

Gender equality in employment and occupation

European Implementation Assessment

ANNEX I

Legal aspects and direct and indirect discrimination

Research paper
by Dr Susanne Burri,
in collaboration with
Prof. Dr Linda Senden and Alice Welland (LL.M)

Abstract

This research paper on the implementation of Directive 2006/54/EC provides an independent legal analysis of the main provisions of this Directive, taking into account relevant case law of the Court of Justice of the EU. The aim of this paper is also to identify gaps in its implementation at the level of the Member States. To this end an in-depth study with a focus on the interpretation and application of the concepts of direct and indirect discrimination has been carried out in six Member States: France, Latvia, Slovakia, Spain, the Netherlands and Sweden.

The following aspects of the Directive are addressed in the legal analysis: the background and structure of the Directive; its transposition and implementation; novelties; the purpose and scope; its concepts (in particular direct and indirect discrimination); equal pay; occupational social security; equal treatment; enforcement; and the promotion of equal treatment and social dialogue. This paper identifies legal problems and gaps. It provides specific recommendations on all these aspects and also offers suggestions in the event that the Directive were to be subjected to a recasting process and/or were to be amended

AUTHOR

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The current paper is part of the European Implementation Assessment of the Directive 2006/54/EC ('Recast Directive') for the Committee on Women's Rights and Gender Equality FEMM, together with other analyses on the same issue.

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Contents

Executive summary	6
Chapter 1 Introduction	8
I - Background to the request of the European Parliament	8
II - Methodology.....	9
III - Outline.....	9
Chapter 2 Background and structure of the Directive	11
I - Background of the Directive	11
II - Recasting some sex equality Directives.....	12
III - Structure of the Directive.....	13
Chapter 3 Transposition and implementation of the Directive	15
I - Transposition obligations for the MS limited to substantive changes	15
II - No <i>considerable</i> substantive changes included in the Commission’s amended proposal.....	16
III - Consolidation of existing case law or substantive change?	17
Chapter 4 Novelties	19
Chapter 5 The purpose and scope of the Directive	21
I - Human rights and fundamental rights.....	21
II - Equal treatment and equal opportunities.....	22
III - Employment and occupation	24
IV - Self-employment.....	25
Chapter 6 Definitions and concepts	26
I - Direct discrimination	26
II - Indirect discrimination	27
III - Harassment and sexual harassment.....	30
IV - Instruction to discriminate	31
V - Sex or gender discrimination.....	31
VI - Positive action	32
Chapter 7 Equal pay	36
I - Article 157 TFEU.....	36
II - The concept of pay	37
III - The principle of equal pay for equal work and work of equal value	38
IV - Relationship between primary and secondary EU law in relation to equal pay	40

Chapter 8 Occupational social security schemes.....	41
I - The relationship between Article 157 TFEU and Directive 86/378/EEC	41
II - Actuarial factors	42
III - Different pensionable ages for men and women.....	42
Chapter 9 Equal treatment as regards access to employment, vocational training, and promotion and working conditions.....	44
I - Material scope	44
II - Return from maternity leave	45
III- Paternity and adoption leave	45
Chapter 10 Enforcement	46
I - Defence of rights	46
II - Sanctions, compensation and reparation	47
III - Burden of proof	47
Chapter 11 Promotion of equal treatment and social dialogue	49
I - Equality bodies	49
II - Social dialogue and dialogue with NGOs	49
III - Victimisation.....	50
IV - Prevention of discrimination.....	51
Chapter 12 Conclusions and recommendations	52
I - Conclusions	52
II - Summary of recommendations	53
1. Recasting and/or amending the Directive	53
1.1 References to relevant international law	53
1.2 Mainstreaming	53
1.3 Multiple discrimination	53
1.4 Gender reassignment and transgender persons.....	54
1.5 Equal pay	54
1.6 Occupational social security schemes	54
1.7 Different pensionable ages between men and women.....	54
1.8 Leaves.....	54
1.9 Time limits	55
1.10 Rights of job applicants.....	55
2. Improving the effectiveness of the Directive	55
2.1 Mainstreaming, preventing and monitoring	55
2.1.1 Mainstreaming and monitoring.....	55

2.1.2	Prevention of discrimination.....	55
2.2	Concepts and burden of proof	55
2.2.1	Substantive equality	55
2.2.2	Pregnancy discrimination.....	56
2.2.3	Gender reassignment.....	56
2.2.4	Indirect discrimination.....	56
2.2.5	Burden of proof	56
2.3.	Equal pay	56
2.4	Self-employment	57
2.5	Enforcement.....	57
Bibliography	58
Annex I Questionnaire	62
Annex II	66

Executive summary

The independent legal analysis and assessment of the implementation of Directive 2006/54/EC provided in this research paper is based on relevant (academic) literature and case law of the Court of Justice of the EU, in particular on the concepts of direct and indirect discrimination. This paper aims also to identify gaps and difficulties in the implementation of the Directive by Member States and its application at national level. This aspect of the analysis is mainly based on a number of reports of the European Commission's European Network of Legal Experts in the Field of Gender Equality that have been made available to the public.¹ In order to further assess these difficulties and gaps in the implementation of this Directive in Member States, in-depth research has been carried out regarding six countries: France, Latvia, Slovakia, Spain, the Netherlands and Sweden. Experts in the field of gender equality were asked to respond to a questionnaire (see Annex I) during an interview. Their answers have been summarized (see Annex II). The experts have checked the summary based on their answers and could amend or add information if they considered it necessary. These six country reports show in particular the diversity of the national (legislative) contexts.

The legal analysis of the Directive in the first place highlights difficulties related to the recasting process itself. Subject to this process were four sex equality directives, of which two had been amended by new directives. These six directives had to be transposed into national law. The obligations of the Member States to implement Directive 2006/54/EC are limited to the provisions that represent a substantive change compared to these older directives, which have now been repealed. No information is provided in the Directive on which provisions represent a substantive change compared to earlier directives and this has complicated the implementation process. An assessment whether the Member States have correctly complied with their obligations under the Directive therefore also presents difficulties. The Directive contains some novelties which are discussed in the research paper. These novelties concern inter alia the purpose of the Directive, the prohibition of discrimination on the ground of gender reassignment, the definition of indirect sex discrimination, positive action, and occupational social security schemes.

The research paper provides specific recommendations that could be taken into account if the Directive were subjected to recasting and/or were to be amended. Most recommendations relate to the novelties in the Directive and/or problems that have become (more clearly) visible due to case law of the Court. In addition to the recasting process itself, recommendations mainly concern:

- the relation between various equality directives
- the relevance of international law
- gender mainstreaming, both at national and EU level
- multiple discrimination
- transgender discrimination
- equal pay

¹ See the website of the European Commission, DG Justice at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8. Most publications of this Network are also available from the EU Bookshop at: <https://bookshop.europa.eu/en/home/>.

- sex-based actuarial factors
- the distinction between statutory and occupational schemes, and its consequences
- leaves
- time limits
- information rights of job applicants.

The suggestions and recommendations in the research paper follow from the legal analysis of the Directive, but the list is certainly not meant to be exhaustive. Recasting and/or amending the Directive will present specific difficulties, inter alia due to the relation with other directives. It is submitted that in the short term, improving the effectiveness of the Directive can be reached by various means. Specific recommendations aimed at improving the effectiveness of the Directive address the following issues:

- mainstreaming and monitoring
- prevention of discrimination
- concepts of discrimination, in particular
 - substantive equality
 - pregnancy discrimination
 - gender reassignment
 - indirect discrimination
- the burden of proof
- equal pay
- self-employment
- enforcement, including the role of equality bodies.

These recommendations are targeted at a range of actors: the European Commission, the Member States, the (European) social partners, works councils, employers and equality bodies. Suggestions are made for further research, e.g. on the scope of protection of EU law of self-employed persons against diverse forms of sex discrimination.

Chapter 1 Introduction

I - Background to the request of the European Parliament

The European Parliament's Committee on Women's Rights and Gender Equality (FEMM) has issued an own-initiative report on the application of Directive 2006/54/EC (hereafter: 'the Directive' or 'the Recast Directive') of the 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.² The Committee on Employment and Social Affairs has requested the application of Rule 54 of the Rules of Procedure of the European Parliament to this report (procedure with associated committees). The Ex-Post Impact Assessment Unit (IMPT) of Directorate C - Impact Assessment and European Added Value (within Directorate General for European Parliament Research Services, DG EPRS) was requested to provide a 'Detailed European Implementation Assessment' on the situation in respect of this Directive. This research paper was commissioned by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value of the European Parliament (DG EPRS).

In accordance with Article 32 of the Directive, the European Commission published a report for the European Parliament and the Council on the application of this Directive in December 2013.³ The Commission has published no proposal up to now to amend Directive 2006/54/EC.

The present study has been carried out by Dr. Susanne Burri, Associate Professor Gender and Law at the Utrecht University School of Law and specialist co-ordinator in gender equality of the European Commission's European Network of Legal Experts in Gender Equality and Non-Discrimination.⁴ Prof. Dr. Linda Senden, Professor of International and European law and member of the executive committee of the above-mentioned network has collaborated in this research.⁵ The in-depth research into six Member States has been carried out by Alice Welland (LL.M), assistant coordinator of the same network.

The aim of this research paper on the application of Directive 2006/54/EC is to identify gaps in its implementation at the level of the Member States, provide an independent assessment of this Directive, and if necessary present suggestions for amendments to this Directive.

² 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), *OJ L* 204, 26 July 2006, pp. 23–36.

³ COM (2013) 861 final.

⁴ See for more information: <http://www.uu.nl/leg/staff/SDBurri/0?t=fbd33a85-aa5-41eb-aa6f-9b582b3bbda2>, accessed 12 February 2015.

⁵ See for more information: <http://www.uu.nl/leg/staff/LASenden/0?t=93722da3-015f-472b-8626-0e38753fd872>, accessed 12 February 2015.

II - Methodology

The aim, scope and provisions of the Directive have been analysed in the light of the relevant academic literature and the case law of the Court of Justice of the EU (hereafter: 'the Court' or 'the CJEU'). The analysis of the implementation of the Directive in national law by the Member States (hereafter: MS) is based on a number of reports of the European Commission's European Network of Independent Legal Experts in the Field of Gender Equality that have been made available to the general public. These concern in the first place two specific reports on the transposition of Directive 2006/54/EC which were published in 2009 and in 2011.⁶ In addition, this Network produced reports on the transposition of all the gender equality directives – including the Recast Directive. The most recent update was published in 2014.⁷ The national experts' findings in these publications allow an assessment of potential gaps in the implementation of this Directive in the MS.

In order to further assess difficulties and gaps in the implementation of this Directive in Member States, in-depth research has been carried out regarding six Member States: France, Latvia, Slovakia, Spain, the Netherlands and Sweden. Experts in the field of gender equality were asked to respond to a questionnaire during an interview (see Annex 1). Their answers have been summarized (see Annex II). The experts have checked the summary based on their answers and could amend or add information if they considered it necessary.

The research paper is drafted in such a way that it is clearly structured, and comprehensible for non-specialists.

III - Outline

The chapters of this paper address:

- the background and structure of the Directive
- the transposition and implementation of the Directive
- novelties

⁶ European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal *The transposition of Directive 2006/54/EC*, European Commission 2009, available at: http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf and European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. van Eijken *The transposition of Directive 2006/54/EC. Update 2011*, European Commission 2011, available at: http://ec.europa.eu/justice/gender-equality/files/recast_update2011_final_en.pdf; accessed 11 February 2015.

⁷ European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. van Eijken *Gender equality in 33 European countries. How are EU rules transposed into national law?* Update 2013, European Commission 2014, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf, accessed 11 February 2015. A more recent report is now published online: European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. van Eijken *Gender equality in 33 European countries. How are EU rules transposed into national law in 2014?* European Commission 2015, available at: http://ec.europa.eu/justice/gender-equality/files/ge_law_33_european_countries_2015_en.pdf, accessed 15 April 2015.

- the purpose and scope of the Directive
- concepts
- equal pay
- occupational social security schemes
- equal treatment
- enforcement
- promotion of equal treatment and social dialogue
- conclusions and recommendations

In each chapter, specific recommendations are made as to how to possibly deal with the identified gaps. The most important recommendations are summarized in the final chapter of this research.

Chapter 2 Background and structure of the Directive

Key findings

- The main aims of the Directive were to modernise, simplify and harmonise a number of previously adopted directives on the principle of equal treatment of men and women and to consolidate case law of the Court. The expectation was that the recasting exercise would make Community legislation in this field clearer, more effective and more accessible.
- The recasting exercise was mainly limited to the field of employment and occupation.
- The directives on statutory social security (79/7/EEC) and self-employment (86/613/EEC) were not part of the recasting exercise. The same is true for directives with a different legal basis (92/85/EEC and 96/34/EEC) and the directive adopted in 2004 on goods and services (2004/113/EC).

I - Background of the Directive

Since 1975, the European legislator has adopted various Directives in order to combat sex discrimination in (access to) employment. The CJEU⁸ has answered many preliminary questions from the national courts of the Member States regarding the interpretation and application of these sex equality directives. Some of these directives were narrower in scope and outdated compared to more recently adopted directives, which cover not only discrimination on the grounds of sex, but also discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation. This broadening of the scope of EU non-discrimination law was only enabled by the introduction of Article 13 EC by the Treaty of Amsterdam (now Article 19 TFEU), providing the necessary legal basis for this. Sometimes the interpretation of crucial concepts by the Court - for example, the concept of pay - had the effect that some provisions of directives were no longer relevant (see Chapter VII). This was one of the reasons why the European Commission started a so-called recasting of some sex equality directives in order to modernise, simplify and harmonise previously adopted directives, and in order to consolidate case law of the Court. The result was Directive 2006/54/EC of the European Parliament and 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 so-called Recast Directive. In this Directive, a number of directives in the field of equal pay and equal treatment of men and women in employment were consolidated. Its aim is, according to the European Commission in its initial proposal, to

‘simplify, modernise and improve the Community law in the area of equal treatment between men and women by putting together in a single text provisions of Directives linked by their subject in order to make Community legislation clearer and more effective for the benefit of all citizens’⁹ (emphasis added).

⁸ Previously the European Court of Justice (ECJ).

⁹ European Commission, COM (2004) 279, p. 2.

According to the Commission, the proposal is also grounded in 'the general context of the new legal and political environment which aims to make the Union more open, understandable and relevant to daily life.'¹⁰ These purposes are closely related to the regulatory function of the legality principle, particularly insofar as the exercise of consolidating and recasting the legislative instruments should render the law more accessible, foreseeable and, as such, improve legal certainty.¹¹ This was therefore an important aim of this recasting exercise.¹²

II - Recasting some sex equality Directives

The legal basis of Recast Directive 2006/54/EC is Article 141(3) EC (now Article 157(3) TFEU), which means that the co-decision procedure of Article 251 EC was followed. The directives that form part of the recasting exercise of EU sex equality legislation¹³ are:

- Directive 76/207/EEC,¹⁴ as amended by Directive 2002/73/EC,¹⁵ on equal treatment for men and women in the access to employment, vocational training and promotion and working conditions;
- Directive 86/378/EEC,¹⁶ as amended by Directive 96/97/EC,¹⁷ on equal treatment for men and women in occupational social security schemes;
- Directive 75/117/EEC¹⁸ on equal pay between men and women; and
- Directive 97/80/EC¹⁹ on the burden of proof.

The objective of the Recast Directive is to combine in a single text not only the main provisions on gender equality as covered by the above Directives, but also the relevant case law (preamble point 1). The Recast Directive had to be transposed in the MS of the EU by 15 August 2008 (Article 33) and the directives consolidated in this Directive were

¹⁰ Ibid.

¹¹ See the explicit reference to legal certainty in the Commission's proposal COM (2004) 279, p. 5.

¹² See further: S. Burri 'Coherent Codification? A case study in EU equal treatment legislation', in: L. Besselink, F. Pennings & S. Prechal *The Eclipse of the Legality Principle in Europe*, European Monographs 75, Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011, pp. 109-124.

¹³ See for a recent overview: S. Burri & S. Prechal *EU Gender Equality Law, Update 2013* European Commission 2013, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8, accessed 11 February 2015.

¹⁴ 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, *OJ L 39*, 14 February 1976, pp. 40-42.

¹⁵ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 269*, 5 October 2002, pp. 15-20.

¹⁶ 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, *OJ 29*, L 225, 12 August 1986, pp. 40-42.

¹⁷ Council Directive 96/97/EC, *OJ 40*, L 46, 17 February 1997, pp. 20-24.

¹⁸ 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, *OJ 18*, L 45, 19 February 1975, pp. 19-20.

¹⁹ Council Directive 97/80/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ 41*, L 14, 20 January 1998, pp. 6-8.

to be repealed one year later (Article 34). Member States could have up to one additional year to comply with the Recast Directive, if this was necessary to take account of particular difficulties (Article 33). However, the Directive does not stipulate when the Member States should communicate to the European Commission that they need an additional year to transpose the Directive. It is submitted that if a longer implementation period is allocated to the MS if necessary to take account of particular difficulties, legislation should mention before which date the MS should communicate to the Commission that they need the additional period.

The recasting exercise did not include the directives on the principle of equal treatment between men and women in statutory social security (Directive 79/7/EEC)²⁰, self-employment²¹ (Directive 86/613/EEC, now repealed by Directive 2010/41/EU)²² or the access to and supply of goods and services (Directive 2004/113/EC)²³. The same is true for the directives on pregnancy and maternity leave (92/85/EEC)²⁴ and on parental leave (96/34/EEC, now repealed by Directive 2010/18/EU),²⁵ which have a different legal basis.²⁶

III - Structure of the Directive

The Recast Directive is divided into four titles. The first title on general provisions includes a description of the aim of the Directive and definitions of various concepts, such as direct and indirect discrimination, harassment and sexual harassment. The

²⁰ 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, *OJ L 6*, 10 January 1979, pp. 24–25.

²¹ 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, *OJ L 373*, 21 December 2004, pp. 37–43.

However, some provisions in the Recast Directive apply to self-employment; see for example Article 2(1)(f), Article 6 and Article 14(1)(a).

²² 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, *OJ L 180*, 15 July 2010, pp. 1–6.

²³ 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 *OJ L 373*, 21 December 2004, pp. 37–43.

²⁴ 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), *OJ L 348*, 28 November 1992, pp. 1–8. A proposal to amend this Directive is pending: see <http://www.europarl.europa.eu/oeil/file.jsp?id=5697042>, accessed 14 June 2011. There is however little chance that this proposal will be adopted; the Council of the EU has not reached a decision on this proposal up to now and if there is no agreement before mid-2015, the proposal will be withdrawn according to the Commission's work programme for 2015, see COM (2014) 910 final, p. 12.

²⁵ 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), *OJ L 68*, 18 March 2010, pp. 13–20.

²⁶ See on the reasons why some directives were discarded: Commission Staff working paper SEC (2004) 482, p. 14.

second title includes provisions on equal pay, occupational social security schemes and on equal treatment as regards access to employment, vocational training and promotion and working conditions. In the third title, provisions are brought together regarding remedies and penalties, the burden of proof, victimisation, the promotion of equal treatment through equality bodies, social dialogue and dialogue with NGOs. This title also includes general provisions on, for example, the prevention of discrimination, gender mainstreaming, and the dissemination of information. Final provisions regarding for example reporting procedures and implementation, form the last title.²⁷

²⁷ See further: N. Burrows & M. Robinson 'An Assessment of the Recast of Community Equality Laws', *European Law Journal* 13, No. 2 (2007): 186-203; M. T. Lanquetin, 'L'égalité de traitement entre les hommes et les femmes en matière d'emploi et de travail: À propos de la directive 2006/54 CE du 5 juillet 2006 (directive « refonte »)', *Droit Social*, No. 7/8 (2007): 861-878 and A. Masselot, 'The State of Gender Equality Law in the European Union' *European Law Journal* 13, No. 2 (2007): 152-168.

Chapter 3 Transposition and implementation of the Directive

Key findings

- The obligation for the MS to transpose the provisions of the Directive is limited to substantive changes compared to earlier directives, but no list of substantive changes is provided in the Directive or in an annex to the Directive.
- According to the initial proposal of the Commission, there are ‘innovations’ in the directive. But the obligations of the MS regarding these ‘innovations’ are not clear.
- The ultimate text of the Directive has left considerable legal uncertainty on the implementation obligations of the MS

Before considering in more detail the specific provisions of the Directive, it is important to discuss at a more general level the nature of the changes the Directive brought and what this implied in terms of implementation obligations for the MS.

I - Transposition obligations for the MS limited to substantive changes

Recital 39 and Article 33 (implementation) clarify that the obligation to transpose the Directive into national law should be confined to those provisions which represent a *substantive change* (emphasis added) compared with the earlier directives. The obligation to transpose the provisions which are substantially unchanged already existed under the earlier directives.

A pre-condition for an assessment of the implementation of the Directive by the MS therefore is that there is clarity about what had to be implemented, determining which parts represent a substantive change compared to the earlier directives. If the Directive does not imply any substantive change compared to the existing directives, which have been implemented previously, the recasting exercise is limited to the EU level. In such case, no further transposition at national level would be needed if the earlier Directives have been implemented correctly. However, neither the Commission’s proposal nor the Directive provides a list of the substantive changes. Only Annex II to the Directive includes a correlation table between provisions of all the directives subject to the recasting exercise and provisions of the Recast Directive. This table shows that only Article 7(2) on the material scope of the occupational social security schemes provisions has no correlate in earlier Directives.²⁸ This provision implements case law which therefore belongs to EU law and has to be applied at national level. It can be considered as a substantive change of EU sex equality law in the field covered by the Recast Directive in so far that it requires a specific transposition into national law which was not required by the now repealed directives. The final provisions in Articles 32- 36 concern among others the review of the Directive by the Commission, the implementation of the

²⁸ The definition of pay in Article 2(1)(e) corresponds to the definition in Article 157(2) TFEU.

Directive, the repeal of the older directives subject to the recasting exercise and the entry into force of the Directive. These Articles do not represent substantive changes either.

II - No considerable substantive changes included in the Commission's amended proposal

The Commission's proposal for the Recast Directive mentioned a number of 'principal innovations', which in the first place concerned the integration of case law of the Court. Second, the scope of application of several provisions was extended: a number of provisions applicable to the access to work and working conditions (Directive 76/207/EEC, as amended by 2002/73/EC) now apply to all the areas covered by the Recast Directive, including for example, occupational social security schemes. Finally, a re-examination clause was added, permitting the Commission to propose any amendments necessary after the Commission has reviewed the operation of the Directive, by 15 February 2011 at the latest.²⁹

During the legislative process, the European Parliament (EP) proposed many amendments to the Commission's proposal.³⁰ Some amendments were included in the second proposal of the Commission, others were rejected.³¹ It is interesting to note that the Commission rejected a number of amendments of the EP arguing that they would amount to a substantive change. For example, amendments regarding the social dialogue and obligations of employers (Article 23 of the first proposal) were rejected with the following arguments:

'These amendments have in common the objective of transforming the obligation of Member States to *encourage* certain measures to be taken either by the social partners (promote equality between women and men, conclude agreements laying down anti-discrimination rules) or by employers (planned and systematic promotion of equality, prevention of discrimination) into an obligation to *ensure* that such measures are taken. This modification cannot be endorsed as it would amount to *considerable substantive changes going beyond what can be reasonably done within the framework of a recasting exercise*' (emphasis added).³²

In the author's view such a statement shows that the Commission had no intention of including substantive changes in the Recast Directive, at least no *considerable* substantive changes. This does not, however, clarify what the obligations of MS are as regards the issues mentioned as amounting to 'innovations' in the Commission's proposal. Do these innovations amount to substantive changes in the meaning of Article 33 or not? There is question of a rather ambiguous approach by the Commission: on the one hand, the proposal acknowledges the possibility of substantive changes and innovations, on the

²⁹ European Commission, COM (2004) 279, 5-6.

³⁰ European Parliament, T6-0283/2005.

³¹ European Commission, COM (2005), 380.

³² The Commission rejected with the same argument a proposal of the EP to modify references to parental leave (in addition, the Commission referred to the fact that Directive 96/34/EC is no part of the recasting exercise) and a proposal to amend Article 141(4) EC in order to place on Member States an obligation to adopt positive measures: COM (2005) 380, 13 and 15.

other hand it seems that they cannot amount to considerable substantive changes. This means that the ultimate text of the Directive has left considerable legal uncertainty, as it does not clarify any of these notions nor explicitly lists what amendments have to be considered as such. It is submitted that if amendments were made to the Directive, information should be provided whether they amount to a substantive change compared to earlier directives or not, for example by providing a table listing the Articles containing substantive changes.

III - Consolidation of existing case law or substantive change?

None of the listed 'principal innovations' is explicitly defined as a substantive change in the Commission's first proposal. It is submitted that the codification of existing case law - if done correctly - indeed does not amount to a substantive change due to the fact that the Court's rulings already have to be applied by the addressees of existing - and implemented - legislation.

However, the extension of some existing provisions in the field of (access to) employment to other areas could be defined as a substantive change, if it adds something new to existing legislation and case law at EU level. Such extensions can contribute to coherent codification and could result in a broader personal or material scope and/or offer more protection.³³ An example is the burden of proof rule in Article 19 that applies to all areas falling within the material scope of the Recast Directive, thus including occupational social security schemes for example.

In addition, the codification of case law might sometimes amount to a broader protection than offered by specific Court rulings. For example, the EP proposed to clarify that, for the purposes of the Recast Directive, discrimination includes less favourable treatment on the grounds of gender reassignment.³⁴ The Commission accepted this amendment in spirit and included in Recital 3 that:

'The Court 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 rights which it seeks to safeguard it also applies to discrimination arising from the gender reassignment of a person.'

According to the Commission, this Recital makes it clear that discrimination of transgender persons falls within the scope of the Directive.³⁵ Up to now, the case law of the Court in relation to gender reassignment concerned pay³⁶, dismissal³⁷ and statutory

³³ The European Economic and Social Committee refers to a possible change in substance as regards the horizontal provision on equality bodies, see: Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 48, C 157/83 of 28 June 2005, at Section 3.7.

³⁴ European Parliament, A-0176/2005, (Recital 2 and Article 2(2)(d)).

³⁵ European Commission, COM (2005) 380, 4.

³⁶ See in particular Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, [2004] ECR I-00541 (*K.B.*).

³⁷ See in particular Case C-13/94 *P v S and Cornwall County Council* [1006] ECR I-02143 (*P/S*).

social security (Directive 79/7/EEC)³⁸. The inclusion of the quoted section in the preamble of the Recast Directive provides some clarity regarding the interpretation of the concept of discrimination, implying that discrimination on the ground of gender reassignment is prohibited in the areas of pay, occupational social security schemes and (access to) employment, and that all the horizontal provisions of this Directive – such as the burden of proof, the right to compensation or reparation, and obligations of social partners and employers – also apply to gender reassignment. However, given the fact that this Recital codifies case law, it would be preferable to specifically address this issue in a provision of the Directive, as recommended in Chapter 6, Section V.

This implies broader protection for transgender persons who have undergone gender reassignment against discrimination than could be derived from the CJEU's case law up to now. In the author's view, however, this does not amount to a substantive change insofar as it codifies the existing approach to this issue by the Court, which covers not only pay, but also occupational and even statutory social security schemes. In addition, it seems quite logical for the provisions applicable to sex discrimination to also apply to gender reassignment, which is considered as discrimination based on the fact that a person is of one or the other sex, therefore constituting sex discrimination.

This having been said, it should be noted that it remains unclear whether the MS are obliged to specify in the relevant national legislation that discrimination on the grounds of gender reassignment is prohibited. According to the Commission's report, very few MS have explicitly transposed this novelty.³⁹ It is submitted that the transposition of this provision into national law would contribute to greater clarity and legal certainty as regards the scope of application of EU anti-discrimination law. It is regrettable that it remains unclear whether MS have to include such provisions in national law or not. This hampers a uniform transposition and application of EU law in the MS regarding the prohibition of discrimination in case of gender reassignment. It would have been preferable to define more clearly the obligations of the Member States in this respect. Providing such clarity is even more recommendable when a provision attributes rights to individuals. In addition, the wording of such provision could clarify that the protection against discrimination is not limited to transgender persons who have undergone gender reassignment. Still, bringing gender reassignment under the scope of the concept of discrimination is not the only novelty in the Directive.

³⁸ See in particular Case C-423/04 *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585 (*Richards*).

³⁹ COM (2013) 861 final, p. 5.

Chapter 4 Novelties

Key findings

- Uncertainty about what can be considered a ‘novelty’ in the Directive complicates the assessment of whether MS have correctly complied with the obligations to transpose the Directive.
- So-called clarifications or novelties primarily concern issues related to the purpose and the scope of the Directive.

As regards the obligation to transpose only substantive changes into national law as specified in Article 33 of the Recast Directive, the European Commission’s European Network of Legal Experts in the Field of Gender Equality pointed out that the implementation may turn out to be complicated because the substantive changes should first be clearly identified.⁴⁰ It should be recalled that apart from the mentioning of Article 7(2)⁴¹ in the correlation table as being a new Article, no information at all is included in the Recast Directive itself about which amendments imply substantive changes. The Commission’s proposal, while clearly mentioning in the various provisions which changes have been made compared to earlier Directives, not once clarifies whether this is a substantive change or not. It would therefore seem that it is left up to the MS to identify such substantive changes in the light of their obligations to implement only those provisions that represent a substantive change as compared with earlier Directives (Article 33). It must be noted that such an approach considerably complicates the assessment whether MS have correctly complied with their implementation obligations under the Directive.

The so-called novelties, innovations or clarifications will be addressed more in-depth in the following chapters of this research paper. Here, a list of novelties is provided.

In the view of the authors of the Report on the transposition of the Recast Directive of 2009, a closer look at the various provisions of the Recast Directive compared to the earlier Directives shows that some ‘clarifications’ or ‘novelties’ can be identified. The independent experts mention the following issues:

- The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities (title of the Directive and Article 1); see further Chapter 5, Sections II and III.
- The Directive also applies to gender reassignment (Recital 3); see further Chapter 6, Section V.

⁴⁰ European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal *The transposition of Directive 2006/54/EC*, European Commission 2009, available at:

http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf, p. 2.

⁴¹ The Article refers to the application of the provisions on pension schemes to civil servants.

- The uniform definition of the concept of indirect discrimination in Article 2(1)(b) of the Recast Directive replaces the definition of the Burden of Proof Directive; see further Chapter 6, Section 2.
- The concept of positive action as described in Article 3 has been broadened in its substantive field of application because the scope of the Recast Directive is broad and also includes e.g. occupational pension schemes (Recitals 21 and 22); see Chapter 6, Section 6.
- Article 7(2) of the Recast Directive on the material scope of the provisions on equal treatment in occupational social security schemes is new (the text incorporates some well-established case law of the CJEU); see Chapter 8.
- The extension of the scope of the Recast Directive to the area of occupational social security schemes leads to an extension of the scope of the horizontal provisions; see Chapters 10 and 11.
- The issue of reconciliation of work, private and family life is explicitly mentioned; see in particular Recitals 11, 26, 27, Article 9(1)(g) and Article 21(2); see Chapter 11, Section II.
- The Directive lays down an obligation for Member States to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, see Article 31(3); see Chapter 6, Section I.
- The availability of judicial procedures for the enforcement of obligations imposed by the Directive also includes, where appropriate conciliation procedures; see Article 17(1), see further Chapter 10, Section I.⁴²

In addition, according to the title of the Directive it applies not only to employment, but also to occupation (see also Article 14(1)(a)) and some provisions apply explicitly to self-employment (Article 14(1)(a)) and self-employed persons (Articles 10 and 11), see Chapter 5, Section IV. Some provisions in the Recast Directive might involve a substantive change, even if this is not explicitly mentioned in relevant documents. For example, the principle of equal opportunities could well be interpreted in a much broader way than the principle of equal treatment, which has been commonly used up to now in EU sex equality legislation. However, such a principle of equal opportunities has not (yet) been clarified at EU level. The obligations of the Member States in this respect have therefore been unclear so far.

⁴² European Network of Legal Experts in the Field of Gender Equality, S. Burri & S. Prechal *The transposition of Directive 2006/54/EC*, European Commission 2009, available at: http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf, p. 2-3.

Chapter 5 The purpose and scope of the Directive

Key findings

- There is a lack of coherence between the preamble of the Recast Directive on the one hand and the preambles of Directive 2000/43/EC (the Race Directive) and Directive 2000/78/EC (the Framework Directive) on the other hand as regards references to relevant international human rights instruments.
- A reference to multiple discrimination, of which women are often a victim, is lacking in the Recast Directive. This also reflects a lack of coherence between the Recast Directive on the one hand and the 2000 Directives on the other hand.
- The aim of the Directive is not formal, but substantive equality, which can involve differentiation in order to have equal results.
- The concept of substantive equality is closely related to positive action.

I - Human rights and fundamental rights

In Recitals 2 and 3 of the preamble of the so-called Race Directive, 2000/43/EC,⁴³ explicit references are made to human rights and fundamental rights and to international human rights instruments that have been ratified by all MS. Recital 2 of this Directive reads:

In accordance with Article 6 of the Treaty on European Union, the European 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 should respect 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.

And Recital 3 reads:

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.

Similar recitals are included in the preamble of the so-called Framework Directive 2000/78/EC⁴⁴ (see Recitals 1 and 4).

⁴³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* 2000 L180, pp. 22-26.

⁴⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and education, *OJ* 2000 L 303, pp. 16-22.

Such references are lacking in the Recast Directive. The MS and the national courts are obliged to respect international obligations and such references to relevant human rights instruments underline these obligations. It is particularly striking that in the Directive no reference at all is made to CEDAW (the UN Convention on the Elimination of all forms of Discrimination Against Women). It is submitted that given the fact that the recasting exercise was aimed at modernising a number of existing directives in particular in the light of the 2000 Directives, such recasting should include references to relevant international law in the preamble similarly to Recitals 2 and 3 of Directive 2000/43/EC.

In addition, mention could be made of some relevant ILO Conventions, in particular Convention 111 (prohibition of discrimination in the field of employment and occupation), which is mentioned in Recital 4 of Directive 2000/78/EC. In addition, the Convention on Workers with family responsibilities (nr. 156) and the Maternity Protection Convention (nr. 183) could be mentioned in the preamble of the Directive.

Similarly, reference is made in Race Directive 2000/43/EC to Article 3(2) EC (now Article 8 TFEU). Recital 14 of the Race Directive reads:

In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

Recital 3 of Directive 2000/78/EC is framed similarly. It is therefore striking that the preamble of the Recast Directive does not include such reference to the gender mainstreaming obligation of the EU in Article 8 TFEU (and Article 10 TFEU). However, a specific mainstreaming obligation addressed to the MS is included in Article 29 of the Directive and entails a clear obligation for the MS. It is nevertheless submitted that a specific reference in the Recast Directive framed in similar terms as those in Recital 14 of Directive 2000/43/EC and Recital 3 of Directive 2000/78/EC in the preamble of the Directive with an explicit reference to the mainstreaming obligations is recommended, as it would further coherence between these three directives and would promote legal clarity. In addition, no reference at all to multiple discrimination can be found in the Directive. It is submitted that the preamble of the Directive should mention these obligations explicitly and refer to multiple discrimination.

II - Equal treatment and equal opportunities

The legal basis of the Directive is Article 141(3) EC, now 157(3) TFEU (see also Recital 4 of the Directive). This Article reads:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

With the introduction by the Treaty of Amsterdam (entry into force in 1999) of Article 141(3) in the EC Treaty – now Article 157(3) TFEU – the MS in their capacity of masters of the Treaties created a specific legal basis for furthering by way of EU regulation the realization of equal treatment and *equal opportunities* of men and women in employment and *occupation*. This can be seen as a recognition on the part of the MS of the fundamental rights' status of the principle of equal treatment of men and women in the employment and occupation sphere, as recognized in the Court's case law already as from the mid-seventies⁴⁵ and as now also recognized in a number of other Treaty provisions (Articles 2 and 3(3) TEU and 8 and 10 TFEU). The fundamental character of equality between men and women is reflected in Recital 2 and Recital 5 (which refers to Article 21 and 23 of the EU Charter of Fundamental Rights) of the Directive.

The broader scope of the principle of equal treatment and equal opportunities is also reflected in the purpose of the Directive in Article 1, which reads:

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.

The initial, pre-Amsterdam legislative action on the part of the EEC in this field was very much tied to the originally purely economic rationale of Article 119 EEC, reflected in the choice of the internal market related legal basis of the early sex equality directives. But the insertion of Article 141(3) EC marked a shift away from that trend, reflected in the post-Amsterdam Directive 2002/73/EC (now repealed)⁴⁶ and Recast Directive 2006/54/EC, which were based on this provision and which were clearly connected to the goal of enhancing equal opportunities and equal treatment in employment and occupation.

Whereas the principle of 'equal treatment' could be understood in a narrow, formal equality sense, it is clear from early case law that it should also be understood in a broader, substantive equality sense: the very recognition of the notion of indirect discrimination (see Chapter 6) implies the recognition that formal equal treatment can actually lead to a discriminatory result that is prohibited unless there is an objective justification. The Court explicitly recognized that the result pursued by Directive 76/207/EEC on access to employment and working conditions (now repealed by Recast Directive 2006/54/EC, which has the same aim and scope in this field) is substantive, not formal equality.⁴⁷ The notion of 'equal opportunities' "recognizes that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of 'being alike' so that the right to like treatment becomes applicable."⁴⁸ As

⁴⁵ To start with Case 80/70, *Gabrielle Defrenne v Belgian State*, [1971] ECR 445 (*Defrenne I*).

⁴⁶ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 2002, L 269, pp. 15-20.

⁴⁷ C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011, paragraph 26 (*Thibault*).

⁴⁸ In this sense E. Howard, *The European Year for Equal Opportunities of All-2007: Is the EU Moving Away from A Formal Idea of Equality?*, *European Law Journal*, Volume 14, No. 2, 2008, at p. 171.

equality of opportunities is geared towards equalizing the starting point for all, giving everyone the same opportunities, this approach may well involve differentiation. Even more, it can be argued that the realization of equal treatment and equal opportunities and the remedying of the disadvantages that some groups suffer, require positive action measures for the disadvantaged group.⁴⁹ The goals of 'equal treatment and equal opportunities' as contained 'in tandem' in Article 157(3) can therefore be said to impose in fact a functional, teleological interpretation of this legal basis, meaning that EU legislative action should not lead to achieving merely formal equality but should also enhance substantive equality in the sense of bringing about equality of opportunity for men and women. In that sense, the logic underlying Article 157(3) as regards Union action is similar to the logic underlying Article 157(4) as regards Member States' action. These provisions should also be interpreted in the light of Articles 2 and 3(3) TFEU, 8 and 10 TFEU and Article 21 and 23 of the Charter of Fundamental Rights, in which equality of women and men has been positioned as a core value of Union law.

III - Employment and occupation

The second important element regarding the purpose and scope of the Directive concerns the question of how to interpret 'matters of employment and occupation'. Article 157(3) speaks of 'measures to ensure the application of *the principle of equal opportunities and equal treatment of men and women* in matters of employment and occupation [...]'. It can therefore be argued that this provision also targets the pre-employment and occupational stage, in order to enhance equal opportunities and equal treatment when it comes to access to employment and occupation of men and women, without them having as yet a certain position under the law such as that of worker or self-employed person (see also below Section IV). Article 157(3) is also about taking measures that allow for better and equal access to such positions.

Article 1 of the Recast Directive defines the scope as follows:

[...] 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.

The scope of the Directive is further defined in Chapter 2 of the Directive as regards occupational pension schemes and in Chapter 3, which addresses (access) to employment. Particularly interesting is that Article 14(1) further specifies that:

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

⁴⁹ E. Howard, *The European Year for Equal Opportunities of All-2007: Is the EU Moving Away from A Formal Idea of Equality?*, *European Law Journal*, Volume 14, No. 2, 2008, at p. 172.

activity and at all levels of the professional hierarchy, including promotion; (emphasis added).

From the approach in this Directive we can therefore infer that it is not confined to strict employment issues, but also extends to more general issues of occupation and self-employment.

IV - Self-employment

The personal and material scope of the gender equality directives is not easy to define. A specific directive applies to self-employment: Directive 2010/41/EU of the European Parliament and the Council of July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity (which repealed Directive 86/613/EEC).⁵⁰ According to Article 2 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.

Directive 2010/41/EU covers those aspects that are not covered by Directive 2006/54/EC and Directive 79/7/EEC (statutory social security).⁵¹ Which self-employed persons are covered either by Directive 2006/54/EC or Directive 2010/41/EU is no easy question.⁵² Identifying gaps in the protection against discrimination of self-employed persons in relation to the scope of Directive 2010/41/EU, the Recast Directive and the Goods and Services Directive 2004/113/EC⁵³ should be the subject of specific research.

⁵⁰ OJ 2010 L 180, p. 6.

⁵¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment between men and women in matters of social security, OJ 1979, L 6, pp. 24-25.

⁵² See further on this issue: European Network of Legal Experts in the Field of Gender Equality, N. Countouris & M. Freedland, European Commission 2012, available at:

http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 11 February 2015 and European Network of Legal Experts in the Field of Gender Equality, C. Barnard & A. Blackham *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*, European Commission 2015, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/self_employed_en.pdf, accessed 15 April 2015.

⁵³ 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, OJ 2004, L 373, pp. 37-43.

Chapter 6 Definitions and concepts

Key findings

- The definition of direct sex discrimination suggests that a comparator (who might be hypothetical) is required in all cases. However, no comparator is required in pregnancy cases.
- The Court has clarified that financial consequences cannot provide a justification for direct sex discrimination.
- Budgetary considerations cannot in themselves provide a justification for indirect sex discrimination. The same is true for mere generalisations.
- More emphasis should be placed on measures to prevent discrimination.
- Discrimination based on gender reassignment amounts to sex discrimination.

I - Direct discrimination

The concept of direct sex discrimination is now defined in Article 2(1)(a) of Directive 2006/54. Direct discrimination occurs:

[...] where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

This definition suggests that a person who is treated less favourably should be compared to another person who is in a comparable situation. However, this definition also allows a comparison with a hypothetical comparator ('would be treated in a comparable situation'), which facilitates the comparison.

In pregnancy cases, a comparison is not required. The Court held that the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. The fact that there are no male candidates is not relevant if the reason for not appointing the woman is linked to her pregnancy (*Dekker*).⁵⁴ A comparator is not necessary then. This means that in pregnancy cases, no comparator is required.⁵⁵ The Court also held in *Dekker* and subsequent cases that such direct sex discrimination cannot be justified by financial consequences.

In the Recast Directive the EU legislator has made it clear that the less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c)). However, this provision does not explicitly specify that no comparator is required in pregnancy cases. In addition, it does not clarify that such direct sex discrimination cannot be justified by financial consequences. It is submitted that codifying case law of the Court of Justice in relation to pregnancy would contribute to legal clarity.

⁵⁴ Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941, paragraphs 15-18.

⁵⁵ For example AG Wahl acknowledged this in his opinion in Case C- 363-12 (*Z.*) at paragraph 55.

Given the drafting of Article 2(2)(c), it would be interesting to know if a man who is pregnant (a transgender) would also be protected against discrimination based on pregnancy. In many countries the requirement of sterilisation no longer applies to transgender persons, which means that more men can become pregnant. A well-known example is Thomas Beatie.⁵⁶ It would therefore be recommended to interpret this provision in such a way that it applies to any less favourable treatment of a *person* related to pregnancy and maternity.

If the Recast Directive were amended, the difficulties related to the personal scope of this Directive can be avoided by deleting the reference to the Pregnancy and Maternity Directive in Article 2(2)(c).⁵⁷

Direct discrimination can only be justified by written exceptions. There is a closed system of exceptions for direct sex discrimination in employment and occupation. There are three exceptions to the prohibition of direct sex discrimination:

- occupational requirements for which the sex of the worker is a determining factor (Article 14(2));
- protection of women, particularly as regards pregnancy and maternity (Article 28(1)); and
- positive action (Article 3).

As regards the protection of women, transgender men could be included if the wording of Article 28(1) is amended to read 'protection of persons, particularly as regards pregnancy and maternity'.

II - Indirect discrimination

The concept of indirect discrimination has been developed by the CJEU in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work.⁵⁸ The landmark case is *Bilka*, which concerned access to an occupational pension scheme.⁵⁹ According to this scheme, part-time employees could obtain pensions if they had worked full time for at least 15 years over a total period of 20 years. The CJEU found that if a much lower proportion of women work full time than men, the exclusion of part-time workers would be contrary to Article 119 EEC (now Article 157 TFEU), where, taking into account the difficulties encountered by female workers working full time, this measure could not be explained by factors that exclude any discrimination on grounds of sex. The measures could, however, be objectively justified if they

⁵⁶ See: http://en.wikipedia.org/wiki/Thomas_Beatie.

⁵⁷ See for example the *Mayr* and *Danosa* cases: ECJ 26 February 2008, Case C-504/06, *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017 and ECJ 11 November 2010, Case C-232/9, *Dita Danosa v LKB Lizings SIA* [2010] ECR I-11405.

⁵⁸ See for example Tobler R.C. *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law* Antwerp, Oxford, Intersentia 2005, and S. Burri & H. Aune 'Sex Discrimination in Relation to Part-Time and Fixed-Term Work', *European Gender Equality Law Review* 2014-1, pp. 11-21, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf, accessed 11 February 2015 and EU Bookshop.

⁵⁹ Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

corresponded to a real need on the part of the undertaking and were appropriate and necessary to achieve that aim. The same objective justification test has been applied in many different CJEU judgments and is now included in the definition of indirect discrimination in all equal treatment directives.

Indirect discrimination is defined in Article 2(1)(b) of Directive 2006/54 as follows:

(...) 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.

The indirect discrimination test, therefore, comprises the following elements. The first major question to be answered is whether a measure significantly disadvantages more persons of one sex than the other. It is for the applicant to prove that a measure or a practice amounts to indirect discrimination.⁶⁰ Such proof can be provided by using statistics for example. In *Seymour* the Court provided more guidance on how to establish such a presumption or *prima facie* case of indirect sex discrimination.⁶¹ A problem that might occur in practice is that relevant statistics are not available or that an employer does not disclose such statistics. Establishing a claim of indirect sex discrimination could then be difficult. The same is true for job applicants (see further Chapter 10).

When there is a *prima facie* case of indirect discrimination the defendant has to provide an objective justification for the indirect discriminatory criterion or practice. Indirect discrimination can be justified if the aim is legitimate and the measures to achieve that aim are appropriate and necessary. The arguments put forward have to be specific, and supported by evidence. For example, in *Seymour* the Court considered that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex; in addition, it was necessary to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim. It is submitted that in order to enhance a correct application of the concept of indirect discrimination as interpreted by the Court, publications and campaigns should be launched to clarify that indirect sex discrimination cannot be justified by mere generalisations, but that the arguments have to be specific.

The Court also considered in *Roks* that:

‘although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes. Moreover to concede that budgetary considerations may justify a difference in treatment as

⁶⁰ Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 3199, paragraphs 10-16 and Case 381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR I-04961, paragraphs 51-62.

⁶¹ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* [1999] ECR I-00623, paragraphs 58-65.

between men and women which would otherwise constitute indirect discrimination on grounds of sex, [...] would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States'.⁶²

This is a very important consideration of the CJEU in matters of statutory social security, as in the *Roks* case a statutory social security scheme was at stake falling under Directive 79/7/EEC. However, sometimes the indirect discrimination test applied in social security matters is less strict and amounts to a reasonableness test, as for example in *Nolte*.⁶³ The Member States have a broad margin of discretion in this field. Nevertheless, in some cases, the Court critically assesses the arguments put forward in the light of the aim of a measure and concludes that there is no objective justification in case of indirect sex discrimination.⁶⁴

The Court has repeatedly confirmed that budgetary considerations in themselves cannot justify indirect sex discrimination. It is submitted that this case law merits broad attention.

The concept of indirect discrimination is a very important concept, as it allows to address more hidden forms of discrimination. However, it is difficult to apply in practice, and at national level some problems occur. The report on the transposition of gender equality directives of the European Network of Legal Experts in the Field of Gender Equality *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law? (update 2013)* highlights some of these problems.⁶⁵ In Hungary, for example, 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. In Greece, the notions of indirect discrimination and instruction to discriminate have not yet been applied in practice. In addition, in Bulgaria for example, case law up to now has mainly addressed direct discrimination. In many countries, there is only scarce case law on indirect sex discrimination and when at stake, courts face difficulties when applying this concept. However, the Spanish Constitutional Court considered disadvantages faced by part-time workers in relation to pensions a form of indirect sex discrimination.⁶⁶

⁶² Case 343/92 *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* [1994] ECR I-571, paragraphs 35-36 and Case C-226/98 *Birgitte Jørgensen v Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg* [2000] ECR I-2447, paragraphs 37-42.

⁶³ Case C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625.

⁶⁴ See for example Case C-123/10, *Waltraud Brachner v Pensionsversicherungsanstalt* [2011] ECR I-10003.

⁶⁵ European Network of Legal Experts in the Field of Gender Equality, S. Burri & H. van Eijken *Gender equality in 33 European countries. How are EU rules transposed into national law?* Update 2013, European Commission 2014, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf, accessed 11 February 2015. A more recent report is currently being produced by this Network, but is not yet available online.

⁶⁶ Judgment of the Constitutional Court 61/2013 of 14 March 2013. See Case C-385/11 *Isabel Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)* [2012], n.y.p. (*Elbal Moreno*).

III - Harassment and sexual harassment

Both harassment and sexual harassment are defined in the Directive in Article 2(1) (c) and (d). Harassment is defined as follows:

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.

The requirements are therefore cumulative ('...and of creating an intimidating...'). Harassment is defined in the Recast Directive in terms similar to those used in all the equal treatment directives adopted since 2000. The sex equality directives also prohibit sexual harassment.⁶⁷ Sexual harassment is defined in Article 2(1) (d) of the Directive as follows:

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.

In this definition, the requirements are not cumulative. Both concepts are included in the concept of discrimination and cannot be objectively justified. Article 2(2)(a) in addition includes:

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

There is no CJEU case law yet on the concepts of harassment or sexual harassment. However in the *Coleman* case, a female worker who had the sole care responsibility for her disabled son was treated unequally in comparison with her colleagues who had no disabled child and she was harassed by her employer.⁶⁸ She quit her job, but sued her employer for disability discrimination. The Court considered that the prohibition of direct disability discrimination in the Framework Directive 2000/78/EC is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his/her child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination. The Court followed a similar reasoning on harassment. Such interpretation extends the protection afforded by the Directive and implicitly recognizes the value of care.⁶⁹

⁶⁷ See further European Network of Legal Experts in the Field of Gender Equality, A. Numhauser-Henning & S. Laulom *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, European Commission, 2011, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9 and EU Bookshop <https://bookshop.europa.eu/en/home/>, accessed 11 February 2015.

⁶⁸ C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

⁶⁹ Ann Stewart, Silvia Nicolai & Catherine Hoskyns, 'Discrimination by Association: A Case of the Double Yes?' *Social and Legal Studies* 2011:20, pp. 173-190.

In Recital 7 and Article 26 employers and those responsible for access to vocational training shall be encouraged by MS 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. This is a rather weak provision. It is submitted that examples of preventive measures that can be taken should be disseminated.

IV - Instruction to discriminate

The prohibition on discrimination includes an instruction to discriminate against persons on grounds of sex (Article 2(2)(b)). This could, for example, apply if an employer required that an agency supplying temporary workers only recruits persons of a certain sex for a specific job. In that case, both the employer and the agency would be liable and would have to justify such discrimination.⁷⁰ It should be noted that incitation to discriminate is not explicitly mentioned in the EU directives. There is no CJEU case law on the instruction to discriminate. Incitation to discriminate is not explicitly prohibited in the Recast Directive. Measures aimed at prevention of discrimination could pay attention to forms of incitation to discriminate. If the Directive were amended, it could specify that Article 2(2)(b) also applies to an explicit incitation to discriminate.

V - Sex or gender discrimination

The concepts of sex or gender are not defined in the Directive. However, as explained above, one of the novelties of the Directive is the reference in Recital 3 to the case law of the Court on discrimination arising from gender reassignment. It reads:

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.

According to the Commission only few MS have national legislation prohibiting discrimination arising from gender reassignment.⁷¹ Some issues that amount to sex discrimination are explicitly mentioned in Article 2(2) of the Directive. It is submitted that an explicit prohibition of discrimination arising out of gender reassignment and an explicit prohibition of discrimination of transgender people could be included in the Directive. Such provision would provide more legal certainty and clarify the obligations of the MS. Discrimination arising out of gender reassignment is already prohibited due to the relevant case law of the Court. A prohibition of discrimination of transgender persons would explicitly clarify that the prohibition of discrimination in the Directive also applies to gender reassignment.

⁷⁰ I. Asscher-Vonk 'Instruction to discriminate' *European Gender Equality Law Review* No. 1/2012, pp. 4-12, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 11 February 2015.

⁷¹ COM (2013) 861 final, pp. 5-6.

VI - Positive action

Positive action is allowed according to Article 157(4) TFEU which reads:

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.

Positive action is defined in Article 3 of the Directive as follows:

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.

This Article applies to all issues covered by the Recast Directive, also occupational pension schemes for example. Recital 21 specifies that: '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.'

This Article replaces Article 2(4) of Directive 76/207/EEC. In the first draft of Article 2 of Directive 76/207/EEC the idea of positive action was included in the definition of equal treatment, which was defined as: 'The elimination of all discrimination based on sex or on marital or family status, including the adoption of appropriate measures to provide women with equal opportunity in employment, vocational training, promotion and working conditions.' During the negotiations on this draft Article, the reference to appropriate measures was deleted. Since then positive action has been framed in EU law as an exception to the principle of equal treatment, instead of as an integral part thereof, an approach which amounts to formal equality (see also Chapter 5, section II).

In addition, another change was made in the provision on positive action with the Treaty of Amsterdam. Whereas Article 2(4) of Directive 76/207/EEC referred to women's opportunities, Article 157(4) TFEU allows positive action for the underrepresented sex. However, at the time of the adoption of the Treaty of Amsterdam, Declaration 28 stipulated that positive action measures should in the first instance aim at improving the situation of women in working life (see also Recital 22 of the Directive and below).

Another approach is reflected in CEDAW, which prohibits discrimination against women and requires States Parties to take all appropriate measures (Articles 1 and 2). It aims at the recognition, enjoyment and exercise by women on a basis of equality between men and women, of human rights and fundamental freedoms. The approach adopted by CEDAW is therefore asymmetric: discrimination against women is prohibited.

By contrast, EU equal treatment law follows a strict symmetric approach, emphasizing the principle of equal treatment between men and women.⁷² This means that men are also

⁷² See for a comparison between CEDAW and EU equal treatment law: A. Wiesbrock 'Equal Employment Opportunities and Equal Pay: Measuring EU Law against the Standards of the

protected against sex discrimination, even if social reality shows that generally speaking women have less power, income and opportunities than men, in particular in relation to employment. The conceptualization of equality in employment does not take into account the fact that the participation and position of men in employment is much less hampered by other responsibilities than work, such as care.⁷³ Statistics show that women in Europe are over-represented in groups who leave the labour market temporarily or those working part time.⁷⁴

In order to realise not only formal, but also substantive, true and genuine equality in results, the differences in relation to care between men and women are relevant to employment matters.⁷⁵ A symmetric approach to equality does not take these differences into account. The same is true for a formal approach to equality when relevant differences are not taken into account. In the Directive a more substantive approach is reflected in Recital 22:

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.

The measures permitted under the positive action provisions are those designed to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. The measures should, in particular, encourage the participation of women in various occupations in those sectors of working life where they are currently under-represented.⁷⁶

One of the means to achieve this end is to set targets or even quotas in recruitment and promotion, which, however, must be proportionate to the aim pursued. According to the CJEU a measure that would give automatic and unconditional preference to one sex is not justified. In the case of recruitment and promotion, targets and/or quotas can only be accepted if each and every candidature is the subject of an objective assessment that takes

Women's Convention' in: I. Westendorp (ed.) *Women's Convention Turned 30*, Antwerp: Intersentia 2012, pp. 227-245.

⁷³ See on this issue for example S. Fredman & J. Fudge 'The Legal Construction of Personal Work Relations and Gender' *Jerusalem Review of Legal Studies* (2013) Vol. 7 pp. 112-122.

⁷⁴ See European Commission *Employment and Social Development in Europe 2013* European Commission 2013, available at:

<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7684>, accessed 11 February 2015.

⁷⁵ See on the concept of substantive equality for example T. Loenen 'Substantive equality as a right to inclusion: dilemmas and limits in law' *American Philosophical Association Newsletter on Law and Philosophy*, Vol. 94 nr. 2, Spring 1995, pp. 63-66.

⁷⁶ See for example European Network of Legal Experts in the Field of Gender Equality & S. Fredman *Making Equality Effective: The role of proactive measures*, European Commission 2009, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9, accessed 11 February 2015. and European Network of Legal Experts in the Field of Gender Equality & G. Selanec & L. Senden *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* European Commission 2011, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf, accessed 11 February 2015.

the specific personal situations of all candidates into account. This case law of the CJEU started with the rather severe judgment in *Kalanke*, which reflects a formal approach to equality.⁷⁷ In the meantime, the CJEU has softened its position in favour of positive action.⁷⁸ In *Lommers*,⁷⁹ for instance, the Court found that measures that gave preference to female employees in the allocation of nursery places, but did not amount to a total exclusion of male candidates, were justified. Preferential allocation of nursery places to female employees was likely to improve equal opportunities for women since it was established that they were more likely than men to give up their careers in order to raise a child. Although, on the one hand, the case was decided in favour of positive measures, on the other hand, it also illustrated the potential dangers of positive action, in the sense that it continues to stereotype women as caregivers. It should be noted that positive action is framed as an exception to the principle of equal treatment between men and women in the Directive, not as a means to achieve substantive equality. The provisions on positive action in the equal treatment directives adopted since 2000 are similar.

A proposal is pending on gender balance in company boards. The proposal sets a minimum objective of a 40% representation for the under-represented sex among companies' non-executive directors. It would require companies with a lower representation to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions, in order to achieve that objective. Its Article 4(3) contains a second obligation that is being imposed through the Member States on listed companies, namely the application of a priority rule for the under-represented sex. This provision reads:

In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the *under-represented sex* if that candidate is *equally qualified* as a candidate of the other sex in terms of suitability, competence and professional performance, *unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.* [emphasis added]

This formulation is in line with the requirements that ensue from *Kalanke* and post-*Kalanke* case law. The deadline would be set for 2018 (public sector) and 2020 (private sector). The directive would expire by the end of 2028. Non-listed companies and SMEs would be excluded, and Member States would also be able to exclude companies employing less than 10% of the under-represented sex.⁸⁰ If the proposal is accepted,

⁷⁷ Case 450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-03051. See for example Loenen & Veldman (1996).

⁷⁸ Case 476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I 02891. See also, for instance, Case 158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR 2000 I-01875 and Case 319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR I-08807.

⁷⁹ Case 476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-02891.

⁸⁰ COM (2012) 614. See for more information:

<http://libraryeuroparl.wordpress.com/2013/11/14/gender-balance-on-company-boards/>, accessed 24 November 2014.

which is not yet certain, it would be the first time that EU legislation requires Member States to take specific positive action measures. Such approach seems in line with Article 4 CEDAW, which allows for temporary special measures aimed at accelerating *de facto* equality between men and women.⁸¹ CEDAW also imposes an obligation on States Parties to combat gender stereotypes in Article 5. While case law of the Court sometimes recognizes the negative impact of gender stereotypes, for example in *Marschall*,⁸² EU equal treatment legislation does not address prejudices and negative stereotyping explicitly yet. Article 5 CEDAW might be a source of inspiration in this sense.⁸³

If the Directive were amended, it is submitted that prejudices and negative stereotyping should be addressed explicitly in the preamble, with a reference to Article 5 CEDAW and relevant case law of the Court (in particular *Marschall*).

⁸¹ See on the compatibility of this Article and the EU positive action approach: L.B. Waddington & L. Visser (2012). Chapter 5 'Article 4 - Temporary special measures under the Women's Convention and positive action under EU law: mutually compatible or irreconcilable?' In I. Westendorp (Ed.) *The Women's Convention turned 30: achievements, setbacks and prospects* pp. 95-107, Cambridge-Antwerp-Portland, Intersentia.

⁸² Case C-409/95, *Hellmut Marschall tegen Land Nordrhein-Westfalen* [1997] ECR I-06363, paragraph 29.

⁸³ See for example H.M.T. Holtmaat & R.C. Tobler 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination' *Maastricht Journal of European and Comparative Law* 12(4): pp. 399-425, 2005, and H.M.T. Holtmaat 'Article 5 CEDAW' in: M.A. Freeman, C. Chinkin, B. Rudolf (Red.) *The UN Convention on the Elimination of All Forms of Discrimination against Women; a Commentary* pp. 141-167, Oxford, Oxford University Press 2012.

Chapter 7 Equal pay

Key findings

- The principle of equal pay for equal work and work of equal value has an economic and social aim, the economic aim being secondary to the social aim.
- The concept of pay in Article 157 TFEU is broad and includes occupational social security schemes. The provisions of the Recast Directive concerning pay have to be interpreted consistently with the case law of the Court on Article 157 TFEU.
- Discrimination in pay between men and women is prohibited, whatever the system gives rise to unequal pay (e.g. a job classification or a pension system).
- Transparency requires that the principle that equal pay be observed in respect of each of the elements of remuneration.
- The Commission's Recommendation on strengthening the principle of equal pay between men and women through transparency provides a useful approach to further wage transparency and merits broad dissemination and attention.
- The principle of equal pay between men and women does not apply if the differences in pay cannot be assigned to a single source. This limitation is problematic in case of outsourcing.

I - Article 157 TFEU

A provision on the principle of equal pay for men and women for equal work was included in the EEC Treaty in 1957.⁸⁴ The meaning of this principle in practice has been developed in many cases of the Court since 1971. On 8 April 1976, the Court ruled that this Article had direct horizontal effect.⁸⁵ This means that this Article can be relied on by individuals before national courts not only against (bodies of) the state, but also against individuals such as private employers. The Court also ruled that respect for fundamental personal human rights is one of the general principles of Community law which the Court has the duty to ensure and that there is no doubt that the elimination of discrimination based on sex forms part of those fundamental rights.⁸⁶

The gender pay gap was one of the first problems addressed by the European Economic Community in 1957, but the principle of equal pay between male and female workers for

⁸⁴ The former Article 119 of the EEC Treaty, then Article 141 EC, now Article 157 TFEU.

⁸⁵ Case 43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 (*Defrenne II*), at paragraph 24.

⁸⁶ Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1978] ECR 1365 (*Defrenne III*), at paragraphs 26-27. See further: C. Barnard 'Gender Equality in the EU. A Balance Sheet' in P. Alston, M. Bustelo and J. Heenan (eds.) *The EU and Human Rights* pp. 215-279 Oxford, Oxford University Press 1999, and S. Burri 'The Position of the European Court of Justice with respect to the Enforcement of Human Rights', in: I. Boerefijn and J. Goldschmidt (eds.) *Changing Perceptions of Sovereignty and Human Rights. Essays in Honour of Cees Flinterman* pp. 311-326 Intersentia 2008.

work of equal value had also been established in other international law instruments previously.⁸⁷

The background of this provision was purely economic: the MS wanted to eliminate distortions in competition between undertakings established in different MS. France had adopted provisions on equal pay for men and women much earlier. This country was afraid that cheap female labour available in other countries would cause undertakings to avoid investment in France.⁸⁸ However, according to the Court, this Article does not only have an economic, but also a social aim. The Court ruled in 1976 that the principle of equal pay forms part of the social objectives of the European Economic Community, which is not merely an economic union, but at the same time intends, by common action, to ensure social progress and to strive towards the constant improvement of the living and working conditions of its people. This double aim, which is simultaneously economic and social, shows that the principle of equal pay forms part of the foundations of the Community.⁸⁹ The Court also ruled in 1978 that the elimination of sex discrimination forms part of the fundamental personal human rights.⁹⁰ More recently, the Court even ruled that the economic aim is secondary to the social aim, which constitutes the expression of a fundamental human right.⁹¹

II - The concept of pay

The potential impact of Article 119 EEC has been strengthened by a large body of case law of the Court on the concept of pay. The Court adopted a broad and purposive interpretation of this concept.⁹² This Article applies not only to sex discrimination arising out of individual contracts, but also to collective agreements and legislation.⁹³ Pay includes not only the basic pay, but also, for example, overtime supplements,⁹⁴ special bonuses paid by the employer,⁹⁵ travel facilities,⁹⁶ compensation for attending training

⁸⁷ See for instance the ILO Equal Remuneration Convention Nr. 100, which was adopted in 1951. The first Article of this Convention concerns equal remuneration for men and women workers for work of equal value: see <http://www.ilo.org/ilolex/english/convdisp1.htm>, accessed 21 May 2008.

⁸⁸ See for a discussion of the adoption of Article 119: C. Hoskins *Integrating Gender* pp. 43-59 London-New York, Verso 1996.

⁸⁹ See Case 43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 (*Defrenne II*), at paragraphs 10-12.

⁹⁰ See Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1978] ECR 1365 (*Defrenne III*).

⁹¹ Case C-50/96, *Deutsche Telekom AG, formerly Deutsche Bundespost Telekom v Lilli Schröder*, [2000] ECR I-743 (*Schröder*), at paragraph 57.

⁹² See for example E. Ellis, *EU Anti-Discrimination Law*, (Oxford: Oxford University Press, 2005), pp. 121-158.

⁹³ See Case 43/75, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] ECR 455 (*Defrenne II*), at paragraphs 21-22.

⁹⁴ See for example Case 300/06, *Ursula Voß v Land Berlin*, [2007] ECR I-10573. (*Voß*).

⁹⁵ See for example Case C-333/97, *Susanne Lewen v Lothar Denda*, [1999] ECR I-7243 (*Lewen*).

⁹⁶ See for example Case 12/81, *Eileen Garland v British Rail Engineering Limited*, [1982] ECR 359 (*Garland*).

courses and training facilities,⁹⁷ termination payments in case of dismissal⁹⁸ and occupational pensions.⁹⁹

In *Defrenne I* the Court had to differentiate between the concept of pay as laid down in Article 119 and in social security systems. The Court ruled that although a consideration in the nature of social security benefits is not alien to the concept of pay, this concept does not include social security schemes or benefits, in particular retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers. These schemes guarantee workers the benefits of a legal scheme, which is financed by workers, employers and possibly the public authorities less by way of the employment relationship between the employer and the worker than through considerations of social policy.¹⁰⁰ In the famous *Barber* judgment, the Court ruled that Article 119 of the Treaty prohibits any discrimination between men and women with regard to pay, whatever the system giving rise to such inequality.¹⁰¹ In this case, there was a close relationship between the occupational and the statutory pension scheme. It is submitted that if the Directive were amended, this aspect should be mentioned in Article 4.

The second section of Article 141 EC, now Article 157 TFEU, contains the same definition of 'pay' as the former Article 119 EEC and Article 2(1)(e) of the Directive. A reference to pay as provided in Article 141 of the Treaty (now Article 157 TFEU) is included in Article 14(1) (c) of the Directive. Such reference ensures that the concept of pay and the principle of equal pay for equal work and work of equal value are interpreted consistently in accordance with primary EU law (see below).

III - The principle of equal pay for equal work and work of equal value

Article 119 EEC was amended when the Treaty of Amsterdam came into force on 1 May 1999 and was renumbered as Article 141 EC. The first two paragraphs remained nearly the same, although the provision in Article 141(1) explicitly stated that 'each Member State shall ensure the principle of equal pay for male and female workers for equal work or work of equal value'. In Article 157(1) TFEU this provision remained unchanged.

The Court explained in *Barber* that with regard to equal pay for men and women, genuine transparency, permitting effective review by the national court, is ensured only if the principle of equal pay must be observed in respect of each of the elements of

⁹⁷ See for example Case C-360/90, *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötzel*, [1992] ECR I-3589 (*Bötzel*).

⁹⁸ See for example Case C-33/89, *Maria Kowalska v Freie und Hansestadt Hamburg*, [1990] ECR I-2591 (*Kowalska*).

⁹⁹ See for example Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, [1986] ECR 1607 (*Bilka*) and Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889 (*Barber*).

¹⁰⁰ Case 80/70, *Gabrielle Defrenne v Belgian State*, [1971] ECR 445 (*Defrenne I*), at paragraphs 7-8.

¹⁰¹ See Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, [1990] ECR 1990, I-1889 (*Barber*), at paragraph 32.

remuneration granted to men and women, and not on a comprehensive basis in respect of the overall consideration granted to men and women.¹⁰² It is submitted that if the Directive were amended, it should be clarified in Article 4 of the Directive that the principle of equal pay must be observed in respect of each of the elements of remuneration granted to men and women, with a reference to the relevant case law.

Both Article 157 TFEU and Article 4 of the Directive (which implements Article 1 of Directive 75/117/EEC) specify that the principle of equal pay also applies to work of equal value. Recitals 9, 10 and 11 clarify some case law of the Court and Annex 2 of the Commission's staff working document accompanying the report on the application of the Directive offers an overview of landmark case law of the CJEU on equal pay.¹⁰³ According to the Court, the principle of equal pay in Article 157 TFEU does apply to equal work and work of equal value and also, *a fortiori*, to work of higher value. The Court adopted this view, stating that otherwise the employer would easily be able to circumvent the principle of equal pay by assigning additional or more onerous duties to workers of a particular sex, who could then be paid a lower wage.¹⁰⁴ However, this Article does not require that a worker is paid more according to the higher value of his or her work compared to the work of his or her colleague of the other sex. Commentators have pointed out that this might leave open the possibility that employers might grade women's jobs as being superior in value, while their wages were classified at the level of the lower-paid men.¹⁰⁵

An important limitation of the application of the concept of equal pay for work of equal value is reflected in the case law when work is outsourced. The Court ruled in *Lawrence* that a situation in which the differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source does not fall under the scope of Article 141(1) EC.¹⁰⁶ It is submitted that given the general increase in outsourcing activities in different forms, this forms a serious limitation of the application of the principle of equal pay between men and women, which is problematic. If the Directive were amended, it should also be considered how situations concerning outsourcing can be brought under the scope of the Directive.

The European Commission paid specific attention to the application of the equal pay provisions of the Directive in practice in its report.¹⁰⁷ In addition the Commission's staff working document accompanying this report provides information on the gender neutral use of job evaluation and classification systems, in Annex 1. Recently, the Commission

¹⁰² See Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889 (*Barber*), at paragraphs 33-34.

¹⁰³ COM (2013) 512 final.

¹⁰⁴ Case 157/86, *Mary Murphy and others v An Bord Telecom Eireann*, [1988] ECR 673 (*Murphy*), paragraphs 9-10.

¹⁰⁵ S. Prechal & N. Burrows, *Gender Discrimination Law of the European Community* p. 81 Aldershot-Vermont, Dartmouth 1990.

¹⁰⁶ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, [2002] ECR I-07325. See also Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-873 (*Allonby*).

¹⁰⁷ COM (2013) 861 final, p. 7.

adopted a recommendation in this field: Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency.¹⁰⁸ This soft-law document might encourage Member States to take additional measures. However, it is too early to provide an assessment of the potential impact at national level of this recommendation. According to Article IV on the follow-up of this recommendation, the MS are invited to notify the measures they have taken in this field to the Commission and the Commission will draw up a report on the progress made in implementing the Recommendation. It is submitted that the recommendation provides a useful approach to further wage transparency, as it clarifies the measures MS, employers and social partners can take in order to strengthen the principle of equal pay by imposing transparency requirements. This Recommendation merits broad dissemination by the Commission, (European) social partners and the MS. If the Directive were amended, the main provisions contained in this Recommendation could be incorporated into the Chapter on equal pay of the Directive.

IV - Relationship between primary and secondary EU law in relation to equal pay

Directive 75/117/EEC did not alter the meaning of Article 119 EEC (now Article 157 TFEU), which is a primary source of Community law. The Court stated in *Worringham* that although this Directive explains that the concept of same work in Article 119 includes work to which equal value is attributed, this in no way affects the concept of pay as laid down in Article 119.¹⁰⁹

The same is true for the relationship between Article 157 TFEU and Article 4 of the Directive, which reads:

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.

The case law of the Court regarding the concept of equal pay in Article 119, in particular the *Barber* judgment and subsequent judgments on occupational social security schemes, has also led to amendments of the so-called fourth Directive on occupational social security schemes, which has now been repealed by the Recast Directive.¹¹⁰ Recitals 12-18 summarize the relevant case law and Chapter 2 of the Directive on equal treatment in occupational social security schemes implements this case law.

¹⁰⁸ OJ L 69, pp. 112-214.

¹⁰⁹ Case 69/80, *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited*, [1981] ECR 767 (*Worringham*), paragraph 21.

¹¹⁰ Council Directive of 24 July 1986 on the implementation of the principle of equal treatment between men and women in occupational social security schemes (86/378/EEC), OJ 1986, L 225/40. This Directive has been amended by Council Directive 96/97/EC of 20 December 1996, OJ 1997, L46/20 (the so-called *Barber* Directive).

Chapter 8 Occupational social security schemes

Key findings

- The exceptions allowed in relation to actuarial factors in statutory social security schemes (Directive 79/7/EEC), the Recast Directive and the Goods and Services Directive (2004/113/EC) differ with respect to occupational social security schemes, given recent case law of the Court.
- The distinction in the case law of the Court on statutory social security schemes and occupational social security schemes is crucial with respect to different pensionable ages of men and women. This issue is problematic in countries where pension schemes are considered to be neither statutory nor occupational.

The principle of equal treatment of men and women in matters of social security was first addressed in Directive 79/7/EEC.¹¹¹ This Directive applies to *statutory* social security schemes, e.g. national legislation providing protection against risks such as sickness, invalidity, old age or unemployment. Such schemes do not fall under the concept of pay. *Occupational* social security schemes do not fall under the scope of Directive 79/7/EEC. These schemes are defined as follows in Article 2(1)(f) of the Recast Directive:

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 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.

Directive 86/378/EEC applied to occupational social security schemes and has now been repealed. The relevant case law has been codified in Title II, Chapter 2 of the Recast Directive.

I - The relationship between Article 157 TFEU and Directive 86/378/EEC

As previously mentioned, due to the case law of the Court, in particular *Barber* and post-*Barber* case law, occupational pension schemes fall under the concept of pay of Article 119 EEC (then 141 EC; now 157 TFEU). This primary law article does not contain exceptions (except on positive action, see Article 157(4) TFEU) contrary to the now repealed Directive 86/378/EEC on occupational social security. Given the primacy of the Treaty article in case of conflict, the provisions on occupational social security schemes had to be

¹¹¹ 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, *OJ L 6*, 10 January 1979, pp. 24–25.

amended. Many cases have clarified the prohibition of discrimination in this field and some are reflected in the examples of discrimination listed in Article 9 of the Directive.

II - Actuarial factors

A difficult issue is the use of actuarial factors when they differ according to sex. Taking into account sex as actuarial factor is allowed in some occupational security schemes according to Article 9(1)(h) and 9(1)(j). However, the use of such factors is prohibited in the area of goods and services in all new contracts concluded after 21 December 2007 (see Article 5(1) of Directive 2004/113/EC). The CJEU considered the exception provided in Article 5(2) invalid in *Test-Achats*.¹¹² Pursuant to this judgment, the Commission has issued guidelines on the application of Directive 2004/113/EC to insurances.¹¹³

More recently, the Court considered that Article 4(1) of Council Directive 79/7/EEC must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are used as an actuarial factor. The judgment concerned the calculation of a statutory social benefit payable due to an accident at work. In this case, by applying the actuarial factor, the lump-sum compensation paid to a man was less than that which would be paid to a woman of the same age and in a similar situation.¹¹⁴ This means that at the moment, the unisex rule applies in the area of goods and services and – at least partially – in the field of statutory social security schemes. The question which implications this case law will have for the exceptions relating to actuarial factors in Chapter 2 of the Recast Directive cannot be answered yet. However it is rather likely that the implications of the *X* case will have to be clarified in the near future, both for the area of statutory social security (Directive 79/7/EEC) and for occupational social security schemes.

III - Different pensionable ages for men and women

Another difficult issue is the question whether MS are allowed to determine different pensionable ages for men and women. According to Article 7(1) of Directive 79/7/EEC on statutory social security schemes, different pensionable ages for men and women are allowed. However, in the field of pay – and this includes occupational pension schemes – different pensionable ages for men and women are not allowed (*Barber* and Article 9(1)(f) of the Directive). It has therefore become crucial to determine what is considered a statutory pension scheme and what an occupational pension scheme. This issue is even more difficult given the fact that in some countries, pension schemes are considered to be neither statutory nor occupational (e.g. Bulgaria).¹¹⁵ Given the complexity and difficulties

¹¹² C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773.

¹¹³ Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*), COM (2011) 9497.

¹¹⁴ Case C-318/13 *Proceedings brought by X*, n.y.r. (*X*).

¹¹⁵ See further European Network of Legal Experts in the Field of Gender Equality, S. Renga, D. Molnar-Hidassy, and G. Tisheva *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries*, December 2010, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit JUST/D/2, available at:

of interpretation of issues related to equal treatment of men and women in old-age pensions and the relation of the Recast Directive with other sex equality directives addressing different pensionable ages for men and women, amendments to Chapter 2 of the Directive do not seem opportune at this point.

Article 7(2) clarifies some case law of the Court regarding the (material) scope of Chapter 2 and should be considered as a novelty. It stipulates that Chapter 2 of the Directive:

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.

In addition, the so-called horizontal provisions on for example the burden of proof and enforcement issues also apply to occupational social security schemes.

http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, accessed 20 March 2014.

Chapter 9 Equal treatment as regards access to employment, vocational training, and promotion and working conditions

Key findings

- Conditions for access to self-employment are explicitly covered by the prohibition of sex discrimination as regards access to employment, vocational training, and promotion and working conditions.
- The provision on return from maternity leave (Article 15) codifies case law of the Court.
- MS may recognise paternity and/or adoption leave, but this is no obligation under EU law.
- Adoption leave is also addressed in Parental Leave Directive 2010/18/EU.

I - Material scope

Chapter 3 of the Directive mainly reflects the relevant provisions of Directive 76/207/EEC in Article 14. Article 14(1) clarifies that direct and indirect sex discrimination is prohibited both in the public and private sectors, including public bodies, and therefore also codifies case law of the Court. The definitions of discrimination in Article 2 of the Directive also apply to this field, which means that for example harassment or an instruction to discriminate in (access) to employment are also prohibited.

As mentioned, a change in the wording of this provision compared with the repealed Directive 76/207/EEC is that access to *self-employment or to occupation* is also explicitly mentioned and therefore included in the material scope of the Directive. However, self-employment is not mentioned in Article 14(1)(c). The issue of equal treatment of men and women in self-employment could be the subject of specific research on the scope of protection and gaps between the Recast Directive, Directive 2010/41/EU and Directive 2004/113/EC as suggested above.

Article 14(1)(d) is a new provision, and reads:

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.

There is no case law yet concerning the issue of sex discrimination in relation to workers' or employers' organisations.

As already mentioned, Article 14(2) provides an exception to the principle of equal treatment regarding occupational activities for which the sex of the worker is a determining factor. According to established EU case law, this exception has to be interpreted strictly.

II - Return from maternity leave

Article 15 codifies case law of the Court. It reads:

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.

For reasons of legal certainty and clarity it is submitted that this Article should not be amended. The Commission started an infringement procedure against the Netherlands for not having implemented this Article correctly. The Court however did not share the view of the Commission.¹¹⁶

III- Paternity and adoption leave

The Directive also contains a provision on rights related to paternity and adoption leave in Article 16, which reads:

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.

Paternity leave is not subject to implementation obligations by MS; they may recognise distinct rights to paternity and/or adoption leave. However, the Parental Leave Directive 2010/18/EU, which implements the revised Framework Agreement of the European Social Partners of 9 June 2009, addresses adoption leave. Clause 2(1) of this Agreement entitles men and women workers to an individual right to parental leave on the grounds of birth or adoption of a child. The parental leave is at least four months (Clause 2(2)). Clause 4 on adoption stipulates in addition that MS and/or social partners shall assess the need for additional measures to address the specific needs of adoptive parents. Here again, the relationship between different directives is an issue, in this case between the Parental Leave Directive - which implements the Framework Agreement of the European Social Partners, which can only be amended by the European Social Partners - and the Recast Directive. Article 28(2) specifies that the Directive is without prejudice to the provisions of the Parental Leave Directive and the Pregnancy Directive.¹¹⁷

¹¹⁶ Case C-252/13, *European Commission v Kingdom of the Netherlands* [2014] ECR n.y.r.

¹¹⁷ See on the implementation of the Parental Leave Directive 2010/18/EU: European Network of Legal Experts in the Field of Gender Equality, Maria do Rosário Palma Ramalho, Petra Foubert & Susanne Burri *The Implementation of Parental Leave Directive 2010/18 in 33 European Countries*, European Commission 2015, available at: http://ec.europa.eu/justice/gender-equality/document/files/parental_leave_report_final_en.pdf, accessed 15 April 2015.

Chapter 10 Enforcement

Key findings

- The so-called horizontal provisions also apply to occupational social security schemes.
- Some case law of the Court has been codified, for example regarding compensation or reparation. Case law concerning time limits has not been codified.
- The burden of proof in sex equality cases is more lenient than in labour law or civil law.
- Legal aid and procedures are often long and costly and might discourage persons who feel discriminated against from starting legal proceedings.
- The position of job applicants is rather weak in relation to access to information.

Title III of the Directive contains so-called horizontal provisions, which apply to all provisions of the Directive (Articles 1-15). A novelty is that these provisions now also apply to occupational social security schemes. Chapter 1 of this Title on remedies addresses the defence of rights (Article 17), compensation or reparation (Article 18) and the burden of proof (Article 19). These provisions are partially similar to the relevant provisions of the repealed directives and also codify case law of the Court. The provisions are drafted in terms similar to those in corresponding provisions of the directives adopted since 2000 and the means of enforcement of anti-discrimination law have been strengthened.

I - Defence of rights

According to Article 17(1) of the Directive, Member States have the obligation to ensure that judicial procedures are available to all persons who consider themselves 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. The reference to conciliation procedures in this provision is new.

Member States have to ensure that organisations and associations that have a legitimate interest in ensuring that the provisions of the equal treatment directives are complied with have *locus standi*. Such organisations, for example anti-discrimination commissions, may engage, either on behalf of or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of the obligations under the equal treatment directives (Article 17(2)). A problem might be that this provision requires the approval of the complainant. This might restrict the possibilities of such organisations to engage in proceedings.

The regular time limits in national law apply (Article 17 (3)). Relevant case law of the Court on requirements for time limits in this field has not been implemented. These principally concern the requirement of effectiveness and equivalence. The same is true for Directive 2000/43/EC and Directive 2000/78/EC.

A problem at national level in relation to access to justice is that legal aid might be costly and might therefore not encourage persons who feel discriminated against to start proceedings. Proceedings are often long and costly, as legal aid free of charge is not available in many EU countries. In some countries, for example in the Netherlands, anti-discrimination offices offer free legal aid.¹¹⁸ In addition, high court fees might have the same negative effect. Generally speaking, there are only few cases on sex discrimination at national level. The low number of cases might also relate to fear of victimisation (see below) and the legal culture in a MS.

II - Sanctions, compensation and reparation

The directives adopted since 2000 stipulate that sanctions, which might comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Articles 18 and 25 of the Directive codify case law of the Court, in particular the requirements developed in *Von Colson*, which have now been integrated in legislation.¹¹⁹ Compensation or reparation has to be real and effective, dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit cannot restrict such compensation or reparation, however Article 18 allows an exception regarding the upper limit if the employer can prove that the only damage suffered by an applicant as a result of sex discrimination in (access to) employment is the refusal to take his or her job application into consideration, which implements case law.

Member States have to lay down rules on penalties applicable to infringements of the national provisions taken in order to implement the Directive. These penalties must be effective, dissuasive and proportionate and can include the payment of compensation to the victim (Article 25).

III - Burden of proof

Rules on the burden of proof have been developed in the case law of the Court, which has now been codified in Article 19 of the Directive. The burden of proof in discrimination cases is more lenient than in labour law or civil law. The burden of proof requires the applicant to establish facts from which it may be presumed that there has been direct or indirect discrimination. The burden of proof then shifts to the defendant, who has to prove that there has been no breach of the principle of equal treatment. Article 19 reads:

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

¹¹⁸ See for example <https://www.discriminatie.nl/antidiscriminatiebureaus>, accessed 20 September 2014.

¹¹⁹ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 (*Von Colson*), at paragraph 28.

respondent to prove that there has been no breach of the principle of equal treatment.

These rules also apply to situations covered by Article 157 TFEU and, insofar as discrimination based on sex is concerned, to the Pregnancy Directive and the Parental Leave Directive, (see Article 19(4)(a)).

Member States may also introduce rules which are more favourable to claimants (Article 19(2)).

These rules do not apply to criminal proceedings, unless otherwise provided by the Member States (Article 19 (5)).

A specific problem concerns the access to relevant information in order for a complainant to be able to establish a presumption of discrimination. This is particularly true for job applicants as illustrated for example in the *Kelly* and *Meister* cases.¹²⁰ If the Directive were amended, it should be specified that job applicants have the right to obtain information on the selection criteria that have been applied in a selection procedure and which procedure has been followed.

¹²⁰ Case C-104/10, *Patrick Kelly v National University of Ireland (University College, Dublin)*, [2011] ECR I-06813 (*Kelly*) and Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH* [2012] ECR n.y.r. (*Meister*).

Chapter 11 Promotion of equal treatment and social dialogue

Key findings

- Equality bodies have an important role at national level in enforcing the provisions of the Directive. However, budgetary restrictions and lack of independence might hamper optimal fulfilment of their tasks.
- Monitoring by the MS and social partners in particular of policies and practices at national level can be improved by developing monitoring tools on the application of the principle of equal pay and equal treatment at the workplace, in vocational training etc. and by disseminating these tools widely.
- Protection against victimisation is extended with codification of case law of the Court.
- Prevention against discrimination merits more attention.

I - Equality bodies

At national level, equality bodies have an important role in enforcing the provisions of the Directive (see Article 20). The tasks of these bodies are the promotion, analysis, monitoring and support of equal treatment. They may form part of agencies with responsibilities at the national level for the defence of human rights or the safeguarding of individual rights. These bodies have the capability to provide independent assistance to victims of discrimination; to conduct independent surveys concerning discrimination and to publish independent reports and make recommendations.¹²¹

In many Member States equality bodies or human rights agencies cover all Article 19 TFEU discrimination grounds and sometimes even more grounds, depending on the national legislation.¹²² A problem in some MS is that budgetary restrictions might hamper the work of the equality body. It is crucial that these bodies are truly independent. Monitoring by the European Commission in this field is a tool to ensure such independence, but the MS have a specific responsibility in this respect.

II - Social dialogue and dialogue with NGOs

Member States also have the obligation to promote social dialogue between the social partners and dialogue with non-governmental organisations or with stakeholders, with a view to fostering equal treatment (Articles 21 and 22). The promotion of social dialogue might include the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as the monitoring of collective agreements,

¹²¹ See further R. Holtmaat *Catalysts for change? Equality bodies according to Directive 2000/43/EC* European Commission, Luxembourg: Office for Official Publications of the European Union 2007, at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/06catalyst_en.pdf, accessed 2 June 2008.

¹²² There is a European Network of Equality Bodies: Equinet, see <http://www.equineteurope.org>.

codes of conduct, research or exchange of experience and good practice. The Commission staff working document on the application of the Directive provides examples of good practices on equal pay at national level.¹²³

Article 21(3) and (4) stipulates that Member States have to encourage employers to promote equal treatment in a planned and systematic way and to provide employees and/or their representatives with appropriate information on equal treatment at appropriate regular intervals. 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. In some countries (e.g. France and Spain), a reporting obligation for employers on gender equality issues is included in legislation. Such obligations can be particularly relevant with respect to equal pay issues. The obligations of employers to monitor the application of the principle of equal pay and equal treatment as enshrined in Article 157 TFEU and the Directive could be further specified, in particular in relation to ensuring wage transparency in the light of the Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU).

The Recast Directive further stipulates in Article 21(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 antidiscrimination rules (...).

This means that the issue of reconciliation of work, private and family life (in different wordings) is now explicitly mentioned in the Directive (see also Recitals 11, 26 and 27) and that is also a novelty.

It should be noted that the EU provisions on adjustment of working time and working hours aimed at facilitating the reconciliation of work and private life are rather weak. It is submitted that the EU legislator should be encouraged to adopt provisions that would provide stronger rights in this field, not only aimed at social partners. Imposing clear obligations on employers in this field might be a way forward.

III - Victimisation

Protection against dismissal or adverse treatment in reaction to a complaint is provided for in Article 24 of the Directive, which reads:

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

¹²³ COM (2013) 512 final.

any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

The extended scope of protection in this provision against adverse treatment codifies case law of the Court.

IV - Prevention of discrimination

The prevention of discrimination is specifically addressed in Article 26, which reads:

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.

It is striking that the Directive includes no specific obligations for employers or social partners, for example, to take measures to prevent discrimination, such as specific responsibilities of bodies at the level of undertakings and organisations for vocational training to prevent discrimination, harassment and sexual harassment. However, Article 30 on the dissemination of information stipulates that:

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.

It is submitted that research should provide more information on good practices in the MS on prevention of discrimination. The result of such research might provide examples of preventive measures that could be disseminated.

Chapter 12 Conclusions and recommendations

I - Conclusions

Quite a few amendments to the Directive have been suggested in the text above. However, one important question has not been addressed yet: what are the advantages and disadvantages of proposals to amend the Directive? As highlighted above, proposals in the field of equal pay cannot have the effect of amending Article 157 TFEU. They can only be aimed at clarifying the principle of equal pay between men and women. A legal definition of the gender pay gap does not currently exist and, in the view of the authors of this report, would be unlikely to contribute to a better application of the principle of equal pay. However, dissemination of information on how to tackle the gender pay gap is certainly welcome. In addition, more precise obligations, in particular on wage transparency for employers and those responsible for the working conditions of workers (e.g. social partners who draft collective agreements; participation bodies at the level of undertakings; and pension trusts) would be welcome.

Many of the suggested recommendations address so-called novelties of the Directive and/or problems that have become (more clearly) visible due to case law of the Court. The recommendations suggested above and summarized below are therefore rather modest. EU non-discrimination law is included in a number of separate directives, with different scopes and diverse exceptions. Sometimes the recommendations would also entail amendments to other gender equality and non-discrimination directives. With the Recast Directive (inter alia) the EU legislator made an effort to create consistency between all the equal treatment directives adopted after 2000, e.g. by using the same definitions of discrimination and by harmonizing provisions on the burden of proof, sanctions etc.. In the assessment of whether certain amendments to the Recast Directive are advisable/desirable or not, also the interest of consistency between the various equality directives should be taken into account. In the view of the authors consistency should be maintained as much as possible.

It has been submitted that a recasting exercise without precisely stipulating the new transposition obligations of the MS presents difficulties. These difficulties relate to more general problems of a recasting process of existing directives that is meant to consolidate and codify EU law without aiming at considerable substantive changes. Defining the exact limits of such recasting is no easy task. If amendments to the Directive are considered, it should be specified precisely which new transposition obligations are being imposed on the MS. Future amendments would probably entail significant substantive changes to the existing provisions and defining the obligations of the MS could then be less problematic compared with a recasting of existing directives. Amending the Directive would offer the opportunity to codify the most relevant existing case law of the Court.

II - Summary of recommendations

If amendments to the Directive were to be considered, the following specific aspects could lead to amendments of the Directive in the light of the present legal analysis. It should be noted, however, that this is no comprehensive list of possible amendments as recent research carried out on the implementation of this Directive commissioned *inter alia* by the European Parliament has provided additional specific recommendations. Some provisions of the Directive refer to Treaty provisions which have been renumbered and to directives that have been repealed. For reasons of clarity, such references should be updated if the Directive were amended.

1. Recasting and/or amending the Directive

If any amendments are made to the Directive, it should be specified whether they constitute a substantive change compared to earlier directives or not. Mentioning that the obligation to transpose a (recast) directive is confined to those provisions which represent a substantive change with respect to earlier directives, as mentioned in Article 33 of the Directive, provides insufficient clarity and leads to legal uncertainty. Such uncertainty can be remedied by providing a list of the articles containing substantive changes which have to be transposed into national law if no such provisions exist in national law.

1.1 References to relevant international law

MS have to comply with obligations of international and human rights law instruments that they have ratified (e.g. UN Treaties, ILO Conventions). Some Treaties and Conventions have been ratified by all 28 MS. Such Treaties should be mentioned explicitly in the preambles of the relevant directives. A good example is Recital 3 of Directive 2000/43/EC.

1.2 Mainstreaming

The Directive contains a specific mainstreaming obligation for the MS in Article 29. However, no reference is made in the preamble of the Directive to the mainstreaming obligation of the Union in Article 8 TFEU to eliminate inequalities and to promote equality between men and women in all its activities (see also Article 10 TFEU). It is submitted that such reference would underline the importance of mainstreaming gender equality not only at the level of the MS, but also at EU level. Recital 14 of Directive 2000/43/EC (the Race Directive) and Recital 3 of Directive 2000/78/EC (the Framework Directive) explicitly refer to this obligation. Similar recitals would promote coherence between these three EU law instruments which have similar objectives.

1.3 Multiple discrimination

The Recast Directive and its preamble include no reference to multiple discrimination. Such reference is included in Recital 14 of Directive 2000/43 (the Race Directive) and Recital 3 of Directive 2000/78/EC (the Framework Directive). Acknowledging multiple discrimination, especially since women are often victims of multiple discrimination, by providing a similar reference as in Directives 2000/43/EC and 2000/78/EC, would also enhance the coherence between these three directives.

1.4 Gender reassignment and transgender persons

Discrimination based on gender reassignment amounts to sex discrimination according to the case law of the Court. If the Directive were amended, it would be recommended to codify that discrimination based on gender reassignment amounts to sex discrimination, in order to include the obligation for MS to transpose such provision.

Discrimination of transgender persons can take place in relation to pregnancy and maternity as the provisions of the Directive explicitly apply to women. If these provisions applied to persons, they would also apply to transgender men who become pregnant. Given the fact that in many countries the requirement of sterilisation no longer applies to transgender persons, more men can become pregnant.

1.5 Equal pay

Any discrimination between men and women with regard to pay is prohibited, whatever the system giving rise to such inequality. If the Directive were amended, a codification of this case law in the Chapter on equal pay would be recommended.

Provisions of the Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU) could also be incorporated in this Chapter in order to enhance wage transparency by providing specific tools to tackle the gender pay gap.

Case law of the Court shows the requirement that differences in pay have to be attributed to a single source. This limits the application of the principle of equal pay and is problematic where outsourcing is involved. If the Directive were amended, it should be considered how situations concerning outsourcing can be brought under the scope of the Directive.

1.6 Occupational social security schemes

The exceptions concerning sex-based actuarial factors in the Recast Directive (Article 9(1)(h) and 9(1)(j)) are no longer consistent with the interpretation of the Court of the Statutory Social Security Directive (79/7/EEC) and the Goods and Services Directive (2004/113/EC). Consistency would require harmonization of these provisions in the light of the relevant case law of the Court.

1.7 Different pensionable ages between men and women

The distinction between statutory pension schemes and occupational pension schemes in relation to different pensionable ages for men and women is problematic for countries where schemes are considered to be neither statutory nor occupational. If amendments to the Directive are considered, differences in pension scheme systems should be taken into account.

1.8 Leaves

A number of EU directives address different forms of leave. Pregnancy and maternity leave are regulated in Directive 92/85/EEC, parental leave in Directive 2010/18/EU and the Recast Directive also applies to leaves. Legal clarity would be enhanced if provisions on leave were addressed consistently in one single comprehensive legal instrument. Given the different legal bases of the above-mentioned directives, this is not likely to happen. Still, amendments to the Recast Directive should be aimed at increasing consistency between the above-mentioned directives.

1.9 Time limits

Case law regarding requirements that apply to time limits has not been codified in the Directive. If the Directive were amended, such codification should be included in Title III of the Directive.

1.10 Rights of job applicants

The rights of job applicants could be strengthened by specifying that job applicants have the right to obtain information on the selection criteria that have been applied in a selection procedure and which procedure has been followed.

2. Improving the effectiveness of the Directive

Correct framing of the Directive's rights and obligations in the light of the relevant case law of the Court could be enhanced by taking into account the following recommendations.

2.1 Mainstreaming, preventing and monitoring

2.1.1 Mainstreaming and monitoring

Further development and dissemination of useful tools enabling MS to gender mainstream their policies, legislation and activities is recommended, as gender mainstreaming requires specific attention and constant efforts. Such tools – e.g. gender impact assessments – could be explicitly mentioned in relation to the application of Article 29 of the Directive. Mainstreaming and regular monitoring by different actors (the European Commission, the MS, social partners, employers, works councils etc.) can contribute to preventing discrimination.

2.1.2 Prevention of discrimination

More emphasis should be placed on measures preventing sex discrimination. Research could provide more information on good practices in the MS on prevention of discrimination and the results of such research should be disseminated. Examples of such measures and their impact in practice can improve the effectiveness of the Recast Directive in the light of the Articles 2(2)(a) on (sexual) harassment and Article 26 on prevention.

Prevention in particular is also relevant in relation to harassment and sexual harassment. In this respect, a soft-law instrument could be developed, also providing means to combat incitation to discriminate.

Preventive measures could also include information on prejudices and negative stereotyping and how to combat them. Exchanging information on relevant projects at national level should be encouraged. Such approach is in line with Article 5 CEDAW.

2.2 Concepts and burden of proof

2.2.1 Substantive equality

The result pursued by the Directive in matters of employment and occupation is substantive equality. This should be emphasized and the substantive equality approach should be further explained in publications and campaigns of the European Commission aimed at combatting sex discrimination. Such information could be provided in

particular on the website of the European Commission. MS also have a role in disseminating such information.

2.2.2 Pregnancy discrimination

Publications and campaigns of the European Commission should expressly state that in pregnancy cases no comparator is required and that financial consequences cannot justify such discrimination, with reference to relevant case law.

At national level, research should be conducted on the (non)-application of the prohibition of direct sex discrimination in relation to pregnancy and maternity in practice, and information should be disseminated to relevant stakeholders on the prohibition of direct sex discrimination, in particular in relation to pregnancy and maternity.

2.2.3 Gender reassignment

Discrimination based on gender reassignment amounts to sex discrimination according to the case law of the Court. Publications and campaigns aimed at preventing discrimination should explicitly provide this information.

2.2.4 Indirect discrimination

The application of the concept of indirect sex discrimination is difficult in practice and this is one of the reasons why the relevant case law of the Court should receive more attention. The Court clarified in particular that indirect sex discrimination cannot be justified by mere generalisations and that budgetary considerations in themselves cannot justify indirect sex discrimination. Attention to the key points of the relevant cases in publications and campaigns of the Commission, MS and stakeholders can contribute to a correct interpretation of the concept of indirect sex discrimination in practice.

2.2.5 Burden of proof

Information on the more lenient burden of proof in sex equality cases, compared with labour law and civil law, could be disseminated among practitioners even more widely than has been done up to now by in particular the European Commission and MS. Monitoring the application of the burden of proof in sex equality cases can contribute to a correct application of the burden of proof in future cases.

2.3. Equal pay

Any discrimination between men and women with regard to pay is prohibited, whatever the system giving rise to such inequality. In particular those responsible for working conditions (including pay) should receive specific information on the relevant case law of the Court.

The same is true for the transparency requirement. The principle of equal pay has to be applied to each element of pay. A useful tool to enhance pay and wage transparency is the Commission's Recommendation of 7 March 2014 (2014/124/EU). This information should be widely disseminated, e.g. by the Commission, (European) social partners and the MS.

2.4 Self-employment

Self-employment is partially covered by the Recast Directive, Directive 2010/41/EU on Self-employment and Directive 2004/113/EC on Goods and Services. Identifying gaps in the protection of self-employed persons both at EU level in relation to the scope of these directives and at national level should be the subject of specific research.

2.5 Enforcement

Equality bodies play a crucial role in the enforcement of the Directive. They should be independent and should receive a budget that enables them to fulfil the required tasks. Monitoring by the European Commission in this field is a tool to ensure such independence, but the MS also have a specific responsibility in this respect. This is particularly true in relation to gender equality in the light of the Treaty provisions and the gender mainstreaming obligations.

In the short term, improving the effectiveness of the Directive by various means in an effort by all actors involved seems the best option. If amendments to the Directive were considered in the future, this study will hopefully provide useful suggestions.

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Annex I Questionnaire

Research on the implementation of Directive 2006/54/EC on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation with a focus on the application of the directive and on the concepts of direct and indirect discrimination

European Parliament
DG for Parliamentary Research Service
EPRS/EVAL/14/205N

March 2015, Utrecht University School of Law
Dr. Susanne Burri, Prof. Dr. Linda Senden and Alice Welland (LL.M)

Research of six focus countries:
France, Latvia, Slovakia, Spain, the Netherlands and Sweden.

Questionnaire:

I - Implementation of the Directive

The aim of the Recast Directive 2006/54 was to ‘simplify, modernise and improve the Community law in the area of equal treatment between men and women by putting together in a single text provisions of Directives linked by their subject in order to make Community legislation clearer and more effective for the benefit of all citizens’.

This concerns EU law. The first three questions concern the impact of the Directive (if any) at national level in your country.

Question 1:

Has national legislation been adopted or amended up to now in order to simplify, modernise and improve national law, in the area of equal treatment between men and women in employment and occupation?

If so, please provide the relevant reference(s) with the date of entry into force of this legislation.

According to Article 33 of the Directive, the obligation to transpose the Directive is confined to those provisions that represent a substantive change compared to the provisions of earlier Directives.

Question 2:

Has relevant national legislation been adopted or amended in order to transpose one or more substantive changes compared to previous Directives, to which the recasting exercise applies (see for a list of changes, so-called ‘novelties’ the annex)? If so, please mention which substantive change(s) has (have) been implemented and provide the relevant reference(s) with the date of entry into force of this legislation.

Question 3:

Please briefly explain what in your view is (or has been) the impact of the Recast Directive in your country?

II - The purpose and scope of the Directive

Question 1:

Does the relevant legislation implementing the Directive refer to human rights and fundamental rights? In particular, is there a reference to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)?

Question 2

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify the scope of this legislation, given the fact that the Directive applies to equal opportunities and equal treatment of men and women in matters of employment and occupation?

Question 3

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify that the aim of the legislation is substantive equality?

III - Definitions and concepts

Question 1

Is the concept of direct discrimination defined differently from the definition in Article 2(1)(a) of the Directive? If so, what are the differences and do you consider these differences problematic? Please explain.

Question 2

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify that in pregnancy cases no comparator is required (see Article 2(2)(c) of the Directive and for example the Dekker Case C-177/88)?

Question 3

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify that financial consequences cannot justify pregnancy discrimination (see for example the Dekker case C-177/88)?

Question 4

Are there specific difficulties in the application of the prohibition of direct sex discrimination in practice? If so, please briefly explain these difficulties.

Question 5

Is the concept of indirect discrimination defined differently from the definition in Article 2(1)(b) of the Directive? If so, what are the differences and do you consider these differences problematic? Please explain.

Question 6

Are there specific problems involved with establishing a prima facie case of indirect sex discrimination in your country? If so, please briefly describe these problems.

Question 7

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify that indirect sex discrimination cannot be justified by mere generalisations (see for example Seymour, Case C-167/97)?

Question 8

Does the relevant legislation implementing the Directive and/or parliamentary proceedings clarify that budgetary considerations in themselves cannot justify indirect sex discrimination (see for example the Roks, Case C-343/92)?

IV - Application and enforcement of the Directive

Question 1

Are there specific difficulties relating to the application and enforcement in practice in your country? If so, please explain.

V - How to proceed further? Recommendations

Question 1

What future initiatives would you recommend to the European Parliament? In particular:

- is there a need for new legislation, or are there other means to more effectively implement the Directive in order to achieve better results? Please explain.
- which recommendations would you specifically address to:
 - 2 the stakeholders;
 - 3 the social partners;
 - 4 the legislator in your country; and
 - 5 the European Commission?

Question 6

Is there any remaining issue that you would like to highlight?

Annex:

List of 'novelties' in the view of the authors of the Report on the transposition of the Recast Directive of 2009 in provisions of the Recast Directive compared to the earlier Directives:

- the purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities (title of the Directive and Article 1).
- the Directive also applies to gender reassignment (Recital 3).
- the uniform definition of the concept of indirect discrimination in Article 2(1)(b) of the Recast Directive replaces the definition of the Burden of Proof Directive.
- the concept of positive action as described in Article 3 has been broadened in its substantive field of application because the scope of the Recast Directive is broad and also includes occupational pension schemes, for example (Recitals 21 and 22).
- Article 7(2) of the Recast Directive on the material scope of the provisions on equal treatment in occupational social security schemes is new (the text incorporates some well-established case law of the CJEU).
- the extension of the scope of the Recast Directive to the area of occupational social security schemes leads to an extension of the scope of the horizontal provisions.
- the issue of reconciliation of work, private and family life is explicitly mentioned; see in particular Recitals 11, 26, 27, Article 9(1)(g) and Article 21(2).
- the Directive lays down an obligation for Member States to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, see Article 31(3).
- the availability of judicial procedures for the enforcement of obligations imposed by the Directive and where appropriate, conciliation procedures; see Article 17(1).

Annex II

FRANCE - H  l  ne Masse-Dessen

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

Prior to the Directive, France had many pieces of legislation that often lacked clarity, but no one specific piece of legislation on equal treatment between women and men. Following the Recast Directive, the Law of 27 May 2008 was implemented with immediate effect. This Law goes far beyond gender equality. Most, but not all of this Law has been codified in the Labour Code. The Law of 27 May 2008 did however improve national law as it included more topics. However, laws in France are very broad, and gaps remain between directives and French legislation due to the different ways in which laws are written.

Anti-discrimination law remains rooted in many different sources: the Constitution; international human rights agreements; general laws; the Labour Code; the Penal Code; special laws; and many national, professional, and local collective agreements.

2. Article 33 of the Directive and the implementation of ‘novelties’

The Law of 27 May 2008 clarifies *indirect discrimination* and incorporates it into law. The prohibition against instruction to discriminate is now also incorporated in the law. However, the change in the Constitution is the most significant. Previously it was not constitutionally possible to distinguish between persons, but the amendment to the Constitution (decision of the Council, 2 July 2008¹²⁴) changed this. It is now possible to, for instance, establish quotas on different persons. From the French legal position, to consider citizens as belonging to groups of persons is a significant and revolutionary change.

The law is now more precise than it was, but in the view of the expert this has not changed much in legal practice. The judiciary had already taken into account the way of thinking of the Directive, although it is now easier to do so. However, problems remain with the fact that French law does not allow for the possibility to prohibit discrimination through association.

The notion of discrimination is interpreted very broadly in civil law, but it is necessarily interpreted very narrowly in criminal law. This has implications on matters such as *sexual harassment* and the burden of proof; there is a presumption of innocence in criminal law.

There is little case law on *gender re-assignment* in French legal practice.¹²⁵

Positive action has been difficult to implement in France. The modification of the Constitution of 2 July 2008 refers to positive action, along with collective agreements.

¹²⁴ [LOI constitutionnelle no. 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve R  publique.](#)

¹²⁵ However, the *Cour de cassation* stated that the change of ‘*etat civil*’ is possible. Decision of 7 June 2012, 10-26.947.

There is no reference to positive action in the Law of 27 May 2008, but it does provide for the possibility of temporary special measures in favour of women to promote equal opportunities (see Article L. 1142.4 of the Labour Code).

There has been a general movement towards improving *judicial proceedings*, but this is not necessarily as a result of the Recast Directive.

3. Overall impact of the Recast Directive

The Recast Directive obliged France to 'clean up' the legislation that addresses gender equality and non-discrimination, which to some extent it achieved. However, clarification is still required. Some texts are incorporated into the Labour Code and some are not. It is necessary to clarify these texts that are not included, because the law is broader than just labour. In the view of the expert, this does not represent a gap in implementation – rather that more time is needed to see the development of the law through legal practice.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

International conventions are part of positive law in France, as well as internal legislation. Human rights and fundamental rights are also part of the Constitution. In addition, judges discuss these concepts in practice, and make reference to the European Convention on Human Rights. The 'protection of dignity' is referred to throughout criminal texts, and harassment is considered within this concept of 'protection of dignity'.

2. The scope of the implementing legislation

There is no specific provision in the Law of 27 May 2008 that deals with the principle of equal opportunities. This does not mean that there are no provisions in general on this issue. For example, under French law there is an obligation to negotiate on the pay gap. In practice, this is not a problem.

3. Substantive equality as aim of the legislation?

Collective agreements do explicitly state that the aim of a particular agreement is substantive equality. The national collective agreement of June 2013 between trade unions and employers makes many references to the need to improve equality. However laws in general do not follow this practice, unless they refer to temporary special measures. Substantive equality is often discussed in judgments, especially in relation to the justification of discrimination.

III - Definitions and concepts

1. Direct discrimination

Article 1 of the Law of 27 May 2008 includes the definition of direct discrimination, which is not exactly the same as the definition found in Article 2(1)(a) of the Directive. However, in practice it operates in almost the exact same way. As mentioned above, a problem that may arise from the difference between the two definitions concerns establishing a case of discrimination by association.

2. Absence of comparator in cases of pregnancy discrimination

As discrimination on the ground of pregnancy is considered to amount to direct sex discrimination, in principle no comparator is considered necessary; however, a comparison could be used as a means to prove discrimination.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

There is no legislative provision that explicitly states that financial consequences cannot justify pregnancy discrimination. However, in judicial practice there can be no justification for discrimination on the grounds of pregnancy. Article L. 1225-4 of the Labour Code specifically states that any dismissal of a pregnant woman will be nullified.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

Generally the issue of gathering proof of discrimination continues to hinder the effective application of the prohibition of discrimination. In addition, it is very difficult to bring a complaint of discrimination in an employment context. However, trade unions are increasingly concerned with discrimination in employment. The agency *défenseur des droits* looks at all forms of discrimination, but unfortunately sex discrimination is often not its priority.

5. Indirect discrimination

As with direct discrimination, the definition of indirect discrimination is not exactly the same definition as the one found in Article 2(1)(b) of the Directive, but it is implemented the same in legal practice. However, it is still difficult for the French judiciary to describe people as belonging to one group or another, and indirect discrimination is not yet incorporated into the culture of jurists.

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

As with direct discrimination, proof remains a challenge when establishing a *prima facie* case of indirect sex discrimination. However, sex-disaggregated statistics do exist, and in enterprises of 50 or more persons employers are obliged to provide these statistics to an elected group of workers (*comité d'entreprise*).

Harassment was not previously considered discrimination; the Law of 27 May 2008 changed this. However, there remains a clear distinction between harassment, discrimination, and equal treatment.

7. Prohibited to justify indirect sex discrimination by 'mere generalisations'?

In France, neither legislation nor parliamentary proceedings clarify that indirect sex discrimination cannot be justified by mere generalisations. However, in such cases there must be a justification in the context of the specific case itself – so 'mere generalisations' would not suffice. This is not a specific rule; rather this is how it has developed through practice. Under Article 1 of the Law of 27 May 2008, indirect discrimination requires an 'objective justification', the scope of which does not cover 'mere generalisations'.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

In France, neither legislation nor parliamentary proceedings clarify that indirect sex discrimination cannot be justified by budgetary considerations.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

As mentioned above, proving discrimination in practice is very difficult, and at the moment the intersectional discrimination suffered by Muslim women in France is particularly pervasive. In addition, the issue of widespread unemployment is currently hindering the full application of the Directive.

Equal pay also remains a difficult topic, particularly because of issues related to proof and the fact that few people actually submit complaints. In particular, an issue that is increasingly discussed is the fact that there are many jobs in which women are overwhelmingly represented, and these jobs tend to be underpaid. However, pay is generally regulated by collective agreements, and these collective agreements essentially consider women as less economically valuable than men.

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

There is a need to emphasise and remind European bodies that gender equality is still a topic in and of itself; women are not a minority and gender equality should not be drawn into the non-discrimination grounds.

2. Recommendations to the stakeholders

To implement effectively temporary special measures.

3. Recommendations to the social partners

The social partners should help victims in their discrimination cases. In addition, the social partners should negotiate more information and provide this information to those who seek to make a complaint. Instruments to measure equality should also be created and adapted to any kind of enterprise.

4. Recommendations to the legislator in your country

The French legislator should ensure that laws are clear and unambiguous. The French legislator should also be especially cautious in the area of pensions: 'equality' in pensions must not lead to women receiving fewer pensions.

5. Recommendations to the European Commission?

The European Commission should also focus on the issue of pension equality.

6. Any remaining issues?

Equality must be considered in everyday topics, and not just in the larger picture.

LATVIA – Kristīne Dupate

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

In Latvia the legislator did not consider it necessary to adopt any implementation measures.

2. Article 33 of the Directive and the implementation of ‘novelties’

No implementation measures were adopted to transpose substantive changes or to incorporate the ‘novelties’ into national law.

- There is no provision in Latvian law that stipulates that discrimination on the ground of *gender reassignment* amounts to sex discrimination.
- The concept of *positive action* does not exist in Latvian law.
- *Occupational security schemes* are not well developed.
- The *reconciliation of work, private, and family life* is not explicitly provided for in legislation.
- However, no statutory act allows for the *exclusion* of women from occupations – this is left for the employer to assess.

3. Overall impact of the Recast Directive

The Recast Directive has had no practical or legislative impact in Latvia. The Ministry of Welfare, responsible for the implementation of gender equality directives, provided the opinion that no implementation was necessary and that the Directive was mere codification.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

In Latvia no reference in national legislation is made to international documents. In addition, almost all non-discrimination and gender equality legislation originates from European law, rather than international law.

2. The scope of the implementing legislation

The only legal document that refers to equal opportunities is the Law on Assistance to Unemployed Persons and Job Seekers 2002. In this legislation, the term ‘equal opportunities’ is implemented to justify affirmative action for disabled people in the context of access to employment. ‘Equal treatment’ is provided in the form of a ‘prohibition of differential treatment’. This might lead to a legally restrictive approach; for example, the literal grammatical application of the provision does not consider the possibility to treat differently persons in substantially different circumstances. The term ‘prohibition of equal treatment’ appears throughout Latvian legislation, including in the Labour Code and in the special laws of public service.

3. Substantive equality as aim of the legislation?

The understanding in Latvia is still restricted to formal rather than substantive equality. The Cabinet of Ministers is required to evaluate all legislative proposals in the context of equal opportunities.¹²⁶ However, 'equal opportunities' is understood in a sense much broader than just non-discrimination and gender equality and it is not restricted to sensitive subjects. For this reason, it is so broad that nobody understands the concept and assessment of a legislative proposal it requires. It leads to a situation where the explanatory notes to legislative proposals state that a legislative proposal will not have an impact on 'equal opportunities'. This obligation is therefore completely inefficient in practice. The same problem applies to the legislative proposals which originate in the Parliament.¹²⁷

III - Definitions and concepts

1. Direct discrimination

The definition of 'direct discrimination' in Latvia is almost exactly the same as that found in Article 2(1)(a) of the Directive. Article 29(5) of the Labour Code stipulates:¹²⁸ 'direct discrimination exists if in comparable situations the treatment of a person in relation to his or her belonging to a specific gender is, was, or may be less favourable than in respect of another person. Less favourable treatment due to pregnancy or maternity leave, or due to leave taken by the father of a child, shall be considered direct discrimination based on the gender of a person.'

In the context of employment it is included in the Labour Code, and in the context of access to employment it is included in the Law on Assistance to Unemployed Persons and Job Seekers. Public service laws include this definition by reference to the Labour Code.

The definition of direct discrimination was amended in 2010 to provide for the notion of pregnancy/maternity/paternity discrimination.

2. Absence of comparator in cases of pregnancy discrimination

It is not explicitly stated that no comparator is required in cases of discrimination on the ground of pregnancy. Article 29.5 of the Labour Code stipulated that less favourable treatment on grounds of pregnancy and maternity *leave* amounts to direct discrimination on the ground of sex (author's emphasis). However, this formulation does not consider that in Latvia has a much more extended maternity *protection* than is provided for. According to the Labour Code the maternity protection lasts a year after giving birth, and the throughout the entire breastfeeding period. This protection ends when the child reaches the age of 24 months. In addition, the definition does not cover other discrimination situations that may arise on the grounds of pregnancy, maternity, or

¹²⁶ The Cabinet of Ministers Instruction No. 19 The Procedure on the Assessment of Initial Impact of Project of a Legal Act (*Tiesību akta projekta sākotnējās ietekmes izvērtēšanas kārtība*), OJ No. 205, 30 December 2009.

¹²⁷ The Law 'Parliament's Order Roll' (*likums 'Saeimas kārtības rullis'*), OG 96, 18 August 1994.

¹²⁸ *Darba likums*, OG No.105, 6 July 2001.

paternity outside the use of the right to respective leaves. Even though EU law provides for the protection from discrimination on the grounds of pregnancy and maternity status, this may still be a problem in the national context.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

There is no explicit provision in Latvian law that stipulates financial consequences cannot justify pregnancy discrimination. However, as it is stated in Article 29.5 of the Labour Code, discrimination on the ground of pregnancy amounts to direct discrimination on the ground of sex, and direct discrimination by definition allows no justification. In addition, in pregnancy in general does not imply any extra cost for employers – all allowances and pregnancy-related sickness benefits are paid by statutory social security.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

A general lack of understanding of the concept of non-discrimination hinders the application of the prohibition of direct sex discrimination. In addition, it is often difficult to identify a comparator in cases of direct discrimination. Recently, the case law of the Supreme Court on comparators has improved, but the Court still hands down some very disappointing decisions.¹²⁹

5. Indirect discrimination

In 2009 Article 29.6 of the Labour Code was amended so that it no longer requires a comparator. Indirect discrimination is now formulated as the following: 'if a neutral condition, criterion, or practice may lead to negative consequences to persons of one sex, it should be considered as indirect discrimination.' This amendment was the result of an infringement procedure and was not an intentional transposition of the Directive.¹³⁰

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

There are no cases that concern purely indirect discrimination, including the more 'classic' types of indirect discrimination cases such as matters of equal pay. However, indirect discrimination has been called into question in cases concerning less-favourable treatment on the ground of using childcare. The Supreme Court does not deny as *prima facie* evidence that the fact that 95 % of persons who take childcare leave are mothers, but the judiciary is confused about how to use this data in the context of a single enterprise. Moreover, sometimes such *prima facie* evidence is not relevant. It is often related to unfair dismissal cases, in which it is automatically the responsibility of the employer to prove that the dismissal was well grounded. In any case, employees are not entitled to look at sex-disaggregated data in relation to a single enterprise, only in the context of the country as a whole. An employee would have to request the court to oblige the employer to hand over the data on the enterprise, but there is no guarantee that this data will be collected

¹²⁹ Decision of the Senate of the Supreme Court of Latvia (8 December 2010) in case No.SKC-1336/2010.

¹³⁰ Reference is not publicly available.

according to appropriate methodology. It is therefore possible that the resulting data will demonstrate no discrimination.

7. Prohibited to justify indirect sex discrimination by ‘mere generalisations’?

There is no explicit provision that stipulates that indirect sex discrimination cannot be justified by mere generalisations. In Latvia, indirect discrimination can be justified if it is ‘objectively substantiated by a legitimate aim and the measures chosen are proportionate’. It appears that such wording excludes the possibility to use ‘mere generalisations’ as a justification.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

Once more, there is no explicit provision in Latvian law that stipulates that budgetary considerations cannot justify indirect sex discrimination. However, it appears that ‘justification’ is used in practice. 90 % of school teachers in Latvia are female, and all school teachers are excluded from a generally applicable pay scheme in the public sector on the ground of budgetary considerations. This is yet to be challenged; the expert contacted a trade union on this matter, which stated that it was not interested in taking the case to the Constitutional Court.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

One of the biggest hurdles to the enforcement and application of the Directive in practice in Latvia is the fact that victims of discrimination are not themselves able to identify discrimination. In addition, the high costs for proceedings and litigation also act as a disincentive to bring a complaint to court. If a case does reach court, it is possible that the court concerned has a low level of expertise in gender equality and non-discrimination doctrine.

It is particularly problematic that it is not stated anywhere that less favourable treatment on the ground of taking childcare leave amounts to discrimination.

Third party victimisation is also an issue in Latvia. If an employee is dismissed, for example on the ground of taking childcare leave, and then brings proceedings before a court; this may be problematic later on when finding a job. News of the proceedings and the reason(s) for dismissal will reach other employers quickly.

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

In the view of the expert, there is a need to define ‘work of equal value’. Latvia and many other countries in Europe would benefit from some concrete criteria on how to identify such work.

2. Recommendations to the stakeholders

No specific recommendations.

3. Recommendations to the social partners

Trade unions in Latvia are generally weak, and those responsible for managing trade union federations are reluctant to raise any discrimination issues, unless under special projects funded by the EU. It seems that there is no visible actor in Latvia that is motivated to make a change and improve equality between women and men. Trade unions should therefore take more seriously their obligations and pay attention to all problematic areas of employment law.

4. Recommendations to the legislator in your country

The obligation to assess legislative proposals in light of equal opportunities should be better implemented.

5. Recommendations to the European Commission?

There is a problem with the implementation of 'the novelties' of the Recast Directive. Article 291 TFEU provides for the right of Commission to adopt an implementing act; such an instrument could be used to explain in detail how the Recast Directive should be implemented, especially with regard to horizontal provisions on equal opportunities.

6. Any remaining issues?

All issues have been covered. Generally in Latvia, there are problems with implementation, understanding, and enforcement of gender equality and non-discrimination principles.

SLOVAKIA – Janka Debreceniová

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

Legislation is very rarely adopted to explicitly transpose or implement the Directive. The Anti-Discrimination Act (ADA; Act No 365/2004 Coll. on Equal Treatment in Certain Areas and on Changing and Supplementing Certain laws, as amended) was adopted only in 2004, which implemented all EU directives. It was also substantially amended in 2008. The following is a list of amendments that significantly changed the legislation, and which can be considered to transpose the Directive, whether intentional or not:

Amendments to the Anti-Discrimination Act

- Substantial amendment by Act No. 85/2008 Coll. This introduced, *inter alia*, the legislative concept of sexual harassment, simplified the enumeration of the prohibited forms of discrimination, and widened the concept of victimisation.
- Amendment by Act No. 384/2008, which introduced *actio popularis* in proceedings against violations of the principle of equal treatment).
- Amendment by Act No. 32/2013 Coll., which amended the provision on 'temporary equalising measures' (positive measures) to enable their application also with regard to sex, and in addition amended the definition of indirect discrimination so that it also includes the possibility of a hypothetical disadvantage, and not only an actual disadvantage.

Amendments of the Labour Code (Act No. 311/2001 Coll. the Labour Code, as amended)

- Amendment by Act No. 48/2011 Coll. concerning the right of an employee to return to her/his original work and workplace following maternity/parental leave. This Act was a clear transposition of the Directive.
- Amendment by Act No. 257/2011, which introduced some flexible working arrangements (shared working position). This amendment also explicitly limited the employer's ability to terminate a contract with a pregnant woman during the contractual probationary period, which is prohibited if on grounds connected to pregnancy. The employer is now obliged to stipulate the reasons for termination, not connected to pregnancy, in writing. This particular amendment was not an intentional transposition of any directive, but rather the result of pressure from NGOs. This Act was a clear transposition of the Directive.
- Amendment by Act No. 348/2007 Coll., which amended the provision on equal pay and incorporated provisions of EU law. For instance, the new Article 119(a) introduced the principle of equal remuneration for equal work

2. Article 33 of the Directive and the implementation of 'novelties'

- Article 2(a)(11)(a) of the ADA stipulates that 'discrimination based on sex also means discrimination related to pregnancy or maternity, as well as discrimination on the ground of sexual or *gender identification*' (author's emphasis).

- There is no specific regulation of *occupational social security schemes* in Slovakia. However, Article 7 of the Act on Additional Pension Saving (Act No. 650/2004 Coll.) prohibits discrimination when calculating additional pension savings, making reference to the ADA (including the provisions on legal protection and proceedings in matters concerning the violation of the principle of equal treatment). Setting different levels of a) benefits in which actuarial factors differing to sex are taken into account, or b) contributions whose aim is to balance the level of benefits for both sexes, shall not be considered discriminatory.
- The amendment of the ADA by Act No. 32/2013 Coll. amended the provision on *temporary special measures* to provide for positive action in order to improve persons of the disadvantaged sex – previously, sex was not included in the grounds of discrimination, although the language of equal opportunities was in place in the original ADA.
- Act No. 32/2013 Coll. also amended the definition of *indirect discrimination*, which is even broader than the definition found in the Recast Directive as it applies an individual rather than collective principle. The amendment introduced the possibility of a potential disadvantage – previously, the ADA only provided for actual discrimination within the definition.
- Act No. 85/2008 Coll. introduced the legislative definition of *sexual harassment*. However, this definition is not fully compatible with the Directive. It does not include an explicit reference to unwanted conduct. From the interpretation of the definition in the Directive it is also clear that the potential violation of an individual’s dignity should be assessed individually and independently in view of whether an intimidating, hostile, degrading, humiliating, or offensive environment has been created. The definition of sexual harassment in the ADA requires the cumulative fulfillment of the condition of actual or potential violation of an individual’s dignity; and the creation of an intimidating, hostile, degrading, humiliating, or offensive environment without indicating the difference between these two requirements.
- Act No. 85/2008 Coll. facilitated the availability of *judicial procedures* for the enforcement of obligations imposed by the Directive, in the form of conciliation procedures. In the view of the expert, this has not been a particularly helpful development. Conciliation proceedings in Slovakia are inadequate and to place emphasis on these proceedings is not conducive to improving judicial proceedings.
- Act No. 384/2008 introduced the principle of *actio popularis* in proceedings concerning the violation of the principle of equal treatment.

3. Overall impact of the Recast Directive

The impact of the Recast Directive has been over-shadowed by the other gender equality and non-discrimination directives. Little attention has been explicitly paid to the Directive, and non-discrimination legislation in Slovakia has developed in tandem with historical and social developments. Moreover, it has been NGOs that have initiated amendments to the ADA, rather than this being a case of the Government being aware of EU obligations, and many *de facto* transpositions were enacted for reasons other than wanting to comply with the Directive. Despite this, the amendment concerning equal pay certainly originated from the EU.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

There are no references to fundamental rights or international human rights conventions, including the Convention for the Elimination of All forms of Discrimination Against Women, in the implementing legislation.

2. The scope of the implementing legislation

Section 6 of the ADA stipulates that the material scope of the Act applies to employment relations and legal relations connected to employment relations. It therefore seems to apply only to the area of dependent paid work. However, in the same Article a provision states that the prohibition of discrimination also applies with regard to the access to employment, *occupation*, and *other earning activities*. This implies that the protection also extends to occupation in a sense broader than just dependent paid work. However, there are mechanisms lacking to safeguard this provision, and the scope of this protection is not clear. To the knowledge of the expert, no case law exists on this issue.

Section 2 ADA defines equal treatment as the prohibition of discrimination on all listed grounds. It stipulates the obligation to adopt measures that prevent discrimination. It is possible that this could encompass equality of opportunities, but it is not explicitly mentioned. The concept does not seem to be an integral component of equal treatment, however Article 8(a) on temporary special measures does stipulate that such measures could be enacted to ensure the equality of opportunities in practice.

3. Substantive equality as aim of the legislation?

The ADA does not explicitly state that the aim of the legislation is substantive equality.

III - Definitions and concepts

1. Direct discrimination

The definition of direct discrimination in the ADA is almost identical to the definition taken from directives. Direct discrimination is defined not only as an action but also an omission that causes one person to be treated less favourably than another is or has been treated in a comparable situation.

2. Absence of comparator in cases of pregnancy discrimination

As stated above, Section 2(a) Paragraph 11 of the ADA stipulates that discrimination on the basis of pregnancy or motherhood is also considered as discrimination on the ground of sex. However, it is not stated that this is *direct* discrimination. It is implicit that no comparator is required, but this is not explicit in the text.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

There is no explicit provision in Slovak law that stipulates that financial consequences cannot be used to justify discrimination on the ground of pregnancy in the context of employment. However, Section 8(8) of the ADA (in relation to services and social

protection) stipulates that the costs related to pregnancy or motherhood cannot lead to differences in the amount of insurance payment. The field is not indicated.

Section 64(1)(c) of the Labour Code prohibits the dismissal of a pregnant woman – this provision pre-dates the Directive.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

Very few cases concerning equal treatment are brought to court. In addition, it is often very difficult to find a comparator, and there are no cases with a hypothetical comparator. Moreover, there is a very high level of non-transparency in any procedure.

5. Indirect discrimination

As mentioned above, the definition of indirect discrimination now provides for the possibility of a hypothetical disadvantage, and an individualised rather than collective principle is applied to the definition.

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

There is insufficient data on employment, which hinders the ability of a potential complainant to obtain evidence. There is no legal obligation on employers to make information about the workplace public. It is therefore also nearly impossible for employees to access information on their salaries.

7. Prohibited to justify indirect sex discrimination by ‘mere generalisations’?

There is no provision in Slovak legislation that explicitly stipulates that ‘mere generalisations’ cannot be used to justify indirect sex discrimination. To the knowledge of the expert, there is no case-law available on this.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

There is no provision in Slovak legislation that explicitly stipulates that ‘mere generalisations’ cannot be used to justify indirect sex discrimination. To the knowledge of the expert, there is no case-law available on this.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

There is much emphasis on judicial proceedings, which must always be initiated by the victim. In the view of the expert it is completely unfair to burden the victim, who is already affected with obstacles such as financial burdens and the fear of losing employment. Moreover, any proceedings take years, and these elements combined have the effect of exhausting rather than assisting the victim. In addition, claimants must bear the costs of appeals, and the fee to make an extraordinary appeal to the Supreme Court is double that of the initial fee. The claimant must also bear the judicial costs in the event

that he or she is unsuccessful, plus the cost of pecuniary and non-pecuniary damages. If a claimant requests non-pecuniary damages, he or she is required to pay 3 % of the requested amount – therefore, the more one claims, the more one pays. This is a significant disincentive to request effective amounts.

Courts often do not have an integrated understanding of the principle non-discrimination, which is still relatively new in Slovakia. The law is usually applied in a very literal sense. A further inadequacy is the practice of judges to split claims into separate judicial proceedings, even when one claimant makes these claims (e.g. validity of dismissal plus non-pecuniary damages). This has the effect of drawing out the process even further.

One further difficulty is the fact that one can only claim financial compensation for non-pecuniary damages (see Section 9(3) of the ADA) if the claimant can prove that his or her dignity was seriously affected. In the view of the expert, the requirement to prove this is entirely unreasonable, as all discrimination affects dignity and as such, the effect should be presumed rather than proved.

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

In the view of the expert, there are weak elements in the Recast Directive. For instance, the concept of victimisation applies only if a victim has already submitted a complaint. In addition, with regard to collective agreements, the Directive only requires States to nullify or amend provisions that are not in accordance with the Directive. In the view of the expert, a 'levelling-up' approach is more appropriate. For instance, an employer who is obliged to nullify a discriminatory provision in a collective agreement on a given benefit is not required to provide that benefit once it has been nullified.

2. Recommendations to the stakeholders

The Slovak equality body is not sufficiently fulfilling its tasks – more scrutiny should be afforded to this body in order to ensure it improves in this regard. In addition, it is not independent, and it is not financially independent as the State proposes its budget.

3. Recommendations to the social partners

The inadequate support afforded by trade unions is rooted in the social and political history of Slovakia. Trade unions should start taking their obligations more seriously, especially in regard to the fact that they are entitled to represent individuals in legal proceedings.

Trade unions should also consider matters of discrimination more rationally, and assess how tolerating and condoning discrimination negatively impacts Slovakia.

4. Recommendations to the legislator in your country

It is crucial that the efficiency and efficacy of judicial proceedings, including access to pecuniary and non-pecuniary damages, is reviewed and drastically improved (see answer to IV.1, above).

5. Recommendations to the European Commission?

Look further than just the transposition of directives, to investigate the extent to which directives have actually had an impact in the Member States.

6. Any remaining issues?

Slovakia has a progressive definition of equal treatment, however, it has not been followed or enforced at all. Moreover, State bodies do not follow the principle of equal treatment, which therefore fails to provide private enterprises with a good example.

SPAIN – María-Amparo Ballester-Pastor

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

Law no. 3/2007 of 22 of March 2007 for the Effective Equality between Women and Men ('Law for Effective Equality') implemented the Recast Directive and significantly improved Spanish legislation in the area of equal treatment between women and men. This law is applicable in all contexts; especially in political, civil, labour, socio-economic, and cultural areas. The law entered into force on 24 March 2007.

Before the Law for Effective Equality, the legislation on gender equality was scattered between different texts. In addition, some of the basic principles of gender equality such as indirect discrimination and affirmative action did not exist explicitly in written legislation. Rather, the courts applied these principles as manifestations of the prohibition of sex discrimination, which was established in general terms in Article 14 of the Constitution.

It is therefore reasonable to state that the Law for Effective Equality in Spain has had a significant impact in Spain, as it expressly established and clarified the content of the right to non-discrimination on the ground of sex, and established concrete strategies to achieve effective equality.

2. Article 33 of the Directive and the implementation of 'novelties'

- Article 1 of the Law for Effective Equality implements the principle of *equal opportunities*, as it stipulates the following: 'This bill is to give effect to the right of equal treatment and *equal opportunities* between women and men' (author's emphasis). The concept of equal opportunities appears throughout the Law for Effective Equality.

- The concept of *indirect discrimination* established by Article 6.2 of the Law for the Effective Equality is exactly the same as the definition established in Article 2(1)(b) of the Recast Directive. This includes the reference to a 'particular disadvantage'.

- The concept of *positive action* established in Article 7 of the Law for Effective Equality is broad and refers to every aspect of life. However, there is no specific reference to the application of positive action to occupational pension schemes, because in Spain specific legislation does not regulate occupational pension schemes. The system in Spain includes only (i) public social security (with different features depending on the activity of the worker); or (ii) private pension plans/or life insurances, which can be totally or partially financed by the employer (these are not occupational pension schemes, but simply ordinary insurance contracts).

- Although there are no express references in Spanish legislation to *occupational pension schemes*, the principle of substantive equality described in the Law for Effective Equality refers to every aspect in life; including employment, the access to goods and services, and to any other legal or social activity.

Spain has transposed Article 7(2) because every sector of activity is included in the principle of non-discrimination in relation to pension schemes, including civil servants.

- Article 44 of the Law for Effective Equality stipulates that *the right to reconciliation* of personal life, work, and family is recognised for men and women workers in a way that encourages the assumption of balanced family responsibilities, avoiding any discrimination based on their exercise.
- A specific *judicial procedure* for the enforcement of obligations related to fundamental rights, including the prohibition of sex discrimination, is contained in Article 176 (and following articles) of the Law of Social Jurisdiction (Law 36/2011, of 10 October). This procedure is easier and faster for the victim because the procedure has preference over any other judicial procedure, and a *prima facie* case is automatically established.
- In addition, Spain does not preclude women's access to any professional activity as regards a genuine and determining occupational requirement.

The only gap in the implementation of the 'novelties' is the fact that there is no provision in legislation that explicitly stipulates that discrimination on the ground of gender reassignment amounts to gender discrimination. There has been no case law on this matter.

3. Overall impact of the Recast Directive

The Law for Effective Equality of 2007 was passed after the Recast Directive. However, it contains no express reference to the Recast Directive. It seems that Spanish legislation was prepared and finalised before the Directive was approved. The Preamble of the Law for Effective Equality does however explicitly refer to Directive 2002/73 (reforming Directive 76/207), so this Directive was taken into consideration.

It seems that the Law for Effective Equality in Spain was not a 'formal' transposition of the Recast Directive, at least not intentionally. However, because the Law for Effective Equality was passed after the Recast Directive, and because some of its contents were contained in Directive 2006/54, it could 'in fact' be considered a transposition.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

The Preamble of the Law for Effective Equality specifically refers to the Convention on the Elimination of all forms of Discrimination Against Women. The Preamble also refers generally to the international human rights conventions, and makes explicit reference to the Nairobi Conference on Women 1985, and the Beijing Conference on Women 1995.

2. The scope of the implementing legislation

The Law for Effective Equality clearly clarifies the scope of the legislation, and makes reference to 'equal opportunities and equal treatment of men and women in matters of employment and occupation' throughout.

3. Substantive equality as aim of the legislation?

The reference to substantive equality appears several times in the Law for Effective Equality. Moreover, the name of the Law itself refers directly to the objective of substantial equality, since it is titled the 'Law for *Effective Equality*'.

III - Definitions and concepts

1. Direct discrimination

The concept of direct discrimination in Article 6 of the Law for Effective Equality is exactly the same as the definition found in Article 2(1)(a) of the Directive.

2. Absence of comparator in cases of pregnancy discrimination

In Spanish legislation it is not necessary to specifically clarify that in pregnancy cases no comparator is required, because Article 8 of the Law for Effective Equality establishes that any 'less favourable treatment of a woman related to pregnancy or maternity leave will be a direct discrimination on the grounds of sex'. As such, the definition of direct discrimination does not require a comparator.

Article 8 of Law for Effective Equality contains the *Dekker* case doctrine because: 1) It recognises that discrimination on the grounds of pregnancy or maternity leave amounts to sex discrimination (which does not require a comparator); and 2) it recognises that pregnancy or maternity discrimination amounts to *direct* sex discrimination.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

Although the Law for Effective Equality does not explicitly state that financial consequences cannot justify pregnancy discrimination, Article 8 establishes that discrimination on the grounds of pregnancy and maternity leave discrimination amount to *direct* discrimination; which can have no justification.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

Article 6 of the Law for Effective Equality uses the same definition of direct discrimination as found in the Recast Directive, so in theory Spanish legislation allows for the use of a hypothetical comparator. However, to date no case law has dealt with this hypothetical comparator, and it is therefore not known if the judiciary are prepared to deal with this new concept.

5. Indirect discrimination

Article 6.2 of the Law for Effective Equality contains the exact same definition of indirect discrimination as found in Article 2(1)(b) of the Directive.

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

In the view of the expert, the main problem encountered when establishing a *prima facie* case of indirect discrimination is related to the fact that employers are not obliged to disclose to employees the data on salaries or promotions disaggregated by sex. In general, employees are not entitled to access any of the employer company's information related to sex.

Trade unions could have part of this information because they must have a copy of each of the contracts signed in the company. However, they are not entitled to information on the individual conditions that could have been stipulated by the company to the employee after he/she has been contracted.

The Labour Inspectorate can access this data, and if the Inspectorate finds elements for a *prima facie* case of indirect discrimination, judicial procedures against the employers have sometimes, but not always, been initiated; occasionally other matters take priority. Therefore, employees and trade unions should be entitled to the information on labour conditions disaggregated by sex, so they can also establish *prima facie* cases of indirect discrimination.

7. Prohibited to justify indirect sex discrimination by ‘mere generalisations’?

Article 6.2 of the Law for Effective Equality describes indirect sex discrimination in precisely the same way as Article 2(1)(b) of the Recast Directive. It does not explicitly state that indirect sex discrimination cannot be justified by mere generalisations, but this does not mean that the *Seymour* doctrine is not applied in Spain. There have been no cases in which this issue has arisen.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

Same answer as above.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

One of the most significant problems with implementing the prohibition of indirect sex discrimination relates to the deficiencies that exist in Spanish law when challenging collective agreements. There are few cases on indirect discrimination in relation to wrong job evaluations in collective agreements, probably because Spanish legislation does not facilitate the challenging of illegal collective agreements. There are two ways to challenge an illegal collective agreement. First, the labour authority could start a judicial procedure against the illegal collective agreement. Second, the social partners with an interest in the subject could also start a judicial procedure. However, the labour authority rarely starts any judicial procedure against any collective agreement. This has been highly criticised. In addition, the social partners with an interest in the subject are basically the same social partners that have agreed with the collective agreement, or that could have agreed with the collective agreement. In reality, it is usually trade unions that have not signed the collective agreement that challenge the illegal agreements. If those trade unions do not exist or do not have an interest in challenging the collective agreement, it remains unchallenged. In theory, an individual could request the judge to disapply a clause of the collective agreement on the ground that it is discriminatory (indirect discrimination). However, because that individual cannot access data disaggregated by sex, he/she

would encounter problems when trying to make a *prima facie* case of indirect sex discrimination.

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

The reform of the Pregnancy and Maternity Directive (Directive 92/85) would be necessary to guarantee the right of non-discrimination of mothers, and also to achieve the objective of co-responsibility if paternity leave is included.

Employers should be obliged to provide sex-disaggregated data on labour conditions to employees and trade unions.

2. Recommendations to the stakeholders

Stakeholders should value the measures for substantive equality and for the reconciliation of work and family life; however it is likely that this will not be achieved unless it is obliged through legislation.

3. Recommendations to the social partners

Women should be on the boards of directors of trade unions, and on the boards that negotiate collective agreements.

4. Recommendations to the legislator in your country

The Government should invest money in equality and in promoting the reconciliation of responsibilities. In addition, the Government should analyse the labour and social security legislation in order to assess which elements are potentially indirectly discriminatory. The Government should also implement the measures still pending development from the Law for Effective Equality. For instance, Law no. 3/2007 established a paternity leave of 13 days. However, the legislator established the obligation that in six years the duration of paternity leave would be increased to four weeks. Soon after this commitment was made, the crisis hit Spain, and paternity leave remains at 13 days.

5. Recommendations to the European Commission?

It would be interesting if the objective of substantial equality would be part of the objectives of the ordinary functioning of the European Union, and if the General European Union Strategies required concrete measures on substantive gender equality. For instance, in the view of the expert, the issues of gender are not very relevant in the Strategy 2020. The Gender Equality Strategy 2010-2015 is more relevant, and it would be more effective if this Gender Equality Strategy was incorporated in the 2020 Strategy.

THE NETHERLANDS – Marlies Vegter

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

In the view of the Dutch Government, transposition of the Recast Directive was not necessary as the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, hereinafter 'GETA'), the Equal Treatment Act Men and Women in Employment (*Wet Gelijke Behandeling mannen en vrouwen*, hereinafter 'ETA'), and Book 7 of the Civil Code (*Burgerlijk Wetboek Boek 7*) already covered the provisions of the Recast Directive in substantive law.¹³¹ According to the Government, all necessary transposition measures had already been taken, either voluntarily or as part of the implementation of previous Directives.

2. Article 33 of the Directive and the implementation of 'novelties'

- The principle of *equal opportunities* is not mentioned explicitly in Dutch equal treatment legislation.¹³² In theory, one could say that the principle of equal treatment may be considered as an instrument to realise *de facto* equal opportunities. The terminology of equal opportunities is most often used in the context of (academic and court room) discussions about the legal acceptability of positive action or preferential treatment measures. The principle of equal opportunities is regularly mentioned by the Netherlands Institute of Human Rights (*College voor de rechten van de mens*; Netherlands Institute for Human Rights, hereinafter 'NIHR') as a major goal of the implementation of the principle of equal treatment.

- The prohibition of discrimination based on *gender reassignment* is not explicitly covered in Dutch equal treatment legislation. Implicitly, this ground is captured under the ground sex. However, this does not cause any problems since the NIHR regularly applies sex equality norms on discrimination arising from gender reassignment.¹³³ There are no (published) cases of the regular court system in which discrimination on this ground was at stake.

- The provision of Article 7(2) of the Directive has not been transposed literally into Dutch equal treatment legislation. However, according to Article 12(a) of the ETA, both civil and public occupational pension schemes are covered under the prohibition to discriminate on grounds of sex in these schemes.

- Under Dutch equal treatment law (Articles 12(a)-(e) ETA), *occupational social security* schemes are usually seen as employment conditions (to which the prohibition of discrimination applies). In addition, Article 12(b) also prohibits discrimination on the

¹³¹ *Kamerstukken II* (Parliamentary Papers), 21 109, no. 179; Appendix, p. 56) and *Staatscourant* (*Government Gazette*), 20 May 2008, no. 94 / p. 25.

¹³² Dutch equal treatment laws do not have an elaborate Preamble in which principles and goals are exemplified, but they sometimes contain a short 'heading' in which it is said that they are meant to implement anti-discrimination standards in the Constitution, in international law, or in EU Directives.

¹³³ See, e.g., past Opinions of the (former) Equal Treatment Commission of 30 November 2010 (2010-175), 1 October 2008 (2008-116), 9 March 2006 (2006-33), and 17 November 2003 (2003-139).

ground of sex in occupational social security schemes by all parties other than the private or public employer.

- The GETA and the ETA allow for *positive action* under strict conditions. It is permitted to apply a specific regulation and/or arrangement in order to put women in a more favourable position, with the aim to remove or decrease actual disadvantages that are related to sex, if the specific regulation is proportional to that purpose. In explaining this, the NIHR follows the case law of the CJEU. In December 2012, the NIHR ruled that the aim of the Recast Directive is to ensure complete equality between men and women in practice and therefore leaves more room for positive action than Directive 76/207, which only mentioned creating equal chances for men and women.¹³⁴ It remains to be seen whether the courts will follow this Opinion if asked to rule on positive action.

- On 1 January 2015 a number of changes to the Employment and Care Act (*Wet arbeid en zorg*) and the Act on the Adjustment of Working Hours (*Wet aanpassing arbeidsduur*) came into effect, which aim to facilitate the *reconciliation of work and care*. However, this legislation was not enacted with the Directive in mind. In addition, Article 1 ETA provides that any distinction on the grounds of pregnancy, childbirth and maternity constitutes *direct* distinction on the grounds of sex.

- *Access to the courts* is guaranteed for victims of discrimination. Before bringing a case before the Court, victims (and interest groups) can bring a case before the NIHR. The NIHR can give an Opinion, but its recommendations are not binding. Access to the NIHR is free of charge.

- The Decree that contains a list of professions for which sex may be a genuine occupational requirement was amended for the last time in 2005.¹³⁵ An evaluation and reporting, as required in Article 31(3) of the Recast Directive, seems not to have taken place after 2006.

3. Overall impact of the Recast Directive

The Directive has had very little impact.

However, there has been some impact of the Letter sent by the European Commission dated 31 January 2008 (no. 2006-2444), which points out inadequacies in the transposition of the Directive 2000/78. Following this letter the definitions of direct and indirect discrimination in the Dutch equal treatment laws were adapted, and the scope of the exception with regard to personal services in the GETA was narrowed. Previously, Article 5(3) stipulated that the prohibition against discrimination did not apply with regard to personal services as long as the desired occupational requirement (i.e. that the services would be carried out by a man or a woman only) was reasonable. After receiving criticism from the European Commission, the term 'reasonable' was replaced by 'based on a legitimate aim' and 'proportional to that aim'.

¹³⁴ NIHR 18 December 2012, 2012-195, *JAR* 2013/41.

¹³⁵ See: *Staatsblad* 2005, 529. The Decree was also changed in 2004, see *Staatsblad* 2004, 163.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

Sometimes international human rights law conventions are referred to in parliamentary proceedings and in case law. However, Dutch equal treatment laws do not have an elaborate Preamble in which principles and goals are stated, but they sometimes contain a short 'heading' in which it is said that they are meant to implement anti-discrimination standards in the Constitution, in international law, or in EU Directives.

2. The scope of the implementing legislation

As mentioned above, the principle of equal opportunities is not mentioned explicitly in Dutch equal treatment legislation. However, the NIHR has previously referred to the Recast Directive in relation to positive action. This was in order to justify positive action measures in favour of women professors in academia, as positive action applies to *equal opportunities* and not just *equal treatment*.¹³⁶

3. Substantive equality as aim of the legislation?

There is no provision that explicitly states that substantive equality is the aim of the relevant legislation.). Some parliamentary documents mention that the aim of the European legislator is to reach full equality in practice.

III - Definitions and concepts

1. Direct discrimination

The only difference between the definition found in the Directive and the definition found in Dutch law is that Dutch law uses the term 'distinction' instead of 'discrimination'. In the view of the expert, this is not problematic; as it is clear from case law that 'distinction' is interpreted in the same manner as 'discrimination'. The difference seems predominantly a matter of sensitive wording. 'Discrimination' implies more legality, whereas 'distinction' is more technical. However, as some cases are more technical in nature, this is neither a good nor a bad thing. The word 'distinction' may occasionally seem to be more appropriate in a different case, and vice versa the word 'discrimination'. For instance, a case before the NIHR in which men complained that they were discriminated against on the ground of sex because they were obliged to place their bikes on the higher bike stands, whereas women were not obliged to do the same, seems less worthy of the term 'discrimination'.¹³⁷

2. Absence of comparator in cases of pregnancy discrimination

There is no explicit provision in Dutch law that stipulates that a comparator in cases of pregnancy discrimination is not necessary. However, Dutch law (Article 1 ETA) does stipulate that any distinction on the grounds of pregnancy, childbirth, or maternity amounts to a direct distinction on the ground of sex. As no comparator is required within

¹³⁶ NIHR 18 December 2012, nr. 2012-195, JAR 2013/41.

¹³⁷ NIHR Opinion no. 2010-62.

the wording of the definition of direct discrimination, it follows that cases of pregnancy discrimination do not require a comparator.

This issue is not really discussed in the Netherlands.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

There is no explicit provision in Dutch law that clarifies that financial consequences cannot justify pregnancy discrimination. However, as pregnancy discrimination amounts to direct discrimination, there can be no justification for such a distinction.

To the knowledge of the expert, this specific justification has never been discussed in case law.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

There are few specific legal difficulties. However, in the view of the expert the sanctions issued in the event of discrimination are not very effective. This is especially true for the case of pregnant women who do not have their temporary contract renewed; in these cases it is likely the court will look favourably towards the principle of freedom of contract. The court may award damages, but these are hardly ever claimed, probably because they are not that high and not worth pursuing once the costs of legal proceedings are considered.

If an employment agreement is terminated during or because of pregnancy, the termination is null and void, which means that the employee remains entitled to her salary. That sanction is more effective. However, the employment relationship most often breaks down after such an incident, which means the pregnant woman may lose her job anyway. .

The NIHR receives many complaints relating to the non-renewal of pregnant women's temporary contracts, most of which are considered well-grounded. However, few women take their cases to court. It might be interesting to do some research in this field.

5. Indirect discrimination

As with the definition of direct discrimination, the only difference between Dutch law and the Directive is that Dutch law uses the term 'distinction' rather than 'discrimination'.

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

There are no problems specific to the Netherlands; however there are occasionally cases in which *prima facie* evidence itself is problematic. The Hague Appeal Court judgment of 21 December 2010 (LJN: BP3748) is an example of this. In this case, the court ruled that the claimant, a female employee, had not established a *prima facie* case of indirect sex discrimination against female teachers, whereas the Equal Treatment Commission (ETC, the predecessor to the NIHR) had reached a different conclusion. The expert on job evaluations at the (then) ETC had produced a thorough statistical analysis of the situation at the school, which concluded that more men than women had been appointed in a

higher position after a change in the job evaluation system. The school subsequently hired a statistics professor who wrote that these changes between men and women observed by the expert were incidental, and not significant from a statistical point of view. The court found this sufficient to discard the expert's report, even though it was far more elaborate than the remarks by the professor. According to the court, the employee had not provided sufficient evidence to refute the professor's observations. This is by no means a typical case, as statistical evidence is used in very few cases, but it is relevant to note that courts and lawyers often struggle with statistics.¹³⁸

In theory employees are entitled to access sex-disaggregated data, but this must not be a 'fishing' expedition – the employee must explain why exactly he or she needs the information.

7. Prohibited to justify indirect sex discrimination by 'mere generalisations'?

There is no explicit provision in Dutch law that stipulates that 'mere generalisations' cannot be used to justify indirect sex discrimination. However, the term 'mere generalisations' does not fit within the scope of justifications provided in the definition, as it is not precise or objective.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

There is no provision in Dutch law that stipulates that budgetary considerations themselves cannot be considered justifications for indirect sex discrimination. Again, it can be reasonably considered that the term 'budgetary restrictions' does not fit within the scope of justification offered by the definition of indirect discrimination.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

In the view of the expert, the biggest problem is the lack of protection of pregnant women, especially those on temporary or flexible contracts. Due to the lack of published cases, it can be assumed that the women concerned do not take further action. As mentioned above, this probably relates to the costs of legal proceedings and the low amounts of damages that are awarded. It is difficult to tackle this matter in a legal way. One possible approach to address this could be if Dutch courts award higher non-pecuniary damages, so as to really deter employers from pregnancy discrimination.

As of 1 July 2015 the Act on Work and Security (*Wet werk en zekerheid*) will come into force. This Act stipulates that when a temporary contract ends after two years or longer, the employee concerned is entitled to compensation in order to facilitate the transition to

¹³⁸ Compare Appeal Court of Amsterdam, judgment of 7 October 2014 (ECLI:NL:GHAMS:2014:4132, JAR 2014/94). In this case, data on the low number of women in higher academic positions, in the Netherlands in general and at the department of Economics at the Amsterdam University in particular, were accepted as one of the facts from which it might be presumed that discrimination had occurred.

another job. The payments are relatively low, but at least this offers something to those women whose temporary contract is terminated after two years.

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

Draw attention to the importance of effective remedies and especially deterrent damages. It is worth investigating the possibility to reach a European consensus on a minimum amount, for instance three months of salary.

In addition, the development of a website on which employers and others can test their assumptions in the field of sex could be developed.¹³⁹

2. Recommendations to the stakeholders

No suggestions.

3. Recommendations to the social partners

The suggestion to develop a website might also be applicable to the social partners.

4. Recommendations to the legislator in your country

Legal aid should be more affordable and accessible.

5. Recommendations to the European Commission?

No specific recommendations.

6. Any remaining issues?

The expert would like to point out that these days discrimination is not so much a legal matter, but rather a matter of awareness, assumptions, and prejudices. This is of course more difficult to tackle, as it is less tangible.

A further general issue in the Netherlands is that the present economic situation means that employers have priorities higher than protecting pregnant women from unemployment and discrimination.

¹³⁹ For instance, following a similar initiative developed by Harvard University. See <https://implicit.harvard.edu/implicit/takeatest.html>, accessed 20 March 2015.

SWEDEN – Ann Numhauser-Henning

I - Implementation of the Directive

1. Adoption of legislation to simplify, modernise, and improve national law

The Swedish Government did not consider any transposition of the Recast Directive necessary, as it considered that national law was already sufficient. There is therefore no 'implementing' legislation as such.

The Discrimination Act (DA) (2008:567) entered into force on 1 January 2009. This is a single, all-encompassing piece of legislation, which covers all grounds of non-discrimination including gender equality. It replaces seven earlier acts. Swedish legislation previously in place, such as the Equal Opportunities Act (EOA) (1991:433), the Parental Leave Act (PLA) (1995:584), and the Prohibition of Discrimination Act (PDA) (2003:307) were regarded to meet the requirements of the Recast Directive prior to August 2008. The EOA 1991 and the PDA 2003 ceased to exist when the DA entered into force, whereas the PLA continues to apply besides the DA. The DA implements all EU law and is not a specific transposition of the Recast Directive.

In the view of the expert, combining all legislation on gender equality and non-discrimination is not necessarily a means to improve national law. The expert considers the way in which gender equality is now considered as part of the non-discrimination grounds (rather than as a separate field in and of itself) particularly problematic.

2. Article 33 of the Directive and the implementation of 'novelties'

- It is expressly stated in Chapter 1 Section 5 Paragraph 2 of the DA that the provisions on sex discrimination cover a person who is about to reassign or has reassigned his or her sex. So far, there is no case law on *gender reassignment* and no implications of special problems in this area.

- *Occupational social security systems* do not exist as such in Sweden. However, Chapter 2 Section 14 of the DA bans discrimination in (all) public social security schemes with an exceptional rule regarding widows' pensions. However, private occupational schemes are only implicitly covered by the (also implicit) ban on wage/pay-discrimination and this goes for the public as well as the private sector.

- The 2008 DA does not contain a provision simply implementing Article 3 of the Recast Directive but a complex structure of different provisions for positive action by area (and for different grounds). Regarding sex/gender there are such provisions opening up possibilities for positive action in the area of employment (Chapter 2 Section 2.2), education (including vocational training) (Chapter 2 Section 6.1), labour market political activities and employment exchange (Chapter 2 Section 9.1), self-employment and professional occupational activities (Chapter 2 Section 10 Paragraph 3), membership of certain organisations (Chapter 2 Section 11 Paragraph 2.) and some other areas not covered by the Recast Directive. In this respect there is no real change to Swedish law.

- Chapter 3 Section 5 stipulates that ‘employers are to help enable both female and male employees to combine employment and parenthood’. This provision concerning the *reconciliation of work, private, and family life* has long been established in Swedish law.
- Chapter 2 Section 2.1 of the DA includes an express exception to the ban on discrimination in employment when *genuine and determining occupational requirements* apply. To the knowledge of the expert, no reports have been submitted to the Commission in this respect.
- Under the new DA there is now only one ombudsman – the Discrimination Ombudsman. The Discrimination Ombudsman and trade unions can represent victims in discrimination cases, and under Chapter 6 Section 2 NGOs can also bring claims to court.

3. Overall impact of the Recast Directive

There has been no impact of the Recast Directive. The changes made by the Discrimination Act cannot be considered an intentional transposition of the Directive and do not implement any real novelties.

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

It is not the usual practice for Swedish legislation to refer to international conventions. The DA makes no reference to international human rights conventions, including the CEDAW; nor does it make any reference to fundamental rights.

2. The scope of the implementing legislation

The general clause in Chapter 1 Section 1 of the DA covers all grounds and areas of society, and therefore addresses a lot of issues outside the Recast Directive. It does mention as its purpose to ‘counteract discrimination and in other ways support equal rights and opportunities’. In addition, the DA makes references throughout to ‘equal opportunities’.

In the context of ‘occupation’, Chapter 2 Section 1 only refers to employers and employees. However, Chapter 2 Section 10 stipulates that discrimination is prohibited with regard to, for instance, ‘financial support permits, registration, or similar arrangements that are needed [...] to start or run a business [...] or exercise a certain profession’.

3. Substantive equality as aim of the legislation?

Chapter 3 of the DA is dedicated to ‘active measures’ in working life and education. Section 1 refers to active measures in reference to equal rights and opportunities. Chapter 2 Section 2.2 stipulates that the ban on discrimination does not prevent measures that contribute to efforts that promote equality between women and men.

III - Definitions and concepts

1. Direct discrimination

The definition of direct discrimination in Chapter 1 of the DA is almost exactly the same as the definition in the Recast Directive and there are no problematic differences.

2. Absence of comparator in cases of pregnancy discrimination

There is no explicit provision in Swedish legislation that stipulates that there is no need for a comparator in cases of pregnancy discrimination, but it is applied this way in practice.

3. Financial consequences prohibited as a justification for pregnancy discrimination?

There is no such explicit provision in Swedish legislation. However, it is for the employer to provide the proof to justify his or her actions once a *prima facie* case of discrimination is established. This is presented to the court, which will then consider the evidence in light of EU law, and likely rule that financial consequences cannot be considered a justification for pregnancy discrimination.

There is no provision in the DA that stipulates that discrimination on the basis of pregnancy amounts to direct sex discrimination. The ban on discrimination in the workplace is worded very subtly. An employer may not discriminate on the grounds enumerated in Chapter 1 of the DA, which includes sex and gender. As EU law considers pregnancy to be a condition of the female sex, by implication and interpretation pregnancy discrimination amounts to sex discrimination, although this is not explicit. There have been no difficulties in practice.

4. Specific difficulties in the application of the prohibition of direct sex discrimination?

No specific difficulties.

5. Indirect discrimination

The definition of indirect discrimination in Chapter 1 of the DA is almost exactly the same as the definition found in the Recast Directive. There are no problematic differences.

6. Specific problems involved with establishing a *prima facie* case of indirect sex discrimination?

No specific difficulties involved with establishing a *prima facie* case of indirect sex discrimination. Chapter 6 Section 3 of the DA stipulates that the burden of proof lies with the defendant in *prima facie* cases of indirect discrimination, and he or she must prove that the discrimination did not take place.

7. Prohibited to justify indirect sex discrimination by 'mere generalisations'?

There is no provision in the DA that stipulates 'mere generalisations' cannot justify indirect sex discrimination. It is for the courts to determine the validity of the justification put forward in such a case. However, the term 'mere generalisations' by definition does not fall within the scope of legitimate justifications stipulated in Article 1 of the DA: that the criterion or measure can be 'objectively justified based on a reasonable goal'.

8. Prohibited to justify indirect sex discrimination by budgetary considerations in themselves?

There is no provision in the DA that stipulates that budgetary considerations cannot justify indirect sex discrimination, but as above, it is for the courts to determine the validity of a justification. This is considered in light of EU law – if EU courts would not accept such a justification, then Swedish courts would follow this line of reasoning.

IV - Application and enforcement of the Directive

1. Specific difficulties in application and enforcement of the Directive in practice?

Now that there is only one equality Ombudsman for all grounds of non-discrimination, the Ombudsman has been less proactive in its responsibilities towards gender equality. The Ombudsman has been criticised in this regard, and as a result the Government acted upon this criticism by giving the Ombudsman special tasks to work more actively in this sphere.¹⁴⁰

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

In the view of the expert, the legislation does not cover all areas. It would be preferable if the scope of gender equality could be extended to mirror the scope of the non-discrimination ground ethnicity, in order to cover as many areas as possible (for example, to the areas covered by other non-discrimination directives, such as health).

2. Recommendations to the stakeholders

No specific recommendations.

3. Recommendations to the social partners

The trade unions in Sweden tend to 'look after their own'. This is especially so if trade unions are operating on a segregated labour market. This means that working conditions (etc.) expressed in collective agreements can for instance be very favourable to mothers, in collective agreements that cover areas where women work predominantly. In other sectors where men work, trade unions do not work as hard for parental rights for men, as fewer mothers are members. Women tend to have better conditions, and this can result in further aggravating sex segregation.

4. Recommendations to the legislator in your country

The Government should consider giving more special tasks to the single Ombudsman to ensure that the Ombudsman pays sufficient attention to gender equality matters.

5. Recommendations to the European Commission?

As above, to broaden the scope of gender equality so that it mirrors the scope of other non-discrimination grounds, particularly ethnicity.

6. Any remaining issues?

No other issues.

¹⁴⁰ See *Återrapportering av regeringsuppdrag (Report on the Governmental Assignment) A2013/6977DISK: Utökade tillsyns- och främjandeinsatser om aktiva åtgärder enligt diskrimineringslagen (Increased monitoring and promotion in relation to active measures according to the Discrimination Act)*, available at: <http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2015/DO-aterrapporterar-regeringsuppdrag/>, accessed 23 March 2015.

