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A comparative analysis of gender equality law in Europe

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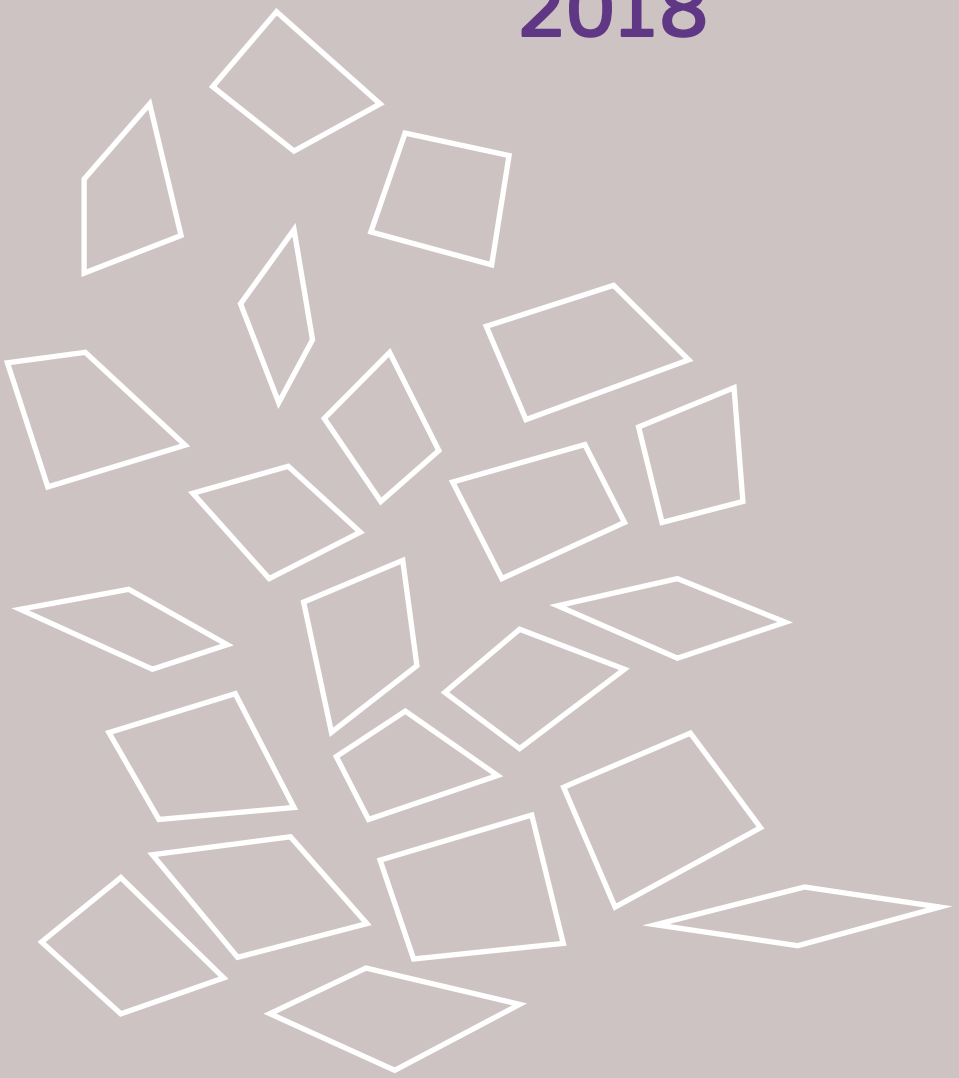

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A comparative analysis of gender equality law in Europe 2018

A comparative analysis of the implementation of EU gender equality law in the EU Member States, the former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey

Prepared by Alexandra Timmer and Linda Senden (Utrecht University) for the European network of legal experts in gender equality and non-discrimination

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Contents

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Introduction

This report provides a general overview of the ways in which EU gender equality law has been implemented in the domestic laws of the 28 Member States of the European Union, as well as Iceland, Liechtenstein and Norway (the EEA countries) and four candidate countries (the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey).[1] The analysis is based on the country reports written by the gender equality law experts of the European equality law network (EELN).[2] At the same time, this report explains the most important elements of the EU gender equality *acquis*. The term 'EU gender equality *acquis*' refers to all the relevant EU Treaty and EU Charter of Fundamental Rights provisions, legislation and the case law of the CJEU in relation to gender equality.

The development of EU gender equality law has been a step-by-step process, starting, at least for the 'oldest' EU Member States, in the early sixties. In 1957, the Treaty establishing the European Economic Community (EEC), the origin of the current EU, contained only one single provision (Article 119 EEC Treaty, nowadays Article 157 Treaty on the Functioning of the European Union 'TFEU') on gender discrimination: namely the principle of equal pay between men and women for equal work. Since then, however, many directives have been adopted which prohibit discrimination on the grounds of sex: the Directive on equal pay for men and women (75/117/EEC), the Directive on equal treatment of men and women in employment (76/207/EEC, amended by Directive 2002/73/EC and now repealed by Recast Directive 2006/54/EC), the Directive on equal treatment of men and women in statutory schemes of social security (79/7/EEC), the Directive on equal treatment of men and women in occupational social security schemes (86/378/EEC, amended by Directive 96/97/EC and now repealed by Recast Directive 2006/54/EC), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613/EEC, repealed by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC), the Parental Leave Directive (96/34/EEC, repealed by Directive 2010/18/EU), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113/EC) and, finally, the aforementioned so-called Recast Directive (2006/54/EC). For your convenience, the six EU gender equality law directives currently in force are attached to this report as annexes.

Since the entry into force of the Lisbon Treaty on 1 December 2009, the European Community and the EU have merged into one single legal order, the European Union. However, we continue to work with two treaties: the Treaty on European Union (TEU) that lays down the basic structures and provisions, and the TFEU, which is more detailed and elaborates the TEU.[3] In addition, the Charter of Fundamental Rights of the EU entered into force in 2009 and has the same legal value as the two Treaties (the TEU and the TFEU).[4] The TEU, the TFEU and the Charter all contain provisions that are relevant to the field of gender equality.

The TEU declares that one of the values on which the EU is based is equality between women and men (Article 2 TEU). The promotion of equality between men and women throughout the European Union is one of the essential tasks of the EU (Article 3(3) TEU). Since the entry into force of the Lisbon Treaty, Article 8 TFEU specifies that:

> 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'

1 In part, this report builds on Burri, S., Van Eijken, H. *Gender Equality Law in 33 European Countries. Update 2014*, European Commission 2015, available at http://www.equalitylaw.eu/downloads/2789-general-report-gender-2014. The present report is an update of Timmer, A., Senden L., *A comparative analysis of gender equality law in Europe 2017*, European Commission 2017, available at: https://www.equalitylaw.eu/downloads/4553-a-comparative-analysis-of-gender-equality-law-in-europe-2017-pdf-847-kb.

2 All gender equality country reports are available on the EELN website: http://www.equalitylaw.eu/country.

3 See Article 1 TEU which provides '(…) The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.'

4 See Article 6(1) TEU.

Article 10 TFEU contains a similar obligation for all the discrimination grounds mentioned in Article 19 TFEU, including sex:

> 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

This provision lays down the obligation of gender mainstreaming. It means that both the EU and the Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities.[5] Although these provisions do not create enforceable rights for individuals as such, they are important for the interpretation of EU law and they impose obligations on both the EU and the Member States.

In addition, the Charter of Fundamental Rights of the EU prohibits discrimination on any ground, including sex (Article 21);[6] it recognises the right to gender equality in all areas, and is thus not limited only to employment, and it also recognizes the possibility of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the 'right to paid maternity leave and to parental leave' (Article 33). Since the entry into force of the Lisbon Treaty, the Charter has become a binding catalogue of EU fundamental rights (see Article 6(1) TEU). The Charter applies to the EU institutions, bodies, offices and agencies, and to the Member States when they are implementing Union law (Article 51(1) of the Charter),[7] i.e. when they are acting '*within the scope*' of Union law.[8]

Another source of EU gender equality law is the case law of the Court of Justice of the EU (CJEU).[9] This Court has played a very important role in the field of equal treatment between men and women, by ensuring that individuals can effectively invoke and enforce their right to gender equality. Similarly, it has delivered important judgments interpreting EU equality legislation and relevant Treaty provisions.

This report will discuss how the above-mentioned Treaty provisions and the directives are implemented at the national level. As this report will show, the transposition was done in various ways: by amending relevant national legislation (such as Labour Codes), by adopting legislation relating to employment and social security legislation, and/or by adopting specific Acts on gender equality and/or non-discrimination. The EU directives which are discussed in this report are annexed to the report. This comparative analysis provides a state-of-the art overview of the implementation of EU gender equality law, and the most recent developments in this area. It discusses the most important topics of EU gender equality law, namely core concepts such as direct and indirect discrimination and (sexual) harassment; equal pay and equal treatment at work; maternity, paternity, parental and other types of care leaves; occupational pension schemes; statutory schemes of social security; self-employed workers; equal treatment in relation to goods and services; violence against women in relation to the Istanbul Convention; and enforcement and compliance issues.

5 See also Article 29 of the Recast Directive (2006/54/EC).

6 The scope of the prohibition of sex discrimination is limited however by the explanations for the Charter, see 2007/C 303/02.

7 See Koukoulis-Spiliotopoulos, S. 'The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality', *European Gender Equality Law Review* No. 1/2008, pp. 15-24 and Ellis, E., 'The Impact of the Lisbon Treaty on Gender Equality', *European Gender Equality Law Review* No. 1/2010, pp. 7-13; available at: https://publications.europa.eu/en/publication-detail/-/publication/17996235-b3b6-4733-9596-10e584fb57bc/language-en/format-PDF/source-86553203, https://www.equalitylaw.eu/downloads/2794-european-gender-equality-law-review-1-2010.

8 CJEU C-617/10 *Åkerberg Fransson,* EU:C:2013:105.

9 Until the entry into force of the Lisbon Treaty: the European Court of Justice (ECJ). In this report, reference is made to the Court of Justice of the EU (CJEU or Court), also in cases pre-dating the Lisbon Treaty.

1 General legal framework

1.1 Constitutional provisions

Sex discrimination is explicitly prohibited in the Constitutions of **all countries** under review, apart from **Denmark**, **Liechtenstein** and the **United Kingdom**.

In the case of the **United Kingdom**, this is explained by the fact that the constitution is unwritten and so by definition contains no articles dealing with non-discrimination. The Human Rights Act 1998, however, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Article 14 ECHR – which includes a prohibition of sex discrimination – *quasi*-constitutional force. This will remain the case after the United Kingdom withdraws from the EU.[10]

In addition, a large number of countries (**Austria**, **Bulgaria**, **Croatia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Liechtenstein**, **Lithuania**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, **Montenegro**, **Poland**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain** and **Turkey**) have also adopted provisions pertaining to equality between men and women in their Constitutions.

In most countries these constitutional provisions on equality between men and women and the prohibition of sex discrimination can be invoked horizontally, meaning between private parties. The exceptions are **Austria**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Montenegro**, the **Netherlands**, **Slovakia** and **Sweden**, where this is not possible. In a few countries (**Belgium**, **Germany** and **Lithuania**) horizontal application is a subject of debate.

1.2 Equal treatment legislation

All countries apart from **Latvia** have enacted specific equal treatment legislation. Until recently **Turkey** was another exception, but with the adoption in 2016 of the Law on the Human Rights and Equality Institution, Turkey now has specific equal treatment legislation. In some countries equal treatment between men and women is part of a broader Anti-Discrimination Act that also relates to other grounds (e.g. **Czech Republic**, **Hungary**, **Ireland**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Sweden** and the **United Kingdom**). Other countries have both an Anti-Discrimination Act (which sometimes also includes a prohibition of sex discrimination) and a Gender Equality Act (e.g. **Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Finland Greece**, **Lithuania**, **Montenegro**, the **Netherlands**, **Romania** and **Serbia**). The **Bulgarian** Gender Equality Law was promulgated in 2016, however by the end of 2017 only minor steps had been taken to implement the law. **Norway** adopted a new act relating to equality and the prohibition of discrimination in 2017, which entered into force on 1 January 2018. It unites all four previously existing laws on equality and non-discrimination in one law.

10 Following the European Union (Notification of Withdrawal) Act 2017, which was passed into law on 16 March 2017, the Prime Minister gave notice of the United Kingdom's intention to withdraw on 29 March 2017. The 'Repeal Bill' will repeal the European Communities Act 1972 on the day that the UK leaves the EU in March 2019. The Government's approach is to 'convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once [the UK has] left the EU'. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf at para 1.12.

2 Implementation of central concepts

This chapter discusses how central concepts of EU gender equality law have been transposed in the countries under review. Most of the concepts discussed in this chapter – but not all of them – are defined in the EU gender equality law directives. Overall, the countries under review have faithfully and often literally transposed these concepts into national legislation.

2.1 Sex/gender/transgender

EU law does not provide definitions of the concepts of 'sex', 'gender' and 'transgender', and does not distinguish clearly between sex and gender.[11] Similarly, very few countries define the concepts of 'sex', 'gender' and/or 'transgender' in their legislation. **Finland**, **Montenegro**, **Romania**, **Serbia**, and **Sweden** are exceptions. In the **Finnish** Act on Equality between Women and Men, a new subsection (Section 3 (5)) defines what is meant by gender identity and expression of gender. Article 10 of the **Serbian** Gender Equality Act defines both sex and gender: 'sex' relates to biological features of a person, while 'gender' means socially established roles, position and status of women and men in public and private lives from which, due to social, cultural and historic differences, discrimination ensues on the basis of biologically belonging to a sex. **Romania** recently (2015) introduced definitions of sex and gender, as well as 'gender stereotypes' in its Gender Equality Law, whereby gender is understood to mean the combination of roles, behaviours, features and activities that society considers to be appropriate for women and for men. In **Sweden**, Chapter 1 Section 5.1 of the Discrimination Act defines sex as the fact 'that someone is a woman or a man.' In the **United Kingdom**, more specifically in Great Britain, there is a partial definition of 'sex' in Section 11 of the Equality Act 2010, which provides that 'In relation to the protected characteristic of sex— (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman'. **Maltese** law includes definitions of 'gender expression' and 'gender identity'. Act LXI of 2016 furthermore introduced the notion of 'lived gender', which is defined as referring to each person's gender identity and its public expression over a sustained period of time.

It is well-established in the case law of the Court of Justice,[12] and subsequently also in Recital 3 of Recast Directive 2006/54, that discrimination arising from the gender reassignment of a person falls within the prohibition of sex discrimination. In line with this, several countries have explicitly codified the prohibition of discrimination due to gender reassignment, namely **Belgium** (where gender identity or expression are considered separately as grounds for sex discrimination), **Bulgaria**, the **Czech Republic**, **Finland**, **Greece**, **Hungary**, **Malta**, **Montenegro**, **Portugal**, **Slovakia**, **Sweden** and the **United Kingdom**. In most of these countries this is part of a broader prohibition of gender identity discrimination (e.g. **Belgium**, the **Czech Republic**, where the term 'gender identification' is used, **Finland**, **Hungary**, **Luxembourg**, **Malta**, **Portugal** and **Sweden**). In **Finland**, Section 3 of the Act on Equality of 2014, defines gender identity as 'the person's own experience of (his or her) gender', and expression of gender as 'articulating one's gender by clothing, behaviour or in some other similar manner'. In a 2016 act re-transposing EU Directives 2000/43 and 2000/78, **Greece** introduced a prohibition of direct and indirect discrimination on the ground of 'gender identity or characteristics'.

In several of the countries where the prohibition of gender reassignment discrimination is not codified as such, there nevertheless exists a broader prohibition on gender identity discrimination (e.g. **Croatia**), or sexual identity discrimination (e.g. **France**).

In 2017, the Federal Constitutional Court of **Germany** issued a landmark judgment that clarified that the prohibition of sex discrimination covers gender identity, and that this also protects persons who identify

11 For discussion see Lembke, U. 'Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies', *European Equality Law Review* 2016/2, p. 46 available at https://www.equalitylaw.eu/downloads/3938-european-equality-law-review-2-2016 (accessed 21 November 2018).

12 *P v. S and Cornwall County Council*, C-13/94 ECR I-2143.

as neither male nor female. The court decided that the birth register must allow for a 'third gender', by 31 December 2018 at the latest.

A few experts are of the opinion that their national legislatures should amend the legislative framework regarding transgender and gender identity or create such a framework (e.g. **Estonia**).

2.2 Direct sex discrimination

The Gender Recast Directive 2006/54 defines direct discrimination as occurring 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation' (Article 2(1)a). As a rule, direct discrimination is prohibited and cannot be justified, unless a specific written exception applies, such as that the sex of the person concerned is a determining factor for the job.

Direct sex discrimination is prohibited in **all countries** under review. The definition of direct sex discrimination appears unproblematic in almost all countries. In **Hungary**, however, the definition of direct discrimination offers less protection in sex discrimination cases than the EU definition, because it allows the possibility of exemption in cases in which a difference in treatment is unavoidable because the fundamental right of another person has to be protected, if it is suitable for the designated purpose and proportional, or otherwise has a reasonable and objective explanation directly related to the relevant relationship.[13] This means that the Hungarian definition allows for justifications for direct sex discrimination that are not allowed under EU law.

Referring to case law of the Court of Justice, the Gender Recast Directive also states that 'unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex.' (Recital 23) Such treatment is therefore also covered by the directive. In line with this, most countries under review explicitly prohibit pregnancy and maternity discrimination as a form of discrimination (**Belgium**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, **Montenegro**, the **Netherlands**, **Norway**, **Romania**, **Slovakia**, **Spain**, **Turkey** and the **United Kingdom**). In some of the countries where this type of prohibition is not explicitly codified, it is nevertheless established in case law that unfavourable treatment related to pregnancy or maternity constitutes sex discrimination (e.g. **Austria**). In **Sweden** pregnancy and maternity discrimination is only indirectly – and tacitly – covered by the Discrimination Act's ban on direct sex discrimination. According to the national expert, the Swedish implementation can – and has been[14] – criticised on this point as not transparent. In **Portugal** discrimination on the ground of pregnancy and maternity is prohibited.[15] However, there is no explicit mention in the law that pregnancy and maternity discrimination is to be qualified as direct sex discrimination. In **Poland** neither the Antidiscrimination Law nor any provision of the Labour Code explicitly states that discrimination includes any less favourable treatment of a woman because of her pregnancy or childbirth-related leaves. However, Article 12 of the Antidiscrimination Law stipulates that, in case of a breach of the equal treatment rule with regard to pregnancy or childbirth-related leaves, such person has the right to damages, according to Article 13 (which refers to discrimination-related damages).[16] Also in the case law based on the Labour Code, discrimination with regard to pregnancy is considered to be sex based.[17]

13 Article 7(2) and (3) of the Equality Act.
14 Compare Votinius, J., 'Troublesome Transformation. EU Law on Pregnancy and Maternity Turned into Swedish Law on Parental Leave', in: Rönnmar, M. (ed.), *Fundamental Rights and Social Europe*, Hart Publishing, Oxford 2011.
15 Articles 24(1) and 25(6) of the Labour Code.
16 The Draft Law amending the Antidiscrimination Law proposes to add the following provision: 'The violation of equal treatment rule … in relation to pregnancy or maternity constitutes direct sex discrimination'.
17 The Supreme Court (SC) in the judgment of 8 January 2008, II PK 116/07; and the ruling of the SC of 8 July 2008, IPK 294/07.

There appear to be few difficulties with applying the concept of direct sex discrimination, although some experts report a scarcity of case law (e.g. **Croatia**). In **Hungary**, the Equality Act refers to 19 explicit grounds, like sex, racial origin, etc. and a general term: 'any other status, characteristic feature or attribute'.[18] This has created the impression that it is enough to refer to discrimination in general without indicating the protected ground on which basis legal redress is claimed. There are still many cases adjudicated by the *Kuria* (the Supreme Court) where the claimant did not indicate the protected ground of his/her claim during the procedure of first instance.[19]

2.3 Indirect sex discrimination

The Gender Recast Directive 2006/54 defines indirect discrimination as occurring 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary' (Article 2(1)b). Indirect discrimination concerns measures that appear neutral, but which have a disadvantageous effect on particular people. For instance, less favourable treatment of part-time workers will often amount to indirect sex discrimination, as long as mainly women are employed on a part-time basis. The possibilities for justification are much broader than with direct discrimination.[20] In 2017, the CJEU ruled in the case of *Kalliri* that requiring a minimum height (1.70 meters for both men and women) to enter the Police Academy in **Greece** must be considered indirect sex discrimination, as far fewer women than men fulfil this criterion.[21]

As with direct discrimination, indirect sex discrimination is explicitly prohibited in **all countries** discussed in this report. Not all national definitions are fully in line with the EU concept of indirect discrimination, however. In **Hungary**, the concept of indirect discrimination is narrower than the EU definition by stipulating a 'considerably larger disadvantage' compared to a 'particular disadvantage' as mentioned in Article 2(1)(b) of the Recast Directive.

Indirect discrimination is difficult to prove.[22] In order to establish a presumption of indirect sex discrimination – in other words to establish the presumption that a neutral provision, criterion or practice has a particular disadvantageous effect on persons of one sex – some countries allow statistical evidence. Statistical evidence is allowed (though not required) in **Belgium**, **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Lithuania**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Serbia**, **Spain**, **Sweden** and the **United Kingdom**. In several countries there is no case law available (including **Croatia**, **Iceland**, **Luxembourg** and **Slovakia**).

The concept of indirect discrimination is complex and has caused difficulties for national courts. For example, the **German** expert reports that many German courts face difficulties when indirect discrimination is linked to the gender-related division of labour and care work, and when discrimination is rooted in job classification systems of collective agreements due to a specific understanding of the autonomy of collective bargaining (freedom of coalition) under the German Constitution. The **Spanish** expert, too, notes problematic aspects of cases on indirect discrimination in relation to incorrect job evaluations in collective agreements.

18 Article 8 of the Equality Act defines discrimination as follows: 'Direct discrimination occurs if a person or a group is treated less favourably on the ground of his/her/its protected characteristic than any other person or group in comparable situation.'

19 For example *Kúria* Pfv.20351/2014/6.

20 See the report produced by the European Network of Legal Experts in the Field of Gender Equality, McCrudden, C, Prechal, S. *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Commission 2009, available at: http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en.

21 CJEU judgment of 18.10.2017 C-409/16 *Ypourgos Esoterikon and Ypourgos Ethnikis paideias kai Thriskevmaton v Maria-Eleni Kalliri* EU:C:2017:767.

22 General issues related to the burden of proof are discussed further below in Section 11.2.

In several countries (**Latvia**, the **FYR of Macedonia** and **Liechtenstein**) there is no case law at all yet on indirect sex discrimination.

2.4 Multiple discrimination and intersectional discrimination

Multiple discrimination refers to discrimination based on two or more grounds simultaneously. The closely related yet distinct concept of intersectional discrimination refers to discrimination resulting from an interaction of grounds of discrimination produces a new and different type of discrimination. The European Equality Law Network produced a thematic report on intersectional discrimination in 2016, written by Sandra Fredman.[23]

Multiple discrimination and/or intersectional discrimination is explicitly covered in the national legislation of **Austria**, **Bulgaria**, **Croatia**, **Denmark**, **Germany**, **Greece** (although the 2016 Act which prohibits multiple discrimination does not include sex as a prohibited discrimination ground), **Ireland**, **Italy**, the **FYR of Macedonia**, **Malta**, **Montenegro**, **Poland**, **Romania**, **Serbia** and **Turkey**. In several, but by no means all, countries there is case law that addresses these types of discrimination: **Austria**, **Belgium**, **Denmark**, **Estonia**, **France**, **Germany**, **Greece** (Ombudsman`s Mediation Report), **Ireland**, **Italy**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovakia**, **Sweden** and the **United Kingdom.**

2.5 Positive action

Article 157(4) TFEU allows positive action, which is described as follows: 'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'[24]

Positive action aims at eliminating or counteracting the detrimental effects of stereotypes concerning the traditional division of roles in society between men and women. As an example of positive action can be mentioned female quotas in recruitment and promotion.[25] As a rule, positive action may be taken in the various areas covered by EU law, such as employment, occupational pension schemes and access to and provision of goods and services. The most important area for positive action has, until now, been access to employment and working conditions.

All countries under review have enacted legislative provisions allowing positive action. The exception is **Latvia**: Latvian law neither allows nor provides for any kind of positive action, except one soft-quota provision concerning the election of judges in self-governing bodies. In **Lithuania**, the act is essentially a dead letter law: positive action is defined in the act as being specific temporary measures laid down by specific laws, however, there are no such laws in force that would allow positive action to be taken. In **Greece**, on the other hand, positive action is not merely allowed, it is required by the Constitution in all areas (Article 116(2)).

23 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at http://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb.

24 See also Article 3 of the Gender Recast Directive 2006/54: 'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty [now Article 157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.'

25 See the reports produced by the European Network of Legal Experts in the Field of Gender Equality, Fredman, S. *Making Equality Effective: The role of proactive measures*, European Commission 2009, http://ec.europa.eu/social/BlobServlet?docId=4551&langId=en and Selanec, G., Senden, L. *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Commission 2011, available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb.

That said, in many countries, positive action measures are not very widespread and are hardly seen as a priority by the legislature, social partners, or individual employers. Whenever positive action measures exist, they appear to be more frequent in the public sector. Where no obligations are laid down, the public sector is at least encouraged to take positive action measures. In the private sector such measures are, on the whole, voluntary. Only in a few countries do obligations exist for the private sector, for instance in the form of equality plans (e.g. **Finland**).

Many national experts report difficulties in relation to positive action. The case law of the CJEU, particularly the cases *Kalanke, Marschall, Badeck* and *Abrahamsson*,[26] has prevented the **Netherlands** from developing affirmative action policies to hire women at universities.[27]

Of particular interest is the issue of gender balance in company boards.[28] A proposal of the Commission on this topic is pending.[29] An increasing number of countries have adopted measures that aim to improve the gender balance in company boards. The countries which have adopted such measures include **Austria**, **Belgium**, **Bulgaria**, **Denmark**, **Finland**, **France**, **Germany**, **Iceland**, **Ireland**, **Italy**, **Luxembourg**, the **Netherlands**, **Norway**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain** and **Turkey**.

In a number of countries there are also other positive action measures, often in the form of 'soft' measures, to improve the gender balance in specific fields, such as positive action regarding political candidates' lists, workers' representatives lists (e.g. in **France**), or regarding the composition of political bodies. The experts from **Belgium**, **Croatia**, **Finland**, **France**, **Germany**, **Greece** (where there is a legal requirement that at least one-third of the members of the service councils and of candidates in local and parliamentary elections must be of one sex), **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, **Montenegro**, **Norway**, **Poland** (where there is a legal requirement that at least 35 % of the candidates must be of one sex), **Portugal**, **Serbia**, **Slovenia**, **Spain**, **Turkey** and the **United Kingdom** report that such measures exist in their countries. In **Greece** such measures are compulsory and their implementation is subject to judicial review. In **Hungary** political parties are allowed to adopt positive action measures; this regulation, however, is not applied in practice.[30]

2.6 Harassment and sexual harassment

EU law prohibits harassment on the ground of a person's sex and sexual harassment and equates both with sex discrimination. Neither harassment on the ground of sex nor sexual harassment can be justified.

Gender Recast Directive 2006/54 Article 2 (1) (c) defines *harassment* as 'where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.' Article 1(d) defines *sexual harassment* as 'where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.' Both concepts include

26 *Case C-450/93 Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051; C-409/95 Marschall [1997] ECR I-6363; Case C-158/97 Badeck [2000] ECR I-1875; Case C-407/98 Abrahamsson [2000] ECR I-5539.*

27 Opinion 2011-198, www.mensenrechten.nl. See also JAR 2012/78 with a comment by Cremers-Hartman, E.; Opinion 2012-195, www.mensenrechten.nl. See also JAR 2013/41 with a comment by Cremers-Hartman, E.

28 Selanec, G., Senden, L. *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, European Commission 2011, available at: https://www.equalitylaw.eu/downloads/3864-positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pdf-2-639-kb; and Senden, L., Visser, M. 'Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies', *European Gender Equality Law Review* 1/2013, pp. 17-33, available at https://publications.europa.eu/en/publication-detail/-/publication/47bf7a78-e399-41a5-bd77-bc95281ee6be/language-en/format-PDF.

29 The 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 of 14 November 2012, COM (2012) 614 final, as amended by the Malta Presidency 2012/0299 (COD) 31 May 2017.

30 11 (1)b of Equality Act.

the violation of a person's dignity and the creation of an intimidating, hostile, degrading, humiliating or offensive environment. The main difference is that in case of harassment on the ground of a person's sex, the person is ill-treated because he or she is a man or a woman. In the case of sexual harassment it rather involves a person being subject to unwelcome sexual advances or, for instance, that the behaviour of the perpetrator aims at obtaining sexual favours. In concrete situations the distinction between the two may be unclear.[31]

The Gender Recast Directive prohibits harassment and sexual harassment in the context of employment, including access to employment, vocational training and promotion. Similar obligations and definitions apply to the access to and supply of goods and services according to Directive 2004/113/EC.

All countries covered by this report have prohibited both harassment and sexual harassment in national legislation.

In **Denmark**, the prohibition of harassment is only explicitly formulated in the acts covering the labour market. In **Greece**, the explicit prohibition also covers the whole scope of the relevant directives, including vocational training and access to and supply of goods and services; however, case law mostly relies on legislation of a wider scope, unrelated to the directives. As regards sexual harassment: **Germany**, **Italy** and **Slovenia** only prohibit this in the employment context.

EU law has explicitly opted to consider harassment on the grounds of a person's sex and sexual harassment as a form of sex discrimination.[32] In practice at the national level, however, this is not always the case. The **Belgian** expert, for example, reports that harassment and sexual harassment are hardly ever perceived or analysed as forms of gender discrimination in case law. Not all countries have enacted legislation that specifies that harassment and sexual harassment amounts to discrimination (see Article 2(2)(a) of Directive 2006/54). Countries where such legislation does not exist are **Portugal** and **Turkey.**

Several national experts have reported that case law on harassment and sexual harassment is scarce (e.g. **Greece** and **Hungary**), because victims cannot prove it, they fear victimisation and/or do not want to risk acquiring a 'bad reputation' in the labour market.

French law takes a step further and also prohibits sexist behaviour at work. This is defined as behaviour based on gender, with the purpose or effect of harming dignity or creating an intimidating, hostile, degrading, humiliating or offensive work environment (see Article L.1142-2-1 of the French Labour Code).

2.7 Instruction to discriminate

In EU law, instruction to discriminate on the ground of a person's sex is equated with discrimination (Article 2(2)(b) of the Gender Recast Directive 2006/54).[33] Thus, where an agency is requested by an employer to supply workers of one sex only, both the employer and the agency would be liable and would have to justify such sex discrimination. EU law does not clearly define an instruction to discriminate.

31 See the report of the European Network of Legal Experts in the Field of Gender Equality, Numhauser-Henning, A., Laulom, S. *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, European Commission, 2011, available at: https://publications.europa.eu/en/publication-detail/-/publication/e06dcc86-b7bf-459e-8241-47502ef379c4/language-en/format-PDF/source-86560771.

32 For a discussion of difficulties with this concept see the report of the European Network of Legal Experts in the Field of Gender Equality, Numhauser-Henning, A., Laulom, S. *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, European Commission, 2011, available at: https://publications.europa.eu/en/publication-detail/-/publication/e06dcc86-b7bf-459e-8241-47502ef379c4/language-en/format-PDF/source-86560802.

33 See also Asscher-Vonk, I. 'Instruction to discriminate', *European Gender Equality Law Review* No. 1/2012, pp. 4-12, available at: https://publications.europa.eu/en/publication-detail/-/publication/dea2021f-0be4-476f-bd8f-86829326380a/language-en/format-PDF/source-86561026.

All countries have prohibited instruction to discriminate. In most countries, the prohibition concerning the instruction to discriminate is similar in formulation to that in EU law and is not further defined. Some countries have adopted a legal definition, however. In **Bulgaria**, it means direct and intentional encouragement, giving an instruction, exerting pressure or persuading someone to engage in discrimination.

Few experts report difficulties with the concept of instruction to discriminate. In **Croatia**, there was confusion whether intent is required or not, a requirement which is not mentioned in Article 2(2)(b) of the Recast Directive. In the **FYR of Macedonia**, it is in practice very difficult to prove instruction to discriminate. The courts rejected several cases where the claimant asserted that hate speech constituted an instruction to discriminate. In many countries there has not yet been any case law regarding instruction to discriminate (e.g. **Belgium**, **Croatia**, **Estonia**, **Germany**, **Greece** (where the legislation transposing Directives 2004/113 and 2010/41 also prohibits 'encouragement' to discriminate), **Luxembourg**, **Malta** and **Romania**).

2.8 Other forms of discrimination

Several countries also prohibit other forms of discrimination in their national law, such as discrimination by association or discrimination based on assumed characteristics (**Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Greece** (which prohibits discrimination by association, but only in respect of grounds of discrimination other than sex), **Hungary** (which prohibits assumed discrimination, segregation and retaliation), **Ireland**, **Montenegro** (which prohibits segregation), **Norway**, **Serbia**, **Turkey** and the **United Kingdom** (**Great Britain**)). Discrimination by association was developed in EU law in relation to disability discrimination in the *Coleman* case.[34] It refers to a situation when someone is discriminated against by virtue of her association with someone who possesses a protected characteristic. Assumed discrimination occurs when someone is treated differently based on assumptions related to a personal characteristic. For example, an employer could treat an employee disadvantageously because she assumes the employee is pregnant.

In **Ireland**, the Employment Equality Act has a particularly broad definition of discrimination as it refers to any of the discrimination grounds which (i) exists, (ii) existed but no longer exists, (iii) may exist in the future, or (iv) is imputed to the person concerned. Discrimination is also taken to occur where 'a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation'.[35]

34 ECJ 17 July 2008, see also Karagiorgi, C. 'The concept of discrimination by association and its application in the EU Member States', *European anti-discrimination law review*, pp. 25-36, available at https://publications.europa.eu/en/publication-detail/-/publication/d172d22d-30f5-44ab-afa2-4768e7a68689/language-en/format-PDF.

35 Section 6 of the Employment Equality Act 1998 (as amended).

3 Equal pay and equal treatment at work

3.1 The EU principle of equal pay

The principle of equal pay for men and women for equal work or work of equal value, now contained in Article 157 TFEU, has been entrenched ever since the beginning in the EEC-Treaty. In order to facilitate the implementation of the principle, Directive 75/117/EEC was adopted in 1975 and has since been repealed by Recast Directive 2006/54/EC. Indeed both direct and indirect discrimination in pay are prohibited and the CJEU has answered many preliminary questions of national courts on this issue. These have included the scope of the notion of 'pay', which the CJEU has interpreted broadly; pay includes not only basic pay, but also, for example, overtime supplements, special bonuses paid by the employer, travel allowances, compensation for attending training courses and training facilities, termination payments in case of dismissal and occupational pensions. In particular, the extension of Article 157 TFEU to occupational pensions has been very important (see Section 10).

Importantly, the Recast Directive requires that the Member States ensure that provisions in collective agreements, wage scales, wage agreements and individual employment contracts which are contrary to the principle of equal pay shall be or may be declared null and void or may be amended (Article 23). Moreover, it provides that where job classification schemes are used in order to determine pay, these must be based on the same criteria for both men and women and should be drawn up to exclude discrimination on the grounds of sex (Article 4).

Unfortunately, despite this legal framework, the difference between the remuneration of male and female employees remains one of the great concerns in the area of gender equality: the average gross hourly wage difference between men and women (= gender pay gap) in the EU is 16.2 %[36] and progress has been slow in closing the gender pay gap.[37] The differences can be partly explained by factors other than discrimination: e.g. traditions in the career choices of men and women; the fact that men, more often than women, are given overtime duties, with corresponding higher rates of pay; the gender imbalance in the sharing of family responsibilities; glass ceilings; part-time work, which is often highly feminised; job segregation etc. However, another part of the discrepancies cannot be explained except by the fact that there is pay discrimination, which the principle of equal pay aims to eradicate.[38]

The principle of equal pay under EU law is, in general, reflected in the legislation of the Member States and the EEA countries, both at the constitutional and the legislative level, either as a part of general labour law or as provided for in specific anti-discrimination legislation. Furthermore, in some states equal pay is also guaranteed (partly) by collective agreement (**Belgium**). Yet, the **Hungarian** expert has expressed concern about the fact that the equal pay principle as such has been removed from the Hungarian Fundamental Law, despite opposition members asking to keep it in place and although it has been replaced by the wider provision that 'Women and men shall have equal rights'. By contrast, in **Greece** the principle of equal pay for equal work or work of equal value is enshrined in the Constitution and this principle covers any ground whatsoever and is not limited to sex. Yet, the scope given to the principle still varies in a number of respects, as the following section will show.

36 Eurostat 2016, see https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/equalpayday-eu-factsheets-2018_en.pdf.

37 See for information on the gender pay gap for example the website of DG Justice at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en#differencesbetweeneucountries.

38 On legal aspects of the gender pay gap see: European Network of Legal Experts in the Field of Gender Equality, Foubert, P., Burri, S., Numhauser-Henning, A. *The Gender Pay Gap in Europe from a Legal Perspective* (including 33 country reports) European Commission, 2010, available at: https://publications.europa.eu/en/publication-detail/-/publication/8745534d-d450-4ae1-bfe2-0f7389d361ef/language-en/format-PDF/source-86561461.

3.2 The scope given to the equal pay principle in national law

Differences in scope of the principle of equal pay for equal work or work of equal value relate in particular to:

(i) The extent to and way in which the concept of pay has been defined

While many countries have implemented the concept of pay as contained in the Recast Directive and as it ensues from the interpretation of the CJEU of Article 157 TFEU, there are also still quite some countries in which the concept is not defined as such in law (**Austria**, **Finland**, **Italy**, **Latvia**, **Norway**, **Sweden**, the **United Kingdom**). While in some this has not caused problems, because of the way that legislation has developed (the **United Kingdom**), in others some uncertainty persists as to whether it is understood in the same way as it is contained in EU law. In some of these countries, compliance with EU law can be deduced mainly from the case law (**Latvia**, **Norway**, **Sweden**) or from a web of different laws (**Estonia**, **Malta**), and in combination with collective agreements and case law (**Austria**, **Italy**). Collective agreements may also provide for definitions (**Belgium**). The definition contained in national law may also be less elaborate than in EU legislation, yet with the meaning being the same (the **Netherlands**, to some extent also **Portugal**). In **Germany**, on 6 July 2017, the new Pay Transparency Act entered into force; the new act explicitly defines 'pay', in line with the EU concept.

In a few countries, the concept does not (seem to) fully comply with the definition and scope of Article 157(2) TFEU. In **Lithuania** significant changes were recently made to make national law more in line with the European provisions on equal pay. Before 1 July 2017, indirect payments were not mentioned in the law and therefore various benefits or services provided by third parties (including insurance or pension benefits) did not fall under the domestic notion of pay. The new Labour Code of 2016 contains a special provision (Section 26(4)) that is in line with the definition of pay under EU law, which states that, for the purposes of discrimination, pay shall also encompass all indirect payments related to the performance of work under the employment contract (Article 140(6) of the Labour Code). In **Slovakia**, severance allowances, discharge benefits, non-mandatory travel reimbursements, contributions from a social fund, supplementary payments to sickness insurance benefits, and contributions to supplementary pension saving funds are excluded from the notion of pay. Also in other domestic laws, there may be somewhat odd omissions, like the **Belgian** Gender Act not expressly stipulating that it also covers work of equal value and **Serbian** law not referring explicitly to remuneration 'in kind'. The definition in **Polish** law is considered deficient to the extent that, when speaking of work-related benefits, it omits the clarification included in the directive according to which the benefit may be both directly and indirectly related to employment and that it has to originate from the employer. While the **Romanian** Labour Code fully transposes the equal pay principle and concept of pay, the Romanian Constitution uses a more limited formulation and the relevance of this has not been clarified so far by the Constitutional Court. As for the law of **Montenegro**, it is not clear whether it fully conforms to the EU concept of pay, because the labour legislation concerned is in the process of being drafted.

(ii) The extent to which national law explicitly prohibits direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration

Article 4 of the Recast Directive requires such a prohibition, but not all national legal systems provide for such an explicit stipulation (**Latvia**, **Montenegro**, the **Netherlands**, **Slovenia**, **Sweden**) or only partly (**Czech Republic**, **Serbia**). In the **Czech Republic** equal pay for men and women is not explicitly mentioned, but the principle of equal pay for all employees apparently also includes equal pay for men and women. In **Germany**, gender discrimination concerning pay is covered by statutory law, applying to the labour market in general. German courts have generally stated that there is no legal rule providing for the same pay for the same work, but that there is a general prohibition of pay discrimination, based upon gender. Furthermore, while most wages and job classification systems in Germany are determined

by collective agreements under the Act on Collective Bargaining, this act does not contain any provisions on equal pay. Even collective agreements with public services and social institutions still contain gender-discriminatory job classification systems. Although the new Pay Transparency Act 2017 contains an explicit prohibition of direct and indirect pay discrimination on the ground of sex/gender (including pregnancy and motherhood) and employers are required to develop a non-discriminatory payment system, it still does not tackle discriminatory structures in collective bargaining and job classifications. On the contrary, when a collective agreement applies, the employer is not obliged to explain the criteria and procedures of his/her wage-setting, but can simply refer to the agreement for an explanation and justification, despite the fact that there are still gender-discriminatory job classifications established by collective agreements and that they remain one of the obstacles to equal pay. Furthermore, although the prohibition of pay discrimination is repeated under the heading 'pay equality', under German law there is still no obligation to pay the same remuneration for the same work, but rather just the prohibition of pay discrimination on the grounds of sex. The Swedish expert has criticised the 'tacit' way of regulating pay discrimination in **Sweden** as being far from transparent.

(iii) The extent to which a comparator is required in national law as regards equal pay claims

In many states a comparator is not required. The **French** Court of Cassation, for instance, holds that 'the existence of discrimination does not necessarily imply a comparison with other workers.' A judge may thus find that a decision amounts to sex discrimination even when there are no men in the company who can be used as comparators. **Spanish** courts resolve equal pay cases by analysing the identity of functions or their equal value, without considering the possibility of introducing the concept of (a hypothetical) comparator, even if the law does not seem to exclude this possibility. The **Hungarian** expert has noted that while the law does not require a comparator, the review of the published cases reveals that taking, elaborating, and contrasting the actual pay of the claimant with another concrete employee significantly improves the claimant's chances of winning the case. But also referring to a hypothetical comparator is not excluded. In **Denmark** as well, there is no legal requirement to this effect but in practice a comparator is often used to assert or prove discrimination.

However, in other countries an actual comparator still needs to be identified on the basis of the law (**Croatia**, **Finland**, **Germany**, **Ireland**, **Malta**, **Northern Ireland**, **Norway**, **Poland**, **Portugal**, **Romania)**. Some countries also allow for a hypothetical comparator (**Austria**, **Great Britain**, **Norway**, **Poland**, **Romania**, **Sweden**), while in others this is unclear yet not considered excluded (**Iceland**, **Portugal**, **Spain**) and left to the courts to be decided (**Italy**, **Malta**, **Serbia**). In yet other countries, the situation is somewhat more diverse as the law itself may not be explicit as such (**Bulgaria**, **Greece**, **Latvia**) although case law does require a comparator. Thus, in **Latvia**, the Supreme Court, in a recent judgment in an unequal pay case, held that a court must assess the real level of the professional qualifications of an employee (for example, his/her education or skills for the performance of a job, etc.), the character of the work in question and the employment conditions, and then compare those indicators with those of other workers in order to establish whether the claimant has performed equal work or work of equal value and whether he/she has been paid according to his/her qualifications and the character of the job in question.[39] In **Greece**, the definition of discrimination may be considered as implicitly requiring a comparator. In other countries, a comparator may not be required in all situations (**Estonia**, the **FYR of Macedonia**, the **Netherlands**). The new **German** law requires those employees making a claim for equal pay to identify the comparable work or work of equal value and that the comparison group of employees of the opposite sex contains at least six people.

In the **FYR of Macedonia** and **Romania**, the comparator requirement relates only to cases of direct discrimination. In the latter country, the National Council for Combating Discrimination has also required parties to provide evidence regarding a real comparator, even if the law allows for a hypothetical one. This is explained by the fact that in practice salaries are established in direct negotiations between employer

39 Decision of the Supreme Court on 27 April 2017 in case No. SKC-792/2017, point 10.3.

and employee, and by the lack of norms establishing salary schemes that would in fact allow for a hypothetical comparator. **Polish** law is comparable in this regard, in that the written law also allows for a hypothetical comparator but case law indicates that it must be an actual comparator and the prevalent view also being that a comparator may not be a person employed by another employer. Furthermore, Polish law stipulates the comparator requirement only explicitly for direct discrimination, yet such a requirement also seems to be implied in the law for indirect discrimination cases. In **Great Britain**, a hypothetical comparator may be relied upon only in direct discrimination cases, but case law on this is lacking so far.

In the **Netherlands** a complex two-way approach is used, the first one requiring a concrete comparison of the salary of a person of one sex with that of a person of another sex. The comparator should be an actual person within the same company, so no hypothetical comparator is allowed. The second approach is not specific for equal pay, but is an application of the concept of indirect discrimination. In this approach a certain practice, e.g. the granting of extra pay to workers who are prepared to work overtime, may be contested if the result of this practice is that substantially more men than women receive the extra pay. It then has to be examined whether there is an objective justification for the difference in pay. In this approach no specific comparator is needed, as different pay systems can be compared with one another. In most cases these systems or practices will be used within one company or group of companies, but theoretically it is possible that a comparison is made between systems or practices that appear in a collective agreement or a statutory arrangement.

In **Greece**, the provisions copying the definition of direct discrimination from the directives allow a hypothetical comparator. However, according to the **Greek** case law, applying the broader equal pay principle requires a comparator in the same enterprise or service or in the framework of the same wage-fixing instrument (e.g. collective agreement, statutory or administrative provision) and when there is no such comparator, the claimant can allege that he/she fulfils the conditions for the higher pay provided by an instrument for workers performing or having performed the same work, and claim the pay difference. In **Estonia**, a comparable employee means an employee working for the same employer, engaged in the same or similar work, but by default the comparison is made on the basis of the collective agreement and in the absence thereof a comparable employee in the same region is taken. In **Malta**, employees are to be compared in 'the same class of employment', with the same employer. Whether comparison of the position of employees with different employers is possible has not been tested as yet.

The above already reveals quite some difficulties that the requirement of a comparator may present in practice. A clear hurdle concerns the requirement that a comparator has to be employed by the same employer (**Croatia**, **Estonia**, **Greece**, **Malta**, the **Netherlands**). In **Greece**, it is also considered problematic that, according to case law, the hypothetical comparator must perform or have performed the same work. Another hurdle concerns the point of reference that is to be taken for the comparison: formal requirements as entailed e.g. in a job classification system or the performance of actual tasks (**Croatia**).

(iv) The extent to which national law lays down parameters for establishing the equal value of the work performed

Interestingly, it appears that only in about one third of the countries covered by this report, national law specifies (to some extent) how and by what criteria the equal value of work performed should be established (**Bulgaria**, **Croatia**, **Czech Republic**, **France**, **Germany**, **Hungary**, **Ireland**, **Lithuania**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, the **United Kingdom**). These include criteria of a personal, job-related and labour-market nature:

- knowledge (**Norway**, **Sweden**);
- professional qualifications (including titles and diplomas) (**France**, **Germany**, **Hungary**, **Luxembourg**, the **FYR of Macedonia**, **Montenegro**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Spain**);

- professional (working) experience (**Bulgaria**, **France**, **Hungary**, **Luxembourg**, the **FYR of Macedonia**, **Montenegro**, **Poland**, **Portugal**);
- seniority (**Bulgaria**);
- skills (**Croatia**, **Ireland**, **Lithuania**, **Montenegro**, **Poland**, **Serbia**, **Spain**, **Sweden**, the **United Kingdom**);
- performance (**Montenegro**);
- work results (**Czech Republic**);
- nature of the job (**Croatia**, **Germany**), plus quantity and quality (**Finland**, **Hungary**, **Portugal**);
- responsibilities/strenuousness/decision-making/significance (**Croatia**, **Czech Republic**, **France**, **Hungary**, **Ireland**, **Lithuania**, **Luxembourg, Montenegro**, **Norway**, **Poland**, **Portugal**, **Serbia**, **Spain**, **Sweden**, the **United Kingdom**);
- complexity (**Czech Republic**);
- physical efforts, stress, manual work (**Croatia**, **France**, **Hungary**, **Ireland**, **Luxembourg, Norway**, **Poland**, **Portugal**, **Serbia**, **Spain**, **Sweden**, the **United Kingdom**);
- mental efforts, stress (**France**, **Hungary**, **Ireland**, **Luxembourg, Norway**, **Poland**, **Portugal**, **Serbia**, **Sweden**, the **United Kingdom**);
- working conditions (**Croatia**, **Czech Republic**, **Hungary**, **Finland**, **Germany**, **Ireland**, **Montenegro**, **Norway**, **Portugal**, **Sweden**);
- whether substitution for one another is possible (**Croatia**);
- labour-market conditions (**Hungary**) and market value; in **Norway** a recurring point of discussion is to what extent this can justify unequal pay.

For **France**, the list contained in the law is not exhaustive and this also seems to be the case for the **United Kingdom**. The **Hungarian** expert has noted that the newly introduced criterion of labour-market conditions, according to the intentions of drafters, opens up the possibility for nationwide employers to provide different wages in different parts of the country. This criterion is considered to oddly fit into the law at issue, as all other criteria deal with the individual and it also provides some leeway for employers. In **Finland**, very dissimilar jobs can be considered to be of equal value, when they are equally demanding. Given the deeply gender-segregated labour market, this is of particular importance. The **Greek** law refers to `professional` instead of `job` classification and also refers to the use of 'personnel evaluation', which is considered misleading, as they may imply that the classification and evaluation concern the worker rather than the job content, as required by the CJEU. In **Iceland**, job classification systems are used at the municipal level and these systems base the evaluation not on the performance of the employee but entail analysis of the basic requirements that apply to those carrying out the job. In **Luxembourg**, Art. L225-3(2) of the Labour Code integrates the obligation for classification systems to have common criteria for women and men.

In some countries, specific parameters ensue from case law. The **Spanish** Constitutional Court has thus pointed out that systems of professional classification and promotion must rely on criteria which should be neutral and not result in indirect discrimination, e.g. using 'physical effort' or 'arduous work' as a reason to give higher value to men's activities. The Supreme Court has also established that workers at the same company doing different work deserve the same payment when the difference relies on the fact that the kind of jobs done mostly by women are undervalued in relation to the jobs occupied mostly by men. The **German** Federal Labour Court has deplored the fundamental lack of objective criteria, and has itself focused on the requirements for work performance such as the necessary knowledge, skills and abilities, the variety of professional duties and educational qualifications. The **Polish** Supreme Court has held that if the employer takes into account such criteria as length of service and qualifications for establishing the level of pay, it must prove that the particular skills and professional experience have special significance for fulfilment of the obligations conferred upon the employee. The **Greek** expert has noted that in 'equal value' cases under the broader equal pay principle, the typical major premise is that the equal pay principle applies to 'workers employed by the same employer, who belong to the same category, have the same formal qualifications and provide the same services aimed at serving the same category of needs, under the same conditions'. So, workers having different qualifications or performing different duties are

not compared, even where they perform the same work under the same conditions. Some judgments require that the content of the work be specified, but the criteria are unclear.

In yet other countries, it is left foremost to the social partners to deal with this in collective agreements (**Austria**, **Bulgaria**, **Finland**, **Turkey**). In **Austria**, work evaluation systems are contained either in collective agreements or in obligatory agreements between works councils and employers and in some cases in individual agreements between employers and employees. Equal treatment law, however, obliges all parties at every level of collective bargaining to apply the equal pay principle and to ensure that no discriminatory criteria for work evaluation processes are implemented. In yet other countries, it is mainly equality bodies that provide for guidance in this respect (**Belgium**, **Estonia**). The **Belgian** Institute for the Equality of Women and Men thus issued a methodological instrument, the 'Gender neutral checklist for job assessment and classification,' which was given legal recognition in the sense that when a joint sector committee adopts a job classification system, the latter must now be submitted to a department of the federal Ministry of Employment for an assessment of its gender neutrality, with the checklist being one element to be taken into consideration for this purpose. The **Estonian** Gender Equality and Equal Treatment Commissioner found sex discrimination after job evaluation in some opinions, deducing requirements from the law in a more indirect way. In the **FYR of Macedonia**, the Ministry of Informatics' Society and Administration publishes a job classification system without determining pay, but based on the same criteria for both men and women. In **Croatia**, the employer is obliged to pay the salary stipulated by regulations, collective agreement, employment rules or employment contract. If the basis and parameters for the determination of salary are not stipulated in a collective agreement, any employer employing more than 20 employees shall stipulate them in employment rules. In the absence of such agreement and rules, and if the employment contract does not provide sufficient information to determine the salary, the employer shall pay the employee 'adequate salary'. Adequate salary is salary usually paid for equal work, and if it cannot be determined, the court will decide on it in accordance with the given circumstances.

(v) The extent to which national (case) law addresses wage transparency

There can only be awareness of pay discrimination when wage and job evaluation systems are public and transparent. The European network of legal experts in gender equality and non-discrimination has recently published a comprehensive report on pay transparency in the EU,[40] following the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency,[41] which sought to contribute to raising awareness regarding this issue.

Many problems persist regarding pay transparency. For instance, in **Belgium** there is no transparency as to the remuneration of managers who are hired by public economic enterprises under employment contracts, although the High Administrative Court in a judgment of 2 May 2016 found that the protection of privacy and of the company's economic interests could not serve as a blanket justification for denying to make the managers' wages transparent at V.R.T., the Flemish public radio and television organisation.[42] In **Hungary**, the possibility of excessive wage adjustment in the public sector is linked to the result of the unspecified evaluation of performance or quality of work done in the previous year. It is considered that the possibility of severe wage adjustment reduces the transparency of wages, and may also contribute to the statistically proven gender-based wage gap in the public sector, the more so given the fact that it is quite frequent in both the private and the public sector that the employer arbitrarily provides better wage conditions for some individuals or some groups of workers. The **Slovene** expert has noted that both the lack of information on comparable jobs (as the concept of equal work and the term comparator

40 Veldman, A. (2017) *Pay transparency*, European Commission, available at http://www.equalitylaw.eu/downloads/4073-pay-transparency-in-the-eu-pdf-693-kb.
41 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014H0124.
42 Dumortier, n°234.609 at www.raadvst-consetat.be.

are not defined) and on the salaries of co-workers makes it extremely difficult for potential victims of discrimination to start judicial proceedings.

A number of states have referred to trade secret and protection of privacy as factors hampering transparency. In **Estonia**, pursuant to a Supreme Court ruling, it is thus considered impossible to analyse gender pay differences because of the level of privacy protection. Similarly, in the **FYR of Macedonia** employers use the protection of privacy argument to treat wage levels as confidential data and as a ground for including confidentiality clauses on wage into the employment contract. In **Poland** as well, there is an ongoing discussion between employers emphasising that remuneration data are part of trade secrets and therefore subject to confidentiality clauses in employment contracts, some courts following this. But such information is also considered protected under the personal data protection act and if considered as a personal good, the employee should be entitled to disclose his salary if he so wishes, the obligation to preserve secrecy then only applying to the employer. Yet, there is general consensus that the prohibition to disclose information cannot extend to general remuneration tables. The **Romanian** Labour Code stipulates that salaries are confidential and to be determined by individual direct negotiations between employer and employee.

There is still a considerable number of states that do not provide for any legal measures whatsoever to ensure wage transparency and in which this issue has not been addressed in case law either (**Bulgaria**, **Czech Republic**, **Greece**, **Ireland**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**, **Romania**, **Serbia**, **Slovakia**, **Spain**). There remain considerable differences between the researched states on the extent to which wage transparency is a problem that needs to be addressed at all with a view to effectively combatting pay discrimination. The **Turkish** expert has noted that pay differentials are not a problem in the public sector and are mostly problematic in the private, informal sector. In the formal sector, collective agreements are deemed transparent, as are individual wages because, under Article 8 of the Labour Law, employers must provide their workers with their terms of employment in writing. As such, workers may easily check and compare their labour contract with other workers' contracts regarding, inter alia, title, grade, category of work or job description and basic wage, wage supplements and frequency of payment.

However, in other countries, there are already more general duties of transparency or such duties have been recently introduced, including:

- *reporting duties*: equal pay audits (**Great Britain**, employers in the private, public and voluntary sectors with 250 or more employees are required to publish, annually, information on their mean and median gender pay gaps, as well as the number of men and women in each pay quartile; the new 2017 **German** Pay Transparency Act restricts the reporting duty to businesses with more than 500 employees and there are no effective sanctions provided in the case of non-compliance; the **Irish** National Strategy for Women and Girls 2017 to 2020[43] sets out to 'promote wage transparency by requiring companies of 50 or more employees to complete a wage survey periodically and report the results'.); income reports (**Austria**, companies with 150+ employees); bi-annual m/w report relating to appointments, training, promotion, pay, etc. (**Italy**, companies with 100+ employees); annual report comparing the situation of men and women in the company (**France**, companies with 50+ employees); 'pay mapping' duty (**Finland**, companies with 30+ employees); duty of gender-segregated wage statistics (**Denmark**, but in 2016 the law was changed so as to no longer impose a duty on smaller companies with 10+ full-time employees, but only on companies with 35+ full-time employees and with at least 10 men and 10 women with comparable jobs); duty to provide work councils with information on the pay structure broken down according to profession and gender (**Lithuania**);
- *pay information right*: in **Finland** the employer is required to provide the victim of alleged pay discrimination 'information on the grounds of his/her pay and other information that is necessary for assessing whether there has been discrimination', under Section 10.3 of the Act on Equality;

43 http://www.genderequality.ie/en/GE/Pages/Conferences, accessed 27 March 2018.

However, the employer is not obliged to disclose information of a comparator who refuses to disclose his/her pay details. The comparator's pay information may in such cases be required to be revealed through an intervention of the Equality Ombudsman; the new **German** law restricts the right to information to businesses with more than 200 employees although the majority of women work in smaller enterprises;

- *recording duty*: In **Portugal**, companies must keep sex-segregated records of recruitment forms and procedures for a minimum period of 5 years. These records must also include information that allows for the research of wage discrimination;
- *publicness of salaries of certain persons* (**Poland**, **Turkey**, of civil servants), also pursuant to staff regulations (**Belgium**);
- *duty for employers to establish a remuneration system*. In **Lithuania**, legislation entered into force in 2017, which established such a duty for companies with more than 50 employees and to make it available for employees. The system must specify categories of employees according to their position and qualification, the remuneration for each of them and the amount of the base rate wage, the grounds and procedure for granting additional payments, and the procedure of wage indexing;
- *duty for employers to establish an equal pay action plan.* In **Sweden**, this duty includes a survey of provisions and practices regarding pay and other terms of employment that are used at the employer's establishment and pay differences between men and women. In **Lithuania**, companies with more than 50 employees have to adopt an internal policy on equal opportunities, which is to be discussed in their works council;
- *duty to establish a sound job evaluation system* (the **Netherlands**, **Portugal**) *and wage scale* (**Hungary**); the widespread application of wage scales in Hungary has eliminated differences in basic wages, as a result of which wage discrimination against women in blue-collar jobs has declined and is now the lowest among all employee groups;
- *investigation powers of specific inspectors*. In **Italy**, the local Labour Inspectorate may obtain gender-differentiated data at the workplace as regards hiring, vocational training and career opportunities; in **Cyprus**, a specific Inspector is appointed to also ensure the full and effective application of gender equality law, and to whom all kinds of information has to be disclosed upon his request;
- *monitoring duty of wage developments in the labour market* (**Swedish** Mediation Office);
- *unenforceability of confidentiality clauses in labour contracts* (**Northern Ireland**);
- *duty of the employer to provide information on pay* (**Norway**, **Greece**, **Lithuania**, **Slovenia**). In **Greece**, the Authority for the Protection of Personal Data imposed a EUR 70 000 fine on a private firm for refusing to provide data to an employee on the comparative evaluation of its employees, which he had requested in order to be able to exercise his employment rights. In **Slovenia**, the employer can refuse to give such information on the ground of an employee refusing to give consent. In **Lithuania**, companies with more than 20 employees must provide anonymised data on the average wages of employees according to gender and professional groups, except those in managerial positions, to works councils and trade unions;
- *duty to produce salary guides in the public sector* (**Slovenia**).

However, although non-compliance with such duties may be considered an unlawful act, there may often be no specific sanctions imposed (e.g. **United Kingdom**). In **Iceland**, the law stipulates a right for employees to disclose their wage if they choose to do so, which is not deemed to be very effective, given the unlikelihood that men will disclose their higher wages to female colleagues. However, on 1 June 2017, the Icelandic Parliament passed, by a vast majority, a law (Law No. 56/2017, which came into force on 1 January 2018) requiring companies and institutions employing on an annual basis 25 or more workers to obtain equal pay certification of their pay systems and the implementation thereof, on the basis of the requirements of a management standard[44] to prove that they offer equal pay for work of equal value, regardless of gender.[45] The Equal Pay Standard ÍST 85 (the Standard) is the first to be

44 The Standard ÍST 85 Equal Pay Management System – requirements and guidance.

45 https://www.government.is/news/article/2018/01/30/Questions-and-Answers-on-equal-pay-certification/, accessed 14 April 2018.

deliberately developed according to international ISO standards, allowing it to be translated and adopted in other countries. The Standard is applicable to all companies regardless of their size, field of activity and the gender composition of their staff. It describes the process that companies and public institutions can follow in order to ensure equal pay within their organisation and is aimed at implementing effective and professional methods for making pay decisions, their effective review and improvement. The Standard ensures professional working methods in order to prevent direct or indirect discrimination and can be purchased at Icelandic Standards.[46] In order to obtain qualification, companies and institutions need to implement an equal pay management system following guidelines in the Equal Pay Standard. An accredited auditor will conduct an audit, and if the company or institution fulfils the requirements, it will receive a certification that must be renewed every three years. Equal pay certification under the standard is designed to confirm that decisions on pay are based only on relevant considerations. The Standard does not entail a requirement that individuals receive exactly the same for the same work or comparable work as employers have discretion to take into consideration individual factors applying to groups and particular personal skills when deciding wages. Nevertheless, it does make the inflexible demand that decisions on wages are based on relevant considerations, such as individuals' qualifications, experience, responsibilities or job performance, such things not involving gender discrimination of any type, direct or indirect. The Standard states that the normal procedure is to be that information on employees' wages are presented in the form of statistics in such a way that they cannot be traced to the individuals involved. The organisations of the social partners are commissioned to monitor compliance that workplaces acquire equal pay certification and that it is renewed every three years. In cases where a workplace either has not acquired equal pay certification or has failed to renew it by the deadline, the organisations of the social partners will be able to report it to the Centre for Gender Equality. The Centre will maintain a register of companies and institutions that have acquired certification or confirmation and will display it in an accessible manner on the centre's website. The centre can also impose on the workplace a formal demand to rectify the situation by a certain deadline. Rectification measures can involve, for example, the provision of information and release of materials or the drawing up of a scheduled plan of action on how the workplace intends to meet the requirements of the Equal Pay Standard. If the workplace fails to act on instructions of this type, the Centre for Gender Equality is authorised to impose *per diem* fines. Appeals can be referred to the Minister of Social Affairs and Equality against a decision to impose *per diem* fines. The minister will also order assessments every two years of the results of certification and confirmation of the equal pay systems of companies and institutions under the act and will issue regulations on the execution and structure of these assessments.

The **Irish** National Strategy for women and girls 2017-2020 also sets out to develop practical tools to assist employers in calculating the gender pay gap within their organisations and to consider its aspects and causes, mindful of obligations regarding privacy and data protection. In **Spain**, a bill on equal pay was presented on 24 October 2017 and sets out three systems for wage transparency: (i) each worker in companies of more than 10 workers would have the right to be informed about average remuneration according to the category of employees or positions, broken down by gender, including all kinds of payments (even complementary or variable components); (ii) the employer would have to inform the company representatives about average remuneration according to the category of employees or positions, broken down by gender including all kinds of payments; (iii) companies of more than 250 workers would be obliged to conduct pay audits. However, the bill was proposed by a party not belonging to the government, so its outcome is uncertain.

No specific action was taken to follow up on the Commission's Recommendation on transparency, except in **Croatia**, **Finland**, **Germany** (see above), **Italy**, **Poland**. In July 2015, the **Croatian** Government thus adopted the Action Plan for the determination and regulation of the salary system, with the overarching aim of establishing equal pay for equal work and transparency in the salary systems in the public and the private sector, to be laid down in the new Act on Salaries in the Public Sector in September 2015. Wage transparency is to be enhanced through the introduction of wage categories, which should enable

46 http://stadlarad.is, accessed 8 November 2018.

differentiation of work according to quality and increase work productivity, i.e. improve the relation between wage and productivity. Unfortunately, however, this initiative came to an end with the entry into office of the new Government in January 2016 and no other legislative steps being announced. In **Finland**, the Ministry of Social Affairs and Health is preparing an instruction on how to implement the recommendation, and in **Italy**, a draft delegated act was presented to Parliament in March 2015 and is under examination by the Commission for Labour, although it has still not become law. In **Poland**, an initiative to impose an obligation on companies to report on wage differences between men and women was announced in 2012, but no concrete legislative steps have been taken so far. Nevertheless, in May 2017, a free software application to measure the pay gap was made available on the website of the (now called) Ministry of Family, Labour and Social Policy (MRPiPS).[47] The ministry is encouraging employers to use the tool, explaining that providing equal pay for equal jobs or jobs of equal value is not only an obligation on employers, but also brings many advantages. The MRPiPS proposes estimating the so-called 'corrected pay gap', where employees' wages are compared considering features such as sex, age, education, the position occupied, working time or the length of service. Although the Polish expert considers the introduction of this tool, which is free of charge, to be a positive step, its voluntary nature is criticised. It is also considered that it should be mandatory to publish monitoring results and to make those available to a wide audience. **France** did not consider amendments to the law to be necessary, as most of the recommendations were already applied, however the new labour legislation and the Act of 29/3/2018 reinforces the transparency obligation for private companies. In **Portugal** some of the issues covered by the Commission Recommendation are already provided for in legislation, such as information on company wages separated by sex being already available to employees. Furthermore, gender equality (including equal pay) is a mandatory topic of collective agreements and the Gender Equality Agency in the Field of Employment has a duty to check all collective agreements just after their publication in order to see whether they include discriminatory clauses. If this is the case, the Agency can present the case to the public attorney, who can take it to court in order to have these clauses declared null and void. This rule, introduced by the Labour Code of 2009 is in line with point 5 of the Recommendation. Furthermore, it can be noted that in **Malta**, the National Commission for the Promotion of Equality in its input to the Equality Bill proposed strengthening protection in relation to pay and referred to the provisions of the Commission's Recommendation.

Not connected immediately to the implementation of the Recommendation, but still noteworthy are the following other initiatives. In the **Netherlands**, there is a website www.gelijkloon.nl (part of www.wageindicator.org), subsidized by the Dutch Government, giving substantive information about (equal) pay and enabling the comparison of wages. In addition, the NIHR has developed the equal pay Quickscan (see www.wervingenselectiegids.nl). The **Luxembourg** Ministry of Equal Opportunities also proposes an online tool to companies who want to analyse their situation regarding equal pay. In **France**, companies with fewer than 300 employees can conclude an agreement with the state to receive financial assistance to carry out a study of their employment equality situation and of the measures they would need to take to ensure equal opportunities between men and women.

(vi) The extent to which justifications for pay differences are allowed in legislation and/or case law, as well as collective agreements

Some countries do not provide for such a possibility in the law (**Czech Republic**, **Cyprus**, **Liechtenstein**, **Serbia**, **Slovakia**, **Slovenia**) or it is left to the courts to decide on this in the end (**Latvia**, **Sweden**, the **United Kingdom**). In other countries, accepted justifications for pay differences in the law in the case of equal work or work of equal value include the following ones, ranging from job-related grounds to personal qualifications in relation to the job and to certain external factors that may induce a pay differential:

47 https://www.mpips.gov.pl/narzedzie-do-mierzenia-luki-placowej. See also: https://www.mpips.gov.pl/gfx/mpips/userfiles/_public/1_NOWA%20STRONA/Aktualnosci/2017/NierownoscPlacowa_raport.pdf, https://www.mpips.gov.pl/aktualnosci-wszystkie/art,5543,9609,luka-placowa-w-polsce.html.

- salary classification systems prescribed by law (**Croatia**) or job classification systems in collective agreements (**Germany**);
- quantity and quality of the work (**Lithuania**, **Montenegro**, **Turkey**);
- being employed at different times (**Malta**);
- responsibility (**Finland**);
- working conditions, unpleasant or deviant working hours (**Finland**, **Montenegro**);
- being a manager (the **FYR of Macedonia**);
- performance of extra duties, 'red circling' or maintaining a personal rate of pay because of particular circumstances that are not based on sex (**Finland**, **Ireland**);
- seniority (**Belgium**, **Bulgaria**, **Poland**, **Portugal**, **Turkey**);
- differences in formal qualifications (educational degree) for the job (**Croatia**, **Iceland**) or demand of higher qualifications for the performance of a wider range of tasks (**Ireland**);
- relevant work experience from previous jobs with the same or other employers (the **Netherlands**) or work experience in general (**Bulgaria**, **Finland**, **Iceland**);
- productivity (**Portugal**), personal performance/work results (**Finland**, the **FYR of Macedonia**, **Montenegro**), economic performance (**Estonia**);
- the lack of periods of absence, excluding the exercise of maternity and paternity rights (**Portugal**);
- age (**Sweden**);
- capabilities (**Sweden**);
- alignment with the last salary earned (the **Netherlands**);
- guarantees to receive a specific salary or supplement granted in the past;
- competitiveness (**Hungary**);
- labour shortages (in some circumstances) (the **Netherlands**) and demand and supply in the labour market (**Lithuania**, **Sweden**);
- results of the activities of the company or organization (**Lithuania**);
- the merging of two organisations, introduction of a new pay system, or changes in the tasks or market-based factors (**Finland**, but only on a temporary basis);
- being a specialist from abroad (**Estonia**);
- collective bargaining outcomes (**Sweden**) and pay negotiations (the **Netherlands**).

The **Swedish** justifications ensue from case law and have been reported to be offering too broad a scope and the same goes for the **Netherlands**. While the NIHR considers, for example, an alignment with the last salary earned to be a non-neutral criterion, the courts do not always follow this and consider it in principle a valid justification. In **France**, pay differentials can only be justified if the work is not of the same value. Therefore, courts concentrate on the value of jobs and not on the justification argument. **Latvian** courts as well are more concerned with the establishment of the similarity of the cases than with the justification of differences. **Spanish** legislation does not make any express reference to the justifications for pay differences, this leaving a lot of leeway for courts to allow these or to not consider all circumstances of the case. For instance, the Constitutional Court has considered that justification is possible for pay differences when the jobs occupied mostly by men require more responsibility and a higher degree of concentration than the jobs occupied mostly by women. **Romanian** law does not address the issue of justifications at all, but leaves full discretion to individual negotiation of salaries. In **Hungarian** case law, employers may justify the wage difference by referring to their freedom of contract, and/or the differences in the bargaining power of different employees. This argument usually does not save them from being liable for wage discrimination, as it happened in a case in which female storekeepers earned 70-100 % less than their male colleagues. If, however, the employer invests some effort into fabricating an argument about the necessity of the challenged policy because of competitiveness, or applying preferential treatment regarding the comparator, the employer has a good chance to win the case. While **Greek** law does not allow for justification of pay differentials, differences in the legal nature of the employment relationship (e.g. being under a private-law contract or being a civil servant) or the wage-fixing instrument (e.g. being covered by a collective agreement or not) are often used as justifications, even in the same firm or service and for the same work. There is also a tendency to justify pay differences on budgetary grounds, by mere generalisations and by referring to the lack of assessment criteria for the work compared. The **Polish**

Supreme Court takes it that the actual performance of the worker determines whether work is equal, and not the description of the obligations of the employee deriving from the employment contract.

(vii) Specific difficulties

Many experts have reported specific difficulties in relation to the application of the principle of equal pay for equal work and work of equal value in practice (**Belgium**, **Croatia**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, the **FYR of Macedonia**, **Montenegro**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Serbia**, **Spain**, the **United Kingdom**).

Some of these reported difficulties are of a rather general and/or persistent nature and have already been seen to relate to the lack of transparency. In **Belgium**, the landmark case worth mentioning here involved the European Trade Union Institute where a female researcher complained of pay discrimination in comparison with male colleagues. The Labour Court of Appeal in Brussels found that the employer's pay system was opaque and simply referred to the CJEU's decision in *Danfoss* to conclude that gender discrimination had taken place. In **Spain** as well, employers are not obliged to disclose to employees the data on salaries or promotions disaggregated by sex and the Supreme Court established that a promotion system that lacked even minimal transparency led to women stagnating in lower ranks, according to statistical analysis, and that this constituted indirect discrimination. In **Serbia**, while the Statistical Office has data on women in the labour market which are gender-sensitively systematized, these are only available to state institutions. In **Austria**, the income reporting duty does not cover smaller enterprises and the rules for using the income reports involve confidentiality rules that may deter works councils and employees from pursuing wage negotiations with their employers and from submitting court cases. In **Lithuania** as well, rules on confidentiality contribute to the reluctance of employees to challenge discriminatory practices in the area of pay, this also being an explanation for the lack of case law. Pay differences are also considered a problem of equality law governed by public law instruments and not of individual labour law. The **Macedonian** expert emphasises statistical and budgetary invisibility of pay differences between men and women in practice as being problematic. In **Malta** as well as **Montenegro**, pay structures are also obscure and there is a lack of information and access to data on pay.

In **Germany**, indirectly discriminatory provisions in collective agreements are considered a root cause for the persisting gender pay gap. This is reinforced by labour court decisions stating that the evaluation of work and the establishment of pay systems are a crucial part of the autonomy of collective bargaining and that the state may not interfere with this autonomy even if the pay systems seem to be arbitrary or unjust. It is still to be awaited whether the statute on general minimum wages, which entered into force on 1 January 2015, might influence the gender pay gap. A recent case decided by the Labour Court of Berlin, concerning a female freelancer working for a public service broadcaster in the position of a senior editor on a full-time basis, with defined duties and receiving a fixed monthly remuneration, confirms this. The complainant took legal action upon realising that her male colleagues doing the same or equivalent work were being paid significantly more than herself. However, the court decided that she had not been discriminated against on the ground of sex, but rather that there were justified differentiations due to seniority and the different contract arrangements for freelancers and permanent employees, which followed from the collective agreement. The court explained that higher remuneration would mainly depend upon negotiating skills, supposedly more pronounced in men, and contractual freedom and that maternity and childcare periods would often lead to shorter periods of employment for women, less seniority and, thus, lower wages, without any discrimination being involved.[48] Another problem concerns the restriction of cases to individual claims, when tackling structural problems (such as discriminatory classifications and pay structures). The fact that there is no possibility of collective or class actions regarding equal pay has been identified, time and again, as one of the main obstacles to achieving gender equality.

48 Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15, http://www.iww.de/quellenmaterial/id/191974.

In other countries it is the comparison of work that poses particular problems. In **Croatia** and the **Netherlands**, the actual comparator requirement and its application by courts is deemed problematic. The **United Kingdom** expert has also noted that in the case of outsourcing, there is the difficulty that the outsourced worker cannot generally use as a comparator a (male) worker who is working for the outsourcer, or for an organisation to which his job has been contracted out (this as a result of the CJEU ruling in the *Lawrence* case). She has also underscored the uncertainty of claimants in advance of bringing a claim whether work is of equal value. The **Polish** expert has referred to the lack in many enterprises of a system of occupational classification as well as the lack of a universal system for valuing work and establishing criteria, allowing for the comparison of various kinds of work, this also causing difficulties in claiming damages resulting from wage discrimination. In **Cyprus** as well, most employers in the private sector do not have an evaluation and job classification system or job description scheme put into place nor have they proceeded to evaluating posts or professions with a view to defining same work or work of equal value. Earlier research on the gender pay gap has also revealed that posts mainly occupied by women are placed in lower salary scales. The **Latvian** expert has criticised the lack of definition of the equal pay for equal value principle, the lack of criteria for assessing the equal value of work, and also the legislator's failure to take adequate account of EU gender equality law. The Latvian Parliament adopted a law on remuneration of state officials and employees with a view to establishing a uniform remuneration system, but excluding school teachers therefrom. Since most of these are women, this constitutes indirect discrimination.

The **Swedish** expert has noted that the main problem does not reside in proving that work is of equal value but in proving that actual discrimination took place, the Labour Court being too ready to accept employer's justifications for pay differentials. Likewise, the **Italian** expert has observed that many gender-neutral criteria can easily be explained by the employer as being objectively necessary and proportionate, responding to a real need of the business. The **Polish** and **Hungarian** experts have noted similar problems in proving discrimination. Hungarian courts are also excessively strict when judging on the amount of compensation to be paid to victims of sex discrimination. In one case, when the directly discriminated female bus driver was not employed because of her sex, only the lost wages were paid until the day she found employment somewhere else, despite the Supreme Court noting that CJEU case law requires persuasive sanctions. In an important case in 2017, the Equal Treatment Agency concluded that a human resources measure that is still widespread, which links a portion of pay to an employee's presence in the workplace constitutes indirect pay discrimination as it is disproportionally detrimental to female workers with young children, who take more leave to care for their sick children than men do.[49] At the same time, however, it is deemed that this may reinforce the traditional role division between men and women in Hungarian society that persists. **Greek** case law considers out-sourcing a justification for pay differentials between workers covered by different wage-fixing instruments. This applies to workers employed by different employers, but also to those employed by the same employer who are covered by different wage-fixing instruments, being incompatible with EU law. It is also a justification in case of different employers, being compatible with EU law. Equal pay cases are scarce in Greece and usually do not concern gender discrimination, even though in practice discrimination against women is quite common, and is growing since the onset of the financial crisis. However, it is notable that, in 2017, the Supreme Civil Court dealt with a few cases and actually adopted two contradictory approaches towards levelling up as an effective way of eliminating gender discrimination in pay. In the first case, the statutes of an enterprise provided that the employment relationship had to end after 30 years of actual service for male employees and after 25 years of service for female employees. The court found that this constituted gender discrimination to the detriment of male employees and extended to them the more favourable treatment provided to female employees, so that they could benefit from the legal compensation and from even higher compensation within the framework of a voluntary exit scheme.[50] In contrast, in two other rulings, the Supreme Civil Court did not apply the equality principle in the same way.[51] These cases

49 EBH/130/2017 http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh1302017-0.
50 SCC No 214/2017 http://www.areiospagos.gr/.
51 SCC No 603/2017 and No 604/2017 SCC http://www.areiospagos.gr/.

concerned the distribution of the capital of a group insurance scheme following the transfer of a bank and the refusal of its successor to continue this voluntary practice. The court found the liquidation that took into account different ages for men (65 years) and for women (60 years) to be lawful and rejected the male applicants' claim that this constituted discrimination based on sex, with the reasoning that the more favourable age provision that was valid for women must be deemed invalid and could not be extended to male employees (levelling down). Apart from this, the Ombudsman found that cuts in pay and allowances during pregnancy, maternity and parental leave have increased the gender pay gap.

In **Estonia**, it is considered problematic that individual pay agreements between employers and employees are dominant and it is often claimed that women agree to work for lower pay. In **Lithuania** as well, there is an overwhelming dominance of individual agreements in the setting of wages and an absence of collective agreements. In the **Romanian** private sector there is also complete discretion to negotiate salaries.

Some experts have also referred to general aspects of their labour markets, the **Macedonian** expert mentioning the problem of the gender segregation of the workforce as one of the main problems for the gender pay gap and the **Montenegrin** expert the factual situation of illegal employment.

3.3 Equal treatment at work; access to work and working conditions

EU gender equality law also covers employment, in particular access to employment, promotion, access to vocational training and working conditions including conditions governing dismissal (see Chapter 3 of Recast Directive 2006/54/EC). Here we discuss the extent to which domestic law aligns with both the personal and material scope of the Recast Directive in this respect, possible exceptions to the equal treatment principle and particular difficulties that emerge in relation to equal treatment at work.

3.3.1 The personal and material scope

The transposition in this area has generally taken the form of a general gender equality act and, very often, amendments to labour law or to legislation concerning civil servants. Most of these national laws provide for a definition of the personal scope in relation to access to employment, vocational training, and working conditions (see Article 14 of Directive 2006/54), except for **Belgium**, the **Czech Republic**, **Latvia**, **Luxembourg**, the **Netherlands**, and **Norway**. But this does not seem to be necessarily problematic. While the **Belgian** Gender Act has no proper personal scope, its material scope is broader than all EU gender equality directives, and as a result it applies to anyone involved in any situation falling within the material scope. In the **Netherlands** as well, the personal scope derives from the material scope of the law. **Czech** law provides that parties to a legal relationship are obliged to guarantee the equal treatment of all physical persons who make use of their right to employment and the Anti-Discrimination Act specifically provides for equal treatment in access to employment, vocation, entrepreneurship, self-employment etc. In **Greece**, the legislative definition of the personal scope is broader than in EU law, but the concept of worker ensues from case law. In **Luxembourg**, the law reproduces Article 14 of the Directive in this regard, but does not define the concept of worker. The application of the link of subordination ensues from case law. **Norwegian** law does not define the personal scope nor the concept of worker, but the law in combination with the case law shows compliance with EU (case) law. Whether **Montenegrin** law contains a concept of worker or employee in conformity with EU law is unclear.

Most legal systems provide for a definition of a 'worker' or, in the alternative, of an employment agreement or contract (the **Netherlands**, **Portugal**), which is generally considered to be in compliance with the case law of the CJEU or to be even broader (**Sweden**). Yet, there are also still some deficiencies to be signalled (**Austria**, **Czech Republic**, **Denmark**, **Latvia**, **Lithuania**, **Turkey**, the **United Kingdom**). **Danish** law employs different definitions of worker. The personal scope of the equal pay principle in **Lithuanian** law is rather confusing and does not encompass all persons falling with the EU notion of worker, e.g. excluding

public servants. By way of legal analogy, however, they may still enjoy the same protection as workers. The **Austrian** expert has noted that 'free contract workers' (persons working under contractual conditions that cannot be wholly subsumed under labour law, entailing some characteristics of self-employment), are not fully covered by gender equality law, even if in reality they share more characteristics with regular employees. Likewise, **Turkish** law also seems narrower, the concept of 'worker' not covering self-employed persons and civil servants. In **Cyprus** and the **United Kingdom** as well, self-employed persons are excluded from the definition of worker, deemed to be inconsistent with EU law. **Latvian** anti-discrimination law protects judges and prosecutors only with regard to access to employment and members of the boards of directors of capital companies are not protected by anti-discrimination law at all.

The material scope in relation to (access to) employment has also been defined in the national law of most states, in accordance with Article 14(1) of Recast Directive 2006/54, except for **Norway** and **Sweden** where the ban on any form of discrimination covers any decision-making by the employer in working life with no further specification whatsoever. The Swedish expert considers this problematic from the perspective of transparency for those concerned. Norwegian law applies to all areas of society and can as such be seen as broader than the scope of the Directive. In other states as well, the scope is wider than contained in the Directive as has been noted above in relation to **Belgium**. In **Croatia**, it also includes discrimination in relation to the work-life balance, as well as pregnancy, giving birth, parenting and any form of custody. **French** law rather simply states that it applies to the public and private sector and covers all aspects of working life. **Spanish** law also applies for instance to staff recruitment and evaluation bodies. In **Greece**, the scope is wider, also prohibiting discriminatory publications and advertisements and mentioning 'family status' as a prohibited ground of discrimination. **Romanian** law is also considered to be wider in scope. The law mentions 'family status' and 'marital status' as forbidden grounds. It also lists various aspects related to employment that are protected from choosing a profession or activity to membership in trade unions and social services. **Irish** law comprises an extensive, detailed overview of the material scope and most recently the publication, the display or the causing to be published or displayed, of a discriminatory advertisement in so far as this relates to access to employment has been included in this as well. An 'advertisement' is defined as '[including] every form of statement to the public and every form of advertisement, whether to the public or not.'

In other countries, the material scope appears more limited in certain respects, the **Czech** Anti-Discrimination Act not including, for example, vocational training and access thereto, promotion, and recruitment conditions. In **Portugal**, the material scope does not cover self-employment and occupation, since self-employment is out of the scope of the Labour Code. In **Iceland**, the scope is a bit more limited as it does not cover membership of, and involvement in, an organisation of workers or employers. **Lithuanian** law is found to be in contravention of EU law as regards non-discriminatory access to employment and promotion for the self-employed. In **Latvia** the material scope is only defined by the Labour Law, which is limited with regard to personal application. Moreover, there is no complete protection against discrimination with regard to access to membership of workers', employers' or professional organisations, including trade unions. In **Finland**, the material scope of the provision on (access to) employment is formulated as a form of 'discrimination in working life' by an employer, and refers to situations of access to work, and thus depends on the definitions of 'employer' and 'employee'. The term 'employee' even covers persons whose work is comparable with employment, but some self-employed persons may fall outside the definition. A separate provision covers discrimination in relation to access to education.

3.3.2 Exceptions

The possibility of exceptions for occupational activities, as provided for in Article 14(2) of the Recast Directive, has been implemented in the national laws of all states, except for **Greece** and **Norway**. Exceptions, or grounds for exceptions, provided for in many such laws (or ensuing from case law) include:

- singers, dancers, actors and artists (**Belgium**, **Bulgaria**, **Cyprus**, **France**, **Italy**, the **Netherlands**, **Northern Ireland**);
- fashion models (**Italy**) as well as photographic models (**Belgium**, **France**);
- prison wards (**Belgium**) or work in male prisons and (public and private) security forces (**Cyprus**);
- work for the Marine Corps and the submarine service (the **Netherlands**) and for the military depending on the type of military force (**Romania**), such exceptions having been repealed in other countries (**France**);
- equal opportunity commissioners and official guardians (**Germany**);
- church Ministers (the **Netherlands**) and other positions in which religious, ideological conviction or national/ethnic origin fundamentally determine the nature of the organisation (**Hungary**) or religious grounds as such (**Bulgaria**, the **FYR of Macedonia**, the **United Kingdom**); in **Northern Ireland**, any action by state-funded bodies shall be taken to be discriminatory unless such action is objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution, and the means of achieving that aim are appropriate and necessary;
- preservation of decency or privacy (**Northern Ireland**) or moral reasons (**Cyprus**);
- where the job is likely to involve the holder of the job doing his work, or living, in a private home (**Northern Ireland**);
- personal service, care and nursing (**Cyprus**, the **Netherlands**, **Northern Ireland**);
- biological characteristics being determinant for the job (**Austria**);
- positions in foreign countries that do not apply the principle of gender equality in employment (**Belgium**) or in countries whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman (**Northern Ireland**, **Cyprus**);
- where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina; **Northern Ireland**) (excluding natural health or resistance; **Cyprus**);
- working underground in mines (**Cyprus**).

In other states, there has been no identification of possible jobs concerned (**Latvia**, **Liechtenstein**) or the exception is formulated in a general way referring to the nature of the work or the context in which the work is carried out, without further specification (**Sweden**, **Portugal**). In **Iceland**, the GEA article 26(3) allows the advertisement of a vacant position that prefers one sex over the other, if the aim of the advertiser is to promote a more equal representation of women and men in an occupational sector. The same applies if there are 'valid reasons' for advertising for a man or a woman only. In **Finland**, exceptions can be made for 'weighty and acceptable reason' but it is unclear what this covers and whether it aligns with EU law. The exceptions provided by **Polish** law offer the employer some leeway not only in the cases listed in Article 14 (access to employment, including the training leading to it) but also regarding any other terms and conditions of employment. In **Hungary**, a draft law is currently being debated which aims to reduce the range of exceptions. The differentiation in the course of employment can be lawful only if (1) it is justified by the nature of the work or the working conditions; (2) it can only be based on real and determinative professional conditions; (3) it must be lawful and proportional. Furthermore, the need to differentiate between the sexes should only be 'substantial' instead of 'genuine and determining' as the Directive stipulates. In **Italy**, derogation is possible regarding 'particularly strenuous' jobs, tasks and duties as provided for by collective agreements. This exception has always been deemed to be in compliance with EU law, it also being considered a rational choice of the legislator to identify these jobs in collective bargaining rather than to cast them in stone in legislation.

Most national laws also provide for the exception on the protection for women, in particular as regards pregnancy and maternity (Article 28(1) of the Recast Directive), except for, **Germany** and **Latvia**. In **Greece**, the protection of paternity and family life is added. In **France** and **Italy**, the law does not explicitly provide for this either, but it does not impede as such the definition of some specific rules for women. **Polish** law does not permit pregnant and breastfeeding women to perform work that is particularly arduous or harmful to their health, a list of such work being laid down in the Ministerial Act of 3 April 2017. In **Spain**, notwithstanding the applicability of the pregnancy and maternity protection rules, it is impossible to prohibit women from performing certain professional activities, the Constitutional

Court also declaring some cases to be non-constitutional where women had been denied access to certain jobs based on the risks that there could be to their health, if those working conditions could be equally hazardous to men.

3.3.3 Particular difficulties

A number of national experts have also reported particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc., concerning a broad range of issues:

- certain categories of workers being excluded from the personal/material scope of the national law, such as certain types of self-employed workers (**Germany**), domestic workers who work four days a week or less in a private household (the **Netherlands**) or the discriminatory termination of self-employment contracts by employers/clients not being explicitly covered (the **Netherlands**);
- problems related to non-discriminatory hiring and promotion, women still often being refused on grounds of pregnancy, motherhood and family obligations (**Estonia**, **Montenegro**) or on the basis of the argument that it's a 'man's job' (**Serbia**) or that a man is more suitable for the position (**Montenegro**). In **Montenegro** these problems occur notably in the private sector. A concrete, recent example regarded recruitment in the Supreme Court of **Iceland** where 10 out of 11 judges are men and the evaluation committee was composed of only men. It suggested that out of the 3 qualified applicants (2 men, 1 woman) a man should be appointed;
- discriminatory dismissal after pregnancy leave or reassignment to a lower or less-paid position when returning from parental leave (**Montenegro**, **Serbia**);
- difficulties for women in making use of their right to return to work or to an equivalent job after pregnancy and maternity leave, especially if a reorganisation of work has led to the termination of certain jobs (**Croatia**);
- exceptions regarding access to certain jobs on religious grounds (**Bulgaria**); it is considered that these cannot be a priori justified and there is a potential problem of non-compliance with EU law in this regard;
- wrongful use of terminology; in **Latvian** law, it is not clearly stated that non-compliance with special protection measures leads to discrimination based on sex. It also uses the formulation 'prohibition of differential treatment' instead of 'prohibition of discrimination', this being problematic from the perspective that equal treatment in different situations may amount to discrimination as well;
- in **Estonia** it is common practice that job applicants are asked about their personal life in job interviews. In 2015 the Gender Equality and Equal Treatment Commissioner received 70 complaints about gender discrimination;
- the **Serbian** expert has also reported that traditional gender stereotypes influence the fact that women dedicate significant time to unpaid jobs and childcare. The majority of citizens believe that successful women neglect their family duties and that a higher salary unavoidably causes family problems;
- in **Montenegro**, the Ombudsman has stated in his 2015 Report that 'in order to achieve better results and support for the struggle for gender equality, ongoing education and directing public awareness towards the values of equal treatment and equal opportunities for members of both sexes are essential. It seems that there is a certain lack of detailed statistical analysis and scientific research, as well as other strategic acts aimed at fostering gender equality, including a gender-sensitive approach to budget planning.'[52]

52 Ombudsman's Report for 2015, pp. 151.

4 Pregnancy, maternity, paternity, parental and other types of leaves related to work-life balance

4.1 Pregnancy and maternity protection

Discrimination for reasons of pregnancy is considered as *direct discrimination* under EU law and therefore also in the Member States. Any less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c) of Recast Directive 2006/54/EC).

At the same time, protection for reasons of pregnancy and maternity justifies different treatment for the women concerned. Thus, *special rights*, related to pregnancy and maternity, such as maternity leave, do not amount to discrimination against men (Directive 92/85/EEC and Article 28 of the Recast Directive). While in the past such rights have been seen as an exception to the principle of equal treatment, nowadays they are considered as a means to ensure the implementation of the principle of equal treatment for men and women regarding both access to employment and working conditions. However, it might be questioned how far protective measures should go, in particular in view of a more balanced division of work and family life between men and women when a very long maternity leave and/or many protective measures exist. It is submitted that a very long maternity leave might hamper a balanced division of family responsibilities and possibilities on the labour market. A combination of a maternity leave that is not excessively long, paternity leave, parental leave, and childcare leave might prevent such drawbacks.

In order to strengthen the protection of pregnant women and women who have recently given birth, the Pregnant Workers Directive 92/85/EEC was adopted in 1992. The most important provisions concern a period of maternity leave of at least 14 weeks (Article 8). Women are entitled to the payment of an adequate allowance during pregnancy and maternity leave (Article 11). This allowance is deemed to be adequate if it guarantees an income at least equivalent to that which the worker concerned would receive in case of illness (Article 11(3)). Another important provision relates to protection against dismissal from the beginning of the pregnancy until the end of the maternity leave (Article 10). Apart from leave and employment protection, the Directive also provides for health and safety protection for pregnant women or women who are breastfeeding. If there is a risk to health and safety or an effect on the pregnancy or breastfeeding, as established on the basis of detailed guidelines, the employer must take the necessary steps, like temporarily adjusting the working conditions, moving the worker to another job or, if there is no other solution, granting the worker temporary leave. At national level, the minimum requirements of the Directives are generally met and national (case) law offers more protection and extensive rights.

Article 10(2) of Directive 92/85 stipulates that, if an employer dismisses an employee during the period of her pregnancy or during maternity leave, he or she must substantiate the grounds for dismissal in writing. The following table gives an overview of how this provision is implemented in the 35 countries under review.

Table 1 Protection against dismissal during pregnancy and maternity leave

Austria	Yes. Employers have to apply for prior consent for dismissal in writing to the Labour and Social Law Courts who have to issue a written verdict.
Belgium	Yes, on request.
Bulgaria	Yes. Article 333 paragraph 6 and 335 of the Labour Code.
Croatia	Dismissal is prohibited during maternity leave. Exceptionally, dismissal due to business reasons in the procedure of winding-up of a company is allowed even during maternity leave (Article 34(4) Labour Act). The employer is always required to substantiate the grounds and reasons for dismissal in writing (Article 120(1) and (2) Labour Act). However, application of this exception is practically impossible, because the notice period cannot begin and is suspended during pregnancy and use of any maternity or parental related right (Article 121(2) Labour Act).

Cyprus	Yes
Czech Republic	Yes
Denmark	Yes
Estonia	Yes
Finland	Yes
France	Yes
Germany	Yes
Greece	Yes, for the whole protected period (i.e. during pregnancy and 18 months after childbirth).
Hungary	Yes, it is a general rule for all dismissals. However, dismissal is prohibited until the end of maternity and parental leave. Fathers are only protected from dismissal during parental leave if they are the sole caretakers of their child(ren).
Iceland	Yes
Ireland	Yes (if requested by the employee)
Italy	Yes, protection is granted for a period of 12 months following the date of confinement.
Latvia	Yes. An employee on maternity leave may only be dismissed in the case of the liquidation of the employer's company.
Liechtenstein	Yes
Lithuania	Yes
Luxembourg	Yes
FYR of Macedonia	Yes
Malta	Yes. By Regulation 12(3) of the Protection of Maternity (Employment) Regulations.
Montenegro	Yes
Netherlands	Yes
Norway	Yes
Poland	Yes. Dismissal is prohibited during pregnancy and maternity/parental leave except in case of the employer's bankruptcy or liquidation. The employer is always required to substantiate the grounds and reasons for dismissal in writing.
Portugal	This specific question does not apply because in Portugal, whatever the ground, all forms of dismissal must follow a strict and written procedure, described in the Labour Code, and the indication and justification of the ground of the dismissal in that procedure is mandatory. This procedure is stricter regarding dismissals of women during pregnancy, maternity leave, parental leave and breastfeeding of a child, since it involves the intervention of a (public) Agency for Equality in Employment (CITE) (Article 63 of the Labour Code).
Romania	Yes.
Serbia	Yes
Slovakia	According to Article 61 of the Labour Code, the employer may only give notice to an employee for reasons expressly stipulated in the Labour Code and the notice must be given in writing and delivered to the employee, or otherwise it shall be invalid. According to Article 72 of the Labour Code, the employer may terminate the employment within the probationary period of a pregnant woman, a mother who has given birth within the last nine months or a breastfeeding woman only in writing, in exceptional cases not relating to her pregnancy or maternal function, giving appropriate reasons in writing, otherwise the termination shall be invalid. (Effective since 1 September 2011).
Slovenia	Yes, according to Article 115/5 of the ERA.
Spain	Spanish legislation does not specifically require the substantiation of the grounds for dismissal in writing until the end of the maternity leave (although there is a general obligation in labour law).
Sweden	No special rule. This right – upon request – follows from general labour law.
Turkey	Yes

United Kingdom	Yes. An employee is entitled to a written statement of reasons for dismissal, without having to request it, where she is dismissed when pregnant or during her ordinary or additional maternity leave. Employees in these circumstances do not have to have two years' continuous service in order to be eligible for this right. (Employment Rights Act 1996 Section 92).

4.2 Maternity leave

All countries provide for at least the minimum period of maternity leave of 14 weeks, as set in the Pregnant Workers Directive. Many countries provide for longer periods. The following table gives an overview of the length of maternity leave, as well as the length of any potential obligatory period of maternity leave, the possibility to share maternity leave with the father, and the amount of payment mothers receive during maternity leave.

Table 2 Maternity leave

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Austria	16 weeks	8 weeks before birth – longer individual maternity leave before birth in cases of medically attested health risks for mother or foetus; 8 weeks after birth, 12 weeks in cases of premature births, multiple births or delivery by Caesarean section	No, except for federal public servants and contractual public servants, who are entitled to 4 weeks of unpaid leave (no federal transfer for this period)	100 % of average earnings (without ceiling) if earning for at least 3 months prior to the maternity leave more than the mandatory social security threshold, in 2018: EUR 438.04 per month
Belgium	15 weeks	1 week before birth, 9 after birth	No, but if the mother dies after giving birth the remaining leave is transferred to the mother's spouse/life partner	82 % for the first 30 days (approx. 4 weeks), 75 % (daily maximum EUR 103.97) remainder
Bulgaria	410 days (58.5 weeks)	45 days (6.5 weeks) before birth.	Since 2009, fathers can replace the mother with her consent after the child is 6 months old	410 days (58.5 weeks) are paid at 90 % of the average income, no ceiling
Croatia	14 weeks + until child reaches age of 6 months	4 weeks before birth, 10 weeks after 71st day (first day after 10 weeks) after birth until child reaches age of 6 months: voluntary maternity leave	The time from 71st day after birth until child reaches age of 6 months is entirely transferable to the father	Compulsory and additional (voluntary) maternity leaves are both paid at the rate of 100 % of the base for calculation of salary compensation, in accordance with the provisions on mandatory health insurance (no ceiling). If no prior length of service is satisfied (12 months uninterrupted length of service / 18 months interrupted length of service): 70 % of budgetary calculation base (currently EUR 312 (HRK 2 328))

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Cyprus	18 weeks	Fully compulsory	No	72 % of the weekly average of the basic insurable earnings of the beneficiary in the previous contribution year. Maximum insurable earnings EUR 4 533
Czech Republic	28 weeks	none	Possible to transfer the leave to the father.	70 % of average income of the last 12 months, with a ceiling of EUR 1 300 (CZK 34 470)
Denmark	18 weeks (4 before birth and 14 after birth)	2 weeks after birth	No	Benefit for 18 weeks. Mothers are only entitled to wages during absences related to pregnancy and childbirth if such a right follows from a collective agreement or an individual employment contract. If the mother is only entitled to benefit and not to wages she will get 90 % of the wages, max EUR 547.48 (DKK 4 075) per week. According to many collective agreements: 100 % of salary
Estonia	20 weeks (140 calendar days)	None, but maternity benefit decreases if maternity leave starts less than 30 days (approx. 4 weeks) before expected date of birth	No	100 % of average earnings of the insured person in the preceding calendar year, no ceiling
Finland	105 week days (between and including Monday to Saturday) – approximately 16.5 weeks	2 weeks before estimated birth and 2 weeks after	No	Payment is dependent on previous earnings: 90 % for the first 56 working days after birth up to EUR 50 606, and for salaries higher than this, 32.5 % of salary for the rest – or a flat-rate benefit if there are no previous earnings
France	16 weeks	2 weeks before and 6 weeks after	No	100 % of average earnings from the last 3 months, with ceiling of EUR 3 129. Some collective agreements provide the worker with full pay

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Germany	14 weeks, up to 18 weeks in cases of premature or multiple births	6 weeks before and 8 weeks after birth; 12 weeks after birth in cases of premature or multiple births. During the 6 weeks prenatal protection period the employee is allowed to work voluntarily, but the employer is prohibited from requiring her to work	No	100 % of last average income of the last 13 weeks or 3 months for dependent employees, no ceiling
Greece	Public Sector: 5 months (approx. 22 weeks) Private Sector: 17 weeks	All. Public Sector: 2 months (approx. 9 weeks) before birth and 3 months (approx. 13 weeks) after. Private Sector: 8 weeks before birth and 9 weeks after	No	Public Sector: 100%, paid by employer. Private Sector: half to one month paid by employer; a social security allowance for the remaining period, which covers the wages for the majority of women, but is subject to 200 working days during the two years preceding maternity leave, while sickness allowance is subject to 100 working days in the year preceding sickness
Hungary	24 weeks	2 weeks obligatory As a *recommendation*: 4 weeks before birth	No	70 % of the average daily salary – no ceilings on payments
Iceland	3 months after birth	First 2 weeks after birth	The 3 months are not transferable	80 % of average total wages of the last 12 months (finishing 6 months before birth). The ceiling is EUR 4 250 per month
Ireland	26 weeks	26 weeks	Fathers cannot share the leave, but if the mother dies the father takes over the remaining leave	First 26 weeks are paid at a level of EUR 235 gross per week, following 16 weeks are unpaid. The employer can choose to 'top up' the payment if agreed between employer and employee
Italy	22 weeks (5 months)	All: 2 (or 1) months before birth, 3 (or 4) months after	Fathers are entitled to four (seven from 2018) days of paternity leave in the first five months following the child's birth, of which two (three from 2018) days can be an alternative to the maternity leave	80 % of average daily remuneration paid throughout the entire maternity leave period, no ceiling

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Latvia	16 weeks, plus extra 2 weeks if woman has visited a doctor and registered her condition before 12th week of pregnancy (18 weeks)	None, it is the right of the pregnant worker, but an employer must not employ a pregnant woman 2 weeks before and 2 weeks after birth	The right to maternity leave is not accessible to fathers, unless the exceptional circumstances occur – the death of a mother or a mother waives her parental rights	80 % of gross salary for entire maternity leave period, no ceiling
Liechtenstein	20 weeks	8 weeks after birth are compulsory, following 12 weeks are voluntary. 4 weeks before birth are optional	No	80 % of salary for full 20 weeks, 16 of which must follow childbirth. No explicit ceiling; the payment is based on the maximum income for the obligatory insurance for illness and old age, which varies according to the general development of salaries
Lithuania	18 weeks	Fully voluntary	No	If the woman has been insured for 12 months preceding birth, 100 % of reimbursed remuneration. The minimum benefit is EUR 228 per month
Luxembourg	16 weeks, but can be extended if birth takes place after expected date of delivery.	All 16 weeks	No	100 %, granted on the basis of a medical certificate and treated as period of sick leave, no ceiling to payment
FYR of Macedonia	9 months (38 weeks), 12 months (52 weeks) for multiple births	73 days (approx. 10 weeks): 28 days (4 weeks) before birth and 45 days (approx. 6 weeks) after	The leave cannot be shared, but can be taken over by the father 9 months (38 weeks), or 12 months (52 weeks) for multiple births, provided that the mother is incapacitated or she does not use the leave	100 % of the average individual salary for the last 12 months (52 weeks) (or minimum 6 months (approx. 25 weeks)), but not higher than the value of two average salaries at national level. If the mother uses the obligatory part, the rest of the leave is paid 50 % on top of her regular salary
Malta	18 weeks	4 weeks before, unless there is agreement between employer and employee to take them after 6 weeks after birth, with the balance to be agreed between employer and employee	No	100 % for first 14 weeks, then flat rate of EUR 172.5 per week for remaining 4 weeks. The rate is in accordance with Social Security Act. The rate may be subject to an increase

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Montenegro	Parental leave (including maternity leave) can last up to 365 days counting from the birth of a child	An employed woman may start maternity leave 45 days, and compulsorily 28 days, before giving birth. The mother of the child cannot cancel maternity leave before the expiry of 45 days from the day of birth	Yes	If an employee has continuously worked between 6 and 12 months before the leave, the compensation is calculated as 70 % of the average monthly salary. If an employee has worked continuously between 3 and 6 months the compensation is 50 % of the average monthly salary. If an employee has worked continuously up to 3 months, the compensation is 30 % of the average monthly salary
Netherlands	16 weeks	Between 4 and 6 weeks are compulsory before birth	No	100 % of salary paid, up to maximum daily wage of EUR 206
Norway	10 weeks of maternity leave, termed 'mother's quota'	3 weeks before birth and 6 weeks after	No	100 % of average salary for 46 weeks, or 80 % of average salary for 56 weeks. The 100 % is limited to 6 'G' (1 G is the base calculation amount as provided by the National Insurance Act, and is annually regulated). From 1 May 2014 1 G amounts to EUR 10 792 (NOK 88 370; exchange rate 8.78). The maximum parental leave salary amounts to EUR 64 752 (NOK 530 220)
Poland	20 weeks and from 31 to 37 weeks in cases of multiple birth, depending on the number of children.	14 weeks after birth	The remaining weeks can be taken by the father, with consent of the mother	100 % of average earnings, no ceiling
Portugal	17 weeks or 21 weeks	6 weeks for the mother after birth.	The period remaining after the confinement period of 6 weeks after giving birth can be divided between both parents	No payment by the employer, but a social security allowance paid on the basis of 100 % of the average salary of the worker if 120 days (17 weeks) are taken or 80 % if 150 days (21 weeks) are taken. No ceiling to payment
Romania	18 weeks	6 weeks after birth	No	85 % of average monthly income of the last 6 months, not more than 12 minimum salaries

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
Serbia	45 days at the earliest, and 28 days in any case, prior to the time of the expected delivery and three full months from the day of childbirth	Must commence maternity leave 28 days before the expected date of delivery and cannot be on maternity leave shorter than 3 full months	No. The father has a right to maternity leave only if the mother abandons the child, dies, or is prevented due to other justified reasons to exercise that right (serving a prison term, serious illness and the like), or is not employed	The amount of maternity pay is equal to the average basic salary paid in the past 12 months prior to the month in which maternity leave was taken. If an employee has worked for less than 12 months, for the months that are missing the salary is calculated as 50 % of the average monthly salary
Slovakia	34 weeks	6-8 weeks before birth and 6 weeks after birth	Yes, but not at the same time	Maternity benefit for 34 weeks amounting to 75 % of the mother's daily income, minimum EUR 324 and maximum EUR 1 260 per month
Slovenia	15 weeks, which commence 4 weeks before the expected date of birth	15 days (approx. 2 weeks), before or after birth or both	No. The father has the right to maternity leave only if the mother: 1. has died, 2. has left the child, 3. is permanently or temporarily unable to live and work independently	100 % of the average salary of the last 12 months immediately prior to the date on which benefits were claimed; no ceiling
Spain	16 weeks, 10 of which are transferable to the father	6 weeks after birth for the mother	Yes	100 % of monthly salary, dependent on minimum period of working time, no ceiling
Sweden	14 weeks before or after giving birth	2 weeks before or after birth	No	Maternity benefits are paid at sick-leave level (80 % of the income up to an income-level of 10 'basic amounts' (EUR 49 000) per year). If not income based, benefits are paid at the basic level (*grundnivå*) of EUR 20 (SEK 225) a day
Turkey	16 weeks	All: 8 weeks before birth and 8 weeks after – 8 weeks before birth can be reduced to 3 weeks (with approval of doctor), with the remaining 5 weeks added to the 8 weeks after birth. Multiple births: 2 additional weeks added to antenatal leave	No, but if a civil servant or worker dies after giving birth, the remaining leave is transferred to the spouse	For civil servants, regular salaries are paid throughout the leave by public bodies. Female workers are paid via the Social Security Institution, which amounts to sickness payments (two thirds of regular wages).

Member State	Duration	Obligatory period	Possibility to share Maternity Leave with the father?	Payment
United Kingdom	52 weeks	2 weeks after birth	Yes, between 2 and 26 weeks may be transferred to the father	Entitled to 39 weeks of maternity pay; 90 % of salary in the first 6 weeks, and a fixed rate of GBP 140.98 (approx. EUR 160) per week during the remaining 33 weeks

The right to return to the same or an equivalent job on terms and conditions which are no less favourable and to benefit from any improvement in working conditions is provided for in Article 15 of Recast Directive 2006/54. In most states a worker returning to work after her maternity leave is protected against unfavourable treatment. Workers are generally guaranteed by law to be able to return to the same job or, if this is not possible, to a similar job. However, a few countries do not provide such a guarantee (e.g. the **Netherlands**)[53] or they do not do so explicitly (e.g. **Belgium**, **Germany**). In **Germany**, such a provision is not necessary. Due to the German concept of maternity leave, the issue of 'returning to the same job' does not arise because the employment relationship remains totally unaffected. However, a transfer to a non-equivalent post after maternity leave would be direct discrimination under the General Equal Treatment Act and the worker concerned would be awarded compensation.[54] In **Hungary**, the new Labour Code does not expressly guarantee the right to return to the original job or an equivalent job at the end of maternity/parental leave. Due to the cumulative interpretation of various sections of this Code, however, the employee has the right to return to work with the same employer, and in the absence of a mutually agreed modification of the employment contract, the employee has the right to return to his/her original job.

4.3 Adoption leave

All countries provide for adoption leave. In **Romania** this is not done explicitly, but the law stipulates that parents who adopt a child have a right to parental leave.[55] In **Slovakia** something similar applies: so-called substitute parents (i.e. adoption, foster care or care in case of death of the child's mother) can apply for maternity and parental leave. In **Turkey**, adoption leave exists when a child under the age of three is adopted. This leave used to exist only for civil servants (leaving adoption leave for workers up to individual/collective labour contracts), but this changed in April 2015 and February 2016. With Law No. 6645[56] and 6663[57] amending the Labour Law, adoption leave is to be granted to workers upon adoption.

4.4 Parental leave

In 2015, the former European Network of Legal Experts in the Field of Gender Equality, published a comprehensive report on the implementation of the Parental Leave Directive 2010/18.[58]

53 The Commission started an infringement procedure on this issue on 24 January 2013, infringement No. 2013/45. On 22 October 2014 the CJEU handed down its judgment on this issue, and dismissed the action as inadmissible because not all of the Article 258 TFEU formalities had been complied with. Specifically, the Commission did not identify any rule of Dutch law that in its content or application was contrary to the wording or the objective of the relevant provisions of Directive 2006/54. See: Case C-252/13 *Commission v. the Netherlands* [2014], ECR n.y.r.

54 Labour Court of Wiesbaden, judgment of 18 December 2008, 5 Ca 46/08.

55 Article 8.(2) of the Government Emergency Ordinance No.111/2010.

56 Official Gazette 23 April 2015, No. 29335.

57 Official Gazette 10 February 2016, No. 29620.

58 Do Rosário Palma Ramalho, M., Foubert, P., Burri, S. *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2723&Itemid=295.

Many countries have not formally implemented the Directive because they believed that their national legislation already complied with EU law (**Austria**, **Czech Republic**, **Finland**, **Germany**, **Hungary**, **Iceland**, **Latvia**, **Lithuania**, **Portugal**, **Spain**, **Sweden**). In addition, the experts for the EEA countries of **Iceland**, **Liechtenstein**, **Norway** indicate that national law is in accordance with EU law. The candidate countries (the **FYR of Macedonia**, **Montenegro**, **Serbia**, **Turkey**) have not implemented the Directive. In the other countries, formal transposition of the Directive has occurred, or minor amendments to national law were made.

In **all countries**, national legislation regarding parental leave is applicable to both the public and the private sector (though not always in the same way).

Apart from **Turkey**, all countries have created a right to parental leave. The length of this leave varies considerably per country, however. The table below provides an overview.[59]

Table 3: Parental leave

Country	Parental leave		
	Length	**Payment**	**Transferable?**
Austria	Until the child is 2[1]	Flat rate adjusted to chosen duration of benefit or income-related (capped at 80 % of former earnings or EUR 66 per day) according to parents' decision with part of the benefit reserved for one parent	No[2]
Belgium	4 months per parent	Flat rate	No
Bulgaria	6 months per parent	Unpaid	In part
Croatia	6-8 months (30 for third and consecutive children & twins	100 % of the monthly earnings but cannot exceed 120 % of the budget calculation base (capped)	In part
Cyprus	18 weeks per parent/ 23 weeks for widow(er)s	Unpaid	In part
Czech Republic[3]	Until the child is 4	Flat rate (CZK 220 000 for the whole period)	Yes
Denmark	32 weeks per child	100 %	Yes
Estonia	3 years minus 70 days	100 % paid (ceiling exists) for 435 days, then unpaid	Yes
Finland	26 weeks per child	70-75 %, capped	Yes
France	Until child is 3	flat rate	Yes
Germany	3 years per parent	67 % for 14 months (when 2 months are taken by the other parent), then unpaid, 4 additional months paid when both parents are working part time	No, but the parental allowances depend upon the sharing of parental leave between the parents
Greece	4 months per parent (9 in the public sector)	Unpaid (private sector) fully paid (public sector)	Yes in public, no in private sector

1 Each parent being able to reserve 3 months of leave to take later. Parents are also entitled to share one month of parental leave. In this case, the overall period is shortened for this 'double month' and parental leave is only granted for 23, rather than 24, months.
2 Both parents have the same right to parental leave; there is no provision for proper transferability. Under the legal provisions parents have the right to divide the duration of parental leave between them; an agreement on how to do this must be reached. Only one parent can take the leave at a time, except for one month where one parent takes over from the other.
3 In the Czech Republic parental leave should be distinguished from parental allowance.

59 This table has been adapted from McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, pp. 68-69, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

Country	Parental leave		
	Length	Payment	Transferable?
Hungary	Until the child is 3 (general rule)[4]	70 % (capped) for 104 weeks, then very low flat rate	Yes
Iceland	4 months per parent	80 % (capped) for 13 weeks	In part
Ireland	18 weeks per parent	Unpaid	In part (if both parents work for the same employer)
Italy	10/11 months per child	30 %	In part
Latvia	18 months per parent (under the Labour Law)	60 % for one of the parents (under social security law, until child attains 12 months of age)	No
Liechtenstein	4 months per parent	unpaid	No
Lithuania	Until the child is 3	100 % for 52 weeks or 70 % the first 52 weeks and 40 % for the next 52 weeks, subject to minimum and maximum ceilings. The minimum benefit is set at 20 percent of average national monthly wage. The maximum benefit is 200 % of average national monthly wage.	Yes
Luxembourg	4 or 6 months per parent full-time; 8 or 12 months half-time; or flexible leave over a period of 20 months	Proportion of the wage, min EUR 1 922, max EUR 3 204 (for full time leave)	No
FYR of Macedonia	52 weeks (78 weeks for multiple childbirth) – father is entitled to parental leave if the mother does not take maternity leave	Paid	Yes, the father can use the leave only if the mother does not use it
Malta	4 months per parent (12 months per child in the public sector)	Unpaid	Yes in public sector, no in private sector
Montenegro	45 days after the birth of the baby until the expiry of 365 days from the day of commencement of maternity leave	100 % (when having worked continuously for 12 months and more, before the leave) 70 % (when having worked continuously between 6 and 12 months before the leave) 50 % (between 3 and 6 months) 30 % (3 months or less)	Yes, if one parent stops parental leave, the other parent is entitled to use the unused part
Netherlands	26 weeks per parent	Unpaid but tax relief	No
Norway	12 months paid, 12 months each of the parents unpaid	100 % for 46 weeks or 80 % for 56 weeks, capped.	In part
Poland	32 weeks/36 months	60 % or 80 % for 32 weeks, child care leave of 36 months generally unpaid	Yes
Portugal	3 months per parent	25 %	No

4 Longer in cases of twins or disabled children.

Country	Parental leave		
	Length	Payment	Transferable?
Romania	2 years per child	85 %, cannot be lower than 85 % of the national minimum wage	Transferable, except for one month that is mandatory for the parent who did not take the parental leave
Serbia	3 months after the birth until 365 days after commencement of maternity leave (2 years for every third and subsequent child)	100 % (if parent has worked at least 6 continuous months) 60 % (if parent has worked between 3 and 6 months) 30 % (less than 3 months)	No
Slovakia	Until the child is 3[5]	Flat rate (EUR 213.20 for one child, EUR 266.50 for twins and EUR 319.80 for triplets and more).	No
Slovenia	260 days per child	100 %, capped	In part
Spain	Until the child is 3	Unpaid	Yes
Sweden	480 days (includes maternity leave)	80 %, capped for 390 days, then flat rate	In part
United Kingdom	18 weeks per parent	Unpaid	No

5 Six if disabled.

In **Turkey**, there is no legislation and/or national collective agreement, or case law specifically mentioning parental leave within the understanding of Directive 2010/18. There are however family-related leaves or leaves that may be used for family/parental issues, which are quite generous and exceed Directive 2010/18.

4.5 Paternity leave

Most countries provide fathers with the right to paternity leave, though in many countries this leave is very short. In 2017 the Commission published a proposal for a Directive on work-life balance for parents and carers.[60] It includes a proposal for 10 days of paid paternity leave, where the payment would at least be equivalent to payment in cases of sick leave.

The table below provides an overview of the current length and level of payment of paternity leave in 35 countries.[61]

Table 4: Paternity leave

Country	Paternity leave	
	Length	Payment
Austria	0-31 days[1]	EUR 700
Belgium	10 days	100 % for 3 days, then 82 % (this is equal to 100 % net as no contributions are deducted from social security benefits)

1 Civil servants are entitled to four weeks' leave; certain groups of employees in the private sector are entitled to leave periods of varying lengths according to some collective agreements or to 28 to 31 days of 'family time', according to a written agreement with the employer.

60 Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM (2017) 253 final.

61 This table has been adapted from McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, p. 65, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

Country	Paternity leave	
	Length	Payment
Bulgaria	15 days	90 %
Croatia	0	N/A
Cyprus	2 weeks	72 %
Czech Republic	5 days[2]	70 %
Denmark	2 weeks	100 %
Estonia	10 days	100 %
Finland	54 days	70 % (capped)
France	11 days[3]	100 % (capped)
Germany	0	N/A
Greece	2 days[4]	100 %
Hungary	5 days[5]	100 %
Iceland	3 months	80 % (capped)
Ireland	2 weeks	EUR 235 gross per week
Italy	4 days (7 from 2018)	100 %
Latvia	10 calendar days	80 %
Liechtenstein	0	N/A
Lithuania	1 month length in the period from birth until the child is 3 months old	100 % capped
Luxembourg	2 days	100 %
FYR of Macedonia	7 days	100 %
Malta	1 day in private sector and 5 days in public sector	100 %
Montenegro	By Collective Agreement	100 %
Netherlands	5 days	2 days 100 %, 3 days unpaid[6]
Norway	2 weeks	100 %
Poland	2 weeks	100 %
Portugal	15 days compulsory, and 10 optional additional days	100 %
Romania	5/15 days[7]	100 %
Serbia	7 days	100 %
Slovakia	0	N/A
Slovenia	30 days	100 % capped for 2 weeks then flat rate
Spain	4 weeks[8]	100 %
Sweden	2 weeks	80 % capped
Turkey	Workers: 5 days Civil servants: 10 days (plus optional 24 months)	100 % Civil servants: 100 % (optional 24 months unpaid)
United Kingdom	2 weeks	Flat rate[9]

2 Paternity leave was introduced in Law 148/2017, which entered into force on 1 February 2018.
3 Eighteen in the case of multiple births.
4 Five days for the military.
5 Seven in the case of twins.
6 As of 1 January 2019, a new law enters into force, which provides for 5 days fully paid paternity leave.
7 Fifteen days if the father has completed a course in infant care.
8 As of 1 January 2017 (previously 13 days).
9 Or 90 % salary if the latter is less.

4.6 Time off/care leave

The table below provides an overview of any other leaves that are available.[62]

Table 5 Availability of care leaves other than leaves relating to parenting

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Austria	Care for relatives living in the same household in cases of sickness. Care for disabled or terminally ill close relatives	7 days or up to 14 days for children under the age of 12 3, in some cases 6 months	Additional paid free days Special state benefit	Worker may instead reduce hours of work
Belgium	Care for young or disabled children or seriously ill relative	48 months over a career	State benefits	Private sector only,[1] subject to 24 months' service and may be taken part time[2]
Bulgaria	Care for sick child, spouse or relative	Up to 60 days per year for a child, 10 for an adult	70 % pay by the employer for the first 3 days and 80 % after that from social insurance for insured persons	
Croatia	Care for sick family member (child or spouse)	60 days per illness for children up to seven, 40 days per illness for children from seven to 18, 20 days per illness for children over 18 and spouse	70 % of salary capped, 100 % of salary for children under 3. All payments subject to a ceiling of EUR 565 (HRK 4 257) per month	
Cyprus	Reasons of force majeure; care for sick family members and close relatives	7 days	No	
Czech Republic	Care for family member	9 days	State benefits (60 % wages)	
Denmark	Care for disabled/ terminally ill relative	6+ months	Yes	
Finland	Care for sick relative Care leave for child	Indefinite Up until child is 3 years old	Unpaid Flat rate benefit	Best practice rather than justiciable right
France	Care for a terminally ill child or spouse	6 months	State benefits available	May be taken part time
Germany	Care for a close relative	2 years	State benefits available	May be taken part time

1 Public-sector workers may take up to five years full-time and five years part-time leave in a career, which may be used for any reason. Such leave is unpaid but entitles the worker to a low level of social security payment; this is paid at a higher level when the leave is used to care for a sick child. There is a proposal to bring the public sector in line with the private-sector scheme, although without improving the level of social security payable to public-sector workers.
2 The 48-month maximum applies regardless of whether leave is taken full time or part time.

62 This table has been adapted from McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, pp. 91-92, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Greece	Care for a child or spouse in hospital or requiring transfusions, or a disabled child	Public sector: 22 days per year Private sector: from 6 to 30 days per year, according to the case.[3]	Public sector: all leaves paid. Private sector: most leaves unpaid	
	Care for sick dependents	6 days per year	No	
	School visits	4 days per year.		
Hungary	Care for a relative	2 years	State benefits may be available	Need for care is certified by a physician
Ireland	Care for seriously ill or disabled person	104 weeks	State benefits	Subject to 1 year of continuous service
Italy	Care for seriously disabled relatives	Three days per month	Yes	Details of the nature of such leave to be determined between employer and worker
	Care for seriously disabled spouse	Two years	Yes	
	Death or serious illness of a close relative	Three days per year	Yes	
	For serious family reasons	Two years over a career	No	
Lithuania	Care for a sick child, relative or spouse- up to 120 consecutive days or 140 days per year	120 days per year for a seriously ill child, 7 for an adult	State benefits for up to 7 days (at once) and up to 120 days per year for a seriously ill child.	
Luxembourg	Care for a sick child	Maximum 12 days for child younger than 4; 18 days for child between 5 and 13; 5 days for child between 14 and 18	Yes, 100 %	
FYR of Macedonia	Care for a sick child under the age of 3	Unknown	Yes	
	Care for close family members	Maximum 30 days per year	Yes	
Montenegro	Serious illness of a close family member	Determined by collective agreement	Yes	
	Death of an immediate family member	7 days	Yes	
	Special care for a child with special needs	Until child turns 3	Yes	
Netherlands	Care for a sick parent or partner	10 days	Yes, at 70 %	May be taken part time
	Care for a close relative or dependent	12 weeks part-time work	No	Worker may reduce hours by up to 50 %

3 These leaves presuppose the exhaustion of other paid leaves; according to the national expert this condition conflicts with Directive 2010/18.

Country	Purpose(s) of leave	Maximum period of leave	Compensation?	Other relevant information
Norway	Care for terminally ill intimates Care for relatives	60 days 10 days per year	Yes, equal to sick leave pay (100 % salary) Yes, equal to sick leave pay (100 % salary)	May be taken part time. May be taken part time
Portugal	Care for a grandchild when the mother is under 16 at the time of birth. Care for dependents	30 days 10 days a year	No No	
Serbia	Serious illness of a member of their immediate family Special care for a child or another person	7 days Until child turns 5	Yes	Parent can be absent from work or work half of the full working hours
Slovakia	When accompanying: (i) a family member to a medical facility for examinations or treatment upon sudden disease or accident, and also for planned examinations and treatment (ii) A handicapped child to a social care facility or special school	(i) Maximum 7 days per calendar year (ii) Maximum 10 days per calendar year	Yes	
Slovenia	Care for close relatives	14 days, capable of extension	80 % salary	
Spain	Care for infirm relatives	One year	No	May be taken as reduced hours
Sweden	Care for sick child under the age of 12 Care for seriously ill relatives	60 days yearly per child 100 days (240 where the relative has AIDS)	80 % salary capped State benefits	
Turkey	For workers and civil servants: Care for a disabled child or a child with a permanent sickness Death of the child / spouse / parent / sibling For civil servants: Sickness and patient companionship leave	Up to 10 days 5 days for civil servants; 3 days for workers 3 months	Yes Yes Yes	No age limit for the child, can be used wholly or partially within 1 year period Upon medical report, may be extended, no age limit for child

4.7 Leave in relation to surrogacy

In only few countries parental leave is available in cases of surrogacy. Countries that have provided for this right are: **Greece**, **FYR of Macedonia**, **Slovakia**, **Spain**, and the **United Kingdom**. In **Portugal** surrogacy has been allowed since 2016, but the legal consequences are not entirely clear. In the expert's opinion the law should be read as implying that the legal parents are entitled to parental leave. In the **Netherlands**, intended parents will have a right to parental leave if they become the legal parents of the child, e.g. through adoption, or if they take permanent care of the child and live at the same address. The surrogate mother might also be entitled to parental leave if she is still the legal mother of the child. In **Iceland**, a draft law was presented to Parliament on this topic in 2015; according to the draft, the surrogate mother while pregnant has all the same rights as pregnant women with regard to health services. According to Article 23 of the draft law the surrogate mother and her spouse are entitled to maternity/paternity leave and parental leave. In a few countries, surrogacy is prohibited (**Estonia**, **Liechtenstein**).

4.8 Leave sharing arrangements

Not all countries provide parents with a legal right to share (part) of the maternity leave. The table below provides an overview.[63]

Table 6: Sharing maternity leave

Country	Maternity leave transferable?
Austria	No
Belgium	Only on maternal death[1]
Bulgaria	Yes, after child is 6 months old
Croatia	Yes, after the first 14 weeks
Cyprus	No
Czech Republic	No
Denmark	Only on maternal illness
Estonia	No
Finland	Only on maternal illness or death
France	No
Germany	No
Greece	No
Hungary	No
Iceland	No
Ireland	Only on maternal death
Italy	Only on maternal death, serious illness or abandonment[2]
Latvia	Only on maternal death, serious illness or abandonment
Liechtenstein	No
Lithuania	No
Luxembourg	No
FYR of Macedonia	Yes, when the mother does not/cannot use maternity leave

1 Leave available to father/partner *as well as to the mother* where the latter is hospitalised.
2 Or where the father has exclusive custody.

63 This table has been adapted from McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, p. 60, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

Country	Maternity leave transferable?
Malta	No
Montenegro	No
Netherlands	Only on maternal death[3]
Norway	Yes, apart from 9 compulsory weeks for the mother
Poland	Yes, after the first 14 weeks
Portugal	Yes, after the first 6 weeks post-birth
Romania	No
Serbia	No
Slovakia	No
Slovenia	Only on maternal illness or abandonment
Spain	Yes, after the first 6 weeks or on maternal death
Sweden	Yes, maternity leave is included in the total amount of 480 days of parental leave, out of which 90 days are reserved for the mother and the father respectively. The rest can be shared according to the wishes of the parents.
Turkey	No, only on maternal death
United Kingdom	Yes, apart for a 2-week compulsory period for the mother

3 This is expected to change, however.
4 Also where she is under 18, an apprentice or a student, in which case the child's grandparent may be assigned the leave.

4.9 Flexible working-time arrangements

The Network's 2015 report entitled *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, authored by Aileen McColgan, has provided the following overview of flexible working-time arrangements:[64]

Table 7 Access to reduced-hours working arrangements

Country	Access to reduced hours		Compensation?
	Tied to reconciliation purposes?	Right or right to request?	
Austria	Yes	Right	No
Belgium	Yes	Right	Yes
Bulgaria	No	Right to request	No
Croatia	Yes, but only as a modality of maternity and parental rights and benefits	Yes, if both previous remarks are taken into account	Yes
Cyprus	Private sector only. Must be agreed.	Right to request	No
Czech Republic	Yes	Right, with exceptions	No
Denmark	Yes	Right to request	No
Estonia	Yes	Right to request	No
Finland	Yes	Right, with exceptions	Wage-related, flat rate or no benefit depending on type of leave
France	No	Right to request	No

64 McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, p. 36, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

Country	Access to reduced hours		Compensation?
	Tied to reconciliation purposes?	Right or right to request?	
Germany	No	Right, with exceptions	No[1]
Greece	Private sector Public sector, reduced hours provided by law as an alternative to parental leave	Right	Yes
Hungary	Yes	Right	Social security benefits
Iceland	No	Right, with exceptions	No
Ireland	No	Right to request	No
Italy	No	Collective agreements only	No
Latvia	Yes	Right	Possibly (unclear as yet)
Liechtenstein	No	Right to request	No
Lithuania	Yes	Right to part-time and additional time-off, right to request job-sharing and work at home	In case of additional time-off[2]
Luxembourg	Public sector only	Right	No
FYR of Macedonia	No	Right only for parents of a child with disabilities	Yes
Malta	Yes	Right to request	No
Montenegro	Yes	Right	Yes
Netherlands	No	Right to request	No
Norway	Yes	Right	No
Poland	Yes, during parental leave	Right	No
Portugal	Yes	Right, with exceptions	No
Romania	Yes, only for women employees who are breastfeeding children under one year old.	A few collective agreements provide for this right	Yes
Serbia	N/A	N/A	N/A
Slovakia	Yes	Right, with exceptions	No
Slovenia	Yes	Right	Social security contributions paid for some parents[3]
Spain	Yes	Right	Sometimes[4]
Sweden	Yes	Right	Sometimes[5]
Turkey	Yes	Right (only for pregnant workers / workers having recently given birth / breastfeeding workers)	Yes
United Kingdom	No	Right to request	No

1 Except where the part-time working arrangement carries entitlement to Home Care Support Benefit.
2 Where the reduced hours arrangement is for parents of children under 12 (or a disabled child under 18), who are entitled to have their weekly hours reduced by 2 hours (4 hours for parents of 3 or more children under 12).
3 Those with a child under 3 or a disabled child under 18, or 2 children one of whom has not completed the first year of primary schooling.
4 Where the reduced hours arrangement is in the form of 'breastfeeding permission' (available to either parent).
5 If parents have not yet exhausted their right to parental benefit.

The same report has also provided an overview of the right to remote working or homeworking.[65]

Table 8 Access to remote working/homeworking

Country	Right to remote working/homeworking
Austria	No
Belgium	No
Bulgaria	No. It may be possible based on an arrangement with the employer.
Croatia	No
Cyprus	No, though some collective agreements provide for it
Czech Republic	No
Denmark	No
Estonia	No, unless agreed with employer
Finland	No, though many collective agreements provide for it
France	No
Germany	No, though many collective agreements provide for it
Greece	No, unless agreed with employer.
Hungary	No
Iceland	No, though some collective agreements provide for it
Ireland	No, though some collective agreements provide for a right / right to request
Italy	No
Latvia	No
Liechtenstein	No
Lithuania	No
Luxembourg	No
FYR of Macedonia	Yes
Malta	No
Montenegro	No, depending on agreement with employer
Netherlands	Right to request
Norway	No, though many collective agreements provide for it
Poland	No
Portugal	No
Romania	No
Serbia	No
Slovakia	No
Slovenia	No
Spain	No
Sweden	No
Turkey	No. It may be possible based on an individual arrangement with the employer or through collective agreement
United Kingdom	Right to request

65 McColgan, A. *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, p. 54, available at http://www.equalitylaw.eu/downloads/3631-reconciliation.

5 Occupational pension schemes (Chapter 2 of Directive 2006/54)

The CJEU has made clear in its case law – in particular in the famous *Barber* judgment[66] – that occupational pension schemes are to be considered as pay. Therefore the principle of equal treatment applies to these schemes as well. According to the CJEU, and in contrast to the so-called statutory schemes, to be discussed in Section 7, Article 157 TFEU applies to schemes which are:

i) the result of either an agreement between workers and employers or of a unilateral decision of the employer;
ii) wholly financed by the employer or by both the employer and the workers; and
iii) where affiliation to those schemes derives from the employment relationship with a given employer.

The most important consequence of this case law was that certain aspects of Occupational Social Security Schemes Directive 86/378/EEC, which was adopted in the meantime, were contrary to what is now Article 157 TFEU and had to be amended.[67] The most salient forms of discrimination in this Directive were maintaining the different pensionable ages for women and men and the exclusion of survivor's benefits for widowers.[68] In the light of the CJEU's case law, these forms of discrimination are no longer allowed. Similarly, in relation to the use of gender-segregated and different actuarial factors – in particular the different life expectancy of women and men (i.e. the fact that on average women live longer which also means that they need old-age pensions for a longer period of time) – the CJEU 'corrected' the Occupational Social Security Schemes Directive to a certain extent. The case law on occupational pensions had a considerable impact on equal treatment in occupational pension schemes in those Member States where it was previously believed that what is now Article 157 TFEU was not applicable and certain forms of discrimination were still allowed.

The case law on occupational social security schemes is now codified in Chapter 2 of Gender Recast Directive 2006/54.

5.1 Direct and indirect sex discrimination in occupational social security schemes

Most countries have prohibited direct and indirect discrimination on the ground of sex in occupational social security schemes. This is not done explicitly in **Germany**, **Latvia**, **Poland**, **Sweden** and **Turkey**. In **Sweden**, for example, the payments in occupational pension schemes are – in parallel with the case law of the CJEU – regarded as pay and are thus covered by the ban on (among other grounds) gender discrimination in the Discrimination Act. This ban covers all types of employer decisions; occupational pension schemes are not mentioned explicitly. In **Turkey**, there is no specific prohibition as regards occupational schemes but the constitutional rule on gender equality applies to state schemes as well as occupational schemes. In **Serbia** and **Montenegro** there are no occupational pension schemes.

5.2 Personal scope

Article 6 of Gender Recast Directive 2006/54 defines the personal scope of Chapter 2 as follows: 'This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons

66 Case C-262/88 *Douglas Harvey Barber* v. *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.
67 Directive 86/378/EEC was amended by Directive 96/97/EC, and has now been repealed by Recast Directive 2006/54/EC.
68 Strictly speaking, there is, under CJEU case law, a difference between the retirement age in the sense of the age at which women or men have to leave their employment, which must be equal, and the age at which women and men qualify for their old-age and related pensions. In certain schemes this difference can be maintained, see Section 7 on Statutory Schemes of Social Security.

seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.'

In most countries the personal scope is the same as in the Directive. However, some national experts report that the personal scope of national law relating to occupational social security schemes is more restricted than in the Directive (**Austria**, **Estonia**, the **FYR of Macedonia**, **Slovenia** and **Turkey**). In **Austria**, for example, where occupational pension schemes are not widespread, the personal scope of the two applicable laws (the Act on Occupational Pension Schemes (*Betriebspensionsgesetz)* and the Act on Private Pension Bearers (*Pensionskassengesetz*)) covers every worker and employee working under a private contract whose employer has established an occupational social security scheme, including board members. The laws cannot be applied to unemployed persons or persons on sick leave with social security benefits or during periods of disability. In **Germany**, the personal scope is more restricted as self-employed persons (and freelancers) cannot normally take part in occupational pension schemes. The expert from the **United Kingdom** expresses concern as to the extent of application of the Equality Act and the equivalent provisions in Northern Irish law to the self-employed: in *Jivraj v. Hashwani* the Supreme Court indicated that autonomous workers were not within the concept of 'worker' for the purposes of UK discrimination law provisions.[69]

5.3 Material scope

Article 7 of Gender Recast Directive 2006/54 defines the material scope of Chapter 2. On the basis of this provision, occupational schemes which provide protection against sickness, invalidity, old age including early retirement, industrial accidents and occupational diseases, unemployment, and occupational schemes which provide for other benefits in particular survivor's benefits and family allowances, all fall under the scope of the Directive.

In most countries the same material scope applies (e.g. **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **France**, **Greece**, **Hungary**, **Liechtenstein**, **Lithuania**, **Malta**, the **Netherlands**, **Norway**, **Portugal**, **Slovakia**, **Sweden**, **Turkey** and the **United Kingdom**).

A few experts report that national legislation relating to occupational social security is more restricted than in the Directive (**Croatia**, **Germany**, the **FYR of Macedonia**, **Poland** and **Slovenia**).

5.4 Exclusions from material scope

Article 8 of Gender Recast Directive 2006/54 provides that certain contracts and schemes can be excluded from the material scope of Directive. Most countries did not make use of this possibility. Experts from **Cyprus**, **Czech Republic**, **Germany**, **Greece**, **Ireland**, **Liechtenstein**, **Malta**, **Portugal** and **Turkey** report that the national legislator has made use of this exclusion clause. The **Czech Republic**, **Greece** and **Portugal** have adopted Article 8 verbatim in their national law. The most common exclusion appears to relate to self-employed persons. In **Germany**, self-employed persons (and freelancers) cannot normally take part in occupational pension schemes. Similarly, in **Turkey** there are no mandatory occupational pension plans for the self-employed.

5.5 Case law and examples of sex discrimination

Article 9 of Gender Recast Directive 2006/54 gives several examples of discrimination. While most countries appear to be free from the types of discrimination mentioned in this article and many experts report that there is no case law, some national experts have reported problems. Much of the case law at national level dates from some time ago. Current cases and developments are discussed below.

69 [2011] UKSC 40.

Article 9(1)f prohibits different retirement ages for men and women. As of 2018, the application of a different pensionable age for men and women in **Italy** has come to an end. In the **FYR of Macedonia**, on the basis of the main pension legislation (Article 18 of the Law on Pension and Disability Insurance), there are still different retirement ages for men and women (64 versus 62). Also, the calculation of pension regarding disability is different for men and women (Article 52). In 2016, the Constitutional Court held that the difference in retirement age does not constitute sex discrimination. Instead, the Court characterised the difference as positive discrimination, based on the special societal protection of mothers and motherhood.

Apart from different retirement ages, other problems and developments also appear. In **Belgium**, the Court of Cassation fairly recently found that as the Gender Act of 10 May 2007 is *d'ordre public*, a retired female worker could rely on Article 12 of the Act to reclaim occupational disablement benefits which had been denied to her when she had reached the age of 60 (before the Act came into force), while they would have been allowed to a man up to the age of 65.[70] In **Finland** differential actuarial factors have been problematic. This will be discussed under statutory schemes. In **Germany**, while the law no longer permits different retirement ages for men and women, indirect sex discrimination remains a major problem. The Federal Labour Court has held that a failure to take periods of bringing up children into consideration for the purpose of occupational pensions constitutes neither direct nor indirect discrimination on the grounds of sex and does not violate European or national constitutional law.[71] The condition of a 15-year period of service for the same employer to be entitled to occupational pensions was not considered to constitute indirect sex discrimination either.[72] The Federal Labour Court explicitly rejects the addition of (interrupted) periods of service for the same employer.[73]

The **Icelandic** expert reported an interesting 2012 Supreme Court case. The Supreme Court held that the pension rights of a man in a divorce case did not fall under 'marriage property' under the Law in Respect of Marriage.[74] The claimant, the former wife, in this case referred to Article 102(2) of the Marriage Act which states that pension rights should not be excluded from divorce settlements if apparently unreasonable. The couple in this case had been married for 35 years and had had four children. His income had been considerably higher than hers as she had not been working full time and subsequently he was expecting a higher old-age pension, albeit no concrete calculation was presented with regard to their expected pensions. The Supreme Court held that pension rights in case of divorce should only be shared in exceptional circumstances as the general principle in the law is that pension rights are not to be shared in the case of divorce. The Supreme Court in assessing whether these circumstances were exceptional held that all circumstances must be scrutinized in context; the claimant (the wife) had acquired her own pension rights with her work outside the home and it had to be assumed that she would be able to increase her entitlement to pension rights before retiring. The Supreme Court furthermore pointed out there was no explicit evidence regarding the value of the pension rights in question to support the claim of exceptional circumstances hence confirming the ruling of the lower court.

In **Greece**, some occupational schemes continue to be discriminatory, in spite of national case law condemning this. For example, Article 32(1) of the Civil and Military Pensions Code[75] sets more favourable conditions for the granting of a pension to fathers of deceased military personnel than those applying to mothers. Although the Court of Audit[76] held that mothers were entitled to a pension subject to the same conditions as fathers, the provision remained.

70 Judgment of 16 September 2013, (2014) *Chroniques de droit social/Sociaalrechtelijke Kronieken*, p. 282.
71 Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08.
72 Federal Labour Court, judgment of 12 February 2013, 3 AZR 100/11.
73 Confirmed by the Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10.
74 Supreme Court case No. 568/2012.
75 Presidential Decree 169/2007, OJ A 210/31.8.2007.
76 Court of Audit 751/2000.

5.6 Sex as an actuarial factor

One particularly difficult issue is the use of actuarial factors in occupational social security schemes when they differ according to sex.[77] The use of gender-related actuarial factors is, within certain limits, still allowed under the Recast Directive (see Article 9(1) (h) and (j)).

Gender-related actuarial factors in occupational pension schemes can be used in **Belgium**, the **Czech Republic**, **Germany** (partly), **Greece**, **Ireland**, **Italy**, **Liechtenstein**, **Malta**, the **Netherlands** and the **United Kingdom**. In **Germany**, lawyers are discussing the question whether the *Test-Achats* ruling should be applied to occupational pension schemes.[78] In 2013, the Higher Regional Court of Celle decided that the state pension agency (covering around four million employees in the public sector) is obliged to employ gender-neutral actuarial factors under constitutional and European equality law.[79] The Higher Regional Court of Cologne disagreed.[80] In 2017, the Federal Court of Justice decided that the use of different gender-based actuarial factors by the state pension agency or by pension schemes organised under private law is incompatible with the prohibition of sex/gender discrimination under the German Constitution as well as with Directive 2006/54 and the *Test Achats* ruling.[81] **Latvia** has no formal provision allowing gender-based actuarial factors, but in practice these can be used in cases where an employer provides an insurance product under an occupational social security scheme which does not fall under the Law on Private Pension Funds.

5.7 Difficulties

A perennial source of confusion is the distinction between occupational schemes and statutory schemes. In some countries the characteristics of the national social security system do not correspond with the concept of 'occupational pension schemes'. This led the respective governments to believe that it was not necessary to transpose the EU provisions on occupational social security schemes, even after the amendments to the initial directive by Directive 96/97/EC. The distinction between statutory and occupational schemes is (and was) problematic in for example **Greece** (where social security legislation and case law deal with all schemes in the same way, without distinguishing between statutory and occupational ones) and **Latvia**. Also, some of the 'new' Member States or candidate countries, in particular the post-communist states, had restructured their social security system in accordance with the so-called 'World Bank Model' (e.g. **Bulgaria**, **Latvia** and the **FYR of Macedonia**). This model does not follow a three-pillar structure like the one used in the EU framework (i.e. statutory, occupational and private schemes). Instead, the World Bank Model follows the distinction between state schemes, mandatory savings schemes and voluntary schemes. It is less obvious how to apply the EU criteria for occupational schemes to the latter model.

77 See Jacqmain and Wuiame, *Gender based actuarial factors and EU gender equality law*, EELR 2015/1, https://publications.europa.eu/en/publication-detail/-/publication/2bc75714-7955-46e2-a500-669d41fdf9cf/language-en/format-PDF/source-86561749, pp. 14-24.

78 E.g. Beyer, A., Britz, T. (2013), 'Zur Umsetzung und zu den Folgen des Unisex-Urteils des EuGH' (Implementation and Consequences of the Test-Achats Ruling) *Versicherungsrecht* No. 28, pp. 1219-1227; Labour Court of Munich, judgment of 21 May 2013, 22 Ca 15307/12.

79 Higher Regional Court of Celle, judgment of 24 October 2013, 10 UF 195/12.

80 Higher Regional Court of Cologne, judgment of 6 January 2015, 12 UF 91/14.

81 Federal Court of Justice, judgment of 8 March 2017, XII ZB 663/13, with further references.

6 Statutory schemes of social security (Directive 79/7)

Equal treatment of women and men in statutory schemes of social security was introduced in 1979, by Social Security Directive 79/7/EEC. Statutory schemes ensure certain benefits for workers. It refers to measures established by national legislation that protect workers against risks such as sickness, invalidity, old age, accidents at work, occupational diseases, and unemployment.

In contrast to occupational pension schemes, discussed in the previous chapter, statutory social security schemes do not fall under the concept of pay. Some litigation revolved around the question of whether a scheme is statutory or occupational. This is particularly important since certain exceptions are allowed under Statutory Social Security Directive 79/7/EEC, but not under Article 157 TFEU or Recast Directive 2006/54/EC.

6.1 Implementation principle of equal treatment

Most of the transposition measures taken by the respective countries concerned amendments to the rules governing the various schemes. In many countries, social security legislation is a complicated matter, governed by a web of legislative provisions, and this is also true for the introduction of gender equality in this domain. All the relevant legislation had to be screened. Almost all national experts report that the principle of equal treatment for men and women in matters of social security has now been implemented in national legislation.

In some countries this has not been done by specific legislation expressly transposing Directive 79/7, but rather through general equal treatment law or provisions in the Constitution (e.g. **Belgium**, **Denmark**, **France**, **Hungary**, **Spain**). Thus, in **Spain** there is no legislation or single legal provision expressly stipulating the prohibition of gender discrimination in statutory social security schemes. However, Article 14 of the Constitution, which generally prohibits gender discrimination, applies to social security as well. In **Greece**, a similar provision of the Constitution (Article 4(2)) also applies to social security in general, while there is legislation of limited scope that prohibits it in the field of Directive 79/7. In the **Netherlands** as well as **Italy**, there is no specific national legislation prohibiting discrimination in statutory social security schemes. Nearly all forms of sex discrimination in this area have been eradicated in these countries, however.

All social security schemes are gender neutral (with the exception that there are different pensionable ages for men and women – discussed below). However, there are no specific provisions explicitly mentioning the principle of equal treatment.

6.2 Personal scope

Article 2 of Directive 79/7 lays down the personal scope of the Directive. On the basis of this provision, the Directive applies to 'the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons.'

While many experts report that the personal scope of national law is the same as in EU law, several experts have reported that the national law relating to statutory social security is broader in personal scope than the Directive (**Finland**, **Iceland**, **Italy**, **Latvia**, the **FYR of Macedonia**, **Montenegro**, **Norway**, **Serbia**, **Slovenia**, **Sweden** and **Turkey**). For example, in **Latvia**, the Law on Social Security applies to all persons residing in Latvia legally (with some exceptions concerning citizens of 3rd countries having temporary residence permits). In **Sweden**, generally speaking, the social security system is individual and based on either residence or gainful activities, including both employment and self-employment. Many schemes – such as that on parental leave and pensions – include a guaranteed level covering all Swedish residents,

which makes the coverage broader than required by Article 2. The scope is also broader in **Serbia**, as Article 4 of the Law on Social Protection stipulates that each individual or family in need of help and support to overcome their social and subsistence difficulties, and to create conditions in order to meet their basic needs, have the right to social security.

In the **Netherlands**, however, the personal scope appears more restricted, as self-employed persons are not always included.

6.3 Material scope

Article 3 of Directive 79/7 lays down the material scope of the directive. It covers sickness, invalidity, old age, accidents at work, occupational diseases, and unemployment.

While many experts report that the material scope of national law is the same as in EU law, several experts have reported that national law relating to statutory social security is broader in material scope than the Directive (e.g. **Austria**, **Belgium**, **Finland**, **Germany**, **Latvia**, **Liechtenstein**, **Montenegro**, **Serbia**).

Social assistance is partially excluded from the scope of the Social Security Directive. Only where it intends to supplement or replace statutory schemes does the prohibition of discrimination laid down in that directive apply (Article 3(1)(b)). For example, a family benefit for low-income families that supplements an unemployment benefit would fall under the scope of the directive.

Article 3(2) stipulates that the directive does not cover family benefits and survivors' benefits. The exception is when family benefits are granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a). Nevertheless, in almost all of the Member States and EEA countries, gender discrimination in these areas has been abolished, independently of EU law requirements. **Cyprus** is an exception when it comes to survivor's benefits: in that country a widow's pension is payable only to a widow. A widower's pension is payable only if a widower is permanently incapable of self-support. The Parliament amended the law, but the President of the Republic referred it to the Supreme Court for a legal opinion on whether the law in unconstitutional, with reference to Article 80 of the Constitution. There is currently a proposal to amend the law as regards widower's pensions. In **Italy**, some groups of part-time workers (i.e. those working less than 24 hours a week and vertical part-timers) are excluded from family allowances. In **Greece**, the legislation implementing Directive 79/7 does not cover all the schemes which must be considered statutory.

6.4 Exclusions from material scope

Article 7 of Directive 79/7 contains a number of derogations Member States are permitted to make from the principle of equal treatment. In this respect a similar tendency can be observed: several countries have abolished gender discrimination on their own initiative. In other words, several States do not make use of the derogations at all or do not do so any more (**Belgium**, **Denmark**, **Ireland**, **Luxembourg**, **Montenegro**, **Netherlands**, **Norway**, **Slovakia**, **Sweden**). The two most important derogations relate to periods of care and to the pensionable age.

Derogations from equal treatment: periods of care (Article 7(1)b)

Article 7 (1) (b) provides that Member States can decide to exclude from the principle of equal treatment advantages in respect of old-age pension schemes granted to persons who have brought up children, and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. In the States under review, there is a whole array of 'advantages' that relate to the fact that women (or more often one of the parents) have engaged in raising the children. These advantages can take the form of qualifying periods, i.e. periods on leave that still count for the purposes

of (certain types of) social security, various bonuses or notional contributions. Much depends on the national scheme in question.

In **France**, for example, legislation granting pension credits to mothers per child had to be amended.[82] However, female civil servants still enjoy an increased insurance coverage for pensions linked to maternity if there is an agreement between the father and the mother. In case the parents do not agree, the advantage will be granted to the parent who can prove that he/she has contributed more and for a longer period to the education of the child. Another example is **Italy**, where advantages as regards old-age pensions for the purpose of child-rearing are provided for the benefit of women. More favourable coefficients of transformation (according to which pensions are calculated) are fixed for maternity. Then, again in relation to maternity, a reduction in the age of retirement of 4 months per child is granted, with a maximum limit of 12 months. As an alternative to this, it is also provided that women with children are able to receive a retirement pension subject to reduced conditions. In **Spain**, Article 60 of the General Law of Social Security stipulates a pension supplement exclusively applicable to mothers of at least two children. The supplement also applies to the mothers of adopted children. No equivalent measure is available to fathers who were responsible for taking care of the children. The supplement is an increase of between 5 and 15 % of the pension and may exceed the maximum pension established in the social security system. The supplement is established to compensate for the losses in their professional careers that women suffer as a result of caring for their children. The Spanish legal expert notes that the exclusion of fathers from this benefit is problematic, as these losses can also occur for men who are dedicated to the care of their children.

Derogations from equal treatment: differences in pensionable age (Article 7(1)a)

As far as the traditional difference in pensionable age is concerned, the overall picture of the statutory schemes in the Member States, the EEA and the candidate countries is as follows:

- In the largest group of States there is no difference (any more) in this respect between men and women (**Belgium**, **Cyprus**, **Denmark**, **Finland**, **France**, **Germany**, **Greece**, **Iceland**, **Ireland**, **Italy** (as of 2018), **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**, the **Netherlands**, **Norway**, **Portugal**, **Sweden**, **Spain**).
- In other States there is a process of equalising the pensionable age, sometimes with long transitional arrangements (**Austria**, **Croatia**, **Czech Republic**, **Estonia**, **Hungary** (general rule for old-age pension), **Lithuania**, the **FYR of Macedonia**, **Serbia**, **Slovakia**, **Turkey** and the **United Kingdom**).
- In the remaining States the difference in pensionable age is maintained (e.g. **Bulgaria** (although the difference is regularly reviewed by the Government and new rules entered into force on 1 January 2016), **Romania** and **Slovenia**).
- **Hungary** and **Poland** form a category of their own: these are countries which have recently introduced differences between men and women in this respect. Hungary introduced more differences in the form of an early retirement option available only for women, and in 2016, Poland reinstated different pensionable ages: 60 for women and 65 for men.

Interestingly, it is in particular former 'socialist' countries that have maintained a difference in pensionable age the longest. In these countries the difference is regarded as fair since it compensates for unequal working conditions for men and women. As we have seen in the previous chapter on occupational pension schemes the CJEU has another opinion concerning this difference in pensionable age cases and such direct sex discrimination is prohibited. However, in the area of statutory social security differences in pensionable age are not prohibited. Although the difference has given rise to some litigation, the (male) complainants have not been successful very often up to now. In the **Czech Republic**, the statutory pension system applies a different pensionable age for men and women and it also allows only women to

82 See also Case C-206/00, *Henri Mouflin v. Recteur de l'académie de Reims* [2001] ECR I-10201 (*Mouflin*) and more recently Case C173/13, *Maurice Leone, Blandine Leone v. Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales*, n.y.r.

reduce their pensionable age if they have raised more than one child. Whereas there is one pensionable age for men, which is gradually being increased, there are differences in the pensionable age for women according to the number of children they have raised. This does not apply to men, even if a man has raised his children alone. The pensionable age will be equal for men and women in 2044, when people born in 1977 will reach retirement at 67. Until then, the current discrimination against men is maintained by legislation. This practice has not been changed following the ECtHR ruling in *Andrle*,[83] or even following the CJEU ruling in *Soukupova*.[84]

6.5 Sex as an actuarial factor

Unlike Recast Directive 2006/54 dealing with occupational social security schemes (see section 6.6), Directive 79/7 does not mention the use of gender-related actuarial factors. The list of derogations under Article 7(1) is exhaustive, and the use of gender-based actuarial factors in the calculation of social security benefits is not included. The first time the CJEU ruled on the legality of the use of sex-based actuarial factors in the calculation of social benefits, was Case C-318/13 (*X*). The Court delivered a judgment following a dispute between X and the Finnish Ministry of Social Affairs and Health concerning the grant of a lump-sum compensation paid following an accident at work.[85] The calculation of that lump sum was based on the age of the worker and his remaining average life expectancy. In order to determine this, the worker's sex was taken into account. X, a man, then complained that he received less compensation than a woman of the same age would have received in a comparable situation. The CJEU ruled that the difference in calculation constituted a form of unequal treatment, which cannot be justified.[86]

In most countries, sex is not used as an actuarial factor in the calculation of social security benefits. The exceptions are **Belgium**, **Bulgaria**, **Finland** and **Germany**. In **Bulgaria**, at the end of 2017, under Act No. 92/2017, the use of sex as an actuarial factor in additional life pension for old age considered as part of the statutory pension system was declared inadmissible. Implementation of the act is yet to be monitored.

In **Finland**, following the CJEU's judgment in *X*, the Supreme Administrative Court found that the use of sex-segregated life expectancy in calculating lump-sum compensation under the Employment Accidents Act breached EU law, and that X had suffered a loss due to the Act.[87] The Employment Accidents Act (608/1948) was replaced by the Act on Employment Accidents and Occupational Diseases (459/2015), which came into force on 1 January 2015. The new Act does not contain any provisions using sex as an actuarial factor.

Belgian legislation concerning accidents at work is similar to the Finnish one, except that only one third of the total value of the life-long compensation benefit may be paid as a lump-sum amount; gender-segregated mortality tables are used in order to calculate this value. After the European Commission requested all Member States to screen their statutory security schemes in the light of Case C-318/13, a Royal Decree amended a previous decree in order to impose the use of gender-neutral actuarial factors as to lump sums to be paid as of 1 January 2016.

In **Bulgaria**, until almost the end of 2017, actuarial factors based on sex were still used in the calculation of social security benefits in the area of supplementary mandatory social insurance for persons born after 31 December 1959. This practice implemented by private insurance companies was systematically

83 *Andrle v. the Czech Republic* [2011] n.y.r. (Application no. 6268/08).
84 Case C-401/11 *Blanka Soukupová v. Ministerstvo zemědělství* [2013] ECR n.y.r.
85 C-318/13 (*X*).
86 The Court reasoned that: 'Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation.' (Finding 38).
87 KHO:2015:8.

challenged and brought before the Supreme Administrative Court between 2011 and 2013 by a group of Bulgarian women born after December 1959. Their complaints were all rejected.

In **Germany**, sex-based actuarial factors are not generally used. Concerning pensions for civil servants, however, the administration uses gender-specific mortality tables to identify the average life expectancy of men and women and calculates (among other things) on this basis. The Federal Administrative Court doubts that this method of 'pure statistical gender equality' is compatible with the Union law principle of equal pay and has expressed its interest in a clarifying decision of the CJEU.[88]

6.6 Difficulties

As regards difficulties with the implementation of Directive 79/7, some countries face the problem mentioned in Chapter 6.7 above: that their security schemes are not comparable to either statutory social security schemes or occupational social security schemes (e.g. **Romania** and **Bulgaria**).

The CJEU has often answered preliminary questions on issues of both direct and indirect sex discrimination in statutory social security schemes.[89] Legislative gaps persist however. In particular, several national experts have raised the precarious position of some groups of part-time workers – often women – who work only few hours per week (e.g. **Germany** and the **Netherlands**).

The experts from Italy and Latvia report inequalities in the calculation of particular benefits, due to women taking childcare leave and thereby interrupting their contributions to social security schemes. In **Latvia**, during childcare leave, parents are insured by the State instead of insuring themselves, but in a minimum amount. Consequently, being on childcare leave negatively affects the amount of the old-age pension. The expert from **Italy** notes that the latest legislation on pensions is far from women-friendly. Act No. 214/2011 provides for an increase of the minimum contribution condition from 5 to 20 years: if the claimant has less than 20 years' contributions, the pension will be paid from the age of 70. Furthermore, it introduced a new minimum benefit amount condition according to which pensions will be paid at 70 rather than at 66 (67 by 2021) when their amount is less than EUR 643 a month. The relevant conditions are particularly difficult to fulfil by those who do atypical work, i.e. intermittent, temporary, occasional and part-time work, which is often done by women. This means that many women may risk receiving their pension only from the age of 70.

In **Spain**, there is also a concrete problem in relation to the pension supplement that was established exclusively for mothers in Article 60 of the General Law of Social Security in 2015, given that it implies a difference between mothers and fathers that take care of children which could be in violation of Article 7.2 of Directive 79/7. Such differences should disappear, not be newly established.

In **Luxembourg**, the High Council of Social Security questioned the compatibility of Article 196 §2(c) of the Social Security Code with Article 10a §1 of the Constitution. The background history to Article 196 is that when it was introduced, it was considered that young women could conclude marriages with older men with the sole objective of being entitled, without paying pension contributions, to survivor's pension rights for the remainder of their lives. In order to prevent such an excessive burden on the finances of the old-age pension scheme, a limit of 15 years in the age difference between spouses was introduced. This provision was never repealed. While the Superior Court did not find indirect discrimination on grounds of sex, it found discrimination between spouses or partners with an age difference of greater than 15 years and those with an age difference of less than 15 years. However, the Constitutional Court did not consider

88 Federal Administrative Court, judgment of 5 September 2013, 2 C 47/11.

89 See for an example of prohibited indirect sex discrimination in Austrian law the recent Case C-123/10 *Waltraud Brachner v. Pensionsversicherungsanstalt* [2011] ECR I-10003 (*Brachner*); Case 385/11 *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012] ECR n.y.r.

the provision to be contrary to the Constitution, arguing that it seemed reasonably proportionate to the aim pursued.[90]

90 Case law N°129 of 7 July 2017. Memorial A N°638 of 14 July 2017. Website: http://data.legilux.public.lu/file/eli-etat-leg-memorial-2017-638-fr-pdf.pdf.

7 Self-employed workers (Directive 2010/41/EU and provisions of the Recast Directive)

Protection against gender discrimination of self-employed persons, their spouses, and insofar as recognised by national law, the life partners of the self-employed, who are not employees or partners, is a complex area. The number of self-employed persons has been increasing in Europe and they experience severe consequences of the recent economic downturn. The relatively weak provisions of Directive 86/613/EEC have been modernised and replaced by the stronger provisions of Directive 2010/41/EU, which repeals the former Directive. But even so, the protection of self-employed persons in EU law still shows lacunas. Directive 2010/41/EU requires that the Member States take the necessary measures to ensure the elimination of all provisions which are contrary to the principle of equal treatment, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity (Article 4(1)). Direct and indirect discrimination, harassment and sexual harassment and an instruction to discriminate are prohibited. The Directive does not extend the social protection of the self-employed, but where a system for social protection for self-employed workers exists in a Member State, that State has to take the necessary measures to ensure that spouses and life partners can benefit from social protection in accordance with national law (Article 7). The Member States have to take the necessary measures to ensure that female self-employed workers, and female spouses and life partners may, in accordance with national law, be granted a sufficient maternity allowance allowing interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks (on a mandatory or voluntary basis). Measures also have to be taken to ensure access to temporary replacements or social services (Article 8). Worth mentioning is that equality bodies should among other things provide independent assistance to victims of discrimination, conduct independent surveys etc. (Article 11).

To this one may add, however, that various other gender equality directives are also relevant for the equal treatment of the self-employed, but then in certain respects only. Directive 2006/54/EC, for instance, prohibits discrimination in the access to self-employment (Article 14(1)(a)) and occupational social security schemes (Articles 10-11). Directive 2004/113/EC, on Goods and Services, is also relevant to the self-employed, because it requires equal treatment in relation to, for instance, the renting of accommodation and services such as banking, insurance and other financial services.

7.1 Implementation of Directive 2010/41/EU

The European Network of Legal Experts in the Field of Gender Equality has recently published a report on the implementation of Directive 2010/41/EU.[91]

In several States no specific law implementing Directive 2010/41/EU has been adopted (e.g. **Belgium**, **France**, **Liechtenstein**, **Spain**). In several other States existing laws were amended to include provisions related to the self-employed (e.g. **Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Estonia**, **Hungary**). In some countries, general equal treatment legislation applies but this does not necessarily cover the full scope of the Directive (e.g. **Austria**, **Denmark**, **Finland**, **Iceland**, **Italy**, **Germany**, the **Netherlands**, **Norway** and the **United Kingdom**). **Greece** has enacted a law to specifically implement the directive,[92] but not all of the directive's provisions were transposed.

91 Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity,* available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295.

92 Act 4097/2012 (OJ A 235/03.12.2012).

7.2 Personal scope

Article 2 of Directive 2010/41/EU lays down the personal scope of the directive. It stipulates that the Directive covers self-employed workers and their spouses or life partners. Self-employed workers are defined as 'all persons pursuing a gainful activity for their own account, under the conditions laid down by national law'. This leaves considerable room for national law to define who might be considered a self-employed worker. The question of who is a self-employed worker according to national law is difficult, however.[93] The definition of self-employment is often not clear at national level. Barnard and Blackham have provided a categorisation of different types of definitions.[94]

Whereas some countries have copied the definition of the Directive (e.g. **Greece**), in several States 'self-employed person' or 'self-employment' is not defined at all in national legislation (**Austria**, **Bulgaria**, **Denmark**, **Finland**, **France**, **Italy**, **Ireland**, **Montenegro**, the **Netherlands**, **Poland** and **Sweden**). In **France**, the criteria for self-employment are developed on the basis of cases of the *Cour de Cassation* (the French Supreme Court). According to the case law, a self-employed person can be defined as a person who provides services to another party in an independent and non-subordinate manner.

7.3 Different categories of self-employed workers and life partners

Related to the question of personal scope, two particular issues arise: the first is whether all self-employed workers are considered part of the same category, and the second is whether national law pertaining to self-employment also recognizes and covers life partners.

As to the first issue, the Directive does not distinguish between different types of self-employed workers. Some countries, however, do differentiate between categories of self-employed workers (e.g. **Croatia** (where the differentiation exists only for tax purposes, not for social security legislation), **Germany**, **Iceland**, the **FYR of Macedonia**, **Romania**, **Spain** and **Turkey**). In some of these countries not all self-employed workers enjoy the same rights. In **Iceland**, for example, not all self-employed workers are considered to be part of the same category with regard to unemployment. There is a special unemployment fund for benefit payments to farmers, small fishing-vessel owners and lorry drivers.[95] Other self-employed individuals, just like wage earners, are entitled to apply to the Directorate of Labour for unemployment benefits when becoming unemployed. In **Romania** and **Turkey**, agricultural workers also form a separate category. In **Germany**, there are hundreds of professions in the field of self-employment and many of them are organised in associations with the right of self-regulation and their own social security systems, especially professional pension funds. Thus, self-employed persons are covered by various and very different federal and state laws, as well as professional regulations. In **Spain**, there are two kinds of self-employed workers: the ordinary ones (who are called *Autónomos)*, and the economically dependent self-employed workers (who are called *Trabajadores Autónomos Económicamente Dependientes* or *TRADE).*

As to the second issue, the recognition of spouses and life partners of self-employed persons, the picture at the national level is diverse. Experts from **Austria**, **Bulgaria**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, the **FYR of Macedonia**, **Malta**, **Montenegro**, **Norway**, **Poland**, **Romania**, **Serbia**, **Slovakia** and **Turkey** report that national law does not recognise life partners or only in a small part. In **Greece** they are recognised: social security rights were granted in 2016, but only to life partnership agreements that were entered into after 23 December 2015. People who entered into a life partnership agreement before 23 December 2015 have the right, if they so wish, to acquire

93 Barnard, C., Blackham, A, 'Self-employment in EU Member States: the Role for Equality Law', *European Equality Law Review* 2015/2, pp. 7-10.

94 Barnard, C., Blackham, A, 'Self-employment in EU Member States: the Role for Equality Law', *European Equality Law Review* 2015/2, pp. 7-10.

95 Article 7 of the Unemployment Insurance Act No. 54/2006.

such rights by means of a notarial deed. However, life partners have not yet been granted rights related to employment.

7.4 Material scope

Article 4 of Directive 2010/41/EU lays down the material scope of the Directive. It provides that 'there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity' (Article 4(1)). Harassment and sexual harassment and an instruction to discriminate are also prohibited.

Many experts report that the material scope of national law is the same as in the Directive (e.g. **Austria**, **Cyprus**, **Estonia**, **Greece**, **Slovakia**, **Spain**, **Sweden**).

7.5 Positive action

Article 5 of Directive 2010/41/EU gives Member States the possibility to take positive action (within the meaning of Article 157(4) TFEU) with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurial initiatives among women.

The majority of States have not made use of this power in the context of self-employment (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, **Czech Republic**, **Denmark**, **Finland**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Sweden** and the **United Kingdom**).

Where positive action has been taken, this has been related to providing financial incentives and subsidies for female entrepreneurs (**Croatia**, **Spain**, **Turkey**); preferential treatment for loans for female entrepreneurs to set up or develop a business (**Estonia** (though this is solely project based, a national support scheme does not exist), **France**, **Germany**, **Italy**, **Poland**, **Sweden**, **Turkey**); providing training (**Croatia**, **Estonia**, **Italy**, the **FYR of Macedonia**, **Turkey**) and advice services (**Spain**); tax relief or exemptions (**Poland**) and social security contribution reductions (**Spain**); support, mentoring, counselling and other activities to encourage women's self-employment (**Germany**, the **FYR of Macedonia**, **Montenegro**, **Serbia**); financial support for independent women's networks (**Luxembourg**).[96]

Despite these actions and programmes, gender inequality persists in this sphere. The **Serbian** expert, for example, explained that women face more unfavourable conditions for the development of their enterprises than men due to their position in the labour market, the gender gap in property ownership, greater involvement of women in the home, and the still strong gender stereotypes which cause a lack of confidence among women and influence their willingness to initiate their own business venture.[97] The main problems in Serbia are: difficulties in obtaining funds from financial institutions and lack of initial capital, disadvantageous traditional lending models and non-creditworthiness, the property usually being registered in the husband's name, the lack of microfinance institutions, the lack of knowledge and skills for entrepreneurship, etc.[98]

96 Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295 at pp. 19-20.

97 See Arandjelovic, R. *Fueling the Economic Potential of Women in Serbia, Overview of the situation in female entrepreneurship in Serbia, obstacles most often encountered by women in business and proposed answers*, available at http://www.policycafe.rs/documents/financial/research-and-publications/A2F-for-women/Women%20Entreoreneurship%20Thesis.pdf, accessed 7 December 2016, p. 5.

98 The National Strategy for the Improvement of the Position of Women and Promotion of Gender Equality, Official Gazette of the Republic of Serbia, No. 15/2009.

7.6 Social protection

Article 7 of Directive 2010/41/EU provides that '[w]here a system for social protection for self-employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners... can benefit from a social protection in accordance with national law.' The Member States may decide whether the social protection is implemented on a mandatory or voluntary basis.

All countries have a system of social protection in place for self-employed workers. These systems vary considerably however. In some countries, self-employed workers are covered in the same way as employees (e.g. **Croatia**, **Montenegro**, **Slovenia**). Often there is a combination of mandatory (e.g. covering pensions and health insurance) and voluntary (e.g. covering sickness insurance) schemes in place. In the **Netherlands**, for example, self-employed persons are covered by the national insurance schemes, which provide for basic welfare benefits, by the Surviving Dependants Act, and from the pensionable age (65 years and 3 months in 2015) by the General Old-Age Pensions Act. They cannot, however, automatically rely on employment-related insurance schemes, such as unemployment and disability benefits. Instead, they can choose to join these insurance schemes voluntarily (but will only benefit if they meet certain criteria, such as having paid contributions for at least three years), to take out (generally more costly) private insurance or choose to remain uninsured. Also, they do not (yet) have access to a supplementary collective pension scheme.

The recent report on the implementation of the directive, by Barnard and Blackham, notes that social protection for spouses (and, sometimes, life partners) is mandatory in most countries (including **Austria**, **Belgium**, **Croatia**, **Cyprus** (not life partners), **Czech Republic**, **Denmark**, **Finland**, **France** (not spouses and life partners in the liberal professions), **Germany**, **Iceland**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, the **FYR of Macedonia** (not life partners), the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Spain**, **Sweden** and **Turkey** (not life partners).[99] Voluntary systems exist in **Bulgaria**, **Estonia**, **Lithuania** (not life partners), **Luxembourg** (voluntary if not in agriculture), **Romania**, **Slovakia**, **Slovenia**, and the **United Kingdom** (though with some residence-based entitlements).[100] In **Greece**, Article 7 of the directive has not been transposed and the persons covered by this Article are not dealt with by social security legislation.

7.7 Maternity benefits

Article 8 of Directive 2010/41/EU regards maternity benefits for female self-employed workers and female spouses and life partners of self-employed workers. Paragraph 1 states that: 'The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners... may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.'

Barnard and Blackham reported that few countries have amended their law to comply with this Article.[101] Several national experts have reported problems with the implementation of this provision either formally or in practice (e.g. **Denmark**, **Germany**, **Greece**, **Latvia**, **Lithuania** and the **FYR of Macedonia**). In 2016, **Denmark** repealed the 2013 Act on Maternity for Self-Employed Workers because only very few

99 See Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295 at p. 22.

100 See Barnard C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295 at p. 22.

101 See Barnard, C. and Blackham, A. (2015), *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295 at p. 23.

self-employed persons made use of the fund it had established. In **Greece**, only self-employed women – not spouses or life partners – may be granted a maternity allowance. In **Germany**, only self-employed artists and publicists as well as helping family members in the agricultural sector are entitled to maternity allowances under special regulations. In **Lithuania**, spouses of self-employed persons are not subject to the regulation on maternity allowances, while life partners are not recognised at all. Similarly, in the **FYR of Macedonia** female spouses or life partners cannot enjoy maternity leave either.

The expert from **Spain** provides an illustration of how maternity leave for self-employed women works in practice: as self-employed women usually declare a lower than real income, the maternity allowance hardly serves to replace the loss of the previous income. In fact, self-employed women tend to go back to work immediately after the compulsory six weeks after birth, discarding the rest of the maternity leave. In Spain, there are no services supplying temporary replacements or other kinds of social services, other than the reductions in the social security contribution if the self-employed woman hires someone to replace her during her maternity leave or during the time devoted to the care of children.

7.8 Occupational social security

Article 10 of Recast Directive 2006/54 stipulates that 'Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest'.

As regards the question whether national law has implemented the provisions regarding occupational social security for self-employed persons the picture is diverse. Experts from **Austria**, **Estonia**, **France** (though the principle of equality does apply), **Germany**, **Hungary**, **Ireland**, **Latvia** (not explicitly), **Lithuania**, the **FYR of Macedonia**, **Montenegro** (occupational social security not recognised), **Serbia** (occupational social security not recognised), **Spain**, **Sweden**, **Turkey** and the **United Kingdom** report that this is not the case. In several of these countries, the view was taken that no implementation was required (e.g. the **United Kingdom**). In **Greece**, Article 10 has been reproduced in the Act transposing the Directive, but without any clarification as to which Greek schemes are occupational.

7.9 Exceptions related to occupational social security

Article 11 of Recast Directive 2006/54 provides for exceptions for self-employed persons regarding matters of occupational social security. In certain circumstances, Member States may defer compulsory application of the principle of equal treatment. Such exceptions only appear to apply in **Greece**, **Ireland** and **Portugal**. In **Ireland**, single member schemes are excluded from the Pensions Acts. In **Portugal**, Article 5 of Decree-Law No. 307/97, of 11 November 1997 (which deals with gender equality in occupational social security) uses the exceptions for self-employed persons regarding matters of occupational social security. As regards **Greece**, the national expert reports that the relevant article of the Act transposing the Directive is not clear.[102]

7.10 Prohibition of discrimination

Article 14(1) of Recast Directive 2006/54 provides that there shall be no direct or indirect sex discrimination in relation to 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'. This prohibition of discrimination has been implemented in **all countries**, albeit not everywhere explicitly specifically for self-employed workers. The exceptions are **Lithuania**, the **FYR of Macedonia**, **Montenegro**, and **Serbia**. Notable about this list is that it includes all candidate countries. In **Germany**, the prohibition of gender-based discrimination against self-employed persons

102 Article 8(3) of Act 3896/2010.

is restricted to access to self-employed activities and promotion. It is contested whether self-employed persons may invoke Section 19 of the General Equal Treatment Act (transposing requirements of Directive 2004/113) against discrimination concerning working conditions or the discriminatory termination of self-employment contracts.[103] Up until now, the courts have not confirmed this possibility. In **Sweden**, as regards the self-employed there is no prohibition applicable to discrimination as regards the choice of a business partner. Nor does legislation cover the termination of contractual relationships with a self-employed person.

103 See Thüsing, G. (2007), *Arbeitsrechtlicher Diskriminierungsschutz*, Paragraph 94, Munich.

8 Equal treatment in relation to goods and services

In conformity with Directive 2004/113, all EU Member States have proceeded to prohibit in their laws direct and indirect discrimination on grounds of sex in the access to and supply of goods and services, also including non-EU Member States **Iceland**, **Liechtenstein**, the **FYR of Macedonia**, **Montenegro** and **Norway**. In **Turkey**, the new Article 5 of the Law on the Human Rights and Equality Institution transposes this directive as well. In **Serbia** the prohibition concerns only the provision of services and not goods.

(i) Scope of domestic laws

According to Article 3(1) of the Directive, it 'shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.' Yet, there are quite some differences between states when it comes to the material scope of their national laws, depending in particular on whether they have used the exclusion of Article 3(3): 'This Directive shall not apply to the content of media and advertising nor to education.'

While quite some countries have used the above exclusions (**Austria**, **Cyprus**, **Estonia**, **Finland**, **Germany**, **Greece**, **Italy**, **Liechtenstein**, **Norway**, **Poland**, **Portugal**, **Romania**), in yet more countries the material scope is actually broader than required by the Directive because it also applies to the content of media, advertising and education (**Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Estonia**, **Hungary** (housing and education), **Iceland**, **Latvia**, **Lithuania**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, **Serbia**, **Slovakia**, **Slovenia**, **Spain** and the **United Kingdom**). Yet, in **Slovene** law the terms goods and services are not defined.

The scope of **Maltese** and also **Macedonian** law are framed very widely, the latter referring to bodies of the legislative, executive and judicial authority, local self-government units and other bodies of the public and private sector, public enterprises, political parties, mass media and the civil sector, and all the entities providing goods and services available to the public, offered outside the area of private and family life. **United Kingdom** law covers 'facilities' as well as goods and services and does not require that services are of a nature which would generally be paid for. **Spanish** law contains two specific provisions that offer protection to pregnant women and women on maternity leave: costs related to pregnancy and childbirth do not justify differences in premiums and benefits of individual persons and in the access to goods and services, it is not allowed to inquire about the pregnancy of a woman, except for health protection. **Serbian** law provides for a duty of social and healthcare institutions and other institutions dealing with the protection of women and children to adjust their work organization and working hours to the requirements of their clients. Two cases were decided by the **Swedish** Equality Ombudsman, both concerning harassment of women by a taxi driver respectively a bus driver. Both women were awarded compensation of EUR 6 300 respectively EUR 3 150. **Ireland** has reported a case that did not lead to a finding of discrimination: the denial of return passage by an airline to a pregnant woman was not considered to be based on the pregnancy, but on the stage of pregnancy and the risk this posed for safety.

Some countries have taken somewhat of a position in the middle in this regard, the **Netherlands** for instance only allowing exceptions regarding education, so as to give institutions for special education some room to follow their own beliefs. Likewise, in **France** the law allows for the organisation of non-mixed (both public and private) schools. **Ireland** has used the exceptions of both education and advertising, whereas **Turkey** has availed itself of the exceptions of advertising and media but not education. In **Sweden** this is yet different, media and advertising not covered by the non-discrimination principle, whereas education is. In **Norway**, the non-discrimination principle extends to both education and advertising. In some countries, the precise material scope is unclear because simply guaranteeing equal access to goods and services without any further specification (**Czech Republic**, **Montenegro**). The

Romanian Goods and Services Law was adopted to transpose the Directive and took over its scope and permitted exclusions, yet such legal limitations are inconsistent with the rest of **Romanian** legislation that was already in place and which exceeds the Directive requirements. Such legislation does not allow for any exceptions, e.g. regarding real estate contracts, bank loans and any other type of contract, and also applies to services in the field of education and media and advertising. Moreover, the 2015 amendment of the Gender Equality Law introduced the explicit obligation that advertising agencies refrain from using gender stereotypes in their productions. According to **Bulgarian** statutory law the non-discrimination principle only extends to education, but on the basis of case law also to media and advertising. The scope of the **Lithuanian** implementing law does not clarify whether the access to goods and services is fully covered, as on the one hand it defines 'different opportunities' for selecting goods and services as a violation of the equal treatment principle that can trigger an administrative penalty, but on the other it does not prohibit situations where the refusal to supply goods or provide services is based on the consumer's sex. Furthermore, the consumer is always perceived as a physical person only. The supply of goods or the provision of services can be denied to legal persons who are represented by natural persons of a certain sex.

Importantly, in some countries the material scope is more restricted. **German** law is confined to contracts concluded under civil law and also provides for certain exceptions such as the application to so-called 'mass contracts' only. Furthermore, the prohibition of sexual harassment is confined to the area of employment. **Latvian** law does not cover goods and services which are publicly offered by natural persons outside commercial activities, for example, if a natural person publicly advertises the sale of his/her own apartment. Non-profit associations are not covered either because they are precluded from providing any goods and services against pay, consequently their activities are not considered as commercial. In **Estonia**, the law mainly refers to nationality, race and colour as grounds prohibiting discrimination in the access to goods and services and it allows for some exceptions and differences in treatment of persons due to their sex. The applicable **Irish** Equal Status Act cannot be used to challenge legislative provisions that may be discriminatory under Directive 2004/113. The best approach to resolve such an issue is to seek a judicial review of the relevant decision and to plead that the decision is in breach of the directive.

(ii) Possibility of justifications

Article 4(5) of Directive 2004/113 stipulates that '[t]his Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.' In some countries, national law does not (explicitly) provide for any such possibility of justification of differences in treatment in the provision of goods and services (**Denmark**, **Iceland**, the **FYR of Macedonia**, **Montenegro**, **Norway**, **Portugal**, **Serbia**), but most domestic laws do (**Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Poland**, **Slovenia**, **Spain**, **Turkey**, the **United Kingdom**). However, application of this rule and case law have been very scarce so far.

In the **Netherlands**, such justifications include sanitary facilities, changing and sleeping rooms and saunas, beauty and sports contests, and the protection from or fight against sexual violence and harassment, and aid for victims thereof. Such sex-segregated services aimed at protection must be necessary and proportional. **German** law allows differential treatment if there is an objective reason for this, examples of this being the prevention of danger or harm to others, or the need to protect privacy or personal security. However, the requirement of proportionality does not exist in the respective German legislation. In **Belgium**, while the federal Gender Act allows for justifications, these have not been further stipulated in an ancillary Royal Decree. But as certain aspects of the notion of 'goods and services' fall within the respective jurisdictions of the federate authorities and statutes, courts may in fact assess proposed justifications for differences in treatment, a case in point concerning the access to a fitness facility reserved for women. This was considered justified because of the morphological differences between men and women and the protection of privacy. The **Finnish** Equality Ombudsman

has considered that offers to one sex only are justified if their value in money is small, and when special offers are made for the annual mother's or father's day celebrations. Some public baths and swimming pools offer some hours for men and women separately, and public saunas are offered for men and women separately. In **Northern Ireland**, limited exceptions for small dwellings are allowed, exceptions designed to protect privacy and decency in circumstances where personal and/or health care is provided or service users will be in a state of undress, as well as to protect religious freedom. In **Ireland**, a male-only golf club was not considered to be discriminatory. In **Estonia**, services specifically aimed at supporting women represent a justifiable exception to the prohibition of gender discrimination in the consumption and supply of goods and services (e.g. shelters). Estonia has a regulated women's support service and most shelters for victims of domestic violence are prepared to meet victims' needs, e.g. women can be accompanied by children, although male victims are the exception.

In **Lithuania**, there is no statutory provision on the possibility of justifications of sex discrimination in the sphere of goods and services, but the Office of the Equal Opportunities Ombudsperson does investigate individual complaints. For example, women on parental leave until the child reaches the age of three were refused the consumers' credit for financing the purchase of domestic electric appliances. The Ombudsperson dismissed this complaint on the ground that there was no evidence that the company had the intention to discriminate against the women. It also justified the equal quotas for boys and girls in the access to the Jesuitical grammar school for reasons of 'creditable' proportionate representation of both sexes. Nor did it see a violation of equal treatment in the activities of the 'pink taxi' company, which was established to provide operational services for women only. In **Bulgaria**, interesting decisions have been taken by both the Supreme Administrative Court and the Commission for the Protection from Discrimination, which show quite some deference to moral arguments and persisting stereotypes as an excuse for not dealing with the issues at stake from the perspective of discrimination. Experts and women's NGOs in **Bulgaria** are convinced that these decisions are also due to the fact that media and advertisements are excluded from the scope of the Directive. Justifications for differences in treatment are specified in the Law on the Human Rights and Equality Institution of **Turkey** (Article 7) with regard to all types of discrimination, including the provision of goods and services.

(iii) Compliance with the Test-Achats ruling

Since the *Test-Achats* ruling,[104] the laws of all EU Member States have been amended so as to ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits, as from the date set for this by the *Test-Achats* ruling, being 21 December 2012 (see also Article 5(1) and (2) of Directive 2004/113). The only non-EU states in which this is not the case are **Liechtenstein**, the **FYR of Macedonia** and **Serbia**. In **Montenegrin** law there is no explicit prohibition on this, but it can be inferred from general equality law that it does not allow for an exception in this regard. In EEA countries, the CJEU ruling is applicable to exchanges of services between EU residents only and therefore in **Liechtenstein** differences in premiums and benefits are still allowed. In **Serbia** as well, risk factors based on sex in connection with insurance premiums and benefits are still used in practice. While **Hungarian** law has been changed, it still allows exemption from the unisex rule as regards group life, accident and sickness insurances. In **Finland**, employers have started to provide pension schemes for some of their employees (typically for directors or high executives) that are not considered as consumer insurances, and as they are not statutory schemes, sex may then be used as an actuarial factor. **Estonian** law still allows insurance undertakings in the assessment of insured risks in sickness insurance to take into account the risks which are characteristic only of persons of one gender, and to differentiate, if necessary, to the extent of the specified risks the insurance premiums and insurance indemnities of women and men. This provision is considered in contravention of EU law. In **Slovenia**, insurance undertakings may in relation to life assurances, accident and health insurances take into consideration the personal circumstance of gender in the determination of premiums and benefits in general, if this does not lead to any differentiation

104 Case C-236/09.

at the individual level. A noteworthy effect of the amendment to the **Spanish** law so as to comply with the *Test-Achats* ruling has been an increase of car insurance costs for women, since before it was quite common for insurance companies to establish better prices for women. Under **Romanian** law all insurance companies have the obligation to draft and apply internal norms and procedures regarding the collection, processing, publishing and updating of statistical and actuarial data used for the calculation of premiums and/or benefits.

(iv) Possibility of positive action measures

Many legal systems allow for positive action measures in relation to the access to and supply of goods and services (in accordance with Article 6 of the Directive); in some countries this was clarified only recently (**Montenegro**). However, the adoption of such measures is the exception rather than the rule, as only **Ireland**, the **FYR of Macedonia**, **Spain**, **Sweden** and the **United Kingdom** have done so thus far. Such measures include public measures in relation to the access of certain goods when women are in special situations of risk; for example, **Spanish** law states that the Government will promote the access of women to housing when they are in a situation of need or at risk of exclusion, and when they have been victims of gender-based violence. The **Irish** Electoral (Amendment) (Political Funding) Act 2012 provides that in order to obtain state funding during the next parliamentary term, each political party must have at least 30 % female candidates running in the next general election. This legislation was enacted because of the low number of women parliamentarians, but a constitutional action against this provision has been initiated in the courts. In **Northern Ireland** as well, positive action measures are allowed in relation to political parties and voluntary bodies. In **Sweden**, differential treatment of men and women with regard to services and housing is allowed, when this is for a legitimate aim and the means applied are necessary and appropriate. In **Estonia**, a child maintenance support fund primarily supports primarily children and women, because the majority of single parents are women. Regulations for the fund's payments are stipulated by the Family Benefits Act (FBA), and the fund became operational on 1 January 2017.[105]

(v) Specific problems

Several States have reported specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in relation to the access to and supply of goods and services. These include:

- complaints regarding discrimination in the access to and supply of health services, mostly in connection with female reproductive health, i.e. abortion and accessibility of contraception. In **Croatia**, the Ombudsperson for Gender Equality reported several complaints during 2017 concerning the denial of abortions by certain health institutions, and the difficulties experienced by women in such cases because health workers may refuse to perform an abortion and pharmacies may refuse the morning-after pill to women because of an appeal on conscience. In February 2017, a decision by the Constitutional Court confirmed the constitutionality of the act regulating the right to freedom of choice regarding childbirth, stating that this is implied in the right to privacy, which includes self-determination, freedom of choice and dignity. It has therefore confirmed the existing freedom of women to decide on the termination of their pregnancy (within the legally prescribed limits);[106]
- banks refusing to grant loans to women during periods of pregnancy and maternity and parental leave (**Croatia**), but following recommendations of the Ombudsperson for Gender Equality many banks changed their practices. Nevertheless, cases of male clients on parental leave being discriminated against have been reported, and also cases regarding compensation for new-born children arising out of life insurance policies being only available for women;
- unequal standards of care and protection of women giving birth, depending on the hospital and differences in fees for voluntary abortion (**Croatia**);

105 Chapter 4 of the Family Benefits Act, RT I, 24.12.2016, 5, https://www.riigiteataja.ee/en/eli/521062017011/consolide, accessed 12 November 2017.

106 Constitutional Court of the Republic of Croatia, Decision of 21 February 2017, U-I-60/1991.

- application of a waiting period before self-employed women can insure themselves with private insurance companies against the risk of maternity leave (the **Netherlands**);
- private health insurance companies terminating the membership of pregnant women or excluding benefits for pregnancy and childbirth from the beginning (**Germany**);
- the access to health services attached to insurance contracts being restricted by the widespread practice of establishing an initial period during which the contract has no effect, this period possibly covering pregnancy time (**Portugal**);
- reported cases of refusals to rent flats to pregnant women (**Poland**);
- denial of services, e.g. in restaurants, to breastfeeding mothers (**Germany**, **Poland**). In a ruling of 14 December 2017, the Court of Appeal in Gdańsk found that preventing a woman from breastfeeding her child at a restaurant table constituted discrimination with regard to sex, ordering the restaurant owner to pay damages equivalent to EUR 500 plus interest. Additionally, the restaurant owner was obliged to issue a public statement apologising to the woman for this unlawful behaviour;
- mothers (occasionally fathers, as well) not allowed to enter into the shops or buses with a pram (**Hungary** and **Poland**);
- the protection under the domestic act is considered not sufficiently clear and precise so as to allow individuals to understand their rights and for goods and services providers to understand their legal obligations as far as transsexual people, pregnant women, and women who have recently given birth are concerned (**Lithuania**);
- in the absence of legislation stipulating what kinds of risks have to be covered by private insurance programmes, insurance companies do not provide any standard travel and health insurance programme covering risks related to pregnancy and maternity (**Latvia**).

By contrast, in **Italy**, Article 4(2) of Directive 2004/113 has been applied to maintain the exemption from fees for all clinical tests related to pregnancy and for certain clinical tests during the same period. Moreover, having children is regarded as a preferential ground to have access to public housing, while having more than one child is a preferential ground to gain access to a public kindergarten.

9 Violence against women and domestic violence in relation to the Istanbul Convention

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) establishes a set of comprehensive obligations for addressing violence against women within the legal framework of international human rights law.[107] The Convention recognises in its preamble the structural nature of violence against women ('a manifestation of historically unequal power relations between women and men')[108] and states the purpose of promotion of substantive equality between women and men, including by empowering women.

The Council of Europe (CoE) adopted the Istanbul Convention on 6 April 2011, and it entered into force on 1 August 2014. In Europe, it is the first instrument to set legally binding standards to specifically prevent violence against women (including girls under the age of 18).[109] The Convention covers a broad range of measures, including data collection, awareness-raising, protection, provision of support services and measures to address asylum and migration. It also deals with legal measures on criminalizing forms of violence against women and the cross-border dimension of violence against women.

In October 2015, the European Commission published a 'Roadmap for (A possible) EU Accession to the Council of Europe Convention on Preventing and Combating Violence against Women, and Domestic Violence (Istanbul Convention)', detailing an initiative that could potentially lead to a Council Decision on EU accession to the Istanbul Convention.[110] Article 216(1) TFEU gives the EU the external competence to conclude international agreements where Treaties or legally binding EU acts so provide, where the agreement is necessary to achieve one of the objectives referred to by the Treaties, or is likely to affect common rules or alter their scope.[111] Given that combating crime and promoting gender equality are clearly established as objectives in the EU acquis, the EU has the general competence to accede to the Istanbul Convention. Under Article 216(b) TFEU, agreements concluded by the EU are binding on its institutions and its Member States.[112] Thus, in case of EU accession to the Istanbul Convention, the Member States will be bound by both the Union policies that implement the Convention and the duties arising from their own ratification. To date, the only international human rights treaty ratified by the EU is the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD).[113] On 13 June 2017, the EU became a signatory party to the Istanbul Convention.

As of the information cut-off date of this comparative analysis, the Istanbul Convention has been signed by 44 members of the Council of Europe, 28 of which have ratified the Convention.[114] All 28 EU Member States have signed, and 16 EU Member States have also ratified it.[115] Of the EEA states, only **Norway** has ratified the Convention.[116] Of the candidate countries, **Montenegro**, **Serbia** and **Turkey** have ratified the Convention.[117]

The following EU Member States have ratified the Convention: **Austria**, **Belgium**, **Cyprus**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Italy**, **Malta**, the **Netherlands**, **Poland** (although some members

107 CETS No. 210, adopted 11 May 2011 and entered into force 1 August 2014.
108 Preamble, Istanbul Convention.
109 See Article 3(f) of the Convention.
110 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf.
111 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
112 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
113 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010D0048&rid=1; http://europa.eu/rapid/press-release_IP-11-4_en.htm.
114 In 2018 (after the cut-off date of this report), the Convention had been ratified by 33 members of the Council of Europe and signed by 45.
115 In 2018, 20 EU Member States had ratified the Convention: **Croatia**, **Greece**, **Ireland** and **Luxembourg** ratified after the cut-off date of this report.
116 **Iceland** ratified in 2018 (after the cut-off date of this report), while **Liechtenstein** still has not.
117 The **FYR of Macedonia** ratified the Convention in 2018 (after the cut-off date of this report).

of the current Government and the President of the Republic of Poland have threatened withdrawal from the Convention), **Portugal**, **Romania**, **Slovenia**, **Spain** and **Sweden**. The following Member States have signed: **Bulgaria**, **Croatia**, **Czech Republic**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Luxembourg**, **Slovakia**, and the **United Kingdom**.[118] In **Hungary**, the leaders of the ruling right-wing political alliance announced that there is no intention to ratify the Convention.

According to the report 'Legal implications of EU accession to the Istanbul Convention' several Member States that have signed the Convention have also taken steps towards ratification. The EU competence in the area of criminal law is of particular importance because the Istanbul Convention is an instrument for combating crime and legislative amendments effected in the Member States before ratification are often in the form of modifications to national Criminal Codes.

118 **Croatia**, **Greece**, **Ireland** and **Luxembourg** ratified the Convention after the cut-off date of this report.

10 Enforcement and compliance

This chapter concerns the way in which states have given effect to the horizontal provisions of all EU gender equality directives, that is to say those that have a bearing on ensuring compliance with and enforcement of the EU rights and obligations contained therein.

10.1 Victimisation

As a matter of EU gender equality law, persons who have made a complaint or instigated legal proceedings aimed at enforcing compliance with the principle of equal treatment have to be protected against dismissal or any adverse treatment or consequence in reaction to their action (Article 24 of Directive 2006/54/EC and Article 10 of Directive 2004/113/EC). Experts from all Member States, except for the **FYR of Macedonia** and to some extent **Sweden**, have reported that their national level is up to the EU standard, in some states the prohibition having been made more explicit recently (**Croatia**, **Italy**). In the **FYR of Macedonia**, protection is only ensured for anti-mobbing procedures. Victimisation is defined in a limited way as unfavourable treatment and exposure of a person to endure damage because of initiating a procedure or testifying in such a procedure. In **Sweden**, the prohibition as such seems to meet the requirements of the Recast Directive. What can be called into question is the fact that the ban on reprisals does not meet the requirement in Article 2.2.a of the directive that it should be included in the very concept of discrimination. However, the Labour Court awarded compensation in damages of EUR 7 900 to a woman that was dismissed on the very day that she made a complaint about sexual harassment. In **Turkey**, the old Article 5 of the Labour Law was the main provision but was deemed inadequate. Now, a new approach to enforcement is envisaged by the Law on the Human Rights and Equality Institution (Law No. 6701). The Human Rights and Equality Institution is to investigate discrimination upon a complaint and ex officio, and is to impose a fine on natural persons and on public/private legal entities in case of discrimination, and it is to help and guide victims concerning administrative and legal procedures.

Yet, there are some limitations to the level of protection in some other states as well. In **Portugal**, there is no explicit reference to victimisation in relation to discrimination in the legal system, this being confined to the employment area. The **Belgian** expert considers the effectiveness of the protection against victimisation in his country disputable, because it mostly concerns the victim's dismissal and the amount of fixed damages for unlawful dismissal is considered too limited to be a real deterrent (six months' gross remuneration), unless for very small businesses. The **Latvian** expert has noted that it would be desirable to implement protection against victimisation also in the field of social security. In February 2017, a proposal to amend the definition of victimisation in the Gender Equality Act passed the first reading in the **Croatian** Parliament, this under pressure of the European Commission to bring this definition more in line with the one contained in the Anti-Discrimination Act. In the expert's opinion this was not really necessary from a legal point of view, but it may still add to the legal certainty of those concerned. The **Montenegrin** expert has noted that a number of law enforcement officers in her country are ignorant about the notion of victimisation. In **Estonia**, 95 % of domestic violence cases are settled through alternative proceedings, one drawback of which is that an appeal is precluded and cases never reach the Supreme Court, meaning that the development of legal texts and interpretation remains poor regarding intimate partner violence, domestic violence and violence against women and girls. Survivors of domestic violence also report that mediation procedures are often imposed on them, that these are humiliating and they feel victimised. It is therefore questionable whether Estonia fulfils the requirement of Article 48 of the Istanbul Convention, which stipulates that the parties must take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of the Convention.

10.2 Burden of proof

A second important issue concerns the provision made in national law for a shift of the burden of proof in sex discrimination cases. As a result of difficulties which are inherent in proving discrimination, EU gender equality law provides for a shift in the burden of proof. An alleged victim of discrimination has to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. It is, however, for the respondent to prove that there has been no breach of the principle of equal treatment. If the Member States so wish, they may introduce more favourable rules for claimants. These rules also apply in the area of goods and services, but do not apply in criminal proceedings (Article 19 of Recast Directive 2006/54/EC and Article 9 of Directive 2004/113/EC). Again, various aspects of this law of evidence in discrimination cases were initially developed by the Court of Justice[119] and only later laid down in legislation.

In all domestic legal systems covered by this report the shift of the burden of proof is ensured, in most of them by way of legislation and in some confirmed in case law (**Bulgaria**, **Ireland**, **Italy**, **Norway**, **Slovakia**). In **Estonia**, if the employer refuses to provide proof, such a refusal is deemed to equal acknowledgment of discrimination. However, the rules pertaining to the burden of proof establish high evidentiary thresholds that represent obstacles to victims of discrimination seeking redress. In **Slovakia**, legislation has been improved and the scope of applicability of the shift of the burden of proof is now actually wider than that contained in the Directives, as it applies to all forms of discrimination.

Yet, in some countries the law is somewhat ambiguous, containing slightly different rules in various pieces of legislation (**Croatia**, **Serbia**). In some countries, there has not been any experience with this in practice, because of the lack of case law (**Liechtenstein**, **Serbia**). In yet others, the case law is not very satisfying. While the **Hungarian** Supreme Court guidelines on employment cases point out the difference between the burden of proof in cases on misuse of the law (direct burden of proof) and equal treatment cases (shared and reversed burden of proof) and regardless of the constant discussion on the burden of proof, it is still rather frequent for lower-level courts in Hungary to request claimants to prove the occurrence of discrimination. In **Greece**, the rules are fine on the books, but they do not seem to be applied, as the Ombudsman also notes, even in spite of a relevant CJEU preliminary ruling in a **Greek** case.[120] An important reason is that they are contained in the legal acts transposing the Directives without being incorporated in the procedural codes, and that they are therefore hardly known. In **Romania**, the burden of proof has three different definitions in three different legislative acts, of which two fall short of the EU definition. This leads to a situation of inconsistent application of the burden of proof in practice. In **Poland**, the burden of proof provision in the law has been understood by many courts so as to require claimants to not just present basic facts, but to also make probable the existence of discrimination by indicating its ground, so in fact asking about the employer's motivation.

Another problem relates to the access of information. In **France**, the Court of Cassation has heard a case very similar to the CJEU's *Meister* case, holding that the Court of Appeal was right in deciding that the employees had a legitimate aim in demanding the communication of information necessary for the protection of their rights, information that only the employer had access to and that he refused to communicate. In **Germany**, the lack of information rights is also considered problematic as well as the courts' reluctance to use statistical data as prima facie evidence. The 2017 Pay Transparency Act does not entirely solve these problems. **United Kingdom** law is considered deficient in the light of EU (case) law to the extent that a potential claimant may be unable to obtain the necessary information to establish facts that are such as to shift the burden of proof. Some countries, however, do provide for a specific right to information, such as **Ireland**. In **Italy**, as regards the use of quantitative/statistical data, national legislation goes further than EU law as it requires companies with more than one hundred employees to draw up bi-annual reports on the workers' situation as regards recruitment, professional

119 In *Danfoss* and *Kelly and Meister.*
120 C-196/02 *Nikoloudi* [2005] ECR I-1789.

training, career opportunities, remuneration, dismissal and retirement. In **Latvia**, access to information is not guaranteed by law and it is up to the court to decide if there is a ground to request any information which is only at the disposal of the respondent.

A particular problem has occurred in **Finland**, where case law has centred on whether a comparison may be made if there are both women and men among those with lower pay. The Labour Court has held that the burden of proof may be shifted onto the defendant if the claimant can present at least one comparator of the opposite sex who has better pay for equal work, irrespective of there being both women and men in lower and higher pay brackets doing equal work. The Supreme Court and the Supreme Administrative Court, however, decided in cases concerning the new pay system for judges that because both men and women were placed in lower bracket offices, there could be no pay discrimination. The claimants had not even managed to establish an assumption of discrimination, which would reverse the burden of proof onto the defendant. The Courts did not proceed to consider whether indirect discrimination could have been at issue, which would have required a comparison of how female and male judges were positioned in different pay brackets.

10.3 Remedies and sanctions

The degree to which EU gender equality law will have the desired effects will depend to an important extent on the remedies and sanctions national laws provide for. While it is up to the Member States to decide on the applicable remedies and sanctions for breaches of EU gender equality law (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.), EU law requires that infringements of the prohibition of discrimination must be met by effective, proportionate and dissuasive sanctions. The CJEU initially developed these requirements and they were only later laid down in EU discrimination legislation (see Articles 18 and 25 of Recast Directive 2006/54/EC and Articles 8 and 14 of Directive 2004/113/EC). Compensation or reparation must also be proportionate to the damage suffered. The fixing of a prior upper limit may not, in principle, restrict this. Similarly, national law may not exclude awarding interest.[121]

(i) Types of remedies and sanctions

As a consequence of the national autonomy that remains, the variety of national remedies and sanctions provided for victims is huge. These include, also depending on the type of violation of gender equality law involved:

- declaration as to the rights of the claimant (the **United Kingdom**);
- request for annulment of unlawful provisions (**Belgium**, **Greece**, **Liechtenstein**, **Serbia**), nullity of discriminatory provisions and practices (**Bulgaria**, **France**, **Italy**, **Luxembourg**, **Malta**, **Spain**), prohibition or termination of the discriminatory activities (**Bulgaria**, **Estonia**, **Greece**, **Hungary**, **Latvia**, **Norway**, **Serbia**, the **United Kingdom**), or action for restitution (**Slovakia**, **Slovenia**, **Turkey**);
- certain right to reinstatement (**Austria**, **Cyprus**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Lithuania**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, the **Netherlands**, **Portugal**, **Romania**, **Slovenia**, **Spain**, **Turkey**) or nullity of the dismissal (**Estonia**, **Greece**, **Spain**, **Sweden**) and of the refusal to hire or promote (**Greece**);
- compensation (**Austria**, **Bulgaria**, **Czech Republic**, **Finland**, **France**, **Germany**, **Hungary**, **Italy**, **Liechtenstein**, the **FYR of Macedonia**, **Malta**, the **Netherlands**, **Portugal**, **Romania**, **Serbia**, **Spain**, **Sweden**, **Turkey**, the **United Kingdom**), also explicitly including interest (**Cyprus**, **Greece**, **Ireland**, **Lithuania**) and compensation for non-material or moral damages (**Bulgaria**, **Cyprus**, **Denmark**, **Estonia**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Lithuania**, **Luxembourg**, **Norway**, **Poland**

121 See for example Case C-271/92 *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4397 (*Marshall II*) and Case C-180/95 *Nils Draehmpaehl v. Urania Immobilienservice OHG* [1997] ECR I-2195 (*Draehmpaehl*).

(in practice), **Romania**, **Serbia**, **Slovakia**, **Slovenia**) when a person's reputation or respect in society or dignity has been harmed (**Czech Republic**) or distress has been caused because of victimisation (**Ireland**);
- penalty payments and administrative fines (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, **Denmark**, **Finland**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Luxembourg**, the **FYR of Macedonia**, **Montenegro**, **Norway**, **Portugal**, **Romania**, **Serbia**, **Slovenia**, **Spain**, **Sweden**, **Turkey**);
- denial or revocation of certain public allowances or financial benefits (**Italy**, **Portugal**);
- automatic application of the most beneficial pay provision to employees of both sexes, provided they perform equal work/work of the same value (**Greece**, **Portugal**);
- publication of the court's decision (**Serbia**), at the respondent's costs (**Croatia**) or publication of the decision on the website of the respondent and that of the Equal Treatment Commission (**Hungary**);
- temporary measures in order to prevent discriminatory treatment and to avoid major irreparable damage (**Serbia**).

In the **Netherlands**, since 1 July 2015, victims of discriminatory dismissals can also request reasonable compensation instead of requesting the court to invalidate the termination. Until this date damages were hardly ever claimed (let alone awarded) in cases of discrimination and the expectation is that this will change now. A 'transitional benefit' was also been introduced on 1 July 2015. All employees who have been employed for two or more years, whether on the basis of a permanent contract or a fixed-term contract, are entitled to this benefit in the event of the termination of their employment, unless the termination is the result of serious misconduct by the employee. The **Irish** expert has reported a case in which the claimant (a very senior sales and marketing director) obtained a total of EUR 315 000 for discriminatory dismissal during maternity leave and for distress caused by victimisation. **Swedish** law allows for 'discrimination compensation', which according to its Supreme Court can be distinguished in dignity compensation and preventive compensation. In **Turkey**, the newly introduced Law on the Human Rights and Equality Institution now provides for the possibility of the Human Rights and Equality Board to issue warnings and to impose an administrative fine, and for the gravity of the violation, the perpetrator's economic status, and multiple discrimination, if any, to be considered as aggravating factors. Discriminatory acts will be punishable with fines of between TL 1 000 and TL 15 000.[122] If the Board determines that the discriminatory act constitutes a crime, it will report this crime. In **Portugal**, a new law was introduced in 2017 reinforcing specifically the protection of harassment victims by granting them accrued rights to damage compensation, imposing upon the employer the duty to approve a Code of Conduct in relation to harassment practices in the company as well as the duty to start a disciplinary procedure against harassment perpetrators. It also extended the protection against dismissal to witnesses of harassment practices who denounce such practices. Under the **German** Victim Compensation Act, if the offender is not identified, victims of gender-based violence can make a claim for compensation. However, an important restricting condition is that the assault must have been of a physical nature, although the consequences compensated can include severe psychological harm or suffering. Victims of stalking or hate speech including rape and death threats, of revenge porn or of cyber harassment are thus not entitled to any compensation, irrespective of the severity and duration of their suffering.

While in many states, the level of compensation is capped (see further below), this is not the case in **Finland**, **France**, **Italy**, **Norway**, **Poland** and the **United Kingdom**. In **Lithuania** the compensation for non-material damages has no maximum amount either, but the courts are reluctant to award high compensation for non-material damages. For example, for the discriminatory refusal to employ Roma women as waitresses in a bar, the employer was obliged to pay compensation of approximately 2.5 times the minimum wage in non-material damages instead of employment. By contrast, in **Slovenia** damages are not capped in the private sector, but they are as regards the award of non-material damages. In **Romania**, alleged victims of gender discrimination first have to file a complaint with the employer or service provider before they can submit a complaint to the court or the national equality body, this in contrast with alleged victims on other discrimination grounds.

122 Due to the high fluctuation of the Turkish Lira no conversion to euro is given.

Criminal sanctions are also possible in a number of states, but for different categories of gender discrimination:

- Discrimination in employment and in the access to goods and services may be a ground for imprisonment in **Belgium**, for one month to one year.
- The **Finnish** Penal Code prohibits discrimination at work and an aggravated form of discrimination at work on the basis of sex and several other grounds, including family relations, in relation to the access to employment and at work. The penalty for the former crime is a fine or a maximum of six months of imprisonment, and for the latter a fine or a maximum of two years of imprisonment.
- Under the **French** Labour Code the employer risks a maximum of one year of imprisonment and a fine of EUR 3 750 and under the Criminal Code any discrimination can be punished with a maximum of three years of imprisonment and a fine of EUR 45 000. But these sanctions are rarely used.
- In **Cyprus**, whoever intentionally contravenes the provisions on the prohibition of pay discrimination shall be guilty of an offence and be punished with a fine not exceeding EUR 6 860 or by imprisonment not exceeding six months or with both such penalties. Furthermore, whoever violates the provisions on gender discrimination, in case of conviction will be punished with a fine not exceeding EUR 7 000, or by imprisonment not exceeding six months or with both such penalties.
- In **Croatia**, sexual harassment provides a ground for a penal sanction, if committed against a subordinate person or other person dependent on the offender, or a person who is especially vulnerable due to age, illness, disability, dependency, pregnancy, severe bodily or mental impairment, involving imprisonment for up to one year.
- In **Greece**, the 'offence to sexual dignity' can lead to imprisonment for six months to thre years and a pecuniary penalty of at least EUR 1 000, if it is committed through the exploitation of the situation of a worker or candidate for employment.
- In Turkey, criminal sanctions can be imposed for crimes against sexual inviolability, including harassment and sexual assault, and involve imprisonment of varying duration according to the gravity of the crime, ranging from three months to 12 years and even up.
- In Lithuania, serious discrimination on the grounds of inter alia sex shall be punishable by community service order, arrest or imprisonment for up to three years, but there have been no cases so far.
- In Serbia, violation of equality law generally may lead to imprisonment for three months to five years.
- In Malta, a fine or imprisonment for up to six months or both is possible in case of victimisation, and (sexual) harassment.
- In Poland, imprisonment for up to two years is possible in the case of very serious and notorious violations of employees' rights, as well as fines and restrictions to the convicted person's liberty and up to three years of imprisonment is possible in the most serious cases of sexual harassment.
- In **Austria** as well, severe sexual harassment is seen as a criminal offence carrying the threat of punishment of up to six months of imprisonment or a criminal fine.
- In the **FYR of Macedonia**, where a breach of equality law constitutes a crime this can lead to a penal sanction/imprisonment.
- In **Norway** and **Portugal**, criminal-law sanctions can concern all discrimination grounds, in both private and public employment, but can only consist of penalties.
- The decriminalization provided by **Italian** Decree No. 8 of 15 January 2016 involved changes in the sanctions for the infringement of the ban on gender discrimination in the working relationship: minor criminal sanctions (a fine from EUR 250 to EUR 1 500) have now been substituted by administrative monetary sanctions from EUR 5 000 to EUR 10 000. The change concerns all cases of discrimination covered by the Code of Equal Opportunities, i.e. all sectors, both public and private and all aspects

(ii) Persisting problems

Importantly, quite a lot of the experts believe that their national laws do not (fully) comply with the general EU standard of effective, proportionate and dissuasive sanctions (**Bulgaria**, **Finland**, **Hungary**, **Latvia**, the **FYR of Macedonia**, **Montenegro**, the **Netherlands**, **Poland**, **Romania**, **Serbia**, **Slovakia**) or observe that serious problems persist in this regard (**Czech Republic**, **Estonia**, **Germany**, **Spain**,

Sweden). In **Greece**, the sanctions are effective, proportionate and dissuasive, but their use is limited as procedural and socio-economic problems deter recourse to legal proceedings (see the next section).

One important, more common problem concerns the (fixed and/or low) level of compensation and damages, and in some countries also their way of application by the courts (**Belgium**, **Bulgaria**, **Czech Republic**, **Estonia**, **Finland**, **Hungary**, **Latvia**, **Lithuania**, **Malta**, **Montenegro**, the **Netherlands**, **Poland**, **Romania**, **Serbia**, **Spain**). As such, these are not considered to meet the requirement of dissuasiveness and are also considered not appropriately balanced with the costs, length and uncertainty of judicial proceedings. While in the **Czech Republic** an offence in the area of equal treatment may be sanctioned with a fine of up to EUR 37 040, labour inspectorates have never imposed such a high fine. In 2014, they imposed some 50 fines, amounting in total to a mere EUR 13 000. The **Spanish** expert considers the remedies and sanctions to be proportionate in theory, but in practice moral damages are difficult to prove and when recognized by the courts, quite low sums are awarded. Furthermore, certain sanctions can only be imposed by the labour inspectorate, which does not always consider gender discrimination a priority. Similarly, in **Serbia** anti-discrimination proceedings are not treated as urgent in practice and sanctions imposed for moral damages have ranged from EUR 40 to EUR 830, which is only symbolic when compared to some other laws. Even in severe cases of discrimination courts have imposed the smallest amounts only and the execution of court decisions has been problematic as well. In **Hungary**, in 2015, the amount of fines applied by the Equal Treatment Authority (ETA) were extremely low: only EUR 310 in two employment discrimination cases, in which a camerawoman's and a driver's employment application were refused because of their sex. This year the ETA, out of the 240 adjudicated cases, found a violation of equal treatment in 33 cases and in 27 of them a fine was imposed, the total sum of which is approximately EUR 26 000, which is only slightly higher than the maximum threshold that can be imposed in one single case.[123] In 2016 the amount of the applied fines increased considerably, but they are still far below the maximum applicable amount (EUR 1 500 - 3 000 compared to the statutory maximum of EUR 20 000). Higher fines were mainly imposed in cases where pregnant women were dismissed during their trial period. In a recent case in the **Netherlands**, the District Court of Limburg[124] decided that an employee whose contract had not been extended because of her pregnancy, was not entitled to compensation for material (income) damage, because it was likely, according to the court, that the contract would only have been extended one more time for one year and would have ended afterwards. During that year, the employee had also received a social security benefit and therefore she had suffered no income damage. The court furthermore granted compensation for non-pecuniary damage of only EUR 1 000, which does not meet the requirement of an effective, proportionate and dissuasive sanction.

In **Lithuania**, the Equal Opportunities Ombudsperson and the courts are rather reluctant to impose severe sanctions for breaches of equality legislation. In **Finland**, it is deemed problematic that the compensation may be reduced or removed altogether if considered reasonable, taking into account the economic circumstances of the violator, his or her attempts to prevent harmful effects caused by the act, or other circumstances. The **Swedish** expert has noted the specific restriction applying to economic compensation in relation to appointments and promotions, which rules out the possibility in these cases of indemnities in addition to 'discrimination compensation'. This restriction, which is a result of the Swedish 'hiring at will' doctrine, can possibly be questioned in the light of the principle of equal access to employment and its effective implementation. In **Ireland**, compensation can only be awarded on the basis of one discrimination ground even if more grounds are at issue in a particular case and 'real and effective compensation' can be doubted given that awards are capped even where there is discrimination on more than one ground. While in **Norway** case law on the matter is sparse, and sanctions therefore hardly imposed, it is noteworthy that in three recent ones high non-pecuniary damages were awarded, above EUR 12 000, which is high in comparison with e.g. cases of unjustified dismissal. In **Romania**, while

123 Report on the activity of the ETA 2015, http://egyenlobanasmod.hu/sites/default/files/tajekoztatok/EBH_T%C3%A1j_2015_EN_Y11593.pdf.

124 District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

administrative sanctions may range between EUR 680 and EUR 22 720 the national equality body stays close to the minimum level and when awarded by the courts, moral damages are very low rendering the sanction ineffective. In **Turkey**, compensation is limited to a maximum of four months' wages. In **Malta**, fines/compensation levels range from EUR 116.47 to EUR 2329.27, depending on the type of violation of gender equality law involved, which is generally considered to be too low to provide a deterrent. While in **Poland**, the level of compensation is not capped, but the usual awards given in practice are considered unlikely to have a dissuasive effect. The **Macedonian** expert has noted that while the Labour Inspectorate is now authorised to issue administrative fines without a court procedure, the amounts of the administrative fines that can be imposed have been decreased significantly. For example, a previously EUR 400 fine now is limited to EUR 70.[125] The **Italian** expert deems the decriminalization provided by Decree No. 8 of 15 January 2016, even though it aims at reducing the workload of the criminal courts, a retrograde step in the effectiveness of sanctions. While the new sanctions are harsher than the previous ones, they have lost both the greater deterrent effect of criminal sanctions and the enforceability of the special procedure of Art. 15 of Decree No. 124/2004, which allowed the employer to avoid a criminal trial by the restoration of a lawful condition (i.e. halting the unlawful situation, if possible) and the payment of a quarter of the maximum of the fine.

Other problems concern for instance the freezing effect of old, inflexible case law of the **Belgian** Court of Cassation that no court may order the reinstatement of a worker under an employment contract. In **Germany**, when discrimination results from collective agreements, the employer is only responsible if it acted with gross negligence or intentionally. Furthermore, the employer as well as the person providing goods and services are obliged to pay material damages only when they can be held responsible for the discrimination by personal fault. These conditions hamper the enforcement and there is also the problem that the compensation granted for personal harm is very modest. In the **FYR of Macedonia**, the weak court system and ineffectiveness of the Gender Equality Body and the Antidiscrimination Commission are seen as particularly problematic. In **Iceland**, despite the burden of proof lying with the employer it is still difficult for the claimant to gather enough evidence to bring a case before the complaints committee. The clause permitting workers to disclose their wage terms is all but a guarantee of transparency. Rather to the contrary, it may be seen as a scapegoat for not fixing the problem. In **Norway**, victims of discrimination have expressed disappointment with the fact that the Equality Ombud and Equality Tribunal are not entitled to award compensation in cases where discrimination has been established. As the Equality Ombud handles 90 % of all discrimination cases each year, this means that the sanctions Norwegian law provides for are hardly used in practice.[126] The **Montenegrin** expert has pointed to more general issues such as slow responses from state organs and other respondents, the massive bureaucracy and the mentality barrier as being problematic.

10.4 Access to courts

Another issue that is of prime importance for ensuring effective compliance with and enforcement of EU gender equality law concerns adequate access to courts for alleged victims of sex discrimination. Member States have the obligation to ensure that judicial procedures are available to all persons who consider that they have been wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. According to the CJEU's case law, national courts must provide effective judicial protection and access to the judicial process must

125 The change of this Law was effected in a short procedure, without any discussion (in a plenary session or in the session of the Commission on equal opportunities of women and men), http://www.sobranie.mk/materialdetails.nspx?materialId=c88da9f4-f206-491a-aa81-714494a882bd.

126 A new structure for the Ombud and Tribunal has been set up in the new Equality and non-discrimination Act of 2017 (LOV-2017-06-16-51), in force from 01.01.2018. The new Tribunal has been granted the power to award compensation as well as non-pecuniary damages, see the diskrimineringsombudsloven (LOV-2017-06-16-50) section 12.

be guaranteed (e.g. Article 17(1) of Directive 2006/54/EC).[127] In this respect as well, quite some problems and obstacles persist in the states covered by this report, which may not always be legal barriers.

(i) Low level of litigation and explanatory factors

While access to courts as such is ensured in all states, a widespread general problem remains that overall the level of gender equality litigation is still (very) low in many states. In addition to the low levels of compensation that may act as a deterrence to engaging in judicial proceedings (see the previous section), the most reported difficulties and barriers victims of sex discrimination encounter and which may explain the low level of litigation, concern:

- the cost of legal proceedings (**Belgium**, **Croatia**, **Estonia**, **Finland**, **Greece**, **Latvia**, the **FYR of Macedonia**, **Norway**, **Poland**, **Slovakia**, the **United Kingdom**; importantly, in the latter country, the Fees Order which imposed a financial burden on potential claimants was found to be unlawful by the Supreme Court in 2017, for contravening the right to an effective remedy under EU law and imposing disproportionate limitations on the enforcement of EU employment rights);
- overly short time limits for initiating proceedings (**Germany**, the **United Kingdom**);
- length of proceedings (**Croatia**, **Estonia**, **Greece**, **Hungary**, **Italy**, **Norway**, **Slovenia**);
- the conditions of entitlement to legal aid (**Belgium**, **Greece**);
- lack of a right of associations to bring proceedings (**Germany**; only possible for works councils, but these have not done so as yet);
- lack of trust or faith in the courts/legal system (**Estonia**, **Italy**, the **FYR of Macedonia**, **Montenegro**);
- only courts being allowed to award compensation and these not necessarily recognising the equality body's finding of discrimination as a basis for claiming compensation (**Bulgaria**, **Hungary**);
- lack of access to information, in particular other court rulings on the matter (**Croatia**, **Latvia**);
- too small benefits ensuing from court action (discussed extensively in the previous section);
- 'stigma' of being a 'troublemaker' associated with such cases (**Croatia**, **Czech Republic**, **Estonia**, **Malta**) and fear of retaliation or victimisation (**Greece**, **Hungary**, **Latvia**, **Liechtenstein**, the **FYR of Macedonia**, the **United Kingdom**);
- being part of a small-scale community (**Estonia**, **Liechtenstein**, **Luxembourg**, **Malta**, **Montenegro**);
- lack of confidence of claimants that they will be believed (the **United Kingdom**) and difficulty of proof (**Greece**, **Italy**, **Latvia**, **Turkey**);
- lack of family support and understanding (**Montenegro**, **Serbia**);
- lack of awareness and knowledge about existing equality law (**Estonia**, **Italy**, **Montenegro**, **Serbia**);
- lack of experience and habit to defend own rights (**Estonia**);
- lack of skilled, experienced advice and assistance (**Greece**, the **United Kingdom**);
- strongly rooted traditional gender stereotypes which entail a greater degree of tolerance (**Montenegro**, **Serbia**);
- the socio-economic crisis, the ensuing high female unemployment and long-term unemployment and the low and subject to strict conditions unemployment benefits (**Greece**).

Among more specific factors that have been pointed to as being particular causes of the reluctance to take individual legal action, is the currently often applied concept of 'diversity', which limits gender to being just one of the criteria amidst many others, therewith shifting the focus of policymakers and media. In **Belgium** pay scales in the private sector are governed by collective agreement and a pay discrimination claim may therefore be considered as quite bold. The **Hungarian** expert has noted that while access to court is safeguarded by legislation, the case law of lower-level courts proves the considerable gaps in the legal practice in four areas: the broad interpretation of exemptions provided for in the law; the reluctance to award dissuasive compensation; the minimization of the weight of violence against women;

127 Well-established case law since Case C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651, https://publications.europa.eu/fr/publication-detail/-/publication/afd6e2fd-7893-4cd0-9fa7-1a7e678d8a2d/language-fr/format-PDF/source-87374794.

and inadequate application of the rules on the burden of proof. On the other hand, an amendment to the rules on non-material damages for pain and suffering might lead to more effective, proportionate and dissuasive sanctions in the future. A ruling of the Supreme Court of **Iceland** in a sexual harassment case is considered not very encouraging for victims to go to court. The woman in this case claimed non-pecuniary damages from her employer for sexual harassment by her superior during a work trip. The Supreme Court held that the behaviour of the man was 'completely inappropriate' (inviting her to join him in a hot tub where he sat naked; knocking on her door an hour after she had bid good night), yet in the Court's view more explicit sexual behaviour ('other things and more') was required for this to be considered sexual harassment.

(ii) Legal – financial – aid

A particular point of attention concerns the legal aid that is available for alleged victims of gender discrimination. A divergent picture emerges here as well, especially when making a distinction between financial aid and legal advice or assistance (see below point (iii)).

In some countries no legal financial aid is provided for (**Austria**, **Lithuania**, **Luxembourg**, **Romania**), in others this is income-dependent (**Belgium**, **Bulgaria**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Malta**, **Montenegro**, **Norway**, **Poland**, **Sweden**) or only available for particular types of cases (the **FYR of Macedonia**, **Turkey**) or before specific courts (**Cyprus**). In **Iceland**, financial aid may also be granted when the outcome of the case were to have great general significance or have strong impact on the employment, social status or other personal status of the applicant. The Legal Aid Committee also looks to factors such as whether the applicant has tried to settle the case, for example by administrative appeal and whether there is a chance that the case would be successful in court, by looking at case law of the courts, hence in light of the Supreme Court's decision mentioned above, the prospects of legal aid for alleged victims of sexual harassment are considered not very promising. In **Turkey**, no legal expenses can be imposed on victims of violence. In **Montenegro**, victims of gender discrimination usually receive free legal aid from NGOs in the form of information, legal advice and representation. In **Poland**, a claimant can also request the court to assign a legal representative to defend his case. In **Macedonia**, the first court verdict finding discrimination against a pregnant worker based on the Law on Prevention and Protection against Discrimination was issued on 3 March 2016, meaning six years after the adoption of the Law, and thanks to the financial support of an international NGO. In **Turkey**, applications to the Human Rights and Equality Institution are free of charge and the Institution is to investigate discrimination upon complaint and ex officio, is to impose a fine on natural persons and public/private legal entities in case of discrimination, and is to help and guide victims concerning administrative and legal procedures. The decisions of the Board are also to specify the legal means/procedures for the parties to challenge its decisions. Natural persons and legal entities can file complaints of discrimination. Applications can be made directly to the Human Rights and Equality Institution or through governors in towns and sub-governors in sub-towns.

In the **Netherlands**, the free legal aid for persons with a low income has been restricted in recent years as part of austerity measures. In **Portugal**, victims of discrimination have free access to the courts and in case of economic difficulties the person has the right to a public attorney for this purpose and does not have to pay the costs of the proceedings. In **Serbia**, there is no free legal aid, but the claimant is released from advance payment of costs of proceedings, which are paid from court funds. In **Sweden**, victims of sex discrimination in all contexts can be represented by the Equality Ombudsman without any costs. But the Ombudsman is free to choose which cases are taken to court and the number of cases brought is very limited (25 in 2014) in relation to the number of complaints (1 949 of which 224 were more closely scrutinized). Furthermore, trade unions also provide legal assistance free of charge. In the **United Kingdom**, legal aid may be available in the county court and for judicial review applications in the high court, but the limitations on cases in which such aid is available, the very low income thresholds below which it is available and the restrictions on legal aid in public law challenges are such that it is of extremely limited assistance to prospective claimants. In **Greece**, legal aid is also subject to the

condition that the remedy is admissible and not manifestly ill-founded. Victims of offences against sexual freedom or abuse of sexual life for financial benefit and victims of domestic violence who lodge penal complaints are exempted from litigation costs, without any conditions. In **Austria**, statutory corporations for employees and the trade unions offer free legal consultations in labour and social security law and in urgent cases they provide free representation for all levels of jurisdiction for their members. Claimants can also file a petition to the relevant court for financial aid concerning court fees, which may also include legal representation by an attorney. This can be granted if the claimant meets certain financial criteria and the claim poses legal difficulties in pursuing.

(iii) Action by proxy of interest groups, equality bodies and social partners

When it comes to access to courts for anti-discrimination/gender equality interest groups or other legal entities that can act on behalf of or represent alleged victims of sex discrimination, this is provided for in quite a number of countries (**Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, **Estonia**, **France**, **Greece**, **Hungary**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Montenegro**, the **Netherlands**, **Norway**, **Portugal**, **Serbia**, **Spain**, **Sweden**). However, in **Greece** the relevant provisions are incorrectly worded (regarding the pre-requisites of recourse to courts by legal entities) and anyway not widely known and not often applied, as they have not been incorporated in the procedural codes The ground acted upon may not always be gender discrimination, but e.g. protection of consumer rights (as was the case for *Test-Achats*) or simply trade unions providing for legal assistance generally to their members (**Belgium**). This may be beneficial to the extent that they also bear the costs. Yet, the following sketchy overview reveals quite some limitations of the applicable national regulations for actions by proxy.

In **Austria**, such action is limited to the so-called 'Klagsverband', an umbrella organisation of several non-governmental organisations acting in the field of anti-discrimination. In **Portugal**, in the field of discrimination these actions are allowed in all cases where a collective interest regarding the promotion of equality is recognised to the entity that initiates the proceedings. Also collective representatives of a victim of discrimination (e.g. trade unions) can promote judicial actions on the victim's behalf or assist the victim in those actions. In **France**, trade unions have the right to act on behalf of an alleged victim of discrimination without being mandated as such, whereas other associations need the written consent of the claimant. In **Spain**, in theory there are many mechanisms for the intervention by interest groups and legal entities for the defence of victims of discrimination. However, these actions are quite rare and most cases of gender discrimination submitted to the courts are pursued by individual victims. In **Serbia**, trade unions may also initiate proceedings in case of discrimination of larger groups of persons or on behalf of individuals giving their consent. In **Denmark**, **Finland** and **Italy** trade unions can bring cases as well and in **Bulgaria** and **Sweden**, both trade unions and other non-profit organisations may bring discrimination cases to court, but with trade unions having a priority right to do so. The Gender Equality and Equal Treatment Commissioner in **Estonia** is pleading for a right to go to court with discrimination cases, but the Ministry of Justice is opposing this proposal. While in **Greece** NGOs have legal standing, they have inadequate resources for actually doing so. In **Slovakia**, NGOs can represent victims only before regular courts, not the Constitutional Court. The **Finnish** Ombudsman has a mandate to assist a victim in court, but the mandate has so far never been used. In other countries, such entities may not be entitled to bring legal action on behalf of the claimant as these must bring their own case (**Germany**, **Ireland**) and may only be supported by counsel or financially (**Finland**, the **FYR of Macedonia**, the **United Kingdom**). In **Romania**, an amendment to gender equality law in 2012 has limited the possibility of alleged victims to be represented by trade unions or NGOs to administrative procedures only, and not court proceedings. In **Turkey**, interest groups have no legal standing, so cannot act on behalf of a claimant, nor is there a right to start class actions. There is only legal standing for the Ministry of Family and Social Affairs. In **Montenegro**, an organisation engaged in the protection of fundamental rights may bring proceedings, but only with the consent of the person discriminated against. Likewise, in **Malta** legal entities having a 'legitimate interest' may engage themselves on behalf or in support of a complainant in all judicial proceedings, with the complainant's approval. **Polish** law rules out the possibility of group proceedings in

claims against employers, but it allows trade unions, NGOs and the Human Rights Defender to initiate a case on a claimant's behalf, requiring the consent of the claimant.

10.5 Equality bodies

Since 2002, by virtue of Directive 2002/73/EC, the Member States and EEA countries are also obliged to designate equality bodies. The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. They may form part of agencies with responsibilities at the national level for defending human rights or safeguarding individual rights. These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations (Article 20 of Recast Directive 2006/54/EC and Article 12 of Directive 2004/113/EC).[128]

All states have put an equality body into place that seeks to implement the requirements of EU and national gender equality law, including **Turkey** as of very recently. Yet, these bodies differ in terms of purpose, competence and discrimination grounds they can deal with. In some countries, there are specific bodies limited to dealing with gender equality issues (**Belgium**, **Croatia**, **Cyprus**, **Iceland**, **Italy**), whereas in most countries they can also act in defence of non-discrimination on other grounds (**Austria**, **Bulgaria**, **Czech Republic**, **Denmark**, **Estonia**, **Finland** (the Equality and Non-Discrimination Board, although the Equality Ombudsman has a mandate on the ground of gender), **France**, **Greece**, **Germany**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, the **FYR of Macedonia**, **Malta**, **Montenegro**, the **Netherlands**, **Norway**, **Poland**, **Serbia**, **Slovakia**, **Slovenia**, **Sweden**, the **United Kingdom**). **Romania** has both types of bodies. Such bodies may have just an informative and/or research function (e.g. **Germany**, **Luxembourg**) or also investigate complaints, give legal advice and assistance, issue (non-binding) opinions, recommendations and warnings, try to get to an out-of-court settlement, bring cases to court, etc. (**Denmark**, **Estonia**, **Finland**, **Greece** (no recourse to courts), **Hungary**, **Iceland**, **Ireland**, **Italy**, **Lithuania**, **Montenegro**, **Norway**, **Poland** (no recourse to courts against private actors), **Serbia**, **Slovakia**, **Sweden**). Some equality bodies may also issue fines (**Cyprus**, **Hungary**, **Lithuania**) or impose sanctions (**Bulgaria**). In **Hungary**, the Equal Treatment Agency can now require publication of its decisions not only on its own website but also on that of the defendant. In the past few years, the ETA's case law also demonstrates a tendency towards choosing more serious sanctions from among its repertoire. In 2017, the amount of fines imposed thus reached a total of EUR 26 500 in 15 cases (out of 30 cases) in which a violation of equal treatment was found. The **Irish** Human Rights and Equality Commission can also invite – a group of – undertakings to carry out an equality review or to prepare and implement an equality action plan. The situation in the **FYR of Macedonia** is rather opaque, as the law also provides for a special state agent to act as a gender equality body, but seemingly not having an independent power of investigation, monitoring and reporting. No information is available regarding its actual functioning either. The Ombudsman can also protect people from sex discrimination, for example by representing groups of victims of discrimination in court. The **Norwegian** expert has noted that the main weakness of the Equality Ombud is that neither she nor anyone else has the specific task of providing independent assistance to victims of discrimination that will enable them to have access to effective, proportionate and dissuasive sanctions as required by EU law.

The **Croatian** expert has noted that many victims feel more confident complaining to the Ombudsperson for Gender Equality in out-of-court, less formalistic proceedings at no cost than when going to court. The same applies for **Greece**. The Ombudsperson annually investigates 300-400 individual complaints. Similarly, in **Portugal** the difference between the reduced number of actions brought before the courts and the intense work of the national equality body (CITE) gives ground to the conclusion that the more effective action regarding practical implementation takes place outside the courts. Alleged victims of

128 On equality bodies in general see Holtmaat, R. *Catalyst for Change: Equality Bodies according to Directive 2000/43/EC* 2007, available at https://www.equalitylaw.eu/downloads/1199-catalysts-for-change-en.

discrimination also have the right to seek counsel and to report discriminatory practices to both CITE and the Labour Inspection Services. The **Polish** expert has also observed that practice shows that often more can be achieved through direct contacts between the Labour Inspectorate and the employer than by going to court, referring to a wide investigation involving 581 companies regarding the dismissals of persons returning from maternity, paternity and parental leaves and the observance of other employee rights. **Turkey** has put into place the Human Rights and Equality Institution based on a new law that entered into force in April 2016, by which two gaps in gender equality were closed; the lack of a specific law on non-discrimination and the lack of an equality body. Turkey also has an Ombudsman institution, and one of the five Ombudspersons is in charge of women and children. It can try to settle complaints but also to get a judicial settlement if need be, in which case the judge will consider the (non-binding) report of the Ombudsperson. The **French** Defender of Rights body can also help victims to make a case against agents of discrimination and, thanks to special powers, can carry out an investigation and demand explanations from defendants, by conducting hearings and collecting other evidence, including the gathering of information on site. It can issue recommendations and publish them, thus encouraging the defendant to comply. Another noteworthy development concerns the establishment of so-called Anti-Discrimination Bureaus (*ADV*) in the **Netherlands**; all municipalities are obliged to establish and subsidise an *ADV*, the main task of these Bureaus being to assist victims of discrimination and to monitor the situation in this regard. While the **Estonian** Gender Equality and Equal Treatment Commissioner receives more complaints every year, its resources are scant. In **Montenegro**, the Ombudsman was given the role of monitoring discrimination cases processed before various enforcement organs. Apart from shortcomings in human and financial resources, the Ombudsman has reported that its work is made more difficult due to the lack of case records relating to discrimination. Although the Law on Prohibition of Discrimination is clear and imperative, the bylaws and regulations to this Act are entirely vague and ambiguous, which has also been reported already by the Ombudsman as well as the inconsistency and inaccuracy of the Rulebook on the Content and Manner of Keeping Separate Records on Cases of Reported Discrimination,[129] which is supposed to provide for the establishment of special records in the form of an electronic database, enabling immediate access to data to the Ombudsman.[130] From 1 January 2018, the new public authority appointed by the **Swedish** government will provide monitoring, analysis, coordination and necessary support in relation to gender equality.

10.6 Social partners

Increasingly, the social partners, alongside NGOs and other stakeholders, are also called upon to play a part in the realisation of gender equality. Member States and the EEA countries have the obligation to promote social dialogue between the social partners with a view to fostering equal treatment. This dialogue may include the monitoring of gender equality practices at the workplace, promoting flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, as well as the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice in the area of gender equality. Similarly, the states are required to encourage employers to promote equal treatment in a planned and systematic way and to provide, at appropriate regular intervals, employees and/or their representatives with appropriate information on equal treatment. Such information may include an overview of the proportion of men and women at different levels of the organisation, their pay and pay differentials, and possible measures to improve the situation in cooperation with employees' representatives (Articles 21 and 22 of Recast Directive 2006/54/EC and Article 11 of Directive 2004/113/EC).

Yet, it appears that in some countries social partners do not play any particular role of significance in this regard (**Bulgaria**, **Czech Republic**, **Estonia**, **Latvia**, **Lithuania**, **Luxembourg**, **Romania**, **Slovakia**, **Turkey**, the **United Kingdom**) or it is unclear what the results are (**Iceland**, **Italy**, the **FYR of Macedonia**, **Malta**, **Norway**).

129 Official Gazette of Montenegro no. 50/2014.
130 Ibid, p. 135.

In other countries, social partners fulfil more visible roles in the development and promotion of gender equality law, by:

- giving opinions (**Austria**, **Belgium**, **Croatia**, **Greece**), also in court cases (**Poland**);
- monitoring the application by employers of labour provisions (**Poland**);
- initiating legal action, including assistance of trade union members in individual cases (**Belgium**, **Finland**, **Greece**, **Hungary**, **Poland**, **Sweden**);
- stimulating discussion on certain issues, such as equal pay and positive action (the **Netherlands**, **Sweden**);
- engaging with equality bodies (**Liechtenstein**);
- representatives of social partners being statutory members of the national equal treatment commission or body (**Greece**, **Italy**) and the right to co-decide on the commission's opinion (**Austria**);
- there being a legal obligation to present and discuss new legislation with the social partners, and the breach of this stipulation making it unconstitutional and therefore not applicable (**Portugal**) or there being a tradition to involve social partners in such discussion (**Norway**, **Slovenia**);
- In **Estonia**, after the national parliamentary elections of the spring of 2015, the Gender Equality Council, an advisory body of the Ministry of Social Affairs consisting of 22 representatives of different organisations, submitted recommendations for the Government to promote gender equality in 2015-2018, sending them to all parties represented in the new Parliament;[131]
- collective agreements (see Section 11.7).

In some other countries, the role of social partners in this area is quite strong. In **France**, there has been a long tradition of involving the social partners mainly through the obligation to annually negotiate on equality and the gender gap. Since 2012, sanctions can be imposed on companies that do not respect their obligation to negotiate and to conclude agreements on gender equality. In **Ireland**, both employers' bodies and trade unions have been considered effective in implementing equality legislation, without there being legislative provisions on this. In **Cyprus**, the social partners play an important role in the application of gender equality law through the Labour Advisory Body. In **Serbia**, the Confederation of Autonomous Trade Unions has had a specific Women's Section since 2002, which takes a variety of initiatives to combat gender discrimination and to reinforce women's rights and protection of maternity. Interestingly, Serbian law also provides that in collective negotiations, trade unions and employers' organizations should make an effort to ensure that 30 % of the representatives of the least represented sex is included in the negotiation committees. In **Greece**, large trade unions have special Secretariats for Women/Equality; however, the unions' possibility to bring discrimination cases to court is limited by the inadequate transposition of the relevant EU law provisions and the non-incorporation of the relevant national provisions into the procedural codes. In **Finland**, trade unions can also bring cases to the Labour Court and to the Equality and Non-Discrimination Board and the social partners are influential in proposing and drafting legislation regarding all issues of working life, including all gender equality law. The social partners traditionally also have joint discussions on gender equality issues.

In other countries, this role could possibly be bigger given the strong position of trade unions. In **Sweden**, the labour market is characterised by a high organisation density, both at employers' and employees' level, with about 75 % of workers being affiliated to a trade union. They play an important role especially in relation to areas that are not covered by the law, such as wages, or that contain semi-mandatory rules leaving room to deviate by collective agreement. Social partners also play a predominant role in the **Danish** labour market. Most employment law cases brought before the ordinary courts are brought by a trade union on behalf of a member and if a claim is based on a collective agreement, the social partners

131 The recommendations prioritised five objectives: 1) decreasing the negative impact of gender stereotypes on the everyday life and decisions of women and men and on the development of economy and society; 2) supporting equal economic independence of women and men; 3) increasing gender balance on all levels of management and decision-making; 4) increasing the quality of life for both women and men and 5) supporting systematic and effective implementation of gender mainstreaming. In 2016, the Council also gave its comments to the draft Welfare Development Plan 2016-2023 which includes the Government's gender equality policy priorities and also reflects the Council's previous proposals.

are the only parties who can enforce it. While in **Portugal** all legal provisions concerning labour law are discussed with the social partners on a regular basis, including provisions on gender equality, gender equality is not traditionally considered an important subject by the social partners.

10.7 Collective agreements

In extension of the previous section, when it comes specifically to the relevance of collective agreements as a means to implement EU gender equality law, the national systems also show a divergent picture. More generally, collective agreements may be binding as a contract but in most states they are not generally binding for non-signatory parties unless a specific measure to that effect has been taken.

In some states collective agreements are of considerable importance for the promotion of equality (**Austria**, **Greece**, **Sweden**). In **Sweden**, collective agreements determine working conditions in general and especially regarding pay. Such collective agreements are legally binding for employers and members of the signing trade union. As pay regulation rests entirely with the social partners they are also under a duty to address the gender pay gap, but they have to do so only on the basis of the general ban on discrimination as no other specific rules apply in this regard. However, given the social partners' autonomy and the strongly gender-segregated nature of the Swedish labour market, it is in fact difficult to assess the Swedish wage-setting system. In **Austria** as well, collective agreements are the basis for national wage policies and can also cover various workplace policies. The state does not influence the collective bargaining process and collective agreements have the legal status of binding general labour ordinances. Their personal scope applies to all enterprises and to all workers of the relevant sector or industry and covers the entire state territory or at least regional areas (such as one of the provinces). Collective bargaining parties have observed the equal pay principle for many years, resulting for instance in the elimination of special low wage groups for female workers. Collective agreements are also used to implement progressive provisions such as additional paid or unpaid parental leave periods, positive action measures etc. **Portugal** shows an interesting approach regarding the enforcement of the equal pay principle via collective agreements, as its Labour Code establishes that whenever a collective agreement or internal provision of company regulations restricts a certain type of remuneration to men or to women, these stipulations are automatically applicable to employees of both sexes, provided they perform equal work or work of the same value. Furthermore, the Labour Code also provides for assessment of collective agreements on possible discriminatory clauses by the national equality body, just after the publication of these agreements. This has proven to be very effective, either because the equality body convinces the social partners to change the clause in question, or, when this does not happen, because the court declares the clause null and void. In **Cyprus**, collective agreements are also used as a tool to implement gender equality law, but they have no force of law. While collective agreements are not generally applicable in **Denmark**, they are still an important source of law as gender equality legislation is subsidiary to collective agreements, providing for similar protection as prescribed by legislation. In **Belgium** a specific collective agreement on equal pay was adopted in the past, which has been declared generally binding by a Royal Decree. In the **Netherlands**, collective agreements provide for supplementary, more beneficial rules than those contained in legislation regarding inter alia the right to childcare facilities, care leave and parental leave. Since the incorporation of the gender equality principle in the **Greek** Constitution, the social partners have often included gender equality issues in collective bargaining and have gradually eradicated direct discrimination in pay, yet this has not been the case for indirect discrimination regarding professional classification in collective agreements. They have also improved maternity and parenthood protection. In **Norway**, eight collective agreements have been made nationally applicable to secure equal pay in certain sectors and all the main agreements refer to gender equality as a specific target.

However, it has also been signalled that collective agreements are not used as a (real) means to implement EU gender equality law (**Bulgaria**, **Czech Republic**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Iceland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, **Montenegro**, **Poland**, **Romania**, **Slovenia**, **Turkey**, the **United Kingdom**), that not all collective agreements contain clauses geared towards ensuring equality

(the **FYR of Macedonia**, **Liechtenstein**), or when they do contain some innovative measures, these may be merely formal without any concrete measures having been taken (**France**). Furthermore, collective agreements may even contain provisions inciting inequalities based on sex (**Croatia**, **Germany**). In **Germany**, the still mostly male-dominated nature of social partner organisations is also considered an obstacle for using collective agreements as an effective means to implement gender equality law. In **Hungary**, collective agreements are mainly concluded at company level and since collective agreements may deviate from legislation, they are not deemed a suitable means for implementing equality law. Under the new Labour Code, collective agreements are used to reduce workers' rights. In **Finland**, collective agreements are not used for implementing EU gender equality law, except possibly soft-law measures in the form of recommendations addressed to the social partners. In **Greece**, since 2010, the system of collective agreements has gradually been dismantled through repeated and extensive statutory interventions in collective bargaining. Furthermore, the collective agreement hierarchy was reversed, so that enterprise-level agreements (where women's bargaining power is weaker) prevail over sectoral agreements. Minimum-wage fixing has also been removed from collective bargaining for the whole country and minimum wages have now been reduced by statute in a way which is discriminatory on grounds of age. These measures are required by Memoranda of Understanding as bailout conditionalities. In **Slovakia**, equal opportunity issues included in collective agreements mostly concerned the working conditions of pregnant women and employees taking care of young children. In **Luxembourg**, there is a legal obligation for social partners to refer to the results of the negotiations, including on the application of equality plans for women and men, but this is not considered very effective since social partners mostly limit themselves to observing that this matter has been discussed.

Sometimes, collective agreements may still contain rules violating equal treatment legislation as appeared from a recently published case of the **Hungarian** Equal Treatment Authority. The collective agreement in this case contained a rule based on which the employer did not provide a voucher (a form of benefit) to the employee while she was on maternity leave. The ETA and the labour court established that this violated the regulations on equal wage and the employer was obliged by the court to pay the wage difference to the employee. No further sanctions were applied.[132]

132 EBH/19/2016 http://egyenlobanasmod.hu/hu/jogeset/ebh192016.

11 Overall assessment: law on the books versus law in practice

The comparative analysis presented in this report of the legal state of affairs in 35 European countries in all fields covered by EU gender equality law shows that much has been achieved and that in 2017 some persisting discriminatory rules have been removed (e.g. different pensionable age in **Italy**). However, it is also clear that many concerns remain. Despite the regulations in force in these states, it appears that in many countries specific problems of proper transposition and application of EU gender equality law remain in all areas. These not only relate to substantive deficiencies of legislation and its application by national courts, but also the 'patchworks' of applicable national laws, affecting clarity and consistency of the overall body of national gender equality law. Some experts also consider that transposition has remained a rather formal process, equality laws never really being scrutinized and modified in order to support the substantial and genuine equality of women, and in order to assess whether these laws produce the desired results.

In addition to specific problems of national equality law, the report has also revealed quite a number of more general problems that occur in many states or at least in a considerable number of them.

The gender pay gap remains one of the main concerns. On a positive note in this respect, we can see the reinforcement of legal frameworks and the development of some practical tools in various states with a view to enhancing the application of the equal pay principle and to bring about actual progress. The most telling example of this concerns the introduction of a mandatory equal pay certification system, based on an equal pay management standard in **Iceland**, but also of a free software application to measure the pay gap in **Poland**. Nevertheless, the Pay Transparency Act introduced in 2017 in **Germany** still reveals several deficiencies that will hamper true progress and continue to act as barriers to access to justice, such as the need for comparable employees and problems concerning the burden of proof. The exception for remuneration systems under collective agreements is also an important obstacle to the analysis and removal of structural pay discrimination. Moreover, without the ability to bring collective or class actions, more rights for works councils and binding obligations, the principle of equal pay will not be strengthened by insulated transparency measures.[133] In that respect, more transparency should be considered as a condition, but not a substitute, for anti-discrimination law enforcement.

Another general concern relates to the enforcement of equality law, which can be seen as one of the major challenges to overcome in the future, as the lack of litigation in most states can be taken as an indicator that the practical effectiveness of the legal framework is weak. In Section 11.4, a broad range of factors explaining the low level of litigation have been identified, which are in need of a more in-depth investigation and also require a more comprehensive policy strategy to overcome them. These factors also expose other general problems, such as the lack of transparency and access to information. Not only wages and pay systems fall short in terms of transparency and accessibility of data and statistics, but also for instance gender equality case law. In some states, this case law is not published or very poorly accessible. This is not only a likely cause of inconsistent interpretation by courts, but it also does not add to the general awareness of gender equality law among all parties concerned. In this context, the limited or incorrect media coverage of gender discrimination cases can be criticised as well. This state of affairs reinforces another commonly felt problem: the lack of specific knowledge and expertise at courts and equality bodies, but also of lawyers and potential victims of gender discrimination.

Effective enforcement is also very much hampered by the length and costs of legal proceedings, the **United Kingdom** expert framing this very pointedly by observing that 'the real problem across the United Kingdom is that enforcement is difficult and increasingly expensive to the extent that the legal rights are in danger of becoming paper entitlements only.' The **Norwegian** situation is also telling in this regard, where most discrimination cases are brought to the Equality Ombud and Tribunal because of the low

133 See German Women Lawyers' Association, https://www.djb.de/verein/Kom-u-AS/K1/st17-05/; https://www.djb.de/verein/Kom-u-AS/K1/pm18-11/.

threshold and it being free of charge, but these bodies are not entitled to award compensation when they establish discrimination. On top of this, the low levels of compensation awarded in many states by the courts also create a disincentive for bringing cases to court at all. The fact that many national laws contain upper limits of compensation also raises serious doubts as to the compatibility with EU law requirements. Only the **French** and **Irish** reports show some optimism in this regard, demonstrating an increase in the number of court cases and more familiarity with the instruments on regulating discrimination and good accessibility of court rulings.

Another issue concerns the role taken up by social partners to implement and promote gender equality law. The picture emerging here is that in many countries they could take up a more active role in this regard and that much more could be done. The autonomy of social partners in some countries, sometimes allowing them to deviate from legislation, so far has not in fact added much to gender equality. In some cases it even had a negative effect. Social partners could give more weight and priority to gender equality in collective bargaining and agreements. More generally, several experts have observed that there is a lack of attention and of a sense of urgency when it comes to gender equality and that more could be done, including at the levels of the legislature and executive authorities when it comes to mainstreaming gender equality into all policies, but also at the level of equality bodies. Recent political and administrative reforms in a number of countries are exacerbating this problem, as well as jeopardising the independence of the judiciary and/or equality bodies (**Estonia**, **Hungary**, **Poland**).

Last but not least, a very worrying issue raised in some reports concerns multiple discrimination and the current reinforcement of gender stereotypes, traditional family values and traditional gender roles limiting women's free choices that is filtering through in national policies, legislation and case law. In some countries, this is clearly related to conservative governments being in place (**Hungary**, **Poland**). Recent measures of concern in **Poland** are: the establishment of a child benefit system that incites women to leave the labour market; budget cuts regarding the activities of the Commissioner for Human Rights; and the police investigation of the financial administration of the Centre for Women's Rights, the most active women's NGO. In other countries, it may be related to the financial crisis and austerity policies (**Greece**). Media content may also still be characterised by sexism and misogyny (**Serbia**). Another highly worrying, connected issue, concerns the number of cases of (sexual) harassment, domestic and gender-based violence (e.g. **Montenegro**). Although in some countries new laws have been introduced to reinforce protection against and to prevent and punish such harassment and violence (**Estonia**, **Portugal**, **Serbia**) or such protection has been reinforced through case law (**Germany**), the level of protection offered by domestic laws in other countries is deemed insufficient, for instance for not considering people in such a position to be 'vulnerable victims' (**Slovakia**) or compensation for the damage done being limited to cases of physical violence (**Germany**). It is to be watched closely whether and how this tendency develops in the near future.

Annex 1 – EU gender equality Directives

Directive 79/7/EEC

http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31979L0007

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 L 006 , 10/01/1979 P. 0024 – 0025
Finnish special edition: Chapter 5 Volume 2 P. 0111
Greek special edition: Chapter 05 Volume 3 P. 0160
Swedish special edition: Chapter 5 Volume 2 P. 0111
Spanish special edition: Chapter 05 Volume 2 P. 0174
Portuguese special edition Chapter 05 Volume 2 P. 0174

COUNCIL DIRECTIVE of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the European Parliament (2),
Having regard to the opinion of the Economic and Social Committee (3),

Whereas Article 1 (2) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (4) provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance its scope and the arrangements for its application ; whereas the Treaty does not confer the specific powers required for this purpose;

Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes;

Whereas the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity ; whereas, in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment,

HAS ADOPTED THIS DIRECTIVE:
Article 1
The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".

Article 2
This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons.

Article 3
1. This Directive shall apply to: (a) statutory schemes which provide protection against the following risks: - sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;
(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).
2. This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a).
3. With a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application. (1)OJ No C 34, 11.2.1977, p. 3. (2)OJ No C 299, 12.12.1977, p. 13. (3)OJ No C 180, 28.7.1977, p. 36. (4)OJ No L 39, 14.2.1976, p. 40.

Article 4
1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: - the scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.
2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.

Article 5
Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

Article 6
Member States shall introduce into their national legal systems such measures as art necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Article 7
1. This Directive shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
(b) advantages in respect of old-age pension schemes granted to persons who have brought up children ; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
(c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;

(d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
(e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof.

2. Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7 (2).

They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7 (1) and of the possibilities for reviewing them at a later date.

Article 9

Within seven years of notification of this Directive, Member States shall forward all information necessary to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council and to propose such further measures as may be required for the implementation of the principle of equal treatment.

Article 10

This Directive is addressed to the Member States.

Done at Brussels, 19 December 1978.

For the Council

The President
H.-D. GENSCHER

Directive 92/85/EEC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085

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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Official Journal L 348 , 28/11/1992 P. 0001 - 0008
Finnish special edition: Chapter 5 Volume 6 P. 0003
Swedish special edition: Chapter 5 Volume 6 P. 0003

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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 118a thereof,

Having regard to the proposal from the Commission, drawn up after consultation with the Advisory Committee on Safety, Hygiene and Health Protection at work,[1]

In cooperation with the European Parliament,[2]

Having regard to the opinion of the Economic and Social Committee,[3]

Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member States being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonizing conditions while maintaining the improvements made;

Whereas, under the terms of Article 118a of the Treaty, the said directives are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings;

Whereas, pursuant to Decision 74/325/EEC,[4] as last amended by the 1985 Act of Accession, the Advisory Committee on Safety, Hygiene and Health protection at Work is consulted by the Commission on the drafting of proposals in this field;

Whereas the Community Charter of the fundamental social rights of workers, adopted at the Strasbourg

1 OJ N° C 281, 9. 11. 190, p. 3; and OJ N° C 25, 1. 2. 1991, p. 9.
2 OJ N° C 19, 28. 1. 1991, p. 177; and OJ N° C 150, 15. 6. 1992, p. 99.
3 OJ N° C 41, 18. 2. 1991, p. 29.
4 OJ N° L 185, 9. 7 .1974, p. 15.

European Council on 9 December 1989 by the Heads of State or Government of 11 Member States, lays down, in paragraph 19 in particular, that:

'Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made';

Whereas the Commission, in its action programme for the implementation of the Community Charter of the fundamental social rights of workers, has included among its aims the adoption by the Council of a Directive on the protection of pregnant women at work;

Whereas Article 15 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[5] provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected;

Whereas pregnant workers and workers who are breastfeeding must not engage in activities which have been assessed as revealing a risk of exposure, jeopardizing safety and health, to certain particularly dangerous agents or working conditions;

Whereas provision should be made for pregnant workers, workers who have recently given birth or workers who are breastfeeding not to be required to work at night where such provision is necessary from the point of view of their safety and health;

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited;

Whereas measures for the organization of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including

5 OJ N° L 183, 29. 6. 1989, p. 1.

maintenance of payment and/or entitlement to an adequate allowance;

Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;

Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness,

HAS ADOPTED THIS DIRECTIVE

SECTION I
PURPOSE AND DEFINITIONS

Article 1
Purpose

1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.
2. The provisions of Directive 89/391/EEC, except for Article 2 (2) thereof, shall apply in full to the whole area covered by paragraph 1, without prejudice to any more stringent and/or specific provisions contained in this Directive.
3. This Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted.

Article 2
Definitions
For the purposes of this Directive:

(a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
(b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
(c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

SECTION II
GENERAL PROVISIONS

Article 3
Guidelines

1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4 (1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.

Article 4

Assessment and information

1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of Directive 89/391/EEC, in order to:
- assess any risks to the safety or health and any possible effect on the pregnancys or breastfeeding of workers within the meaning of Article 2,
- decide what measures should be taken.
2. Without prejudice to Article 10 of Directive 89/391/EEC, workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.

Article 5

Action further to the results of the assessment

1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4 (1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.
2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.
3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.
4. The provisions of this Article shall apply mutatis mutandis to the case where a worker pursuing an activity which is forbidden pursuant to Article 6 becomes pregnant or starts breastfeeding and informs her employer thereof.

Article 6

Cases in which exposure is prohibited

In addition to the general provisions concerning the protection of workers, in particular those relating to the limit values for occupational exposure:

1. pregnant workers within the meaning of Article 2 (a) may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardize safety or health, to the agents and working conditions listed in Annex II, Section A;
2. workers who are breastfeeding, within the meaning of Article 2 (c), may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardize safety or health, to the agents and working conditions listed in Annex II, Section B.

Article 7
Night work

1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.
2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:

(a) transfer to daytime work; or
(b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably by required on duly substantiated grounds.

Article 8
Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.
2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

Article 9
Time off for ante-natal examinations

Member States shall take the necessary measures to ensure that pregnant workers within the meaning of Article 2 (a) are entitled to, in accordance with national legislation and/or practice, time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours.

Article 10
Prohibition of dismissal

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;
2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.

Article 11
Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized in this Article, it shall be provided that:

1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;
2. in the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2,

other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;
4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2 (b) conditional upon the worker concerned fulfilling the conditions of eligibilty for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.

Article 12
Defence of rights

Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who should themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.

Article 13
Amendments to the Annexes

1. Strictly technical adjustments to Annex I as a result of technical progress, changes in international regulations or specifications and new findings in the area covered by this Directive shall be adopted in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC.
2. Annex II may be amended only in accordance with the procedure laid down in Article 118a of the Treaty.

Article 14
Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after the adoption thereof or ensure, at the latest two years after adoption of this Directive, that the two sides of industry introduce the requisite privisions by means of collective agreements, with Member States being required to make all the necessary provisions to enable them at all times to guarantee the results laid down by this Directive. They shall forthwith inform the Commission thereof.
2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference of this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive.
4. Member States shall report to the Commission every five years on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry.

However, Member States shall report for the first time to the Commission on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry, four years after its adoption.

The Commission shall inform the European Parliament, the Council, the Economic and Social Committee and the Advisory Committee on Safety, Hygiene and Health Protection at Work.

5. The Commission shall periodically submit to the European Parliament, the Council and the Economic and Social Committee a report on the implementation of this Directive, taking into account paragraphs 1, 2 and 3.
6. The Council will re-examine this Directive, on the basis of an assessment carried out on the basis of the reports referred to in the second subparagraph of paragraph 4 and, should the need arise,

of a proposal, to be submitted by the Commission at the latest five years after adoption of the Directive.

Article 15
This Directive is addressed to the Member States.

Done at Luxembourg, 19 October 1992.

For the Council
The President
D. CURRY

ANNEX I

NON-EXHAUSTIVE LIST OF AGENTS, PROCESSES AND WORKING CONDITIONS

referred to in Article 4 (1)

A. Agents

1. Physical agents where these are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment, and in particular:
(a) shocks, vibration or movement;
(b) handling of loads entailing risks, particularly of a dorsolumbar nature;
(c) noise;
(d) ionizing radiation;[6]
(e) non-ionizing radiation;
(f) extremes of cold or heat;
(g) movements and postures, travelling - either inside or outside the establishment - mental and physical fatigue and other physical burdens connected with the activity of the worker within the meaning of Article 2 of the Directive.

2. Biological agents
Biological agents of risk groups 2, 3 and 3 within the meaning of Article 2 (d) numbers 2, 3 and 4 of Directive 90/679/EEC,[7] in so far as it is known that these agents or the therapeutic measures necessitated by such agents endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II.

3. Chemical agents
The following chemical agents in so far as it is known that they endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II:
(a) substances labelled R 40, R 45, R 46, and R 47 under Directive 67/548/EEC[8] in so far as they do not yet appear in Annex II;
(b) chemical agents in Annex I to Directive 90/394/EEC;[9]
(c) mercury and mercury derivatives;
(d) antimitotic drugs;
(e) carbon monoxide;
(f) chemical agents of known and dangerous percutaneous absorption.

6 See Directive 80/836/Euratom (OJ N° L 246, 17. 9. 1980, p. 1).
7 OJ N° L 374, 31. 12. 1990, p. 1.
8 OJ N° L 196, 16. 8. 1967, p. 1. Directive as last amended by Directive 90/517/EEC (OJ N° L 287, 19. 10. 1990, p. 37).
9 OJ N° L 196, 26. 7. 1990, p. 1.

B. Processes

Industrial processes listed in Annex I to Directive 90/394/EEC.

C. Working conditions

Underground mining work.

ANNEX II

NON-EXHAUSTIVE LIST OF AGENTS AND WORKING CONDITIONS

referred to in Article 6

A. Pregnant workers within the meaning of Article 2 (a)

1. Agents
(a) Physical agents
Work in hyperbaric atmosphere, e.g. pressurized enclosures and underwater diving.
(b) Biological agents
The following biological agents:
- toxoplasma,
- rubella virus,
unless the pregnant workers are proved to be adequately protected against such agents by immunization.
(c) Chemical agents
Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. Working conditions
Underground mining work.

B. Workers who are breastfeeding within the meaning of Article 2 (c)

1. Agents
(a) Chemical agents
Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. Working conditions
Underground mining work.

Statement of the Council and the Commission concerning Article 11 (3) of Directive 92/ 85/EEC, entered in the minutes of the 1608th meeting of the Council (Luxembourg, 19 October 1992)

THE COUNCIL AND THE COMMISSION stated that:

'In determining the level of the allowances referred to in Article 11 (2) (b) and (3), reference shall be made, for purely technical reasons, to the allowance which a worker would receive in the event of a break in her activities on grounds connected with her state of health. Such a reference is not intended in any way to imply that pregnancy and childbirth be equated with sickness. The national social security legislation of all Member States provides for an allowance to be paid during an absence from work due to sickness. The link with such allowance in the chosen formulation is simply intended to serve as a

concrete, fixed reference amount in all Member States for the determination of the minimum amount of maternity allowance payable. In so far as allowances are paid in individual Member States which exceed those provided for in the Directive, such allowances are, of course, retained. This is clear from Article 1 (3) of the Directive.'

Directive 2004/113/EC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13(1) thereof,
Having regard to the proposal from the Commission,
Having regard to the Opinion of the European Parliament,[1]
Having regard to the Opinion of the European Economic and Social Committee,[2]
Having regard to the opinion of the Committee of the Regions,[3]
Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law.

(2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

(3) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context and the freedom of religion.

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

(6) The Commission announced its intention of proposing a directive on sex discrimination outside of the labour market in its Communication on the Social Policy Agenda. Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005)[4] covering all Community policies and aimed at promoting equality for men and women by adjusting these

1 Opinion delivered on 30 March 2004 (not yet published in the Official Journal)
2 OJ C 241, 28.9.2004, p. 44.
3 OJ C 121, 30.4.2004, p. 27.
4 OJ L 17, 19.1.2001, p. 22.

policies and implementing practical measures to improve the situation of men and women in society.

(7) At its meeting in Nice of 7 and 9 December 2000, the European Council called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.

(8) The Community has adopted a range of legal instruments to prevent and combat sex discrimination in the labour market. These instruments have demonstrated the value of legislation in the fight against discrimination.

(9) Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

(10) Problems are particularly apparent in the area of the access to and supply of goods and services. Discrimination based on sex, should therefore be prevented and eliminated in this area. As in the case of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin,[5] this objective can be better achieved by means of Community legislation.

(11) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.

(12) To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.

(13) The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education.

(14) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner.

(15) There are already a number of existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation. Therefore, this Directive should not apply in this field. The same reasoning applies to matters of self-employment insofar as they are covered by existing legal instruments. The Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship.

(16) Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

5 OJ L 180, 19.7.2000, p. 22.

(17) The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.

(20) Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only.

(21) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(22) The rules on the burden of proof should be adapted when there is a prima facie case of discrimination and for the principle of equal treatment to be applied effectively, the burden of proof should shift back to the defendant when evidence of such discrimination is brought.

(23) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(24) With a view to promoting the principle of equal treatment, Member States should encourage dialogue with relevant stakeholders, which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

(25) Protection against discrimination based on sex should itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment.

(26) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation, which already prevails in each Member State.

(27) Member States should provide for effective, proportionate and dissuasive penalties in cases of breaches of the obligations under this Directive.

(28) Since the objectives of this Directive, namely to ensure a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(29) In accordance with paragraph 34 of the interinstitutional agreement on better law-making,[6] Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;

(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3
Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.
2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.
3. This Directive shall not apply to the content of media and advertising nor to education.
4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

6 OJ C 321, 31.12.2003, p. 1.

Article 4

Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that
(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;
(b) there shall be no indirect discrimination based on sex.
2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.
5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 5

Actuarial factors

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.
3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

Article 6

Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

Article 7

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.
2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II
REMEDIES AND ENFORCEMENT

Article 8

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.
3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 9

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(3).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

Article 10

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11

Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

CHAPTER III
BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.
2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
(b) conducting independent surveys concerning discrimination;
(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV
FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, and in particular that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 16

Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter.

The Commission shall draw up a summary report, which shall include a review of the current practices

of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

2. The Commission's report shall take into account the viewpoints of relevant stakeholders.

Article 17

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such publication of reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 18

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 13 December 2004.

For the Council
The President
B. R. BOT

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0113

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13(1) thereof,
Having regard to the proposal from the Commission,
Having regard to the Opinion of the European Parliament,[7]
Having regard to the Opinion of the European Economic and Social Committee,[8]

7 Opinion delivered on 30 March 2004 (not yet published in the Official Journal).
8 OJ C 241, 28.9.2004, p. 44.

Having regard to the opinion of the Committee of the Regions,[9]
Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law.

(2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

(3) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context and the freedom of religion.

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

(6) The Commission announced its intention of proposing a directive on sex discrimination outside of the labour market in its Communication on the Social Policy Agenda. Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005)[10] covering all Community policies and aimed at promoting equality for men and women by adjusting these policies and implementing practical measures to improve the situation of men and women in society.

(7) At its meeting in Nice of 7 and 9 December 2000, the European Council called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.

(8) The Community has adopted a range of legal instruments to prevent and combat sex discrimination in the labour market. These instruments have demonstrated the value of legislation in the fight against discrimination.

(9) Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

(10) Problems are particularly apparent in the area of the access to and supply of goods and services. Discrimination based on sex, should therefore be prevented and eliminated in this area. As in the case of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin,[11] this objective can be better achieved by means of Community legislation.

(11) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty

9 OJ C 121, 30.4.2004, p. 27.
10 OJ L 17, 19.1.2001, p. 22.
11 OJ L 180, 19.7.2000, p. 22.

establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.

(12) To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.

(13) The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education.

(14) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner.

(15) There are already a number of existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation. Therefore, this Directive should not apply in this field. The same reasoning applies to matters of self-employment insofar as they are covered by existing legal instruments. The Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship.

(16) Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

(17) The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.

(20) Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only.

(21) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(22) The rules on the burden of proof should be adapted when there is a prima facie case of discrimination and for the principle of equal treatment to be applied effectively, the burden of proof should shift back to the defendant when evidence of such discrimination is brought.

(23) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(24) With a view to promoting the principle of equal treatment, Member States should encourage dialogue with relevant stakeholders, which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

(25) Protection against discrimination based on sex should itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment.

(26) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation, which already prevails in each Member State.

(27) Member States should provide for effective, proportionate and dissuasive penalties in cases of breaches of the obligations under this Directive.

(28) Since the objectives of this Directive, namely to ensure a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(29) In accordance with paragraph 34 of the interinstitutional agreement on better law-making,[12] Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another

12 OJ C 321, 31.12.2003, p. 1.

is, has been or would be treated in a comparable situation;

(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.
2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.
3. This Directive shall not apply to the content of media and advertising nor to education.
4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

Article 4

Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that

(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;

(b) there shall be no indirect discrimination based on sex.

2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.
5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 5

Actuarial factors

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The

Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

Article 6

Positive action

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

Article 7

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.
2. The implementation of this Directive shall in no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II
REMEDIES AND ENFORCEMENT

Article 8

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.
3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 9

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other

competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 8(3).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

Article 10

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11

Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

CHAPTER III
BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.
2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV
FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, and in particular that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 16

Reports

3. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter.

The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

4. The Commission's report shall take into account the viewpoints of relevant stakeholders.

Article 17

Transposition

3. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such publication of reference shall be laid down by the Member States.

4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 18

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 13 December 2004.

For the Council
The President
B. R. BOT

Directive 2006/54/EC

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,
Having regard to the proposal from the Commission,
Having regard to the opinion of the European Economic and Social Committee,[1]
Acting in accordance with the procedure laid down in Article 251 of the Treaty,[2]
Whereas:

(1) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[3] and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes[4] have been significantly amended.[5] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women[6] and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex[7] also contain provisions which have as their purpose the implementation of the principle of equal treatment between men and women. Now that new amendments are being made to the said Directives, it is desirable, for reasons of clarity, that the provisions in question should be recast by bringing together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the Court of Justice of the European Communities (hereinafter referred to as the Court of Justice).

(2) Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and

1 OJ C 157, 28.6.2005, p. 83.
2 Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 10 March 2006 (OJ C 126 E, 30.5.2006, p. 33) and Position of the European Parliament of 1 June 2006 (not yet published in the Official Journal).
3 OJ L 39, 14.2.1976, p. 40. Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).
4 OJ L 225, 12.8.1986, p. 40. Directive as amended by Directive 96/97/EC (OJ L 46, 17.2.1997, p. 20).
5 See Annex I Part A.
6 OJ L 45, 19.2.1975, p. 19.
7 OJ L 14, 20.1.1998, p. 6. Directive as amended by Directive 98/52/EC (OJ L 205, 22.7.1998, p. 66).

women in all areas, including employment, work and pay.

(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

(7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice.

(8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the acquis communautaire, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

(9) In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.

(10) The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

(12) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

(13) In its judgment of 17 May 1990 in Case C-262/88,[8] the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93[9] and C-351/00,[10] that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

(15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined-benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.

(16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at

8 C-262/88: Barber v Guardian Royal Exchange Assurance Group (1990 ECR I1889).
9 C-7/93: Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune (1994 ECR I-4471).
10 C-351/00: Pirkko Niemi (2002 ECR I-7007).

the time when the scheme's funding is implemented.

(17) It is well established that benefits payable under occupational social security schemes are not to be considered as remuneration insofar as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who initiated legal proceedings or brought an equivalent claim under the applicable national law before that date. It is therefore necessary to limit the implementation of the principle of equal treatment accordingly.

(18) The Court of Justice has consistently held that the Barber Protocol[11] does not affect the right to join an occupational pension scheme and that the limitation of the effects in time of the judgment in Case C-262/88 does not apply to the right to join an occupational pension scheme. The Court of Justice also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice. The Court of Justice has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

(19) Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

(20) This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests. Measures within the meaning of Article 141(4) of the Treaty may include membership or the continuation of the activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment between men and women.

(21) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to 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.[12] This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.[13]

11 Protocol 17 concerning Article 141 of the Treaty establishing the European Community (1992).
12 OJ L 348, 28.11.1992, p. 1.
13 OJ L 145, 19.6.1996, p. 4. Directive as amended by Directive 97/75/EC (OJ L 10, 16.1.1998, p. 24).

(25) For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life,[14] Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

(27) Similar considerations apply to the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child. It is for the Member States to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.

(28) The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.

(29) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

(30) The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.

(31) With a view to further improving the level of protection offered by this Directive, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of a complainant, without prejudice to national rules of procedure concerning representation and defence.

(32) Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.

(33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

(34) In order to enhance the effective implementation of the principle of equal treatment, Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations.

(35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

(36) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in

14 OJ C 218, 31.7.2000, p. 5.

accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(37) For the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels.

(38) Equal treatment of men and women in matters of employment and occupation cannot be restricted to legislative measures. Instead, the European Union and the Member States should continue to promote the raising of public awareness of wage discrimination and the changing of public attitudes, involving all parties concerned at public and private level to the greatest possible extent. The dialogue between the social partners could play an important role in this process.

(39) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

(40) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B.

(41) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making,[15] Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I
GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;
(b) working conditions, including pay;
(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2
Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose

15 OJ C 321, 31.12.2003, p. 1.

or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) 'pay': the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) 'occupational social security schemes': schemes not governed by 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[16] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

TITLE II
SPECIFIC PROVISIONS

CHAPTER 1
Equal pay

Article 4

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.
In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

CHAPTER 2
Equal treatment in occupational social security schemes

Article 5

Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

16 OJ L 6, 10.1.1979, p. 24.

Article 6

Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7

Material scope

1. This Chapter applies to:
(a) occupational social security schemes which provide protection against the following risks:
(i) sickness,
(ii) invalidity,
(iii) old age, including early retirement,
(iv) industrial accidents and occupational diseases,
(v) unemployment;
(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.
2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8

Exclusions from the material scope

1. This Chapter does not apply to:
(a) individual contracts for self-employed persons;
(b) single-member schemes for self-employed persons;
(c) insurance contracts to which the employer is not a party, in the case of workers;
(d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:
(i) either additional benefits,
(ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;
(e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.
2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9

Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:
(a) determining the persons who may participate in an occupational social security scheme;
(b) fixing the compulsory or optional nature of participation in an occupational social security scheme;

(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
(d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
(f) fixing different retirement ages;
(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;
(i) setting different levels for workers' contributions;
(j) setting different levels for employers' contributions, except:
(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,
(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;
(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Article 10

Implementation as regards self-employed persons

1. Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC became applicable in their territory.
2. This Chapter shall not preclude rights and obligations relating to a period of membership of an occupational social security scheme for self-employed persons prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 11

Possibility of deferral as regards self-employed persons

As regards occupational social security schemes for self-employed persons, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:
(i) either until the date on which such equality is achieved in statutory schemes,
(ii) or, at the latest, until such equality is prescribed by a directive;
(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;
(c) the application of Article 9(1)(i) in relation to the use of actuarial calculation factors, until 1 January 1999 or for Member States whose accession took place after that date until the date that Directive 86/378/EEC became applicable in their territory.

Article 12

Retroactive effect

1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.
2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.
3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.
4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

Article 13

Flexible pensionable age

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Chapter.

CHAPTER 3

Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14

Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Article 15

Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16

Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

TITLE III
HORIZONTAL PROVISIONS

CHAPTER 1
Remedies and enforcement

Section 1
Remedies

Article 17

Defence of rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.

Article 18

Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

Section 2
Burden of proof

Article 19
Burden of proof

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

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

CHAPTER 2
Promotion of equal treatment — dialogue

Article 20
Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

Article 21
Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.
2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and

private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion.
4. To this end, employers shall be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.

Article 22

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.

CHAPTER 3
General horizontal provisions

Article 23

Compliance

Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
(b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;
(c) occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

Article 24

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 25

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 26

Prevention of discrimination

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

Article 27

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the provisions of this Directive are complied with.

Article 28

Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.
2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.

Article 29

Gender mainstreaming

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 30

Dissemination of information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

TITLE IV
FINAL PROVISIONS

Article 31

Reports

1. By 15 February 2011, the Member States shall communicate to the Commission all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. Without prejudice to paragraph 1, Member States shall communicate to the Commission, every four years, the texts of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam.
3. Member States shall assess the occupational activities referred to in Article 14(2), in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment periodically, but at least every 8 years.

Article 32

Review

By 15 February 2011 at the latest, the Commission shall review the operation of this Directive and if appropriate, propose any amendments it deems necessary.

Article 33

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive. Member States shall take all necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.
When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.
The obligation to transpose this Directive into national law shall be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.
Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 34

Repeal

1. With effect from 15 August 2009 Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC shall be repealed without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.
2. References made to the repealed Directives shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 35

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 36

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament
The President
J. BORRELL FONTELLES
For the Council
The President
P. LEHTOMÄKI

ANNEX 1

PART A

Repealed Directives with their successive amendments

Council Directive 75/117/EEC	OJ L 45, 19.2.1975, p. 19
Council Directive 76/207/EEC	OJ L 39, 14.2.1976, p. 40
Directive 2002/73/EC of the European Parliament and of the Council	OJ L 269, 5.10.2002, p. 15
Council Directive 86/378/EEC	OJ L 225, 12.8.1986, p. 40
Council Directive 96/97/EC	OJ L 46, 17.2.1997, p. 20
Council Directive 97/80/EC	OJ L 14, 20.1.1998, p. 6
Council Directive 98/52/EC	OJ L 205, 22.7.1998, p. 66

PART B

List of time limits for transposition into national law and application dates

(referred to in Article 34(1))

Directive	Time-limit for transposition	Date of application
Directive 75/117/EEC	19.2.1976	
Directive 76/207/EEC	14.8.1978	
Directive 86/378/EEC	1.1.1993	
Directive 96/97/EC	1.7.1997	17.5.1990 in relation to workers, except for those workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under national law. Article 8 of Directive 86/378/EEC — 1.1.1993 at the latest. Article 6(1)(i), first indent of Directive 86/378/EEC –1.1.1999 at the latest.
Directive 97/80/EC	1.1.2001	As regards the United Kingdom of Great Britain and Northern Ireland 22.7.2001
Directive 98/52/EC	22.7.2001	
Directive 2002/73/EC	5.10.2005	

ANNEX II

Correlation table

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/ EEC	Directive 97/80/EC	This Directive
—	Article 1(1)	Article 1	Article 1	Article 1
—	Article 1(2)	—	—	—
—	Article 2(2), first indent	—	—	Article 2(1), (a)
—	Article 2(2), second indent	—	Article 2(2)	Article 2(1), (b)
—	Article 2(2), third and fourth indents	—	—	Article 2(1), (c) and (d)
—	—	—	—	Article 2(1), (e)
—	—	Article 2(1)	—	Article 2(1), (f)
—	Article 2(3) and (4) and Article 2(7) third subparagraph	—	—	Article 2(2)
—	Article 2(8)	—	—	Article 3
Article 1	—	—	—	Article 4
—	—	Article 5(1)	—	Article 5
—	—	Article 3	—	Article 6
—	—	Article 4	—	Article 7(1)
—	—	—	—	Article 7(2)
		Article 2(2)		Article 8(1)
—	—	Article 2(3)	—	Article 8(2)
—	—	Article 6	—	Article 9
—	—	Article 8	—	Article 10
—	—	Article 9	—	Article 11
—	—	(Article 2 of Directive 96/97/EC)	—	Article 12
—	—	Article 9a	—	Article 13
—	Articles 2(1) and 3(1)	—	Article 2(1)	Article 14(1)
—	Article 2(6)	—	—	Article 14(2)
—	Article 2(7), second subparagraph	—	—	Article 15
—	Article 2(7), fourth subparagraph, second and third sentence	—	—	Article 16
Article 2	Article 6(1)	Article 10	—	Article 17(1)
—	Article 6(3)	—	—	Article 17(2)
—	Article 6(4)	—	—	Article 17(3)
—	Article 6(2)	—	—	Article 18
—	—	—	Articles 3 and 4	Article 19
—	Article 8a	—	—	Article 20
—	Article 8b	—	—	Article 21
—	Article 8c	—	—	Article 22
Articles 3 and 6	Article 3 (2)(a)	—	—	Article 23(a)
Article 4	Article 3(2)(b)	Article 7(a)	—	Article 23(b)
—	—	Article 7(b)	—	Article 23(c)
Article 5	Article 7	Article 11	—	Article 24
Article 6	—	—	—	—

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/ EEC	Directive 97/80/EC	This Directive
—	Article 8d	—	—	Article 25
	Article 2(5)			Article 26
—	Article 8e(1)	—	Article 4(2)	Article 27(1)
—	Article 8e(2)	—	Article 6	Article 27(2)
—	Article 2(7) first subparagraph	Article 5(2)	—	Article 28(1)
—	Article 2(7) fourth subparagraph first sentence			Article 28(2)
—	Article 1(1a)			Article 29
Article 7	Article 8	—	Article 5	Article 30
Article 9	Article 10	Article 12(2)	Article 7, fourth subparagraph	Article 31(1) and (2)
—	Article 9(2)	—	—	Article 31(3)
—	—	—	—	Article 32
Article 8	Article 9(1), first subparagraph and 9(2) and (3)	Article 12(1)	Article 7, first, second and third subparagraphs	Article 33
—	Article 9(1), second subparagraph	—	—	—
—	—	—	—	Article 34
—	—	—	—	Article 35
—	—	—	—	Article 36
—	—	Annex	—	—

Directive 2010/18/EU

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0018

COUNCIL DIRECTIVE 2010/18/EU

of 8 March 2010

implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 155(2) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Article 153 of the Treaty on the Functioning of the European Union (the 'TFEU') enables the Union to support and complement the activities of the Member States, inter alia in the field of equality between men and women with regard to labour market opportunities and treatment at work.

(2) Social dialogue at Union level may, in accordance with Article 155(1) of the TFEU, lead to contractual relations, including agreements, should management and labour (the 'social partners') so desire. The social partners may, in accordance with Article 155(2) of the TFEU, request jointly that agreements concluded by them at Union level in matters covered by Article 153 of the TFEU be implemented by a Council decision on a proposal from the Commission.

(3) A Framework Agreement on parental leave was concluded by the European cross-industry social partner organisations (ETUC, UNICE and CEEP) on 14 December 1995 and was given legal effect by Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.[1] That Directive was amended and extended to the United Kingdom of Great Britain and Northern Ireland by Council Directive 97/75/EC.[2] Directive 96/34/EC contributed greatly to improving the opportunities available to working parents in the Member States to better reconcile their work and family responsibilities through leave arrangements.

(4) In accordance with Article 138(2) and (3) of the Treaty establishing the European Community (the 'EC Treaty'),[3] the Commission consulted the European social partners in 2006 and 2007 on ways of further improving the reconciliation of work, private and family life and, in particular, the existing Community legislation on maternity protection and parental leave, and on the possibility of introducing new types of family-related leave, such as paternity leave, adoption leave and leave to care for family members.

(5) The three European general cross-industry social partner organisations (ETUC, CEEP and BUSINESSEUROPE, formerly named UNICE) and the European cross-industry social partner organisation representing a certain category of undertakings (UEAPME) informed the Commission on 11 September 2008 of their wish to enter into negotiations, in accordance with Article 138(4) and Article 139 of the EC Treaty,[4] with a view to revising the Framework Agreement on parental leave concluded in 1995.

1 OJ L 145, 19.6.1996, p. 4.
2 OJ L 10, 16.1.1998, p. 24.
3 Renumbered: Article 154(2) and (3) of the TFEU.
4 Renumbered: Articles 154(4) and 155 of the TFEU.

(6) On 18 June 2009, those organisations signed the revised Framework Agreement on parental leave (the 'revised Framework Agreement') and addressed a joint request to the Commission to submit a proposal for a Council decision implementing that revised Framework Agreement.

(7) In the course of their negotiations, the European social partners completely revised the 1995 Framework Agreement on parental leave. Therefore Directive 96/34/EC should be repealed and replaced by a new directive rather than being simply amended.

(8) Since the objectives of the Directive, namely to improve the reconciliation of work, private and family life for working parents and equality between men and women with regard to labour market opportunities and treatment at work across the Union, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(9) When drafting its proposal for a Directive, the Commission took account of the representative status of the signatory parties to the revised Framework Agreement, their mandate and the legality of the clauses in that revised Framework Agreement and its compliance with the relevant provisions concerning small and medium-sized undertakings.

(10) The Commission informed the European Parliament and the European Economic and Social Committee of its proposal.

(11) Clause 1(1) of the revised Framework Agreement, in line with the general principles of Union law in the social policy area, states that the Agreement lays down minimum requirements.

(12) Clause 8(1) of the revised Framework Agreement states that the Member States may apply or introduce more favourable provisions than those set out in the Agreement.

(13) Clause 8(2) of the revised Framework Agreement states that the implementation of the provisions of the Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by the Agreement.

(14) Member States should provide for effective, proportionate and dissuasive penalties in the event of any breach of the obligations under this Directive.

(15) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as long as such Member States take all the steps necessary to ensure that they can at all times guarantee the results imposed by this Directive.

(16) In accordance with point 34 of the Interinstitutional agreement on better law-making,[5] Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures, and to make them public,

HAS ADOPTED THIS DIRECTIVE:

Article 1

This Directive puts into effect the revised Framework Agreement on parental leave concluded on 18 June 2009 by the European cross-industry social partner organisations (BUSINESSEUROPE, UEAPME, CEEP and ETUC), as set out in the Annex.

Article 2

Member States shall determine what penalties are applicable when national provisions enacted pursuant to this Directive are infringed. The penalties shall be effective, proportionate and dissuasive.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive or shall ensure that the social partners have introduced the necessary measures by agreement by 8 March 2012 at the latest. They shall forthwith inform the Commission thereof.

5 OJ C 321, 31.12.2003, p. 1.

When those provisions are adopted by Member States, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States may have a maximum additional period of one year to comply with this Directive, if this is necessary to take account of particular difficulties or implementation by collective agreement. They shall inform the Commission thereof by 8 March 2012 at the latest, stating the reasons for which an additional period is required.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Directive 96/34/EC shall be repealed with effect from 8 March 2012. References to Directive 96/34/EC shall be construed as references to this Directive.

Article 5

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 6

This Directive is addressed to the Member States.

Done at Brussels, 8 March 2010.

For the Council
The President
C. CORBACHO

ANNEX

FRAMEWORK AGREEMENT ON PARENTAL LEAVE (REVISED)

18 June 2009

This framework agreement between the European social partners, BUSINESSEUROPE, UEAPME, CEEP and ETUC (and the liaison committee Eurocadres/CEC) revises the framework agreement on parental leave, concluded on 14 December 1995, setting out the minimum requirements on parental leave, as an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women.

The European social partners request the Commission to submit this framework agreement to the Council for a Council decision making these requirements binding in the Member States of the European Union.

I. General considerations

1. Having regard to the EC Treaty and in particular Articles 138 and 139 thereof;[6]
2. Having regard to Articles 137(1)(c) and 141 of the EC Treaty[7] and the principle of equal treatment

6 Renumbered: Articles 154 and 155 of the TFEU.
7 Renumbered: Articles 153(1)c and 157 of the TFEU.

(Articles 2, 3 and 13 of the EC Treaty)[8] and the secondary legislation based on this, in particular Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;[9] Council Directive 92/85/EEC 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;[10] Council Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes;[11] and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast);[12]

3. Having regard to the Charter of Fundamental Rights of the European Union of 7 December 2000 and Articles 23 and 33 thereof relating to equality between men and women and reconciliation of professional, private and family life;
4. Having regard to the 2003 Report from the Commission on the Implementation of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC;
5. Having regard to the objective of the Lisbon strategy on growth and jobs of increasing overall employment rates to 70 %, women's employment rates to 60 % and the employment rates of older workers to 50 %; to the Barcelona targets on the provision of childcare facilities; and to the contribution of policies to improve reconciliation of professional, private and family life in achieving these targets;
6. Having regard to the European social partners' Framework of Actions on Gender Equality of 22 March 2005 in which supporting work-life balance is addressed as a priority area for action, while recognising that, in order to continue to make progress on the issue of reconciliation, a balanced, integrated and coherent policy mix must be put in place, comprising of leave arrangements, working arrangements and care infrastructures;
7. Whereas measures to improve reconciliation are part of a broader policy agenda to address the needs of employers and workers and improve adaptability and employability, as part of a flexicurity approach;
8. Whereas family policies should contribute to the achievement of gender equality and be looked at in the context of demographic changes, the effects of an ageing population, closing the generation gap, promoting women's participation in the labour force and the sharing of care responsibilities between women and men;
9. Whereas the Commission has consulted the European social partners in 2006 and 2007 in a first and second stage consultation on reconciliation of professional, private and family life, and, among other things, has addressed the issue of updating the regulatory framework at Community level, and has encouraged the European social partners to assess the provisions of their framework agreement on parental leave with a view to its review;
10. Whereas the Framework agreement of the European social partners of 1995 on parental leave has been a catalyst for positive change, ensured common ground on work life balance in the Member States and played a significant role in helping working parents in Europe to achieve better reconciliation; however, on the basis of a joint evaluation, the European social partners consider that certain elements of the agreement need to be adapted or revised in order to better achieve its aims;
11. Whereas certain aspects need to be adapted, taking into account the growing diversity of the labour force and societal developments including the increasing diversity of family structures, while respecting national law, collective agreements and/or practice;

8 Article 2 of the EC Treaty is repealed and replaced, in substance, by Article 3 of the Treaty on the European Union. Article 3(1) of the EC Treaty is repealed and replaced, in substance, by Articles 3 to 6 of the TFEU. Article 3(2) of the EC Treaty is renumbered as Article 8 of the TFEU. Article 13 of the EC Treaty is renumbered as Article 19 of the TFEU.

9 OJ L 45, 19.2.1975, p. 19–20.

10 OJ L 348, 28.11.1992, p. 1–8.

11 OJ L 46, 17.2.1997, p. 20–24.

12 OJ L 204, 26.7.2006, p. 23–36.

12. Whereas in many Member States encouraging men to assume an equal share of family responsibilities has not led to sufficient results; therefore, more effective measures should be taken to encourage a more equal sharing of family responsibilities between men and women;
13. Whereas many Member States already have a wide variety of policy measures and practices relating to leave facilities, childcare and flexible working arrangements, tailored to the needs of workers and employers and aiming to support parents in reconciling their professional, private and family life; these should be taken into account when implementing this agreement;
14. Whereas this framework agreement provides one element of European social partners' actions in the field of reconciliation;
15. Whereas this agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of force majeure, and refers back to Member States and social partners for the establishment of conditions for access and modalities of application in order to take account of the situation in each Member State;
16. Whereas the right of parental leave in this agreement is an individual right and in principle non-transferable, and Member States are allowed to make it transferable. Experience shows that making the leave non-transferable can act as a positive incentive for the take up by fathers, the European social partners therefore agree to make a part of the leave non-transferable;
17. Whereas it is important to take into account the special needs of parents with children with disabilities or long term illness;
18. Whereas Member States should provide for the maintenance of entitlements to benefits in kind under sickness insurance during the minimum period of parental leave;
19. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave as well as the role of income among other factors in the take-up of parental leave when implementing this agreement;
20. Whereas experiences in Member States have shown that the level of income during parental leave is one factor that influences the take up by parents, especially fathers;
21. Whereas the access to flexible working arrangements makes it easier for parents to combine work and parental responsibilities and facilitates the reintegration into work, especially after returning from parental leave;
22. Whereas parental leave arrangements are meant to support working parents during a specific period of time, aimed at maintaining and promoting their continued labour market participation; therefore, greater attention should be paid to keeping in contact with the employer during the leave or by making arrangements for return to work;
23. Whereas this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the European Union economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium sized undertakings;
24. Whereas the social partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore play a special role in the implementation, application, monitoring and evaluation of this agreement, in the broader context of other measures to improve the reconciliation of professional and family responsibilities and to promote equal opportunities and treatment between men and women.

THE SIGNATORY PARTIES HAVE AGREED THE FOLLOWING:

II. Content

Clause 1: Purpose and scope

1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice.
2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements and/or practice in force in each Member State.
3. Member States and/or social partners shall not exclude from the scope and application of this agreement workers, contracts of employment or employment relationships solely because they relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency.

Clause 2: Parental leave

1. This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.
2. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, at least one of the four months shall be provided on a non-transferable basis. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.

Clause 3: Modalities of application

1. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreements in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:
   (a) decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system, taking into account the needs of both employers and workers;
   (b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; Member States and/or social partners shall ensure, when making use of this provision, that in case of successive fixed term contracts, as defined in Council Directive 1999/70/EC on fixed-term work, with the same employer the sum of these contracts shall be taken into account for the purpose of calculating the qualifying period;
   (c) define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and/or practice, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation. Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and/or practice;
   (d) in addition to (c), authorise special arrangements to meet the operational and organisational requirements of small undertakings.
2. Member States and/or social partners shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. Member States and/or social partners shall have regard to the interests of

workers and of employers in specifying the length of such notice periods.

3. Member States and/or social partners should assess the need to adjust the conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness.

Clause 4: Adoption

1. Member States and/or social partners shall assess the need for additional measures to address the specific needs of adoptive parents.

Clause 5: Employment rights and non-discrimination

1. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.
2. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply.
3. Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave.
4. In order to ensure that workers can exercise their right to parental leave, Member States and/or social partners shall take the necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements and/or practice.
5. All matters regarding social security in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law and/or collective agreements, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

All matters regarding income in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law, collective agreements and/or practice, taking into account the role of income – among other factors – in the take-up of parental leave.

Clause 6: Return to work

1. In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs.

The modalities of this paragraph shall be determined in accordance with national law, collective agreements and/or practice.

2. In order to facilitate the return to work following parental leave, workers and employers are encouraged to maintain contact during the period of leave and may make arrangements for any appropriate reintegration measures, to be decided between the parties concerned, taking into account national law, collective agreements and/or practice.

Clause 7: Time off from work on grounds of force majeure

1. Member States and/or social partners shall take the necessary measures to entitle workers to time off from work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.
2. Member States and/or social partners may specify the conditions of access and detailed rules for applying clause 7.1 and limit this entitlement to a certain amount of time per year and/or per case.

Clause 8: Final provisions

1. Member States may apply or introduce more favourable provisions than those set out in this agreement.
2. Implementation of the provisions of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this agreement. This shall not prejudice the right of Member States and/or social partners to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances (including the introduction of non-transferability), as long as the minimum requirements provided for in the present agreement are complied with.
3. This agreement shall not prejudice the right of social partners to conclude, at the appropriate level including European level, agreements adapting and/or complementing the provisions of this agreement in order to take into account particular circumstances.
4. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with the Council decision within a period of two years from its adoption or shall ensure that social partners introduce the necessary measures by way of agreement by the end of this period. Member States may, if necessary to take account of particular difficulties or implementation by collective agreements, have up to a maximum of one additional year to comply with this decision.
5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and/or practice.
6. Without prejudice to the respective role of the Commission, national courts and the European Court of Justice, any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion.
7. The signatory parties shall review the application of this agreement five years after the date of the Council decision if requested by one of the parties to this agreement.

Done at Brussels, 18 June 2009.

For ETUC
John Monks
General Secretary
On behalf of the trade union delegation
For BUSINESSEUROPE
Philippe de Buck
Director General
For UEAPME
Andrea Benassi
Secretary General
For CEEP
Ralf Resch
General Secretary

Directive 2010/41/EU

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0041

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 157(3) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee,[1]

Acting in accordance with the ordinary legislative procedure,[2]

Whereas:

(1) Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood[3] ensures application in Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such activity. As far as self-employed workers and spouses of self-employed workers are concerned, Directive 86/613/EEC has not been very effective and its scope should be reconsidered, as discrimination based on sex and harassment also occur in areas outside salaried work. In the interest of clarity, Directive 86/613/EEC should be replaced by this Directive.

(2) In its Communication of 1 March 2006 entitled 'Roadmap for equality between women and men', the Commission announced that in order to improve governance of gender equality, it would review the existing Union gender equality legislation not included in the 2005 recast exercise with a view to updating, modernising and recasting where necessary. Directive 86/613/EEC was not included in the recasting exercise.

(3) In its conclusions of 5 and 6 December 2007 on 'Balanced roles of women and men for jobs, growth and social cohesion', the Council called on the Commission to consider the need to revise, if necessary, Directive 86/613/EEC in order to safeguard the rights related to motherhood and fatherhood of self-employed workers and their helping spouses.

(4) The European Parliament has consistently called on the Commission to review Directive 86/613/EEC, in particular so as to boost maternity protection for self-employed women and to improve the situation of spouses of self-employed workers.

(5) The European Parliament has already stated its position on these matters in its resolution of 21 February 1997 on the situation of the assisting spouses of the self-employed.[4]

(6) In its Communication of 2 July 2008 entitled 'Renewed Social Agenda: Opportunities, access

1 OJ C 228, 22.9.2009, p. 107.
2 Position of the European Parliament of 6 May 2009 (not yet published in the Official Journal), Position of the Council at first reading of 8 March 2010 (OJ C 123 E, 12.5.2010, p. 5), Position of the European Parliament of 18 May 2010.
3 OJ L 359, 19.12.1986, p. 56.
4 OJ C 85, 17.3.1997, p. 186.

and solidarity in 21st century Europe', the Commission has affirmed the need to take action on the gender gap in entrepreneurship as well as to improve the reconciliation of private and professional life.

(7) There are already a number of existing legal instruments for the implementation of the principle of equal treatment which cover self-employment activities, in particular 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[5] and 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.[6] This Directive should therefore not apply to the areas already covered by other directives.

(8) This Directive is without prejudice to the powers of the Member States to organise their social protection systems. The exclusive competence of the Member States with regard to the organisation of their social protection systems includes, inter alia decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits, the level of contributions and the conditions for access.

(9) This Directive should apply to self-employed workers and to their spouses or, when and in so far as recognised by national law, their life partners, where they, under the conditions laid down by national law, habitually participate in the activities of the business. In order to improve the situation for these spouses and, when and in so far as recognised by national law, the life partners of self-employed workers, their work should be recognised.

(10) This Directive should not apply to matters covered by other Directives implementing the principle of equal treatment between men and women, notably 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,[7] inter alia, Article 5 of Directive 2004/113/EC on insurance and related financial services remains applicable.

(11) To prevent discrimination based on sex, this Directive should apply to both direct and indirect discrimination. Harassment and sexual harassment should be considered discrimination and therefore prohibited.

(12) This Directive should be without prejudice to the rights and obligations deriving from marital or family status as defined in national law.

(13) The principle of equal treatment should cover the relationships between the self-employed worker and third parties within the remit of this Directive, but not relationships between the self-employed worker and his or her spouse or life partner.

(14) In the area of self-employment, the application of the principle of equal treatment means that there must be no discrimination on grounds of sex, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

(15) Member States may, under Article 157(4) of the Treaty on the Functioning of the European Union, maintain or adopt measures providing for specific advantages in order to make it easier for the under-represented sex to engage in self-employed activities or to prevent or compensate for disadvantages in their professional careers. In principle, measures such as positive action aimed at achieving gender equality in practice should not be seen as being in breach of the legal principle of equal treatment between men and women.

(16) It is necessary to ensure that the conditions for setting up a company between spouses or, when and in so far as recognised by national law, life partners, are not more restrictive than the conditions for setting up a company between other persons.

(17) In view of their participation in the activities of the family business, the spouses or, when and in so far as recognised by national law, the life partners of self-employed workers who have access to a system for social protection, should also be entitled to benefit from social

5 OJ L 6, 10.1.1979, p. 24.
6 OJ L 204, 26.7.2006, p. 23.
7 OJ L 373, 21.12.2004, p. 37.

protection. Member States should be required to take the necessary measures to organise this social protection in accordance with national law. In particular, it is up to Member States to decide whether this social protection should be implemented on a mandatory or voluntary basis. Member States may provide that this social protection may be proportional to the participation in the activities of the self-employed worker and/or the level of contribution.

(18) The economic and physical vulnerability of pregnant self-employed workers and pregnant spouses and, when and in so far as recognised by national law, pregnant life partners of self-employed workers, makes it necessary for them to be granted the right to maternity benefits. The Member States remain competent to organise such benefits, including establishing the level of contributions and all the arrangements concerning benefits and payments, provided the minimum requirements of this Directive are complied with. In particular, they may determine in which period before and/or after confinement the right to maternity benefits is granted.

(19) The length of the period during which female self-employed workers and female spouses or, when and in so far as recognised by national law, female life partners of self-employed workers, are granted maternity benefits is similar to the duration of maternity leave for employees currently in place at Union level. In case the duration of maternity leave provided for employees is modified at Union level, the Commission should report to the European Parliament and the Council assessing whether the duration of maternity benefits for female self-employed workers and female spouses and life partners referred to in Article 2 should also be modified.

(20) In order to take the specificities of self-employed activities into account, female self-employed workers and female spouses or, when and in so far as recognised by national law, female life partners of self-employed workers should be given access to any existing services supplying temporary replacement enabling interruptions in their occupational activity owing to pregnancy or motherhood, or to any existing national social services. Access to those services can be an alternative to or a part of the maternity allowance.

(21) Persons who have been subject to discrimination based on sex should have suitable means of legal protection. To provide more effective protection, associations, organisations and other legal entities should be empowered to engage in proceedings, as Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(22) Protection of self-employed workers and spouses of self-employed workers and, when and in so far as recognised by national law, the life partners of self-employed workers, from discrimination based on sex should be strengthened by the existence of a body or bodies in each Member State with competence to analyse the problems involved, to study possible solutions and to provide practical assistance to the victims. The body or bodies may be the same as those with responsibility at national level for the implementation of the principle of equal treatment.

(23) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions.

(24) Since the objective of the action to be taken, namely to ensure a common high level of protection from discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

1. This Directive lays down a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC.

2. The implementation of the principle of equal treatment between men and women in the access to and supply of goods and services remains covered by Directive 2004/113/EC.

Article 2

Scope

This Directive covers:

(a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law;

(b) the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, not being employees or business partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.

Article 3

Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be, treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose, or effect, of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal, or physical, conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 4

Principle of equal treatment

1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.

2. In the areas covered by paragraph 1, harassment and sexual harassment shall be deemed to be discrimination on grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

3. In the areas covered by paragraph 1, an instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination.

Article 5

Positive action

Member States may maintain or adopt measures within the meaning of Article 157(4) of the Treaty on the Functioning of the European Union with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurship initiatives among women.

Article 6

Establishment of a company

Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, the Member States shall take the measures necessary to ensure that the conditions for the establishment of a company between spouses, or between life partners when and in so far as recognised by national law, are not more restrictive than the conditions for the establishment of a company between other persons.

Article 7

Social protection

1. Where a system for social protection for self-employed workers exists in a Member State, that Member State shall take the necessary measures to ensure that spouses and life partners referred to in Article 2(b) can benefit from a social protection in accordance with national law.
2. The Member States may decide whether the social protection referred to in paragraph 1 is implemented on a mandatory or voluntary basis.

Article 8

Maternity benefits

1. The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.
2. The Member States may decide whether the maternity allowance referred to in paragraph 1 is granted on a mandatory or voluntary basis.
3. The allowance referred to in paragraph 1 shall be deemed sufficient if it guarantees an income at least equivalent to:

(a) the allowance which the person concerned would receive in the event of a break in her activities on grounds connected with her state of health and/or;

(b) the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law and/or;

(c) any other family related allowance established by national law, subject to any ceiling laid down under national law.

4. The Member States shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 have access to any existing services supplying temporary replacements or to any existing national social services. The Member States may provide that access to those services is an alternative to or a part of the allowance referred to in paragraph 1 of this Article.

Article 9

Defence of rights

1. The Member States shall ensure that judicial or administrative proceedings, including, where Member States consider it appropriate, conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider they have sustained loss or damage as a result of a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. The Member States shall ensure that associations, organisations and other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that this Directive is complied with may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative proceedings provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 10

Compensation or reparation

The Member States shall introduce such measures into their national legal systems as are necessary to ensure real and effective compensation or reparation, as Member States so determine, for the loss or damage sustained by a person as a result of discrimination on grounds of sex, such compensation or reparation being dissuasive and proportionate to the loss or damage suffered. Such compensation or reparation shall not be limited by the fixing of a prior upper limit.

Article 11

Equality bodies

1. The Member States shall take the necessary measures to ensure that the body or bodies designated in accordance with Article 20 of Directive 2006/54/EC are also competent for the promotion, analysis, monitoring and support of equal treatment of all persons covered by this Directive without discrimination on grounds of sex.
2. The Member States shall ensure that the tasks of the bodies referred to in paragraph 1 include:

(a) providing independent assistance to victims of discrimination in pursuing their complaints of discrimination, without prejudice to the rights of victims and of associations, organisations and other legal entities referred to in Article 9(2);
(b) conducting independent surveys on discrimination;
(c) publishing independent reports and making recommendations on any issue relating to such discrimination;
(d) exchanging, at the appropriate level, the information available with the corresponding European bodies, such as the European Institute for Gender Equality.

Article 12

Gender mainstreaming

The Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 13

Dissemination of information

The Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought by all appropriate means to the attention of the persons concerned throughout their territory.

Article 14

Level of protection

The Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.

The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

Article 15

Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission by 5 August 2015.

The Commission shall draw up a summary report for submission to the European Parliament and to the Council no later than 5 August 2016. That report should take into account any legal change concerning the duration of maternity leave for employees. Where appropriate, that report shall be accompanied by proposals for amending this Directive.

2. The Commission's report shall take the viewpoints of the stakeholders into account.

Article 16

Implementation

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 August 2012 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When the Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Where justified by particular difficulties, the Member States may, if necessary, have an additional period of two years until 5 August 2014 in order to comply with Article 7, and in order to comply with Article 8 as regards female spouses and life partners referred to in Article 2(b).
3. The Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 17

Repeal

Directive 86/613/EEC shall be repealed, with effect from 5 August 2012.
References to the repealed Directive shall be construed as references to this Directive.

Article 18

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 7 July 2010

For the European Parliament
The President
J. BUZEK
For the Council
The President
O. CHASTEL

Annex 2 – List of equality bodies[1]

Albania
- Commissioner for the Protection from Discrimination

Austria
- Ombud for Equal Treatment
- Austrian Disability Ombudsman

Belgium
- Unia (Interfederal Centre for Equal Opportunities)
- Institute for the Equality of Women and Men

Bosnia and Herzegovina
- Institution of Human Rights Ombudsman of Bosnia and Herzegovina

Bulgaria
- Commission for Protection Against Discrimination

Croatia
- Office of the Ombudsman
- Ombudsperson for Gender Equality
- Ombudswoman for Persons with Disabilities

Cyprus
- Office of the Commissioner for Administration and Human Rights (Ombudsman)

Czech Republic
- Public Defender of Rights

Denmark
- Board of Equal Treatment
- Danish Institute for Human Rights

Estonia
- Gender Equality and Equal Treatment Commissioner

Finland
- Ombudsman for Equality
- Non-Discrimination Ombudsman

Former Yugoslav Republic of Macedonia (FYROM)
- Commission for Protection against Discrimination

France
- Defender of Rights

Georgia
- Public Defender (Ombudsman)

1 See also http://www.equineteurope.org/-Equinet-Members-.

Germany
- Federal Anti-Discrimination Agency - FADA

Greece
- Greek Ombudsman

Hungary
- Equal Treatment Authority
- Office of the Commissioner for Fundamental Rights

Ireland
- Irish Human Rights and Equality Commission

Italy
- National Equality Councillor
- National Office against Racial Discrimination - UNAR

Latvia
- Office of the Ombudsman

Lithuania
- Office of the Equal Opportunities Ombudsperson

Luxembourg
- Centre for Equal Treatment

Malta
- Commission for the Rights of Persons with Disability - CRPD
- National Commission for the Promotion of Equality - NCPE

Moldova
- Council on Preventing and Eliminating Discrimination and Ensuring Equality

Montenegro
- Protector of Human Rights and Freedoms (Ombudsman)

Netherlands
- Netherlands Institute for Human Rights (formerly Equal Treatment Commission)

Norway
- Equality and Anti-Discrimination Ombud – LDO

Poland
- Commissioner for Human Rights

Portugal
- High Commission for Migration
- Commission for Citizenship and Gender Equality - CIG
- Commission for Equality in Labour and Employment - CITE

Romania
- National Council for Combating Discrimination - CNCD

Serbia
- Commissioner for Protection of Equality

Slovakia
- National Centre for Human Rights

Slovenia
- Advocate of the Principle of Equality

Spain
- Institute of Women and for Equal Opportunities
- Council for the Elimination of Ethnic or Racial Discrimination

Sweden
- Equality Ombudsman

United Kingdom
- Great Britain - Equality and Human Rights Commission (EHRC)
- Northern Ireland - Equality Commission for Northern Ireland

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