3b</sup> § 2(1)) and “Positive Actions” (Art. 18<sup>3b</sup> § 3).

Polish Labor law provides protection against negative consequences arising from an employee exercising their rights in respect of the principle of equal treatment in employment in accordance with the EU standard of protection against victimization. This protection is granted not only to the person claiming discrimination and exercising their rights due to this violation (as prescribed expressly by EU anti-discrimination law), but also to any employee who has supported such a person (Art. 18<sup>3c</sup>). In cases where violation of the non-discrimination principle is alleged, the Labor Code stipulates the requirement for shared burden of proof, which means that the violation of the principle of equal treatment in employment is presumed unless the employer proves that the alleged unequal treatment occurred for objective reasons and not because of the claimant’s gender (Art. 18<sup>3b</sup> § 1). This is unique, being an exception to the rule prevailing in Polish law that the necessity of proof always lies with the person who makes a claim.

As to the consequences of the violation of the principle of equal treatment of men and women in employment, the Polish legislator decided to introduce employer’s liability for damages of at least the

amount of the minimum remuneration for work (Art. 18<sup>3d</sup>). This corresponds to Directive 2006/54/EC, which requires that this kind of measure should be a deterrent and proportionate to the damage suffered. The other legal remedies available in cases of discrimination are regulated in other parts of the Labor Code and other legal acts.

The Anti-discrimination Act, on the other hand, implements not only Directive 2006/54/EC (particularly in areas not covered by the Labor Code) and other employment directives, but also Directive 2004/113/EC. Hence, it protects from discrimination and ensures equal treatment regardless of gender in the following areas: employment and the labor market, access to trade unions, employers' organizations and professional self-governing bodies, access to the welfare state, access to housing services and acquisition of goods, rights and energy (Art. 6 and 8). It also rearranges the institutional setting for gender equality in Poland, dividing the responsibilities between the Human Rights Ombudsman and the Plenipotentiary for Equal Treatment. The Anti-discrimination Act provides a framework for the policy of equal treatment in Poland complementary to the one under the Labor Code, although it does not do this in a comprehensive manner. It does not refer to preventing and counteracting gender discrimination in health care, education or private and family life. Despite the fact that the EU recommends introducing gender equality policies as horizontal strategy, the Act does not provide for a separate budget to finance their development. The gender equality strategies, measures and activities are covered from the budgets of particular institutions or governmental bodies without any additional public finances.<sup>31</sup> For these and other reasons, including doubts about the personal scope of protection against gender discrimination, the Anti-discrimination Act has been criticized.<sup>32</sup>

31 M. Warat, 'Development of Gender Equality Policies in Poland. A review of success and limitations', *Working paper no. 2.2*, 2011, pp. 20-21.

32 D. Szelewa, op. cit., p. 5; K. Kędzióra, K. Śmiszek (eds), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz*, Warszawa: Wolters Kluwer 2017, p. 69 et seq.



In areas where EU law imposes no obligations, gender equality in the Polish legal system is protected only barely or not at all, and regulated only by internal law and soft law.<sup>33</sup>

## 4 Gender Equality in Poland after Accession to the European Union: Conclusions

The achievement of real equality between men and women requires multiple and multidimensional actions. These are undertaken by the EU both in its relations with the Member States and with the wider world, including EU candidate countries and potential candidates, European Neighborhood Policy countries, and other third countries,<sup>34</sup> in the form of substantial practical and financial support to incorporate the principle of equality between women and men. This two-dimensional approach is characteristic for all EU activities undertaken to contribute to the delivery of global public goods.<sup>35</sup>

One of the EU instruments of enhancing gender equality in the Member States is legislation. Although specific Member States' social, cultural or historical circumstances always affect the process of harmonization of gender equality law, EU legislation remains the most effective instrument for the introduction of a single, harmonized gender equality standard in the whole EU, and the most effective instrument of achieving tangible results. Although the advancement is still rather slow and of limited material scope, statistical data and by EU doctrine<sup>36</sup> confirm that the EU has contributed significantly to protection against gender discrimination domestically within Member States. However, EU action must be supplemented by similar activi-

33 On this issue see more M. Pachocka, A. Szczerba-Zawada, D. Eerma, 'Women on corporate boards in Poland and Estonia in the context of the EU gender equality policy', in: M. Aluchna, G. Aras (eds.) *Women on corporate boards. An international perspective*, London: Routledge (forthcoming).

34 On this issue see more 2017 Report on equality between women and men in the EU, European Union 2017, pp. 45-47, [ec.europa.eu/newsroom/document.cfm?doc\\_id=43416](http://ec.europa.eu/newsroom/document.cfm?doc_id=43416) [2017-09-04].

35 U. Kurczewska, 'Rola Unii Europejskiej w zarządzaniu globalnymi dobrami publicznymi w ramach polityki zrównoważonego rozwoju', in: E. Latoszek, M. Proczek, M. Krukowska (eds), *Zrównoważony rozwój a globalne dobra publiczne w teorii i praktyce organizacji międzynarodowych*, Warszawa: Szkoła Główna Handlowa, 2016, p. 158.

36 J. Mulder, *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities*, Oxford and Portland/Oregon: Hart Publishing 2017, p. 2.

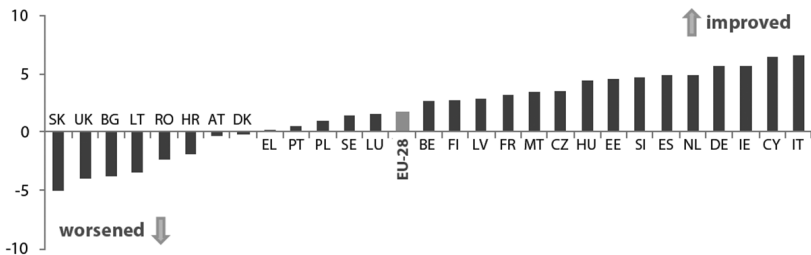
ties within the Member States. “This relates to the principle of subsidiarity and to the fact that much of the action required to provide global public goods takes place at the national level, and requires the engagement of national actors.”<sup>37</sup>

The accession of the Republic of Poland to the EU has contributed in a positive way to the Polish legal framework for gender equality protection. Several amendments were made to the Labor Code and new acts were adopted to implement EU gender law, providing new definitions of discrimination, an anti-discrimination remedies mechanism based on shared burden of proof, and new institutional arrangements for gender equality issues.<sup>38</sup>

EU accession has also changed the language used for addressing gender equality, from discourse on women’s rights to discourse on equality and anti-discrimination. As a result, the struggle for women’s rights has become part of the mainstream discourse in Poland.<sup>39</sup>

And EU accession has contributed to enhanced equality between men and women in practice. Statistics prove that the slight but tangible positive effects of equality law in Poland, which corresponds with a trend visible at the EU level. The improvement in gender equality in the EU since enlargement in 2004 is illustrated by the following figure.

**Figure 1. Gender Equality Index Scores by Member State, Differences Between 2005 and 2012**



Source: Gender Equality Index 2015 – Measuring gender equality in the European Union 2005-2012, European Institute for Gender Equality, 2015, p. 77.

<sup>37</sup> C.M. Blackden, *op. cit.*, p. 7.

<sup>38</sup> Critically of this I. Bego, *Gender Equality Policy in the European Union: A Fast Track to Parity for the New Member States*, London: Palgrave Macmillan 2015, p. 19 *at seq.*

<sup>39</sup> M. Warat, *op. cit.*, p. 16.

Studies prove, however, that women are still disadvantaged compared to men in many spheres. As revealed by the GEI Index, the EU's overall score of 52.9 out of 100 in 2012 means that the bloc is only half way to equality, although the score is improving (52.4 in 2010 and of 51.3 in 2005).<sup>40</sup> The pace of progress needs to increase if the EU is going to achieve the gender aims laid out in the Europe 2020 Strategy<sup>41</sup> and the strategic engagement for gender equality.<sup>42</sup>

The table below gives more detailed data about the state of equality between men and women in Poland.

**Table 2: Results of the Gender Equality Index for 2002-2012 (Poland)**

Domain	Year		
	2005	2010	2012
Work	58.5	55.8	55.5
Money	42.4	52.4	54.2
Knowledge	46.5	43.8	41.8
Time	34.1	20.8	20.8
Power	24.0	34.2	38.5
Health	81.3	83.2	83.6
Overall results	42.7	43.0	43.7

Source: Own elaboration on the basis of the Gender Equality Index Report 2015, op. cit., pp. 77-88.

Thus, Poland saw a small improvement (one point) after accession to the EU. The best results and the biggest improvements were achieved in areas covered by Polish legislation (money, employment and power) which, to a great extent, implements the relevant EU equality provisions. Unfortunately, these provisions prioritize the labor market, reconciliation of family and work and the social security system over other areas. This prioritization has negative effects both

<sup>40</sup> Gender Equality Index Report 2015, op. cit., p. 75.

<sup>41</sup> European Commission, Europe 2010. A European strategy for smart, sustainable and inclusive growth, <http://ec.europa.eu/eu2020/pdf/COMPLETE%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> [2017-09-08].

<sup>42</sup> European Commission, Strategic engagement for gender equality 2016-2019, Luxembourg: Publications Office of the European Union (2015), [http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic\\_engagement\\_for\\_gender\\_equality\\_en.pdf](http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf) [2017-09-08].

at EU and national level, such as the exclusion of, for example, domestic violence or reproductive rights from gender equality legislation.<sup>43</sup>

Despite the identified weaknesses, the results confirm that EU law is the main driver of change in Poland with respect to gender equality. This justifies efforts to adopt further EU equality legislation, especially in areas in which the principle of gender equality still awaits implementation (for example, improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures<sup>44</sup>). Nevertheless, if the EU and its Member States are to achieve tangible gender equality results, legislative action must be combined with educational, social, economic and political instruments. Putting equality into practice is strongly dependent on social attitudes towards gender equality. In Poland, the traditional vision of the woman's role within the family and society remains very influential in determining the states of gender equality in areas such as housework and economic decision-making.<sup>45</sup>

## References

- 2017 Report on equality between women and men in the EU, European Union 2017, pp. 45-47, [ec.europa.eu/newsroom/document.cfm?doc\\_id=43416](http://ec.europa.eu/newsroom/document.cfm?doc_id=43416).
- Aalto, P., *Public Liability in EU law. Brasserie, Bergaderm and beyond*, Oxford and Portland/Oregon: Hart Publishing, 2011.
- Act of 26 June 1974 The Labour Code, Journal of Laws from 1974 No. 24 item 141 as amended.
- Act of 5 January, 2011, Election Code, Journal of Laws from 2011 No. 21 item 112 as amended.
- Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Anti-discrimination Act), Journal of Laws from 2010 No. 245 item 1700 as amended.

<sup>43</sup> M. Warat, *op. cit.*, p. 17.

<sup>44</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. COM/2012/0614 final - 2012/0299 (COD), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0614:FIN> [2017-09-08].

<sup>45</sup> D. Szelewa, *op. cit.*, p. 4. This is proved by the newest statistical elaboration "Labour force survey in Poland" delivered by the Central Statistical Office, according to which in the first quarter of 2017 women constituted 61,6% of economically inactive population and the family and household duties were pointed as major reasons for their inactivity (Central Statistical Office, Labour force survey in Poland, Warsaw 2017, p. 37).

- Bego, I., *Gender Equality Policy in the European Union: A Fast Track to Parity for the New Member States*, London: Palgrave Macmillan 2015.
- Blackden, C. M., 'Gender Equality and Global Public Goods: Some Reflections on Shared Priorities', OECD, <https://www.oecd.org/dac/gender-development/43882963.pdf> [2017-09-14].
- Boruta, I., 'Zakaz dyskryminacji w zatrudnieniu – nowe pojęcie', *Monitor Prawa Pracy*, no. 2, 2004, pp. 36-45.
- Caruso, D., 'Limits of the classic method: Positive action in the European Union after the new equality directives', „Jean Monnet Working Paper”, no. 10, 2002, pp. 1-61.
- Central Statistical Office, *Labour force survey in Poland*, Warsaw 2017.
- Chamon, M., 'Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty', *Common Market Law Review* 2016, vol. 53, issue 6, pp. 1501–1543.
- CJEU judgment of 30 September 2003, C224/01, Köbler, EU:C:2003:513.
- CJEU judgment of 15 July 1964, C-6/64, Costa, EU:C:1964:66.
- CJEU judgment of 30 April 1996, C-13/94, P v S, EU:C:1996:170.
- CJEU judgment of 5 February 1963, C-26/62, van Gend & Loos, EU:C:1963:1.
- Consolidated versions of the Treaty on European Union, Official Journal of the European Union, C 326, 26 October 2012.
- Council directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Official Journal of the European Union L 373, 21 December 2004.
- Council directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, Official Journal of the European Communities L 6, 10 January 1979.
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Official Journal of the European Communities, L 348, 28 November 1992.
- De Vos, M., 'Beyond Formal Equality. Positive Action under Directives 2000/43/EC and 2000/78/EC', Luxembourg: Office for Official Publications of the European Communities 2007.
- Deloitte, *Women in the boardroom. A global perspective – 5th edition*, 2017, <https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom-a-global-perspective.html> [2017-09-04].
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal of the European Union, L 204, 26 July 2006.
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men

- and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC EU, Official Journal of the European Union L 180, 15 July 2010.
- EIGE, 'Gender Equality Index', <http://eige.europa.eu/gender-statistics/gender-equality-index> [2017-09-02].
- Ramos Martín, N. E., 'Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision Making Positions', *Spanish Labour Law and Employment Relations Journal*, vol. 3, issue 1-2, 2014, pp. 20-33.
- European Commission at work, [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/index.cfm?lang\\_code=EN&r\\_dossier=&noncom=o&decision\\_date\\_from=&decision\\_date\\_to=&active\\_only=o&EM=PL&title=&submit=Search](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=o&decision_date_from=&decision_date_to=&active_only=o&EM=PL&title=&submit=Search), infringement number 20172119, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20PK%20333-15-1.pdf> [2017-09-04].
- European Commission, Europe 2010. A European strategy for smart, sustainable and inclusive growth, <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> [2017-09-08].
- European Commission, Strategic engagement for gender equality 2016-2019, Luxembourg: Publications Office of the European Union (2015), [http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic\\_engagement\\_for\\_gender\\_equality\\_en.pdf](http://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/strategic_engagement_for_gender_equality_en.pdf) [2017-09-08].
- European Union 2017, [ec.europa.eu/newsroom/document.cfm?doc\\_id=43416](http://ec.europa.eu/newsroom/document.cfm?doc_id=43416) [2017-09-04].
- Gender Equality Index 2015 – Measuring gender equality in the European Union 2005-2012, European Institute for Gender Equality, 2015.
- Joint Staff Working Document Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020, SWD(2015) 182 final.
- Kędziora, K., Śmiszek, K. (eds), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz*, Warszawa: Wolters Kluwer 2017.
- Kurczewska, U., 'Rola Unii Europejskiej w zarządzaniu globalnymi dobrami publicznymi w ramach polityki zrównoważonego rozwoju', in: E. Latoşek, M. Proczek, M. Krukowska (eds), *Zrównoważony rozwój a globalne dobra publiczne w teorii i praktyce organizacji międzynarodowych*, Warszawa: Szkoła Główna Handlowa, 2016.
- Warat, M., 'Development of Gender Equality Policies in Poland. A review of success and limitations', *Working paper no. 2.2*, 2011, pp. 1-135.
- Maliszewska-Nienartowicz, J., 'Geneza i rozwój prawa antydyskryminacyjnego Unii Europejskiej', in: A. Zawidzka-Łojek, A. Szczerba-Zawada (eds), *Prawo antydyskryminacyjne Unii Europejskiej*, Warszawa: Instytut Wydawniczy EuroPrawo 2015, pp. 13-40.
- McCormick, J., *Understanding the European Union. A Concise introduction*, London: Pelgrave Macmillan, 2017.

- Moravcsik, A., 'Europe: Quietly Rising Superpower in a Bipolar World', in: A.S. Alexandroff, A.F. Cooper (eds.), *Rising States, Rising Institutions Challenges for Global Governance*, Washington: Brookings Institution Press 2010, pp. 151-174.
- Mulder, J., *EU Non-Discrimination Law in the Courts: Approaches to Sex and Sexualities*, Oxford and Portland/Oregon: Hart Publishing 2017.
- Neyer, J., *The Justification of Europe. A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012,
- Nugent, N., *The Government and Politics of the European Union*, London: Pelgrave Macmillan, 2017.
- Pachocka, M., Szczerba-Zawada, A., Eerma D., 'Women on corporate boards in Poland and Estonia in the context of the EU gender equality policy', in: M. Aluchna, G. Aras (eds), *Women on corporate boards. An international perspective*, London: Routledge (forthcoming).
- Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. COM/2012/0614 final - 2012/0299 (COD), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0614:FIN> [2017-09-08].
- Ramos Martín, N. E., 'Positive Action in EU Gender Equality Law', *University of Amsterdam Working Paper* 2013, no. 139, pp. 1-44.
- Regulation of the Ministry of Science and Higher Education dated as of 25 October 2015, Journal of Laws from 2015 item 1879.
- Szczerba-Zawada, A., 'Działania pozytywne w prawie Unii Europejskiej – wyjątek od zasady równości czy narzędzie jej urzeczywistniania?', in: J. Breczko, K. Karaskiewicz, T. Kozłowski, D. Stasi, M. Woch (eds), *Prawo naturalne – Prawo pozytywne. Konflikt w interpretacji praw człowieka*, Warszawa: EXPOL, 2016, pp. 149-164.
- Szczerba-Zawada, A., 'State responsibility for breach of EU principle of equal treatment', in: L. Vojáček, P. Salák, J. Valdhans, *DNY PRÁVA 2015 – DAYS OF LAW 2015. Část VI. Odpovědnost v právu*, Brno: Masarykova univerzita, 2016, pp. 226-239.
- Szelewa, D., 'The policy on gender equality in Poland', European Parliament, May 2011.
- Treaty on the Functioning of the European Union (consolidated versions), Official Journal of the European Union, C 326, 26 October 2012.

