



Gender Equality Law in 30 European Countries 2009 update

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Introduction

The purpose of the present publication is to provide an updated general overview of the transposition of EU gender equality law in the 27 Member States of the European Union, as well as in Iceland, Liechtenstein and Norway, the EEA countries to which most of the EU equality law applies.¹ This publication is complementary to the publication *EU Gender Equality Law*, written by Prof. dr. Sacha Prechal and dr. Susanne Burri and published by the Office for Official Publications of the European Communities in 2008.² Both publications are aimed at a broad – but not necessarily legal – public and explain the most important issues of the EU gender equality *acquis* and its implementation.

The present publication deals with the implementation of the EU gender equality *acquis* in the Member States and EEA countries. The term ‘EU gender equality *acquis*’ refers to all the relevant Treaty provisions, legislation and the case law of the European Court of Justice in relation to gender equality. Another often-used term is ‘sex equality’. Both terms are used in the present publication, more or less interchangeably. However, it should be noted that while the term ‘sex’ refers primarily to the biological condition and therefore also the difference between women and men, the term ‘gender’ is broader in that it also comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society.

Another brief explanation that merits attention is the difference between the EU and the EC. Currently, i.e. before the entry into force of the Lisbon Treaty, the European Community and therefore also EC law³ is only one part of the European Union and of EU law. All gender equality law is law that originates in the EC Treaty, which is older than the EU Treaty. Therefore, while we may speak about EU gender equality law, the more precise references are to the EC Treaty. When – and if – the Lisbon Treaty enters into force, the EC and the EU will be merged into one single unit, the European Union. However, we would continue to work with two treaties, the Treaty on European Union (TEU) that lays down the basic structures and provisions, and the Treaty on the functioning of the EU (TFEU), which is more detailed and elaborates the TEU.⁴

This publication gives a country-by-country overview of how each State has implemented EU gender equality law, in particular the relevant directives.⁵ The national overviews present, in succession, the implementation of central concepts in national law, equal treatment in relation to access to work, working conditions etc. (matters covered by Directives 76/207/EEC and 2002/73/EC), pregnancy and maternity protection; parental leave (matters covered by Directives 92/85/EEC and 96/34/EC; relevant provisions from Directives 76/207/EEC and 2002/73/EC), equal

¹ The first overview was published in November 2008. The present publication is an update.

² This publication is in electronic form available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed 26 May 2009.

³ And previously, before 1992, the European Economic Community and EEC law.

⁴ See Article 1 TEU which provides ‘(...) The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.’

⁵ The full – official – name of the respective directives and their publication are included in Annex I. Annex II contains a selected bibliography of EU gender equality law (in English or French).

pay (matters covered by Directive 75/117/EEC, certain provisions from Directive 2002/73/EC and Article 141 TEC), equal treatment in occupational pension schemes (matters covered by Directives 86/378/EEC and 96/97/EC and partly also by Article 141 TEC), equal treatment in statutory schemes of social security (matters covered by Directive 79/7/EEC), equal treatment of the self-employed and helping spouses (matters covered by Directive 86/613/EEC and some relevant provisions in Directive 2002/73/EC), equal treatment in access to and the supply of goods and services (matters covered by Directive 2004/113/EC) and aspects of the enforcement of and compliance with EU gender equality law (this last item corresponds with various common provisions of all directives and relevant provisions from Directive 97/80/EC). The country overviews conclude with a brief assessment of the implementation.⁶

⁶ In Annex III the reader can find an overview, per country, of the most important legislation enacted in order to implement the directives or Treaty provisions respectively.

National Law: Reports from the Experts of the Member States and EEA Countries

AUSTRIA

1. Implementation of central concepts

The prohibition of discrimination on grounds of sex has been enshrined in Article 7 of the Federal Constitution since 1920. In 1998 a new paragraph was added to it, which reads as follows: ‘The federal state, the regions and the communities acknowledge the principle of the de facto equality of men and women. Measures aimed at the promotion of de facto equality between women and men in particular which are aimed at the elimination of existing inequalities are admissible.’ The content and wording of the paragraph is influenced by Articles 1-4 of the UN Convention on the Elimination of all forms of discrimination against women (CEDAW), which are adopted at the level of constitutional law, as well as by Directive 76/207/EC.

In 2008 the Federal Constitution has again been amended so that the Federal State, the regions and the communities will have to aim at de facto equality between women and men when preparing their budgets. This new principle has been implemented into the Act on the Federal Budget in more detail.

The principle of equality which is governed by the Equal Treatment Act¹ contains the prohibition of **direct and indirect discrimination** on the grounds of sex regarding access to employment, equal pay for equal and equivalent work, social benefits, vocational training, career advancement, other working conditions and the cessation of service as well as access to occupational counselling, advanced vocational training and retraining. The **instruction to discriminate** is defined as a form of discrimination as well. Moreover, the Equal Treatment Act states that measures aimed at the promotion of de facto equality between women and men do not have to be regarded as sex-related discrimination. Due to an amendment in 2008 this authorisation has been extended to all areas of the labour market as well as to the field of goods and services.

Regarding the public sector the Federal Equal Treatment Act contains provisions on affirmative action and the promotion of women² which oblige all representatives of the employer to aim at the elimination of the existing under-representation of women and existing disadvantages for women in connection with working relations. These provisions define ‘under-representation’ as when women are represented under a quota of less than 40 % of all employees within their group in the pay scheme or the level of a particular function. All ministers have to pass affirmative action plans for their ministries every six years and these plans have to provide for binding targets to

¹ The system of equal treatment legislation in Austria is not homogenous but separated into two main parts, namely legislation for the private sector and for the public sector. The legislation for the public sector itself – in accordance with the legislative competencies within the Federal State – is divided into legislation for the public service of the Federal State and for the public services of the (nine) federal regions. In general regional legislation is designed along the same lines as the model for federal legislation. As the following questions concern several pieces of legislation, in the following the legislation for the private sector (OJ I 66/2004) shall be examined as the leading example – except the legally binding provisions on positive action in favour of women, which are only in force in the public sector (OJ I 65/2004).

² The law for the Federal State, which was enacted prior to all others in 1993, can be regarded as a model for the legislation of the regions.

raise women's representation and have to be adjusted according to the development of the personnel structure every second year. Furthermore, female applicants for posts, who are equally qualified with the best qualified male candidate, have to be appointed or promoted according to the targets of the affirmative action plan. Finally, women have to be given preference when applying for vocational training which qualifies for advancement to higher positions or functions according to the targets of the affirmative action plan.

2. Access to work and working conditions

Equality legislation for the private and the public sector cover all labour relationships based on private contract or an administrative decree, conditions for access to self-employment, home workers and the employment of persons who work by order and for the account of others and resemble employees due to their economic dependency. Furthermore, equality law applies to employees which are deployed to Austria by an employer without a seat in Austria. Exceptions are only allowed if the sex of the worker is an indispensable precondition for conducting the work or service.

3. Pregnancy and maternity protection; parental leave

The Maternity Protection Act provides that pregnant workers and workers who have recently given birth are not allowed to work during eight weeks before and after confinement. During this time, the worker will receive a maternity benefit equal to her average income over the last 3 months. Civil servants continue to receive their ordinary pay and a one-time allowance of 70 % of their basic salary. The purpose of maternity benefit is to compensate the mother's loss of income.

Parental leave for mothers is regulated in the Maternity Protection Act, while parental leave for fathers is regulated in the Fathers' Leave Act. Parental leave is a period during which the obligations deriving from the labour contract are suspended for both the employer and the employee. The employment contract as such is not interrupted, but the obligations which arise therefrom, namely for the employer to pay a salary and for the worker to perform work, are suspended. Each parent can take up parental leave until the child is 2.5 years of age. This leave can be extended up to the age of 3 if the other parent exercises this right as well. Dismissal protection is granted for 24 months. Additionally, employees are entitled to leave for care in cases of illness (to the amount of two weeks maximum).

The Child Care Allowance Act provides for childcare benefits, not only for employees or the self-employed but for all parents, regardless of whether or not they are or have been employed. The allowance can be used in 3 alternative forms and the benefit will be higher the shorter the duration of the leave will be. Parents are allowed to have an additional income while receiving the allowance up to a maximum of EUR 16 200 per year.

The same conditions apply in the case of adoption, commencing on the date of the child's adoption.

4. Equal pay

The Equal Treatment Act for the private sector provides for the prohibition of discrimination on grounds of sex in the field of remuneration. Furthermore, it obliges that job classification systems on the plant level as well as collective agreements have to take into account the principle of equal pay for equal and equivalent work and may not contain different criteria for women and men which constitutes discrimination. Legislation does not define the term equal pay for women and men as such. 'Pay' – in

conformity with EU case law – covers every advantage in cash and in kind provided by the employer. Legislation does not allow justifications for pay differences, but under the application of constitutional law principles this has to be interpreted in so far as differences are justified if they are objective and well founded. Under these aspects, for instance, an Austrian court ascertained different pay for equivalent work depending on the venue of the duties in the different regions of Austria to be justified. However, the Austrian courts have not found the following to be in conformity with the principle of equal pay: inter alia, such differences which were the result of the better ability of the employee to negotiate on the question of remuneration or which were based on qualifications which were not yet divulged at the time of agreeing on the salary but would have been expected for the future.

In general collective bargaining traditionally plays an important role in the regulation of salaries. Collective agreements only apply to the private sector and cover about 98 % of the workforce and there are around 450 collective agreements in force at the sector level.

The salaries of civil servants are governed by legislation which – formally – does not contain gender-specific differences.

5. Occupational pension schemes

The legal framework for occupational pension schemes is laid down in the Act on Private Pensions and the Act on Business Pensions. Occupational pension schemes covering the risks of age and incapacity to work are usually based on collective agreements between the employers' and employees' representatives, either on the sector or plant level, or on individual agreements. All these agreements provide for promises of benefits, which are usually dependent on the length of employment. In 2007 a provision was introduced into the Act on Private Pensions, according to which different contributions or benefits may be based on the factor of 'sex' only when this criterion constitutes a determining factor within a risk assessment, which is based on relevant and exact statistical data. Risk assessment and actuarial factors have to be published in the business plan of the pension fund and have to be evaluated on a regular basis. The Act on Business Pensions provides for a general principle of equal treatment of employees or groups of employees and it forbids differentiations which are arbitrary and not justified.

The social security systems for civil servants of the Federal Government and the provincial governments are allocated to the second pillar as the pension payments to civil servants are considered to be 'pay' within the meaning of the case law of the European Court of Justice. The law on pensions for civil servants is not part of the general social security system. The Federal State as well as the nine Austrian regions have enacted separate acts.

Generally speaking, the laws contain rules on the entitlement to pensions of civil servants, their survivors and relatives. Female and male civil servants pay the same contributions, they have the same pensionable age, the same entitlement to old-age pension and early retirement and the exchange of the survivors' benefit for a higher old-age pension. There are no differences in the calculation of pensions neither regarding the sex of the civil servant nor her or his family status. Pension expectancies can be acquired during child-raising periods subject to the condition that the child has been brought up by the civil servant as the main carer for a maximum period of 48 months – equally for female and male civil servants.

6. Statutory schemes of social security

The statutory regimes of social security form a complex web of legislation, each being applicable to a certain group of persons like employees, persons engaged in trade and commerce, the self-employed, farmers, notaries or artists. According to these laws general social insurance includes health, accident and pension insurance, provided that full insurance cover is granted. The General Pensions Act, which entered into force in 2005, harmonizes the different pension systems by adding up the sum totals of the bases for calculating the insurance contributions acquired under the respective systems. Originally the standard retirement age in Austria was 65 years for men and 60 years for women. After the Constitutional Court determined that the different pension age for women and men was unconstitutional in 1990, the legislator imposed a step-by-step system which gradually raises the statutory retirement age for women to that of men. The transition period for equalising the standard retirement age will be from 2024 to 2033. The early retirement age is 61.5 years for men and 56.5 years for women. Widows' and widowers' pensions are granted equally concerning the pensionable age. Widows' or widowers' pensions are granted if the spouse was validly married at the time of the death of the insured person or, in case of divorce, if he/she received maintenance payments from the insured person at the time of his/her death.

In general persons employed on the basis of quasi-freelance contracts, home workers and persons in minor employment are not entitled to full insurance cover, but the General Social Insurance Act provides for the inclusion of these groups of employees provided that certain requirements are met. Spouses are entitled to derived rights, which are usually tied to the duration of the marriage and cover health and accident insurance solely whereas one's own pension expectancies can be acquired during child-raising periods only.

In addition to this the Unemployment Insurance Act governs the insured event of unemployment for certain groups of persons and certain persons in training, except for civil servants in public-law employment relationships. Moreover, the social welfare acts of the provinces provide for additional social assistance.

7. Self-employed and helping spouses

Self-employment – more than other fields of employment – is dominated by the economy rather than by the law. Legal instruments in this sector, such as the Act on the Regulation of Businesses of 1994, contain basic provisions governing access to and the conditions of self-employment in general as well as of different professions. The principle of gender equality in self-employment was introduced in 2004 on the occasion of the transposition of Directive 2002/73/EC by the renewed Equal Treatment Act for the private sector.

Helping spouses are covered by the social security schemes, but there is no obligation for cover guaranteeing independent entitlement. Helping spouses might be insured as employees or as spouses of self-insured persons, but only the status as an employee can guarantee independent rights whereas the status as a helping spouse does not create individual rights. Due to the Austrian Civil Code helping spouses are entitled to adequate remuneration for their work which depends on the character and duration of the work carried out, the living conditions of both spouses and any maintenance which has been paid.

Maternity protection for self-employed women is regulated under the Business Support Act which provides for maternity protection for self-employed women in the business and agricultural sectors. Self-employed women may choose between a

replacement to be provided by the insurance company to take over her duties during eight weeks before and after the birth including the date of birth or a maternity leave allowance, which is exempted from income tax. Furthermore, self-employed and helping spouses are entitled to receive childcare allowance.

8. Goods and services

The Goods and Services Directive has been implemented by an amendment to the Equal Treatment Act in 2008. Several new paragraphs determine the scope of application, the principle of equality, definitions, exceptions, positive measures, the prohibition of harassment, sexual harassment and victimisation as well as sanctions. These regulations apply to all legal relations regarding access to and the supply of goods and services which are available to the public, including their initiation and foundation, as well as their utilization and enforcement.

Exceptions are made for goods and services in private and family life, concerning the content of media and advertisements as well as for public and private education. Furthermore, the unequal supply of goods and services does not constitute discrimination if the difference made is justified by a legitimate aim, and is adequate and necessary.

In addition to this the principle of equal treatment of women and men in private insurances has been introduced by amendments to the insurance legislation. Concerning health insurances the new provisions determine that the costs related to pregnancy and maternity shall not result in higher premiums or less favourable services for women. The prohibition of gender-specific treatment shall not be at the disposal of individual contracts. Gender-related differences may be admissible if and so far as the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The insurance companies, which make use of the exception concerning actuarial factors and statistical data, are obliged to inform the finance market monitoring authority, to deliver all relevant documents and to widely publish all statistical data concerning gender-based differences related to insurance risks, e.g. mortality tables or gender-segregated damage statistics, to the public.

9. Enforcement and compliance

Persons who feel discriminated against on the ground of their sex may seek counselling and support from the Ombudspersons for Equal Treatment Affairs or may ask the Equal Treatment Commission for a – legally non-binding – opinion. Claims aimed at the enforcement of rights deriving from any labour relation have to be filed at the Labour or Civil Courts. Concerning insurances legal protection is given by the possibility for individuals to claim compensation, whereas organisations dedicated to consumer protection may claim for any omission before the Civil Courts.

Sanctions in cases of discrimination differ according to the form or area of discrimination and whether there is material and immaterial damage, pay differences or inclusion in social benefits. Measures against **victimisation** are provided by the prohibition of dismissal or other adverse treatment as a reaction to the complaint of the complaining persons, of witnesses or other persons who act as supporters.

The **burden of proof** is shifted on to the defendant in a claim filed by a discriminated person in as far as the alleged victim of a violation has to make credible all facts and circumstances, whereas the defendant has to provide evidence that the decision under dispute is based on any other reason than the sex of the person.

Within all proceedings the victims of discrimination may formally be supported by a certain non-governmental organisation which is explicitly mandated by legislation. Social partners are involved in the enforcement of equality rights as members of the Equal Treatment Commissions. Furthermore, the Labour Courts' senates each consist of a judge and two lay judges delegated from both sides of industry. Finally, according to the Labour Court Act, the collective bargaining partners are entitled to bring a motion for a declaratory judgment to the Supreme Court on the question of the existence or non-existence of rights which has to be of interest to a minimum of three employees or three employers.

Collective agreements at the plant level are governed by legislative provisions *inter alia* aimed at the initiation of measures for the promotion of gender equality. According to this legislation the works council may establish specialised committees on the preparation and implementation of tasks like equal treatment, affirmative action in favour of women, the interests of employees with family responsibilities and measures against sexual harassment. In addition to this the employer has to deliberately implement measures on positive action in favour of women and questions of the reconciliation of work and family life with the works council.

Collective agreements at the sector level are used as a tool for the promotion of gender equality as well. There are several examples where 'good practice' model projects have been developed and implemented. For instance, the merged unions of the metal and the textile sector together with the Equality Ombudsperson and other national and European partners conducted a project in which 39 collective agreements were assessed with a view to their gender impact. Furthermore, the union for white-collar workers has developed a model collective agreement for the plant level, which is strongly influenced by the spirit of Directive 2002/73/EC. Moreover, a collective agreement in the banking sector contains explicit provisions on equal opportunities of women and men which tackle the gender dimension like higher salaries at the beginning of the working relationship, gender-sensitive competence factors in the case of promotion or measures for the better reconciliation of work and family life.

10. Brief assessment

The Equal Treatment Act applicable to the private sector fulfils the basic requirements and standards of the Directive. In particular, the definitions of direct and indirect discrimination are exactly consistent with Directive 76/207/EEC, as amended by Directive 2002/73/EC. Furthermore, legislation complies with the EU standards regarding sanctions in cases of discrimination and the definitions of sexual harassment and harassment are in conformity with Directive 76/207/EEC as amended by Directive 2002/73/EC. The Equal Treatment Act for the private sector focuses on the equality rights of individuals only, but does not include provisions on preventative measures or on systematic equality plans. In general the obligatory elements of the directives have been properly implemented, whereas the provisions of Directive 2002/73/EC, which are not binding, have not been explicitly transposed.

The Equal Treatment Acts applicable to the public sector go further than what EU law requires, in particular concerning the legally binding provisions on affirmative action in favour of women.

As far as parents' rights are concerned, legislation provides for comprehensive welfare state standards, however one provision raises concerns, namely the protection against dismissal during parental leave for a period of 24 months only, while a parent is entitled to parental leave until the child reaches the age of 30 months. This might be

contrary to the right of a parent to return to the same or an equivalent job guaranteed by the Parental Leave Directive and Directive 2002/73/EC.

The main problem regarding social insurance cover for women is that due to the principle of equivalence, it is tied to a (regular) employment relationship which depends to the amount of contributions and the time periods during which contributions were paid. Spouses are entitled to derived rights, which are usually tied to the duration of the marriage and cover health and accident insurance solely whereas one's own pension expectancies can be acquired during child-raising periods only; however, recently this has been considerably improved to the benefit of women.

Self-employment is still gender segregated regarding the type of profession as well as the under-representation of women in the upper levels of hierarchies. The areas of discrimination are to be found in reality rather than on a formal level. The Act on the Regulation of Businesses of 1994 contains basic provisions governing access to and the conditions of self-employment in general as well as of different professions. On the one hand, there were no legal provisions which were explicitly contrary to the directives, but, on the other, this Act did not include a special anti-discrimination clause until the Equal Treatment Act for the private sector was extended to self-employment in 2004.

As far as helping spouses are concerned, it appears that they are covered by the social security schemes but there is no obligation to obtain cover guaranteeing independent entitlement. Helping spouses might be insured as employees or as spouses of self-insured persons, but only the status as an employee can guarantee independent rights whereas the status as helping spouse does not provide an entitlement to individual rights, which would be essential to achieve *de facto* equality between women and men.

Regarding enforcement and compliance aspects the Austrian legal system provides for high standards as far as the enforcement of individual rights are concerned, whereas collective means of enforcement are still not as well developed as the severity and dimension of sex-related discrimination would require. Furthermore, the obstacles which hinder the implementation of *de facto* equality between women and men in society and the economy require a more systematic and comprehensive policy conducted by and including all actors like the judiciary, politicians, the unions, employers, governmental and non-governmental organisations and civil society.

BELGIUM

1. Implementation of central concepts

The principle of equality under the law is enshrined in the Constitution, with the prohibition of discrimination as a corollary. The distinction between **direct and indirect discrimination** was introduced in compliance with EC law, including the successive definitions of indirect discrimination (from Directive 97/80/EC to Directive 2002/73/EC), and these notions are commonly accepted. However, the settled case law (be it constitutional, civil or administrative) considers that any discrimination, direct or indirect, is potentially justifiable.

This contradiction with the European Court of Justice's stance induced the following artificial solution, embodied in the new anti-discrimination legislation of 10 May 2007 (three Acts aimed respectively at implementing Directive 2000/43/EC; Directive 2000/78/EC; and all the gender equality directives). A difference is made between 'distinction' and 'discrimination'; discrimination is a distinction which

cannot be justified; when the object of a direct distinction falls within the scope of EU law, there is direct discrimination for which no justification is permissible, unless the Act provides otherwise (see below), while if the object does not fall within the scope of EU law, i.e. exclusively under national law, even a ‘direct distinction’ can be justified. There is every reason to fear that the law courts will not understand such subtleties and that the protection provided by EU law will be weakened.

Following the scheme explained above, **positive action** is regarded as a lawful justification for a ‘direct distinction’. There is no requirement of positive action; on the contrary, the Gender Act of 10 May 2007 imposes a set of conditions (developed previously by the Constitutional Court in a matter unrelated to EU law) which fits the ECJ’s case law, but is expressed in rather a forbidding way. The implementation of the legal provision is conditional on an ancillary Royal Decree which has not yet been promulgated, so that the lawfulness of positive actions which had been undertaken under the previous (and less restrictive) gender equality legislation is uncertain.

Regarding **instructions to discriminate**, the Act of 10 May 2007 includes the necessary provision to comply with EU law (such instructions are forbidden), but there is no related case law.

Belgian law preceded EU law in equating sexual harassment with sex discrimination, but more recently Directive 2002/73/EC introduced a distinction between **sexual harassment and gender-related harassment**. The present Act of 10 May 2007 complies with the distinction. However, Belgium possesses, within the Well-Being at Work Act of 4 August 1996 (i.e. the legislation aimed at protecting health and safety at work), a complete set of provisions devised for the prevention of and redress for harassment and sexual harassment regardless of the perpetrator’s motives. Regrettably, the Act of 10 May 2007 provides that when the victim of harassment/sexual harassment is an employee, she/he must rely exclusively on the Act of 4 August 1996 to obtain protection or redress. Preventing the victim of a gender discrimination which consists of harassment/sexual harassment from relying on the Gender Act appears completely at variance with EU law, all the more so as the Act of 2007 provides a minimum amount of fixed damages as compensation for moral prejudice while the Act of 1996 does not.

2. Access to work, working conditions

It should be made clear that given the federal structure of Belgium, vocational orientation and training fall within the exclusive jurisdiction of the federate authorities, which is also true for various other matters such as education (including school staff) or public housing (within the scope of Directive 2004/113/EC). This causes extreme confusion and some significant gaps still remain in the transposition of EC law, although in 2008 several federate authorities adopted new legislation, usually inspired by federal legislation. Certain (but not all) of those new *décrets/decreten* or *ordonnances/ordonnanties* refer to Directive 2006/54/EC. Curiously, the federal Gender Act of 10 May 2007 does not; a formal rather than a substantive omission.

With those serious qualifications, Belgian law fits the substantive and personal scopes of the directives, as (within the Federal Parliament’s jurisdiction) the Act of 10 May 2007 covers all types of employment relations, in the private and public sectors, and in all their aspects of recruitment, working conditions and dismissal. As to self-employed persons, the Act guarantees equal treatment not only in access to professions, but also in access to partnership in associations of practitioners.

The exceptions which the directives allow (positive action; protection of maternity; positions for which sex is a determining factor) are accepted by the Act of 10 May 2007 as ‘justifications of direct distinctions’ (see above at 1).

Moreover, the Act provides that the protection of maternity, far from being discrimination, is a condition for an effective equal treatment of men and women.

3. Pregnancy and maternity protection; parental leave

As to the protection of pregnancy and maternity, the Working Conditions Act of 16 March 1971 (which is applicable to all employers and employees, private and public, in the whole country) provides for a 15-week period of maternity leave, of which the last week preceding the delivery and the nine subsequent weeks are compulsory; extra weeks are available under certain circumstances. An employee who is pregnant or has given birth may only be dismissed on grounds which are unrelated to her physical condition. The right to return to the same job is not formally guaranteed, but the employer’s failure to reinstate the employee would be seen as being equivalent to her dismissal. During the maternity leave, tenured staff members in the public services remain entitled to their normal remuneration; the other employees (in the public and private sectors) receive social security benefits equal to 82 % of the gross remuneration (i.e. 100 % of the net remuneration) during the first 30 days and 75 % during the remainder of the leave.

Shortcomings of the protective system concern the lack of statutory provisions to guarantee that the absences related to maternity are taken into account for the entitlement to benefits such as a Christmas bonus; and the amount of the fixed damages to be paid by the employer in the case of an unlawful dismissal (six months’ pay) is hardly an effective deterrent.

As to the other leave regimes, there are provisions for parental leave (a personal right for any employee for a child under 12; 3 months full-time or 6 half-time; with a modest benefit paid by the social security; and protection against dismissal); for adoption leave (a personal right for any employee; 6 or 4 weeks when the child is less or more than 3 years old; with the normal remuneration for 5 days and then the same social security benefit as during maternity leave; and protection against dismissal); for paternity leave (a personal right; 10 days to be used during the 4 months following the birth; with the normal remuneration for 3 days and then the same social security benefit as during the maternity leave; and no protection against dismissal, which does not comply with Directive 2002/73/EC); and time off (a personal right; 10 days per year; unpaid and without benefit; and no protection against dismissal). Provisions for the last three forms of leave are more generous in the public sector.

4. Equal pay

Equal pay is guaranteed both by Collective Agreement No. 25 of the National Labour Council (only applicable to the private sector) and by the Act of 10 May 2007 (which includes the public sector, but with the restriction explained in 2 above). Taken together, both instruments cover all the aspects of the notion of pay within the scope of EU law, such as remuneration proper, be it in specie or in natura, tips, various bonuses, etc. and they include job classification schemes; however, the Act of 10 May 2007 does not mention work of the same value (obviously a mere omission).

The case law on equal pay is extremely scanty. In a couple of cases, the courts accepted that a difference in education was a justification for unequal pay, without checking whether such a criterion was relevant to the job in question.

Although all sectors of activity are encouraged by the Federal Government to develop gender-neutral job classification schemes and the social partners endeavoured to promote such developments when they updated Collective Agreement n°25 in 2008, the process is very slow and progress reports are not readily available.

5. Occupational pension schemes

The provisions of the Act of 10 May 2007 are a carbon copy of those of the amended Directive 86/378/EEC. Concurrently, the Occupational Pension Schemes (Employees) Act of 28 April 2003 complies with the Directive. In that way, Belgian law covers the substantive scope of EU law, prohibiting gender discrimination in all occupational schemes (which, in Belgium, may only supplement the statutory social security schemes).

However, as to personal scope originally the Act of 10 May 2007 did not deal with occupational schemes for the self-employed; that gap has been filled by an amendment to the Act, inserted by an Act of 8 June 2008.

Both Acts (of 2003 and 2007) make use of the faculty of exceptions offered by Article 6(1) i) and j) of the Directive, concerning a limited use of gender-related actuarial factors.

The validity of the same exceptions, both in the Directive and in national law, has been called into question by the ECJ's ruling in Case C-227/04 P. *Lindorfer v Council* [2007] ECR I-6767, but no attention has been paid to that development by the Belgian authorities.

6. Statutory schemes of social security

The Act of 10 May 2007 contains a prohibition on discrimination in statutory schemes of social security. The substantive and personal scope is wider than in Directive 79/7/EEC as family benefits and survivors' benefits are included as well as annual vacations and holiday bonuses (in Belgium, a statutory scheme for employees), and the retirement pension scheme for tenured staff members in the public services (which the ECJ's case law would regard as occupational).

Up to the Act of 2007, there was no such general provisions, but various statutes and regulations had been brought into line with the Directive, so that the implementation is adequate, although some limited gaps can still be identified (e.g. apprentices under 18 in small businesses are regarded as dependent children under the Healthcare and Sickness Insurance scheme; consequently, during maternity leave a female apprentice is not entitled to maternity benefits, which are paid by that Insurance, so that the leave is unpaid, an eventuality which cannot affect a male apprentice).

The main objects of debate are, firstly, the weakness of retirement benefits for employees and the self-employed, which are a function of the average earnings over the whole career; given the pay gap between active men and active women and the negative impact of interruptions in the career due to the unbalanced sharing of family responsibilities, the dimension of *de facto* indirect gender discrimination is obvious. And secondly, the desirability of substituting individual rights for dependents' rights, as the latter may be regarded as a consecration of women's subordinate position (i.e. relying on widows' pensions rather than personal retirement benefits).

Belgium made use of the exceptions concerning the age of retirement and the related duration of a full career until 1996; as from 1997 the differences have been reduced progressively and since January 1st 2009, the age is 65 and the full career 45

years for both sexes in the employees' and self-employed schemes (there has never been any difference in the public service scheme).

7. Self-employed and helping spouses

Aspects relevant to Directive 76/207/EEC as amended, Directive 86/378/EEC as amended and Directive 79/7/EEC have been mentioned in 2, 5 and 6.

A limited scheme of maternity leave has been introduced. Presently, its duration is eight weeks, of which five are optional and may be divided into single weeks; a benefit (EUR 368 per week) is paid by the maternity branch of the health-care sickness scheme.

Initially, access to the sickness (and maternity) scheme was made available for helping spouses on a voluntary basis. More recently, affiliation to the whole system of social security for the self-employed was made compulsory for helping spouses.

Obviously, the compulsory affiliation goes much further than the requirements of the Directive.

8. Goods and services

The Act of 10 May 2007 implements the Directive in a rather literal way, although its scope does not exclude education and the media. Some protection against victimisation is provided, as well as minimum fixed damages as a means of redress. There are provisions for positive action (see above at 1) and for goods and services destined to one sex (but the latter must be listed in a Royal Decree which has not yet been drafted).

As to the use of gender-related actuarial factors in insurance, the original Article 10 of the Act provided that it was only permitted until 20 December 2007. However, an Act of 21 December 2007 has amended Article 10 so that the exception remains in force (for life insurances only), with a number of safeguards aimed at complying with Articles 5(2) and 16(1) of the Directive. Whether in doing so Belgium has not reintroduced a particular form of discrimination, contrary to the ECJ's ruling in Case C-144/04 *W. Mangold v R. Helm* [2005] ECR I-9981, remains an object of dispute.

9. Enforcement and compliance

The provisions on **victimisation** (a prohibition on dismissal or a negative modification of the employment conditions, unless for reasons unrelated to the employee complaining of discrimination) are standard in labour law and are well understood by the courts. However, when the employer fails to reinstate the employee in the job or subject to the previous conditions, the standard amount of fixed damages (six months' pay) is no deterrent.

The provisions on the **burden of proof** are a copy of those in Directive 97/80/EC (the claimant must adduce *prima facie* evidence of discrimination, after which the defendant must demonstrate that there is no discrimination). There is a single decision in a case concerning an opaque pay scheme which the court resolved through a mere application of the ECJ's ruling in Case C-109/88 *Danfoss* [1989] ECR I-3199.

The Act of 10 May 2007 has improved previous provisions on **remedies and sanctions** in order to make the courts' power to issue injunctions to put an end to discriminations more effective; there is no case law as yet in that respect. The Act also introduced a long-awaited minimum amount of fixed damages (six months' pay) to be allowed as compensation for the moral damage due to discrimination (unless the victim can demonstrate that the damage is greater); again, such an amount is hardly a deterrent (see 3).

Access to the courts fits the requirements of the directives, which the Act of 10 May 2007 closely follows. Within the scope of the directives, any person claiming to be a victim of gender discrimination may bring an action at the Labour Courts. Moreover, if the source of discrimination is a decision of a public authority, the victim may apply to the *Conseil d'Etat/Raad van State* for its annulment.

There is a **gender equality body**, the Institute for Equality of Women and Men, entrusted with the missions required by the directives and in addition endowed with the power to commence proceedings.

Apart from C.A. No. 25 on Equal Pay (see at 4), recently updated by C.A. No. 25ter of 9 July 2008, one can hardly say that the **social partners** have been very active in the promotion of gender equality. Legislative provisions do not go beyond recognising their capacity to have standing in the courts (in order to assist their individual members or to defend their collective interests) and requiring that they be consulted before Royal Decrees implementing the Act of 10 May 2007 are promulgated.

Collective agreements are contracts between their signatories, but those provisions which improve the employees' individual rights are automatically extended to the whole workforce in question. C.A.s may be made generally binding by way of Royal Decrees, so that an employer who fails to comply at the same time commits a misdemeanour. C.A.s are not applicable in the public sector, which uses different systems of collective negotiation.

Again, C.A. No. 25 must be quoted, as well as some collective agreements which include provisions on positive action, but generally, no great improvements in gender equality have been achieved through such instruments.

10. Brief assessment

Belgium started building up its gender equality legislation in 1978. Over the years, quite an extensive case law has been developed but, apart from some pioneers, a genuine awareness among practitioners (judges, advocates, legal advisors with the trade unions and employers' associations) is quite a recent (and welcome) phenomenon. As to the legislation itself, the Act of 10 May 2007 is one element in an ambitious attempt to construct a comprehensive anti-discrimination system and implement European law at the same time. The above comments have expressed misgivings as to the excessive complexity of certain key concepts; case law will reveal whether they were ill-founded. It is also regrettable that, two years after the Gender Act of 10 May 2007 came into force, several ancillary Royal Decrees which are necessary for its proper application have not been adopted yet (e.g. concerning **positive action**, see 1). Finally, the implementation of EU law in federal Belgium remains crippled by the multiplicity of competent authorities.

BULGARIA

1. Implementation of central concepts

The central concepts of the EU gender equality *acquis* have been fully transposed in the Bulgarian legislation prior to the EU accession in 2007.

The definitions of **direct discrimination** and **indirect discrimination** correspond to the EU definitions. The prohibition on discrimination (as '(...) any limitation of the rights or any privileges') is declared in Article 6(2) of the Bulgarian Constitution. The Law on Protection from Discrimination (LPFD) contains the prohibition on

discrimination on a broad range of grounds, including on the ground of gender. It also contains the definitions of direct and indirect discrimination. Direct discrimination represents any less favourable treatment of a person than another person is, has been or would be treated under comparable circumstances. Indirect discrimination is to place a person in a less favourable position in comparison with other persons by means of an apparently neutral provision, criterion or practice, unless the said provision, criterion or practice can be objectively justified in view of a lawful aim and the means for achieving this aim are appropriate and necessary. The Labour Code ensures special protection against direct and indirect discrimination, including that based on sex, in the exercise of labour rights and obligations.

The case law of the Commission for Protection from Discrimination and of the courts has so far mainly dealt with the notion of direct discrimination.

The possibility to apply **positive action measures** for achieving gender equality is provided for in the Law on Protection from Discrimination. Such measures are allowed along with measures in favour of disadvantaged groups in general. Thus positive action measures in favour of the under-represented sex may be taken in education and training for ensuring a balance in the participation of men and women, and as special measures for individuals or groups of persons in a disadvantaged position. In the sphere of employment relations, positive action can be taken for encouraging persons belonging to the less represented sex to apply for a certain job or position and for encouraging the vocational development and participation of workers and employees belonging to the less represented sex.

The positive action measures which are allowed in the process of hiring for positions in state and local government administration are in compliance with the EU standards. It is a pity, though, that in 2006 the possibility for applying a quota system for the participation of women and men in managing and advisory bodies was abolished. This amendment, made with the justification 'to achieve compliance with EU law', in practice deprived Bulgaria of a much needed tool for achieving gender equality, which is allowed by the EU's case law.

In conclusion, the Bulgarian legislation on positive action goes beyond the employment sphere and thus beyond the EU standards. In the employment sphere, the regulation of positive action measures for the under-represented sex is an obligation of the employer.

The case law of the Commission for Protection from Discrimination and of the courts has so far focused on gender quotas in the education system. The Commission ruled in favour of such quotas in languages and teaching university subjects in order to avoid further sex segregation in the labour market (the decision was confirmed by the Supreme Administrative Court). The case law of the civil courts is rather contradictory.

The Bulgarian notion of **harassment and sexual harassment** corresponds to the EU standards. Harassment and sexual harassment are explicitly forbidden and defined by the Law on Protection from Discrimination. Moreover, the Bulgarian law goes beyond the regulation of harassment at the workplace and also extends the protection to harassment in educational institutions. The case law consists mainly of court cases initiated by women concerning sexual harassment and there is a tendency that the number of such cases is increasing.

As to the **instruction to discriminate**, it is explicitly recognised as discrimination and means direct and intentional encouragement, giving an instruction, exerting pressure or persuading someone to engage in discrimination where the instigator is capable of influencing the person instigated.

2. Access to work, working conditions

The protection given by the Bulgarian legislation in the field of access to work and working conditions is almost in full compliance with the EU Equal treatment directives. The main guarantees are given by the Law on Protection from Discrimination, supplemented by the guarantees of the Labour Code (for the labour contracts) and by the respective provisions of the Law on Civil Servants.

The protection provided by the law covers all aspects of working life and is extended to all types of employment relations, including those in the armed forces, with the exception of activities and posts where sex constitutes a determinant factor. The protection also covers civil service relationships. In addition, the Bulgarian law also contains protection against discrimination in unemployment.

As an **exception**, different treatment is allowed by reason of the nature of a particular occupation or activity, or of the conditions under which it is performed, gender characteristics constitute an essential and decisive occupational requirement, the aim is legitimate and the requirement does not go beyond what is necessary for its achievement. Two ordinances by the Minister of Labour and Social Policy and by the Minister of Defence determine lists of activities where sex represents such a requirement. More concrete exceptions are provided in cases of occupational activities and religious education or training at religious institutions or organisations.

The detailed regulation of the exceptions goes beyond the EU law and presents a risk of non-compliance with the requirements for legitimacy and proportionality – namely, the exceptions based on religious considerations cannot be *a priori* justified. Those specified by the Minister of Defence are related to health and safety at work and to overprotection in the field of pregnancy and maternity. Therefore these exceptions fall outside the scope and substance of the EU standards and can be detrimental to gender equality.

The case law in the field of equal treatment is scarce and consists of cases before the Commission for Protection from Discrimination.

3. Pregnancy and maternity protection; parental leave

Under Bulgarian law, the employer is obliged to adjust the working conditions for pregnant or breastfeeding women while retaining the same salary level. If such an adjustment is not possible, the employer shall grant leave to the woman in question. The period of maternity leave is currently 410 days, 45 of which are prior to giving birth and adoptive mothers can benefit from this right as well. This extended leave was introduced in January 2009 and the change was justified by demographic considerations, as Bulgaria is the country which is most severely affected by the demographic crisis in Europe. The effects of this measure can be seriously doubted, because a maternity leave period which is too long may harm gender equality in general and the possibilities of Bulgarian women in the labour market in particular. Despite this, the recent changes in the Labour Code and in the Law on Protection from Discrimination at least reveal a development in Bulgarian legislation, shifting from a focus on special protection of women as mothers towards reconciliation measures ensuring more equality both for women and men. In fact, after the child is 6 months old and with consent of the mother (or adoptive mother), the father (or adoptive father) is allowed to use the remaining leave, instead of the mother.

In all the other areas, maternity protection is ensured according to EU requirements. For example, the maternity benefits amount to 90 % of the salary and the protection of a pregnant woman from dismissal is almost absolute. Bulgarian women on maternity leave as well as fathers on paternity and childcare leave are

explicitly recognised as having the right to return to their job or to an equivalent post and to benefit from improvements in working conditions, salary increases included.

There are some gaps, however, such as the requirement for pregnant women to submit a medical certificate as a condition to benefit from the protection from dismissal.

After the end of the maternity leave period, and up to the second year of the child, the parents have a transferable right to childcare leave paid on the basis of the minimum social security benefits. This leave is mainly used by mothers and can also be used by the grandparents of the child. It corresponds to the Bulgarian tradition of grandmothers' support in child rearing. As to parental leave, this was introduced in August 2004 but it is not yet in full compliance with EU law. Both parents or adoptive parents of a child between 2 and 8 have a non-transferable right to an unpaid parental leave of up to six months. Therefore, the right to the non-transferable parental leave cannot be used before the child turns 2. Parents using parental leave are not guaranteed the right to return to their job or to an equivalent post.

Paternity leave was recently recognized under Bulgarian law. When the parents are married or live together, the father has the right to 15 days' paternity leave upon the birth of the child.

During maternity/childcare leave and the 15 days' paternity leave, the mother and the father are insured under the Code of Social Insurance if they were insured for the previous 12 months. The compensation is generally equivalent to 90 % of the average salary received in the previous 12 months. There is an absolute ban on dismissal of a worker or employee on maternity or childcare leave, except in cases where the enterprise has to close down.

4. Equal pay

The EU standards of equal pay are fully transposed in Bulgarian legislation. The principle of equal pay is regulated in the Labour Code and in the Law on Protection from Discrimination. The employer shall ensure equal remuneration for equal or equivalent work. It shall apply to all types of pay – remuneration, paid directly or indirectly, in cash or in kind. The notion of equal pay includes the assessment criteria in determining the labour remuneration and the assessment of the work performance. These criteria shall be equal for all employees and shall be determined by collective labour agreements or by internal administrative rules regarding salaries. There is a specific procedure for the assessment of civil servants.

In principle, no justifications for differences in pay for women and men are accepted. This is confirmed by the case law of the Commission for PFD (ex. *Devnya Cement* case – Decision of the CPF No. 29/4.07.2006, confirmed by Decision No. 10594/1.11.2007 of the Supreme Administrative Court).

The law provides for the possibility of more advantageous working conditions in relation to different working experience or seniority, when it is objectively justified for achieving a legitimate aim with the means deemed necessary. In this context, the existing legal provisions for additional payments for seniority were broadly debated and contested in 2006 but were finally maintained.

There is a big gap between the formal recognition of the equal pay principle and its implementation in practice.

5. Occupational pension schemes

From the beginning of 2000, the pension system in Bulgaria consists of three pillars. The model was based on the World Bank's advice and is different from the pillars in

the EU countries. The first pillar is the universal social security fund, a 'pay as you go' type, which is obligatory for persons in an employment relationship or self-employed. The second pillar is a mandatory and fully-funded pension fund with defined contributions which are allotted to individual accounts run by licensed pension insurance companies. The third pillar includes supplementary voluntary pension schemes.

In Bulgaria there are no second pillar pension schemes comparable to the type of occupational pension schemes recognised in EU law. The fact that we have a different pillar system is crucial and implies that it cannot be compared to EU standards.

6. Statutory schemes of social security

Statutory social security schemes in Bulgarian law are in compliance with EU standards.

Equality between insured persons, thus also gender equality, is among the guiding principles of the Bulgarian social security system.

According to Article 2 of the Bulgarian Social Security Code, public social insurance provides benefits, allowances and pensions for: (1) temporary disability; (2) temporarily reduced working capacity; (3) disablement; (4) maternity; (5) unemployment; (6) old age and (7) death. The law differentiates between the benefits of persons insured against all social insurance risks, those insured against employment injury and occupational diseases and persons insured against disablement by general sickness, old age and death (Article 11-13 SSC). The main reasons to exclude people from receiving benefits are unpaid social security contributions and participation in non-remunerated jobs. Since women prevail in such jobs, they are more often deprived of social security.

With respect to the exclusions, the main one is maintaining the difference in the pensionable age for men and women. By the date of the adoption of the SSC, this age was fixed at 60 years and 6 months for men and 55 years and 6 months for women. Since December 2000 this age is being increased by 6 months for both men and women from the beginning of each year until 63 years for men and 60 years for women is reached.

Instead of the system of universal family benefits, targeted family assistance schemes were introduced in Bulgaria. The latter are not based on equality principles but on purely economic criteria.

7. Self-employed and helping spouses

The harmonisation of Bulgarian legislation is not sufficiently satisfactory. Gender equality in self-employment and the status of helping spouses do not fall explicitly within the scope of anti-discrimination legislation. The general provisions of the LPFD and of the Social Security Code remain the only reference to equality in self-employment. Except for freelancers and artisans, there is no clear and explicit definition of self-employed persons as a specific group. The unclear status of helping spouses reflects on their social security status. Their right to social security is not guaranteed.

There is a guarantee for the rights of those categories of self-employed persons who are registered under the Social Security Code and under the Ordinance on the Social Insurance of Self-Insured Persons and Bulgarian citizens working abroad. For them, mandatory social security schemes do exist. Self-employed women are entitled to compensation for pregnancy and maternity under these schemes. Voluntary social security pension schemes were introduced with the Social Security Code and they are

open to all persons in a position to pay the contributions. The insurance gives the right to an individual pension for age or disability, a survivor's pension, etc.

According to the Law on Family Assistance for Children, both categories of women – self-employed and helping spouses – are eligible for the allowances for pregnancy and giving birth, and for the targeted child allowances.

8. Goods and services

Equality in the access to and provision of goods and services is guaranteed by the Law on Protection from Discrimination. The private insurance schemes which represent the third pillar of the social security system also fall under the scope of the services directive and are in compliance with its equality principles. No explicit or implicit protection is provided for transsexual people.

Since the end of 2007, the LPFD allows differential treatment in the provision of goods and services in accordance with EU law – when the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Maintaining proportionate differences in individuals' premiums and benefits is allowed where the use of sex is a determining factor in the assessment of risk and is based on relevant and accurate actuarial and statistical data.

Media and advertising are not expressly excluded. Offensive, sexist and discriminatory advertisements of alcohol are widespread, and this was reason for a group of thirteen women to bring an important case against one such advertisement before the Commission for Protection from Discrimination. The case has been pending since September 2008.

9. Enforcement and compliance

The enforcement mechanisms are new for Bulgarian law and are not yet sufficiently effective. Nevertheless, for a New Member State, Bulgaria has achieved a good level of harmonisation with the formal EU requirements. Persons whose rights are violated have **access to the courts** (with the application of the Civil Procedural Code, CPC) or to the Commission for Protection from Discrimination (with the application of the special procedure under the LPFD, the Administrative Procedural Code and the CPC). In the procedure for protection against discrimination persons who consider themselves to be **victims of discrimination** have to establish facts from which it may be presumed that there has been discrimination. Then the **burden of proof** falls upon the respondent and he/she has to prove that there has been no breach of the principle of equal treatment.

Persons who have or are supposed to have instigated an action against discrimination, or those who intend to instigate such an action, are explicitly protected against discrimination.

The Commission for Protection from Discrimination was created in 2005 as an independent jurisdiction under the law, and its mandate covers all types of direct and indirect discrimination prohibited by law and by international instruments to which Bulgaria is a party. The Commission has broad competences, including initiating discrimination cases of its own volition and assisting the victims of discrimination in bringing a claim. The administrative procedure before the Commission is very flexible and easy to follow by the petitioners. Upon the identification of a discriminatory act, the Commission has the power to impose fines. The latter are higher in cases of repeated acts of discrimination. The decisions of the Commission can be appealed before the Supreme Administrative Court.

Discrimination cases can be brought before the Commission or before the courts but compensation can only be ordered by the civil courts. The procedure for awarding compensation is based on tort law provisions and principles. The general level of compensation, as well as compensation awarded for discrimination, is still very low in Bulgaria and is not proportionate to the damage suffered by the persons whose rights have been violated. The enforcement of sanctions is not effective and they do not have a dissuasive effect.

A positive element in the court procedure is the possibility for trade unions and civil society organisations to join or initiate a discrimination case on behalf of a person who has been discriminated against. When the rights of many individuals are violated, the organisations mentioned can initiate the discrimination procedure before the court.

Despite its broad mandate, the Commission for Protection from Discrimination does not have enough competences in order to respond to the EU requirements for **equality bodies** dealing with gender equality. Namely, the Commission is not a body which deals with the promotion, monitoring and analysis of equal treatment based on sex.

The **social partners** in Bulgaria do not yet play an important role for the enforcement of gender equality law. Collective agreements which are binding for the respective sectors do not generally have gender equality elements and do not promote gender equality.

10. Brief assessment

The implementation of gender equality standards in Bulgaria is satisfactory and this is mainly due to the adoption of a comprehensive anti-discrimination law and to the establishment of the Commission for Protection from Discrimination. However, parental leave provisions have to be made effective and the length of maternity leave should be more balanced to offer better possibilities for reconciliation. The protection of self-employed and helping spouses must be explicitly regulated. The effectiveness of sanctions and the level of compensation in cases of discrimination remain a serious issue and further developments in case law will be the driving force of improvement. In the case of the adoption of a special gender equality law, a special **equality body** will be established and the enforcement and overall protection will improve as well. Such a law is expected, which should also regulate the role of the **social partners** in the enforcement of gender equality.

The Bulgarian social security system is not compatible with the EU standards and this makes EU law on **occupational pension schemes** inapplicable in this field. Although it is not an issue of pure compliance, it is an issue to be dealt with at EU level.

CYPRUS

1. Implementation of central concepts

Equality between men and women is enshrined in Article 28(1) of the Constitution, which prohibits any direct or indirect discrimination against any person, *inter alia*, on grounds of sex (Article 28(2)). The Supreme Court has strictly interpreted the

constitutional principle of equality as meaning substantive equality³ and not allowing actual positive action.⁴ After an appropriate Amendment to the Constitution, positive actions are now allowed.

The main concepts of the EU gender equality *acquis* have gradually been embodied in Cypriot legislation. Law No. 205(I)/2002, which provides for the Equal Treatment of Men and Women in Employment and Vocational Training, has definitions of the concepts of **direct and indirect discrimination** on grounds of sex, of **positive actions**, of **harassment** and of **sexual harassment**, which are the same as in relevant directives. Furthermore, the Law considers as discrimination on grounds of sex any discrimination against women which is related to pregnancy, childbirth, breastfeeding, motherhood or illnesses caused by pregnancy or childbirth, but not including **positive actions**, whereas any **instruction to discriminate** against persons because of sex constitutes discrimination on grounds of sex. It also provides for positive actions. These are measures which, for the purpose of ensuring full and substantial equality between men and women in professional life, in posts or levels of occupational hierarchy or the sector of vocational training, especially for women, prevent or balance the disadvantages in the professional lives of such persons.

The following Amendment Laws were enacted and published in the Official Gazette of the Republic of 24 April 2009:

- a.) The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed (Amendment) Law No. 38(I)/2009 (basic Law No. 177(I)/2002).
- b.) The Equal Treatment for Men and Women as regards Access to Employment and Vocational Training (Amendment) Law No. 39(I)/2009 (basic Law No. 205(I)/2002).
- c.) The Equal Treatment for Men and Women in Occupational Social Insurance Schemes (Amendment) Law No. 40(I)/2009 (basic Law No. 133(I)/2002).

The above Laws transpose into national legislation the provisions of Recast Directive 2006/54/EC which relate to the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

2. Access to work, working conditions

Law No. 205(I)/2002 as amended (Law No. 39(I)/2009) has provisions which ensure the implementation of the principle of equal treatment between men and women without direct or indirect discrimination, specifically in the field of access to employment, terms and conditions of employment, dismissal and vocational training. It also provides that measures to counter sex discrimination will be part of collective agreements or any other agreements between employers and workers and can take the form of equal opportunities and equal treatment measures in private enterprises or in the public sector. In this context, any provision which is contrary to the principle of equal treatment which is included in collective or other agreements is null and void.

The Law covers all workers (men and women) who work under a contract of employment, either fixed-term or for an indefinite period, either full time or part time. It does not cover self-employed persons and has excluded from its scope of application those occupational activities where the sex of the worker constitutes a determining factor and specifies reasons for the exclusion of such activities. The Law

³ *Marina Christoforou v Republic*, 1985 3 CLR, pp. 8-68. *Pelagia Eglezaki v G. Attorney of Republic*, 1992, 1 SCJ p. 697, www.cylaw.com

⁴ *Micrommatis v The Republic*, 2R 5CC p.12. *Constantinou v The Republic*, Case No. 1063/99, www.cylaw.com

also lists occupations falling within this latter category, i.e. home care of old or disabled persons, prison guards, private security bodies, artistic performers.

3. Pregnancy and maternity protection; parental leave

According to the relevant laws, upon the presentation of a certificate from a doctor attesting to her pregnancy, the worker is entitled to maternity leave of 18 weeks, of which at least two weeks must be taken prior to confinement. In the case of adopting a child under five years of age the maternity leave is 16 weeks. She is also entitled to paid time off work for antenatal examinations and to a daily one-hour absence from work for a period of six months for breastfeeding and child care, without any loss of pay. Pregnant workers may under no circumstances be obliged to perform duties which may expose them to health-endangering conditions. Dismissal is not allowed during the period from the beginning of the pregnancy and up to three months after the end of maternity leave. Maternity leave may not affect employment rights such as rank and position, seniority or the right to promotion or to return to work. Employers must take measures to protect the safety and health of pregnant workers at work.

Any worker (a man and a woman) who has been working for the same employer for a continuous period of six months can take paid parental leave after the end of the maternity leave. This can be taken before the child's sixth birthday, or in the case of adoption, before six years have expired after the adoption while the child is still under 12 years of age. The minimum period of parental leave per year is one week and the maximum is four weeks. At the end of the parental leave, the worker is entitled to return to work in the same or similar post and all his/her rights are safeguarded. Also, the worker is entitled to seven days time off work per year without pay on grounds of force majeure for urgent family reasons or accidents.

Pregnant employees who have been dismissed either directly or indirectly because of pregnancy have the right to seek compensation including reinstatement, either through the District Court or through the Industrial Disputes Court.

Pregnancy and maternity protection measures help not only women and their baby in the field of health and employment protection, but are also conducive to the creation of healthy families. In Cyprus little use is made of parental leave and time off, which are unpaid. Paternity leave does not exist in Cyprus.

4. Equal pay

The Equal Pay between Men and Women for the Same Work or for Work of Equal Value Law No. 177(I)/2002 as amended (Law No. 38(I)/2009) requires employers to apply equal pay for men and women for the same work or work of equal value. It applies to all employees for all activities related to employment. The maximum rights enjoyed by one sex shall also apply to the other sex. Any collective agreement or individual contract of employment, which is contrary to the provision of the law, is repealed. The Law abolished all direct or indirect discrimination between men and women that appeared in collective agreements or individual contracts of employment. References to male-female positions in collective agreements and contracts have been abolished. Employers are obliged to protect all employees by taking all proper measures which promote the principle of equality between men and women and also promote social dialogue, provisions which are relevant to Article 141 TEC.

In the public and semi-public sectors equal pay is applied in all jobs at all levels. Unfortunately, most employers in the private sector do not have job classification or job description schemes, nor have they proceeded to an evaluation of every profession or post for the purpose of defining what is the same work or work of equal value. For

this reason, posts which are occupied mostly by women are placed on a lower salary scale.

5. Occupational pension schemes

In Cyprus there is a clear distinction between statutory pension schemes and occupational pension schemes. More precisely, the General Social Insurance Scheme (GSIS) and the Social Pension Scheme (SPS) (see below) are considered to be statutory, whereas occupational pension schemes for employees in the public service and the broader public sector, the voluntary provident fund schemes and other similar pension schemes fall under the category of occupational pension schemes.

Occupational pension schemes provide for benefits in case of old age, including early retirement, death, the interruption of employment due to maternity, sickness or invalidity, industrial accidents and occupational diseases.

Under all occupational pension schemes men and women enjoy equal treatment, as provided in the Equal Treatment for Men and Women in Occupational Social Insurance Schemes Law as amended (Law No. 40(I)/2009). There are no exceptions.

6. Statutory schemes of social security

The GSIS falls under Directive 79/7/EEC and covers all persons gainfully occupied in Cyprus, either as employed or self-employed persons.

The current system comprises the GSIS, the SPS, the Special Allowance for pensioners and the Public Assistance Scheme, which provides financial assistance and social services to persons whose means are not sufficient to meet their basic and special needs. The pensionable age is the same for men and women.

The GSIS provides for the following benefits: invalidity pension, old-age pension, widow's pension, sickness benefit, unemployment benefit, employment injury benefit, orphan's benefit, maternity grant, marriage grant, funeral grant, maternity allowance.

Positive discrimination in favour of women can be considered the provision of credits under the GSIS for periods off work for child care of up to three years for each child, as well as the Social Pension, which benefits almost entirely non-insured women, and the mother's allowance, which is paid to every woman who has raised four or more children. Also credits are provided for persons who interrupt their employment for parental leave.

The provision of SPS closes the gap in accessibility to pensions by providing non-means-tested pensions to those residents who, for any reason, have not participated in the labour market and as a consequence have no pension income either from the GSIS or from any other source. In other words, the SPS ensures universality in the provision of pensions.

The SPS is of importance for women, especially of the older generation and for women in non-remunerated family work in agriculture as well as for housewives.

There is discrimination between unmarried and married women in cases in which both are not insured and give birth to one or more children. An unmarried woman does not receive a maternity grant whereas a married woman is entitled to receive this due to her husband's participation in the GSIS.

As regards a survivor's benefit a widow's pension is payable only to a widow. A widower's pension is payable only if a widower is permanently incapable of self-support.

Reform of GSIS legislation is required. There is an ongoing dialogue with the social partners to reform legislation, remove inequalities and make the pension system sustainable.

7. Self-employed and helping spouses

In the Cypriot social security system every employed person, including the self-employed, is compulsorily insured under the GSIS. Marriage and maternity grants and a widow's pension are payable to women based on their husband's insurance. Helping spouses have no other rights except those deriving from their spouse's participation in the Social Insurance Scheme.

Self-employed persons enjoy all the benefits except unemployment and employment injury benefit. Under the GSIS voluntary insurance is available to persons who wish to continue to be insured after a certain prescribed period of compulsory insurance or to persons who work abroad in the service of Cypriot employers.

Helping spouses are considered to be self-employed persons and are compulsorily covered. Therefore he/she is liable to pay contributions. The GSIS does not recognize helping spouses as a separate category. There is equal treatment between self-employed men and women.

8. Goods and services

The Law on Equal Treatment between Men and Women as regards access to and the supply of goods and services has incorporated all the Articles of Directive 2004/113/EC.

The law applies to all persons who supply goods and services to the public, both in the public and private sector and are offered outside private and family life. Every person is free to choose with whom to enter into a contract, provided the selection of the other contractual party is not made on the basis of sex. The law does not apply in education, in the mass media and in advertisements, in employment and in vocational activities. Any discrimination on the grounds of sex in applying the scope of the law is forbidden, but the law allows for different treatment in providing goods or services to persons of one sex if there is a good justification for this. Also positive actions are allowed if they serve the purposes of the law.

9. Enforcement and compliance

Generally, in the Cypriot legal system, the **burden of proof** in civil cases is based on the balance of probabilities and in criminal cases the guilt of the defendant must be proved beyond reasonable doubt. In 1967, the Annual Holidays with Pay Law established the Industrial Disputes Court, which has jurisdiction to deal with labour disputes in the private sector.

In cases brought before the Industrial Disputes Court the burden of proof rests with the defendant (Directive 97/80/EC). So the employer has the burden of proof to establish that the dismissal or termination of services was justifiable. Every court decision is subject to an appeal to the Supreme Court within 42 days of the publication of Civil and Industrial Court judgments and 14 days for criminal judgments. The judgment of the Industrial Court can only be appealed on questions of law.

In criminal cases under Law No. 177(I)/2002 (Directive 75/117/EEC) and under Law No. 205(I)/2002 (Directives 76/2007/EEC and 2002/73/EC) the prosecuting authority has the burden of proof. There are no Supreme Court decisions up to now in cases falling within the provisions of these laws.

In criminal cases, the person who is guilty of an offence under Law No. 205(I)/2002, No. 177(I)/2002, and No. 18(I)/2008, is punished with fine of EUR 7 000 or six months imprisonment or both. These penalties are not considered

satisfactory. On the other hand, the application of the provision relating to the burden of proof has positive results in labour relations cases.

Types of **remedies**: The above laws provide for damages, either just and reasonable compensation or real damages, and for damages for moral harm to the plaintiff plus legal interest and reinstatement. **Access to the courts** is ensured for alleged victims of discrimination according to the Constitution and the above laws. The Trade Unions and Women's Organizations have the right to represent the victim before the Commissioner for Administration (Ombudsman). The Law on Equal Treatment as regards access to Employment and Vocational Training obliges employers to take necessary measures to put a stop to **harassment** and calls for dialogue for the promotion of equal treatment in the workplace and dialogue with NGOs.

The Commissioner for Administration has been given the authority to examine complaints of discrimination on the grounds of sex. Through her Decisions, Reports and Recommendations, she calls for the application of EU principles. Responsible bodies have to follow her recommendations. All decisions in cases of discrimination on the ground of sex have, up to now, come from her office.⁵

Law No. 205(I)/2002 established a **Gender Equality Body in Employment and Vocational Training**. This Body is responsible for various matters falling within the purpose and scope of the Law, such as hearing complaints or bringing complaints on its own initiative to the Chief Inspector, who will investigate them further. It also gives protection against revengeful acts against employees or vocational trainees for having testified in cases relating to complaints of a violation of the equal treatment provisions.

The **social partners** play an important role in the application of gender equality law through the Labour Advisory Body and collective agreements. Collective agreements are gentlemen's agreements and have no force of law for the time being. Collective agreements are used as a tool to promote gender equality, to comply with Community Law and to amend or eliminate any direct or indirect discrimination against one sex in existing provisions. Collective agreements are mainly drawn up as gender-neutral or gender-blind, with the exception of maternity provisions.

10. Brief assessment

Overall, the transposition of directives on the gender equality *acquis* into the national laws in Cyprus has been satisfactorily completed and they have started to have a positive effect on the lives of working people. Gender equality principles have also been embodied in collective labour agreements. The problem rests with the implementation of the legal provisions due to a lack of proper information for the social partners. Since 2004 (the year of Cyprus' accession) no case on matters of discrimination has been brought before the Supreme Court. On the other hand, the Commissioner for Administration has issued reports and recommendations on the issue of discrimination within the context of the above laws which are taken into serious consideration by the Government Departments responsible for the implementation of the laws in question.

On 16 February 2009, the Industrial Tribunal Court of Limassol issued a judgment on application No. 312/2005 between E. Diamantidou and M & M Investments Ltd for termination of services because of pregnancy and for unlawful dismissal on the ground of sex. The applicant requested compensation for unlawful

⁵ See www.ombudsman.gov.cy

dismissal because of pregnancy contrary to the Protection of Maternity Law⁶ and for unlawful discrimination contrary to the provision of the Equal Treatment for Men and Women in Employment and Occupational Training Law⁷. The Court, having heard the witness evidence, found that there was unlawful dismissal and granted compensation and damages in favour of the applicant. The compensation granted was almost ten times higher than the amount which would have been granted if the dismissal had not been based on grounds of pregnancy but on the Termination of Employment Law No. 24/1967, as amended. This case was the first which was brought before the Industrial Tribunal Court in Cyprus.

CZECH REPUBLIC

1. Implementation of central concepts

The main concepts of EU gender discrimination law have been implemented in several acts and laws. The concept of equality as such is defined in the Czech Charter of Fundamental Rights and Basic Freedoms, which is part of the Constitution.

Discrimination will probably be also forbidden through the Anti-discrimination Act which is not adopted yet, on equal treatment and legal instruments for protection against discrimination (hereinafter the Anti-discrimination Act) and through other acts, such as the Labour Code, the Employment Act, and so on.

The proposal for the Anti-discrimination Act regulates the right to equal treatment and the prohibition on discrimination in more detail. The Act also incorporates legal definitions of **direct and indirect discrimination, instructions to discriminate, and harassment and sexual harassment**. The Anti-discrimination Act follows the definitions within EC law and does not go further than EC law requires. **Positive action** is permitted in national legislation under certain conditions. Section 7(3) of the Anti-discrimination Act defines what is not discrimination. It states that '[M]easures targeted at preventing or reducing disadvantages resulting from being a member of a group of people who may be discriminated against on the ground of their race, ethnic origin, nation, sex, sexual orientation, age, handicap, religion, faith or world opinion shall not be considered as discrimination.'

2. Access to work, working conditions

Access to work, working conditions and so on are guaranteed by a number of laws and acts. First of all, it is the Anti-discrimination Act which regulates equal access to employment. The Act uses the right of EU Member States to provide that a difference in treatment which is based on a characteristic related to sex shall not constitute discrimination under specific conditions. Some general exceptions as stipulated in the directives are regulated in the Act on the service relationship of members of the security corps. The protection against discrimination applies to all natural persons who fall within the legal relations covered by the Act (the right to employment and access to employment, access to vocational training, entrepreneurship and other self-employment activity, labour relations and relations of civil servants and other dependent activities, and membership of and activity in trade unions, works councils and organisations of employers, professional chambers, etc).

⁶ Law No. 100(I)/1997, as amended by laws Nos. 45(I)/2000, 64(I)/2002, 109(I)/2007, 8(I)/2008, 43(I)/2008.

⁷ Law No. 205(I)/2002 as amended by laws Nos. 191(I)/2004, 40(I)/2006, 176(I)/2007.

Access to employment is also regulated in the Employment Act, which prohibits any form of direct or indirect discrimination against persons exercising their right to employment on the grounds of gender and other grounds. Until the Anti-discrimination Act enters into force, the Employment Act remains the most important and general source of law containing anti-discrimination measures.

The Labour Code sporadically regulates the prohibition on discrimination in labour relations. Employers are obliged to ensure equal treatment to all employees as regards their working conditions, remuneration for work and the provision of other monetary considerations and consideration of a monetary value, professional training, and the opportunity of being promoted or other advancement in employment.

3. Pregnancy and maternity protection; parental leave

Czech Labour Law pays particular attention to pregnant women and also guarantees mothers and fathers special protection for their labour relationship until their child reaches three years of age.

According to relevant provisions of the Labour Code, pregnant women are protected against having to carry out unsuitable work. If a pregnant woman's job involves tasks which, according to medical opinion, might endanger her pregnancy then her employer must temporarily transfer her to more suitable work for an equal wage. Similar rules apply to young mothers up to nine months after the birth and to breastfeeding women. Pregnant women who carry out night work may request to be transferred to day work and the employer may not refuse such a request.

According to Section 242 of the Labour Code, an employer must grant a female employee who is breastfeeding her child special breaks for breastfeeding. Breaks for breastfeeding are included in the working hours and a compensatory wage or salary equivalent to the amount of average earnings is paid for such breaks.

If a pregnant woman or a parent looking after a child aged under 15 years old or a person looking after a bedridden person requests that his/her working hours be reduced, or that some other suitable adjustment be made to the prescribed weekly working time, the employer is obliged to comply with his/her request, provided that he is not prevented from doing so for serious operational reasons.

As a direct result of the implementation of European law, Czech legislation now protects not only mothers, but also fathers. According to Section 196 of the Labour Code, the employer must grant a male or female employee parental leave if so requested. Parental leave shall be granted to the mother of the child at the end of her maternity leave (the general duration of maternity leave is 28 weeks; the period can be extended up to 37 weeks if the woman gives birth to two or more children at the same time) and to the father of the child from the day the child is born, for the amount of time applied for, until the child reaches the age of three. The parents of the child are entitled to take maternity and parental leave concurrently.

Pregnant women and parents looking after children under three years of age who are on parental leave are protected against dismissal. Czech law in this regard has gone beyond the provisions of EC law, as it guarantees a return to the same job not only after maternity leave, but also after parental leave, which may last until the child reaches three years of age.

4. Equal pay

In Czech law pay is defined as a wage, salary or remuneration, which is a monetary consideration and an in-kind consideration provided to an employee for work done. Section 110 of the Labour Code regulates the equal pay obligation. All employees are

entitled to receive equal pay for the same work or for work of an equal value. The same work or work of an equal value is taken to mean work of the same or comparable complexity, responsibility and strenuousness, which is performed in the same or comparable working conditions and which is of equal or comparable working efficiency and brings equal or comparable work results. The Labour Code assumed almost all the basic principles and elements of remuneration, including the principle of equal pay. However, the principle of equal pay for men and women is no longer explicitly mentioned.

The principle of equal pay has also been introduced in the Anti-discrimination Act (Sec. 5(3)).

5. Occupational pension schemes

The issue of occupational pension schemes was the subject of a long-lasting discussion between the Czech Republic and the EC Commission. The Czech representation has been arguing for several years that in the Czech Republic there is no occupational pension scheme and therefore it is not obliged to implement the relevant directives. In its judgment from December 2008, the ECJ⁸ declared that the Czech Republic had failed to adopt (all) the laws, regulations and administrative provisions necessary to comply relevant directives on equal treatment in occupational pension schemes.

The Antidiscrimination Act envisages guaranteeing equal treatment in occupational schemes (Section 8). All the exceptions allowed in the relevant directives have been implemented in the Anti-discrimination Act.

The wording of whole parts of directives has been entirely adopted and copied in Sections 8-10 of the Anti-discrimination Act. In this regard, implementation does not seem to be satisfactory as the directives have not been transposed in the real sense of the word, but have just been copied. This means that the concrete context of the Czech reality in this area has not been taken into account, which is erroneous. The obligation to implement this part of EC law shall be formally completed but without any real legislative consideration as regards concrete issues.

In the Czech Republic there are some further elements of the occupational schemes, for example there is the possibility for an employer to contribute to the individual pension scheme of his employees who are insured within a state-contributory supplementary pension scheme and at the same time there is a prohibition on discrimination within this scheme.

6. Statutory social security schemes

In the Czech Republic, within the sickness insurance scheme, a care benefit, sickness benefit, maternity benefit and compensation benefit for pregnant women and mothers are provided.

Disability and old age are covered by the pension scheme through an invalidity pension and an old age pension, and in certain circumstances old age is also covered through a widow's or widower's pension.

Accidents at work and occupational diseases are covered by labour legislation and obligatory accident insurance until 31 December 2009. As from 1 January 2010 the new Act No. 266/2006 Coll. on Employees' Accident Insurance should enter into force. Several benefits are envisaged in this law.

⁸ C-41/08 Commission v Czech Republic.

The conditions of the Czech social security systems are not normally linked to gender. According to the new legislation on sickness insurance (in force since 1 January 2009), the maternity benefit may also be paid to the child's father, if the mother and father agree so in writing and if the mother cares for the child for at least six weeks after it is born.

However, there is a problem with the pension system as it allows access to more generous benefits for women. The first benefit is connected with the pensionable age. Whereas there is one pensionable age for men, which is being gradually increased, there are differences in the pensionable age for women according to the number of children they have raised. This does not apply to men, even if a man has raised his children alone.

Regarding family benefits, there is no difference based on sex. Since 1995 there is a parent benefit, which can be claimed by one parent. In reality, however, in 98 % of cases this benefit is claimed by women.

As regards survivors' benefits, there are also equal conditions for claiming a widow's and a widower's pension. The only difference is in the age which must be reached in order to be able to claim a survivor's pension for an unlimited period.

7. Self-employed and helping spouses

As regards conditions for establishing and continuing self-employed activity, there do not seem to be any differences between men and women according to Czech law. There are no rights specifically defined for self-employed persons.

Self-employed persons merely have voluntary access to sickness insurance, but this is a totally gender-neutral rule.

Helping spouses are covered by social security schemes – by sickness insurance and pension insurance, if they have taxable income from self-employed activity. In such cases both schemes are mandatory for such helping spouses and they derive individual rights from these schemes.

8. Goods and services

The Anti-discrimination Act ensures the right to equal treatment regarding access to goods and services, including housing, if these are provided to the public. The Czech Republic makes use of the possible exceptions provided by the Directive in this field. The Czech Republic also allows for a differentiated calculation of premiums and benefits based on sex. As the Antidiscrimination Act has not been adopted yet, the Czech Republic is now facing another case before the ECJ. The Commission has asked the ECJ for a declaration that the Czech Republic has failed to implement Directive 2004/113/EC.⁹

There are specific laws regulating access to specific services, which also include an equal treatment rule when accessing these services (e.g. legislation on consumer protection, market inspection, access to information services, libraries etc.).

9. Enforcement and compliance

The Anti-discrimination Act defines as **legal instruments of protection against discrimination** the right of a person who has been affected by discriminatory behaviour (this shall mean not only the victim) to demand through the courts a distancing from such behaviour, the removal of the consequences of this infringement, and appropriate redress, including financial redress.

⁹ C-15/09 Commission v Czech Republic.

As regards procedure, the **burden of proof** has been transferred to the employer through Section 133a of the Act on Civil Procedure.

The Anti-discrimination Act widens the competencies of the Czech Ombudsman, who becomes the **equality body**. He may now act in the field of private legal relations, even though the office was established in order to protect people against the misbehaviour of public authorities. Moreover, the Ombudsman merely has information and consultancy competence and has no direct access to the courts. In this regard the implementation of the Act is not satisfactory because it does not fit within the context of Czech legislation.

The Anti-discrimination Act makes it possible for legal entities which have been established in order to protect victims of discrimination to provide information and help in the drafting of claims requesting protection against discrimination. Such entities are also competent to propose checks on or the monitoring of a public authority overseeing equal treatment legislation. These private legal entities do not have a direct right of **access to the courts**, however.

As regards **social partners**, they hardly play any real role in promoting gender equality in the Czech Republic. Not even **collective agreements** are very often used as a means to implement EU gender equality law.

10. Brief assessment

To sum up, the gender equality *acquis* has been implemented in the Czech Republic to a certain extent. There was a problem with the endless hesitation of the current political representation in the adoption process of the Antidiscrimination Act. There was a real danger, that the Act would not be adopted at all, as the Government was in demission at the time, and the whole Parliament was meant to be dissolved. If the Act had not been adopted by the current Parliament, the whole exercise of adopting the Antidiscrimination Act would have had to be started all over again, after the appointment of the new Parliament and Government. In that event, the legislator would have had to think more in-depth on how to implement the ‘spirit’ of the directives in order not to be reproached by the Commission for not implementing certain directives. Luckily, this did not happen, as the Antidiscrimination Act adopted in the end.

The hesitation in adopting the Act did, however, prove that in actual daily life, and within the specific Czech political situation, there is still quite a long way to go for the Czech Republic to go towards a society which fully enacts and applies the principle of equal treatment of men and women on a daily basis.

DENMARK

1. Implementation of central concepts

The definition of **direct discrimination** in the EU directives is repeated in the Danish implementing legislation with the same wording as used in the directives. The definition of **indirect discrimination** is also repeated but not with exactly the same wording as used in the Recast Directive.

Under the directives ‘indirect discrimination’ may be justified by a *legitimate* (in the Danish version of the directives *legitim*) aim, and the means of achieving that aim are appropriate and necessary.

There are two different definitions of ‘indirect discrimination’ in Danish equality legislation: one in the Equal Treatment Act and the Equal Pay Act, where it deviates

from the underlying directives by using the word *saglig* (sound and proper) instead of *legitim* (legitimate), and a different one in the Equality Act using the word *legitim* (legitimate) in accordance with the underlying directive. Under Danish labour law, working conditions will normally be considered *saglige* (sound and proper) if they result from collective bargaining and can be seen as an expression of what the labour market organisations on both sides regard as reasonable.

Under the Danish Gender Equality Act the responsible minister may, within his/her area of responsibility, permit measures for the promotion of gender equality aiming at preventing or compensating unequal treatment on the ground of gender. The Minister for Gender Equality is authorised to lay down rules specifying the cases in which measures to promote gender equality may be taken without authorisation. By statutory instrument¹⁰ the Minister for Gender Equality has issued rules on initiatives to promote gender equality.

Under the Equal Treatment Act the responsible minister may permit measures for the promotion of gender equality aiming at promoting equal opportunities for women and men, in particular by removing factual inequalities which affect access to employment, training, etc.

The provision on **instruction to discriminate** in the EU directives is repeated in the Danish implementing legislation.

The definitions of **harassment and sexual harassment** in the EU directives are repeated in the Danish implementing legislation with the same wording as used in the directives.

2. Access to work, working conditions

In 2005, the Equal Treatment Act was amended so that the scope of application of the principle of equal treatment was extended to membership of and involvement in trade unions and employers' organisations. Until recently, there was a problem on this point in Denmark where there was a Women Workers' Union. This problem has disappeared. After more than one hundred years the Women Workers' Union has ceased to exist as an independent trade union. On 1 January 2005 it merged with the predominantly male General Workers' Union into 3F, Denmark's biggest trade union.

Danish legislation has not been sufficiently adapted to the new shape of the exception relating to occupational activities for which characteristics related to sex constitute a genuine and determining occupational requirement. Under the Equal Treatment Act the responsible minister may, within his/her area of responsibility, exempt jobs where the sex of the worker is a genuine occupational qualification from the ban on discrimination. That is a broader exception than allowed under the Directive which only gives Member States the freedom to provide for exceptions from the ban on discrimination, as regards *access to employment* including the training leading thereto.

This problem is of some practical relevance in Denmark in respect of women priests in the Danish People's Church (*Folkekirken*). The Ministry of the Church has allowed recognized religious communities (including, for example, the Catholic Church or the Islamic community) to decide for themselves whether or not they will accept gender equality.

The majority of Danes are members of the Danish People's Church which is a Protestant Lutheran church where women priests are accepted in the sense that they have access to positions as priests but they do not enjoy full gender equality. Some

¹⁰ See statutory instrument No. 340 of 10 April 2007.

male priests (who think that women should not be allowed to become priests) refuse to work with them, to participate in church ceremonies together with them, etc. The exception for religious communities which dates back to 1978¹¹ is not – as the equivalent provision in the underlying Directive – limited to access to jobs.

Denmark has a strong historical tradition for not accepting protective measures for women. Until the implementation of the Pregnancy Directive in 1994 there was, for example, only voluntary and no mandatory maternity leave for women. When implementing the Pregnancy Directive Denmark adopted the minimum required by the Directive and nothing more. Protection for other reasons, i.e. not pregnancy or motherhood-related protection, does not exist in Danish law.

3. Pregnancy and maternity protection; parental leave

Statutory provisions on discrimination in relation to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave are mainly found in the Equal Treatment Act which contains a prohibition on discrimination on grounds related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave and the Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven*). In addition, the force majeure clause in the Parental Leave Directive (96/34/EC) is implemented in the Act on employees' right to leave for special family-related reasons which entered into force on 1 April 2006.

The Equal Treatment Act contains a ban on discrimination on grounds related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave. This includes a prohibition on dismissal on grounds related to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave. There is also a right to return to the same or an equivalent job.

Before the adoption of the Equal Treatment Act in 1978 which implemented the Equal Treatment Directive from 1976 it was lawful under Danish law and usual for employers to dismiss or otherwise treat women unfavourably on grounds of pregnancy. A major change in Danish law brought about by the adoption of the Equal Treatment Act was the improved protection of pregnant women. The Pregnancy Directive was implemented in 1994 by an amendment to the Equal Treatment Act.

Since 2006, the rules on maternity, paternity and parental leave and benefit have been placed in a special Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven*) covering these (and only these) issues. The parents are – between them – entitled to 52 weeks parental leave on full benefit. The 52 weeks parental leave are composed of maternity leave to commence 4 weeks before the expected date of confinement until 14 weeks after the birth of the child, followed by parental leave. Maternity leave can only be taken by the mother. In the maternity leave period the father is entitled to 2 weeks paternity leave. From 14 weeks after the birth of the child the parents are entitled to 32 weeks parental leave which they can share as they please. There are some possibilities of prolonging the parental leave period by accepting a reduced benefit and also some possibilities of postponing the leave period until later.

The Maternity, Paternity and Parental Leave and Benefit Act (*Barselloven*) only provides for benefit which for most workers is considerably lower than full pay. In practice most Danish workers/employees are covered by collective agreements providing for full or partial pay for the whole or part of the period of parental leave. As a result pregnancy, etc. may be costly for an employer. During recent years efforts

¹¹ See statutory instrument No. 350 of 10 July 1978.

have been made to make pregnancy, etc. cost-neutral for employers by imposing obligations on all employers to contribute to covering the costs of pregnancy, maternity, paternity and parental leave. In the spring of 2004, the Confederation of Danish Trade Unions (LO) and the Confederation of Danish Employers' Organisations (DA) concluded a collective agreement on reimbursement within a maximum of pregnancy, etc. payments by employers who are members of a DA organisation. This solution has since been generalised for the whole private sector of the labour market by legislation. The Act on reimbursement of pregnancy, etc. payments in the private sector (*Barselsudligningsloven*) requires all employers in the private sector who are not under a similar duty by collective agreement to pay contributions to a pregnancy fund.

Until recently the *force majeure* clause in the Parental Leave Directive was, in Denmark, only implemented in a number of collective agreements allowing parents to stay at home on the first day of a child's illness. An Act on employees' right to leave for special family-related reasons was adopted in 2006.

4. Equal pay

Equal pay between men and women is in Denmark governed by the Equal Pay Act which dates back to 1976 when it was adopted to implement the Equal Pay Directive from 1975. It has been amended several times, most recently in 2008 in connection with the implementation of the Recast Directive (2006/54/EC). It means that for the same work or work of equal value men and women must be paid the same. Originally, the Danish Equal Pay Act only provided for equal pay for the same work because that was the wording preferred in collective agreements. After the Commission brought an infringement case against Denmark the European Court of Justice found against Denmark. After that judgement the wording of the Danish Equal Pay Act was changed.

5. Occupational pension schemes

The principle of equal treatment for men and women in occupational pension schemes is in Denmark governed by the Act on equal treatment of men and women in occupational social security schemes.

In Denmark most occupational pension schemes are defined contribution schemes. One or two generations ago most pension schemes used actuarial calculations which were gender-related in such a way as to result in women receiving smaller monthly benefits than men for whom the same contributions had been paid. During the last 25 years or thereabouts the trend has been shifting. A number of new pension schemes were established in connection with the renewal of collective agreements in 1989 and 1993. Most of these schemes use actuarial calculations that result in women receiving the same monthly benefits as men for whom identical contributions have been paid. This is known as the unisex basis of actuarial calculations. A few older schemes, for example the one applying to lawyers, have also adopted the unisex calculation.

In 1998, a new Act providing for unisex pension schemes was adopted. The main provision of the Act prohibits provisions in pension schemes according to which men and women are treated differently on grounds of sex as regards the determination and calculation of contributions and benefits. Of special importance is that the Act prohibits both different contributions and different benefits, also in cases where the reason for different treatment is actuarial factors. However, the prohibition of sexual

differentiation on grounds of actuarial factors only applies to workers who joined the scheme after 1 July 1999.

6. Statutory schemes of social security

In connection with the implementation of Directive 79/7/EEC, Denmark revised its social security legislation to make it sex-neutral with effect from 1984. Before this, the qualifying age for the general statutory old-age pension (*folkepension*) was 67 for men and married women and 62 for unmarried women. This age was made sex-neutral and fixed at 67 for everyone. It was later lowered to 65. Married men whose spouses were between 64 and 67 were entitled to a wife benefit. This benefit was abolished. There was also a special Act concerning widow's pensions. This Act was repealed and widow's pensions were also abolished. Denmark therefore did not opt to make use of the possibilities for derogation provided by the Directive, but instead chose to make its social security legislation gender-neutral.

7. Self-employed and helping spouses

The Directive on self-employed and helping spouses is implemented in Denmark in the Equal Treatment Act which extends the prohibition against sex discrimination to anyone who makes decisions on access to or conditions of work as a self-employed person or helping spouse. That provision has, for example, been used in a Danish case on private practising doctors which was brought before the European Court of Justice (C-226/98) for the interpretation of the underlying Directive.

8. Goods and services

Denmark has had a Gender Equality Act since 2000. In 2007, Denmark partially implemented the Supply of Goods and Services Directive, i.e. except for Article 5 on gender equality and actuarial factors. The main content of the amendments was the following: clarification of the scope of application of the Gender Equality Act, a rewording of the definitions of discrimination in accordance with the underlying Directive and the insertion of a new provision on the invalidity of provisions in violation of the ban on sex discrimination in individual or collective agreements.

9. Enforcement and compliance

The provision on **victimisation** in the underlying directives is repeated in the Danish implementing legislation.

The provisions on the shared **burden of proof** in the underlying directives are repeated in the Danish gender equality legislation. In addition the Equal Treatment Act provides for a reversal of the burden of proof in the case of dismissal during pregnancy, maternity, paternity or parental leave.

Under the Equal Treatment Act the typical sanction for a breach of the duty not to discriminate on grounds of sex is compensation which may cover both economic and non-economic loss.

In equal pay cases the typical **remedy** is the payment of the difference in payment between the woman and the male comparator. Interest to compensate for the loss sustained can be awarded. The substantive right to equal pay or compensation for a breach of the ban on sex discrimination will usually be time-barred after 5 years. In principle violations of the Equal Treatment Act can also be sanctioned by a fine. In practice that only happens in case of sex-discriminatory job advertisements. There is no criminal sanction in the Equal Pay Act.

There are no special rules for equality cases on **access to the courts**. Alleged victims of discrimination will clearly have access. For interest groups their legal standing depends on how concrete an interest they have in the case. The requirement of establishing one or more **equality bodies** in the Recast Directive (2006/54/EC) and the similar requirements for gender equality bodies in the Equal Treatment Directive and the Supply of Goods and Services Directive have not been transposed into Danish law. According to Article 20 of the Recast Directive, Member States should designate a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the ground of sex. Member States are to ensure that the competences of these bodies include: (a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; and (c) publishing independent reports and making recommendations on any issue relating to such discrimination. Denmark has no gender equality bodies with all the competences outlined in the Directive, only a Gender Equality Complaints Board (*Ligestillingsnævnet*) with the competence required under (a) above. In connection with the implementation of the Equal Treatment Directive (2002/73/EC) a number of organisations, including the Danish Confederation of Trade Unions (LO), have criticised this point. The Government's response was that there are many institutions in Denmark to analyse gender equality, for example the universities. In the Government's view, there is no need for a special body with regard to gender equality apart from the Gender Equality Complaints Board, which only deals with individual complaints regarding alleged discrimination at the request of individual complainants and has no competence to conduct independent surveys concerning discrimination, to publish independent reports or to initiate cases at its own initiative.

Generally, the **social partners** play a predominant role on the Danish labour market. If a claim is based on a collective agreement the social partners are the only ones who can enforce it. In addition, most employment law cases brought before the ordinary courts are brought by a trade union on behalf of a member.

Most EU Member States have a system for extending **collective agreements** so as to make them binding on employers who are not parties to them, i.e. to make them generally applicable or give them *erga omnes* effect. That possibility does *not* exist in Denmark, where collective agreements can *not* be extended to cover employers who are not parties to them. There are thus no generally applicable collective agreements in Denmark. Collective agreements that – as other contracts bind the parties to them and no one else – are, however, a very important source of law in Denmark. Gender equality legislation is subsidiary to collective agreements providing for similar protection as prescribed by legislation.

10. Brief assessment

By and large the Danish implementation of the EU gender equality *acquis* is satisfactory but there are (small) gaps as indicated above, in particular there are no gender equality bodies in Denmark with the competences required in the gender equality directives.

ESTONIA

1. Implementation of central concepts

The Estonian Constitution provides that everyone is equal before the law; no one shall be discriminated against *inter alia* on the grounds of sex. Gender equality issues are mainly regulated by the Gender Equality Act (GEA) 2004. GEA applies to all 'areas of social life', with two exceptions: (1) professing and practising faith or working as a minister of religion in a registered religious association; and (2) relations in family or private life. Thus the scope of the GEA is wider than the scope of the EU directives, covering all areas of social life.

The GEA provides the definitions of the main concepts. It prohibits direct and indirect discrimination based on sex. **Direct discrimination** occurs where one person is treated less favourably on grounds of sex than another in a comparable situation. Less favourable treatment of a person in connection with pregnancy and childbirth, parenting, performance of family obligations and sexual harassment also constitute direct discrimination based on sex. **Indirect discrimination** occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a disadvantage compared with persons of the other sex, unless the difference in treatment is objectively justified by a legitimate aim, and the means are appropriate and necessary. The law allows the application of **special measures to promote gender equality** and to grant advantages for the under-represented gender. An instruction given to a person to discriminate against another person also constitutes discrimination.

The law also prohibits **sexual harassment**. Sexual harassment takes place where unwanted verbal, non-verbal or physical conduct, which has the purpose or effect of violating the dignity of a person or creates a disturbing or intimidating environment, occurs in a subordinate or dependent relationship. Under Estonian law the concept of sexual harassment also includes a subjective requirement that the person has to reject or tolerate such conduct for the reason that it affects his or her access to employment, or in order to maintain the employment relationship, to have access to training, or to receive remuneration or other benefits.

It appears that the definition of sexual harassment is stipulated more strictly in the Estonian legislation than in the EU directives, requiring that it has to take place in a relationship of subordination or dependency and the person has to reject such a conduct or tolerate it for a reason that it affects his or her access to certain benefits. Further, currently the concept of harassment on grounds of sex is not provided for under Estonian law. However, a draft Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act is currently pending in Parliament to bring the definition of sexual harassment fully into line with EU law. The draft Act would also introduce a new concept: 'harassment based on sex', which means unwanted conduct related to the sex of a person that occurs with the purpose or effect of violating the dignity of that person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

2. Access to work, working conditions

As pointed out above, according to the Gender Equality Act discrimination based on sex is prohibited in all areas of social life. This means that the law applies to employment in both the private and public sector, including the civil service. The prohibition of discrimination extends to both persons already in employment as well as those applying for a position.

In addition, the Labour Contract Act¹² (LCA) stipulates some provisions concerning prohibition of discrimination in the employment relationships in the private sector. According to Article 10 LCA discrimination against employees, including on the grounds of sex, marital or family status and family-related duties, is prohibited. Accordingly, employers may not discriminate against persons applying for employment or employees in remuneration, concerning promotion, giving instructions, termination of employment contracts, access to retraining or in-service training or otherwise in employment relations.

Additionally, since 1 January 2009 the Civil Service Act (CSA) includes an equal treatment clause. Accordingly, the State and local government agencies have to guarantee that persons are protected against discrimination and have to observe the principle of equal treatment according to the Gender Equality Act and Equal Treatment Act. The law also prohibits discrimination of civil servants or applicants for jobs in the civil service on the grounds of sex (Article 36¹ of the CSA).

The law lays down the duties of employers in terms of promoting equal treatment. These include ensuring that persons of both sexes are employed to fill vacant positions and that the number of men and women hired in different positions and promoted is as equal as possible; the creation of working conditions that are suitable for both women and men and support the combination of work and family life; ensuring that employees are protected from sexual harassment in the working environment; and regularly providing relevant information to employees and/or their representatives concerning equal treatment and measures taken to promote equality (Article 11(1) GEA). An employer also has to collect gender-based statistical data concerning employment, which would allow the relevant institutions to monitor and assess whether the principle of equal treatment is complied with in employment relationships.

By way of an exception, the following is not deemed to be discrimination: a difference in treatment which is based on a characteristic related to sex where, by reason of the nature of the particular occupational activities concerned, such characteristic constitutes a genuine and determining occupational requirement (Article 5(2)(4) GEA). The law does not lay down specific categories of persons to whom this exception would be applied, and thus this provision is yet to be tested in court practice.

3. Pregnancy and maternity protection; parental leave

According to the law, the less favourable treatment of a person in connection with pregnancy and childbirth, parenting and the performance of family obligations also constitutes a form of direct discrimination. However, granting advantages in connection with pregnancy, childbirth and care for minor children is not deemed to be unequal treatment. Further, an act by an employer shall be deemed to be discriminatory if the employer 'passes over a person' in employment relations due to pregnancy or childbirth.

A pregnant woman is entitled to request a temporary adjustment of working conditions or a temporary transfer to another job, in which any salary differences will be reimbursed under the conditions of the Health Insurance Act. If the Employment Inspector ascertains that an adjustment or transfer is not possible, the pregnant woman's work will be suspended and she will be paid sickness benefit under the

¹² On 1 July 2009 a new Labour Contracts Act will take effect. The new Act fully revises the regulation of labour contracts. By enforcement of the new Labour Contracts Act the Wages Act, the Working and Rest Time Act and Holidays Act are declared invalid.

Health Insurance Act. It is not permitted to post a pregnant woman to a location outside her normal place of work. The termination of a pregnant woman's employment contract is prohibited, except on a limited number of grounds, such as the liquidation or bankruptcy of the undertaking. In addition, an employer has to create suitable working and rest conditions for women who are pregnant or breastfeeding.

The duration of pregnancy and maternity leave is 140 days. The Sickness Fund covers 100 % of the woman's average pay from the previous calendar year during the pregnancy and maternity leave. Women who are pregnant or breastfeeding also have advantages in respect of planning time off for vacation.

Parental leave is available both for mothers or fathers until the child reaches the age of 3. The State pays the parent his or her average salary from the previous calendar year during 575 days after the granting of maternity benefit. In the first 70 days after childbirth, as a rule only mothers are entitled to the parental benefit. After the period of payment of the parental benefit, a childcare allowance to one parent at a flat rate is paid pursuant to the State Family Benefits Act.

Fathers have the right to be granted additional childcare leave of fourteen calendar days during the pregnancy leave or maternity leave of the mother or within two months after the birth of the child. In addition, parents may be granted a certain number of additional days off for childcare purposes, which are financed from the state budget. Further, any parent raising a child under 14 years of age has the right to additional unpaid childcare leave of up to 14 calendar days.

The employer is prohibited from terminating the employment contract of an employee who is on childcare leave, unless the termination results from the liquidation or bankruptcy of the undertaking (Article 91(1) LCA). Employment contracts with persons who take care of children under 3 years of age can only be terminated on limited grounds. Persons on maternity, parental or childcare leave also have advantages in terms of holiday planning.

The parental benefit paid by the State is an area where Estonia could serve as an example of good practice; it has proved conducive to women having children while reducing the disadvantageous effects of the childcare leave for the employers.

4. Equal pay

The rules on equal pay are stipulated in the Gender Equality Act, the Labour Contracts Act and the Wages Act¹³. 'Pay' is the remuneration that an employer pays to an employee for work performed in accordance with an employment contract, a legal instrument or in other cases prescribed by legislation, a collective agreement or employment contract. Pay is comprised of basic wages and additional remuneration, bonuses and additional payments paid in the cases prescribed by law (Article 2(1) of the Wages Act). Any increase or reduction of wages on the grounds of gender, marital status or family obligations is prohibited. In 2001, the Wages Act was complemented by Article 5¹, which harmonised the Act with Directive 75/117/EEC. Article 5¹ prohibits different wages for the same work, or work of equal value, for employees of different sex. Upon the request of an employee, the employer is obliged to prove that this principle has been adhered to, and that any preferences given have been based on objective circumstances unrelated to gender. Employees have the right to request explanations concerning the grounds for calculating the salary. They can request equal payment for the same work, or work of equal value, and a redress of damages caused

¹³ The Wages Act is effective until 1 July 2009. As of 1 July 2009, these issues are regulated under the new Labour Contracts Act.

by a breach of the principle of equal remuneration. GEA repeats the principles established in Article 5¹ of the Wages Act, as well as introducing some further provisions.

Despite these legislative provisions, in reality a considerable gender pay gap persists in Estonia.

5. Occupational pension schemes

Pensions are regulated in Estonia by the following acts: the State Pension Insurance Act, the Earned Years Pensions Act, the Favourable Conditions Pensions Act, the Funded Pensions Act, and acts which establish entitlements to special pensions in certain professions. By way of a general outline of the Estonian pensions system, a pension reform was carried out in 1999-2002, resulting in a three-pillar pension system, which is composed of mandatory state pension insurance, a mandatory funded pension and supplementary private pensions. Only the last pillar falls into the category of occupational schemes. Although the pension provisions are not discriminatory, the Ministry of Social Affairs pointed out in 2005 in the National Report on Strategies for Social Protection and Social Inclusion 2006-2008¹⁴ that one consequence of the pension reform is that pensions are now more closely connected with working and remuneration-related payments. This, given the gender pay gap and periods taken off by women in connection with raising children, appears to pose the risk that women receive a lower pension in comparison with men.

6. Statutory schemes of social security

As regards pensions, the first two pillars of the Estonian pension system fall within the scope of Directive 79/7/EEC. The legal criteria are equal in respect of men and women, except for the pensionable age in both the first and the second pillar where the qualifying age will be gradually equalised by 2016.

The various acts regulating social benefits, such as the Health Insurance Act and the Unemployment Insurance Act 2001, are gender-neutral; women and men are treated equally in the calculation and payment of benefits and contributions.¹⁵ Additionally, the scope of the Gender Equality Act 2004 includes 'all areas of social life' (Article 2); a footnote attached to the title of the Gender Equality Act mentions that the Act, *inter alia*, is meant to implement Directives 79/7/EEC, 86/378/EEC and 96/97/EC.

7. Self-employed and helping spouses

The provisions of the Gender Equality Act, which apply to 'all areas of social life', also apply to self-employed and helping spouses. However, the respective Directive has had a marginal impact in Estonia and has not led to any further, specific implementing steps.

8. Goods and services

As noted above, the GEA applies to all areas of social life, including the provision of goods and services. Additionally, some aspects are regulated by the Insurance

¹⁴ 2005 National Strategy Report on Adequate and Sustainable Pensions; Estonia, Report by the Ministry of Social Affairs of the Republic of Estonia, available at www.sm.ee, accessed 20 December 2007.

¹⁵ R. Leetma, L. Leppik, P. Liimal, 'Töötuskindlustus – teooriast ja praktikast' ('Unemployment insurance – about the theory and practice') *Praxis*, 2004, www.tootukassa.ee, p. 54, accessed 4 June 2008.

Activities Act (IAA), which took effect on 1 January 2008. Article 14¹(1) IAA stipulates that differences in the individual insurance premiums and benefits of men and women may not be caused by the use of sex as a factor in the assessment of insurance risks. Pregnancy and maternity may not have an effect on individual insurance premiums and benefits. If sex as a factor has a different impact on insurance risks within different age groups and the insurance undertaking takes into account the joint effect of the sex and age when assessing the insurance risk, then sex as a factor may be taken into account in some cases of life insurance, accident insurance and sickness insurance. In such a case the impact of the use of sex as a factor on the individual premiums and benefits of women and men has to be based on relevant and accurate actuarial and statistical data, with the difference in the individual premiums and benefits being proportionate to the weight of the impact of sex as a factor.

A further exception is envisaged in the draft Act amending the GEA, to cover situations where the goods or services are exclusively or primarily provided to members of one sex and the treatment is proportionate and justified by a legitimate aim. The draft Act further aims to amend the GEA by laying down a general right to claim compensation and termination of the harmful activity, and to extend the scope of application of the principle of shared burden of proof, so that these rights would also apply to discrimination in the provision of goods and services.

9. Enforcement and compliance

In relation to **victimisation**, the activities of an employer are deemed to be discriminatory if the employer downgrades the working conditions of an employee or terminates an employment relationship with him or her due to the fact that the employee has invoked the GEA. Protection against victimisation under the GEA only covers employment-related situations, without extending to the provision of goods and services.

The principle of a shared **burden of proof** is regulated by Article 4 GEA. According to this provision, a person addressing a court or a labour dispute committee has to set out the facts based on which it can be presumed that discrimination has occurred. The respondent then has to prove that there has been no breach of the principle of equal treatment. If the respondent refuses to provide evidence, such a refusal shall be deemed to be equal to acknowledgment of discrimination by the respondent. The shared burden of proof does not apply in administrative or criminal proceedings. However, the principle of shared burden of proof applies only to employment-related issues, but not to the supply of goods and services. A draft Act pending in Parliament aims to amend the GEA to bring the scope of the principle of the burden of proof into line with the directives.

Pursuant to the GEA, a party that has suffered discrimination may request **compensation** for damages and the termination of the harmful activity. The affected party may additionally demand a reasonable amount by way of compensation for non-patrimonial damage. When determining the amount of compensation, the courts shall take into account the scope, duration and nature of the discrimination. A claim for compensation for damages expires within one year as of the date when the injured party becomes aware or should have become aware of the damage caused. When the employment contract has been terminated illegally, the employee can request reinstatement to his or her position and the payment of his or her average wages for the time of absence from work. However, persons applying for employment or service with whom the employer refused to enter into an employment contract or a contract for the supply of services or who were not appointed or elected to office on the

grounds of sex cannot demand for the employment contract or contract for the supply of services, the appointment or election to office to become effective.

The GEA does not explicitly provide for compensation beyond employment-related discrimination, such as discrimination in the provision of goods and services. In such cases, the person could seek protection under the Constitution and the general law of obligations. The draft Act amending the GEA broadens the scope of the respective provision of the GEA.

Additionally there is a right to resort to the **Gender Equality and Equal Treatment Commissioner**, an independent expert acting under the GEA and Equal Treatment Act. The Commissioner can give an opinion on whether discrimination has occurred. In addition, discrimination cases may be brought to the Chancellor of Justice (an institution similar to an ombudsman), to a Labour Dispute Commission or to the courts.

In terms of the rights of associations, according to the Chancellor of Justice Act a person who has a legitimate interest in overseeing equal treatment may act as a representative in conciliation proceedings (Article 23(2)). In civil court proceedings, organisations can be involved as advisers in the proceedings (Article 228 Code of Civil Procedure). The role of trade unions and other **social partners** is marginal in Estonia and there are virtually no relevant provisions in **collective agreements**.

10. Brief assessment

The overall legal framework implementing the EU law on gender equality *acquis* is satisfactory, and Estonia stands out by virtue of some welcome innovations such as the parental benefit paid from the state budget. None the less, certain weaknesses can be identified in terms of the full transposition of the requirements of the directives. For example, the scope of the principle of a shared burden of proof is yet to be fully implemented in national law; at present this principle applies only to employment-related situations. In addition, the concept of sexual harassment is stipulated more narrowly than in the EU directives and harassment on the grounds of sex is not regulated under Estonian law at present. The transposition of Directive 2004/113/EC could also be more complete in some aspects. To this end, a draft Act to amend the GEA is pending in Parliament in order to bring the laws into conformity with EU requirements. Overall, the obligation to transpose EU gender equality directives and in particular the creation of the post of Gender Equality and Equal Treatment Commissioner have increased the awareness of the general public concerning discrimination issues.

FINLAND

1. Implementation of central concepts

The Act on Equality between Women and Men, enacted to satisfy the requirements of the UN Women's Rights Convention, has been amended on several occasions in order to implement EU law. **Direct discrimination** is defined in the Act as treating women and men differently on the basis of gender, or treating someone differently for reasons of pregnancy or childbirth. Pregnancy discrimination is explicitly defined as direct gender discrimination for reasons of clarity. **Indirect discrimination** is defined as treating women and men differently on the basis of gender by virtue of a provision, ground or practice that appears to be gender-neutral but where the effect of the action is such that the person may actually find her/himself in a less favourable position on

the basis of gender. ‘Less favourable position’ requires less proof than EU law, which requires proof of a ‘particular disadvantage’. Finnish law is strongly oriented towards **positive action**. In all public-nominated (but not elected) administrative bodies, a minimum of 40 % of men and women is required. Authorities and educational institutions and authorities have a positive duty to promote gender equality. The authorities must create administrative and operating practices that advance equality in decision-making. Employers are to promote equal recruitment and career advancement, equality of terms of employment, and facilitate the reconciliation of family and working life. Employers of at least 30 persons must prepare an annual equality plan, which must assess the equality situation of the workplace (jobs held by women and men, the pay for the jobs and pay differentials), and present a plan on how equality is to be achieved. Educational institutions must prepare an equality plan and pay attention to gender equality in student selections and performance assessment. However, the effect of the provisions on positive duties is lessened by their lack of sanctions. Both EU law and the Finnish Constitution are seen to set limits to what type of positive action is allowed. **Harassment** and sexual harassment constitute discrimination, but the terms are not defined. A Government Bill was presented to the Parliament in March 2009 to include a definition of harassment in the text of the Act on Equality. An employer who, upon being informed that an employee has been a victim of sexual or other gender-based harassment, neglects to take steps to eliminate harassment discriminates against the employee. Similar provisions apply to educational institutions (excluding those providing basic education) – here Finnish law goes further than EU law - and to labour market organisations.

2. Access to work, working conditions

The Act on Equality prohibits gender discrimination in access to private and public employment, although the wording of the provision narrows down ‘access’ to ‘employing a person’ or ‘selecting someone for a particular task or training’, thus leaving aside preparatory measures and recruitment policies. The exceptions to the prohibition include ‘weighty and acceptable grounds related to the nature of the job or the task’, which refer to genuine occupational requirements in EU law. The Act also excludes the religious practices of religious communities. In 1986, the same year that the Act was enacted, the Evangelical Lutheran Church of Finland opened its ministerial offices to women, however. A recent court decision¹⁶ confirms that equal treatment under the Act on Equality is to be followed in church offices. The religious practices of other religious communities remain outside the scope of the Act, however. The sanctions under the Act on Equality do not apply to the acts of Members of Parliament or the President of the State and thus any of the appointments they make. Military positions are open to women, but with military service being compulsory for men and optional for women, fewer women have the needed qualifications. Employers must not manage the work, distribute tasks or arrange working conditions in a discriminatory manner, or terminate an employment or lay off an employee on the basis of gender. The provisions obligate both private and public employers.

3. Pregnancy and maternity protection; parental leave

Treating someone differently for reasons of pregnancy or childbirth is defined as direct discrimination. Employing a person, selecting her for a task or training, or

¹⁶ Finnish Supreme Administrative Court decision KHO:2008:8.

deciding the duration of employment or pay or other terms of employment so that the person finds herself in a less favourable position on the basis of pregnancy or childbirth constitutes employment discrimination on the ground of gender. Treating someone differently on the basis of parenthood is defined as indirect gender discrimination. The provision also protects men with family responsibilities and is more favourable to victims of discrimination than EU law. Persons returning from family-related leave are entitled to return to former duties under the Employment Contract Act. If an employer terminates the job of a pregnant worker or a person on family-based leave, the termination is presumed to be on the ground of pregnancy or such leave. Family-related forms of leave are similar in both the private and public sectors. Employees are entitled to leave during maternity, paternity and parental leave periods, during which they receive benefits from the sickness insurance system. Maternity leave and benefit is for around four months, after which parental leave and benefit is available until around 11 months from the beginning of maternity leave. Parental leave is transferable between parents, and is mainly taken by mothers. Paternity benefit and corresponding leave during the maternity or parental benefit period is reserved for the father. A father who has taken paternity leave is entitled to a so-called 'father's month' which is not transferable to the mother. The Finnish parental leave system exceeds what is required by EU equality law.

4. Equal pay

Pay is not defined in the Act on Equality. Pay discrimination is a situation where an employer applies pay or other terms of employment so that the employee or employees are disadvantaged on the basis of sex compared with other employees performing the same work or work of equal value. Although work of equal value is expressly mentioned, it is difficult for an employee to prove that he or she is performing work of equal value. It is difficult to get information on other jobs, especially if the jobs to be compared are under different collective agreements. Comparing jobs under different collective agreements is a much disputed issue. Employers offer many types of justifications for gender pay differentials, such as education, personal performance, experience and personal qualifications. Personal performance is a valid justification only if substantiated by an assessment. The scarcity of labour is only considered a valid justification for differentials if the employer can prove that the scarcity exists.

5. Occupational pension schemes

The Finnish pension system differs considerably from the assumptions that underpin EU gender equality law. Occupational pensions in the EU sense have been replaced by statutory occupational schemes including entrepreneurs and agricultural entrepreneurs, and there is no prohibition which is specific to gender discrimination in occupational pension schemes as such schemes do not exist. It is confusing that state pension schemes for public servants fall within the scope of EU occupational pensions. By the EU criteria, Finnish municipal and state pension schemes should be considered as occupational, while other quite similar statutory occupational schemes are not. Gender-specific retirement ages existed for military personnel under the former Finnish state scheme, which the EC Court found in Case C-351/00: Pirkko Niemi, but by now the public as well as private schemes are gender-neutral and non-discriminatory. Individual pension schemes are now sometimes offered as a part of an employment contract, but they are treated as private pensions, and their conditions fall under the protection of goods and services.

6. Statutory schemes of social security

Employed persons in the public and private sectors, self-employed persons, entrepreneurs and agricultural entrepreneurs are covered by statutory insurance schemes against old age, invalidity and sickness including short-term incapacity to work. As stated above, these statutory schemes are in fact a hybrid between occupational and statutory social insurance. The social insurance system is in practice very uniform, although different types of occupation are regulated under different pieces of legislation. The schemes are paid by the insured person and his or her employer on a statutory basis, and protect persons in gainful occupations. After the recent reforms, the time spent on family-based leave is a pension credit. The statutory schemes are gender-neutral as to the obligation to contribute, the contributions, and the benefits including survivors' benefits; the military pension scheme that was at stake in Niemi was exceptional and was considered void even before the scheme in question was amended in 2005. The universal, residence-based national pension scheme guarantees a minimum income to those who do not receive such income from occupational schemes. The national pension is coordinated with occupational statutory pensions so that occupational pension benefits reduce the amount paid from the national pension scheme. The national pension remains important especially for elderly women without a working history. The general prohibitions on discrimination on the basis of gender in the Constitution and Act on Equality cover social insurance.

7. Self-employed and helping spouses

The term 'helping spouse' no longer exists under Finnish law. Persons who have an income from occupational activity without being employees are considered as entrepreneurs. An entrepreneur shall insure him/herself under the entrepreneurs' or agricultural entrepreneurs' pension schemes. In a family enterprise, family members can be owners, entrepreneurs or employees, but an entrepreneur cannot reduce pay and social security costs paid to a spouse from the occupational income. There are no legal obstacles to spouses establishing an enterprise together, or both spouses being defined as entrepreneurs. Social benefits, such as maternity benefit, are paid from the insurance scheme. The contributions are based on an annual income estimation, corresponding to what would be paid to an outsider for the job in question. Persons defined as entrepreneurs in a family enterprise have sometimes found it difficult to convince the authorities that they are in fact unemployed and no longer gainfully occupied in the family enterprise. Farmers are considered entrepreneurs with a specific social security scheme. The income from family farms must be divided between the spouses. Unless the spouses propose otherwise, the income shall be halved. A minimum of one third is not transferable between them. Maternity, paternity and parental leave benefits are paid to all parents, gainfully occupied or not, but the level of the benefit varies on the basis of occupational income. For agricultural entrepreneurs, temporary replacements are provided for parents on family-related leave, but there is no organized stand-in service for other entrepreneurs. The family-related benefits for entrepreneurs and the temporary replacement system in agriculture exceed the requirements of EU gender equality law.

8. Goods and services

An amendment of the Act on Equality that came into force at the beginning of 2009 provides that it is to be considered as discrimination if a supplier of goods and services puts a person into a disadvantageous position or that s/he is the target of adverse consequences after s/he has claimed her rights or become involved in a

procedure concerning gender discrimination. Although such discrimination was also prohibited before under the general prohibition of gender discrimination, the amendment compensation was not available for persons denied access to goods and services on the grounds of sex.

The insurance legislation permits the use of sex as an actuarial factor in the calculation of private insurance premiums and benefits, if the use is justified by statistical evidence. The risk calculation using sex as an actuarial factor must be delivered to the Insurance Supervisory Authority for supervision; the Authority publishes an abstract of the calculation, but not the information on which it is based. The risk assessment must be reviewed within five years.

9. Enforcement and compliance

A person who has availed him/herself of the remedies or been partly involved in settling a discrimination matter is protected against **victimization** by the Act on Equality. The **burden of proof** in discrimination cases is divided between the alleged victim and the defendant so that if the victim shows facts on the basis of which discrimination can be presumed; it is for the defendant to show that there has been no violation. Under penal law, the burden of proof in discrimination cases lies with the prosecutor or the victim. Various **remedies** are available for victims of discrimination. **Compensation** claims under the Act on Equality are brought to the ordinary courts, and compensation is determined in each case depending on the nature of the violation. Compensation can be reduced or waived due to the offender's financial situation or other circumstances of the case. Compensation under the Tort Liability Act and the Employment Contracts Act can also be paid to the victim of discrimination, but then the rules on the burden of proof are different. Tort liability requires that the defendant has acted intentionally, which is not required in discrimination cases under the Act on Equality. Because the compensation can be reduced or waived, it is doubtful whether the EU law standard is fully met. At present, the maximum compensation in cases concerning access to employment is capped at EUR 16 210 for all candidates that have been discriminated against; no maximum is set for other situations where discrimination takes place. The Government presented a Bill to amend the Act on Equality in March 2009. The amendment aims at removing the maximum in relation to the candidate with the greatest merits, who would normally have been appointed, if discrimination had not taken place. Judicial remedies also exist under administrative law, when the decision made by an administrative body is claimed to be discriminatory and thus void. Administrative law can in these cases offer a stronger remedy than compensation, as the victim can be reinstated in office or be nominated to a position that was wrongfully denied to him or her. The Equality Ombudsman has the competence to assist a party in a case involving compensation when the case is of general interest. In practice this does not happen. The Labour Court decides all cases involving collective agreements, but the victims of discrimination have no direct access to the Labour Court, as only social partners can initiate cases there. Labour market organizations often assist their members in discrimination cases, but have no official position when doing so; neither have other stakeholders such as women's associations. The remedy system is complicated. There is no access to mediation or another less burdensome procedure than the ordinary courts. The Ombudsman for Equality and the Equality Board are the bodies that supervise the implementation of the Act on Equality. The Ombudsman mainly has consultative and supervisory competence. The Equality Board, whose members represent working life and equality

expertise, is nominated by the Government. The Board can prohibit the continuation of a discriminatory practice.

10. Brief assessment

EU gender equality law is for the most part implemented correctly in Finland. Because Finnish gender equality law precedes the country's membership of the EU, and because the social security system differs from the general European model, there are problems in assessing implementation. The remedy system under Finnish law could be less complicated and allow more room for associations and other stakeholders. The compensation system is not completely satisfactory from the European point of view, but the Bill now before Parliament is at least expected to remove the limited compensation in cases of access to employment. There is a longer tradition of gender-neutral legislation in Finland than in most European states, and provisions on positive action and the reconciliation of family and working life exceed what is required by EU gender equality law.

FRANCE

1. Implementation of central concepts

Until May 2008, the main concepts of EU gender discrimination law have not been properly implemented in France, as French legislation has included no legal definition of the concepts of direct and indirect discrimination, even if judges have applied the European definitions in gender case law. The concept of harassment has also not been defined in relation to discrimination. The Act adopted on 15 May 2008 defines these concepts, mostly in accordance with the European definition. The Act applies to public and private relationships. According to this Act, there is direct discrimination where one person is treated less favourably on grounds of sex than another is, has been or will be. There is here an important difference with the definition given by the Directive as the conditional tense has not been used to define discrimination. As a consequence, the French definition does not seem to allow comparing the situation of a worker with the situation of a hypothetical one. However, judges may interpret the French definition in compliance with the European one, but it is too early to know what will be the judges' interpretation. The definition of **indirect discrimination** is now the same as the European one. French judges seem to be reluctant to use the concept of indirect discrimination¹⁷ but in some recent decisions, the *Cour de Cassation* has referred explicitly to indirect discrimination.¹⁸

Concerning **positive action**, the Labour Code recognizes the possibility to carry out positive action through temporary measures laid down by decree or by collective agreements at sectoral levels and some collective agreements organize some positive action. The Constitutional Council in 2003¹⁹ has recognized the constitutionality of legal positive actions but they cannot take the form of quotas.²⁰ The reform of the Constitution, adopted at the end of July 2008, includes an amendment which will facilitate positive actions. As provided by the Directive, discrimination also now includes the instruction to discriminate against persons on grounds of sex (or the other grounds). **Harassment and sexual harassment** have not been defined in relation to

¹⁷ See, for example, *Conseil d'Etat*, 29 December 2004, No. 265097.

¹⁸ Soc. 9 January 2007, No. 05-43962.

¹⁹ 14 August, decision No. 2003-483 DC.

²⁰ 16 March 2006, decision No. 2006-533.

discrimination. The new Act adds a new definition to these concepts as the European law required. However, the new Act has not repealed the existing definitions. This could create some problems of coordination as two different definitions of harassment could now concurrently apply.

2. Access to work, working conditions

French law needed some adaptations in the 1980s and 1990s. For example, it was only in 2001 that the prohibition of night work for women was abolished. Now, the implementation of the Directive seems satisfactory.

The protection of employees from sex discrimination covers every aspect of working life. As provided by the Directive, any provision contrary to the principle of equal treatment which is included in collective agreements or contracts of employment is null and void. Exceptions are very few. Article L.1142-2 states that the prohibition of discrimination does not apply when the sex of the worker constitutes a determining factor in employment and that the objective sought is proportionate and the exception is also proportionate. Before the 2008 Act, a decree defined the types of employment concerned: it only covers actors and models. With the 2008 Act, there now is some debate on the precise scope of the exceptions. Are they still strictly defined by the narrow list of this decree or is it now possible to allow other exceptions as well, when the sex of the worker constitutes a determining factor? In a recent decision²¹ the HALDE considers that only the exceptions defined in the decree should be allowed, but it recommends the Government to clarify the 2008 Act on this point.

The situation is more complicated in the public sector where the General Statute of Public Service includes equality rules implementing the Directive. However, some exceptions still exist. For example, it seems that the navy has not yet opened up posts on submarines to women. A few exceptions also exist in some specific police forces (e.g. the gendarmerie mobile).

3. Pregnancy and maternity protection; parental leave

The period of maternity leave is six weeks before the presumed date of confinement and ten weeks after confinement; the same provisions apply to civil servants. During her maternity leave, the worker is entitled to maternity benefits on condition that she has been registered under the social security system for at least ten months on the presumed date of confinement. The amount of the maternity benefit is calculated on the basis of the average salary received over the last three months. Many collective agreements nevertheless provide that the worker receives full pay during maternity leave. At the end of her maternity leave, the worker will be reinstated in her previous job or given similar work. A recent Act in 2006 has increased the rights related to maternity. Thus, the wages must be increased after the maternity leave in order to follow any general increases received by individual co-workers of the same category during the period of the employee's leave. In general, the worker is also entitled to all the advantages occurring during her leave that she would have been entitled to if she had not taken maternity leave. She is entitled to normal paid leave and to the normal rights to vocational training as if she had not been absent.

Dismissal is prohibited from the beginning of the pregnancy until four weeks after the end of the maternity leave, even if the employer was not notified of the pregnancy, except in the case of a serious fault by the worker or if the dismissal is objectively necessary for reasons not linked to pregnancy, confinement or adoption. The *Cour de*

²¹ Deliberation n°2009-21, 26 January 2009.

cassation has allowed a right of reinstatement when this rule is infringed²² but not during a probationary period.²³

According to the Labour Code and to civil servant statutes, any worker, irrespective of the size of the enterprise, has an individual right to parental leave in the case of the birth or adoption of a child, if the employee has been working in the enterprise for at least one year before the birth or adoption of the child. The period of parental leave is initially for one year, and can be renewed twice until the child is three years old. Parental leave can be granted on a full-time or part-time basis. During parental leave, the employment contract is suspended and after parental leave, the worker has the right to return to the same job or, if this is not possible, to an equivalent or similar job, where the same advantages apply as before. The parental leave is unpaid but employees could be eligible for specific allowances. However, as the level of allowances is low, the parental leave is mostly taken by low-qualified women and could lead to some women withdrawing from the labour market.

Since 2001, paternity leave has been recognized for all fathers who are employees and civil servants. Paternity leave is eleven consecutive days in the case of the birth of a single baby. Paternity leave is paid by the social security scheme up to a ceiling and thus could be dissuasive for executives. Some companies have adopted full pay for fathers in terms of a ‘parent-friendly’ measure.

In some respects, French provisions go further than European law, mostly because maternity leave and specifically parental leave are longer than the European minimum required. However, parental leave is mostly taken by women.

4. Equal pay

The Labour Code provides for equal pay for men and women ‘for the same job or a job of equal value’. The definition of the remuneration it gives is the same as Article 141 of the Treaty. The principle of equal pay also applies in the public sector. Much of the case law on equal pay raises the issue of the possible justification for unequal pay. Differentiation is thus possible on the basis of an objective reason like seniority, efficiency, the quality of work, or a difference in job classification. However, most of the time this litigation is not based on sex discrimination but on a difference between one worker and others placed in the same situation as a general principle of equal pay for equal work applies in France.

Some provisions go further than what EU law requires in involving the social partners. At a sectoral level and in enterprises where collective bargaining has to take place annually, collective bargaining must also concern remuneration. In order to ensure the effectiveness of mandatory bargaining, specific information must be provided on the situation of male and female workers including a comparison between both groups. More recently, the Act of 23 March 2006 has introduced new provisions profoundly modernizing the relevant rules. The new law is aimed at reducing the wage disparities between men and women. Indeed, it goes so far as to specify that the gap must disappear by 31 December 2010 and entrusts parties to collective bargaining to achieve that aim. However, no incentive or sanction is laid down.

²² 30 April 2003, Bull. No. 152.

²³ *Cour de cassation*, 21 December 2006, No. 05-44806.

5. Occupational pension schemes

Article L.913-1 of the Code of Social Security ensures the implementation of Directive 86/378/EEC and states that any clauses in agreements, decisions, and contracts which are in breach of the non-discrimination principle are null and void.

The *Griesmar* case (C-306/99) clearly highlights some of the French difficulties in implementing Directives 86/378/EEC and 96/97/EC and Article 141 TEC. In French occupational pensions, various family benefits used to exist which favoured women in particular in order to compensate for the time they spent in raising children. After the *Griesmar* case, many developments took place in the field of pensions. However, there are still some special pension schemes embodying similar discrimination between men and women. Cases are regularly brought before the judges and the *Cour de cassation* and the *Conseil d'Etat*, following the *Griesmar* case, have recognized the existing discrimination.²⁴ These special pension schemes are actually being renegotiated.

6. Statutory schemes of social security

Statutory social security schemes respect the principle of equality between men and women. The French legislator has chosen to implement the exception in Article 7(b) of Directive 79/7/EEC according to which Member States can exclude from the scope of their legislation the advantages in respect of old-age pension schemes granted to persons who have brought up children. Thus the law of 23 July 2003 on pension reform chose to retain the 2-year credit per child for women. The Constitutional Council²⁵ recognized the constitutionality of the measure 'on grounds of general interest' given the low level of women's pensions, noting in particular that 'they had interrupted their professional employment far more than men in order to ensure the education of their children'. Finally, it stipulates that such a provision is destined to disappear, even if there is no such indication in the Act. However, in a recent case,²⁶ the *Cour de Cassation*, applying Article 14 of the European Convention of Human Rights, held that such difference of treatment between men and women is contrary to the Convention; it can only be allowed if there is an objective and reasonable justification of this difference. Thus the man who brought the case, a father who raised 6 children, was entitled to the same pension benefit as a woman. The decision of the *Cour de Cassation* follows a deliberation of the HALDE, who took the same position²⁷ and asked the legislator to modify the Social Security Code. However, one may fear that amending the law will give the legislator the opportunity to weaken women's rights and to stop women from receiving a benefit necessary to maintain a minimum pension.

7. Self-employed and helping spouses

In French law, there are some binding provisions that protect women engaged in an activity in a self-employed capacity. The conditions under which a company is formed are the same for both married and unmarried couples. Since 2005, the spouse of a self-employed worker, participating in the spouse's activity, has to decide whether he/she wishes to work in the business as an employee, as a partner or as a co-working spouse (*conjoint collaborateur*). In this case, the spouse can apply for sickness benefit and

²⁴ See, for example, *Conseil d'Etat*, 7 June 2006 case No. 280 126 or *Cour de cassation*, 8 July 2004, case No. 03-30210, also see the HALDE's deliberations, No. 2006-39 and 2006-201.

²⁵ On 14 August 2003, decision 2003-483 DC.

²⁶ *Cour de cassation*, 19 February 2009, n°07-20668.

²⁷ Deliberation n°2008-237, 27 October 2008.

he/she must contribute to a pension scheme. She/he can also apply for a daily maternity benefit plus a benefit for temporary replacement. The spouse can also apply for a benefit for temporary replacement for paternity leave. The same rights apply to agricultural workers and in this case rights are also granted even if the couple are not legally married but have entered into a civil partnership (*pacs*). Contributory social security systems also exist for self-employed workers and grant personal rights to spouses. Clearly French law goes further than Directive 86/613/EEC even if these benefits are sometimes low. As a consequence, self-employed pregnant women will, very often, discontinue their activities for a short period.

8. Goods and services

Directive 2004/113/EC has been implemented without much debate by two Acts. The first Act of December 2007 reproduces Article 5 of the Directive (see the new Article 117-1 of the Code of Insurance). The 2008 Act also reproduces the scope of and most of the exceptions in Directive 2004/113/EC. It provides a general prohibition of direct or indirect discrimination based on sex in access to and the supply of goods and services. The Act also adopts the exception by using almost the same terms as the Directive. The principle of non-discrimination shall not preclude differences based on sex when the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. However the Act does not exclude, as the Directive does, the non-discrimination principle for the content of media or advertising. This exception was in the original proposal, but it has disappeared in the final text. For the Senate, it would have provided a legal basis for sexist advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools.

9. Enforcement and compliance

Different rights are also recognised to facilitate the bringing of claims of discriminatory actions and the referral of such cases to the Courts.

Concerning **victimisation**, the Labour Code states that no employee can be the subject of disciplinary action, be dismissed or be subject to a discriminatory act for having testified to having witnessed discrimination or having talked about this and the 2008 Act has extended the scope of this provision to the public sector.

The **burden of proof** has been amended, first by case law influenced by the European directives and by ECJ decisions,²⁸ and then by the Act of 16 November 2001 that implements Directive 97/80/EC and the EU Framework and Race Directives on equal treatment (Directives 2000/43/EC and 2000/78/EC). In a civil action, the burden of proof concerning a discriminatory act no longer lies solely with the employee but it now falls equally upon the employer. Employees or job applicants who feel that they have been discriminated against must present the court with evidence ‘that leads one to believe that direct or indirect discrimination has taken place’. In the light of this evidence, it is up to the defendant to ‘prove that the decision taken was justifiable according to objective facts that had no connection with any form of discrimination’. Here again, the 2008 Act has extended the scope of the rule on the burden of proof.

As to **remedies and sanctions**, in France the sanctions and remedies meet the European standards and they are proportionate and effective. Any discriminatory

²⁸ See *Cour de cassation*, 23 November 1999, Bull. V No. 447.

actions by employers are regarded as null and void as of right, and the employee retains all previously held rights. In the context of a dismissal, this means that any dismissal on discriminatory grounds could be annulled as of right and a worker dismissed on a discriminatory ground can claim her/his reinstatement and he/she is regarded as never having left the job. This is a specific sanction for discriminatory acts. In a case where the employee does not want to continue the employment relationship, he or she is eligible for a compensatory payment equal to at least the previous six months' wages as well as compensation granted for unlawful dismissal. In situations other than dismissal the sanction is compensation that should entirely compensate the damage. Penal sanctions are also possible even if they are rarely used. Under the Labour Code the employer risks a maximum of one year imprisonment and a fine of EUR 3 750. Under the Penal Code the employer additionally risks a maximum of three years' imprisonment and a fine of EUR 45 000 for certain more serious infringements.

Access to the courts is also safeguarded. The right to bring a court case concerning a discrimination claim has also been extended under certain conditions to representative trade unions and to associations which have been legally established for at least five years.

At the end of 2004, a new institution was created: the **High Authority against discrimination and for equality** (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité, HALDE*). The HALDE is an independent administrative body and it has already proved that it is going to play a very active role in the fight against discrimination. The HALDE's mandate covers all forms of direct and indirect discrimination prohibited by French legislation or in international agreements ratified by France. Victims of discrimination may directly present their case before HALDE. Without replacing the traditional channels for redressing discrimination within the legal system, HALDE can identify discriminatory practices. It can also help victims make a case against agents of discrimination and, thanks to special powers, carry out an investigation and demand explanations from defendants, by conducting hearings and collecting other evidence, including the gathering information on site. It can issue recommendations and publish them thus encouraging the defendant to follow them. HALDE may equally engage in mediation between the victims and the defendant.

Through the obligation to negotiate every year on equality and on the gender gap, the legislator intends to induce the **social partners** to play an active role in the implementation of gender equality law. The possibility which trade unions have to bring a court case on behalf of an employee also gives trade unions a role in the enforcement process. However, for a long time the social partners have not seemed very interested in equality issues but an evolution can be noticed. An important inter-professional national agreement was concluded on 1 March 2004 in order to promote professional equality between men and women. With the 2006 Act on equal pay, more **collective agreements** have been concluded and should be concluded in the following months dealing with gender equality.

10. Brief assessment

If the process of implementing the directives has been long, the overall implementation seems satisfactory. In some aspects, French law goes further than the European obligations, for example in providing for longer parental leave, for paternity leave, or by obliging the social partners to negotiate on the pay gap. However, even if formally the situation is satisfactory, for years there has been very little litigation on equality issues and, moreover, most of the litigation has concerned men claiming the

same rights as women (see, for example, the *Griesmar* case). Three elements reveal an evolution. Generally, the number of cases on discrimination brought before the courts is increasing. Lawyers, judges and the legal literature are becoming more familiar with the instruments of discrimination regulation and it will have consequences for sex discrimination. Even if sex represents only 6 % of the claims brought before the HALDE, the HALDE is going to play an active role in the fight against discrimination. Finally, the social partners now seem to be more interested in negotiating on sex discrimination.

GERMANY

1. Implementation of central concepts

Germany's main law implementing EU gender discrimination law is the *Allgemeines Gleichbehandlungsgesetz* (General Act on Equal Treatment, AGG). It defines the four concepts of **discrimination – direct, indirect, harassment and sexual harassment** – with the same wording as the European anti-discrimination directives. The law employs the term '*Benachteiligung*' (putting at a disadvantage) instead of '*Diskriminierung*', but does not mean to weaken the protection as compared to the European directives. The legislator only intended to emphasise that unjustified different treatment deserves the negative term of discrimination. The Federal Constitutional Court explicitly recognized the European concept of indirect gender discrimination as also applying under German constitutional law. The **instruction to discriminate** is also understood as being discrimination; it is not limited to instructions to discriminate against an employee.

Positive action is explicitly permitted if used to prevent or offset disadvantages based on gender. This applies to the area of employment as well as to the provision of goods and services. According to the Federal Constitution, public entities are even under a duty to further women's equality in fact. As a consequence, the federal level and the federal states have enacted laws to further equality between the sexes. They oblige public institutions to enact plans to increase women's representations on all levels of employment, and to hire or promote women instead of an equally qualified man, unless there are exceptional reasons to decide in favour of the male candidate. In contrast, there are no laws obliging private enterprises to promote women's equality.

2. Access to work, working conditions

Almost all subject areas of these directives are covered by the AGG. It applies to access to work, working conditions, and promotion, both in individual and collective agreements, as well as to vocational training and to membership of, involvement in, and the benefits of employers' and employees' organisations. The law is applicable to all employment relationships between private parties and for employees in the civil service who do not enjoy the special status of civil servants. In violation of the directives, dismissals are not covered by the AGG. Instead, they remain under the general laws on dismissal, which do not contain a prohibition of gender discrimination. Despite the clear text of the law, the Federal Labour Court interprets the AGG as covering dismissals. At present, it is unclear whether this interpretation will prevent indirect gender discrimination by dismissal. This danger exists because a typical criterion for choosing the employees to be dismissed in case of economic difficulties is the length of their employment by the employer in question, and women tend to have to work in less stable employment contracts.

Under the AGG, a differential treatment based on sex is permissible if the type of activity or its context require the employee to be a man (or woman). The requirement must pursue a legitimate aim and must be proportionate. Therefore, the argument that the employer's clients, for example, would not accept a woman as a company representative would not justify refusing to hire a woman. Thus, the German law reflects, even in its wording, the permissible exceptions under Directive 2002/73/EC.

For civil servants, special laws contain rules on gender equality and non-discrimination, and the AGG only applies insofar as there are any gaps.

3. Pregnancy and maternity protection; parental leave

Going beyond the European directives, the law on the protection of mothers grants pregnant employees a right to a fully paid leave six weeks before, and eight weeks after childbirth. During this time, they also remain entitled to the benefits of health security schemes, and their contributions to social security schemes continue to be paid. During their pregnancy, employees may not perform work that is dangerous to their own health or that of the unborn child. They also have a right to special protection, such as breaks or the possibility to sit down. Pregnant women may not be dismissed during their pregnancy and four months after childbirth. After the end of her maternity leave, an employee has the right to return to her former job.

Parental leave is available for parents for up to three years after birth or, in the case of an (intended) adoption, beginning with the child's entry into the household. Parental leave can be taken for one's own children, but also for the child of one's spouse or same-sex life partner, provided that the child lives in the couple's household. Parental leave may be taken by both parents concurrently; if the employer employs more than 15 employees, parental leave may be taken in the form of a reduction of working hours. During parental leave, employees cannot be dismissed. The law on parental leave does not grant a right to return to the same or a comparable job.

The law on parental leave goes beyond the European requirements by providing for a parental allowance to parents for up to 14 months, provided that at least two months are taken by the other parent. It amounts to 67 % of the average salary of that parent during the past twelve months, but may not surpass EUR 1 800. Parents with a salary below EUR 1 000 receive an increase which brings their parental allowance up to EUR 1 000.

Employees are entitled to take time off work in the case of the sickness or accident of a family member. Surpassing European requirements, this right is also granted in the case of the death or marriage of a close family member or when the employee's wife gives birth. In these cases, employees continue to be paid by their employer.

4. Equal pay

The AGG prohibits gender discrimination in respect of pay. The term 'pay' is interpreted in an extensive way, and includes all benefits granted by the employer. Therefore, it not only covers the salary as defined in an employment contract, but also all other contributions of financial value, such as one-off payments, premiums, benefits in kind (cars, mobile phones, other electronic communication devices etc.) or paid leave.

The prohibition of gender discrimination in respect of pay is understood as an obligation to grant equal pay for equal work. However, there is no statutory definition of what constitutes equal work. Following the case law of the European Court of

Justice, German courts and legal doctrine consider that equality of work depends on whether two workers can be employed interchangeably. This is determined by the criteria of the type of work and concomitant responsibilities, the qualifications required, and working conditions, including physical and psychological strain. Moreover, work is considered equal if it is of the same value. Here, the decisive criteria are job classifications contained in collective agreements, provided they have been set up in a discrimination-free way. In addition, the criteria mentioned above (responsibilities, qualifications, working conditions) are also used.

An important factual obstacle to realizing the principle of equal pay is the fact that there are no obligations to publish employees' salaries and fringe benefits. Consequently, employees do not know whether they earn less than their colleagues, and thus cannot establish whether there is gender pay discrimination within a company. The lack of such transparency provisions is often justified by requirements of the protection of personal data, despite the fact that such data could be made available without reference to specific persons.

5. Occupational pension schemes

Occupational pension schemes are covered exclusively by a special law (*Betriebsrentengesetz*, BetrAVG). It applies to benefits for retirement, invalidity, or for surviving family members, and to schemes based on pension funds and insurances. The law does not contain a prohibition on gender discrimination. It only adapts earlier rules concerning different retirement ages for women and men to the requirements of the *Barber* judgment of the ECJ. In its present form, it does not permit different retirement ages for women and men, and it does not make use of the exceptions permitted by Directive 96/97/EC. Following the case law of the ECJ, the Federal Labour Court developed effective protection against gender discrimination, and especially indirect discrimination of (mostly female) part-time workers. In particular, it held that the employer may not set up waiting periods that cannot be met by part-time workers, and it required the employer to conclude pension agreements that provide for different classes of workers according to their working hours.²⁹ The Court also considered provisions that granted men a survivor's pension only if the deceased wife had been the main provider of the family income to be discriminatory.³⁰

6. Statutory schemes of social security

Statutory social security schemes apply to all employees and persons in vocational training. They automatically fall under these schemes (unemployment, health care, work accidents, retirement). Going beyond the Directive, they also apply to statutory care insurance. The contributions to these social security schemes are borne equally by the employee and employer and are deducted from the salary before payment to the employee. However, according to Social Code No. IV (*Sozialgesetzbuch IV*), employees in small work contracts ('*geringfügig Beschäftigte*') who work in private households are not covered by these social security schemes. Legal commentators justify this exception by referring to the social and occupational policy aim of legalising such employment relationships, which until then, were predominantly done on the side.

²⁹ BAG, judgments of 4 March 1989, 3 AZR 490/87, *Neue Zeitschrift für Arbeitsrecht (NZA)* 1990, 25; of 23 January 1990, 3 AZR 58/88, *NZA* 1990, 778; of 20 November 1990, 3 AZR 613/89, *Entscheidungssammlung zum Arbeitsrecht (EzA)* § 1 BetrAVG Gleichberechtigung No. 8; and of 5 October 1993, 3 AZR 695/92, *NZA* 1994, 315.

³⁰ BAG, judgment of 19 November 2002, *NZA* 2003, 380.

7. Self-employed and helping spouses

Self-employed persons are covered by the AGG. Consequently, any gender-based discrimination with respect to access to self-employed activities and promotion are prohibited. This provision is of little relevance as the chapter referred to gives a right of action against private employers who discriminate, and hence does not apply to the situation of the self-employed. The provision is of importance only insofar as it grants protection against employers' associations or professional organisations. There are no provisions concerning helping spouses.

With respect to the social protection of self-employed and helping spouses, German law has not introduced any provisions concerning pregnancy and maternity protection. The right to parental leave does not apply if there is no formal employment contract. A self-employed person or helping spouse is entitled to the parental allowance only if he/she was protected under the statutory social security scheme. This is the case only for farmers and members of the liberal professions. All others, including helping spouses, are only covered if they voluntarily became members of the statutory social security scheme – which many do not because of the costs involved.

8. Goods and services

The AGG contains a prohibition on gender discrimination in relation to the provision of goods and services. While all private law insurances fall under this provision, it remains, in other respects, below the requirements of Directive 2004/113/EC: The German law restricts the notion of a good or service 'available to the public' to so-called 'mass contracts,' that is contracts which are typically concluded irrespective of the identity of the other contracting party, or where the identity of that person is of little importance. A landlord that rents out up to 50 apartments is considered not to provide a service available to the public. Moreover, the AGG extends the exception under the Directive on goods and services 'offered outside the area of private and family life' to situations where the contract will bring the parties into close spatial contact or into a relationship of trust. It excludes, in particular, contracts that would lead to both parties being housed on the same piece of land.

The law goes beyond the requirements of Directive 2004/113/EC in that it extends protection against gender discrimination also to the areas of social protection, including social security and health services, as well as social advantages and education. However, this prohibition only extends to such services provided under civil law. For the provision of services under public law, the prohibition of gender discrimination contained in the Constitution (*Grundgesetz*) applies. This means that harassment and sexual harassment are not considered to be discrimination and the special rules on support by anti-discrimination organisations do not apply.

Under the AGG, differential treatment based on sex is permitted in the provision of goods and services if there is an objective reason. This formulation is wider than the one permitted under the Directive, which requires a legitimate aim and the proportionality of the measure. According to academic writing, these restrictions must be read into the German law. Examples of 'objective reasons' under German law are given in the AGG; they are: the prevention of danger or harm to others, the need to protect privacy or personal security, or the granting of special advantages where there is no interest in enforcing equal treatment. For the latter reason, the provision of a service in a sex-segregated way is considered permissible by legal commentators, as long as both men and women receive it to the same extent. An objective reason could be the desire of women to exercise at a fitness centre free of male observation and

possible harassment. The AGG permits the use of sex as a factor for determining an insurance premium.

9. Enforcement and compliance

The AGG prohibits **victimisation** in labour relations and gives the victim of discrimination or any person who supported him/her a right of action against the employer. This rule also applies to the discrimination of civil servants.

In civil and labour cases, there is a shift of the **burden of proof**: If the claimant proves facts permitting the conclusion that there was discrimination, the defendant has to show its absence. Courts disagree as to whether statistical data is sufficient as prima facie evidence of discrimination.³¹ In administrative law concerning civil servants, claimants do not even have to adduce the facts alleged because the courts are obliged to investigate the facts. The decision will be taken to the disadvantage of the party whose set of facts cannot be corroborated by the court.

The AGG provides for a right to damages for discrimination. The **remedies and sanctions** for breaching the prohibition of gender discrimination differ according to the field of law. In labour and civil cases, the victim has a right to pecuniary compensation, but not to reinstatement or the fulfilment of the denied contract. However, in both cases, the perpetrator of the discrimination can exonerate himself/herself by showing that he/she did not act negligently or intentionally. This requirement of fault is not compatible with the case law of the ECJ with respect to labour law. In labour cases the victim of gender discrimination has a right to moral damages even if he/she would not have received the benefit in question (especially hiring or promotion) in a discrimination-free procedure. The damages due amount to a maximum of three months' salary and can be deemed dissuasive, especially because they are to be paid to every victim that brought a case. In the case of discrimination caused by collective agreements, the employer is responsible only if he/she acted with gross negligence or intentionally. This provision also infringes the European directives. Because of the short time that the AGG has been in force, few decisions have been rendered so far, and none have concerned the problems described. In civil law cases, the victim can also bring a claim for the cessation of the discrimination and non-repetition.

In the employment relations of civil servants, all claimants have the right to a discrimination-free repetition of the (hiring or promotion) procedure, and there is even a right of the best candidate to be chosen. The effectiveness of this remedy depends on the authority informing the victim of discrimination of its decision before the other candidate is nominated to the post. Otherwise, the victim can merely claim compensation. Criminal sanctions and administrative fines are not available in cases of gender discrimination.

Access to the courts is ensured for individuals who claim to have been the victim of gender discrimination. Anti-discrimination interest organisations do not have standing in court, but may only support individual claimants. Thus, the realisation of gender equality through the courts remains exclusively in the hands of individual claimants. In cases of discrimination within the context of employment and access to goods and services provided under civil law, labour courts and civil courts (the 'ordinary courts') are competent, and claimants have a right to (financial) legal aid for

³¹ Judgment 15 Sa 517/08 of the State Labour Court (*Landesarbeitsgericht*) of Berlin of 26 November 2008, *Neue Juristische Online Zeitschrift* (NJOZ) 2008, pp. 5206, and judgment of the State Labour Court of Berlin and Brandenburg (2 Sa 2070/08) of 12 February 2009, Beck-Rechtsprechung (BeckRS) 2009 52314.

court and lawyer's fees if, by a superficial examination, their case has good chances of success. Administrative courts are competent to decide claims against a public authority, both when the case is brought by a civil servant for alleged gender discrimination and when gender discrimination in the provision of public services is alleged. In these cases, as in cases before the social courts concerning statutory social security benefits, claimants do not even have to pay a court fee and must not be represented by a lawyer. In civil and labour cases, the claim has to be brought within two months; in administrative and social law cases, the time-period is one month. An obstacle to the effectiveness of the sanctions in labour law is the lack of a right of access to the employer's files to determine whether there was discrimination.

Since 2006, there is a general **anti-discrimination authority** on the federal level (*Antidiskriminierungsstelle des Bundes*). Its powers extend to all grounds of discrimination contained in the European anti-discrimination directives. Its tasks are to inform individuals claiming to have been discriminated against and the public in general of the legal means available in case of discrimination. Moreover, the authority shall conduct studies on discrimination and shall propose measures to prevent discrimination. The authority has no power to support individuals in anti-discrimination suits, and cannot impose any fines for discrimination. On the level of the states (*Länder*), no comparable bodies exist.

Although the **social partners** are aware of their responsibility to prevent and abolish gender discrimination in collective agreements, they have not yet undertaken a systematic assessment. The legislator is reluctant to impose specific obligations on the social partners in this respect, pointing to its obligation to respect their freedom of coalition under the Federal Constitution. Yet, legislation obliging the social partners to live up to their responsibility would be constitutional as it would merely emphasise their obligations flowing from EU law.

Collective agreements play an important role in German labour law, but vary to a great extent. Most collective agreements are concluded at the level of the states. Collective agreements contain rules on the contents, conclusion, and dissolution of employment contracts. These rules are binding and directly applicable between an employer and employee if both are members of the social partners that concluded the agreement. Exceptionally, the Federal Minister of Labour may declare a collective agreement to be generally applicable to all labour relations in the pertinent sector. The social partners do not consider collective agreements as a particular means to implement EU gender equality law. Critics argue that the reason for this is that women are under-represented within these organisations.

10. Brief assessment

Overall, Germany's implementation of EU gender equality law is satisfactory. Courts and legal practitioners are aware of EU law, the case law of the ECJ, and the obligation to interpret national law in the light thereof. The most important mistake lies in the insufficient transposition of the obligation to provide for sanctions even in cases where the employer has not been at fault when discriminating on the ground of gender. A highly problematic gap is the exclusion of dismissals from the scope of application of the General Equality Act. The recent judgment of the Federal Labour Court that filled this gap is not sufficient as European Law requires unequivocal transposition of directives.

GREECE

1. Implementation of central concepts

Gender equality is required by three constitutional provisions: Article 4(2): ‘Greek men and women have equal rights and obligations’; Article 22(1)(b): ‘All workers, irrespective of sex or other distinction, shall be entitled to equal pay for work of equal value’; Article 116(2): ‘Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities existing in practice, in particular those detrimental to women’.

These Articles are considered not only to prohibit gender discrimination, but also to require the promotion of *substantive* (real) gender equality, the legislature and all other state authorities having the obligation to take the **positive measures** in favour of women that are necessary and pertinent for achieving this aim, where women are in an inferior position.³² Moreover, Article 21(1) of the Constitution proclaims that ‘the family, marriage, maternity and childhood are under state protection’. This provision is considered to require, *inter alia*, measures to facilitate the ‘harmonization’ of family and working life by men and women.³³

The Act transposing Directive 2002/73/EC came in force in 2006 and the courts have not yet applied it. It defined for the first time **direct and indirect discrimination** by copying the Directive’s definitions. The courts had already condemned direct discrimination on the basis of the Constitution and previous legislation, in light of EC law,³⁴ but, although indirect discrimination was also prohibited, cases are scarce and this notion is almost unknown. Directive 2006/54/EC (recast) has not yet been transposed.

While Directive 2002/73/EC prohibits ‘**instructions to discriminate** against persons on grounds of sex’, the Act transposing this Directive merely prohibits ‘discriminatory instructions’. Thus, the prohibition is not clear. There is no case law on this matter.

The Act transposing Directive 2002/73/EC copies the Directive’s definitions for **harassment and sexual harassment**. This is satisfactory. There is no case law based on this Act. There is previous case law based on national provisions prohibiting offences against one’s personality (i.e. against a person’s dignity); however, most of the cases failed due to a lack of evidence.

2. Access to work, working conditions

Article 4(2) of the Constitution (*supra* 1) covers all areas, including those covered by the gender equality directives. It is thus much wider in scope than these directives. Both the constitutional provisions and the Act transposing Directive 2002/73/EC apply to the private and the public sector. The Act specifies that it covers, within both sectors, any branch of activity, any employment relationship or form of employment and independent employment, as well as professional training of any kind or form. It concerns access to all levels of employment and professional training; working

³² Council of the State (CS) (Supreme Administrative Court) judgments 1933/1998 (Plen.), 2832-2833/2003, 192/2004, in light of EC law and the Convention on the elimination of discrimination against women (CEDAW).

³³ CS judgment Nos. 3618/2003 (Plen.), 1 and 2/2006, in light of EC law.

³⁴ E.g. the Supreme Civil Court (SCC) in judgments Nos. 85/1995, 593/1996, 1785/2001 and 1429/2004 declared null and void the dismissal of women at a pensionable age which was lower than that of men.

conditions, including dismissal; and membership of and involvement in workers' or employers' professional organizations, including benefits provided by such organizations. Thus, its scope corresponds to that of the Directive and is therefore satisfactory. Case law still mostly concerns typical employment (*travail salarié*) rather than employment in a wide sense.

As regards the protected persons, Article 4(2) of the Constitution refers to 'Greek men and women'; however, since Article 116(2) refers to 'men and women' in general (*supra* 1), it must be considered that the constitutional gender equality rule covers Greeks and all foreigners, even non-EU citizens, thus surpassing EC law. There is no case law on this scope. The Act transposing Directive 2002/73/EC applies to persons employed in or candidates for any kind of employment, as well as those who receive or are candidates for professional training of any kind. It makes no distinction as to nationality. Therefore, in light of the Constitution and human rights treaties, it must be considered that it covers Greeks and all foreigners, even non-EU citizens, thus surpassing EC law. There is no case law.

Derogations from gender equality were allowed by a constitutional provision, which was repealed in 2001 and replaced by a requirement of positive action (*supra* 1) as a result of a big NGO campaign and case law acknowledging that the constitutional gender equality rule requires substantive equality. Consequently, the Act transposing Directive 2002/73/EC allows no derogations. This is consistent with EC law, since derogations are a mere option for Member States – not an obligation – and more favourable national provisions prevail.

The Act transposing Directives 76/207/EEC and 75/117/EEC and the Act transposing Directive 2002/73/EC, instead of specifically repealing discriminatory provisions, only vaguely stipulate that such provisions are repealed. There is a statutory provision that allows the termination of a private-law employment contract when the employee becomes entitled to an old-age pension. Similar provisions persist in internal regulations, in particular of banks. This leads to women who are entitled to a pension being dismissed earlier than men. Although these provisions have been condemned by well-established Supreme Civil Court jurisprudence, they remain on the books and are applied as well.³⁵

Furthermore, there still is indirect discrimination regarding access to employment. A typical example: until 1999, the law provided for maximum quotas for the access of women to police academies; the minimum height requirement was 1.70 m. for men and 1.65 m. for women. Following the abolishment of the quotas, the minimum height for women was raised to 1.70 m. The Council of State, while accepting that the average height of men is higher than that of women, held that this requirement is justified by reasons of public interest related to police duties.³⁶ This is a 'mere generalization', which the ECJ does not consider sufficient to exclude indirect discrimination.

3. Pregnancy and maternity protection; parental leave

Rules in the public and private sector vary; they are scattered, complex and often modified.

Maternity leave in the private sector is seventeen weeks; pay is replaced by social security benefits, at least for women covered by the most important social security scheme (IKA). In the public sector it is five months paid leave. It is prohibited to

³⁵ See e.g. SCC judgments in the previous note, and First Instance Athens Court judgment No. 1847/2008 (interim measures) regarding the Alpha Bank.

³⁶ CS judgment No. 1247/2008.

refuse to hire on grounds of pregnancy or maternity and to dismiss during pregnancy and one year after childbirth or during a longer absence due to a pregnancy-related illness, except on a 'serious ground' to be invoked and proved by the employer (reduced output due to pregnancy is not such a ground); a dismissal must be in writing and reasoned and be notified to the woman and the labour inspectorate, otherwise it is null and void. Disclosure by the woman of her situation is not required; it is necessary only for the employer to take 'positive measures' (e.g. health and safety measures, granting maternity leave). Maternity leave is working time and does not affect employment rights. Women are entitled to return to the same or an equivalent post on the same terms and conditions and to benefit from any improvement in working conditions which they would obtain during their absence. Less favourable treatment on grounds of pregnancy or maternity is prohibited. The protection applies in the public sector, too, along with constitutional guarantees of the permanence of civil servants. Thus, Directive 92/85/EEC is surpassed regarding the length of leave, benefits and the extent of protection against dismissal.

The law is satisfactory and the Greek courts have traditionally been favourable to maternity protection. However, some recent judgments are incompatible with EC law. It has been held, for example, that maternity protection does not extend beyond the expiry of a fixed term contract, the employer not being obliged to renew it; and that a woman was not entitled to a voluntary pay rise given during her maternity leave to all her colleagues performing the same work.³⁷

Parental leave: In the private sector, both (natural and adoptive) parents employed for one year by the same employer have a non-transferable right to a three and a half months unpaid leave (i.e. longer than the minimum provided by Directive 96/34/EC), after maternity leave, until the child reaches the age of three and a half. This leave is working time, but social security coverage is only maintained if the worker pays his/her contributions and that of the employer, something that seems incompatible with EC law. Very few women and almost no men take this leave, due to the loss of earnings and to the reluctance of employers to grant it.

In the public sector, until 2007, only women were entitled to a nine-month paid leave after their maternity leave, until the child reached the age of four, as an alternative to a reduced working day. Currently, both parents have a transferable right to this leave and the reduced working day (*infra*). Thus, this goes beyond Directive 96/34/EC as to the length of the leave and pay, but they are not individual rights for each parent, as the Directive requires. Moreover, when the leave is not requested upon the expiry of maternity leave, but later, while the child is still under four, by a parent who made no use of the reduced working day, a 'fictitious use' of the reduced working day is taken into account, the leave being proportionately curtailed. The Legal Council of the State agreed with this practice,³⁸ which is in breach of EC law. A father, who was refused parental leave at the time that the law only granted it to mothers, obtained the judicial annulment of this refusal. Instead of complying with the judgment, his service followed the above practice and granted him a curtailed leave. The father had recourse to a special Committee of the Council of State, whose task is to ensure the execution of judicial decisions by administrative authorities. Without

³⁷ Supreme Civil Court (SCC) judgment Nos. 1341/2005 and 1221/2004, respectively.

³⁸ Legal Council of the State (LCS) Opinion 64/2008. The LCS (Νομικό Συμβούλιο του Κράτους) represents the State before national and international/European courts and gives opinions at the request of public authorities submitted through a minister, which are not binding, unless the minister endorses them.

any justification, this Committee also agreed with that practice.³⁹ There are also directly discriminatory provisions: If a male civil servant's wife is not working, he is entitled to neither the reduced working day nor the leave, unless his wife is unfit to take care of the child due to a serious handicap. Besides, a three-month paid adoption leave (equal to maternity leave after childbirth) is granted to female civil servants who adopt a child under the age of six; according to case law these adoptive mothers are also entitled to the nine-month parental leave.⁴⁰ There is no provision or case law regarding adoptive fathers.

Other measures for facilitating the 'harmonization' of family and working life are a working day reduction, which goes further than Directive 96/34/EC, and time off, which sometimes also goes further than this Directive.

In the private sector, mothers, and subsidiarily fathers, are entitled to a paid working day reduction for thirty months after maternity leave. Alternatively, a paid leave of equivalent length for the mother and subsidiarily for the father may be agreed with the employer. Recently, mothers have been granted an additional six months leave, following maternity leave or the leave eventually agreed with the employer, paid through social security benefits at the rate of the legal minimum wage. This should be considered parental leave and should be granted to fathers too. Besides, the parents of handicapped children are entitled to an unpaid working day reduction. In all cases, the working day reduction or leave is working time.

In the public sector, both parents have a transferable right to a paid working time reduction, after maternity leave, until the child reaches the age of four, or alternatively, to a nine-month paid parental leave (*supra*). The reduction lasts longer for a fourth child and for unmarried, widowed, divorced or handicapped parents whose paid leave is also longer.

In the private sector, both parents have a transferable right to unpaid time off for the illness of a dependent child or other family member, which is working time. This is a satisfactory implementation of Directive 96/34/EC, but it does not apply to the public sector. In both the private and the public sector parents have a transferable right to paid time off for school visits, which is working time. In the public sector, employees whose children or spouse have a serious health problem obtain paid leave. These provisions surpass Directive 96/34/EC.

Direct or indirect discrimination against workers with family responsibilities (dependent children or other family members) regarding access to and the maintenance of employment or professional development, as well as dismissal due to exercising the right to parental leave or to family responsibilities are prohibited. Workers have the right to return after parental leave to the same or an equivalent post on the same terms and conditions and to benefit from any improvement in working conditions to which they would be entitled during this absence. This protection applies in the public sector too; civil servants also enjoy constitutional guarantees of permanence. This is a satisfactory implementation of Directives 96/34/EC and 2002/73/EC.

4. Equal pay

The definition of 'pay' in the Act transposing Directive 75/117/EEC was not as wide as the Article 141 TEC definition. Thus, the only benefits paid by the employer that case law has acknowledged as 'pay' were family allowances. The Act transposing

³⁹ CS, Special Committee Decision No. 16/2009.

⁴⁰ CS judgment 607/2007.

Directive 2002/73/EC improved the situation by copying the Article 141 TEC definition. Furthermore, although the Constitution (*supra* 1), the Act transposing Directive 75/117/EEC and the Act transposing Directive 2002/73/EC refer to work of 'equal value', equal value criteria are not provided. Thus, the 'equal value' notion is not applied and the traditional, non-transparent job classification, in particular in collective agreements, is unchanged, making indirect discrimination very likely.

Most equal pay judgments do not concern gender discrimination and they usually deal with the same work. Differences in the legal nature of the employment relationship of the workers compared (e.g. one worker is under a private law contract, while the other is a civil servant) or the fact that one worker is covered by a collective agreement while the other is not are often used as a justification for pay differences, even in the same undertaking or service and for the same work.⁴¹ Thus, the implementation of the equal pay principle is not satisfactory.

5. Occupational pension schemes

The notion of 'occupational scheme' is virtually unknown, in spite of two Greek ECJ cases.⁴² This is mainly because a decree transposing the relevant directives merely copies them, without indicating which Greek schemes are occupational or providing any criteria for them. Thus, the ECJ requirements of clarity and transparency are not complied with. Recently, the ECJ found Greece to be in breach of Article 141 EC, due to gender discrimination in ages and other conditions for civil servants' pensions⁴³

6. Statutory schemes of social security

Directive 79/7/EEC has only been implemented by a Decree that abolished discrimination between wives and husbands and between the mothers and fathers of workers covered by the main statutory scheme (IKA), regarding conditions for derived sickness benefits. Case law deals with gender discrimination in social security on the basis of the Constitution, ignoring the nature of the schemes under EC law, and allows no exceptions. Consequently, there is no justification for Greece to maintain exceptions allowed by Directive 79/7/EEC.

7. Self-employed and helping spouses

There is no specific implementation of Directive 86/613/EEC and there is indirect discrimination against women. Thus, e.g. family workers (the employer's spouses, children and other close relatives) are entitled to affiliation with the main statutory social security scheme (IKA). However, coverage starts and ends on the day the worker or the employer notifies the IKA of the commencement or termination of employment; otherwise, the worker is not covered, even if he/ she actually works and contributions are paid. This is an exception to the general rule that coverage starts automatically upon the commencement of work. This is indirect discrimination against women, the majority of family workers. Moreover, the income of a spouse derived from an undertaking owned by the other spouse is added to the latter's income, making income tax higher. This is indirect discrimination against women (who are usually the ones working for their spouses). In all the above cases, a disincentive for women's economic activity is also created.

⁴¹ SCC (Plen.) judgment 3/1997, SCC judgments 288/2003, 453/2002.

⁴² Case C-147/95 *DEI v Evrenopoulos* [1997] ECR I-2057; Case C-457/98 *Commission v Greece* [2000] ECR I-11481.

⁴³ Case C-559/07 *Commission v Greece*, judgment of 26 March 2009 (nyr).

8. Goods and services

Directive 2004/113/EC has not yet been transposed in Greece.

9. Enforcement and compliance

Civil courts hear cases concerning workers under a private law contract. Administrative courts hear cases concerning workers under a public law relationship (civil servants of the State, local government authorities and other legal persons governed by public law). Administrative courts hear social security cases, except civil servants' pension cases, which are heard by the Court of Audit.

Victimisation: the Act transposing Directive 2002/73/EC prohibits dismissal or other adverse treatment due to the rejection of harassment or to giving evidence or to any other action by a worker before a court or other authority against gender discrimination. This is a satisfactory implementation of the Directive. The courts have not yet applied this Act, but such conduct is traditionally deemed an abuse of a right; the employer must present a lawful justification.⁴⁴

The **burden of proof** rule was inadequately implemented by a Decree which merely copied it from Directive 97/80/EC, while it should be included in the Codes of Civil and Administrative Procedure;⁴⁵ thus, it is unknown. The only known case where the issue was raised led to a preliminary reference,⁴⁶ which, however, does not seem to have encouraged other cases.

Remedies and sanctions in civil and administrative cases are generally very effective; they are also applied in gender discrimination cases. They are proportional and dissuasive and can even serve as a model.⁴⁷ Thus, a discriminatory dismissal is declared null and void (by the civil courts) or annulled (by the administrative courts). In all cases, the dismissal is deemed never to have occurred; the worker retains his/her post and thus reinstatement is unnecessary. A discriminatory refusal to hire or promote is declared null and void by the civil courts and the hiring or promotion is deemed to exist from the time it should have occurred. Administrative courts annul such a refusal and order the issuance of an administrative act of retroactive hiring or promotion. In all cases, the worker is entitled to full back pay plus legal interest and moral damages. Full compensation for actual and future financial and moral damages is always awarded; this is now explicitly required by the Act transposing Directive 2002/73/EC. This Act does not affect the traditional sanctions. It adds disciplinary sanctions for civil servants and extends administrative fines (which were already provided for employers) to directors or their representatives; it provides heavier sanctions for a 'violation of sexual dignity' (a criminal act under the Penal Code), when it constitutes the exploitation of workers or candidates for work.

Alleged victims of discrimination have effective **access to the courts**, but individual workers are denied the possibility (*locus standi*) to seek the annulment of extended collective agreements (*infra*); only professional organizations that participated in the collective bargaining can seek such an annulment.⁴⁸ Furthermore,

⁴⁴ See e.g. SCC judgment 1284/1996.

⁴⁵ This is what the CS had recommended in its Opinion 348/2003 on the legality of the draft Decree.

⁴⁶ Case C-196/02 *Nikoloudi v Organismos Tilepikoinonion Ellados (OTE)* [2005] ECR I-1789.

⁴⁷ See S. Koukoulis-Spiliotopoulos 'Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships' *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp. 74-82, and 'Les sanctions non pécuniaires', in: M. Verwilghen (ed.), *Access to Equality between Men and Women in the EC* pp. 133-159 Louvain-la-Neuve, Presses Universitaires de Louvain 1993; Chr. McCrudden 'The Lessons of the Conference', in the same volume, pp. 231-259.

⁴⁸ CS judgments 4339/1983, 2932/1987, 476/1989 (Plen.) reversing previous decisions (e.g. CS 520/1982).

the rule in Directive 2002/73/EC requiring the *locus standi* of trade unions and other organizations to bring individual workers' claims before the courts or other authorities was implemented in the same ineffective way as the burden of proof rule.

The Act transposing Directive 2002/73/EC makes the Ombudsman, whose independence is constitutionally guaranteed, an **equality body**. A deputy Ombudsman deals with gender equality, but it is not clear whether she has all the powers required by the Directive.

This Act requires that trade unions inform their members on its content and measures implementing it. However, the Directive's requirements to promote **social dialogue** on gender equality and to encourage **social partners** to conclude relevant agreements were not transposed.

Collective agreements traditionally cover employment under a private law contract. They may deal with any terms and conditions of employment and social security, except pensions. They are binding on the employers who belong to the professional organizations that concluded them and are judicially enforceable. Those that bind employers employing at least 51 % of the workers of a sector or profession can be extended by a decision of the Minister of Labour to the whole sector or profession. Collective agreements prevail over legislation insofar as they are more favourable to workers. There are five categories of agreements: national general agreements, which determine compulsory minimum standards for all workers across the country; sector agreements, covering companies which produce the same or similar products in a particular town, region or in the whole country; company agreements which apply to specific companies and are generally scarce; national professional agreements which cover a particular profession; and local professional agreements, covering a profession in a town or region. The provisions of the last four categories may not be less favourable to workers than the national general agreements. Individual contracts prevail in so far as they are more favourable to the worker. There are agreement clauses on maternity and parental protection which surpass legislation and are often sanctioned by statute. Employment under public law may also be covered by agreements, but these are scarce and of limited scope.

10. Brief assessment

The implementation of EC law on the access to and conditions of work is rather satisfactory. However, due to inadequate legislative techniques, certain discriminatory provisions remain on the books. Moreover, certain notions, in particular equal value and indirect discrimination, are not applied, due to insufficient criteria and a lack of sensitization. The implementation of EC law on occupational social security is highly inadequate. National provisions on maternity protection and measures for facilitating the reconciliation of family and work surpass EC law in certain respects. However, regarding reconciliation of family and work, there is still direct discrimination in the legislation applying to the public sector. Moreover, application in practice is often not satisfactory, either due to a lack of pay or other benefits during leave, in the private sector, or due to adverse practices of employers, including the State. Non-transferable individual rights of parents, in all cases, would improve the perception of parental responsibilities as shared responsibilities and increase men's take-up, thereby promoting real equality and the idea that reconciliation is not a women's issue. In order not to disrupt the civil service and to serve family needs for a longer period, parental leave could be granted until the child reaches a higher age. Remedies and sanctions are very effective, but in spite of widespread discrimination in practice, litigation levels are very low. An important reason for this is the inadequate

transposition of EC rules on the burden of proof and the *locus standi* of organizations and their lack of incorporation in the Codes of Civil and Administrative Procedure.

HUNGARY

1. Implementation of central concepts

The implementation of the EU gender equality *acquis* is largely determined by the fact that the legislature has adopted one uniform ‘Equality Act’ (Act CXXV of 2003) that prohibits discrimination on the basis of, in total, 19 grounds of different significance (e.g. listing part-time and fixed-term employment on an equal footing with race or sex) including sex and sex-related grounds supplemented with a general clause of ‘any other status’. The following central concepts are therefore defined for all forms of discrimination based on any of the listed attributes.

Discrimination (direct and indirect) is defined as one form - although the main one – of the violation of equal treatment. Harassment, unlawful segregation, retaliation, as well as an instruction to do all these are defined as further, separate forms of the violation of equal treatment. The definitions of direct and indirect discrimination are identical to the definition given in Directive 2002/73/EC except that the Hungarian concept goes beyond the relevant directives in as much as it protects not only individuals, but also groups against any form of unequal treatment.

Positive action is permitted but is certainly not required: the provisions are restrictive rather than encouraging. Such action might only be prescribed by law or a collective agreement, it must not violate fundamental rights, it must not grant unconditional preference and it must not exclude the consideration of individual aspects. Any proposal for a quota system has so far been met by a strong rejection.

The Equality Act defines **harassment** somewhat more narrowly than Directive 2002/73/EC: only those forms of conduct that violate dignity amount to harassment in contrast to the Directive that already sees harassment when a conduct has such an intention. The Hungarian text uses the intention or result with respect to creating an intimidating, hostile, degrading, humiliating or offensive environment as an *addition* to the completed violation of human dignity. The legislature is reluctant to regulate *sexual harassment*. Originally it was entirely missing from the text; but from the end of 2006 an addition to the definition of ‘harassment’ was supposed to prevent further criticism of this omission. Namely, while in the past any ‘conduct’ (without specification) could qualify as harassment, according to the amended text a conduct ‘of a sexual or other nature’ amounts to harassment.

2. Access to work, working conditions

The legislative system in Hungary guarantees equality in employment between men and women, prohibits discrimination and has removed all inequalities from employment opportunities. All employees and all employers (both public and private) are covered. Equal treatment applies to job advertisements, selection procedures, hiring and firing, terms and conditions of employment, job-related training, remuneration and other benefits, membership of and participation in employees’ organizations, promotion as well as liability for job-related offences or damage.

Under permitted exceptions regarding employment, sex might be a job requirement if it is justified by the characteristic or nature of the work as well as being proportionate and based on substantial and legitimate requirements. The wording of the Hungarian law is less strict than the Directive: the need to employ one sex should

be ‘substantial and legitimate’ instead of ‘determining’. Broader exceptions are permitted in the case of religious or other conviction organizations if the differentiation is based on a proportionate and genuine requirement, justified by the given job and directly connected to the conviction determining the organization. A female supervisor in all-female public baths was considered a lawful exception. The fact that the path permitting sex-based differentiation is too broad is illustrated by a case where the female applicant to a lower-rank clerical job was rejected with reference to the physical needs of the job, stating that it might occasionally require lifting weights of several, sometimes dozens of, kilos, for which reason the position was considered ‘preferably for males’. Apparently, the physical aspects were the main selection criteria, automatically classifying the applicants. The ETA accepted the employer’s defence with reference to justified exception.⁴⁹

3. Pregnancy and maternity protection; parental leave

The Labour Code prohibits work by a pregnant woman in a job that is inadequate for her condition. Going beyond the protection provided by EU law, all pregnant workers are protected, not only those who inform their employer of their pregnancy. Furthermore, not only listed unhealthy or dangerous work, but any work that is unsuitable for the particular pregnant woman engenders the employer’s duty to provide adequate working conditions. During the period of protection women might not be assigned to perform overtime or night work. In any case the worker is entitled to previous average earnings. If there is no feasible solution she must be ‘exempted from work and keep her basic salary. Maternity leave amounts to 24 weeks, four weeks must be granted before delivery and 70 per cent of the gross salary might be provided under social insurance rules.

The worker has the right to be exempted from work for prenatal medical examinations with full pay. Similarly, going beyond the protection required by EU law, the dismissal of pregnant workers is prohibited for any reason (except disciplinary dismissals for gross misconduct) and is not dependent on the pregnancy being made known. The Supreme Court invalidated the dismissal of a pregnant woman in a case where, at the time of the dismissal, the worker herself was not aware of her pregnancy. The protection against dismissal is also granted to employees participating in human reproduction procedures as well as to pregnant workers.

Although Hungarian law provides for generous rules on parental leave, the implementation of Directive 96/34/EC is imperfect: it guarantees the right for any of the parents but does not provide an individual right to both of them. The rules on childcare leave have significantly changed in the last few years in order to improve the labour market activity rate. Parents are entitled to childcare leave – with an insurance-based entitlement to 60 per cent of their salary – up to the second birthday of the child, and then to flat-rate assistance (equivalent to the minimum pension of about EUR 100) until the child reaches three years of age (up to school age in the case of twins and up to ten years in the case of a seriously ill or permanently disabled child.) Although undertaking work (even full time) is now permitted the ratio of fathers taking this leave is not increasing.

Adoptive parents, if they take the child into custody during the period of maternity leave, have the right to the remaining part of the maternity leave, but only if they are female. Male adoptive parents (or the father himself) do not have the same right.

⁴⁹ 441/2008.

Pregnancy and maternity protection is a very controversial area. While, on the one hand, legal provisions guarantee above average protection, in practice many violations occur in this area and latent violations are thought to be high.

4. Equal pay

Equal pay has special emphasis in the equality legislation system: equal pay for equal work is guaranteed by the Constitution, and also the Labour Code includes (as a result of a 2006 amendment) Article 142/A requiring – in a somewhat circumvent way – ‘the observance of equal treatment when determining pay for work which is assessed as being of equal value’. This provision enumerates the factors that especially have to be taken into consideration when determining pay for work that is ‘equal or acknowledged as being of equal value’. These are the ‘nature, quality, quantity and conditions of work performed, the required skill, physical or intellectual effort, experience or responsibility’. The concept of ‘pay’ is defined in accordance with Article 141 of the Treaty, covering all direct or indirect payments whether in cash or in kind (including social benefits) provided to the worker on the basis of employment. Wages paid on the basis of job classification or performance also have to be provided in compliance with the principle of equal treatment.

The insertion of 142/A into the Labour Code and the exclusion of sex-based exceptions from the application of the principle of equal pay in the Equality Act seemed to bring Hungarian legislation into compliance with EU law. In reality, however, earnings are still different; according to official statistics the wage gap is about 15 per cent, but estimations put it higher due to the huge role of non-reported pay that gives broad room for unlawful differentiation.

5. Occupational pension schemes

The implementation of the EU law on occupational pension schemes is still incomplete. The Equality Act (it alone) refers to the implementation of Directive 86/378/EEC; however, at the time of its adoption Hungary did not yet have an occupational pension scheme. From 2008 ‘employers’ pension schemes’ might be set up and they might be considered as ‘occupational pensions’ but as yet there is no information on the application of the law in practice.

Private pension schemes in the form of voluntary mutual pension funds were, in the past, considered as being very similar to occupational pension schemes and were assessed as being in compliance with the directive. New legislation, in force from the very end of 2007, permits – with reference to the implementation of Directive 2004/113/EC – the application of sex-based actuarial calculations under certain conditions (see subsection 8 below). There is no age or other further sex difference; the pensionable age is based on the uniform rules for the statutory pension (see below in 6). In case of transborder employment, the norms of the law of the country where the headquarters of the employer is located are to be applied. The system covers primarily old-age benefits in the form of annuity or lump-sum payments. Survivors (or other beneficiaries designated by the worker) as well as disabled persons may become entitled to benefits, depending on the construction of the scheme.

‘Social benefits’ granted by the employer – either voluntarily or based on an obligation established by a collective agreement – fall under the concept of pay and therefore have to be in compliance, without exception, with the principle of equal treatment.

6. Statutory schemes of social security

The Hungarian social insurance system intends to cover the largest proportion of the population possible. Thus, the personal scope of the coherent system ('the concept of insured') covers nearly everyone performing work and obtaining an income from such work, regardless of the form of the contract and the type of relationship. The scope of the legislation covers all risks enumerated in Directive 79/7/EEC (sickness, invalidity, old age, industrial accidents and occupational diseases, unemployment) and ensures equal treatment with regard to the access, contribution to and benefits from insurance covering these risks.

The pensionable age is 62 for men and women equally. An exception – giving a 2-3 year preference for women - is made with regard to age limits for an early pension (based on an earlier difference in the general pensionable age). Raising children does not differentiate between men and women; exceptional (slight) privileges on this ground are granted equally to both parents. Childcare leave is considered to be working time thereby providing a pension entitlement (pension fund contributions are deducted from the allowance). The transposition of Directive 79/7/EEC resulted in the full equality of parents of a sick child taking sick leave with sickness benefit.

Hungarian law goes further than EU law, as it applies gender equality regarding a survivor's pension, i.e. there is no difference between the income spectrum of the earnings of a male and a female insured person: they result in the same entitlement for surviving spouses, orphans or parents. Similarly, the family allowance is no longer a work-related (primarily male) benefit, it can be claimed by either of the parents, depending on their choice, and neither the entitlement nor the amount is dependent on the sex of the parent.

Social assistance allowances which substitute social security benefits for those who have reached the retirement age or are disabled but fail to qualify for the benefits are the 'old-age allowance', 'regular social aid' and a so-called 'stand-by support' under strict coercive conditions, which is the only allowance available to persons with capacity for work. Child carers (after the childcare benefit has ended) are exempted and entitled to social aid: the lack of childcare institutions makes work outside the home impossible for them. The first two allowances are extremely low cash benefits, granted on the basis of a means test. While the exemption solves survival problems, it confirms gender stereotypes, aggravating the multiple disadvantages of women in the most vulnerable social groups.

7. Self-employed and helping spouses

Without any specific implementation law the Hungarian legal system complies with a major part of the Directive in the sense that there is no distinction between men and women in the norms relating to self-employed persons or helping family members.

The concept of 'self-employed' is not clearly defined in Hungarian law, it is closest to the concept of 'individual entrepreneur' that is narrower than that of 'self-employed' as used in the EU. The emphasis on an 'entrepreneurial' position implies that, in the view of the legislature, there is less need for protective legislation. While formal equal treatment is guaranteed, no attention is paid to the disproportionately disadvantaged position of self-employed women in reality. In the case of pregnancy and childbirth several benefits that are guaranteed to working women (exemption from certain work, guaranteed breaks, paid time off and leave) are simply not available for the self-employed due to a lack of adequate services to assist them.

Hungarian law uses the broader term of a 'helping family member' instead of 'helping spouse' in EU law. Considering that a family business may involve the work

of adult children, parents and other relatives besides the entrepreneur's spouse, Hungarian law provides protection to a broader group of persons than Directive 86/613/EEC. Helping family members are covered for the full range of compulsory social security benefits if their salary reaches at least one-third of the statutory minimum wage. They are insured in their own right like any employee. The status of 'helping family members' raises a further question: the Equality Act excludes family law relationships as well as 'legal relationships between relatives' from its scope.

While the status of helping family members has been approximated to employees, in contrast to the self-employed, their situation shares a number of features. They are entitled to all forms of leave and time off available to mothers during pregnancy and after childbirth as well as to parents; however, the lack of appropriate services to replace them during their absence means that, in reality, these benefits are not available to them in their entirety.

8. Goods and services

The Equality Act of 2003 has covered services from the time of its adoption. The principle of equal treatment has to be observed in public services, including social, health, and childcare institutions. A special section deals in detail with the scope of the prohibition with respect to private services and retail outlets that are open to the public. The law goes further than EU law in as much as it extends to education, including all kinds of relevant services (e.g. dormitory, placement services etc.) The extensive legislation has not had much impact in practice. (Public attention was paid to making Turkish baths available to women on certain days and a case was taken to the Equal Treatment Authority when a male customer was not admitted to a fitness centre which had been opened and advertised for 'women only'; the ETA found the sex-based discrimination to be a legitimate exception).

Strangely enough, the only law adopted with reference to Directive 2004/113/EC is the one that regresses from the formerly guaranteed full equality in services and permits a sex /based differentiation in the calculation of premiums and benefits for the purpose of insurance and related services.

In principle the media – as services - are obliged to observe the principle of equal treatment, but this is only an obligation on the part of service providers towards their employees and customers, not towards the public. The customer's order seems to prevail over the right to dignity and equal treatment: gender-biased or directly sexist vocabulary, advertisements and various forms of communications are the order of the day in the public media.

9. Enforcement and compliance

While the enforcement system for non-discrimination rules appears to be almost impeccable with respect to compliance with EU requirements, in reality sex discrimination reigns supreme with scarce or little sanctions.

Although '**retaliation**' (corresponding to the concept of 'victimization' under EU law) is prohibited as one form of unequal treatment, victims of retaliation hardly reach the courts, in spite of numerous anecdotal cases of retaliation. The provisions on the burden of proof now provide a balanced distribution between the parties. The claimant has to show a 'likelihood' of a disadvantage. This imposes the burden of proof on the offender to prove either that there was no disadvantage, or that the disadvantage was a legitimate exception to the rule of equal treatment.

Remedies and sanctions differ on the basis of the acting law enforcement authority. The victim of sex discrimination may choose the relevant procedure: either

civil litigation or the administrative procedure (e.g. the labour inspectorate) or both. The administrative procedure is easier and more expeditious than court litigation. It can order the violation to be halted, it can prohibit future violations and it can also impose fines (up to about EUR 50 000). Civil litigation can result in a full remedy, although the procedure is more formal and longer. Under the Labour Code an unlawfully dismissed employee is entitled to reinstatement in the same job, to receive full back-pay as well as full compensation for eventual additional damages without any pre-established upper limit. The employee may opt for pecuniary compensation *in lieu* of reinstatement (an additional amount of two to twelve months salary as decided by the court).

The **judicial procedure** is available to alleged victims, but still very few victims take their case to the courts. The introduction of procedural fees in labour litigation in 2008, making it fairly expensive for the worker, will probably be another strong discouraging factor.

The Equality Act has adopted some form of '*actio popularis*', authorizing relevant NGOs as well as the public attorney and the ETA itself to sue a discriminating actor, but only in narrowly defined 'collective' cases, namely when equal treatment has been violated in respect of a 'major undefined group of individuals'. In such cases the NGOs may also initiate the ETA procedure. Furthermore, a victim of discrimination may choose a civil organization or the ETA to represent her/him at the courts instead of a private lawyer.

The Equality Act established a governmental agency (the **Equal Treatment Authority**, ETA), with the power of investigating and adjudicating individual complaints, acting against certain state agencies upon its own initiative and initiating public interest litigation. The Authority is financially subordinated to the Prime Minister, who allocates a modest budget.

Little importance is attributed to the **social parties** in guaranteeing gender equality. The laws of Hungary ensure that trade unions and other NGOs with an interest in gender equality have the right to represent workers in equality litigation or complaint procedures, they can be a party themselves in administrative procedures and they can initiate public interest litigation – but they hardly ever do so. The national tripartite interest reconciliation body (the National Reconciliation Council) has a *subcommittee on Equal Opportunity* charged with discussing equality issues; however, it has no significant role, especially with regard to gender equality.

The legislation established an obligation for all **public employers and private employers** with a majority state share to adopt an equal opportunity plan. Since no sanction has been attached to this obligation most employers do not comply or just formally do so by adopting a few general declarations.

Collective agreements are binding legal instruments and they have the force of a contract between the stipulating parties as well as the force of law within an authorized personal and material scope. They cover all employees of the employers who are parties to the collective agreement; an extension is possible to all employees in a sector if a sectoral agreement has been concluded by qualified representative parties in the given industry. But collective agreements scarcely address equality issues; some working time flexibilities aimed at facilitating the reconciliation of private and workplace rights are inserted in a few collective agreements. A good combination are examples when provisions of equal opportunity plans, if providing some real, substantive benefit, are put into the collective agreement in order to ensure enforceability.

In summary, while the applicable sanctions are proportionate and dissuasive, and the law formally goes beyond the requirements of EU equality law, enforcement is not effective in reality, due to the male approach still determining the attitudes of lawyers, employers and victims.

10. Brief assessment

The overall state of gender equality legislation reflects the combined and controversial effects of three factors. First, the genuine and benevolent effort to bring Hungarian laws into line with the requirements of the relevant EU *acquis communautaire*. Second, the zeal towards the observation of new liberties (especially privacy, the freedoms of property and contract) reflected and endorsed by the first Constitutional Court frequently works against the weak. Third, the inherited and embedded gender-biased approach permeating society and the public mind, including lawmakers and the judiciary. The resulting situation – with some simplification – is nearly perfect compliance in the law books, but a hesitant, fluctuating approach by law enforcement authorities and slow progress in reality. Maternity protection - a priority even for traditional minds – goes beyond EU law and is consistently enforced (if a claim reaches the courts) while areas requiring a new approach gain support much more slowly, such as the change in family roles and the situation of peripheral groups (women with multiple disadvantages, outside traditional employment).

ICELAND

1. Implementation of central concepts

The principle of equality is specifically addressed in a provision in the Constitution of the Republic of Iceland stating that men and women are to have equal rights in every respect. The current Gender Equality Act (GEA) from 2008 prohibits all discrimination on the basis of gender as does the Administrative Procedure Act No. 37/1993.

A general prohibition against discrimination in Article 24 of the GEA states that any type of discrimination on the basis of gender, either direct or indirect, is prohibited. The Act explicitly defines **direct discrimination** (Article 2) as ‘any distinction, exclusion or restriction made on the basis of gender which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by the other sex of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. **Indirect discrimination** is defined as existing ‘where a neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, unless it is appropriate, necessary or can be justified by objective factors unrelated to sex’.

Also, the GEA states explicitly that ‘**special temporary measures**’ are not to be considered in violation of the Act. The GEA imposes duties on employers, labour unions as well as public authorities to make systematic efforts to equalize the status of the sexes within their companies or institutions. Balancing the role of the sexes in decision making and managerial positions is emphasised and companies and institutions employing more than 25 people must prepare programmes on matters of equality.

Harassment related to the sex of a person which is, together with sexual harassment, prohibited under the GEA, is defined as unfair and/or offensive conduct related to the sex of the person, which is unwanted and has an impact on the self-

respect of a person and continues despite clear signals that it is unwelcome. This type of harassment can be physical, verbal or symbolic. **Sexual harassment** is defined with the exact same wording as the above, adding 'sexual' prior to the word 'conduct'.

There is furthermore a special Regulation No. 1000/2004 on measures against harassment in the workplace or bullying in the workplace. Under this Regulation sexual harassment is categorized as one form of 'bullying'. Harassment in this regulation is defined as objectionable or continuous inappropriate conduct, which is conduct or behaviour which degrades, humiliates, insults, hurts, discriminates, threatens or causes distress to the person subject to this conduct. Sexual harassment or other mental or physical violence is part of this.

2. Access to work, working conditions

According to the GEA, all individuals shall have equal opportunities to benefit from their own enterprise and develop their skills. The protection of employees from sex discrimination covers every aspect of working life, including access to employment and vocational training. It is not considered discriminatory to make special arrangements for women due to pregnancy or the birth of a child.

With regard to selection criteria and recruitment conditions, the Icelandic rules are not satisfactory as they only mention vacant positions *open for application* but not all the conditioning factors of the promotion progress within the professional hierarchy. This may constitute indirect discrimination as in reality the prevailing practice puts women at a disadvantage compared with men. The provisions protect 'applicants' but not individuals subject to promotion through processes that are not formal or advertised as vacant. The Supreme Court in a judgment in 2004 found a company to be in breach of the prohibition regarding promotion as employers had not given any consideration to the gender equality provisions as they were supposed to with regard to the applications. They were hence liable to pay compensation.⁵⁰

Trade unions are bound by the principle of non-discrimination. The Working Terms and Pension Rights Insurance Act guarantees that 'wages, and other working terms agreed between the social partners shall be considered minimum terms, independent of sex (...), for all wage earners in the relevant occupation within the area covered by the collective agreement.' The Government Employees' Act states that women and men shall have an equal right to public employment at equal pay for equivalent work.

In accordance with the GEA the only occupational activities which may be excluded from the principle of equal opportunities are restricted to those which necessitate the employment of a person of one sex by reason of the nature of the particular occupational activity concerned, such as staff in the dressing rooms of fitness centres or swimming pools.

3. Pregnancy and maternity protection; parental leave

If the safety and health of a pregnant woman and a woman who has recently given birth to a child, or a woman who is breastfeeding a child, is considered to be in danger according to a special assessment, her employer shall make the necessary arrangements to ensure the woman's safety according to the Act on Maternity, Paternity and Parental Leave. Changes which are considered necessary in a woman's working conditions and/or working time shall not affect her wages.

⁵⁰ Supreme Court No. 39/2004.

The Act on Maternity and Paternity Leave and Parental Leave (AMPLPL) provides for an independent right to maternity/paternity leave of up to three months due to a birth, primary adoption or the permanent foster care of a child. Working men have an individual and non-transferable right to paternity leave while maintaining their rights relating to employment. Parents have a joint right to three additional months, which may either be taken entirely by one of the parents or else divided between them. The right to maternity/paternity leave lapses when the child reaches 18 months. A woman is permitted to start her maternity leave up to one month prior to the expected date of confinement and she is obliged to take maternity leave for at least the first two weeks after the birth of her child. There are also provisions for leave in the case of adoption.

Maternity/paternity leave is flexible in the sense that employees have the right to take the leave in one continuous period but also to divide it into a number of periods in agreement with the employer. A parent shall obtain a right to payment from the maternity/paternity leave fund after he/she has been active in the domestic labour market for six consecutive months prior to the leave. The employment relations between an employee and his/her employer shall remain unchanged during maternity/paternity leave and parental leave. The employee shall be entitled to return to her/his job or to a comparable position upon the completion of maternity/paternity leave or parental leave. It is in principle prohibited to dismiss an employee due to the fact that he/she has given notice of intended maternity/paternity leave or parental leave or during his/her maternity/paternity or parental leave without reasonable cause. The same rule applies to pregnant women and women who have recently given birth. An employer who dismisses a pregnant woman or a woman who has just given birth is liable under general rules. Under the Family Responsibilities Act a person may not be made redundant solely because of the family responsibilities he/she bears.

The amount of payment from the Maternity/Paternity Leave Fund to a working parent during maternity/paternity leave has been reduced by 12.5 % and may never exceed EUR 2 044 (ISK 350 000) according to an amendment of Article 13 Paragraph 3 of the AMPLPL by Article 18 of Act No. 70/2009 on measures regarding the state budget, which took effect on 1 July 2009 and applies to parents with children born or permanently adopted on 1 July 2009 or later.

The provision covering the accumulation and protection of rights in Article 14 of the Act on Maternity, Paternity and Parental Leave was amended by Article 10 of Act No. 74/2008, which became effective on 1 June 2008. According to Article 14, a parent shall pay a minimum of 4 % during maternity/paternity leave into the pension fund, whereas under Article 13 of Act No. 167/2006 the Maternity/Paternity Leave Fund shall pay a minimum of 8 %. In addition, the parent shall have the right to make payments into a defined contribution plan, but after the amendment made by Article 10 of Act No. 74/2008, the Maternity/Paternity Leave Fund is no longer obliged to pay the statutory complementary contribution.

Two regulations have been issued in 2009 for the further application of the Maternity Paternity Parental Leave Act: Regulation No. 420/2009 on 15 April 2009 making effective Regulations No. 647/2005 and 629/2006, and Regulation No. 1218/2008 on 29 December 2008 on payments from the Maternity/Paternity Leave Fund and payment of maternity allowances.

4. Equal pay

Under Article 19 of the GEA, women and men who work for the same employer are to receive equal wages and enjoy equal terms for the same or work of equal value.

Equal wages means that pay is determined in the same manner for women and men. The criteria used to determine the pay shall not involve gender discrimination. The Supreme Court has confirmed that it is sufficient under the equal pay requirement that the work is of substantially equal value although, for instance, requiring a different educational background.⁵¹

‘Pay’ covers the direct wages while ‘terms’ is the all-encompassing concept for remuneration referring to, besides wages, pension rights, the right to holiday and sick leave and all other terms of employment and rights that can be evaluated in monetary terms. Employees are always at liberty to reveal their wages and terms if they so wish.

The GEA prohibits the waiving of rights and therefore restricts the freedom of contract. The provision is unconditional in particular when negotiating pay, as the aim is to protect the employees in concluding contracts with their employers.⁵²

5. Occupational pension schemes

In Iceland, there is an overlap between the public pension scheme (see below) and the occupation pension. Social security pension payments diminish if the recipient receives simultaneously benefits from occupational pension schemes, which are statutory in Iceland.

The Pension Act provides for compulsory pension fund membership of all employed persons, employers or self-employed persons. No one may be refused membership of a pension fund for reasons of health, age, marital status, family size or gender. According to the Pension Act all employees receive the same benefits for equal contributions independent of the longer life expectancy of women than men. Individuals receive payments throughout their lives. The occupational schemes include widows’ and widowers’ benefits which the national social security scheme has abolished. Pension fund members may on the basis of an agreement with their spouses make arrangements so that up to one-half of the old-age pension payments will go to his/her spouse or former spouse. The pension fund concerned shall in such cases divide payments in accordance with the decision by the fund member, but they shall cease upon his/her demise. Should a spouse or former spouse receiving such payments predecease the pension fund member, the payments in their entirety shall accrue to the fund member.

6. Statutory schemes of social security

The tax-financed social security scheme in Iceland is a resident-based means-tested scheme covering the whole population. Individuals are only entitled to additional payments from social security if their pension payments from occupational funds are below a certain level. The determination of the pensionable age is the same for both sexes. There is no concern or credit for women who have been home workers taking care of children, single mothers or part-time workers and are not receiving the same amounts from occupational pension funds as men. Women have in general 16 percent lower salaries and those who have never been active on the labour market are not in an enviable position as they get older. The full annual old-age pension is ISK 297 972 (EUR 2 400). This may constitute indirect discrimination.

⁵¹ Supreme Court No. 11/2000.

⁵² Parliament Ombudsman’s conclusion, case No. 3837/2003.

7. Self-employed and helping spouses

The principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood is to be found in the GEA which applies to all in all spheres of society; the Act on Maternity/Paternity and Parental Leave which applies to parents who are self-employed and also to parents who are not active in the labour market; the Act on Working Environment, Health and Safety in Workplaces No. 46/1980 covers all activities, where one or more persons are employed, whether they are owners of the enterprise or employees. Spouses of self-employed individuals in agriculture were given special concern during the preparation of the Act on Maternity/Paternity and Parental Leave as the means to earn money among farmers is more restricted than among other walks of life. The gender pay gap is less in agriculture than other spheres and, at the same time, average wages in agriculture are lower than in other fields of work. Women farmers who are running the farm in co-operation with their spouses complain that they do not enjoy full recognition as self-employed individuals. Two self-employed persons cannot run a farm on an equal basis. The social security number of a farm can only be linked to one of the spouses which is usually the husband and hence the male farmer is the only official recipient of Government payments.

8. Goods and services

The Goods and Services Directive – which was supposed to introduce new provisions concerning discrimination on grounds of sex/gender reassignment in the provision of goods, facilities and services and premises – has not yet been implemented. The Directive is not a part of the EEA agreement and the EEA Joint Committee has not yet made its decision as to whether or not to implement the Directive. The GEA prohibits discrimination in areas of employment, occupation and vocational training while Directive 2004/113/EC covers other areas outside employment and professional life and would hence supplement the existing legislation if transposed.

9. Enforcement and compliance

The GEA provides for protection against **victimisation** as employers are prohibited from dismissing an employee due to him/her demanding redress on the basis of the Act. Employers must ensure that no employee is subjected to injustice as a reaction to a complaint or to a legal proceeding.

If evidence is presented that there has been a violation of the GEA, the employer has the **burden of proof**. He/she must prove that the dismissal or alleged injustice was not based on the employee's demand for redress or his/her charge concerning sexual harassment or the dissemination of information of harassment, sexual harassment or other forms of gender discrimination. Recently a new paragraph has been added to the prohibition of discrimination or dismissal. When an applicant asks for reasons why he/she has not been employed or when an assessment is made concerning the alleged violation, account must be taken of the victim's education, work experience, specialization, or talents required for the occupation according to the law or regulations or deemed necessary for the job.

Employers who deliberately or through negligence violate the law shall be liable to pay **compensation** for non-financial loss, in addition to any financial loss, to the person subjected to damage. Violators may also be **liable to fines**, to be paid to the State Treasury, which is unusual in Icelandic law given the often private law nature of

the relations at issue.⁵³ Furthermore, under the Penal Code, anyone who is found guilty of serious sexual harassment may be subject to **imprisonment** for up to 2 and sometimes even 4 years.

Individuals and non-governmental organizations in their own name or on behalf of their members who consider that they have been subjected to violations of the Gender Equality Act may seek redress with the **Complaints Committee on gender equality**. The opinions of the Committee are binding on all parties and subject to appeals to a higher authority. The Centre for Gender Equality, which has a surveillance role under the Gender Equality Act may initiate legal proceedings and impose a daily fine in order to monitor the implementation of the Act.

The Icelandic labour system is mainly based on **collective agreements**. The law stipulates some basic principles concerning workers' rights and duties. A typical feature of the current labour law is that it lays down certain minimum rights, while making it possible for the labour unions and employers to agree on better solutions through collective bargaining. Agreements between individual workers and employers specifying more disadvantageous employment terms than those provided for in the general collective agreements are invalid.

10. Brief assessment

The EU equality *acquis* has been implemented in Icelandic legislation *prima facie* in a satisfactory manner. Authorities maintain that they have taken systematic steps to introduce and promote equality in all areas of society. These steps have not been affirmative enough to bring the underrepresented sex to the goal of achieving pay equality and have not led to the real empowerment of women. The incorporation of the provisions of the directives, mainly in gender equality legislation, too often sounds as empty, rhetorical testimonials which Icelandic employers, public administration and the government take too lightly. Despite the Act on Maternity/Paternity and Parental Leave there are occurrences where women are dismissed during pregnancy without being officially established. The working environment seems to be widely reproachful towards men who intend to stay at home with their newborn child for three months. Statistics indicate, however, that 88 % of fathers availed themselves of their separate paternal leave entitlement entirely or in part in 2004. Real efforts regarding the reconciliation of family responsibilities and work obligations seem as distant from the labour market as high fashion in the ghettos.

IRELAND

1. Implementation of central concepts

The Irish Constitution of 1937 forbids any exclusion by reason of sex from Irish nationality and citizenship. Article 40 states that 'all citizens shall, as human persons, be held equal before the law' and proceeds to allow the State, in its enactments, to 'have due regard to differences of capacity, physical and moral, and of social function'. Article 45 provides that all citizens, 'men and women equally', have the right to an adequate means of livelihood', and directs the State to ensure that they may 'through their occupations find the means of making reasonable provision for their domestic needs'.

⁵³ The draft law with the provision stipulating that violations of the Act may be liable to fines to be paid to the State Treasury was met with a great deal of resistance from the Employer's Association.

The Employment Equality Acts 1998 to 2008 prohibit discrimination, both direct and indirect, on nine grounds⁵⁴, including the gender ground. There is no reference to gender reassignment. **Discrimination** shall be taken to occur where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds which exists, existed but no longer exists, may exist in the future or is imputed to the person concerned. There may also be discrimination by association. **Indirect discrimination** occurs where an apparently neutral provision puts persons of a particular gender at a particular disadvantage in respect of any matter other than remuneration compared with other employees of the same employer. The employer shall be treated as discriminating unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Statistics are admissible in such claims. There is a similar definition of indirect discrimination in respect of the entitlement to equal remuneration.

There may be **positive action** in respect of any measures maintained or adopted with a view to ensuring full equality in practice between men and women and providing for a specific advantage so as to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Both gender **harassment and sexual harassment** are prohibited. Harassment is any form of unwanted conduct related to gender and references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. Unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. An employee may not be victimised for rejecting such harassment. An **instruction to discriminate** against persons on grounds of sex shall be deemed to be discrimination.

2. Access to work, working conditions

The Employment Equality Acts 1998 to 2008 apply. An employer shall not discriminate against an employee or a prospective employee in relation to access to employment, entry requirements, conditions of employment, training or experience for or in relation to employment, promotion or degrading, or classification of posts, instructions or practices. A provider of agency work shall not discriminate against an agency worker. An employer cannot discriminate in respect of terms and conditions of employment in respect of training, promotion, overtime, shift work, short-time, transfers, lay-offs, redundancies, dismissals and disciplinary procedures. There shall be no discriminatory advertising and the Equality Authority may apply to the courts to obtain an injunction preventing the appointment of any person to which the advertisement relates. The Acts apply likewise to a partner in a partnership as if s/he were an employee. There cannot be discrimination in respect of vocational training. It is not unlawful to confine a post to a man or a woman where gender is a *bona fide* occupational qualification.

⁵⁴ Gender, marital status, family status, sexual orientation, religion, age, disability, race and the Traveller community ground (the Traveller community is the community of people commonly so called who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland) (Section 6 of the 1998 Act).

3. Pregnancy and maternity protection; parental leave

The Maternity Protection Acts 1994 and 2004 cover all female employees and the employed father on the death of the mother. An employee is entitled to paid time off for antenatal and postnatal medical checks and also for certain antenatal classes. Maternity leave is for 26 consecutive weeks. Employees on maternity leave are in receipt of state maternity benefit for the duration of such leave but employers may 'top up' payment to normal remuneration. An employee is also entitled to an optional 16 weeks (unpaid) additional maternity leave. There are certain rules in the event of the illness of the mother and/or the hospitalisation of the baby. An employee is deemed to be in employment during any leave. Dismissal during leave or notices of termination given during leave and to take effect during leave or after the end of leave are void. Any period of probation, training or apprenticeship is suspended during absence on leave. There is a general right to return to the same job for employees who have been on maternity leave. There is a right to suitable alternative work provided the work is appropriate and under the same terms and conditions of employment.

Employers must carry out a risk assessment of the health and safety of employees who are pregnant or breastfeeding. If a doctor certifies that a woman should not perform night work during pregnancy or within fourteen weeks of the birth then she shall be transferred to day work. There is entitlement to time off work or a reduction of working hours for breastfeeding.

The Adoptive Leave Acts 1995 and 2005 mirror the maternity leave provisions (as appropriate) for an adopting mother or sole male adopter.

The Parental Leave Acts 1998 and 2006 provide that each employee parent (with one year's service) is entitled to 14 weeks unpaid leave for each natural or adopted child up to eight years of age. Leave is non-transferable between parents except when they are working for the same employer. Parental leave may consist of a continuous period of 14 weeks or of separate blocks of a minimum of 6 continuous weeks or by agreement on more favourable terms. The employee has the right to return to his/her own job or suitable alternative employment. Time spent on parental leave is deemed to be time spent at work. There is provision for *force majeure* leave in the event of the urgent illness of a relation (including a relationship of domestic dependency and same-sex partners) where the immediate presence of the employee is required and is indispensable.

There is provision for carer's leave with carer's benefit and allowance (up to 104 weeks under the Carer's Leave Act 2000 with a right to return to work) when persons have to leave the workforce or work shorter hours due to looking after incapacitated relations in their home.

4. Equal pay

The Employment Equality Acts 1998 to 2008 provide that there cannot be direct or indirect pay discrimination in relation to employment on the gender ground. Remuneration has a wide definition and includes not only basic pay and is similar to Article 141. It has been held to include accommodation, bonus earnings, commission payments, marriage gratuities, overtime payments, permanent health insurance, redundancy payments and sickness payments. In order to bring a claim a claimant must show that there is a person of the opposite sex (the comparator) in the same employment working for the same or an associated employer doing 'like work'. 'Like work' is defined as where two people perform the same work under the same or similar conditions or each is interchangeable with the other, similar work or work performed by one is equal in value to the work performed by the other, having regard

to such matters as skill, physical or mental requirements, responsibility and working conditions. A claimant is entitled to the same rate of remuneration as a comparator of the opposite sex. The employer may use the defence of grounds other than sex.

5. Occupational pension schemes

Occupational benefit schemes are defined in Part VII of the Pensions Act 2004. There cannot be discrimination (direct or indirect) on the ground of gender.⁵⁵ The definition includes schemes for both self-employed and employed persons. ‘Occupational benefits’ include benefits in the form of pensions relating to termination of service, retirement, old age or death, interruptions of service by reason of sickness or invalidity (income continuance), accidents, injuries or diseases arising out of or in the course of a person’s employment, unemployment, expenses incurred in connection with children or other dependants. There are detailed provisions which render unequal rules null and void and automatically equalises the terms of the scheme to provide the equivalent treatment. Where there are provisions which infringe the principle of equal pension treatment on the gender ground and which are purported to take effect on or after 5 April 2004 (the date of the commencement of the Act), the provision is levelled up from that date until equalised on another basis. The Protection of Employees (Part-Time Work) Act 2001 provides that part-time employees who work less than 20 % of the normal hours of work of a comparable full-time employee may be treated less favourably in respect of pensions. Such exclusion could constitute indirect discrimination.

Pensionable age has been the same for men and women in Ireland both in occupational pensions and also in statutory retirement age. Account shall not be taken of differences in the level of contributions or the amount of benefits which have been included for the purpose of removing or limiting differences as between men and women or to the extent that the difference results from the use of actuarial factors differing according to sex. There cannot be gender discrimination in respect of survivor’s benefit or a deceased member’s widow or widower.

6. Statutory schemes of social security

Employers and employees pay Pay-Related Social Insurance contributions. Most contributory entitlements are based on the number of weeks of contributions. The social welfare provisions are contained in the Social Welfare (Consolidation) Act 2005 (as amended). Such legislation and rules are complex. The legislation provides for state benefits/assistance in respect of disability, unemployment, occupational injuries, health and safety (where the employment would affect mother and child), old-age (contributory and non-contributory) and retirement, invalidity, widow’s and widower’s pension. There are various other supplementary schemes for such persons. There are also various schemes which provide additional allowances or supplements for persons who may wish to go back to work or enter the workforce. In summary they provide for granting of various benefits if persons wish to obtain higher education at a later age. Since 1991 most part-time workers are included in the social welfare scheme. However, this group would have reduced social welfare contributions, i.e. the number of years of contribution and arguably this could be deemed to be indirect discrimination as the vast majority of such employees are women. In the main all movement in the tax and social welfare system is towards

⁵⁵ Or on any of the other eight grounds listed in the employment equality or equal status legislation.

individualisation. Whilst the rules are extremely complicated, there appears to be compliance with Directive 79/7.

7. Self-employed and helping spouses

In general in Ireland this Directive has not been put in place. Family members working together are generally not insurable under the social welfare legislation. Spouses of an employed or self-employed contributor are specifically exempt from social insurance contributions. However, spouses who are partners in a family business, or who work together in a legally incorporated company can be insurable. Self-employed partners have protection under the Employment Equality Acts 1998 to 2008 and self-employed women have maternity and adoptive leave benefits. However, such benefit is not applicable to assisting spouses. In summary the assisting spouse has no rights.

8. Goods and services

The Equal Status Acts 2000⁵⁶ to 2008 provide that there cannot be direct discrimination, discrimination by association or by imputation, or indirect discrimination based on gender⁵⁷ in respect of the disposal of goods and the provision of services, the disposal of premises and the provision of accommodation, activities of educational establishments and activities of registered clubs. A male-only golf club was considered not to be discriminatory under the Acts.⁵⁸ There cannot be gender or sexual harassment. There are certain exceptions on the ground of gender (for example on grounds of authenticity, privacy, sporting facilities or single-sex schools). The non-discrimination provision provides that it shall not apply to differences in the treatment of persons in relation to annuities, pensions, insurance policies or any other matters related to the assessment of risk where the treatment is effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or other relevant underwriting or commercial factors and is reasonable having regard to the data or other relevant factors. Ireland is availing of the derogation. Directive 2004/113/EC is now transposed since 20 July 2008 under the Civil Law (Miscellaneous Provisions) Act 2008. The amending provision is in respect of the assessment of the risk of the insurance (motor insurance, life assurance, health insurance). It provides that there can only be differences of treatment on the gender ground provided there is actuarial or statistical data from a reliable source or there are relevant underwriting or commercial factors. From 21 December 2009 there cannot be differences in the treatment in relation to pregnancy and maternity.

9. Enforcement and compliance

A person may seek material information from the person who allegedly discriminated against them. The parties may refer a case to mediation. In any proceedings under the Employment Equality Acts the claimant must show a *prima facie* case of discrimination and, if this is successful, the **burden of proof** then falls on the

⁵⁶ There was a further amendment to these Acts in respect of claims against licensed premises by the Intoxicating Liquor Act 2003.

⁵⁷ Or on any of the other grounds as under the Employment Equality Acts 1998 – 2008. The definition of ‘family status’ includes ‘being pregnant’. There is no reference to gender reassignment.

⁵⁸ *In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by section 51 of the Courts (Supplemental Provisions) Act, 1961, the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235. Appealed to the Supreme Court and judgment awaited (April 2009).

respondent to show that there was no such discrimination. The claim must be brought within six months of the alleged discrimination. If there are proceedings under more than one ground, each ground is a separate claim. Cases are referred in the first instance to the Equality Tribunal or on the gender ground only to the Circuit Court. A recommendation of the Equality Tribunal may be appealed to the Labour Court. There may be appeals on a point of law to the High Court. The Equality Tribunal may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for ongoing equal pay, and an order for compensation for the effects of acts of discrimination or **victimisation**. In equal treatment cases there may be an order for **compensation** up to a maximum of two years' remuneration⁵⁹ and/or an order for a specified course of action. In dismissal cases reinstatement, re-engagement or compensation up to a maximum of two years may be ordered. If the claim is referred to the Circuit Court there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Where the claimant is not an employee the maximum award is EUR 12 697.38. Interest may be awarded and the Circuit Court may award costs. There are provisions for enforcement and criminal sanctions.

A prospective claimant under the Equal Status Acts 2000 to 2008 must notify the person alleged to have discriminated against them within two months of the discrimination. A claim must be referred to the Equality Tribunal within six months of the alleged prohibited conduct. Compensation may be awarded up to a maximum of EUR 6 348 and/or an order may be issued for a specified course of action to be taken; however, a claim on the gender ground may also be brought to the Circuit Court which may order unlimited compensation. Claims against licensed premises are brought to the District Court. The claim may be referred to mediation if the parties so agree. There are provisions for enforcement and criminal sanctions.

Claims under the Pensions Acts 1990 to 2004 may be referred to the Equality Tribunal or to the Circuit Court (on the gender ground only with unlimited jurisdiction) within six months of the date of termination of employment.

Any person may refer a **collective agreement** to the Equality Tribunal where it is considered that a provision of the agreement is discriminatory. If such an agreement/provision is considered discriminatory, it is null and void. Collective agreements are generally considered to be non-binding. There are certain registered employment agreements (e.g. the construction industry) where the agreement is legally binding.

The **social partners** generally play a part in employment equality law, for example the Irish Business and Employers' Confederation and the Irish Congress of Trade Unions work in partnership in respect of equality generally.

The **Equality Authority** has considerable powers to include the function of working towards the elimination of discrimination, provides information on the maternity, adoptive and parental leave legislation and may provide codes of practice, undertake research and information, carry out equality reviews and audits, conduct inquiries and may issue a non-discrimination notice where it is satisfied that there has been or is discrimination. The Equality Authority may provide assistance to persons who consider that they are or have been discriminated.

⁵⁹ The maximum amount of compensation can only be awarded by the Equality Tribunal, even though a claimant may have been successful on more than one discriminatory ground.

Any litigation (which is rare) in respect of social welfare is a reference to a deciding officer and on appeal to an Appeals Officer and if necessary to the High Court.

10. Brief assessment

Arising from the complexity of the equality and employment leave legislation, the Law Reform Commission announced on 23 July 2008 that the legislation is to be restated so that it will be simpler for people to comprehend. Overall, the EU directives have been satisfactorily transposed into Irish law. It is questionable, however, whether the legislation includes 'real and effective compensation'. Still, the decisions of the Equality Tribunal and Labour Court are detailed and reasoned decisions. They are available online⁶⁰ and the Equality Authority, the Equality Tribunal and the Labour Court all provide excellent annual reports to include detailed legal sections. There is one major problem in respect of litigation in employment equality in that there are considerable delays in bringing proceedings before the Equality Tribunal due to the number of cases referred. In practice this can have a dissuasive effect on a claimant. There has been a considerable volume of case law and the Equality Tribunal, the Labour Court and the courts have applied the jurisprudence of the ECJ.

ITALY

1. Implementation of central concepts

Decree No. 198/2006, a consolidation act called 'Code of Equal Opportunities between Men and Women', gathers all gender anti-discriminatory provisions which were issued to implement EC directives or which already conformed with them. It regards women's participation in all fields, including the working relationship.

All notions of **direct and indirect discrimination** as well as the notion of **harassment and sexual harassment** repeat almost word for word the respective concepts set by EC directives. Case law is very scanty on all these matters and generally does not add anything to legislative provisions.

A slight difference concerns the notion of direct discrimination, which does not include the reference to a possible or a past comparable situation. This can probably be considered to be implied by the text, although we do not have any case law on this point.

On the contrary, a more serious gap concerns the lack of an express equalization of less favourable treatment on grounds of pregnancy and maternity as well as of the infringement of maternity rights and of dismissals during pregnancy/maternity due to sex discrimination.

The notion of indirect discrimination is even stricter than EC law as far as justification is concerned. In fact, neutral criteria which involve a disparate impact are only legitimate if they are essential requirements for the job.

Positive actions are not merely permitted but are also promoted and sustained by the allocation of a specific Fund, both in the private and in the public sector. Further funds have been allocated for the promotion of female self-employment and entrepreneurship and for the reconciliation of working life with family/private life. Positive actions, in a form of a plan set up to remove discrimination, are also the possible consequence of both an attempt at conciliation promoted by the Equality

⁶⁰ www.equalitytribunal.ie; www.labourcourt.ie.

Advisor and of an ordinary proceeding for collective discrimination, where the judge can order the adoption of a positive action plan in the decision ascertaining collective discrimination. The Civil Service plays a leading role in the enhancement of positive actions, as in this sector three-year positive action plans shall be drawn up in jobs and levels where women are under-represented. Infringements of this provision prevent the Civil Service from recruiting new personnel.

2. Access to work, working conditions

As regards the personal scope, the Code of Equal Opportunities provides a ban on gender discrimination which applies to all persons employed in any sector (both private and public, including the military forces) and irrespective of the size of the employer. On this point implementation is fully satisfactory although it does not go further than the EU law.

As regards the substantive scope, the ban on discrimination covers all stages of the employment relationship. That is to say: access to work, for the employed and self-employed, in a wide meaning, including vocational guidance, training, further training or refresher courses, as well as 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 by such organisations; working conditions, including the assignment of duties, promotion and remuneration; termination of employment; social security benefits, including retirement age.

The law does not authorize any general *a priori* exclusion of women. It only allows two exceptions: a gender requirement in hiring in artistic and fashion activities and in the pursuance of public performances, when such a requirement is essential to the nature of the work/job; specific exceptions, provided by collective agreements, to the prohibition on discrimination in access to work for women in cases of particularly heavy work.

Article 28 of Decree No. 81/2008, the new Code for Safety at Work, extended the evaluation of risks to safety and health at work to factors which can regard specific groups of workers, such as risks arising from work-related stress (following the European Framework Agreement signed on 8 October 2004) and from gender, age and race differences. Also, an express reference to risks concerning pregnant workers was included. Therefore, an overall assessment of risks shall take into consideration gender differences, as well as age and race differences. Moreover, the reference to work-related stress according to the European Framework Agreement involves an analysis of factors such as work organisation and processes (for instance working-time arrangements) and subjective factors (for instance social pressure, perceived lack of support), which often hinder the achievement of substantial equality at work.

3. Pregnancy and maternity protection; parental leave

Italian legislation, now consolidated by Decree No. 151/2001, goes far beyond the requirements of the EC directives. It provides a compulsory maternity leave of five months. The decree also provides: a 10-month parental leave to be taken until the child reaches the age of 8, which is paid for 6 months provided that the child is not older than 3 years; time off in connection with child care; and leave for workers taking care of disabled persons. Many other provisions extend some of the mother's rights to the father, e.g. the mother's compulsory leave in special cases and remunerated time off to take care of the child. As a measure to encourage fathers to take parental leave (which is still quite unusual in Italy), the maximum total length of the leave awarded per child has been increased from ten to eleven months if the father

takes it for at least three months. The most important care leaves are paid; the institution of figurative or notional contributions prevents workers from suffering prejudice in the future enjoyment of pension benefits due to absence from work for caring duties. At the end of the leave, workers have the right to return to the same workplace (or, if not possible, to a workplace in the same municipality as the previous one) and to the same job or, if that is not possible, to an equivalent job. Furthermore, the recent Act No. 101/2008 lays down the right of a woman on maternity leave to benefit at the end of this period from any improvement in working conditions to which she would be entitled during her absence.

As regards dismissal, it must also be noted that the protection afforded is much stronger than required by EU legislation, as it is ensured purely on grounds of pregnancy, regardless of whether the employer has been informed or not; moreover, protection is granted during pregnancy and maternity leave and for a period of 12 months following childbirth. The dismissal of the working mother during pregnancy/maternity is null and void. A dismissal on the ground of an application for, or the taking of, parental leave is also null and void.

All these provisions are also granted in the case of the national and international adoption and official custody of a child.

The EU requirements on guidelines for the assessment of hazardous agents/processes and assessments/information on specific risks and consequent actions to be undertaken have been transposed into the Italian system. The Decree also provides for a ban on night work for pregnant women and for a period of 12 months following childbirth. Women are also granted paid time off from work for antenatal examinations.

4. Equal pay

Legislation regarding equal pay applies to all employees in the private as well as in the public sector. Article 37 of the Constitution states that a working woman shall have the same rights and, for equal work, the same remuneration as a male worker. The latter constitutional principle was reworded and clarified by an ordinary provision stating that a female worker shall be entitled to the same remuneration as a male worker where the services required are equal or of equal value, and that occupational classification systems applied for the purpose of determining remuneration shall adopt common criteria for men and women.

No justifications for differences in pay are provided by Italian legislation, save those admitted on the ground of the general notion of indirect discrimination, such as a premium pay awarded by the employer to salespeople who are available for frequent business trips where workers obtaining it are mainly men, but mobility is an essential requirement for the job.

The concept of pay is not defined by the law, but has been widely construed by Italian courts, on the basis of collective agreements, as including any economic benefit in cash or in kind directly and indirectly paid on the ground of the employment relationship. Under industry-wide agreements, different job classifications on the ground of sex have been abolished from the 1960s onwards. However, indirect discrimination could hide in additional wages bargained at the local or enterprise level and in the so-called *superminimo individuale* (possible sums given on the basis of individual bargaining): the partial reversal of the burden of proof—could be an important measure to disclose this, but no recent and specific studies or case law can be recorded on this matter.

The implementation of EU directives is, on the whole, satisfactory.

5. Occupational pension schemes

The directives on occupational pension schemes have never been specifically implemented.

The Italian system shows, in particular, some discriminatory features. In the first place, the occupational old-age pension is allowed on the attainment of the pensionable age established in the statutory system, where women's pensionable age is set at 5 years lower than that for men. Women can, however, carry on working until the pensionable age set for men: for this purpose, the protection against unfair dismissal has been extended to the extra period during which they can choose to work. In this respect, therefore, men are subjected to more disadvantageous treatment than women, as they cannot anticipate their pension and have a fixed pensionable age set at 65. The Court of Justice (case No. 46/07) has declared the pension scheme for civil servants, as managed by INPDAP (National Provident Institution for the Employees of Public Administrations), to be discriminatory on the basis of Article 141 EC, since it provides that the general pensionable age for men is 65 and for women 60. The Court, however, regarded the INPDAP scheme as an occupational scheme, whereas the Italian legislation considers it a statutory fund that replaces the general insurance public pension scheme run by the INPS (National Social Welfare Institute).

Another discriminatory feature concerns the anticipated payment of severance pay, which is allowed in case of parental leave: when workers pay the severance lump-sum into occupational schemes for the purpose of contributions, they lose the opportunity to benefit from the anticipated payment thereof for reasons of parental leave.

Furthermore, the discipline of the supplementary funds makes no provisions for the recovery of wasted contributions during maternity leave or during leave for serious family reasons; thus the funds' regulations are allowed to omit provisions such as those on notional contributions or on redemption. In the case of maternity, many fund regulations provide for a reduced rate of notional contributions, i.e. only the contributions corresponding to the amount of the maternity allowance are credited.

Our legislation on occupational funds does not show other discriminatory features based on gender.

6. Statutory schemes of social security

The directives on statutory schemes of social security have never been specifically implemented.

The following are the discriminatory features of the statutory social security system in the light of Directive 79/7/EEC. In first place, insurance and contribution periods for the purpose of determining the amount of pension (and according to some scholars also for the purpose of both crediting weekly contributions and the definition of the insurance period) for part-timers under the pay-based system are calculated proportionally to the number of hours effectively worked; therefore, part-timers are not credited with contributions for the weeks when they do not carry out their working activity and this can noticeably endanger the contribution record of vertical part-timers. Then, aggregations of income in order to determine entitlement to the supplementation of pensions to the minimum and its amount can engender indirect discrimination: indeed, even if the threshold is doubled when the income of the spouse is taken into consideration, the benefit may be refused more frequently for women than for men, provided that men generally have incomes higher than women. Furthermore, vertical part-time workers cannot contribute to unemployment insurance, in relation to the periods of suspended work, on the assumption that the

inactivity during those periods is voluntary, as it is part of the working time agreement which exists between the employer and the vertical part-timer. Finally, temporary, seasonal and precarious workers are excluded from the mobility allowance under the system of social protection for unemployment and this can be of direct concern once again for women.

As regards the exclusions in Article 3(2) of the Directive, the Italian Family Allowance falls within this clause. The scheme again reveals discriminatory features as regards part-time workers working less than 24 hours a week and vertical part-timers, who are entitled to benefits in proportion to the number of days spent at work, independently from the number of hours worked each day.

Survivors' provisions, on the other hand, are part of the old-age pension system and as such fall within the objective scope of the Directive. The Code of Equal Opportunities lays down the principle of gender equality as regards survivors' benefits.

The exclusions in Article 7(1) of the Directive have been used in the Italian social security system in relation to both the pensionable age and the advantages as regards old-age pensions for the purpose of child rearing. Women's pensionable age for the purpose of the old-age pension is set at 5 years lower than that of men. Given women's higher life expectancy, the possibility of anticipated access to pension implies a higher real rate of yield for women's pensions than those of men. Women can, however, carry on working until the pensionable age set for men. Thus, the pensionable age is only flexible for women and not for men: within a statutory scheme, this might be justified as it helps to fill the gaps in the contribution records of the claimants or to compensate for the care work carried out by women.

Advantages as regards old-age pensions for the purpose of child rearing are provided under the new contribution system for the benefit of women. More favourable coefficients of transformation (according to which pensions are calculated) are fixed for maternity. Then, again in relation to maternity, a reduction in the age of retirement of 4 months per child is granted, with a maximum limit of 12 months. Finally, it is also provided that women with children are able to receive a retirement pension subject to reduced conditions.

7. Self-employed and helping spouses

The actual impact of Directive 86/613/EEC on national regulations has been very weak also because the regulations on access to professions, self-employment, the establishment of companies, small entrepreneurs (including farmers), family enterprises, agrarian families and conjugal enterprises were not discriminatory and they did not require any specific intervention.

Italian legislation even goes beyond EU provisions. In fact, the Code of Equal Opportunities between Men and Women implements the principle of substantial equality in the field of entrepreneurial activity, providing for the promotion of female self-employment through preferential measures meant to favour access to banking credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of undertakings owned or managed by a high percentage of women in the most innovative sections of different production sectors.

In relation to social security provisions, the coverage in terms of social protection is provided by specific public schemes concerning the commercial, agricultural and craft sectors.

As for maternity rights entitlements, a maternity allowance is provided for mothers who are not covered by the social security system and earn less than a certain amount. Self-employed women are entitled to a maternity allowance, independent of their decision whether or not to suspend their working activity. Workers on projects have a right to suspend the working relationship. Furthermore, three months of remunerated parental leave are assured to women performing the liberal professions and to self-employed women in the sectors of commerce, handicrafts and agriculture. Helping spouses can only benefit from measures which do not depend on the performance of a specific working activity and they are not included in the personal scope of provisions aimed at implementing Directives 82/95/EEC and 96/34/EC.

8. Goods and services

EC Directive 2004/113/EC has recently been implemented by Decree No. 196/2007, which adds ten articles to the Code of Equal Opportunities. On the whole, it satisfies the EU law requirements, but does not go any further, as it repeats word for word the text of the Directive, including provisions on its substantive scope and on the admitted exceptions.

At present, there is a total lack of cases regarding the implementation of Directive 2004/113/EC. Neither were any cases reported regarding gender discrimination as regards goods and services before the implementation of the Directive. So it is not easy to detect possible weaknesses of the text. From a general point of view, we can underline that on the one hand, there is no debate at all in Italy as regards differences in access or prices of services on the ground of sex, and that such differential treatment is, as far as we know, very rare. So a substantive implementation may need measures aimed at making people and institutions aware of the importance of this issue. The sector where discrimination is most likely to take place is that of insurances and financial services

9. Enforcement and compliance

The Code of Equal Opportunities provides protection against **victimisation** in the subsection on sexual harassment. It could probably be interpreted as referring to any kind of discrimination but no case law on this item can be traced.

The provision on the partial reversal of the **burden of proof** can be deemed to be a satisfactory implementation of Directive 97/80/EC, and it has been used by the scanty case law on indirect discrimination. As regards the use of quantitative/statistical data, the Code goes further than EU law as it requires companies with more than one hundred employees to draw up every two years (and to deliver to the company union representatives and to the Regional Equality Advisers) reports on the workers' situation (male and female), as regards e.g. recruitment, professional training, career opportunities, remuneration, dismissal and retirement.

Minor **criminal sanctions** are provided for the infringement of the prohibition on discrimination in access to work and working conditions, and **administrative sanctions** are provided for the protection of motherhood and fatherhood. Positive actions are also provided as remedies against collective discrimination ascertained by the judge. The revocation of public benefit or even the exclusion, for a certain period, from any further award of financial or credit inducements or from any public tender is also provided in the case of ascertained direct or indirect discrimination. The general remedy of nullity is enforceable for all discriminatory acts and in the case of dismissal on the ground of pregnancy or marriage. The special **remedy** (reinstatement) provided by Article 18 of the Worker's Statute is enforceable in the case of a discriminatory

dismissal. Compensation for economic damage can be awarded following the general principles on contractual and extracontractual liability. The refund of non-economic damage, which in the Italian system is limited to cases expressly provided by the law, is also provided by the Code on Equal Opportunities, but only for special and urgent proceedings. In general, the prohibition on stating an upper limit for compensation or reparation is not expressly provided by the law, as such a limit does not exist in the Italian system. This piece of national legislation can reasonably be considered to be in line with the Directive.

Cases on equality rights are judged under procedures for labour disputes; ordinary or special urgent legal proceedings can be brought to court, according to different circumstances.

Italian legislation empowers Equality Advisers to assist the victims of discrimination. They can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisers can also proceed when delegated by an individual employee or can intervene in the process initiated by the latter. Recently, also associations and organizations promoting respect for equal treatment between male and female workers have been entitled to act on the workers' behalf.

As regards the functions required by EU law, a central role is played by the **Net of Equality Advisors and the Equal Opportunities National Committee** set up by the Labour Ministry Central Offices. The law states that they shall be independent, but it is up to the Minister of Labour to set the conditions for the organisation and the functioning of the Equality Advisors' staff. The lack of independency of the National Equality Advisor was shown by the Decree of 30 October 2008 of the Labour Minister, in agreement with the Minister for Equal Opportunities, which removed the advisor from office, arguing that she was not 'in line' with the Government's policies.

The Commission for Equal Opportunities between Men and Women, which deals with all sectors, the Committee for the promotion of female entrepreneurship, and the General Division, which deals with equality in the field of access to and the supply of goods and services, all established by the Prime Minister's Offices (Equal Opportunities Department), cannot be deemed to be independent.

Trade unions can be delegated by the worker to act on his/her behalf in case of discrimination, receive the gender data on personnel from undertakings employing more than 100 workers, and can ask to be admitted to the financing of positive action plans. There are no other legislative provisions aimed in general at sustaining the **social partners'** role in compliance with and the enforcement of gender equality law. The social partners' sensitivity in these issues is still not uniform in all regions and sectors and it is mostly absent in one of its most important aspects, that is mainstreaming in collective bargaining.

Collective agreements are not generally applicable so they cannot be used as a means to implement EU gender equality law.

10. Brief assessment

As regards labour law, several legislative interventions during the last twenty years grant, on the whole, a good level of implementing EU directives. Sometimes domestic legislation has gone further than EU law. This is the case with rulings on maternity and paternity protection and leave, positive actions, gender data on personnel in undertakings employing more than 100 workers, justification clauses for indirect discrimination, and the promotion of female self-employment. Some gaps are still to

be found. One of these is the lack of an express equalization of less favourable treatment based on pregnancy or maternity, including dismissal during pregnancy/maternity, with sex discrimination. Another gap can eventually be detected as regards the functions of bodies entrusted with the promotion of respect for the principle of equal treatment, the conformity of which relies on the concept of independence adopted at the EU level. The provision on victimisation should also expressly refer to all kinds of discrimination. More in general, the analysis of the recent national legislation implementing EU law shows a tendency to merely transpose it by a verbatim repetition of the EU Directive, which does not ensure the necessary coordination with other provisions. Last but not least, it is worth emphasising that the Recast Directive (2006/54/EC) has not yet been implemented in our system.

As regards social security legislation, despite the fact that the directives have never been specifically implemented, the domestic legislation is, on the whole, fairly in line with EU law.

However, in relation to social security, both public and occupational, one has to bear in mind that the benefit rights of atypical workers, intermittent, temporary, occasional and part-time workers as well as those of workers with earnings which are less than average, many of whom are women, will always be at stake as their qualifying conditions, their contributions record and the amount of their benefit depends on the regularity of their careers.

LATVIA

1. Implementation of central concepts

The ECJ has held that discrimination can only arise through the application of different rules to comparable situations or the application of the same rules to different situations.⁶¹ The Constitutional Court of Latvia has adopted the same legal doctrine interpreting Article 91 of the Constitution of Latvia providing for the general principle of equality.⁶² However, the principle of non-discrimination in Latvian normative acts is formulated as ‘prohibition of differential treatment’ instead of the term ‘prohibition of discrimination’. It may result in an improper application of EC law, for example by excluding discrimination which arises due to the equal treatment of persons in different situations or by excluding exceptions provided within the framework of the principle of non-discrimination.

National legislation provides for an identical definition of **direct discrimination** as provided by EC law. However, none of the direct discrimination definitions state explicitly that less favourable treatment on grounds of pregnancy and maternity also constitutes direct discrimination. So in practice, it has resulted in an improper application of EC law. A national Court has dealt with a case of dismissal on the ground of pregnancy without the application of any EC non-discrimination provisions.⁶³

⁶¹ Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker*, [1995] ECR I-00225, Paragraph 30.

⁶² See, for example, the decision of the Constitutional Court of Latvia in case No.2000-07-0409, <http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/D0565968560B2A16C2257451004B464B?OpenDocument>, last visited 27 May 2008.

⁶³ Decision of the Riga city Central district court of 26 January 2007, in civil case No. C27176204. Draft amendments to the Labour law explicitly provide the principle that less favourable treatment on grounds of pregnancy and maternity constitutes direct discrimination. It is suggested that since

The definition of **indirect discrimination** has not been correctly implemented. Latvian law provides that indirect discrimination arises where in comparable situations a neutral condition, criterion or practice creates or may create unfavourable consequences due to the sex of the person. Such an extra requirement does not feature in the EU definition of indirect discrimination and, in fact, it negates the whole idea of indirect discrimination: persons are subjected to less favourable treatment exactly because they are in a different situation.

Latvian law neither allows nor provides for any kind of **positive action**. Article 29(4) of the Labour Law, Article 2¹(2) of the Law on Social Security and draft amendments to the Law on the Protection of Consumer Rights provide that discrimination also occurs where someone instructs someone to discriminate against another person.

Article 2¹(5) of the Law on Social Security provides for a prohibition of **harassment**, but Article 29(7) of the Labour Law and draft amendments to the Law on the Protection of Consumer Rights provide for both the prohibition of **harassment** and that of **sexual harassment**.

2. Access to work, working conditions

Article 29(1) of the Labour Law provides for a prohibition of discrimination regarding all stages of employment – recruitment, working conditions and dismissal. A person may claim a discriminatory refusal to employ on the grounds of Article 34 of the Labour Law, discriminatory working conditions on the grounds of Article 95 of the Labour Law, a discriminatory dismissal on the grounds of Article 29(1) and a discriminatory dismissal during a probationary period on the grounds of Article 48 of the Labour Law.

The right of non-discrimination in the public sector has only been partially implemented. There are several groups of persons which are employed in the public sector under special laws: civil servants, officers of the Ministry of the Interior, judges and prosecutors. The right of non-discrimination is available to civil servants and officers of the Ministry of the Interior.⁶⁴ The law on Judicial Power prohibits discrimination only regarding the election of a judge⁶⁵, but the right to non-discrimination is not further extended to the service conditions. No right to non-discrimination is provided for with regard to prosecutors. Labour law applies to the persons who are employed in public sector, but who do not fall within any of the categories mentioned. There are no provisions laying down the right not to be discriminated against when one is self-employed or as regards access to self-employment.

Concerning exceptions, Article 29(2) of the Labour Law provides that the sex of the person may create justified differential treatment if its objective is an occupational requirement which is proportionate. Other exceptions concern the special rights of persons during pregnancy, maternity, paternity leave and with regard to family responsibilities.

Latvia provides an exclusive right for men to take paternity leave, the definition of direct discrimination must include also less favourable treatment on grounds of paternity.

⁶⁴ Law on the Civil Service, OG No. 331/333, 22.09.2000., as amended up to 2007. OG No. 93, 12 June 2007.

⁶⁵ Article 51(2) of the Law on Judicial Power, OG No.1, 14.01.1993., as amended until 1997, OG No.46/47, 13 February 1997.

3. Pregnancy and maternity protection; parental leave

The health and safety provisions contained in the Labour Law are equally applicable to pregnant workers, workers who have given birth to a child for a period of one year and workers during breastfeeding periods (these will hereinafter be referred to as the 'maternity' period).

The Labour Law provides that after notification by a doctor, the employer may not employ a worker during the maternity period in work which is dangerous to the health or safety of the worker or the child and the employer must provide the worker with such employment conditions so as to prevent any risk to her health and safety. If this is not possible the employer must assign the worker to other work or provide her with leave on average salary. The employer may not send the worker on a business trip or compel her to work overtime during the maternity period unless she agrees to this in writing. The Labour Law prohibits the dismissal of the worker during the maternity period, except in cases strictly defined by the law. A notice of dismissal may also not be given during sick leave, annual leave or during periods when the worker does not perform work due to other justified reasons.

Although the Labour Law provides for a high standard of protection for workers during the maternity period, there are still some problems, however. Firstly, the Labour Law prohibits the issuing of a notice of dismissal which must be given one month before the actual dismissal while EU law prohibits an actual dismissal. Secondly, according to EU and national legislation a pregnant worker is a worker who has informed the employer of her pregnancy. In practice, the employer gains knowledge of the pregnancy before the pregnant worker officially informs the employer.

The Labour Law also gives the right to women to insist on part-time work during the maternity period. It is undeniable that the extra right given to a woman only because she has given birth less than a year previously demonstrates that the Latvian legislator considers women to be the main carers of children in the family.

Under the Labour Law maternity leave may last from 56 days before and 56 days after the expected date of confinement. Besides, if a woman has visited a doctor and has registered as a person under medical supervision due to pregnancy by the 12th week of pregnancy she is entitled to a period of extra leave for 14 days. The Labour Law provides that the employer may not employ a pregnant worker two weeks before and after birth giving.⁶⁶ During maternity leave a woman acquires the right to annual leave.

Latvian legislation does not provide for maternity pay, only for a maternity allowance under the state social security system. Maternity benefit in Latvia is paid in the form of an allowance under the state social security scheme. The amount of maternity allowance exceeds the normal salary. It constitutes 100 % of the gross salary received during the period taken into account for the purposes of calculating the maternity allowance. The right to a maternity allowance is provided by the same period as provided by the Labour Law.

Each worker, irrespective of his/her sex, who has a child under one and half years old has a right to have time off for feeding. Breaks for feeding must be paid in full. Piece-work must be remunerated according to average earnings.

The Labour Law provides for the right to take 10 calendar days paternity leave for the father of a child, but the Law on Maternity and Sickness Insurance provides for

⁶⁶ This provision is in contrast to Article 8 of Directive 92/85 and the ECJ ruling in *Boyle*, which provides for mandatory maternity leave of two weeks in total. Case C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* [1998] ECR I-06401, paragraph 49.

the paternity allowance. A father may obtain this right immediately after the child's birth but not later than when the child is two months old. The amount of paternity leave is 80 % of the average salary. So, the paternity allowance is less than the maternity allowance.

The Labour Law provides that each employee has a right to parental leave of 18 months until the child reaches 8 years. One of the parents is entitled to a state social security allowance – the parent's allowance – until the child reaches 1 year. The parent's allowance constitutes 70 % of the average salary. Parents are entitled to a flat-rate state social allowance (LVL 30 or EUR 43) until the child reaches 2 years.

The Labour Law grants one of the adoptive parents the right to 10 calendar days adoption leave. The worker also has a right to unpaid leave if he or she is at the pre-adoption stage and the child resides with him/her.

The Labour Law requires that the worker after maternity, paternity, childcare and adoption leave be provided with his/her previous or equivalent work, with working conditions which are not less favourable and to benefit from all the improvements in the employment conditions to which he/she would have been entitled.

4. Equal pay

The concept of equal pay is provided by Article 60 of the Labour Law. Article 60(1) lays down the general right to receive equal pay for equal work or work of equal value, irrespective of one's sex. There is no explicit notion of 'equal pay' provided by the law. However, Article 59 of the Labour Law does provide for the notion of 'pay'. It states that pay is regularly paid remuneration for work, which also includes bonuses and other kinds of remuneration in connection with employment as provided by Acts of Parliament, collective agreements or employment agreements.

There have so far been no national cases on the components of pay within the meaning of equal pay, thus it is unclear whether the national courts will apply the notion of pay as defined by Article 59 of the Labour Law, which does not explicitly define all the possible components of pay within the meaning of equal pay as derived from the case law of the ECJ.

There are no Acts of Parliament to define such concepts as 'equal work' and 'work of equal value' and there is no case law dealing with issues such as justifications for differences in pay.

Enforcing the right to equal pay is overall problematic, because, firstly, information on remuneration is usually confidential and, secondly, there is no effective control mechanism on payment systems within private undertakings. So, most frequently an employee can only simply guess how much his/her colleagues performing the same work actually receive in the form of wages and according to which criteria the employer determines the pay of individual workers. Regarding pay for work of equal value, the State has not adopted any Acts of Parliament laying down specific criteria for establishing work of equal value.

5. Occupational pension schemes

Article 11(4) of the Law on Private Pension Funds provides that an employer may only apply objective criteria (such as profession, position and employment terms) regarding the amount of contributions to private pension funds. The employer may not require different amounts of contributions according to the sex of the employee.

Currently, Latvian private pension funds do not provide for services such as payments out of private pensions based on biometrical data (life expectancy). Latvian private pension funds work as savings banks. This means that a person after attaining

the age of 55 may receive only the sum which he/she or the employer has contributed to the private pension fund. Saved sums of money may be paid out immediately after attaining the pensionable age or on a monthly basis. Under such circumstances, no actuarial factors are applicable.

In order to implement Directive 2004/113/EC, on 19 February 2009 Parliament adopted amendments to the Law on Insurance Companies and their Supervision, which came into force on 5 March 2009. Article 5 of said law is intended to implement requirements of Article 5 of Directive 2004/113/EC. These amendments allow the use of actuarial factors but prohibit less favourable treatment with regard to pregnancy and maternity concerning premiums and benefits.

In addition to pensions provided by private pension funds, there are several categories of persons employed in the public sector who are entitled to long-term service pensions: persons in military service,⁶⁷ a certain category of persons serving at the Ministry of Interior affairs,⁶⁸ public prosecutors,⁶⁹ judges⁷⁰ and artists employed by the State or a municipality.⁷¹ Although this kind of pension is fully paid from the state budget, it still complies with all three criteria established by the ECJ in *Niemi*,⁷² thus falling within the scope of Article 141. Usually, the persons in the categories listed above are entitled to early retirement, and therefore, until they reach the statutory pensionable age, this special pension serves as a bridging pension. After the date of becoming entitled to old-age pension, the long-term service pension is proportionately decreased to the level of the old-age pension.

6. Statutory schemes of social security

The Law on Social Security provides for the principle of non-discrimination, definitions of direct and indirect discrimination and harassment, as well as the prohibition on any instruction to discriminate. The Law on Social Security constitutes an umbrella piece of legislation regulating the whole social security system – including the right to healthcare, education, assistance to job seekers, state social allowances, state social insurance allowances, and social assistance as provided by the State and municipalities. It follows that the principle of non-discrimination provided by the Law on Social Security goes far beyond the requirements of EU law.

Since 2008 entitlement to the state old-age pension commences at the same age for both sexes – 62.

The most problematic issue is the acquisition of benefit entitlements following periods of interruption due to childcare leave. Each employed person has a right to a state social insurance allowance proportionate to the contributions made by him/her and by the employer. During childcare leave, the State insures the parent instead of

⁶⁷ *Militārpersonu izdienas pensiju likums: LR likums. Latvijas Vēstnesis 1998. 1.aprīlis, No. 86 (1147), 01.04.1998 (Law on pensions for the military).*

⁶⁸ *Par izdienas pensijām Iekšlietu ministrijas sistēmas darbiniekiem ar speciālajām dienesta pakāpēm: LR likums. Latvijas Vēstnesis 1998. 16.aprīlis No. 100/101 (1161/1162) (Law on pensions for employees of the system of Ministry of Interior Affairs with special ranks).*

⁶⁹ *Prokuroru izdienas pensiju likums: LR likums. Latvijas Vēstnesis 1999. 3.jūnijs No. 181(1641), (Law on pensions for prosecutors).*

⁷⁰ *Tiesnešu izdienas pensiju likums: LR likums. Latvijas Vēstnesis 2006.7.jūlijs No. 107 (3475) (Law on long term service pensions for judges).*

⁷¹ *Valsts un pašvaldību profesionālo orķestru, koru, koncertorganizāciju, teātru un cirka mākslinieku izdienas pensiju likums: LR likums. Latvijas Vēstnesis 2004. 7.jūlijs No. 106 (3045) (Law on pension for artists of state and municipal orchestras, choirs, concert organizations, theatres, and circus).*

⁷² Case C-351/00 *Pirkko Niemi* [2002] ECR I-07007.

himself/herself, but in a minimum amount. Consequently, if, for example, the risk of unemployment materializes during a particular period after childcare leave, the person concerned is entitled to an unemployment allowance of a minimum amount. The same problem applies to the old-age pension, which is calculated on the basis of actual contributions. Being on childcare leave negatively affects the amount of the old-age pension. Since a considerably greater proportion of women than men still use the right to childcare leave, such a situation constitutes indirect discrimination against women. Such treatment does not correspond to the principle of non-discrimination provided by the Law on Social Security.

On 1 January 2009, direct discrimination against persons on paternity leave was eliminated. Previously, the State did not insure young fathers against the social insurance risks listed in Directive 79/7. Respective amendments were adopted by Parliament on 16 June 2008.

7. Self-employed and helping spouses

The provisions of national law correspond to the requirements of Directive 86/613/EEC only with regard to the right of helping spouses to protection during pregnancy and motherhood. In particular, according to the Law on State Social Insurance the spouse of a self-employed person has a right to join the statutory social security system voluntarily. She/he may then insure herself/himself against the risks of old age, maternity, disability, sickness and child care.

It is doubtful whether such regulation ensures the effective protection of helping spouses in practice, since there is only a right to join the state social security system voluntarily.

8. Goods and services

The provisions of Directive 2004/113/EC are still to be implemented. However, since an infringement procedure has been initiated against Latvia for the non-implementation of Directive 2000/43/EC with regard to access to and the supply of goods and services, the executive and legislative powers are working with some haste on the implementation of both Directive 2000/43/EC and Directive 2004/113/EC. In July 2008 amendments to the Law on the Protection of Consumer Rights were adopted providing for non-discrimination on the grounds of sex and race or ethnic origin. Further draft amendments to the Law on Insurance Companies and their Supervision are on the legislative agenda providing for a prohibition on use of actuarial factors in insurance and less favourable treatment on grounds of pregnancy and maternity.

Nevertheless, there is a doubt as to whether those amendments will implement all the requirements of Directive 2004/113/EC because the Law on the Protection of Consumer Rights concerns only those goods and services providers who act within their professional capacity. They do not cover the selling of goods and the provision of services between private parties. For example, the draft amendments do not cover such a situation where a person sells his/her own apartment and offers it to the general public by commercial means.

In April 2009, in its second reading, Parliament adopted the draft Law on non-discrimination of natural persons pursuing professional activities⁷³. This law is intended to implement one more aspect of the Directive 2004/113/EC: it prohibits

⁷³ Available on the home page of the Cabinet of Ministers, www.mk.gov.lv at <http://www.mk.gov.lv/lv/mk/tap/?dateFrom=2007-09-29&dateTo=2008-09-28&text=Fizisku+personu%2C+kuras+veic&org=0&area=0&type=0>, accessed 28 September 2009.

discrimination against self-employed persons with regard to the access to and supply of the goods and services necessary for the professional activities of those persons.

9. Enforcement and compliance

In Latvia there are only two kinds of courts – ordinary courts deciding civil and criminal matters and administrative courts. Employment disputes fall under the jurisdiction of the ordinary courts, but disputes concerning employment in the public sector fall under the jurisdiction of the administrative courts.

The prohibition of **victimisation** is governed by the Labour Law. It is generally formulated – prohibiting any negative action by the employer due to the fact that the employee has made use of or claimed employment rights. National case law shows that courts consider the prohibition of victimisation as going beyond the scope of the EC Non-discrimination Directive and it applies to any kind of victimisation, irrespective of whether a discriminatory ground has been involved.⁷⁴

The burden of proof is also governed by the Labour Law. The application of the reversal of the burden of proof by the national courts is not satisfactory. So far, only one case can be identified where the national court explicitly refers to the concept of a reversal of the burden of proof.⁷⁵ This may be explained by uncertain legal regulations. The labour law only refers to the principle of reversed burden of proof, whereas in civil procedure, the Law on Civil Procedure applies. This Law, however, provides for a procedure of competition of parties only.

There are two **sanction mechanisms** for a breach of the principle of non-discrimination. One is provided by the Labour Law and is applicable in disputes between private parties – the employer and the employee. Article 29(8) of the Labour Law explicitly provides for the right to compensation for moral damage in cases where a breach of the principle of non-discrimination has been established. In the case of a discriminatory dismissal a right to reinstatement is provided. The second mechanism concerns the vertical relationship, namely sanctions which administrative institutions may impose on private persons. Currently, Article 204¹⁷ of the Administrative Violation Code provides for an administrative penalty of LVL 100 to LVL 500 (EUR 142 to EUR 711) if a person has breached the principle of non-discrimination as laid down in specific Acts of Parliament. Article 149¹ of the Criminal Law also provides for criminal sanctions if a person has breached the principle of non-discrimination. The sanction is a fine of up to 30 times the minimum wage (presently LVL 4 800 or EUR 6 830). However, data shows that since these norms were adopted, no administrative and criminal cases have been decided by national courts. Only damages under the Labour Law have been more or less effective. Usually, the national courts partially allow claims for compensation for moral damage.

There are some problems with the time frame for bringing a claim before the courts when the principle of non-discrimination has been breached in an employment relationship. In discrimination cases the Latvian Labour Law allows one month for bringing a claim. Other types of claims under the Labour Law, according to Article 31(1), must be brought within a time-limit of two years, except for claims of unfair

⁷⁴ Decision of 16 February 2005 by the Riga City Central District court in case No. C27175804; C-308/05/7; decision of 21 September 2005 Riga Regional court in case No. CA-2787/19, 2005; decision of 8 February 2006 by the Supreme Court of Latvia in case No. SKC-54.

⁷⁵ *Ilvija Pūce, Pienākums pierādīt* (Obligation to prove), portal www.politika.lv, 18.12.2007, at <http://www.politika.lv/index.php?id=14922>, accessed 14 June 2008.

dismissal. This is in breach of two principles provided by EC law – effectiveness and equivalence.⁷⁶

Formally, the **national courts are accessible** to victims of discrimination. However, victims of discrimination do not always go to the courts. One of the reasons for this is the costs of legal services, which are high, and, secondly, the fear of victimisation. However, since 2006 state-paid legal assistance is available for persons who lack the necessary financial means. The Law on Associations and Foundations provides for the right of non-governmental organizations to represent the interests of individuals before the national courts. In addition, the **National Equality Body** in Latvia functions as the Ombudsman Office of the Republic of Latvia. The Ombudsman's office supervises the implementation and enforcement of all international law providing for the principle of non-discrimination in the field of human rights. According to the Ombudsman Law the Ombudsman has a right to represent the interests of private persons in civil proceedings when there has been a breach of the principle of non-discrimination. So far the Ombudsman's office has acted as such a representative in two cases.

Overall, **collective agreements** are not generally binding. Collective agreements are usually applicable within one enterprise or institution. However, there are some sectors of industry which have generally binding collective agreements (for example, construction, medicine, the railways), but they do not specifically deal with issues concerning gender equality. Trade union movements and workers' representatives are not yet well developed.

10. Brief assessment

The EU gender equality *acquis* has only been partially implemented in Latvian law. EC non-discrimination law has not yet been implemented with regard to self-employed persons and with regard to access to and the supply of goods and services. Implementation is also not always correct and precise. The main preconditions for the effective enforcement of EC gender equality law is awareness rising in society, so that persons are able to identify discrimination, and professional training for judges and lawyers. Overall, the situation concerning the enforcement of the EC gender equality *acquis* is becoming better, taking into account that Latvia only joined the EU in 2004.

LIECHTENSTEIN

1. Implementation of central concepts

The main concepts of EU gender discrimination law have been implemented in Liechtenstein by the Gender Equality Act (GLG). The GLG contains definitions of **direct and indirect discrimination** that exactly follow the wording of Directive 2002/73/EC. **Positive action** is allowed insofar as there is no discrimination if adequate measures are taken to achieve factual equality. **Instructions to discriminate** are also considered as discrimination according to the GLG. Definitions concerning **harassment and sexual harassment** in the GLG again follow those in Directive 2002/73/EC.

The intention of the legislator by introducing these definitions into national law was indeed to attain harmonisation with EC law. But there is no jurisprudence dealing with these concepts, consequently the field of interpretation is still rather open.

⁷⁶ Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-07835, para. 44.

On 23 September 2008, the Government of Liechtenstein addressed a bill presented to Parliament to implement **Recast Directive 2006/54/EC**. The proposal does not go into much detail, but lists several national laws that will have to be changed in the future in order for legislation to be in line with the Directive.⁷⁷

2. Access to work, working conditions

The Gender Equality Act regulating the promotion of *de facto* equality between women and men entered into force on 5 May 1999 and applies to employees in private and public employment relationships. Article 3(4)(b) GLG provides for an exception to discrimination where, firstly, adequate measures are taken to achieve factual equality, and, secondly, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, a characteristic related to sex constitutes a genuine and determining occupational requirement.

3. Pregnancy and maternity protection; parental leave

Several laws contain norms which are relevant to the subject, namely the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), the Labour Code (*Arbeitsgesetz*) and the Sickness Insurance Act (*Krankenversicherungsgesetz, KVG*).

Articles 35, 35a and 35b of the Labour Code entered into force on 1 January 1998 and regulate health protection, occupational activities, alternative work and the continued payment of wages during maternity. According to these provisions, working conditions for pregnant workers and women who are breastfeeding have to be adapted so that their health and that of their children are not affected. Women in this condition can only be employed with their consent. They are allowed to leave the workplace by simple notification. Breastfeeding mothers are entitled to time off which is necessary for breastfeeding. Women are not allowed to work for eight weeks after childbirth. Pregnant workers are not allowed to work from 8 p.m. to 6 a.m. during the eight weeks preceding childbirth. The employer is obliged to offer them equal work from 6 a.m. to 8 p.m. The same applies in the case of a medical indication at any other moment during the pregnancy and for the period between 8 and 26 weeks after childbirth. Women are entitled to the continued payment of 80 % of their salary plus adequate compensation for the rest if their employer is not able to offer them equal work between 6 a.m. and 8 p.m. During the entire period described, the woman must not be deprived of any advantage with respect to her professional position in the company, her seniority or any promotion linked to her regular workplace.

§ 1173a Article 18 Section 3 ABGB prescribes that the employer has to continue to pay salary to the employee during absence due to pregnancy and childbirth, provided that the employment contract was concluded for a period of more than at least three months, or that the employment relationship has already lasted for more than three months. A reduction in the annual leave is not allowed if the employee is absent from her workplace for up to five months a year on the grounds of pregnancy and childbirth. According to § 1173a Article 49 Section 1(b) ABGB the employer is not allowed to give a notice of dismissal to the employee during her pregnancy and up to 16 weeks after childbirth. This last provision was introduced in 1992.

Furthermore, § 1173a Article 36a ABGB provides for a return to the workplace after maternity leave. This provision refers to the disposition governing a return to the workplace after parental leave.

⁷⁷ Law proposal BuA 2008/118; <http://bua.gmg.biz/BuA/index.jsp>, accessed 17 April 2009.

Article 15 KVG provides that benefits shall be paid to women for 20 weeks of which at least 16 weeks are after childbirth, provided that the woman in question was insured before childbirth for a period of at least 270 days of which three months must have been consecutively. The allowance under this maternity insurance scheme amounts to 80 % of the insured salary.

Protection is also foreseen with regard to parental leave and for employees with family obligations, if they have to raise children up to 15 years of age and for relatives or near persons needing care, this has to be taken into account when fixing the working hours. Such an employee has to agree to work overtime and he or she can ask for a lunch break of at least an hour and a half (Article 36 Labour Code).

If the employee has been employed since more than a year or if the contract was concluded for more than one year, the employee is entitled to three months' parental leave. The right to parental leave is established upon the birth of a child and leave can be taken until the child is three years of age. In the case of adoption or the permanent care of a foster child, leave can be taken until the child is five years old. The employee has to inform the employer of the intended period of parental leave three months in advance. The employer may request that the employee selects a different period if there are reasonable work-related grounds, such as the fact that the work in question is seasonal work, that no replacement can be found in time, that a certain number of other employees are all asking for parental leave at the same time, or because the employee's position in the company is of strategic importance. In companies with less than 30 employees the employer has the right to defer the period of parental leave in all cases where the planned leave would interfere with the operations of the company. The employee is entitled to take parental leave on a full-time, part-time or hourly basis, provided he/she respects the justified interests of the employer. After parental leave, the employee has the right to return to his or her former work or, if this is not possible, to equivalent or similar work (§ 1173a Article 34(a-c) ABGB).

4. Equal pay

Section 3 of the GLG establishes the prohibition of direct and indirect discrimination of female and male employees on grounds of sex. The prohibition also specifically concerns sex discrimination resulting in unequal pay. Pursuant to Section 5 GLG a person who is discriminated against by receiving unequal pay has the right to compensation for the difference in salary from the date of instituting proceedings to five years before and after that date until the termination of the employment contract. The obligation to pay equal salaries to men and women for equal or equivalent work was already integrated into labour legislation (§ 1173a Article 9(3) ABGB) in 1995. Enforcing the right to equal pay for equal or equivalent work then became possible on an individual basis. The law does not specify in detail how far pay differentials are accepted.

5. Occupational pension schemes

In Liechtenstein a specific law provides for occupational schemes (*Gesetz über die betriebliche Personalvorsorge, BPVG*) and covers benefits for old age, invalidity and death. The working population consists of 41 % women and 59 % men. These figures show that less women than men are profiting from occupational schemes. Since 2005 the pensionable age of 64 years for women and men is the same.

6. Statutory schemes of social security

The first pillar is considered to consist of the obligatory sickness insurance (*Krankenversicherung, KVG*), the invalidity scheme (*Invalidenversicherung, IVG*), the old-age scheme (*Alters- und Hinterlassenenversicherung, AHVG*), the accidents at work and occupational diseases scheme called obligatory accidents insurance (*Unfallversicherung, UVersG*) and unemployment insurance (*Arbeitslosenversicherung, ALVG*). Every person domiciled in Liechtenstein is insured on a compulsory basis against sickness and nursing, accidents, invalidity and old age. Employees are, in addition, insured against accidents at work and occupational diseases as well as unemployment.

Following existing stereotypes mostly women profit from family and survivors' benefits. But Liechtenstein's legislation has been changed in order to eliminate gender discrimination as far as possible. In general spouses of both sexes are treated equally.

In this field gender equality has gone rather far. Since 2001 the pensionable age is equal between men and women (64 years) (Article 55 AHVG). Pensions for widows and widowers are foreseen in the law (Arts 57 and 58 AHVG) and equal for both. Advantages for parents who dedicate time for the education of their children are equally divided between them. They profit from so-called '*Erziehungsgutschriften*', a fictitious income, which is added upon the calculation of the pension for the period dedicated to family work. With regard to the main points no gender discriminating provisions can be found. It should be added that only for a transitional generation (male spouses born in 1944 and earlier) will an additional pension for the female spouse be paid by the insurance if the wife was born in 1954 or earlier.

7. Self-employed and helping spouses

The first equality report of the Liechtenstein Government in 1997 stated that the legislation concerning commerce had to be free from any gender-based discrimination and had to be construed as gender-neutral from a material point of view. Provisions in the former Commercial Code were not allowed to have any gender discriminatory effects. It was also stated in the report that Article 30 Section 2 of the former Commercial Code (*Gewerbegesetz*) had been amended in 1996 so as to allow widows and widowers to continue a business enterprise based on the trading licence of the deceased spouse. Now it has been replaced by a new Commercial law that no longer contains such a specific norm.

Article 46(a) of the Marriage Act (*Ehegesetz*) regulates the compensation for participating spouses of self-employed workers in the enterprise and it entered into force on 1 April 1993. If one spouse performs work in the enterprise of the other spouse, he or she is entitled to compensation for this work. The amount of the compensation is calculated on the basis of the nature of the work and the period during which it was performed. The standard of living of the spouses as a whole and the maintenance allowance are also taken into consideration in this calculation.

8. Goods and services

Directive 2004/113/EC has not been implemented in Liechtenstein.

9. Enforcement and compliance

The GLG provides for **judicial protection** before the courts and in a conciliation procedure preliminary to the court procedure (Article 7 GLG). In addition, specific protection in the case of so-called revenge dismissals is foreseen where persons are dismissed as a reaction to a complaint within the undertaking or to any legal

proceedings aimed at enforcing compliance with the principle of equal treatment (Article 10 GLG). Furthermore, the GLG includes a provision concerning the prohibition of any reprisal for the employee him/herself and any other employees involved in the case, as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment (Article 7(a) GLG).

Norms introduced in 2006 concern improved protection against unfair dismissal and the possibility for **group actions**, and, in addition, the procedure was amended through facilitation respectively easing the burden of proof.

Pursuant to Article 5 GLG a person who is discriminated against by receiving unequal pay has the **right to compensation** for the difference in salary from the date of instituting proceedings to five years before and after that date until the termination of the employment contract. According to Article 5(1)(a-c) GLG a person discriminated against has the right to demand before the court or the administrative authority that imminent discrimination is to be forbidden or has to be omitted, an existing discrimination has to be removed or a discrimination has to be declared if it is still disruptive. If there is any discrimination in declining an appointment or in the termination of a private employment contract, the person in question is entitled to compensation on the basis of the determined salary. In the first case the prescription period is three months from the moment of the employee being informed of the refusal by the employer. In the second case the person has to appeal to the employer in writing within the notice period (normally a three-month notice period) and if the contract will not be continued the prescription period is six months from the end of the contract (§ 1173a Article 48 ABGB). The compensation for discrimination in declining an appointment corresponds to the amount of three monthly salaries at a maximum. This amount is the same even if there are more persons demanding compensation. The compensation for discrimination in a termination of a private employment contract also corresponds to the amount of three monthly salaries in total, respectively at least 5000 Swiss francs when concerning (sexual) harassment. (Article 5(4) GLG).

Article 7 GLG gives organisations having had their seat in Liechtenstein for five years and which deal with equality matters between women and men in a broad sense the opportunity to defend the interests of employees in sex discrimination cases before the courts. Individual persons affected by sex discrimination need to give their prior authorisation when the legal action shall state in the name of the organisation that discrimination has taken place. Before bringing the case to court the employer's opinion has to be heard. The court's decision takes the form of a declaration that discrimination has (not) been shown. In order to receive compensation, the individuals concerned will each have to start separate and individual proceedings, although this will be much easier following a **group action**.

Articles 18 and 19 GLG provide for the **Gender Equality Commission** and the **Gender Equality Office**. Since March 2005 the Equality Office has dealt with equal opportunities. Its competence has been modified with regard to its independent position. Article 19(3) GLG explicitly states that the Equality Office shall be independent with respect to its tasks of counselling authorities and the private sector, executing public relations as well as studies and recommendations on the appropriate measures to authorities and the private sector. The social dialogue is guaranteed in Article 19(2)(e) GLG where the Equality Office shall cooperate with public or private institutions; the Government report explains that under institutions one shall also understand the social partners.

Collective bargaining (especially the so-called *Gesamtarbeitsvertrag*, *GAV*, § 1173a Article 101 et seq. ABGB) is an instrument used in Liechtenstein's private law whose function is rather similar to the law itself. This particular collective bargaining agreement (GAV) puts into force clauses between the parties which override the individual labour contract and partly the legal regulations and can also apply to third parties. The GAV is mutually agreed and signed by the employees' representative (the trade union *LANV*) and by the representative of the employers (the *GWK*). The contracting parties wish to achieve several goals by signing the GAV such as preserving the labour peace, settling disputes by mutual consent, enhancing the social, economic and environmental development of each branch of trade as well as keeping Liechtenstein's marketplace competitive in a social market economy by encouraging innovations and a modern labour organisation. This also includes equal opportunities for men and women with regard to equal pay. Thus a third of all GAVs explicitly contain a clause concerning equal opportunities between men and women. It has to be mentioned that those GAVs (such as in the metal industry, the non-metal industry and the building trades) mentioning equal opportunities between men and women are applied to the largest number of employees.

10. Brief assessment

From the purely theoretical point of law it can be confirmed that the application of the principle of equal treatment is satisfactory. But because of the lack of case law concerning gender equality in Liechtenstein it is difficult to estimate whether enforcement is the same. Nevertheless, sensitising work concerning gender equality is actively conducted.

LITHUANIA

1. Implementation of central concepts

The Constitution of 25 October 1992⁷⁸ establishes the general principle of equality (Section 29) and provides the right to fair remuneration for work where the concept of 'fair remuneration' may also include the principle of non-discrimination (Section 48(1)). However, the Constitutional Court has not yet examined the horizontal effect of these provisions.

The Labour Code of 4 June 2002 mentions, among the principles of labour law, the general principle of the equality of subjects of labour law irrespective of *inter alia* their gender and repeats the principle of fair remuneration for work. The most important definitions are given in the Equal Opportunities Act of Women and Men (EOAWM). The EOAWM defines direct and indirect discrimination and consolidates other important rules and in this way complements and explains the labour legislation.

Direct discrimination means treatment where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation, unless there is a statutory defined exception. In defining major concepts in the EOAWM the Lithuanian legislator has tried to keep in line with relevant EC directives. However, the definition of discrimination does not reflect the less favourable treatment related to pregnancy and maternity leave. **Indirect discrimination** is the different treatment where an apparently neutral provision, criterion or practice puts or would put persons of one sex at a particular disadvantage

⁷⁸ *Valstybės žinios* (State Gazette), 1992, No. 33–1014.

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.

Positive action is perceived as an admissible deviation from the principle of different treatment, but requires additional authorization under the (special) law. An **instruction to discriminate** is clearly indicated as amounting discrimination, but is not further defined. **Sexual harassment** is perceived as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature by a person with the purpose or effect of violating the dignity of another person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. **Harassment** means any unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of that person, and aiming to create an intimidating, hostile, degrading, humiliating or offensive environment.

Positive actions are explicitly mentioned as an exception to the principle of non-discrimination. They are defined as specific temporary measures laid down by specific laws, aimed at accelerating the guaranteeing of factual equal rights for women and men and which must be repealed upon the implementation of equal rights and equal opportunities for women and men. However, the reference to specific laws makes this action practically unenforceable since there are no other laws allowing these measures to be taken.

2. Access to work, working conditions

The Labour Code expressly prohibits the rejection of job applications and the termination of employment contracts on the ground of sex (Sections 96 (1) and 129(3)(3) of the Labour Code). The Labour Code contains no further provisions expressly prohibiting direct or indirect discrimination as regards access to employment, vocational training and promotion, and working conditions, but they are consolidated in the EOAWM.

According to Section 5 of the Act, the employer is obliged to apply gender-neutral recruitment and promotion criteria and conditions, except where the work can only be performed by persons of a particular sex where the necessity of a particular sex may be grounded on the nature of activity or the context in which it is carried out, provided that the objective sought is legitimate and complies with the principle of proportionality. Furthermore, compulsory military service is reserved exclusively for men.

As far as working conditions are concerned, the EOAWM obliges employers to provide equal working conditions and equal opportunities to improve qualifications, to provide equal benefits, to apply the principle of equal pay for equal work, including all payments. The special protection of women during pregnancy, childbirth and nursing as well as requirements for safety at work which are applicable to women and aimed at protecting women's health have been withdrawn from the scope of application of the principle of non-discrimination.

The Labour Code is applicable to all employees, i.e. persons involved in the relationship based on the contract of employment. The scope of application of EOAWM is quite ambiguous. In particular, it does not explicitly involve 'public servants' as is a case in the Equal Opportunities Act. Public servants may rely on its provisions only by way of analogy, but administrative court practice is lacking. It seems that politicians, the highest state officials, judges, prosecutors, and military personnel do not fall under the EOAWM since their legal status is regulated by special laws. However, some new provisions in the EOAWM on social security

schemes take them into account because they expressly refer to persons covered by the social security scheme and to self-employed persons.

3. Pregnancy and maternity protection; parental leave

The labour legislation provides an extensive list of guarantees and special arrangements for three groups of employees:

- pregnant workers (pregnant women who submit to their employer a certificate issued by a health-care institution testifying that they are pregnant);
- workers who have recently given birth (mothers who submit to the employer a certificate confirming that they have given birth and who take care of a child of up to one year old), and
- breastfeeding mothers (mothers who submit to their employer a certificate confirming that they are taking care of and breastfeeding a child of up to one year old).

All three groups of employees may not be assigned to perform work in conditions that may be hazardous and affect the health of the woman or the child. If they have to attend medical examinations, they must be released from work for such examinations without any loss of average pay. Special paid breaks are foreseen for breastfeeding. The law requires the consent of an employee if the employer assigns her to night work (between 10 p.m. and 6 a.m.), to send her on a business trip, to work overtime or on Saturdays and Sundays or on public holidays (Section 278 Labour Code).

There are no specific rules prohibiting discrimination in relation to pregnancy and maternity, maternity leave, parental leave, adoption leave and paternity leave. The majority of violations would be definitely covered by the general rules on non-discrimination in the Labour Code and EOAWM.

There is no direct provision prohibiting dismissal on the grounds of an application for, or the taking of, parental leave, but Section 131(1) of the Labour Code entails a general prohibition on the dismissal of an employee during his/her leave, regardless of the type of leave. The dismissal of a pregnant woman is prohibited from the day her employer receives the certificate confirming her pregnancy until one month after maternity leave. Furthermore, the employment contracts of employees raising a child (children) under 3 years of age may not be terminated without any fault on the part of the employee. In addition, Lithuanian labour law provides for the number of procedural requirements and guarantees which are applicable to workers with childcare responsibilities. Employees raising children under 14 years of age may be dismissed only in extraordinary cases. Priority to retain a job shall be given to employees who are raising children or have adopted children under 16 years of age alone.

The Labour Code grants pregnant employees a maternity leave of 70 calendar days before confinement and 56 calendar days after confinement. Similar rules apply in the case of adoption. During maternity leave a worker is entitled to a state social security allowance paid by the State Social Insurance Fund. At the end of maternity leave, workers have the right to return to the same job on the same terms as before the leave. There is no explicit provision that the worker shall benefit from any improvement in working conditions to which he/she would be entitled during her/his absence, and the employee will be forced to make use of the general principles and norms of non-discrimination in order to achieve the same level of working conditions. The Labour Code only requires the period of maternity leave to be taken into account for the determination of the next annual leave.

Parental leave until the child has reached the age of 3 is granted to the mother, the father and also to other relatives. This leave is granted at the choice of the family and may be taken as a single period or be distributed in parts. During the leave a parental allowance is paid by the State Social Insurance Fund and the person concerned retains his/her job, with the exception of cases where the enterprise has been dissolved. At the end of parental leave, workers have the right to return to the same job on the same terms as before the leave. There is no explicit provision that the worker shall benefit from any improvement in working conditions to which he/she would be entitled during his/her absence.

The Lithuanian Labour Code is heavily loaded with other family-friendly arrangements which go beyond the requirements of the directives. For example, paternity leave with a paternity allowance is guaranteed for fathers until the child reaches the age of one month. A prolonged minimum annual leave of 35 calendar days (whilst the normal minimum leave is 28 calendar days) is granted to employees who, as single parents, are raising a child. Employees raising children are entitled to additional unpaid leave.

4. Equal pay

The Labour Code defines the concept of ‘pay’ as ‘the basic salary and all additional payments directly paid by the employer to the employee for the work performed under an employment contract’. Under the Labour Code, men and women shall receive equal pay for equal or equivalent work. Within the work classification system for determining pay, the same criteria shall be equally applicable to both men and women, and the system must be elaborated in such a way as to avoid any discrimination on the grounds of sex. Furthermore, the wage of an employee shall depend upon the amount and quality of the work, the results of the activities by the enterprise, agency or organisation as well as the labour demand and supply on the labour market. Thus other criteria of differentiation shall not be allowed but there is no case law on that point as yet.

The EOAWM also introduces the principle of equal pay. It stipulates that the employer is obliged to provide equal pay for work of equal value, to provide equal working conditions and equal benefits. The application of less (more) favourable terms of employment or payment for work to an employee is considered as a ‘violation of equal rights for women and men’ and this is punished according to the rules of administrative law.

5. Occupational pension schemes

Occupational social security schemes in the private sector were introduced in 2006 and are still very rare in Lithuania. The pension and social security schemes for public servants form a part of the general statutory scheme, accompanied with specific state pension schemes for judges, scholars, public officials, and members of the armed forces.

A different pensionable age in occupational pension schemes is expressly prohibited under EOAWM. On 19 June 2008 the EOAWM was supplemented to include the new provisions on the prohibition of discrimination based on sex in the social security schemes, including those which aim to supplement or replace the state social security system. The sickness, invalidity, old-age, early retirement, accidents at work, occupational diseases, unemployment and social protection schemes are covered by the principle of non-discrimination, including survivors’ pensions, allowances and other benefits. Discrimination is prohibited in the establishment of the

possibilities to participate and enjoy social protection, the determination of contributions and their level, the determination of allowances including those to spouses and dependants, as well as related to the duration of the payment of allowances. The non-discrimination provisions in social security schemes are applicable to 'employed persons', including self-employed persons, persons who terminate their employment due to sickness, maternity, an accident at work or forced unemployment as well as persons looking for employment, disabled workers and persons who are entitled to receive the benefits on their behalf. Thus the public servants and other categories of state employees who are covered by the system of state pensions (military personnel, scientists and judges) to this extent do fall under the principle of non-discrimination.

Section 23 of the Law on Occupational Pension Schemes⁷⁹ prohibits discrimination based on the sex of the participants to the occupational pension scheme. Both the Law on Occupational Pension Schemes and the EOAWM enumerate possible breaches of the principle of non-discrimination simply by copying the relevant provisions of Article 9 of the Directive 2006/54/EC. Exceptions are foreseen for benefits if the contributions are paid by workers on a voluntary basis, and if there is a necessity to take account of different actuarial calculation factors, the pension supplements and different levels for contributions in order to equalise the amount of the final benefits, or to ensure the adequacy of the funds necessary to cover the cost of the benefits.

6. Statutory schemes of social security

The EOAWM provides for a statutory exception for different pensionable ages for women and men. Under the state social security scheme the pensionable age for men and women is different: 60 years for women and 62 years and 6 month for men. This difference is traditional in the Lithuanian social security system, although at this moment in time this difference is currently declining from 5 years to 2½ years. A person who is awarded a pension may continue to work and receive double incomes – his/her pension and his/her wage.

The EOAWM amendments of 19 June 2008 have significantly broadened the scope of application of the equal treatment principle. Now Section 5-3 EOAWM states that the discrimination based on sex shall be prohibited in establishing and applying the provisions on social security, including those which aim to replace or supplement the state social security system. In other words, state social security schemes are now under EOAWM (see 5) with the only exception being the different pensionable age.

7. Self-employed and helping spouses

The status of a self-employed person is not always as clear as that of employed (salaried) persons. They generally do not fall under the EOAWM (see 1) despite the fact that the new amendment to EOAWM concerning social security schemes (see 5) explicitly refer to them. The notion of self-employed emerges in the legal framework of state social insurance – such persons are only covered by the pension insurance (age, disability and widows/widowers' pensions). Helping spouses of farmers are covered by the mandatory health social insurance scheme. Helping spouses of other categories of self-employed persons and persons treated as such may participate in voluntary health insurance schemes. All these persons may be covered by pensions

⁷⁹ State Gazette, 2006, No. 82-3248.

and sickness and maternity state social insurance on a voluntary basis. Still, there exist national social schemes granting certain services and cash benefits to these women regardless of their social insurance, financial situation or professional activity (e.g. birth grants).

The important gap in the implementation lies in the fact that there is no clear provision prohibiting discrimination in relation to access to self-employment or occupation, vocational training and working conditions.

8. Goods and services

The EOAWM *prima facie* meets the requirements of Directive 2004/113/EC as it prohibits any kind of discrimination. The EOAWM states that when implementing equal rights for women and men salespersons, producers and service providers must apply equal pay terms or guarantees for the same products, goods and services or those of equal value to all consumers irrespective of their sex; and to assure that there will be no humiliation, restriction of rights or the granting of privileges as well as forming public attitudes towards the superiority of one sex against the other when providing information on their products, goods and services or advertising them. Furthermore, the EOAWM enumerates discriminatory acts by sellers, the producers of goods or the providers of services such as different conditions of payment or guarantees for the same and equal value goods, services or products or different opportunities of selecting the goods are established; information about products, goods and services or advertisements forming the public opinion that one sex is superior to another, the discrimination of consumers on grounds of sex; and the persecution of a person who has complained about discrimination. There will be no direct discrimination if the sale of goods or the provision of services to persons of a certain sex or to the majority of a certain sex is justified by a legitimate aim, provided that these restrictions are appropriate and necessary. Under the Law on Insurance⁸⁰ insurance companies are also allowed to demand sex-differentiated contributions after a risk evaluation within the sphere of insurance.

9. Enforcement and compliance

In case of a violation of the principle of non-discrimination four different types of **sanctions** may be imposed. Criminal sanctions may be imposed as a result of a criminal offence. Discrimination on the grounds of *inter alia* sex shall be punished with a community service order, arrest or imprisonment for up to 3 years but there have been no cases so far. Administrative fines from LTL 100 (EUR 29) to LTL 4 000 (EUR 1 160) for a breach of the EOAWM may be imposed by the Equal Opportunities Ombudsperson, but in many cases the Ombudsman issues a simple warning. Theoretically, the breach of labour legislation may be investigated by the State Labour Inspectorate but they are reluctant to evaluate the case of discrimination as a breach of labour legislation. The violation of equal opportunities for women and men or the **sexual harassment** of colleagues, subordinates or customers may (but not necessarily shall – it is left to the employer to decide) invoke disciplinary sanctions on an employee – dismissal.

The rules on the judicial enforcement of rights are no less favourable than those governing similar domestic actions. In cases of discriminatory refusal or dismissal compensation, alongside instatement, may be awarded but the court is free not to reinstate an employee. In the case of financial claims by an employee, the court may

⁸⁰ State Gazette, 2003, No. 94-4246.

grant the employee interest when the employer has breached financial duties – 0.06 % interest for one day of delay. In addition, in all labour cases the *court* may award financial compensation for non-material damage caused by discrimination. The compensation for non-material damage is not restricted by the determination of a prior upper limit. However, the courts are reluctant to award high compensation for non-material damage. For example, for the discriminatory refusal to employ Roma women in a bar the employer was obliged to pay compensation of approx. 2½ times the minimum wage for non-material damage instead of employment.

The EOAWM contains a provision on the reversal of the **burden of proof** while examining complaints or disputes between persons arising from discrimination on the ground of sex. This rule has to be applied in the civil courts of general competence or in the Enterprise Commissions on Individual Labour Disputes. If there is a dispute in the administrative courts involving public servants, the rule on the reversal of the burden of proof shall also be invoked.

Access to the courts is generally safeguarded for alleged victims of discrimination. Since 2008 the EOAWM allows the victim to be represented in administrative and court proceedings by organizations of workers and employers and by other legal persons having a legitimate interest.

The **Office of Equal Opportunities Ombudsman** as an independent state institution was established in 1999. It supervises the implementation of the Law on Equal Opportunities (discrimination based on the grounds of age, sexual orientation, disability, racial or ethnic origin, religion or belief) and the EOAWM (gender equality). The Office investigates complaints, supervises the implementation of the EOAWM by the public institutions and employers, hears cases of administrative offences and imposes administrative sanctions, consults the victims of discrimination, assists the public organizations and NGOs, collects, analyses and summarizes data on equal opportunities in Lithuania, submits recommendations etc.

The impact of the **social partners** in the promotion of gender equality is rather weak. The national Agreement on Tripartite Cooperation of 13 June 2005⁸¹ consolidates *inter alia* the ‘creation of equal opportunities in the labour market’ as a priority for cooperation between the parties. However, the parties did not attempt to explain or develop this concept in the agreement and no particular measures or actions have so far been taken. **Collective agreements** are binding, but they are not used as a tool for transposition because of their low coverage. The impact of collective bargaining in promoting equal opportunities and implementing the principle of equal pay is less than fractional. The inclusion of those issues into the agenda of collective bargaining is not realized by either parties – for employees it is more desirable to have at least a collective agreement on wages or other working conditions than to consider gender equality issues which are, according to the parties, thought to be the task of state authorities or not relevant for the parties.

10. Brief assessment

The formal implementation of the EU gender equality directives in Lithuania is considered satisfactory. The national labour legislation has traditionally been so heavily loaded with guarantees for women and persons raising children that some provisions may potentially be challenged by male employees. In general, the legislator tries to keep in step with the legal developments at the European level and does not impede the adoption of new legislative initiatives proposed by the Equal

⁸¹ State Gazette, 2004, No. 75-2726.

Opportunities Ombudsman or the Ministry of Social Security and Labour. The problem lies in the practical implementation of non-discrimination rules at the workplace – no cases have been brought to the courts. Employees, trade unions and even lawyers are reluctant to use the powerful instruments offered to them by the national transposing legislation. The state initiatives and the initiatives by the social partners are insufficient in the promotion of the real enforcement of equality rights. NGO activities are fragmental and limited to surveys and public campaigning only.

LUXEMBOURG

1. Implementation of central concepts

Usually, Luxembourg national law reproduces the definitions given by EU law. Generally speaking, the Luxembourg Government has adopted the so-called ‘one to one’ implementation approach of EU law.

The concepts of direct and indirect discrimination as well as those of harassment and sexual harassment are textually reproduced in national legislation transposing EU gender equality law. Sexual harassment at the workplace was introduced on the national level in 2000. Since then it is laid down by law that employers have to abstain from any sexual harassment in employment relationships. Employers also have to take care that any act of sexual harassment of which they are informed ceases immediately and they have to take preventive measures to ensure the protection and the dignity of their employees. In the case *L'Estrade c/Barthelemy c/Etat*,⁸² the *Cour Supérieure de Justice* (Supreme Court of Justice) recognized the employer's responsibility for acts by his manager arguing that the manager was the physical representative of the employer. Case *Rausch c/Luxair*⁸³ of the Supreme Court of Justice maintains that the employer is not obliged to proceed to a formal investigation before suspending a worker who is suspected of having engaged in sexual harassment.

Even if the concept of harassment was mentioned by law previously, no definition was provided until the adoption of the Law transposing Directive 2002/73/EC on 30 April 2008. On 29 March 2007, the Supreme Court of Justice considered, arguing that since the concept of harassment was not defined in national labour law, that it was advisable to refer to the definition in Directive 2000/78/EC. Furthermore, the judgment determined that it is up to the worker to provide proof of the components of harassment. Thus, the Supreme Court of Justice referred exclusively to the definition of harassment given by the Directive without considering its provisions as regards the burden of proof.

Since July 2006, the Luxembourg Constitution lays down that women and men are equal regarding rights and duties and that the State promotes the elimination of any obstacles in the field of equality between women and men. Even if positive actions did previously exist, the adoption of this provision provided a legal basis for those actions. In this area, the Ministry of Equal Opportunities has developed a programme in order to encourage private enterprises to adopt projects on equality between women and men. These positive actions are exclusively addressed in order to promote the under-represented sex on the private labour market.

The legal framework for positive actions consists of Article L.243-1 to Article L. 243-5 of the national Labour Law. Positive actions are defined as being concrete

⁸² C.S.J. 30 01 2003 No. 26327.

⁸³ C.S.J. 29 06 2006 No. 30051.

measures conceding specific advantages in order to facilitate the exercise of a professional activity by the under-represented sex or to prevent or compensate disadvantages in the professional career path. Positive action projects can relate to either one or more companies, or a sector or an economic branch. The State subsidizes the agreed projects.

The Labour Law also contains provisions which allow employers to obtain financial support when they employ people of the under-represented sex. According to Article L.242-1 an under-represented sex in a profession is considered to be the sex whose representation is equal to or lower than forty percent of the total workforce in this occupation on a national level. Moreover, according to Article L.242-3 employers may implement specific advantages in order to facilitate the activity of the workers of the under-represented sex or to prevent or compensate disadvantages in their professional career path.

2. Access to work, working conditions

The Law to implement Directive 2002/73/EC was adopted by Parliament on 30 April 2008.

Since no national law aimed specifically at the self-employed has existed, the recently adopted Law has been divided into two parts, the first of which creates a general framework of non-discrimination between women and men, whereas the second deals exclusively with aspects of work and employment. Thus, the first part constitutes an autonomous Law applicable to all categories of workers (self-employed, employees and civil servants) while the second part contains provisions modifying existing specific legislative instruments (labour law and public service).

Regarding access to employment, a difference in treatment based on a characteristic related to sex does not constitute discrimination within the meaning of the law when, because of the nature of the particular activities concerned or their framework, such a characteristic constitutes an essential and determining professional requirement. The objective has to be legitimate and the requirement proportional.

3. Pregnancy and maternity protection; parental leave

The protection of pregnant workers and workers who have recently given birth or are breastfeeding was reformed by the Law of 1 August 2001.

According to the Law, pregnant workers cannot be required to work during eight weeks preceding the supposed date of confinement. Workers also cannot be required to work during eight weeks following childbirth. The global maternity leave can however exceed 16 weeks. This is for example the case when the birth takes place after the envisaged date.

Maternity leave is granted on the basis of a medical certificate and it is treated as a period of sick leave. In Luxembourg, absence from work on grounds of sickness is fully paid. Social security schemes and labour law both remain applicable.

During maternity leave, the employee's job has to be preserved. The dismissal of workers is prohibited during the period from the beginning of their pregnancy to the end of the maternity leave.

Workers are entitled to two 45-minute breaks per working day if they are breastfeeding after maternity leave.

Parental leave was introduced by law in 1999. According to the Law, workers who have worked in Luxembourg for at least twelve months at the time of the birth of the child are entitled to parental leave.

Parental leave is an individual right and cannot be transferred from one working parent to the other. The monthly overall parental allowance is paid by the State.

There are two types of parental leave. Full-time parental leave is six months and cannot be refused by the employer. Part-time parental leave is twelve months and relies on the employer's agreement. Throughout parental leave, employment relationships are maintained and the worker is entitled to reinstatement or, in the event that this is impossible, similar work corresponding to his/her qualifications must be provided with equivalent remuneration.

The dismissal of workers when on parental leave is prohibited. The Supreme Court of Justice stated⁸⁴ that if the employer proves that it is impossible to reinstate the worker in his/her original work, he can propose other work, even if this is of a different kind. In this case, the worker concerned had refused the proposed new work in particular because of less favourable career expectations, which was not proved. The contested dismissal was declared valid.

In another case concerning a dismissal, the Supreme Court of Justice held⁸⁵ that the prohibition of dismissal does not exclude a dismissal due to the reorganization of the company involving the removal of the workplace where the employee worked before his parental leave. After the period of protection during parental leave, a dismissal due to these reasons remains valid. The worker in question had been dismissed the day after the end of her parental leave.

On 1 March 2009, a childcare-service voucher system was introduced in Luxembourg. It gives each child the right to at least three free hours of care per week. The scheme also offers twenty-one hours at a reduced rate, at a maximum of EUR 3 per hour. The system was announced as the first step towards free childcare.

Four out of eight political parties who are running for the national elections of June 2009 have included free childcare as a goal in their election programmes.

4. Equal Pay

On 10 July 1974 equal pay for women and men for the same work or for work to which equal value is attributed was introduced by Grand Duchy Regulation. Remuneration includes the wages or the basic or minimum ordinary salary and all the other direct or indirect advantages and benefits, in cash or in kind, paid by the employer. Since then provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay have been declared null and void. The highest remuneration is automatically substituted when pay is not equal.

According to the modified Law of 12 June 1965 on collective agreements, the social partners have to envisage in any collective agreement the application of the principle of equal pay between women and men.

The question concerning the direct effect of European legislation was placed before the Luxembourg courts. The first judgement (*Bank M.M. Warburg-Brinckmann Wirtz International c/ Pagani*) on this matter was delivered by the *Cour d'Appel de Luxembourg* (Court of Appeal of Luxembourg) on April 21 1982. This judgment substantially adopts, once again, the terms of the *Defrenne II* judgment by the ECJ by saying that Article 119 of the EC Treaty applies directly without European or national measures being necessary for its implementation. The question addressed

⁸⁴ Judgment C.S.J. 07 30 2007 No. 31422.

⁸⁵ Judgment C.S.J. 06 12 2007 No. 32095.

to the court was to determine whether a household premium constituted an advantage paid directly or indirectly to employees. The court determined that the premium was to be considered as remuneration within the meaning of Article 119 (now 141) of the EC Treaty, ILO Convention No. 100 and the Grand Duchy Regulation from 1974. This judgment reinforced the Grand Duchy Regulation of 1974 which ranks lower in the national legal hierarchy.

On 28 March 1991, the Court of Appeal of Luxembourg decided in the case *Laroche c/ Administration communale de Pétange* that it is sufficient to establish a difference in wages between female and male workers engaged in the same cleaning service. The employer had argued that the difference in wages between women and men workers was attributed to the fact that male workers would be likely to be engaged in more strenuous tasks than female workers.

5. Occupational pension schemes

The legal framework for occupational pension schemes is provided by the Law of 8 June 1999. Self-employed workers are not covered by the Law. No legislative framework exists for this category which, however, is aimed at by the Directive.

Occupational pension schemes which contain regulations which are contrary to the principle of equal treatment between women and men are declared null and void. Article 16 of the Law reproduces Article 6 of Directive 96/97/EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes in its integral form. So, different levels of benefit are allowed, in so far as they may be necessary to take account of actuarial calculation factors which differ according to sex.

6. Statutory schemes of social security

The principle of equal treatment between women and men in matters of social security was introduced by the law of December 15, 1986.

This law concerns workers, self-employed persons as well as workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment. Retired or invalided workers and self-employed persons are also covered. The pensionable age is the same for women and men (65 years). No sex-specific advantages are granted. In fact, certain advantages related to children's education mainly favour women since they are still the ones who assume this role.

Bill No. 5155 reforming divorce regulations has been pending since May 2003. One of the aims of this legislative project is to introduce the splitting of pension rights by civil judgment. NGOs have insisted that splitting pension rights should be mandatory and regulated by social law, but the Government maintains the civil approach, according to which, in the event of divorce, the civil court could compare the ex-partners' pension rights. This option should be considered before any other division of pension rights is contemplated. National solidarity should intervene if necessary.

7. Self-employed and helping spouses

There is no specific law in Luxembourg on self-employed workers and their treatment. The concept of a self-employed worker is however defined (social security scheme – act on social insurance) which implies that self-employed workers are protected against sex discrimination in so far as those specific laws grant such protection.

Assisting spouses do have access to voluntary social insurance coverage. Assisting spouses have to assist their spouse or partner in his/her principal activity.

8. Goods and services

On 18 December 2007, Parliament adopted the Law which transposes Directive 2004/113/EC. The Law entered into force on 21 December 2007.

According to this Law, discrimination between women and men is prohibited in access to and the supply of goods and services which are available to the public and which are offered outside the area of private and family life. This prohibition does not apply to the content of media and advertising or to education.

The Law establishes platforms of dialogue between the ministries concerned and entities having a legitimate interest in contributing to the fight against discrimination based on sex.

The Law allows the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance where the use of that criterion is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

For contracts concluded after 20 December 2009, the expenses related to pregnancy and maternity cannot result in differences in insurance premiums and benefits.

9. Enforcement and compliance

As already mentioned, the Luxembourg legislator used to implement EU law by adopting the text of the latter. As a result, Luxembourg equality law generally meets European standards. The minimalist approach also implies that the national provisions seldom go beyond the minima contained in the European Directives.

Regarding victimisation, national equal treatment law guarantees protection from adverse treatment for complainers as well as for witnesses. This also applies to the field of access to and the supply of goods and services as well as to work and employment

Directive 97/80/EC on the burden of proof in cases of discrimination based on sex has been implemented by law in 2001. The law of 28 June 2001 deals with direct and indirect discrimination based on sex. The law applies to the civil and administrative procedure concerning the public or private sector in relation to access to employment, pay, professional promotion, access to independent work, working conditions and occupational social security schemes. According to the law, respondents have to prove that there has been no violation of the principle of equal treatment between women and men if claimants establish, before the courts or another competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. Since 2007, the same rules apply in the field of access to and the supply of goods and services.

According to EU gender equality law, remedies and sanctions have to be effective, proportionate and dissuasive. Luxembourg's gender equality law contains several specific provisions in the event of discrimination based on sex. Thus, in the event of a dismissal, the worker can call for the dismissal to be nullified in order to retain his/her job, or if necessary to be reinstated. Concerning job offers, any person who makes an offer which is not in conformity with the principle of equality between women and men is punishable with a fine from EUR 251 to 2 000.

The law transposing Directive 2004/113/EC implementing the principle of equal treatment between men and women in access to and the supply of goods and services

has introduced an innovative provision by allowing victims to choose between a fixed allowance (EUR 1 000) and covering the damage really suffered as regards moral harm. The second option implies that the claimant will bear the burden of proof.

Access to the courts was recently reinforced. Non-profit associations and trade unions can, under certain conditions, engage in proceedings on behalf or in support of any victim. Associations can do so in the field of work and employment as well as in the field of access to and the supply of goods and services. Trade unions can only do so in the field of work and employment. Associations should obtain ministerial approval which will be given under certain conditions determined by law.

No specific body exists regarding gender equality. A national equality body, the *Centre pour l'égalité de traitement* (Centre for Equal Treatment) was established by law on 28 November 2006. The Centre for Equal Treatment is concerned with discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The CET is directed by a board of five members who are designated by Parliament. Designations took place in 2008 and the last member joined the CET in June 2008.

From late 2008 to February 2009, the CET had to deal with about thirty claims. There was one complaint regarding gender discrimination, which was about the name of married women. In Luxembourg, married women are automatically registered under the name of their husbands. The CET has published no decision on the subject.

The *Comité du Travail Féminin* (Women's Labour Committee) consists of women's NGOs, employers' and workers' organisations and ministries. This advisory body is responsible for studying, either on its own initiative or at the Government's request, all matters connected with the work, training and professional advancement of women. This committee constitutes a very good platform for exchanges between the various actors in the field of gender equality.

Social partners are able to negotiate collective agreements which can be declared a general obligation. In that case, the sectors concerned must obey the rules thus laid down. The control carried out before a general obligation is declared relates to the form and not to the content of the deposited agreement.

Any provision which is contrary to the principle of equality between women and men is formally prohibited. Collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. It can be considered regrettable that the elaboration of equality plans does not appear among the obligatory measures imposed on the social partners. This matter was discussed during the revision of the law on collective agreements in 2003. The social partners and the government could not agree on this.

In fact, the legal provision consisting of an obligation to refer to the results of negotiation on different matters such as the application of 'equality plans of women and men' can be considered as not being effective as the social partners mostly respond to this by mentioning that the matters have been discussed. A few exceptions to the above-mentioned principle can however be highlighted. On the one hand, the provisions as regards parental leave and maternity leave are beyond the minimum required by EU law. One can also notice that certain texts envisage extensive consultation and dialogue mechanisms with civil society.

On the other hand, one has to recall that Luxembourg did not integrate independent workers by transposing Directive 96/97/EC.

Directive 2006/54/EC has not been transposed yet (April 2009). The Ministry of employment and labour affairs is in charge of the file.

10. Brief assessment

Generally, Luxembourg complies with the implementing provisions even if certain adaptations are sometimes necessary. It is regrettable, however, that the European general framework is rarely exceeded at the national level.

Generally speaking, it seems that the concern for promoting equality between women and men has decreased in Luxembourg in recent years. Just like at the European level one can note a tendency to gather the various grounds for discrimination in political actions. This approach results in much confusion. We can even see the grounds for discrimination being placed in a hierarchical order. Thus, just like Directive 2004/113/EC the national implementing law is not concerned with the content of the media and advertising or with education. In Luxembourg, legal protection on the grounds covered by Directive 2000/43/EC and Directive 2000/78/EC is currently stronger than the protection on the ground of sex, which has the lowest level of protection in the field of goods and services.

Considering that equality between women and men is a fundamental EU principle, it is important to reinforce this principle. Action could for example consist of reinforcing the principle of equal pay. More than fifty years of dealing with this matter have certainly brought about improvements, but the pay gap between women and men remains. Concretely, one could consider an obligation to establish gender equality plans within the framework of collective agreements. Such plans should include measures such as data collection, follow-up activities and a regular evaluation and adaptation.

MALTA

1. Implementation of central concepts

The main laws are the Employment and Industrial Relations Act 2002 (EIRA) and the Equality for Men and Women Act 2003 (EMWA). The EIRA's definition section (Section 2) did not define direct or indirect discrimination in terms of the Directive, but spoke of 'discriminatory treatment'. Then, both **direct and indirect discrimination** were prohibited by EMWA, the later piece of legislation, and although there was no definition of indirect discrimination as such this law included under 'discrimination' 'any treatment (...) which disadvantages a substantially higher proportion of members of one sex.' Therefore, unlike the new definition of indirect discrimination in the Equal Treatment Directive, the definition thereof in the EMWA (Section 2(3)(d)) contained a statistical element. However, Regulations (rules made under a power conferred by a principal law, an Act of Parliament, normally by the Minister concerned) adopted later under the EIRA spelled out the definitions used in the primary legislation. The Equal Treatment in Employment Regulations of 2004 (the ETE Regulations) as amended in 2007, in order to bring Maltese law more closely into line also with Community sex discrimination law, by the Equal Treatment in Employment (Amendment) (No. 2) Regulations 2007 plugged many of the gaps, generally bringing all concepts and definitions into line with EC law. However, discrepancies remained, and Parliament passed two laws in April 2009 in order to bring the EIRA and the EMWA themselves more fully into line with EC law. These are Act No. IV 2009, amending the EMWA, and Act No. V 2009, amending the EIRA. New definitions are included for discrimination of all kinds. The EMWA now provides that statistical evidence is only one form of evidence of indirect discrimination, and emphasises that the National Commission for the Promotion of

Equality (the NCPE, which is the Equality Body for gender and race in Malta) must act independently in all it does. By virtue of Act No. V, the EIRA now makes it clear that protection is afforded also in case of dismissal. It also clarifies that compensation must be ordered by the Courts. Maltese law still does not go beyond EC law by offering greater protection, but the main gaps relating to the concepts of direct and indirect discrimination, instructions to discriminate, harassment and sexual harassment, and equal pay for work of equal value have been redressed.

2. Access to work, working conditions

The principal law implementing Directive 76/207/EEC is the Employment and Industrial Relations Act 2002 (EIRA). This law provided for the possible extension of its provisions to public officers. However, it was only recently that the provisions on employees on definite contracts were so extended. In general, however, this new Act, replacing previous employment legislation, made important changes in line with the Directive. The other main piece of legislation in the area is the Equality for Men and Women Act (EMWA), which contains provisions that overlap, to a marked degree, with those of EIRA but can be assumed to apply to all employees. Arguably, as is also assumed by the National Commission for the Promotion of Equality (NCPE), although not tested as yet, while EIRA only applied to public officers in so far as the Minister might extend its provisions to the public service, which has actually been done, the EMWA, which to a large degree reproduces the relevant provisions, does in fact apply. In any case, if the public service collective agreements are an indication, the Government is playing the role of a model employer. Also, employment is defined broadly to include self-employment. EMWA contains the main provisions on direct and indirect discrimination, victimisation, harassment and sexual harassment, positive action, the validity of collective agreements, the spouses of self-employed workers, and makes specific provision prohibiting discrimination by educational establishments, providers to the public of goods and services and accommodation facilities, and for access to financial services. Together, the Acts provide for the duties of employers, as well as remedies including the right to compensation.⁸⁶ EMWA provides expressly that ‘positive action’ may be taken to redress a structural disadvantage. No specific measures have as yet been adopted on this score, but the ETE Regulations now fully reflect EC law on the matter.

3. Pregnancy and maternity protection; parental leave

Both EIRA and EMWA provide protection in this context in line with EC law. These are supplemented by the Protection of Maternity (Employment) Regulations of January 2004. It is an offence for any person to contravene the Regulations, punishable by a fine of not less than EUR 490 (LM 200), a minimum considered by many NGO experts to be too low to provide a deterrent.

Directive 96/34/EC on Parental Leave was implemented by the Parental Leave (Entitlement) Regulations 2003 and the Urgent Family Leave Regulations 2003, both adopted under EIRA. The employer can rely on ‘justifiable reasons for postponing such leave’, and this is done by cross-reference to the European Level Framework Agreement. The Regulations provide protection from unfair dismissal and guarantee the employee’s right to return to work. Any breach of the regulations is an offence

⁸⁶ Although Regulation 10 (2) of the ETE Regulations 2004, Legal Notice 461 of 2004 (as amended), adopted under EIRA, qualifies the complainant’s right to request the court to order (and the courts’ power to order) compensation with the words ‘where applicable’. No such qualification is made in the directives. Where damage is done, compensation should follow.

rendering the offender liable to a *minimum* penalty of some EUR 120 (LM 50) and a *maximum* penalty of some EUR 1 220 (LM 500), and again it can be seriously doubted whether this provides sufficient deterrence in practice.

4. Equal pay

For the purposes of the EIRA, ‘pay’ is now defined in line with the Recast Directive 2006/54/EC. Sections 26 and 27 of EIRA provided for equal pay for work of equal value. It should be noted by the general reader that Section 26(3) of EIRA provides that the rule against different treatment shall not apply ‘to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered (...) or where the requirements⁸⁷ are established by any applicable laws or regulations’.

The ETE Regulations of 2004 (as amended) also impose the duty on the employer ‘to ensure that for the same work or for work to which equal value is attributed, there shall be no direct and indirect discrimination on grounds of sex with respect to all aspects and conditions of remuneration’. They specify that the employer has the duty ‘to ensure, in particular, that 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’.⁸⁸ These provisions should be sufficient to cover the cases that have arisen under EC Law. The ETE Regulations are self-declared to be *minimum* requirements implementing the relevant directives, while leaving it open to collective agreements to take protection beyond the minima therein established.

5. Occupational pension schemes

In Malta, the relevant legislation is the Equal Treatment in Occupational Security Schemes Regulations, enacted under the powers given by the Social Security Act. These are in line with the relevant Directive but the ‘qualifications’ permitted by the Directive in relation to the *worker’s* contribution are sought to be utilized by the Maltese Regulations in relation to the *employer’s* contribution. The pensions reform (ongoing) is designed to introduce a three-pension structure, but so far no developments have occurred as to the second and third pensions.

6. Statutory schemes of social security

The Social Security Act is deemed to cover all the relevant risks and the general principle of equality between men and women is applied. In general, Maltese law has in the past not addressed the matters referred to in Article 7(1) of the relevant Directive, i.e. the exclusions. However, the Government has declared its intention to abide by its obligation under the Directive to periodically examine the matter of the exclusions. For example, the statutory scheme has in fact been amended by the Social Security (Amendment) Act of 2006 to provide for equal retirement ages and the gradual (phased-in) increase in the retirement age to 65 for both men and women. Another recent change brought men on a par with women as to the ‘social assistance allowance (female)’ (as it was called) – a form of assistance for the care of an elderly dependant that was previously only available to women.

⁸⁷ Of a job or a post.

⁸⁸ This is the language of Directive 75/117, with the duty cast by Maltese law squarely on the employer.

7. Self-employed and helping spouses

Maltese law (EMWA) protects the self-employed against discrimination. Until recently it was not possible to regard assisting spouses as employed by the family business, but this has now been changed. As to spouses who, not being employed or partners, habitually, under national law conditions, participate in the activities of a self-employed worker and perform the same or ancillary tasks, the law entitles them to fair compensation from their spouse. However, this does not apply where certain matrimonial regimes operate as between the spouses as, notionally at least, there is the right to share in income or profits. This might deserve looking into in practice. Generally speaking, there is no difficulty as long as work is declared and contributions are paid; however, it would be well for Malta to re-examine, as required by the Directive, whether and under what conditions such persons as are covered by the relevant Directive have access to certain services and benefits. It is not the case that Maltese law goes beyond the provisions of the Directive. A review of this whole area, both at national and at European level, is to be encouraged. In particular, the provision entitling the spouse to fair compensation is weak and fraught with difficulty in interpretation and application, perhaps explaining the dearth of cases on the matter.

8. Goods and services

The transposition of Directive 2004/113/EC was delayed by some months but was effected with the adoption of the Access to Goods and Services and Their Supply (Equal Treatment) Regulations, 2008 (Legal Notice 181 of 2008). The sticking point appears to have been Article 5 of the Directive. Of course, there were provisions in already existing legislation that covered particular issues. For example, EMWA makes provision regarding banking and financial services establishments offering goods, services or accommodation and protection against sexual harassment at those places (Section 9); Section 10 covers advertisements; Section 8 deals with educational establishments and similar entities and access to courses, awards, selection and assessment thereat. Some other provisions of relevance are in force, such as that on employment agencies in the Equal Treatment Employment Regulations of 2004. In any event, it can now be reported that although Malta had failed to specifically transpose Directive 2004/113/EC by the deadline of 21 December 2007, it had done so by August 2008.

9. Enforcement and compliance

Avenues for redress, besides the Industrial Tribunal under EIRA,⁸⁹ include the Civil Court, the Civil Court sitting in its constitutional jurisdiction, the Constitutional Court, the Public Service Commission (for the public service) and the Ombudsman (whose recommendations are non-binding). The Industrial Tribunal and the Court are also **accessible** with the assistance of the National Commission for the Promotion of Equality (the NCPE), which is Malta's '**equality body**' as set up under EMWA with powers of investigation, mediation and, with the victim's approval, of suit. Only one action has been brought under these provisions, and this was then settled out of court. Indeed, the annual reports of the NCPE⁹⁰ declare that some one hundred or so complaints are filed every year in the gender context and that a large number of these have been settled after mediation by the NCPE. The one case brought by the NCPE in the Industrial Tribunal was then settled.

⁸⁹ Which appears to have exclusive competence for matters falling within the scope of that Act.

⁹⁰ There have been five reports so far, dating back to 2004, with the latest (for the year 2008) published in February 2009. See the website of the NCPE, www.equality.gov.mt.

Regulation 10 of the ETE Regulations applies to all situations of sex discrimination in employment and vests the right to access the Industrial Tribunal, without prejudice to the right to bring an action in the Civil Court for an order to desist, for a declaration of nullity of any contract, collective agreement or clause as such, and for compensation. It places the **burden of proof** on the employer once the plaintiff proves that ‘he or she has suffered discriminatory treatment’. This wording is arguably, but not perfectly clearly, compliant with Article 4 of Directive 97/80/EC (the Burden of Proof Directive) which requires only the proof *of facts from which it can be presumed* that there has been discrimination, the burden then shifting to the employer. As to time limits, EIRA and the ETE Regulations 2004 set a peremptory period of ‘within four months of the alleged breach’ for the filing of the complaint or the bringing of the action. EMWA, which applies also beyond the employment context, sets no time limit. The Minister is empowered to make regulations under EIRA and under EMWA governing all matters relating to procedures for redress but has not yet done so.⁹¹ Again, EMWA provides that the Minister may make regulations providing arrangements whereby the NCPE may itself refer a matter to the competent courts or tribunal. Work on these regulations is in progress. This lack of detailed provisions can still cause uncertainty also in the relationship between the two pieces of legislation, the EIRA and the EMWA. Clarity and legal certainty need to be introduced into this area of enforcement.

The NCPE and other associations, organisations or legal entities having a ‘legitimate interest’ may engage themselves on behalf of or in support of a complainant in all judicial fora with the complainant’s approval. There is no clear provision engaging the ‘**social partners**’. While the trend is to regard **collective agreements** as binding, they cannot be said to have been employed as such to implement Community Law. Also, the dearth of cases shows the reluctance of complainants to sue or authorize others to sue on their behalf. Otherwise, remedies include an order to desist and/or, in the eventuality, reinstatement and compensation. However, in general it can be said that where the law imposes a penalty (a fine) such penalties are clearly not sufficiently dissuasive and deterrent, as has been pointed out above. The punishment of imprisonment is laid down for cases of victimisation, harassment or sexual harassment but no prosecution has ever been brought. Also, the respective jurisdictions of the Industrial Tribunal (certainly for claims arising under EIRA) and the Civil Court (certainly for claims arising under EMWA) should be clarified. Arguably, there remain uncertainties in the provision of fully effective mechanisms for the protection of rights.

10. Brief assessment

Categorical assessment is impossible without court judgments. Certainly one can still emphasise the need to carry out a gender audit of the social security legislation.⁹² Also, it remains true that the manner of compliance in general has itself given rise to some lack of clarity in the law. There are the respective but overlapping spheres of the EIRA and the EMWA. Regulations for giving ‘better effect’ to the primary legislation have been made under the EIRA, but detailed regulations have not yet been made under the EMWA for the latter’s full ease of implementation. The EIRA regulations that had been made effectively updated the principal legislation’s key concepts and

⁹¹ The NCPE laments that this makes it difficult for them to operate due to a lack of, for example, rules governing the summoning (including the power to summons) and hearing of witnesses.

⁹² As pointed out by a research study conducted under Project ESF No.46 for the NCPE. See the NCPE website at: www.equality.gov.mt.

brought these concepts closer to the definitions in the respective directives, although there was still an occasional lack of precise correspondence. The situation is thought to have been much improved, if not fully remedied, by the enactment of Acts IV and V of 2009. Still, where penalties are set down, they are regarded as being so weak in the estimation of many as to provide no truly effective deterrent. Also, European law may really need to take a hand in solving the problem that complainants are reluctant to take up their rights and pursue remedies through the national tribunals and courts, for example by examining the use of public interest actions.

Having said that, the overall comment should be that the Maltese courts and tribunals have the tools at their disposal to properly ‘apply’ Community law by properly interpreting and applying the Maltese law in place as well as giving effect to directly applicable or directly effective Community law.

THE NETHERLANDS

1. Implementation of central concepts

As far as terminology is concerned, one should be aware that instead of ‘discrimination’ the word ‘distinction’ is used in the General Equal Treatment Act (GETA) and the Equal Treatment Act (ETA). Recently, the Government of the Netherlands received a letter from the European Commission, pointing out alleged inadequacies in the transposition of the equal treatment directives.⁹³ In this letter, the Commission criticised the definitions of direct and indirect discrimination in the General Equal Treatment Act (and all other Equal Treatment Acts in the Netherlands), and criticized the broadness of some legal exceptions in the Equal Treatment Act as well. With regard to the latter, the Dutch Government has reacted by stating that both the interpretation and the enforcement of these exceptions *in substantive law and case law* are in line with the Directive’s requirements.⁹⁴ With regard to the different definitions, there seem to be two problems here. First, that the Dutch legislator uses the word ‘distinction’ instead of ‘discrimination’. Second, that the definitions of direct and indirect discrimination are both formulated in a somewhat different way than in the EC Directives.

As to the first definitional problem, the Dutch *Raad van State* (‘Council of State’, the Dutch legislator’s most important advisor) has advised the Government to abandon the neutral word ‘distinction’ and has demonstrated itself to be an advocate of using the more normative concept of discrimination.⁹⁵ The main reason for this preference is to bring the terminology of Dutch equal treatment legislation in line with EC Equality Law.⁹⁶ In 2005, the Government has commissioned an in-depth study on

⁹³ Letter dated 11 January 2008, with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444.

⁹⁴ Letter from the Dutch Government to Mr. Spidla, dated 18 March, *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling nr. 2006/2444* (reaction to letter dated 11 January).

⁹⁵ Advisory Opinion of the Council of State and Complementary Report (*Advies van de Raad van State en nader Rapport*), Tweede Kamer, 2001-2002, 28 169, B, pp. 5-6 and Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State and Complementary Report (*Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport*), Tweede Kamer, 2001-2002, 28 187, A, pp. 4-5.

⁹⁶ The same advice had also been given by the Interdepartmental Commission European Law (ICER, ‘Interdepartementale Commissie Europees Recht’). See ICER, *Implementation of the Article 13*

this matter. This report was finalized in September 2006.⁹⁷ The conclusion of the author is that the way in which the word distinction is used in the Dutch equal treatment legislation is in line with the meaning of the word discrimination in EU non-discrimination law. However, for other reasons, it might be preferable to change the terminology in the Equal Treatment Laws, one of these reasons being that the word distinction might suggest that each and every differentiation between categories of people amounts to discrimination. The use of the word distinction, for that reason, is almost always accompanied by the adjective ‘unjustified’. The concept of ‘unjustified distinction’ is perfectly in line with what is generally conceived of as discrimination. The Dutch Government is preparing a bill for a law that will integrate all of the existing equal treatment laws (including the existing sex-discrimination laws). With this, a new discussion about the use of the word ‘discrimination’ instead of ‘distinction’ will be raised.⁹⁸

As to the second problem, the Dutch definitions are indeed phrased somewhat differently from the ones in the Directives. Direct distinction is defined as making distinctions between men and women; this includes making distinctions on the ground of pregnancy, childbirth and motherhood. The comparator element – explicitly mentioned in the Directive’s definition – is not present in the Dutch definition. However, the concept of direct discrimination is *de facto* (i.e. in the way it is applied) similar to EU concepts arising from the Directives. The prohibition of indirect discrimination is phrased as the prohibition on making a distinction between people based on a neutral, but not forbidden ground that nevertheless *results in* unequal treatment on the ground of sex. In the part outlining the exceptions, the law adds that indirect distinction is not prohibited when this distinction is objectively justified by a legitimate aim and where the means to achieve that aim are appropriate and necessary. Instead of using the Directive’s wording of ‘apparently neutral provision, criterion or practice’, the Dutch definition speaks of ‘other [i.e. other than sex] characteristics or conduct that *results in* discrimination on the ground of sex’. It is not quite clear why the Dutch legislator uses this different wording. In practice, the Equal Treatment Commission (ETC) and the courts apply the standards that are laid down in the Directives. However, to avoid any misinterpretation in the future, the Government has recently presented a bill to Parliament, proposing to adopt the definitions of the Directives ‘word by word’.⁹⁹ In the explanatory memorandum, the Government emphasizes that this proposal is only meant to streamline, and not to change any of the content of Equal Treatment Legislation in substantive law.

The GETA and the ETA explicitly permit positive action under certain conditions; this is formulated as an exception to the prohibition on making a distinction on the ground of sex. These conditions imply that (a) a positive measure must be aimed at diminishing or cancelling disadvantages for women, (b) the disadvantages must be linked to sex and (c) the measure must be proportionate to the aim. There is no obligation or requirement to introduce and effectuate positive action programmes.

Directives, conclusions and recommendations (Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen), ICER 2001/54, p. 2.

⁹⁷ M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part of the report on the differences in meaning between the words ‘distinction’ and ‘discrimination’ (pp. 3-113) was written by Prof. Rikki Holtmaat.

⁹⁸ Letter of the Government, dated 18 March 2008, *Kamerstukken II*, 2007-2008, 27 017, No. 40, Annex.

⁹⁹ *Kamerstukken 2008-2009*, 31 832, Nos. 2 and 3.

Instructions to discriminate are equally prohibited by law as is discrimination itself. The term ‘instruction’ is not defined. There is some discussion about the question whether the legislator has interpreted this word too restrictively (in the Memorandum of Explanation to the EC Implementation Bill). As yet, there is no case law to clarify this point.

Harassment and sexual harassment are prohibited by law in the same way as discrimination itself. The definition of (sexual) harassment is quite similar to the definition in the Directives. However, there is one difference as compared to the Directive’s definitions: the word ‘unwanted’ is lacking. The Government believes that this would put quite a heavy burden of proof on the victim to show that the sexual harassment was (subjectively) unwanted. Instead, the Government wanted to emphasize that sexual harassment, objectively speaking, is always an offence. Therefore, leaving out ‘unwanted’ does not seem to be a problem, since this offers more protection to potential victims of discrimination / sexual harassment.

2. Access to work, working conditions

The ETA and GETA apply to all sectors of public and private employment and occupation, including contract work, self-employment and military service.

The GETA and ETA prohibit unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas:

- a. public advertising of employment and procedures leading to the filling of vacancies;
- b. the services of an employment agency (inserted by the EC Implementation Act);
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permission for staff to receive education or training during or prior to the employment relationship;
- g. promotion;
- h. working conditions.

The ETA also covers the area of access to professional education and the conditions under which this education takes place (including examinations). In addition, the ETA covers the area of occupational pensions (as part of equal pay) – see below.

Finally, the GETA covers membership of professional organisations: ‘it shall be unlawful to make distinctions with regard to the membership of or involvement in an employers’ organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement’.

3. Pregnancy and maternity protection; parental leave

Pregnant women and women who have given birth are protected by equal treatment legislation, since this legislation extends the scope of the concept of sex discrimination to pregnancy and maternity-related discrimination: ‘(...) the term direct *distinction* on the ground of sex must also be understood as a distinction on the ground of pregnancy, childbirth and maternity.’ This means that in respect of all the aspects of the employment relationship that are covered under the GETA and ETA, pregnant women and mothers are protected against all forms of discrimination (i.e. including indirect discrimination and harassment). In the Civil Code there is an explicit prohibition on dismissing a woman *because* she marries and *during* pregnancy. There is no explicit right to return to the same or a comparable job after

having taken pregnancy or maternity leave; the Government did not deem it necessary to implement these provisions in the Directive since this right is guaranteed under the right not to be treated unfavourably with respect to any condition of work, or the prohibition on dismissing somebody *because of* pregnancy, childbirth or motherhood.

The issue of leave is mainly addressed in the *Wet arbeid en zorg* (Work and Care Act 2001). In this act, a range of care leave arrangements are provided, namely:

– Pregnancy/maternity leave: This provides for a 16-week pregnancy/maternity leave with 100 % salary. The pregnant mother can decide herself when to start the leave, provided that she announces this three weeks in advance.

– Parental leave: a right to unpaid leave for 13 times the weekly working time. Parental leave can be spread out. This right to leave is restricted to employees who have worked at for least one year for their employer, available if a child of a parent is under the age of 8.

– Adoption and foster-parent leave: fully paid leave for both parents up to 4 consecutive weeks, to be taken between 2 weeks before the actual adoption of a child and 16 weeks afterwards at the latest.

4. Equal pay

The concept of pay, as defined in the ETA and applied by the Dutch Courts and the ECT, is in line with the (wide) interpretation given by the ECJ. That is: it includes occupational pensions as well as a wide range of ‘benefits’ that flow from the employment relationship.

As far as equal pay is concerned, there are in fact two different procedures that can be used in order to combat or eradicate unfair practices. In the first place, any ‘neutral’ pay practice can in effect lead to indirect pay discrimination on the ground of sex, for instance, a practice granting extra pay for workers who are prepared to work overtime. This can be contested under the provisions prohibiting indirect sex discrimination. In that case, it will be tested whether there is an objective justification; for this the normal (stringent) objective justification test is applicable. The other possibility is when an individual female worker compares her salary with that of an individual male worker and finds that her pay is less than that of her colleague.

This latter procedure is explicitly provided for by the law in Articles 7-10 ETA and Articles 7:646-7:649 of the Civil Code. This means that there is a right to equal pay for work of equal value or of approximately equal value for workers who work for the same employer. There is an obligation to use (standardized) work classification schemes to evaluate the value of jobs that are being compared. However, the ETC has sometimes held that in fact the job classification system itself is discriminatory since it is not gender neutral.

No justifications for pay differences are accepted, as soon as it is established that these differences do in fact exist and are related to sex.

5. Occupational pension schemes

As a consequence of the *Barber* judgement and Directive 96/97/EC in 1998 some provisions concerning occupational pension schemes were included in the ETA (Articles 12a/12e ETA). The intention of this amendment was to transpose the *acquis* as precisely as possible and to add nothing more in terms of the protection or reparation of women’s rights than is required by the directives and the case law of the ECJ. The exceptions in this legislation are in accordance with the directives.

6. Statutory schemes of social security

There is no specific national legislation prohibiting discrimination in statutory social security schemes. The Government abolished – sometimes after it had been forced to do so by the courts on the ground of their application of EC law – many discriminatory provisions in social security laws after Directive 79/7/EEC came into force. In as far as there are still instances of direct or indirect discrimination in this area, Dutch citizens may refer directly to the Directive or may refer to Article 1 of the Constitution or to Article 26 of the ICCPR. All of these provisions have in fact often been used in court cases, leading to the eradication of – as far as we can judge, not being experts in social security issues – the most important instances of sex discrimination in this area.

7. Self-employed and helping spouses

In the GETA and ETA, self-employment is also covered. This is defined as: ‘the conditions for and access to the liberal professions and with regard to pursuing the liberal professions or for development within them’. Although the term ‘self-employment’ is not used in this context, giving a broad interpretation to the term ‘liberal profession’ will guarantee that not only doctors, architects etc. are covered, but also freelancers, solo traders, entrepreneurs, etc. The ETC does indeed interpret this term widely.

Helping spouses are not expressly covered under the equal treatment legislation. However, in a case where a company required that not only the franchiser himself but also his wife was fully available for the work, the ETC decided that helping spouses are covered under this legislation (see ETC 8 August 1988). On some occasions (e.g. for tax purposes) helping spouses can be considered as employees of their husband/wife.

8. Goods and services

Goods and services have been covered under the GETA since 1994. For that reason, the Government did not deem it necessary to implement Directive 2004/113/EC at this point. The only change that was made is that – with respect to offering goods and services – a prohibition on sexual harassment was added to the GETA.

GETA Article 7 lays down the prohibition of making a distinction which is applicable to (in brief):

- the supply of or allowing access to goods or services which also embraces all forms of education;
- the provision of career orientation and guidance (*loopbaanoriëntatie*);
- advice or information regarding the choice of an educational establishment or career.

It is furthermore specified in this Article that the GETA only applies to the above-mentioned areas if the alleged discriminatory acts are committed: (a) in the course of carrying on a business or exercising a profession, (b) by the public service, (c) by institutions which are active in the field of housing, social services, health care, cultural affairs *or education*, or, (d) by private persons not engaged in carrying on a business or exercising a profession in so far as the offer is made publicly.

The exception of positive action, provided for in that Directive, is also included in the GETA.

The Dutch legislation concerning **sex-segregated services** is in conformity with Directive 2004/113/EC and even goes beyond the requirements: Dutch equal treatment law in principle forbids sex-segregated services unless one of the legal

exceptions can be applied. These exceptions are comprehensively listed in the *Equal Treatment Order* (a Ministerial Decree). This boils down to a **closed system** of possible justifications for sex-segregated services. Article 4(5) of the Directive, however, only prescribes that sex-segregated services shall have a legitimate aim and shall be proportional. Certain types of sex-segregated services can of course harm the principle of equality and non-discrimination, but examples of harmless and even favourable segregated services do exist as well. The Dutch legislation on this issue may therefore be regarded as unduly restrictive. An open system of justifications (as is reflected in Article 4(5) of 2004/113/EC) seems to leave sufficient room for favourable forms of sex-segregated services, but at the same time is adequate in ruling out discriminatory and undesirable kinds of sex-segregated services.

Providing goods and services (by means of e.g. laws, decrees, subsidies, etc.) by governmental institutions are excluded from the scope of the equal treatment laws. Bringing all unilateral governmental decisions and acts under the scope of the GETA (and subsequently under the enforcement by the ETC) would mean that the margins of appreciation of national and local governments about how to construct their policies and laws or regulations would be severely limited. Besides, the need to bring these unilateral governmental decisions and acts within the ambit of the GETA could clash with some fundamental features of the Dutch legal system, e.g. the fact that the Constitution excludes the possibility of a constitutional review of legislation (Article 120 of the Constitution) and that all Government acts are already ‘governed’ by Article 1 of the Constitution (prohibiting unequal treatment and discrimination). In addition, there exists a refined system of administrative appeal/ administrative courts in the Netherlands, to which cases of direct and indirect discrimination can be brought.

9. Enforcement and compliance

The equal treatment acts protect against **victimisation**, dismissal and against other forms of disadvantages as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, e.g., by means of testimony. This is in accordance with the standards in the directives.

The ETA and GETA have a provision concerning the **burden of proof** that is in line with the directives. The partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the General Act on Administrative Law. Strictly speaking, the partially reversed burden of proof does not apply in procedures before the ETC. However, on a voluntary basis the Commission nevertheless applies it in its procedures. There is some discussion about the question whether the burden of proof rules are applicable in cases of victimisation.

Sanctions in case of discrimination are applied by the courts. (In the following we leave aside criminal sanctions for discriminatory offences, since they are hardly ever imposed, especially not in the case of sex discrimination.) According to the GETA and the ETA, discriminatory dismissals and victimisation dismissals are ‘voidable’ (*vernietigbaar*). The employee can ask the court to invalidate the termination of the contract and can thereby claim wages. He/she can also demand to be reinstated in the job. Or, he/she can claim pecuniary damages under the system of sanctions in general administrative law, contract law and/or tort law. However, damages are hardly ever claimed (and awarded) in cases of discrimination. Contractual provisions which are in conflict with the GETA and the ETA shall be null and void. If the claim or complaint has been brought by interest groups the sanctions are similar.

The GETA and ETA mention some **additional ‘sanctions’**. Sanctions under these laws are imposed by the ETC, not by the courts. Under Article 13(2) GETA, the ETC may make recommendations to the party found to have made an unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Advice to the Ministers concerned, and to organisations of employers, employees, professionals, public servants (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the ETC may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified. This power must be considered in light of the fact that the ETC’s Opinions are not binding. The ETC has never made use of this possibility. It is seriously doubted in academic legal circles whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be ‘effective, proportionate and dissuasive’.

Access to the courts is ensured for victims of discrimination. Also, interest groups whose aim is to help victims of discrimination or to combat discrimination have access to the courts. Access to the ETC is free of charge.

The ETC is the first officially designated **equality body**. Its task is mainly to hear complaints (from individuals and organizations) about discrimination (and to give non-binding opinions), to give advice to organizations which want to revise their policies, to monitor developments and to advise the Government with respect to the implementation of anti-discrimination legislation and/or any necessary revision of this legislation. Besides, on 1 January 2007 two non-governmental organizations, the National Bureau against Racial Discrimination (*Landelijk Bureau ter Bestrijding van Rassendiscriminatie, LBR*) and the local Anti-discrimination Centres (*Antidiscriminatiebureaus, ADBs*) were merged into one new organization called ‘Article 1’ (after Article 1 of the Constitution.) This new organization now covers all of the Article 13 ECT non-discrimination grounds, including sex discrimination, and is officially designated as one of the equality bodies. It mainly has a role in assisting victims and in monitoring the occurrence of discrimination. New legislation (which is in the final stage of the decision process) will oblige all local governments to provide for an accessible independent non-discrimination organisation to monitor discrimination and assist victims.¹⁰⁰

Social partners do play an important role, although this has not been regulated in the equal treatment laws. In the field of gender discrimination the trade unions play an especially active role in the field of equal pay. Also, they stimulate the discussion on positive action (e.g. by means of quotas).

Collective agreements are used as a means to supplement the legal rules governing the labour contract. Under Dutch law, a collective agreement is binding on:

- all employers who were (represented by the) parties in the collective agreement;
- all employees of an employer who was party in the collective agreement (regardless of membership of a labour union that does not or did not negotiate or agree);
- any employment contract in a sector, if a declaration of ‘generally binding’ has been issued by the Minister for Social Services and Employment.

In case of a binding collective agreement, all the arranged regulations are binding on all contracts. Individual employment contracts may only differ in favour of the employee. The length of the validity of collective agreements is at most 5 years. In

¹⁰⁰ *Kamerstukken II 2007-2008*, 31 439, Nos. 1-3: *Wet gemeentelijke antidiscriminatievoorziening*, accessible at <http://parlando.sdu.nl/cgi/login/anonymous>

collective agreements one can find rules concerning inter alia the (supplementary) right to childcare facilities, supplementary rights to care leave (including parental leave), et cetera.

10. Brief assessment

The overall impression is that the implementation of the directives in the field of gender discrimination is to a great extent satisfactory. There are some issues that are debatable. First, the issue of the need to bring the definition of ‘indirect discrimination’ more into line with the directives’ requirements has now been taken up by the Government. Furthermore, it is argued that the Dutch Government interprets the prohibition of an ‘instruction to make a distinction’ unduly narrowly and that it has adopted an unduly restrictive approach as regards the ‘scope of liability’ for discrimination. The partially reversed burden of proof – not applicable in victimisation claims – also seems to fall short of EC requirements. In addition, the requirement that sanctions should be ‘effective’, ‘dissuasive’ and ‘proportionate’ are certainly not met by the Dutch legislation. This latter point seems to be the most serious shortcoming of the implementation of EC law in this respect. Finally, Dutch equal treatment law concerning sex-segregated services is in line with the requirements; however, it can be argued that the current closed system of justifications regarding sex-segregated services is unduly restrictive, as it rules out certain favourable and desirable forms of sex-segregated services as well.

NORWAY

1. Implementation of central concepts

As to the concepts of **direct and indirect discrimination**, the general clause of the Gender Equality Act (GEA), Section 3, states that direct or indirect differential treatment (discrimination) of women and men is not permitted. The concepts are overall in line with the EU *acquis*.

Positive action is explicitly permitted, but has been interpreted with a limitation not inherent in the wording of the GEA. GEA Section 3a explicitly states that only the different treatment that promotes gender equality in conformity with the purpose of this Act is allowed. The same applies to special rights and rules regarding measures that are intended to protect women in connection with pregnancy, childbirth and breastfeeding. Further provisions as to which types of different treatment are permitted include provisions regarding affirmative action in favour of men in connection with the education and care of children. One of the few measures implemented over the last three years regarding positive action is an obligation to secure a balanced gender representation on company boards. The boards in all state-owned companies, as well as public limited companies in the private sector are obliged to have a minimum of 40 percent representation of each gender. The provisions of the Norwegian legislation are in its wording more far-reaching and progressive relating to promoting the status of women than the current *acquis*, as is shown by the judgment of the EFTA Court in case No. E-1/02 in which a measure to increase women in academic positions was found to be in contravention of Directive 76/207/EEC Article 3(1). After this judgement, a few measures on positive action have been implemented.

The GEA Section 3(5) bans **instructions regarding acts that are in contravention of provisions of this Act**. It is specified that such instructions shall be regarded as illegal differential treatment. No case law has emerged on this theme.

The GEA Section 8a bans both **gender-based harassment and sexual harassment**. Such harassment is considered to be illegal differential treatment in contravention of Section 3. The law defines 'gender-based harassment' as unwelcome conduct related to a person's gender that has the effect or purpose of offending another person's dignity. The term 'sexual harassment' is defined as unwelcome sexual attention that is offensive to the object of such attention. It is the employer and management of organizations or educational institutions that shall be responsible for preventing and seeking to preclude the occurrence of harassment in contravention of provisions of the GEA within their sphere of responsibility. Gender-based harassment may be brought before the Gender Equality Ombud and the Gender Equality Tribunal, whilst the prohibition against sexual harassment shall be enforced by the courts of law.

2. Access to work, working conditions

The implementation of the EU directives relating to access to work and working conditions has overall been good. In relation to matters concerning pregnancy and the question of effective remedies, implementation is not as effective as it should have been. GEA Section 4(2) states that in connection with the employment, promotion, dismissal or laying off of employees, no difference must be made between women and men in contravention of Section 3. The opinions of the Gender Equality Ombud and Tribunal in relation to discrimination in the hiring process are in reality quite ineffective, as the case is heard after another applicant has successfully secured the vacant position, and as the Ombud and Tribunal has no power to grant compensation. In order to be awarded compensation a case must be filed at the ordinary courts.

3. Pregnancy and maternity protection; parental leave

The general regime for the protection of pregnant women and women who give birth is in general excellent, and most regulations in terms of financial benefits go further in terms of time than what is stipulated in EU law. Pregnant women with strenuous work and work with hazardous substances might have the right to a pregnancy allowance, if their employer is not able to adapt their workload to less strenuous work. Prenatal check-ups are free, and employees have a right to time off with pay. All medical expenses during pregnancy, birth and the postnatal phase are covered by the national insurance scheme. Protection against dismissal while an employee is pregnant is provided for in the WEA Section 15-9. An employee who is pregnant or is on maternity leave cannot be dismissed for this reason alone. Any employer who dismissed an employee during these periods must prove that there are reasonable grounds for the dismissal not related to the pregnancy or period of absence from work. The GEA prohibits the discrimination of pregnant employees and those on leave, but the law itself does not specify the right to return to the same or a comparable job.

Parents, including parents who adopt, have a right to extensive leave from work as stipulated in the Working Environment Act (WEA), for a period of up to three years, although only one of these potential years off are paid leave. The right to benefits during this leave is laid down in the National Insurance Act (NIA). The parental benefit period in connection with birth is either 44 weeks at the full rate, or 54 weeks at the reduced rate. Of this, the mother must take three weeks leave before the birth and 6 weeks after the birth. The father has a right to 6 weeks' leave. It is up

to the couple to decide how to spend the remaining period of the leave. In order to earn the right to these benefits, parents must be employees and have had a minimum income for at least 6 of the 10 months immediately prior to the receipt of parental benefits. Non-working mothers are entitled to compensation in the form of cash in relation to the birth. Nursing mothers are entitled to time off from work to breastfeed. As a starting point this is not paid time off, but many employees have paid time off for breastfeeding stipulated in their collective agreements.

4. Equal pay

The legal standard 'equal pay for work of equal value' is codified in the GEA Section 5, in which the starting point is that women and men in the same enterprise shall have equal pay for the same work or work of equal value. The pay shall be fixed in the same way for women and men regardless of sex. The term 'pay' means the ordinary remuneration for the work as well as all other supplements or advantages or other benefits provided by the employer. This aspect normally poses no difficulties, although there have been issues relating to part-time workers (mainly women) receiving less favourable employment insurances which usually also provide additional occupation pension rights. After the introduction of WEA Section 13-1(3) in 2005, in which the discrimination of an employee who works part time or on a temporary basis is banned, discrimination because of part-time work has received additional attention. It is especially in terms of other benefits provided by the employer (including pensions) that large female-dominated professions have experienced that they have received less than other groups. The right to equal pay for the same work or work of equal value applies regardless of whether such work is connected with different trades or professions or whether the pay is regulated by different collective wage agreements. Whether the work is of equal value is to be determined after an overall assessment in which importance is attached to the expertise that is necessary to perform the work and other relevant factors, such as effort, responsibility and working conditions. This is the theory. In reality it has proved quite difficult for employees with different professional backgrounds to ascertain that their job is of equal value. As the employment market is highly gender segregated in Norway, there are certain jobs with a high proportion of women such as nurses and others with an equivalent high proportion of men such as engineers. Key justifications for pay differences between different professional sectors have been the 'market value' and 'historical differences'. The introduction of a system for group action might change these, although no group litigation cases on equal pay have yet been heard. A recent public study, the report NOU 2008:6, showed that key differences regarding pay equality occur during maternity leave and because of the gender-segregated employment market.

5. Occupational pension schemes

There are no gender-specific differences in relation to occupational pension schemes in Norwegian law and, as such, EU-relevant legislation is fulfilled. However, in a number of instances workers are not covered by the schemes, such as insurance agreements operating with conditions requiring that a person has to work at least 14 hours weekly before membership in a supplementary pension system or that a certain time of employment is required before rights to membership/benefits are earned. Such insurance arrangements may very well be in breach of the prohibition of indirect discrimination as most part-time workers are women.

6. Statutory schemes of social security

The NIA provides a basic package of benefits for sickness, invalidity and old age, which depend on the time of residency in Norway and the years of gainful employment. Legislation addressing occupational accidents, the Act of 16 June 1989 No. 65, makes it mandatory for all employers to ensure that all employees are covered through a private insurance paid by the employer which ensures full protection against accidents at work and occupational diseases. In addition there are various laws providing compulsory additional benefits in case of accidents or old-age benefits. The main reasons for excluding people from receiving benefits are that they work in minor employment, in non-remunerated jobs as well as in temporary jobs. The basic package is granted, but no additional compensation is provided. No exclusions have explicitly been made in relation to the exclusions mentioned in Article 3(2) and Article 7(1) of the Directive, but differential treatment as in the case above or in the form of threshold requirements in order to qualify for membership in the pension systems may prevail in the various pension systems. Non-discrimination is safeguarded in the statutory scheme through the application of the rules of the GEA. In the process of creating and amending laws, the Ombudsman is taking part in responding to proposals. The problems in practice become more evident as a result of the gender-segregated employment market and the high percentage of women working part time. These two factors play a part as men and women have different outcomes in their accrued rights to an additional pension.

7. Self-employed and helping spouses

The NIA provides compulsory coverage for all people working or residing in Norway for 12 months. This gives anyone basic coverage in terms of benefits. The size of the benefits will vary depending on the income which the person has had. Legislation is gender neutral in its wording. As Directive 86/613/EEC has so few requirements that are targeted and specific, Norwegian legislation is satisfactory. However, in light of the existing gender-segregated employment market in Norway, key areas must be highlighted in order to focus on areas where equal treatment regardless of sex is not always achieved. This especially concerns helping spouses and their economic independence. The situation may be improved especially by strengthening the helping spouse's right to individual rights. Helping spouses do not have individual rights under the additional pension system of the NIA. The married couple must agree on how much income is to be reported for each of the parties when filling the tax return at the end of the year. If no income is reported for the helping spouse, she remains 'invisible'. Legal measures should provide helping spouses with individual rights to pay, pension credits, holiday pay and social security benefits so that helping spouses do not have to depend on the goodwill of their spouse to receive compensation for their work. Norway has a low number of self-employed women, as these traditionally have not benefited fully from the good maternity rights and social security benefits which follow from public employment. As from 1 July 2008, self-employed women will receive full maternity benefits, which go further than the requirements in EU law.

8. Goods and services

Directive 2004/113/EC is implemented in the EEA Agreement. The relevant provisions of the Directive are covered by the GEA, but according to our traditional legal technique it is not a copy out. Whether or not this transposition is sufficient to make the wording of the Directive known to the public might be discussed. Existing Norwegian legislation is, as was mentioned before, considered as meeting the

requirements of the Directive through the wording of the Gender Equality Act of 9 June 1978 No. 45 (GEA), see Sections 1, 2 and 3. Section 1 states that the Act shall promote gender equality, and aims in particular to improve the position of women. Section 3 states that direct or indirect differential treatment of women and men is not permitted. Section 2 states that the Act shall apply to all areas, except for the internal affairs of religious communities. The GEA is thus not limited to the employment market.

The concepts of ‘**goods**’ and ‘**services**’ are not defined in national legislation. Case law will be interpreted as closely as possible in line with the approach taken by the ECJ. However, according to the GEA, the prohibition against discrimination on the ground of sex has been applied to health services, all public funded, with no concern as to whether or not it is a service or goods offered. See the cases of the Tribunal: 2/2006 (routines for finding breast cancer vs prostate cancer), 9/2006 (egg donation vs sperm donation), 4/2003 (different price for sterilization of men and women) and 1/2004 (sex as actuarial factor in calculation of insurance premium covering income loss due sickness and accidents).

9. Enforcement and compliance

Protection against **victimisation** is implemented in GEA Section 3(5) which states that no person may be subject to reprisal/disciplinary action for having presented claims of breach of the GEA or having implied that such a complaint may be brought. The same rule applies to any witnesses to such actions.

The **burden of proof** is regulated in the GEA Section 16. In all discrimination cases where there are circumstances that give reason to believe that there has been direct or indirect differential treatment in contravention to the GEA, such differential treatment shall be assumed to have taken place unless the person responsible proves on a balance of probabilities that such differential treatment nonetheless did not take place. This applies equally to situations of reprisals. This has been interpreted by the Ombud and the Tribunal to mean that as long as there are objective facts that can substantiate the case the burden of proof shifts to the employer. Various kinds of administrative **remedies** are established, such as orders to stop any discriminatory practice and the duty to provide information to the Ombud and the Tribunal.

Norway has a free low threshold **complaint system** for gender equality and other discrimination grounds. The Gender Equality and Anti-Discrimination Ombud accepts cases of gender discrimination and will, after having heard both parties, provide a decision as to whether she finds that discrimination has taken place or not. The Ombud’s decision may be appealed to the Equality and Anti-Discrimination Tribunal. The Ombud/Tribunal system works to such an extent that few cases are handled by the ordinary courts, and few lawyers are well versed in discrimination-relevant legislation. The Ombud and the Tribunal do not have the mandate to award compensation according to the GEA Section 17, but they can recommend the party to pay compensation in cases where a party is found to have acted in breach of the GEA. As such agreements are private, neither statistics as to the level of compensation nor the number of agreements exist.

Cases of discrimination may be handled by the ordinary courts, but since 1985 and until June 2008 there have been less than 20 cases. Cases alleging that **collective agreements** contain clauses that are discriminatory may be taken to the Labour Court by one of the parties to the agreement. The Labour Courts have only handled 10 cases of alleged discrimination, and have in all but one case avoided addressing the issues

relating to the GEA, but have solved all cases based on interpretations of the collective agreement itself.

10. Brief assessment

The overall implementation of the EU gender equality *acquis* is satisfactory. As there is very little case law from the ordinary courts concerning the GEA, little of the practice from the EU Court is referred to in national judgments. The Recast Directive (2006/54/EC) as well as all other gender equality directives have been implemented through the EEA Agreement and are covered in national legislation mainly through the GEA, the Working Environment Act and the NIA. One of the greatest challenges in the future is to bridge the gap between the legislation on the individual's right to protection against discrimination with the structural reasons which are the basic foundations of discrimination which therefore may take place on an individual basis. For the case of Norway that is for instance the gender-segregated employment market and the extensive use of part-time work amongst women. The CEDAW Article 5a may be the useful legislative tool in that respect.

POLAND

1. Implementation of central concepts

The equal treatment of women and men at the workplace and in social security is traditionally a constitutional value. The equality rule and the prohibition of discrimination (direct and indirect due to various reasons, including sex) are provided in the Labour Code and repeated (with some modifications) in the Law on the Promotion of Employment and Institutions of the Labour Market, as well as in the Act on Social Security Systems. The most developed regulations on equality are contained in the Labour Code, which considers the equality rule as belonging to fundamental principles of labour law, which means that other provisions of labour law and their interpretation must be consistent with this rule. It also contains the definition of **direct and indirect discrimination, harassment and sexual harassment**. In addition, it permits **positive action** and prohibits an **instruction to discriminate**. Although several central concepts generally follow the EU definitions to a certain degree, some of the equality provisions introduced until November 2008 did not correctly reflect EU concepts. The Law of 21 November 2008 amending Labour Code improved the definition of indirect discrimination, which now includes a reference not only to existing, but also to hypothetical situations and mentions not only unfavourable disproportions but also particularly disadvantageous situations. It also makes reference to 'legitimate aim' and, as regards the means to achieve this aim, to the principle of proportionality. In addition, while describing the area in which indirect discrimination may occur, the amended Labour Code has substituted the general expression 'in conditions of employment' by more detailed terms of establishing and termination of employment, conditions of work, promotion and access to training upgrading professional qualifications. The definitions of harassment and of sexual harassment have been significantly improved. They now reflect a clear distinction between sexual harassment and harassment based on sex. In addition, after amendments, definitions of harassment and sexual harassment refer to the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The relevant provision now also explicitly reflects the idea that discrimination includes less favourable treatment based on a person's rejection of or submission to

harassment or sexual harassment. It has also broadened the scope of protection against worse treatment in case of filing a discrimination claim, by extending its application to supporting and assisting persons and by extending the prohibition of retaliation also to other kinds of unfavourable treatment besides dismissal from work .

Despite the introduced amendment, definitions of some central concepts in the Labour Code still need further improvement. It particularly needs more explicit explanation that the notion of discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave.

2. Access to work, working conditions

The Constitution guarantees equal access to employment, promotion and positions. This principle is laid down in the Labour Code, underlining that it also means equal access to vocational training, upgrading professional qualifications, regardless of whether the employment is full or part time. This principle applies to every employee regardless of the label of her/his work contract; essential in this respect are conditions in which work has to be performed (under another person's guidance as to the place, time and conditions of work). The law states that the principle of equal treatment does not affect the non-employment of someone because of her/his sex if this is justified due to the type of work, the conditions for its performance or the occupational requirements placed on employees. The definition of admissible exceptions to the principle of equal treatment after the amendments made to the Labour Code in 2008, includes reference to the principle of proportionality and to the notion of 'legitimate aim' and provides a more precise formulation of the exception in cases related to the character of work. In particular, the notion of 'genuine and determining occupational requirements' was added, since earlier the sole type of work or conditions of its performance were reason enough to justify the fact of not being offered an employment contract based on the grounds listed in the Labour Code. The differentiation based on age in establishing conditions of work, promotion and access to training raising professional qualifications is now exceptionally allowed when the criterion of length of employment is applied.

Admissible is also the differentiation of the situation of employees in order to protect parenthood or disability.

3. Pregnancy and maternity protection; parental leave

The Labour Code, after amendments introduced by the laws of 21 November 2008 and of 6 December 2008, deals in a rather satisfactory fashion with the protection of pregnant women in employment as well as persons on maternity leave. In particular, the Labour Code provides for a prohibition on employing pregnant women for work which is particularly heavy or detrimental to health and the duty of an employer to assign a pregnant woman to another job in order to avoid exposure to any danger. If this is impossible or inadvisable the woman should be released from performing work while her remuneration is maintained. A pregnant woman cannot be dismissed from work. In the opinion of the Supreme Court, it is irrelevant for the protection of pregnant women from dismissal whether the employee was aware of her pregnancy, the employer had been informed about this fact, or that the pregnancy has terminated by miscarriage. The only thing that matters is the objective existence of pregnancy at the moment of dismissal. The Labour Code also contains the prohibition of dismissal during maternity leave. After the amendments of November 2008, it now contains an explicit guarantee for women after maternity leave, regarding their return to their previous position (or, if that is not possible, to an equivalent position, corresponding

with the relevant woman's qualifications) with a remuneration equal to that received by other employees working in the same position who did not profit from maternity benefits. Polish labour law sees maternity leave as the personal right of an employee. According to the amendments of December 2008, as of 2010, the maternity leave will consist of two parts: an obligatory and an optional part. The obligatory maternity leave has three time limits: 18 weeks in case of giving birth to the first child, 20 for every next birth and 28 for multiple birth, which will be substituted according to the new regulation by: 20 weeks (for the first and every other single birth) and in case of multiple birth by a leave of 31 to 37 weeks depending of the number of children. Prolonged in a similar way will be the length of leaves in case of adoption of one or simultaneously more than one child. As of 2010, the new law will give parents the possibility to take an optional maternity leave after expiration of the obligatory maternity leave. The length thereof shall increase gradually, starting from 2 weeks in order to reach 6 weeks in 2014. At present, after 14 weeks of maternity leave, the woman can transfer the remaining part of her leave to the child's caring father. The amendments envisage the introduction of a non-transferable period of leave for the father in addition to the possibility mentioned above. This will perish if the father does not use it during the first year of the child's life. This so-called paternal leave will be introduced gradually, starting from 2010 (first amounting to one week and eventually to two weeks from 2012 onwards).

The parental leave to which both parents are entitled on an equal basis may be granted, as a general rule, for 3 years up to the child's 4th birthday and divided up into 4 parts; both parents may take it simultaneously for up to 3 months. During the parental leave low income families are entitled to an allowance of 60 % of the minimum wage. For others this leave is unpaid. The Labour Code provides, among other things: the prohibition on terminating an employment contract during parental leave, the right to return to the same job or, if this is impossible, to an equivalent post, the inclusion of a parental leave term in the employment term constituting the basis for calculating employment benefits as well as the recognition of the right of an employee, entitled to parental leave, to request reduced working hours. The novelty provided for by the amendments of December 2008 consists of the introduction of a protective period of 12 months, during which the employer will not be able to dissolve the employment contract after the employee returns from maternity (paternity) leave and decides to work in a shortened work time schedule, instead of going on parental leave. The employer is obliged to accept the employee's choice. Such a contract can only be dissolved in case of a bankruptcy or liquidation of the enterprise or for disciplinary reasons.

Of some importance is the recent decision of the Constitutional Tribunal which declared as unconstitutional, according to the principle of the protection of maternity, the governmental regulation which stated that in case maternity allowances coincided with allowances connected with parental leave, the first shall consume the latter. The Labour Code provides for the right to paid time off in case of emergencies for family reasons.

The Labour Code provides for the right to paid time off in case of emergencies for family reasons.

The law of December 2008 has also provided for an augmentation of the bases of the retirement and disability pensions insurance contributions, paid from the State Budget, and increases the maternity leave payment for farmers. It also extends the maximum length of the period of payment of sickness benefits for pregnant women (from 182 to 270 days). At the same time, other children-friendly measures have been

introduced, such as the possibility to use the enterprise's social fund for the development and maintenance of nurseries and kindergartens for the employees' children, situated at the place of employment, or the release from payment of contributions to the Employment Fund for the period of 36 months in case of each employee continuing work after return from maternity, paternity or parental leaves.

The Polish rules dealing with maternity exceed the minimum standard of protection provided in the EC directives in regard to the length of paid maternity leave. They also have shortcomings. One of these deficiencies is the fact that the protective Labour Code provisions do not apply to employees hired for a short trial period or to employees with whom an employment contract was concluded for substitute purposes. It may also be criticized that only very low-income families are entitled to the allowance connected with parental leave, the value of which is symbolic.

The regulations may raise some criticism with regard to the relatively short length of the non-transferable leave for the child's father and the fact that its introduction has been postponed. It can also be pointed out that while extending the protection of employees returning from maternity leave, the amendment fails to explicitly add that the horizontal protection in case of discrimination also applies to any less favourable treatment of women related to pregnancy or maternity leave (this might be unclear, since the provisions dealing with protection of paternity are not included in the chapter of the Labour Code dealing with equal treatment).

4. Equal pay

The principle of equal pay for equal work or work of equal value for women and men is laid down in the Constitution and the Labour Code, without any legal justifications for differences in pay. This principle should be applied in all kinds of working relationships. Work of equal value is work which requires comparable professional skills and qualifications (certified by documents or by practice and professional experience) from employees, as well as comparable responsibility and effort. Remuneration is understood to include all possible components, irrespective of their description or nature, as well as other benefits related to employment which are granted to workers as payment, either in money or in kind. According to the case law of the Supreme Court the reimbursement of travel costs is part of this remuneration (understood as compensation payments).

A diffidence may be considered to be the fact that Poland does not have a general system of occupational classifications for the purpose of determining remuneration and also lacks a universal system for evaluating work. In addition, the provision making the remuneration dependent on the length of employment, regardless of the type of work performed, may be criticized as being contradictory to EC case law .

5. Occupational pension schemes

According to the Act on Occupational Pension Schemes, this system may be applied to any person employed on the basis of a contract of employment (whether appointed, elected or nominated to the contract or whether it concerns a cooperation contract) on a full or part-time basis for a period not shorter than three months. Those limitations connected with the form of the employment contract and the minimum time-limits for the employment are the only legal burden for entering into the system.

The Act on Occupational Pension Schemes of 2004 has removed the non-compliance of Polish law with EC law by eliminating, in particular, the provisions which differentiated the required retirement age for women and men.

6. Statutory schemes of social security

The reform of the social security system carried out in 1998 made the system more universal and uniform in the sense that the application of the Social Security Act was no longer limited to employees, but also involved persons performing work not based on an employment relationship (e.g. the self-employed, performing work on the basis of an agency contract or a contract of mandate). The only group still to fall outside the scope of the Act are farmers who are covered by a separate Act from 1990. In the current system, contributions are divided into the following categories: old-age and disability pensions, sickness and maternity insurance, insurance against accidents at work and occupational diseases. The protection against unemployment is regulated in the Law on Social Aid. To a large extent the current statutory social security system seems to conform to the requirements of the EC regulations. This is also mainly true for the well developed anti-discriminatory provisions. The Polish regulation maintained, however, a different retirement age for men and women. As a result of this fact one may estimate that in the future the old-age pensions of women will be lower by a half than the new old-age pensions of men, which may be perceived as gender discrimination.

7. Self-employed and helping spouses

The Act on Economic Activity generally stipulates that undertaking and carrying on an economic activity is free to anyone on an equal basis when the necessary conditions laid down in the law are observed. The statutory social security system provides for the same mechanisms for all social and professional groups, including self-employed workers and persons co-operating with them. Persons performing work e.g. on the basis of an agency contract or a contract of mandate and persons co-operating with them, although also covered by this system, are poorly protected. In the context of this Act, the category of persons co-operating with the self-employed person includes the spouse, but also other persons (children, including adopted children, parents, including step- and adoptive parents). However, in order to be covered by the insurance, the spouse and other persons mentioned above must not only co-operate with the self-employed person, but must also share a common household with them. Both self-employed persons and persons co-operating with them are subject to obligatory (compulsory) old-age and disability insurance and insurance against accidents at work and occupational diseases. The insurance against sickness and in the case of motherhood may be joined by those persons on voluntary basis.

Pursuant to the Act of 1990, the social insurance of farmers covers the farmers themselves as well as members of their household working with them, including their spouse. The social insurance for farmers includes insurance in case of accidents, sickness, motherhood, as well as old-age and disability pensions. For farmers (and members of their household) with an agricultural farm of more than 1 hectare the insurance is obligatory. For other farmers or members of their households it is optional. The insured person, after giving birth, has the right to maternity benefits to an amount equal to the sickness benefits for eight weeks. The Polish legislation seems to be compatible with the requirements laid down in EC law, however the provisions referring to the rights resulting from social security for some categories of workers (in particular farmers) and persons co-operating with them, may not be subject to an unambiguous estimation, mostly because they are less protected than self-employed persons.

8. Goods and services

This Directive has not yet been implemented in Poland.

9. Enforcement and compliance

The Labour Code states that an employee is entitled to special protection against being laid off in retaliation for initiating a claim for a failure to comply with the principle of equal treatment. The relevant provision may be criticized since it narrowly defines the protection against retaliation (to an employee being the alleged victim of discrimination) and restricts the protection only to the termination of the employment relationship with or without notice.

Since 2001 the **burden of proof** in discrimination cases before the labour courts has been reversed. The relevant provision of the Labour Code requires the employer to prove that he/she was guided by considerations other than sex, in cases of decisions such as those terminating the employment relationship, establishing the rate of pay or relating to promotion. In the event of a breach of the principle of equal treatment the injured party may initiate legal proceedings before the courts. All disputes arising from employment relationships are decided by special labour or social security courts. **The access to those courts** used to be simple. However, since 2006 access is no longer free of charge. This has resulted in a decline in the number of individual claims, which may be a sign of an unjustified reduction in the level of judicial protection e.g. against discrimination. It also has to be stressed that the **trade unions** play a rather significant role in proceedings relating to a violation of the principle of equal treatment, both outside and within the judicial system. In the latter case they may initiate proceedings on behalf of employees, take part in judicial proceedings as a representative of the employee or present opinions to the court. The right to initiate proceedings is also granted to some other social organizations, such as e.g. human rights NGOs, or social associations of disabled persons.

When the principle of equal treatment has been infringed an employee has the right to **compensation** which is not less than the minimum wage (currently circa EUR 230). While establishing the compensation the labour court shall take into consideration the kind and gravity of the discriminatory behaviour of the employer and its consequences. Unfortunately, there are no reliable data as to the level of compensation awarded in cases of gender discrimination. On the basis of some press information one may estimate that the average level of compensation in gender discrimination cases varies from 1 to 5 times the minimum monthly wage. Compensation in this amount is not likely to have a dissuasive effect. Next to civil law remedies, the administrative controlling body (the so-called State Employment Inspection), may also initiate proceedings against a discriminating employer. These proceedings are considered to be effective. In addition, the Penal Code of 1997 provides, for the most serious and notorious cases of violations of employees' rights, for a maximum **penalty** of up to 2 years' imprisonment (or a fine or restrictions the convicted person's liberty). The criminal punishment of a deprivation of liberty for up to 3 years may also be imposed in the most serious instances of sexual harassment. However, the practical significance of penal law sanctions in discrimination cases is minor. The legal infrastructure aimed at the protection of employees against gender discrimination in Poland is insufficient also due to the lack of a **gender equality body** as required by EU law. Such a requirement is neither fulfilled by the Governmental Plenipotentiary for the Equal Status of Women and Men, abolished in 2005, nor the Head of Department for the issues of Women, Family and Counteracting Discrimination within the Ministry of Labour and Social Policy, who took over the

duties of the former Plenipotentiary. In March 2008 the Prime Minister nominated the new Governmental Plenipotentiary for Equal Treatment; however, up to end of July 2008 the Plenipotentiary's Office has not been created and her prerogatives are not finally established.

The role of **collective agreements** in promoting the equal treatment of women and men and preventing gender discrimination is insignificant. Such agreements can be concluded on the level of an individual enterprise or a part of or the whole branch of an employment sector. An analysis of the collective labour agreements at the enterprise level indicated that they very seldom include regulations which are more favourable for employees than the minimum stipulated in the provisions of labour law. More often they simply repeat the Labour Code provisions on equal treatment. This trend is coupled with an increased frequency of cases where the parties to collective labour agreements suspend the application of the entire agreement or a part thereof.

10. Brief assessment

The process of the transposition of selected EU equality directives into Polish Labour Code was already initiated before accession and it had a progressive character; in 2001, a new section, called 'equal treatment of women and men in employment', was adopted. In 2003 this section was renamed and modified so as to enable the application of provisions contained therein also to instances of discrimination based on other reasons than gender. The Law of 2004 on the Promotion of Employment and Institutions of the Labour Market dealing with discrimination in access to hiring or job training accomplished the process of the transposition of equality directives in the field of access to work. In 2006 and 2008 further amendments to the Labour Code were introduced, revising the central concepts and dealing mainly with the protection of women's health during pregnancy, extension of maternity and paternity leaves and also providing for different forms of flexible working time. In 1998, the general reform of the mandatory social security scheme took place. The Act on Occupational Pension Schemes of 2004 achieved the compliance of our law with relevant EC directives in this respect. As a result of those legislative changes labour law, as well as social security law, correspond, in general, with the requirements of the equality directives. However, on the other hand, when it comes to the transposition of particular EU concepts and regulations, despite several, consecutive amendments, they still show many inadequacies and deficiencies. Sometimes, binding labour law provisions are overprotective, e.g. in the prohibition of the performance of certain activities by all women. In addition, the actions of the legislator aimed at applying the provisions on equal treatment in employment to instances of discrimination based on reasons other than gender resulted in some detrimental aspects in the field of protection against discrimination based on gender. For example, exceptions to the equal treatment principle provided in the Labour Code no longer refer to pregnancy (referring, instead, to parenthood only). Furthermore, some amendments to the definitions of exceptions to the principle of equal treatment are recommended. In addition, the lack of an equality body, a body which is required by the equality directives, and the delay in the implementation of the Goods and Services Directive 2004/113/EC, deserve a negative assessment.

PORTUGAL

1. Implementation of central concepts

In Portugal, the major principles and the main concepts regarding gender equality are dealt with in the Portuguese Constitution and in the Labour Code (LC).¹⁰¹ The Constitution establishes a general principle of non-discrimination on several grounds (including sex), but also considers the active promotion of equality between men and women as a fundamental task of the Portuguese State.¹⁰² The Labour Code establishes a non-discrimination principle (on the grounds of sex and on other grounds) in the field of employment and working relations and develops this principle in several regulations.¹⁰³

All the main concepts in this area, such as **direct discrimination, indirect discrimination, positive actions, harassment and sexual harassment** have been transposed over the years into the Portuguese legal system, and are now integrated in the LC. The content of these notions is in general consistent with European Law, and in some cases they have a broader scope than European Law. This is true for positive actions, which are explicitly allowed by legislation, and are considered as non-discriminatory measures, provided that they are established on a temporary basis in order to correct a factual discrimination which already exists.

2. Access to work, working conditions

The principle of equality in access to work, working conditions, and in access to professional training is developed by the LC, both in a general way and for the gender perspective.¹⁰⁴ The legislation prohibits discriminatory practices against employees both in access to employment as well as in access to promotion and to professional training. Some exceptions to this principle are allowed, due to the nature of the profession or the context of the execution of the labour contract, but only if the different treatment is objectively justifiable and determinant. Harassment and sexual harassment are also prohibited¹⁰⁵.

In this area, the Portuguese legislation goes beyond EC law in one specific aspect: it establishes that professions and professional categories established in collective agreements as 'men's' or 'women's' professions, as well as any requirements to access a job or promotion, applicable only to female or to male candidates, are to be considered automatically as being applicable to employees of both sexes.

3. Pregnancy and maternity protection; parental leave

The LC provides protection during pregnancy and after giving birth. This protection is granted both to the mother and the father, except in matters physically and directly

¹⁰¹ The Portuguese Constitution dates from 1976, but has since been revised on several occasions. There is a new Labour Code (LC), which was approved by Law No. 7/2009, of 12 February 2009, and applies to employees of the private sector. In what regards employees in public services, equality issues are currently dealt with in Law No. 59/2008, of 11 September 2008.

¹⁰² Portuguese Constitution, Article 13 and Article 9(h).

¹⁰³ LC, Articles 23, 24 and 30. For the public sector, the same principles arise from Articles 13, 14 and 18 of Law No. 59/2008.

¹⁰⁴ LC, Article 24 and Articles 30, 31, and 32, respectively. The same goes for the public sector, in Articles 13, and 18 of Law No. 59/2008.

¹⁰⁵ LC, Article 29, and for the public sector Article 15 of Law No. 59/2008.

related to the state of pregnancy and giving birth. These rules are complemented by other legislation.¹⁰⁶

The main provisions in the legal system in this area are the following.

– The protection of women during pregnancy and during maternity leave: while pregnant and when breastfeeding, women have the right not to do night work and extra work, as well as to be transferred to a non-dangerous function; they have the right to attend medical consultations, when pregnant and, while breastfeeding, they have the right to a reduced working time; the dismissal of these women is presumed to be unlawful and must be approved by a public body; in the case of unfair dismissal these women have the right to return to their jobs.¹⁰⁷

– Leave concerning maternity and parenthood: women who have given birth (and in some cases also fathers) have the right to a paid maternity leave (from 120 days to 150 days), which is also applicable in the case of adoption; fathers have a right to 10 days of paid leave following the birth of the child; both the mother and the father have the right to parental leave (unpaid); other forms of leave may apply to care for young children, possibly up to 2 or 3 years, unpaid; when returning from leave, both the father and the mother have the right to return to their previous jobs.¹⁰⁸

In this area, the national legislation meets the requirements of the directives, and it has even gone beyond European law in the rules concerning the right to short paid absences to attend medical consultations during pregnancy, and the right to reduced working hours when breastfeeding. The most positive aspect of these rules is the fact that the provisions are in general directed both at the father and the mother, and this perspective contributes to a more balanced participation of both of them in childcare tasks.

4. Equal pay

EC rules regarding equal pay are dealt with by the LC, which establishes the right to equal pay between men and women, for equal work or work of the same value.¹⁰⁹

The concept of pay for this purpose is laid down in the law, and the legislation also establishes the notions of equal work and work of the same value. The concepts of equal work and work of the same value are consistent with EC law, but the concept of remuneration for the purpose of this principle is established in a rather unclear way, since it does not rely upon the concept of Article 141 of the TCE,¹¹⁰ but on the national concept of remuneration, the content of which is narrower, in the sense that it does not integrate all financial advantages granted to the employee under a labour contract. Therefore, national legislation is not completely consistent with European law as far as this issue is concerned.

Differences in pay are allowed, provided they are based on objective criteria, common to men and women (for instance, productivity, seniority, the lack of periods of absence). Among these criteria, taking into account periods of absence may under certain circumstances lead to indirect discriminatory practices, since even justified absences are taken into consideration for this purpose (except absences for maternity

¹⁰⁶ LC, Articles 33 and ff. and Decree Law No. 91/2009, from 9 April. For the public services, the rules regarding maternity and paternity issues are in Articles 24 and ff. of Law No. 59/2008, and in Decree-Law No. 89/2009, of 9 April.

¹⁰⁷ LC, Articles 46, 47, 58, 59, 62 and 63.

¹⁰⁸ LC, Articles 35, 38, 40, 41, 43, 44, 51, 52 and 53.

¹⁰⁹ LC, Articles 24 No. 2 b) and 31 No. 2 b). For the public sector the same principles are established in Article 19 of Law No. 59/2008.

¹¹⁰ LC, Articles 24 No. 2 b) and 31 No. 2 b).

reasons) and this includes absences for care reasons, which in Portugal is more often taken by women than by men.

In this area, the national legislation goes beyond the requirements of EC rules concerning the sanctions which are applicable to collective agreements that do not observe the equal pay principle: in this sense, whenever a collective agreement establishes a remuneration which is applicable only to men or to women workers, these rules are automatically applicable to employees of both sexes, provided they perform equal work or work of the same value.

5. Occupational pension schemes

In Portugal professional social security schemes are rare, due to the public and universal scope of the general social security scheme. Over the years almost all specific social security schemes (some of which cover many benefits and others with a more limited scope) have been integrated into the public social security scheme.

The main area in which specific social security subsystems still exist is in the financial sector, especially in banking companies. In these cases, the systems rely on collective agreements and may differ concerning the nature of the pension (complementary to the statutory pension or replacing this pension) as well as in the form of calculating the pension. The variety of situations makes it too difficult to describe them.

It may be noted that gender equality issues are not addressed in these schemes, and there are no specific safeguards for gender equality.

6. Statutory schemes of social security

In Portugal, most of the social security provisions fall under the scope of Directive 79/7/EEC and the situations contemplated by the Directive are covered by the Social Security General Law.¹¹¹ This Law establishes two social security systems: the first one is the ‘system of social citizenship protection’, which integrates three subsystems: the ‘social action subsystem’ (intended to promote actions in the social field), the ‘solidarity subsystem’ (intended to eradicate poverty in situations that do not fall under the ‘contribution’ system), and the ‘family protection subsystem’ (intended to compensate people for specific family charges);¹¹² the second one is the ‘contribution system’, and is intended to compensate the social risks of persons with a professional activity and based upon the contributions of employers and employees.¹¹³ This final and more general system integrates social protection related to sickness, invalidity and old-age pensions, family allowances (in situations related to maternity, paternity and adoption), unemployment, accidents at work and occupational diseases, in the sense of Directive 79/7/EEC.¹¹⁴ The rights granted by this general legislation are developed by specific legislation and each benefit is given under specific conditions.¹¹⁵

¹¹¹ Law No. 4/2007, of 16 January 2007.

¹¹² Law No. 4/2007, Article 6 and ff. (the citizenship system – ‘*sistema de protecção social de cidadania*’); Article 29 and ff. (the social action system – ‘*subsistema de acção social*’); Article 41 (solidarity social system – ‘*sistema de solidariedade social*’); Article 44 and ff. (the family protection system – ‘*sistema de protecção da família*’).

¹¹³ Law No. 4/2007, Article 50 and ff (‘*sistema previdencial*’).

¹¹⁴ Law No. 4/2007, Article 52.

¹¹⁵ Old-age and invalidity pensions for dependent workers – Decree Law No. 329/93, of 25 September 1993, with the changes introduced by Decree Law No. 35/2005, of 19 February 2005; Old-age and invalidity pensions for independent workers – Decree Law No. 328/93, of 25 September 1993, as amended by Decree Law No. 119/2005; Sickness allowance – Decree Law No. 28/2004, of 4 February 2004, as amended by Decree Law No. 146/2005, of 26 August 2005; Accidents at work

Here, again, it may be observed that gender equality issues are not addressed in these schemes, and there are no specific safeguards for gender equality.

The main reasons for excluding people from receiving benefits in the Portuguese social security system have been, until now, employment for an insufficient period of time, since almost all benefits depend on a minimum period of paid work with registered contributions to the social security system. This minimum period differs for each benefit, but it is the same for men and women. On the other hand, leave periods related to maternity and paternity are taken into account as working time, so that social security benefits cannot be excluded for a minimum contribution time on that account.

7. Self-employed and helping spouses

The impact of Directive 86/613/EEC in Portugal has not been very significant, in the sense that gender equality in the area of independent work is not considered an important issue, contrary to the situation in the area of dependent work. The lack of importance attached to this issue is in contrast to the growing importance of the self-employment of women, not so much in traditional areas like agriculture, but especially in the area of goods and services.

Regardless of this general view, this Directive has been important in Portugal concerning specific issues, namely in the areas concerning economically dependent workers, the extension of maternity and paternity provisions, and helping spouses in social security area.

Workers who are formally independent, in the sense that they do not have a labour contract but economically depend on an employer, are covered by the LC rules concerning non-discrimination in general, gender equality and maternity and paternity.¹¹⁶

Maternity provisions regarding dependent workers are partially extended to independent workers: these workers have access to public allowances in the case of maternity, paternity or adoption, according to the same conditions as dependent workers.¹¹⁷ However, in situations regarding family charges or sickness, these workers are not protected, at least in the general scheme, regardless the fact that these situations may be linked with maternity and paternity.

In the social security area, helping spouses are covered by the legal social security scheme of independent workers;¹¹⁸ there are specific provisions concerning assisting spouses in the area of agriculture.¹¹⁹

8. Goods and services

Directive 2004/113/EC has been transposed into national legislation by Law No. 14/2008, of 12 March 2008. This legislation is in accordance with the Directive concerning the definitions of discrimination (direct and indirect), harassment and sexual harassment, the broad scope of the Law, which applies to both the private and

and occupational diseases – Law No. 100/97, of 13 September 1997, and LC, Articles 284 and ff and 309 and ff.; Family allowances, related to maternity, paternity and adoption - Decree Law No. 91/2009, of 9 April and, for the public sector, Decree Law No. 89/2009, of 9 April; Unemployment - Decree Law No. 220/2006, of 3 November 2006.

¹¹⁶ LC, Article 10.

¹¹⁷ Decree Law No. 328/93, of 25 September 1993, Article 53 No. 1 and Decree Law No. 91/2009, of 9 April 2009, Article 4 No. 1.

¹¹⁸ Decree Law No. 328/93, of 25 September 1993, with the changes introduced by Decree Law No. 240/96, of 14 December 1996. Article 6 No. 1(c).

¹¹⁹ Decree Law No. 159/2001, of 18 May 2001.

the public sectors, and the rules regarding the enforcement and monitoring of the Law.¹²⁰

This legislation seems to go beyond the requirements of the Directive in the following provisions: discriminatory practices in contractual practices are forbidden; concerning actuarial factors, the rules imposed by the Directive are generally applicable to all contracts and not only to contracts entered into after December 2007 (except in insurance contracts related to maternity); the Law contemplates a system of sanctions to ensure its practical implementation.¹²¹

9. Enforcement and compliance

Concerning enforcement, the following points are to be noted:

The provisions on the **burden of proof** have been transposed into national legislation by the LC in a general way, in the sense that the rule of the reversal of the burden of proof applies to all actions regarding discriminatory practices (gender included), with the exception of actions based on harassment practises.¹²²

The law establishes both **civil and administrative sanctions** to respond to discriminatory practices (civil compensation, administrative fines), and it also establishes direct sanctions applicable to collective agreements, like the automatic replacement of discriminatory clauses by neutral clauses.¹²³ The standard of these measures is adequate.

The **access to the courts** for alleged **victims of discrimination** is safeguarded, and they have the right to seek counsel as well as to report discriminatory practices to the legal authorities (the Working Conditions Public Authority and the Equality Agency in the area of Employment)

There is a **public body** which deals with gender equality issues specifically in the area of work and employment (*Comissão Para a Igualdade no Trabalho e no Emprego, CITE*).

Social partners can play a role in the enforcement of gender equality law, since provisions concerning Labour Law are discussed with them. However, gender equality does not seem to be considered an important subject at this level.

The LC establishes that **collective agreements** should implement the necessary measures to enforce equality.¹²⁴ However, this rule is not mandatory and equality issues are not an important issue in collective bargaining. The situation could change if this issue was to be considered as a mandatory content of collective agreements, since these agreements are binding and are usually declared to be generally applicable. The LC also establishes a system of assessment of the content of collective agreements by the CITE, performed during the first 30 days after the publication of these agreements and designed to check them for possible discriminatory clauses and promote their elimination by the court.¹²⁵

10. Brief assessment

The Portuguese legislation formally complies with EC law, although exceptions are apparent concerning some particular points, such as the concept of remuneration, the

¹²⁰ L. No. 14/2008, of 12 March 2008, Articles 2, 3, 8, 9 and 11.

¹²¹ L. No. 14/2008, of 12 March 2008, Articles 4, 6, 10, 17, 12, and 13.

¹²² LC, Article 25 No. 5 and No. 6. The same rule applies in the public sector, including for harassment situations (Articles 14 No. 2 of Law No. 59/2008).

¹²³ LC, Articles 28 and 26.

¹²⁴ LC, Article 492 No. 2 d).

¹²⁵ LC, Article 479.

burden of the proof rule in harassment situations and the extent of social protection to some professional categories. However, when one goes beyond the legal framework, the material weaknesses of the system are easily apparent. These weaknesses are mainly in three points.

First, although the law establishes many protective measures, the State does not finance them, whenever needed, and therefore, some of these measures do not actually in practice (this is true for some of the maternity and paternity measures). Second, there is no practical implementation of the legal measures by collective agreements, with or without the assistance of the State. Finally, there is no relevant case law regarding gender equality to describe, since in Portugal hardly any cases have been decided in this area.

This situation seems to indicate a lack of practical implementation of the legal provisions in this area. The system exists in the law, but its practical effectiveness is weak.

ROMANIA

1. Implementation of central concepts

The main concepts of European Union gender discrimination law have been implemented in Romania somewhat gradually. Since 2002 when the Law on Equal Opportunities for Women and Men was adopted, EU legal provisions addressing gender discrimination started to be transposed into the national legislation. As a general remark, it has to be stated that the gender discrimination legal framework is rather a young concept, in the sense that major court decisions still do not accompany the existence of such law. While the Romanian Constitution was modified in 2003 and the vast majority of the articles have been revised, gender equality provisions have been slightly amended.

The concept of **direct discrimination** is understood as the less favourable treatment of a person based on gender, compared to the treatment applied to another person and thus does not contain the aspect of a comparable situation that is provided for by the EU law. All instructions to discriminate against a person based on gender are considered discrimination. The concept of **indirect discrimination** has been accordingly transposed into the Romanian legal framework. The concept of **positive discrimination** or **positive action** is covered within the national legislation referring to equal opportunities for women and men as representing those special measures adopted for a temporary period in order to accelerate the *de facto* achievement of equal opportunity between women and men and which are not considered discriminatory actions. Positive actions are especially regulated for equal opportunities for women and men in decision making. Even if provided for by the law, the concept of positive discrimination is not very well perceived by political party representatives. In this regard, positive discrimination is considered as contrary to the absence of discrimination, the main argument used being the fact that participation in decision-making bodies shall be acquired based on specific competencies. While **harassment** is defined by law as any undesirable gender-based behaviour, which is intended to negatively affect the dignity of a person and/or to create a degrading, intimidating, hostile, humiliating or offensive environment, the definition of **sexual harassment** has the same formulation except that it replaces ‘gender-based behaviour’ with ‘sexually-based behaviour’.

2. Access to work, working conditions

According to the legal provisions of the Labour Code any employee shall be protected against sex-based discrimination in all aspects concerning working life. Such a legal provision covers both the public and the private sector. The right to collective negotiations, personal data protection and respect for dignity without discrimination is guaranteed to all employees. With regard to access to work and working conditions, the Romanian legal framework has accordingly transposed the standards provided for by EU law, including the exceptions contained in the pertinent directives. However, it is to be highlighted that Law No. 202 of 2002 on equal opportunities for women and men stipulates in relation to access to education, health, culture and information that restricting the access of one gender to public or private education institutions may be undertaken based on objective grounds. These objective grounds shall be made public and be based on the relevant legal provisions of the anti-discrimination legislation. All workers, including self-employed persons and those who work in agriculture, benefit from equal opportunities and treatment between women and men in the field of labour. Employers have the obligation to ensure equal opportunities and treatment of employees, women and men, in labour relations of any kind, by introducing provisions in the organization and operation regulations, and in the internal order of companies, that forbid discrimination. Employers also have also obligation to regularly inform employees, including by posters in visible places, of their rights to the observance of equal opportunities and treatment in labour relations, both in the private and public sectors.

3. Pregnancy and maternity protection; parental leave

Maternity leave lasts for 126 days, 63 days being allocated before confinement and 63 days after confinement, with a mandatory minimum of 42 days for the leave after confinement. Parental leave to take care of children lasts for up to two years or up to three years in case the child is disabled. Parental leave can only be taken after maternity leave. Parental leave may be taken by all workers who are parents, i.e. by both women and men equally. The right to parental leave is granted both to biological parents and to adoptive parents. With regard to paternal leave, the current legal provisions entitle the fathers of newborn babies to five working days paternal leave so as to enable them to ‘effectively participate in caring for the newborn child’. Paternal leave is granted only to fathers who have an employment contract. Paid paternal leave can also be granted for a period of 15 working days, provided that the father can show that he has completed a course on infant care. The legal provisions with regard to the length of parental leave are rather insufficient if compared to their affirmed scope: such a short paternal leave cannot contribute nor does it stimulate effective participation by the father in caring for the newborn child.

Employers are not allowed to dismiss pregnant workers, workers who have recently given birth or workers who are breastfeeding based on grounds directly related to their condition. This prohibition equally applies women workers on maternity risk leave, maternity leave or parental leave, which is granted to care for children up to two years old or up to three years old in case the child is disabled. The mentioned prohibition does not apply in the case of a dismissal for reasons related to the reorganization of the company following a judicial order or the employer’s bankruptcy. At the end of maternity leave or parental leave, the worker who has been on leave has the right to return to his/her job or to an equivalent one and also has the right to benefit from all the advantages occurring during his/her period of leave.

Women workers who consider that their labour relationships were interrupted and that they were dismissed in connection with their condition may object against the employer's decision to the competent court within 30 days from the date of the notice of dismissal. Any legal action taken by these workers is exempted from court tax. The burden of proof is on the employer who must adduce the necessary evidence in its defence at the first hearing before the court.

Romanian legal framework provisions go further than the EU law standards with regard to the duration of both the maternity leave and parental leave, as well as the duration of compulsory maternity leave.

4. Equal pay

One of the most important changes brought about by the 2003 Romanian Constitution is represented by Article 16(3) regarding the 'Equality of Rights'. According to the revised text, the Romanian State shall guarantee equal opportunities for men and women in having access to public, civil or military positions. With regard to the constitutional provisions it is however to be underlined that Article 41, referring to labour and the social protection of labour, does not address the deficient formulation of the equal pay for equal work principle. Paragraph 4 of Article 41 of the 2003 Constitution stipulates that 'For equal work with men, women shall get equal wages'. This legal formulation establishes men's work as a payment standard for women, while the work of both women and men shall be evaluated as equal work against non-gender related standards.

The notion of 'pay' as defined by the legal provisions of the Labour Code represents the equivalent value of the work carried out based on the individual labour contract. An employee shall have the right to a wage expressed in monetary terms for the activity performed under the individual employment contract. When setting and providing for the wage, any discrimination based on sex is prohibited. The pay includes the basic pay, the benefits, the extra pay and other supplements. The payment in kind of a part of the wage may only be possible if it has been expressly provided for in the applicable collective labour agreement or in the individual employment contract.

Apart from constitutional provisions, the equal pay obligation is provided for in the 2007-2010 National Collective Contract. The equal pay principle implies that for the same work or for work being attributed with an equal value, sex-based discrimination shall be eliminated with regard to all pay elements and the conditions for pay to be granted. The concept of work of equal value is defined as the paid activity that shows, when compared with another activity and using the same indicators and units of measure, that similar or equal knowledge and professional skills were used and that similar amounts of intellectual and/or physical efforts were exerted.

5. Occupational pension schemes

The national legal framework referring to occupational pension schemes is a very recent one. At the beginning of 2008 Parliament adopted the pertinent national legislation referring to the application of the principle of equal treatment for men and women in occupational social security schemes. The envisioned legal provisions shall apply to the active working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment. The mentioned legal provisions also cover retired and disabled persons and those claiming rights on their behalf.

According to the European standards transposed into the national legislation with regard to the application of the principle of equal treatment in occupational social security schemes, any direct or indirect discrimination based on sex shall be removed, including in relation to the retirement age for women and men, the amount of contributions and the length of service. The criteria for considering a social security scheme as an occupational scheme comprise the following elements:

- it refers to a particular category of workers;
- it is directly linked with the length of service; and
- the pension is calculated based on a reference to the worker's last salary or to the average last salary.

6. Statutory schemes of social security

All participants in public pension systems benefit from a non-discrimination system with regard to their rights and obligations as provided for by the law. According to the Romanian legal framework, the public system allows for the granting of several types of pensions: the old-age pension, anticipated pension, partially anticipated pension, invalidity pension, and survivors' pension. In addition to the mentioned types of pension, persons insured within the public system have the right to paid support in the case of death. In the case of the death of the insured person or of the pensioner, only one person can benefit from paid support subject to the condition of proving that the expenses were incurred by the death. This person could be the surviving spouse, the child, the parent, the tutor or the successor of the deceased.

With regard to sickness, accidents at work and occupational diseases schemes and associated benefits as mentioned by the EU relevant legal standards, medical leave and health state insurances available to persons, as ensured in the public insurances system, are represented by medical leave and allowances for temporarily work-related incapacity. Other types of medical leave and health state insurances available to persons insured in the public insurances system are represented by medical leave and allowances for maternity, medical leave and allowances for taking care of a sick child and medical leave and allowances for a maternity-associated risk.

The categories of persons who could be insured must meet some specific requirements under the law, such as benefiting from an individual labour contract or benefiting from monthly payments granted from the unemployment state budget.

7. Self-employed and helping spouses

Romania has taken all the measures necessary to abolish national legal provisions contrary to the principle of equal treatment as defined in the EU's applicable legal standards. In this regard, there are no measures which are contrary to the principle of equal treatment in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, including financial facilities. Romania has ensured that the conditions for the formation of a company between spouses are not more restrictive than the conditions for the formation of a company between unmarried persons.

The aspect of the recognition of the work of assisting spouses is not adequately implemented in Romania with regard to the equal opportunities principle and represents one of the weak points in transposing EU legal standards into the national legal framework, as well as in implementing it in the sense provided for. The issue of recognising the situation of assisting spouses does not have any public coverage, both authorities that are in charge of equal opportunities policies and the mass media do not cover it at all. The concept of 'assisting spouses' does not benefit from a proper

equivalent in the Romanian legal framework. Therefore, this category of persons is not expressly dealt with within the national legal framework.

8. Goods and services

National legislation addressing equal access to goods and services is very recent and reflects the standards as provided for by the EU legislation, including by reproducing exactly the scope and all the exceptions as provided for in the European Directive. On 14 May 2008 the Romanian Government adopted an ordinance for transposing EU legal standards with regard to equal access to goods and services. Its legal provisions are applicable to all persons who provide goods and services available to the general public irrespective of the persons concerned with regard to both the public and private sectors, including public bodies. These goods and services are offered outside the area of private and family life concerning transactions carried out in this context. The non-discrimination principle is excluded for the content of media and advertising, education and employment, including independent professions.

9. Enforcement and compliance

The National Agency for Equal Opportunities between Women and Men represents in Romania the **national body seeking to implement the gender equality *acquis***. The National Agency has the strategic role of ensuring active and visible gender mainstreaming into all national policies and programmes and to ensure the substantiation, preparation and implementation of the Government strategy and policies in the field of equal opportunities and treatment between women and men.

Employees are entitled, whenever they consider themselves to be discriminated against based on gender, to file notifications or complaints to the employer or against it, if the latter is directly involved, and to request the support of the trade union or the employees' representatives in the company to settle their situation at the workplace. The **burden of proof** lies with the person against whom the complaint/notification has been submitted or, as the case may be, the file submitted to the court contains facts that allow the assumption of a **direct or indirect discrimination** and the person complained of then has to prove the non-infringement of the equal treatment principle. The complaints submitted to the courts by persons who consider themselves to be discriminated against based on gender are exempted from stamp tax. The National Agency, the **trade unions** and NGOs operating in the field of human rights protection, as well as other legal persons with a legitimate interest in observing the equal opportunities and treatment principle are entitled to legally represent discriminated persons and to assist them in the administrative procedures, at their request.

The Labour Code and the national equality legislation state that no employee can be dismissed or be a subject of a discriminatory act for having testified in a discrimination case. These provisions are applicable to both the public and private sector.

Persons who consider themselves to have been wronged because the principle of equal treatment has not been applied to them with regard to access to goods and services are entitled to formulate complaints to or against the goods or services provider in case the provider is directly involved. If such a complaint is not addressed, the person has the right to notify the National Council for Combating Discrimination and to engage in a judicial procedure before a competent court for removing the consequences of the discriminatory action.

When persons who consider themselves to have been wronged because the principle of equal treatment has not been applied to them establish before the court facts from which it may be presumed that there has been direct or indirect discrimination, it shall be up to the respondent to prove that there has been no breach of the principle of equal treatment.

The **infringement of the legal provisions** referring to equal opportunities for women and men with a view to eliminating direct and indirect gender discrimination, in all fields of Romania's public life, entails the disciplinary, material, civil, administrative or penal responsibility of the guilty persons.

Social partners do not play a decisive role in Romania in compliance with and the enforcement of the gender equality role. **Collective agreements** are not used as specific means to implement gender equality law. Apart from mentioning in the introductory article the general principles of non-discrimination, the remainder of the provisions contained in the 2007-2010 National Collective Agreement as well as in the collective agreements negotiated at the sector level do not specifically address gender equality aspects. It is to be underlined that provisions of the 2007-2010 National Collective Agreement are binding on and are generally applicable to all employees from companies with state or private registered capital, Romanian, foreign or mixed registered capital. Collective agreements could be also concluded for public institutions.

10. Brief assessment

As an overall evaluation there is a satisfactory level of implementation of the EU's relevant legal standards within the national legal framework. In some respects, Romanian legislation goes further than the European standards, for instance relating to the length of maternity leave, compulsory maternity leave and parental leave. It must be mentioned, however, that litigation with regard to equality issues is rather absent in Romania. This reality does not allow for any evaluation of the extent to which legal standards are implemented. As a general evaluation the number of cases of discrimination brought before the Courts is very small, up to ten cases at the national level on a yearly basis.

SLOVAKIA

1. Implementation of central concepts

The Anti-discrimination Act provides the general framework for the application of the principle of equal treatment in public and private relationships and it stipulates the legal remedies in case of a violation of this principle. The Anti-discrimination Act regulates direct discrimination, indirect discrimination, harassment, instruction to discriminate, incitement to discriminate and victimisation and after the second amendment, in effect since April 2008, also sexual harassment.

Direct and indirect discrimination are not identical with the definitions contained in the directives, but they are regulated in accordance therewith. 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. Indirect discrimination is a seemingly neutral regulation, decision, order or practice discriminating against a person in comparison with other persons.

An **instruction to discriminate** is an activity which abuses subordination of a person for the purpose of discriminating against a third person. Incitement to discrimination is persuading, affirming or inciting a person to discriminate against a third person. The difference between an instruction to discriminate and incitement to discriminate lies in the level of subordination of the discriminated person in relation to the perpetrator.

Harassment is behaviour the consequence of which is or could be to intimidate, humiliate, degrade or offend a person and the purpose or the consequence of which is or could be to interfere with the freedom or personal dignity of that person.

Sexual harassment is verbal, non-verbal or physical behaviour of a sexual nature, the purpose or the consequence of which is or may be the diminution of personal dignity and that creates an intimidating, degrading, dishonourable, hostile or offensive environment. Both definitions do not fully correspond to the definitions contained in the Directive because they do not contain the adjective 'unwanted'.

The amendment to the Anti-discrimination Act reintroduced temporary affirmative action (literally a balancing measure) for disadvantaged groups. During the adoption process Parliament refused to include the adoption of temporary special measures on the grounds of ethnic or racial origin, nationality or ethnic group and sex. Instead it replaced these grounds by social and economic disadvantage. This provision ignores the fact that women, as well as the Roma, have faced long-term and systematic discrimination resulting in a disadvantaged status for women and Roma. The current provision on temporary affirmative action cannot remedy this situation effectively as it does not reflect that these persons were and still are disadvantaged on the grounds of sex and, in case of the Roma, on the grounds of ethnic origin or nationality.

The third amendment to the Anti-discrimination Act, in effect since October 2008, allows the Slovak National Centre for Human Rights (equality body) and NGOs operating in the antidiscrimination area to file public actions (*actio popularis*) in their own name for cases where the violation of the equal treatment principle might lead to the infringement of rights of a larger or indeterminate number of persons, or where such violation might seriously harm the public interest.

The Anti-discrimination Act also allows exceptions to the principle of equal treatment. Objectively justified by a legitimate aim, the differences in treatment on grounds of sex shall not be deemed to constitute discrimination where they consist of determining different retirement ages for men and women, and their purpose is to protect the provision of services and goods more favourably to members of one sex.

2. Access to work, working conditions

During the accession process a part of the European anti-discrimination legislation, including the prohibition on discrimination on the ground of sex, gradually became a part of the labour legislation. The prohibition of night work for women was abolished and new legislation prohibited the publication of job offers containing any limitations and which are discriminatory. An important milestone was the adoption of the so-called 'Euro-Amendment' to the Labour Code in Slovakia in 2003. The Labour Code contains an almost identical stipulation of the prohibition of direct or indirect discrimination based on sex. It provides that women and men have the right to equal treatment as regards access to employment, remuneration, vocational training and working conditions, and that employers must not disadvantage and harm their employees because they exercise their rights resulting from the employment relationship. Following the adoption of the Anti-discrimination Act the terminology in

the Labour Code was changed: the 'prohibition of discrimination' was replaced by the 'principle of equal treatment'. The legal definitions of indirect and direct discrimination were removed from the Labour Code, because they are now contained in the provisions of the Anti-discrimination Act.

The legislation concerning the public sector also contains the general clause on equal treatment for men and women in access to work and working conditions as contained in Anti-discrimination Act.

3. Pregnancy and maternity protection; parental leave

According to the Anti-discrimination Act, objectively justified differences in treatment on grounds of sex are admissible where their purpose is the protection of pregnant women and mothers.

The Labour Code contains some protective measures for women on grounds of their pregnancy or when they have recently given birth, such as the prohibition of night work. Some protective measures, such as special protection concerning working time or dismissal, are guaranteed with regard to their parenting responsibilities and are equally granted to men who are taking care of their child and are also applicable to employment in the public service. The Labour Code further establishes the framework for a temporary adjustment of working conditions or for moving the women concerned to another work, or granting them leave for a necessary period of time with financial compensation. It further contains provisions on maternity and parental leave, and also provisions on breaks for breastfeeding. Women are entitled to maternity leave in connection with childbirth and to care for a newborn child either for the duration of 28 weeks or 37 weeks in the case of multiple births or single mothers. Men are also entitled to parental leave under the same conditions if they are the ones who care for a newborn child. Employers are obliged to grant parental leave upon request to the parents of children up to the age of 3 or up to age of 6 if the child is chronically and seriously disabled. Maternity leave generally commences 6 weeks prior to the expected date of confinement. Maternity leave may never be shorter than 14 weeks and may not in any case be terminated or interrupted prior to the end of the 6th week from the day of confinement. When employees return to work following their maternity or parental leave (after the duration of 28 weeks or 37 weeks in the case of multiple births or single mothers), they are entitled to return to their original work and working position. If this is not possible, as such work is no longer carried out or the workplace no longer exists, the employer must transfer them to other work corresponding to the employment contract. When an employee returns from maternity leave, unlike employees returning from parental leave (up to when the child attains the age of 3 or up to the age of 6 if the child is chronically and seriously disabled), the employer is not obliged to offer the original job.

The Slovak legislation is in accordance with the directives and the regulations on the length of maternity and parental leave go further than the directives required. However, there is still a great deal of room for improvement from the legislative point of view, which could contribute to achieving gender equality in practice. One of the obstacles is the practical impossibility for both parents to take parental leave at the same time, which is caused by unsatisfactory social protection during this period of time as leave is only available to one of the parents (with a very negligible exception in one case). Slovak legislation does not contain the institution of paternal leave.

4. Equal pay

The principle of equal pay for men and women is generally guaranteed under the Slovak Constitution. According to Section 36, all employees have the right to fair and satisfactory conditions at work, in particular the right to remuneration for the work performed and the right of collective bargaining. The principle of equal pay can also be deduced from the Anti-discrimination Act. It provides that the principle of equal treatment applies to employment relations, including to remuneration. The general principle of equal pay for equal work is laid down in the Labour Code. Its provision states that pay conditions must be agreed upon without any discrimination on grounds of sex. Women and men shall be entitled to equal pay for the same work or work of an equal value. This condition applies to all remuneration for work and benefits that are paid in relation to employment in accordance with Article 141 of the Treaty and the decisions of the ECJ. There are no detailed provisions on job classifications and remuneration is based on collective or individual agreements.

Special Acts govern the employment relations of public servants and civil servants with their employers. The Civil Service Act provides that the rights contained therein are guaranteed equally to all civil servants and that the provisions of the Labour Code on equal treatment apply to them. The Public Service Act (regulating public servants performing work in the public interest and their employers are state administration bodies, except those falling under the civil service, municipalities, regional bodies, etc.) explicitly lacks an established principle of equal pay for men and women, as well as the employer's duty to inform employees about the prohibition of discrimination and their rights to equal treatment. Both acts contain provisions concerning the personal bonus (civil/public servants may be awarded a personal bonus of up to 100% of their tariff salary to reward extraordinary personal skills, results achieved in the performance of their civil/public service, or work performed beyond the requirements of a particular job). These provisions create room for potential sex discrimination in remuneration based on subjective individual assessments of employees' job performance by their employers.

5. Occupational pension schemes

In Slovakia, it is not possible to distinguish between statutory pension schemes (which are not related to pay or to a working relationship) and occupational schemes (which are related to pay and to a working relationship). The social insurance system does not contain a specific regulation of occupational social security schemes. Some provisions of the Act on Supplementary Pension Insurance, however, could be considered as laying down conditions for occupational social security schemes. The aim of this act is to regulate the third tier of the pension system and to enable an insured person to gain an additional income in old age or during invalidity and to enable his or her survivors to gain an additional income in the case of the death of the insured person. The participation of an employer and employees in this system of pension insurance and the level of the contributions by the employee can be agreed upon in a collective agreement. In this tier actuarial factors are used. Although the Act on Supplementary Pension Insurance does not contain any apparent discriminatory provisions, it also does not contain any explicit prohibition of discrimination whatsoever nor any clause safeguarding the principle of equal treatment, and hence no specific legal protection thereof.

6. Statutory schemes of social security

The Social Insurance Act has unified (with a transitory equalizing period until the year 2014) the retirement age for men and women at 62 years. Here we must bear in mind that the average earnings of women are approximately 25-30 % lower than those of men. Women usually work for less years than men for the reason of child care as well as due to the higher unemployment rate for women, by which an assumption of inequality, as regards the amount of future old-age pensions, is automatically created. Slovak law does not contain any form of reward for women taking care of a child, e.g. the requirement of a shorter period of insurance for women in comparison with men.

The scope of social insurance is sickness, accident, guarantee and unemployment insurance. The Act on Social Insurance contains a general equal treatment clause as regards access to insurance. However, women may in practice be disadvantaged and can gain lower benefits from the social security system. The exclusion from the obligatory social insurance system of family members, who might receive the benefits from the sickness insurance scheme without paying contributions to the sickness insurance, may be regarded as a weakness in the regulation of sickness insurance. Especially female spouses are affected by this provision. Another criticized fact - that the legislation does not guarantee the minimum old-age pension - will have a similar impact on women. In view of the high rate of unemployment (particularly of women), a relatively large number of citizens (especially women) will have no legal title to the minimum old-age pension.

7. Self-employed and helping spouses

The issue of the equal treatment of self-employed persons and the protection of self-employed women during pregnancy and motherhood are regulated in several special laws. In relation to self-employed workers the directive is transposed more or less satisfactory. In all legislation that contains a definition of self-employed persons, the principle of equal treatment is expressly entrenched in compliance with the concept of equal treatment as in Anti-discrimination Act.

The spouses of self-employed workers, not being their employees or partners in the business, are not protected under the social security scheme for self-employed persons. They are, however, allowed to join the social security scheme voluntarily. The previous legislation, which was repealed by the current Act on Social Insurance, defined a co-operating person as a spouse who participates in the activities of a self-employed worker. This institution had a significant meaning in terms of voluntary social insurance which a cooperating member could opt for if his or her self-employed worker was insured. According to the current legislation there is practically no legal definition of a helping spouse and no legal/social protection for such persons and issues relating to their social protection are not resolved in a satisfactory manner.

8. Goods and services

The main objective of the second major amendment to the Antidiscrimination Act included in Act No. 85/2008 Coll. was the transposition of Council Directive 2004/113/EC which is satisfactory. The amendment expanded the application of equal treatment to all persons who provide goods and services. In accordance with the Directive it allows for an exception to the principle of equal treatment. Objectively justified by a legitimate aim, the differences in treatment on the ground of sex shall not be deemed to constitute discrimination where their purpose is to provide services and goods which are more favourable to members of one sex.

The Directive has been partially implemented by two other acts. According to the Act on Consumer Protection the discrimination of consumers by the seller is prohibited.

Slovakia decided to maintain differences based on gender in insurance premiums and benefits. Such a regulation is contained not only in the Anti-discrimination Act but also in the Act on Insurance. The Ministry of Finance has the obligation to ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated, as required by Article 5(2) of the Directive.

9. Enforcement and compliance

Victimisation, according to the Anti-discrimination Act, is considered to be discrimination. It is an action or omission which has adverse consequences for the person in question and directly relates to legal protection against discrimination when the person in question or a third person complains against or testifies to a breach of the principle of equal treatment. The Anti-discrimination Act does not regulate other methods of protection for the purpose of a breach of the principle of equal treatment (e.g. filing complaints or reconciliation). However, special laws regulating the principle of equal treatment also regulate opportunities to claim protection. For example, the Labour Code allows an employee to complain to the employer when there has been a breach of the principle of equal treatment, with the employer then being obliged to respond to the complaint without unnecessary delay, to rectify the situation, to refrain from illegal action and to remove its consequences. This provision also applies to the public sector at universities and schools. A common feature of these provisions is that there are no procedural mechanisms specified for investigating the complaints.

The **‘reversal of the burden of proof’** is applied in proceedings concerning a violation of the principle of equal treatment based on the Anti-discrimination Act. Such a regulation is not contained in the Code of Civil Procedure which has the same legal authority as the Anti-discrimination Act. The courts can therefore ‘only’ follow the procedural regulation and avoid applying the provision embodied in the anti-discrimination law. As a result, it is often the case that women who are discriminated against often do not succeed in court proceedings due to a lack of evidence.

According to the Anti-discrimination Act, every person who considers him/herself to have been wronged because the principle of equal treatment has not been applied to them may pursue their claims according to the judicial process. The application of this provision in practice has so far shown that **court protection** in proceedings in such cases is very limited. It particularly applies to cases where the aggrieved party can only claim adequate financial compensation or non-pecuniary compensation. In many cases in which women are discriminated against, only the claim for adequate compensation is possible. If the **sanction** in the form of redress is to be effective, proportionate and dissuasive, the amount of money claimed needs to reflect that. Many women who have been discriminated against are therefore discouraged from filing a complaint with the court, as the high court fees often constitute a real barrier to protecting their right to equal treatment and protection from discrimination.

The **social partners** still pay little attention to equal opportunity. Trade unions primarily try to negotiate the highest possible increase in wages and the greatest degree of job security for employees. Equal opportunity issues which have been

included in **collective agreements** have mostly concerned the working conditions of pregnant women and employees taking care of young children.

10. Brief assessment

The present Slovak legislation in the area of the equality of opportunities is largely compatible with the EC gender equality legislation. No specific law on gender equality exists in Slovakia, but the individual provisions of the EC directives have been incorporated, particularly in the Anti-discrimination Act.

The institutional framework of gender equality is insufficient in Slovakia. One of the key problems is based on an insufficient budget allocation for the work of the relevant institutions working in the area of gender equality, such as the Slovak National Centre for Human Rights. Even though the Centre is regarded by the Government as the gender equality body, it does not have a special division on gender equality with sufficient funding and gender equality experts. The same applies to the Government Council for Gender Equality. Although the Council has its own Executive Committee and Consulting Committee, the potential of this multi-level structure is not sufficiently used. The majority of the members of the Council and its committees is appointed by the individual ministries. The Council is only formal and only makes 'recommendations' to the Government that correspond with the Government's opinions.

The Department for Gender Equality and Equal Opportunities of the Ministry of Labour, which performs tasks related to the administrative and technical safeguarding of the Council's activities, fails to create the conditions allowing the members of the committees of the Council to acquire information about prepared and implemented changes in legislation and to submit their comments to these changes. Such initiative is desirable also because it may help the systematic application of the gender aspect in the legislative process, which is not applied yet in Slovakia.

SLOVENIA

1. Implementation of central concepts

In the year 2007 important changes to the Employment Relationship Act (hereinafter the ERA) and the Act Implementing the Principle of Equal Treatment (hereinafter the AIPET) have been made in order to properly implement some concepts of EU gender discrimination (the definitions of direct discrimination and special measures) and to make uniform and gather all the relevant definitions in the above-mentioned Laws.

According to the above-mentioned legislation **direct discrimination** occurs when a person has been, is or could be treated less favourably than another person in an equal or comparable situation on the ground of his/her personal circumstances. **Indirect discrimination** occurs when an apparently neutral provision, criterion or practice in equal or comparable situations and under similar conditions put, puts or might put a person with certain personal circumstances in a less favourable position compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Less favourable treatment of workers related to pregnancy and parental leave and instructions to discriminate are also deemed to be discrimination, as provided by Directive 2002/73/EC.

Under the AIPET and the ERA **harassment** is unwanted conduct, based on any kind of personal circumstance, with the purpose or effect of violating the dignity of

the person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. And **sexual harassment** is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of the person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. Any sexual and other harassment is deemed to be discrimination.

Special measures (**positive action measures and encouraging measures**) are explicitly permitted and defined in the AIPET and in the Act on Equal Opportunities for women and men (hereinafter the AEOWM). They are temporary measures aimed at establishing real equal opportunities for women and men as well as promoting gender equality in specific fields of social life, in which the non-balanced representation of women and men or the unequal status of persons of one gender is ascertained. They may be used to remove objective obstacles that result in a non-balanced representation of women and men or an unequal status of persons of one gender as well as to give special benefits in the form of incentives to the under-represented gender or to the gender experiencing an unequal status. These incentives must be justified and in proportion to the purpose of the special measure. Positive action measures that give priority to persons of the gender which is underrepresented or is experiencing an unequal status and encouraging measures that provide special benefits or introduce special incentives for the purpose of eliminating the non-balanced representation of women and men or an unequal status on account of gender may be adopted by state authorities, employers, political parties, civil society organisations and other subjects with regard to their nature of activity and area of work.

The definitions of the central concepts in the national legislation are almost identical to the definitions in the Directive 2002/73/EC. Some provisions go even further than what EU law requires. An example is Provision 6 of the ERA which considers as discrimination not only the less favourable treatment of women related to pregnancy or maternity leave but all workers related to pregnancy and parental leaves and the latter are provisions of the AIPET and the AEOWM which provide a precise and detailed legal ground for the adoption of positive action measures.

2. Access to work, working conditions

Since common bases and premises for ensuring the equal treatment of all persons in asserting their rights, performing their duties and exercising their human rights and fundamental freedoms are determined by the AIPET and the AEOWM, we can find concrete provisions in the ERA and the Public Servants Act (hereinafter the PSA).

Besides the general prohibition of discrimination concerning job applicants and employees on the ground of gender in the ERA we can also find some special provisions: the provision of equal treatment for job applicants in advertising a vacancy and during the selection procedure (requirements to provide information on one's family and/or marital status, pregnancy, family planning – unless they are directly related to the employment relationship - are not allowed); protecting workers from harassment and sexual harassment and obliging employers to take measures to prevent harassment, sexual harassment and bullying and protecting workers against unfair dismissal due to gender, pregnancy etc. In addition, the principle of equal access to working positions is defined by the PSA.

There are two provisions in the ERA allowing for exceptions to equal treatment. The first provides the legal grounds for such exceptions. And the second allows for an exception when advertising a vacancy for only men or for only women and when the

advertisement is worded in a way which indicates that in the recruitment one of the sexes would be given priority if the recruitment of one particular sex constitutes a genuine and determining working requirement, provided that the objective is legitimate and the requirement is proportionate

The implementation of the EU legislation is satisfactory. However, in respect of Article 26 of the ERA, prohibiting an employer from requiring that the applicant provides information on his/her family and/or marital status, pregnancy and family planning, Slovenian law goes even further than what European law requires.

3. Pregnancy and maternity protection; parental leave

The ERA contains some general provisions regarding the right to parental leave, the obligation to inform an employer of the commencement of parental leave, how it will be distributed and the benefits during periods of leave. But the most important provisions are found in the Parental Care and Family Benefits Act (hereinafter the PCFBA). According to the PCFBA there are 4 different types of parental leave: maternity leave, paternity leave, parental leave on the ground of the birth of the child, and adoption. Female workers are entitled to a period of full-time maternity leave of 105 days, commencing at least 28 days before the date of confinement. Male workers are entitled to a period of full-time paternity leave of 90 days, out of which 15 days must be used until the baby is 6 months old and 75 days until the child is three years old. The right to parental leave on the ground of the birth of the child is granted to one of the parents directly after the end of maternity leave to take care of the child during a period of 260 days for one child (which can be extended by up to 90 days for each additional child) on a full-time or part-time basis. A worker who adopts a child between the age of one and four is entitled to parental leave of 150 days or to 120 days if the child is between four to ten years old. During these periods of leave insured persons are entitled to benefits which are equal to 100 % of their average salary over the 12 months immediately prior to the date on which the benefit was claimed. The exception is only paternity leave where only 15 days are paid.

During parental leave, workers remain employed under the terms of the existing employment agreement and are therefore generally entitled to return to the same job at the end of the leave. However, there are no specific provisions which would guarantee the right to return to the same job and the right to return to an equivalent or similar job consistent with the employment contract. For this reason the implementation of Council Directive 96/34/EC might not be satisfactory.

Concerning health protection at the workplace for pregnant workers and workers who have recently given birth or are breastfeeding and leave from work for antenatal examinations the Regulation on the protection of health at the workplace of pregnant workers and workers who have recently given birth or are breastfeeding is relevant. It contains provisions on the assessment of any risk to the safety or health and any possible effects on the pregnancy or breastfeeding of the workers concerned and on measures and actions to be taken with respect to health and safety at work further to the results of the assessment. In addition, it defines cases in which exposure is prohibited and entitles female workers to time off for antenatal examinations.

In case of urgent family reasons (sickness, accidents etc.) workers are entitled to time away from work. The duration of the sickness leave is limited to 7 or 15 days, depending on the age of the child and on whether the leave is needed for a child with special needs. The benefit is equal to 70 % of the average salary during the preceding year.

Two provisions of the ERA prohibit dismissals. The first is a general provision and prohibits dismissal due to taking sickness or parental leave. And the second is a provision providing special protection against the dismissal of women during pregnancy and breastfeeding and parents on full-time parental leave.

Besides the above-mentioned gap in the implementation of directives regarding pregnancy and maternity protection, Slovenian provisions go further than what European law requires, mostly because maternity and parental leave are longer and benefits during their duration are higher than the European minimum required.

4. Equal pay

Besides the general provisions of the ERA, the AIPET and the AEOWM dealing with equal pay indirectly when prohibiting discrimination on grounds of gender there are also some provisions in the ERA and in the Act on the System of Salaries in the Public Sector (hereinafter the ASSPS) which directly apply the principle of equal pay. In accordance with the relevant provision of the ERA workers must be paid equally for equal work and for work of equal value regardless of their sex; any provisions in individual employment contracts or collective agreements or any acts by the employer that breach this principle are void. Furthermore, the ASSPS lays down the principle of equal pay for male and female workers for work in comparable posts and functions in the public sector and provides a legal basis for publicly divulging salaries in the public sector. The concept of pay covers salary, composed of a basic salary, salary on the basis of work efficiency and benefits, and any other types of remuneration.

To be able to apply the existing legislation successfully, the concept of work of an equal value should be defined and job classification schemes should be determined.

5. Occupational pension schemes

A collective supplementary pension insurance scheme was introduced in 2000 with the adoption of the Pension and Invalidity Insurance Act (hereinafter the PIIA). The conditions for the acquisition of rights under the collective supplementary insurance, the types and scope of these rights as well as the procedure for their assertion must be defined in the pension scheme. All employees working for an employer who has determined the pension scheme alone or with other employers have the right to join the pension scheme financed by the employer under the same terms. In addition, the conditions for the acquisition of rights under the voluntary supplementary insurance shall not differ in respect of the gender of the insured person.

According to exceptions allowed by directives the supplementary pension is calculated with the application of adequate actuarial calculations which consider the life expectancy of the insured person on the basis of adequate mortality tables. Taking into account the higher life expectancy of women, the amount of the supplementary pension paid is lower for women than man.

6. Statutory schemes of social security

The social security of Slovenian citizens and others is above all ensured by compulsory social security schemes (the health insurance scheme, the pension and invalidity insurance scheme, the unemployment insurance scheme and the social assistance scheme). Particular insurance schemes are regulated by different laws (the HPIA, the PIIA, the Employment and Unemployment Insurance Act and the Social Security Act) which all determine rights and obligations for both genders equally.

The only exception is the PIIA which excludes gender equality in relation to: the determination of different conditions for the acquisition of old-age and invalidity

pension as regards the pensionable age and the completion of the pension qualifying period (that means that women may retire at 58 years of age with a 38-year pension qualifying period or at 61 years of age with a 20-year pension qualifying period; meanwhile men may retire at 58 years of age with a 40-year pension qualifying period or at 63 years of age with a 20-year pension qualifying period); and lowering the retirement age limit by virtue of having children to a certain defined age for each child born or adopted. In the latter case parents shall mutually agree who will assert this right.

7. Self-employed and helping spouses

The Slovenian Companies Act and the Institutes Act are neutral as regards gender and therefore provide equal opportunities for women and men. The Directive is also well implemented in the social security area where self-employed and helping spouses are covered by mandatory social security schemes. There is one provision in the PIIA which provides for voluntary membership in the mandatory pension and invalidity insurance for persons (usually the spouses of farmers) engaged in an independent agricultural activity and do not meet the conditions for mandatory insurance. Self-employed and helping spouses are also covered by the mandatory parental care insurance and are therefore entitled to maternity and parental leave and benefits if they engage in an independent agricultural activity in the Republic of Slovenia as their sole or principal occupation and are already included in the mandatory pension and disability insurance scheme.

Slovenia completely fulfils the requirements of the Directive 86/613/EEC. The provisions protecting certain categories of women as contained in the above-mentioned Directive are binding and go further than what EU law requires.

8. Goods and services

Directive 2004/113/EC has been transposed by the AIPET, the Insurance Act (hereinafter the IA) and the Consumers Protection Act (hereinafter the CPA). The AIPET provides for equal treatment irrespective of gender in the access to and supply of goods and services, which are available to the public, including apartments and their supply. The IA provides for the equal treatment of all insured persons and prohibits differences in insurance premiums and benefits on the grounds of sex, maternity and pregnancy in general. The CPA obliges enterprises to sell goods and provide services to all consumers under equal conditions.

Exceptions are provided for in the AIPET and the IA. The AIPET provides a legal basis for allowing different treatment based on gender regarding insurances and linked financial services and the IA permits differences in insurance premiums and benefits in the case of life insurances, insurances in case of accidents and health insurances where the use of sex is a determining factor in the assessment of the risk based on relevant and accurate actuarial and statistical data.

The implementation of Directive 2004/113/EC is satisfactory, although the relevant paragraph in the AIPET providing for equal treatment in access to and the supply of goods and services should be concretized and the same term for 'goods' should be used in directives and laws.

9. Enforcement and compliance

Concerning **victimisation**, the ERA and the AIPET state that a discriminated person and a person assisting a victim of discrimination must not be subjected to adverse consequences due to his/her actions.

As regards the **burden of proof** the ERA states that if an applicant or a worker in a dispute alleges facts from which it may be presumed that there has been discrimination, it is up to the respondent to prove that there has been no breach of the principle of equal treatment.

In case of a breach of the prohibition of discrimination an administrative fine may be imposed on an employer and some criminal sanctions may also be imposed. Moreover, **access to the courts** is safeguarded as well. A worker or a not chosen applicant may request judicial protection before the labour court and claim a continuation of his/her employment with all the rights deriving from the employment contract, reinstatement to a former position, the payment of social security contributions and the salary with statutory interest, the reimbursement of legal costs etc. In addition, a worker may claim damages (for physical pain, distress, fear, adverse effects on health etc.) arising from unlawful acts, actions or omissions pursuant to the general rules of civil law. Damages are not limited in the private sector, but are limited for job applicants in the public sector (Article 65 of the PSA). For this reason the implementation of the European law might not be satisfactory.

Access to the courts is only ensured for alleged victims of discrimination. Interest groups and other legal entities are excluded. All the above-mentioned **remedies and sanctions** in Slovenia are effective, proportionate and dissuasive.

The Slovenian body aiming to create equal opportunities and conditions for the equal representation of both genders in all areas of social life is the **Office for Equal Opportunities** (hereinafter the Office). It has the status of the governmental office, dealing with other grounds of discrimination as well. It co-ordinates the formulation of policies and the drafting of regulations in the area of the prevention and abolition of discrimination, offers initiatives and proposals to the Government and ministries for measures related to equal opportunities and the prevention and abolition of discrimination, makes and draws up analyses, reports and other material in the area of equal opportunities, promotes the creation of equal opportunities etc. It also employs the Advocate for Equal Opportunities for Women and Men and Advocate of the Principle of Equality who hears cases of alleged discrimination. Unfortunately the Office is not entirely independent because a director is responsible for its work towards a Secretary General of the Government, which might not be in accordance with the requirements of European law.

A **collective agreement** binds the parties to that collective agreement or its members and is therefore valid for all persons employed by an employer or employers to whom the collective agreement applies. The validity of the collective agreement or a part thereof may be extended to all employers in an activity or activities for which the collective agreement has been concluded. Since collective bargaining is of great importance (because the trade unions are influential) and collective agreements are generally applicable and have a similar legal status as legislation they should deal more often with equality issues. So far, however, provisions are rare and mostly deal with the neutral use of expressions for a worker in the masculine grammatical gender, the prohibition of discrimination, damages, and the reconciliation of work, private and family life.

10. Brief assessment

In order to become a member of the EU, Slovenia first made a detailed analysis of the national legislation in force in all areas of the law prior to accession. Consequently a major part of the legislation was adjusted, revised or newly adopted in order to implement the EU gender equality *acquis*. As is now seen the overall implementation

seems satisfactory. In some aspects, Slovenian law goes even further than what EU requires, for example in providing for longer maternity and parental leave and higher benefits during leave or when prohibiting an employer from requiring certain information from the applicant. However, there are some gaps as well. For example, provisions which would guarantee the right to return to the same or equivalent job after leave are lacking, the concept of work of equal value is not defined, the provision on the implementation of the Goods and Services Directive in the AIPET is too general and the amount of compensation in the PSA is limited. Besides, there is almost no litigation on equality issues.

SPAIN

1. Implementation of central concepts

In general terms, the implementation of central concepts is satisfactory in Spain as the definition of these concepts is practically identical to that envisaged in EU gender discrimination law. The concepts of direct and indirect discrimination, positive action, harassment and sexual harassment are defined mainly in Law 3/2007 on the effective equality of men and women, and are applicable in all contexts, especially in political, civil, labour, socio-economic, and cultural areas.

Even before Law 3/2007 the concept of **indirect discrimination** had already been introduced by Spain's Constitutional Court, for the first time in Sentence 145/1991, in relation to the system of professional classification envisaged in a **collective agreement**. The Spanish Constitution states that equality should be real and effective for everybody and based on this the Constitutional Court understood that **positive action** measures could be adopted. What was lacking, however, was the inclusion in the Spanish legal order of the concepts of **harassment and sexual harassment**, which are now defined in Law 3/2007 on sexual harassment and on harassment on the ground of gender. In contrast to the EU concepts, the Spanish regulations do not require that harassment should be non-desired behaviour, so that conduct may be considered as harassment even though there is no express and categorical opposition on the part of the victim. However, the omission from Spanish law of the 'undesired' nature of the harassment does not make much difference, because if this behaviour creates an intimidating, degrading or offensive situation it will, in most cases, be 'undesired' by the victim. Both sexual harassment and gender-related harassment are qualified as discriminatory and the conditioning of a right or the expectation of a right to the acceptance of a situation which can be considered as harassment is also qualified as discriminatory.

Concerning **direct discrimination**, the concept includes all unfavourable treatment of women related to pregnancy and maternity.

Positive action measures are expressly regulated in Law 3/2007 and in the Workers' Statute, and are intended for the authorities but also for private individuals and legal entities. Outside a strictly labour-related context, Law 3/2007 establishes the need for a balanced presence of men and women, which may imply an imposed quota, e.g. on the Board of Directors of trading companies, on the management bodies of the Civil Service or in electoral candidate lists.

2. Access to work, working conditions.

The principle of equal treatment of men and women in access to employment, training, and professional promotion and in working conditions has been implemented

in the Spanish legal order in different regulations and in general terms in Article 5, Law 3/2007 for both private and public service employment, which also includes equal treatment with respect to membership and participation in trade unions and employers' organizations and any other professional organization. Discrimination in access to employment is expressly forbidden in employment law for public employment services, employment agencies and, in particular, employment vacancies referring to one sex are considered as discriminatory, except where this is a determining factor for the working activity. The Constitutional Court has declared some cases to be non-constitutional where women have been denied access to certain jobs, including decisions such as Judgment 229/1992, 14 December, in relation to face workers in mines, and Judgment 216/1991, 14 November, which analyzed the non-access of a woman to the Armed Forces because the legal implementation which would have allowed such access was lacking. It is also forbidden to use 'physical strength' as a requirement when advertising a job vacancy designed for only one of the sexes. Finally, the principle of equality is also applicable within the context of professional promotion and the definition of professional categories and groups, which must be adapted to rules which are common to both sexes.

The principle of equal access to public sector employment is contained in general terms in Law 3/2007 on equality (Article 51), and specifically on the Armed Forces and Official Security Forces (Articles 65 and 67), including the requirement of a balanced composition of men and women in staff recruitment and evaluation bodies.

The labour regulations allow collective bargaining to determine positive action measures in the context of access to employment, promotion and professional training. Equality policies in business enterprises may also cover these areas so as to achieve equal treatment and opportunities for men and women within the enterprise.

Protection against discrimination in relation to dismissal has also been recently modified, in agreement with the extension of recognised rights to facilitate the reconciliation of work and family life, for the suspension of the employment contract for risks during breastfeeding and for paternity, as well as dismissals motivated by the exercise of recognised rights by victims of gender-related violence.

3. Pregnancy and maternity protection; parental leave

The transposition of EU law in these subjects was carried out through various internal regulations which have then been modified on various occasions. Protection during pregnancy, after a recent birth and breastfeeding periods are regulated in the Prevention of Labour-related Accidents Law, and includes adapting working conditions or changing the post or function when there is a health or safety risk. If these measures are not possible or adequate, the employee affected can be put in a situation where the contract is suspended (which will last as long as required for health or safety protection) on account of risks during pregnancy or natural breastfeeding (for children under the age of nine months.), with the right to a financial benefit equivalent to 100 % of the monthly salary and with the right to be readmitted to the post previously held. Dismissals during these periods when the employment contract is suspended as well as the dismissal of pregnant women, from the start of pregnancy to the start of maternity leave, will be considered null and void, except where the reason for the dismissal is a serious fault on the part of the worker or the dismissal is objectively necessary for reasons not linked to pregnancy and maternity, such as economic or technical reasons. The employee also has the right to remunerated time off work for antenatal check-ups and birth preparation techniques.

Maternity leave lasts for 16 continuous weeks (with two further weeks for each child, in the case of multiple births), of which 6 weeks must be taken by the mother immediately following the birth. If both parents work, the mother may choose to cede part of the remaining leave period (10 weeks) to the other parent, which can be taken simultaneously or successively to the mother's period of leave and on a full or part-time basis. In cases of adoption or fostering the leave will be the same, although with some specific conditions concerning international adoptions or concerning how the leave may be taken if both parents work. Employees who make use of these leave periods for birth or adoption will be entitled to remuneration equivalent to 100 % of their monthly salary, whenever the legal requirements are met. Public service employees will have the same rights, and in addition will be able to participate, during the period of the leave, in training courses organised by the Civil Service.

Paternity leave, independent of whether maternity leave is shared with the mother, will last for 13 continuous days, extended by 2 more days for each child, in cases of adoption or fostering, with the right to remuneration. For public service employees the leave period will be for 15 days, although the aim of the law is to gradually extend the leave to 4 weeks, over a 6-year period. Even though this leave is intended for the father, the provision is drafted neutrally so as to be compatible with family structures where both parents are of the same sex.

4. Equal pay

The equal remuneration requirement is contained in the Workers' Statute, Article 28, and the obligation is to pay equal remuneration for work of equal value, a question on which the Constitutional Court has made several pronouncements,¹²⁶ pointing out that the systems of professional classification and promotion must rely on criteria which should be neutral and not have indirect discrimination as a result, for example when using 'physical effort' or 'arduous work' in order to give a higher value to men's activity.

The scope of the remuneration concept is wide-ranging and includes any payment made by the employer, directly or indirectly, whatever the nature thereof: salary or different from salary, paid in cash or in kind.

5. Occupational pension schemes

Occupational pension schemes are private, free and voluntary, usually established through an agreement in collective bargaining, and are totally excluded from the Social Security system (which is public and compulsory). Collective agreements must respect the constitutional principle of equality and the prohibition of discrimination on grounds of gender. The compromise (pension obligations) established in the collective agreement should be guaranteed through collective insurances or occupational pension schemes. All employees, including those with a special labour contract, can participate in the occupational pensions schemes, as one of the principles on which the occupational pension schemes are based is a general prohibition of discrimination in the access thereto.

6. Statutory schemes of social security

Statutory schemes of Social Security are subject to the constitutional principle of equality and the prohibition of discrimination on grounds of gender, and the Constitutional Court has played an important role in this matter from the beginning of

¹²⁶ Judgments 145/1991, 58/1994 and 147/1995.

the 1980s. From this point of view the impact of Directive 79/7/EEC in Spain has not been very significant on the whole. During 2007 the Social Security Law was modified in order to allow access to pensions and other rights to workers (women or men) who had interrupted their employment and their contributions to the Social Security system due to the education of their children.

People covered by the Social Security system with regard to contributory benefits are Spanish nationals with their residence in Spain or foreign nationals with their legal residence in Spain who are: employed, self-employed, students or civil servants. The beneficiaries of non-contributory economic benefits are Spanish nationals with their residence in the country and who are in state of necessity.

The general scheme of the social security system covers economic benefits in different situations. There are also some family benefits and, in the case of death, several survivors' benefits.

7. Self-employed and helping spouses

Law 3/2007 implements the principle of equal treatment between men and women in agriculture and creates a new legal status in order to recognize the work and social protection of assisting spouses. The protection of self-employed women during pregnancy and maternity has also been improved in the same Law to facilitate reconciliation concerning maternity and paternity leave, as well as the new right of financial payment from the social security system in the case of risks during natural breastfeeding.

8. Goods and services

Directive 2004/113/EC has been implemented through Law 3/2007 on equality between women and men. We can consider that the Directive has been correctly implemented, at least from a formal point of view, as there has been a literal transposition of the most relevant provisions of the Directive. There is a general prohibition on the use of sex as a factor in the calculation of premiums and benefits when this results in differences in individuals premiums and benefits, but the Government is allowed to elaborate a Royal Decree in order to introduce some proportionate differences therein (using the possibility of Article 5(2) of the Directive). The Directive's impact has been rather limited despite its proper implementation. This is probably due to the lack of initiatives on behalf of the authorities, the lack of a specific regulation of the rights and obligations in the various areas and contract agreements, as well as the lack of court claims concerning specific discrimination issues.

9. Enforcement and compliance

The rule on the reversal of the **burden of proof** (*onus probandi*) was introduced by the Constitutional Court¹²⁷ in Spain mainly in cases of trade union-related discrimination and the latter applied to other discrimination contexts. At present, the Law on Labour Procedure establishes the scope for changing the burden of proof, where the mere allegation of discrimination is not enough. To this effect, previous evidence must be presented of the infringement of rights by the party alleging discrimination. When evidence of the infringement is presented, the defendant must demonstrate the existence of reasons unrelated to the intention to discriminate to objectively justify the conduct.

¹²⁷ Judgment 38/1981.

In equal treatment cases the persons so affected have standing before the courts and, if the victim so authorizes, also trade unions and associations for the promotion of equality. In cases of sexual harassment and harassment due to gender the only person who has standing is the victim of the harassment.

When the reason for terminating the contract is dismissal on grounds of sexual discrimination the employer's decision will be declared null and void with the immediate effect of readmission to the post and according to the same conditions as previously. This context covers situations arising during the suspension of a contract for maternity, risks during pregnancy and breastfeeding periods, an illness related to pregnancy, birth or breastfeeding, adoption, fostering or paternity. The periods immediately after the employee's return to work, when the above-mentioned periods of suspension have come to an end, are also protected.

The Workers' Statute states that all decisions taken by the employer which amount to **victimisation** against an employee for making an internal complaint or a judicial claim in order to ensure the principle of equal treatment and non-discrimination, will be considered as a discrimination on the grounds of gender and the effects will be null and void. The **remedies** should be real, effective and proportionate to the damage, as stated in the Law on equality between women and men, reinforced by an efficient and dissuasive system of sanctions. Discrimination, sexual harassment and harassment on grounds of gender are considered to be serious transgressions and the fine can be from EUR 6 251 to EUR 187 515.

The role of **collective agreements** in the development of equality issues was not really relevant before the enactment of the 2007 Law on equality. From that moment onwards, there is a general obligation for the **social partners** to negotiate, in collective agreements, measures promoting the equality of treatment and opportunities for women and men or equality plans in those companies required to implement them.

The **autonomous institution** independent from the Ministry of Equality, the *Instituto de la Mujer*, has as a new competence to provide assistance to the victims of discrimination so that they can deal with proceedings on claims or complaints against discrimination. A Commission on Equality between Women and Men was created in November 2007 with the responsibility to co-ordinate policies and measures adopted by ministerial departments on these grounds and to actively supervise the principle of equal treatment and opportunities in the activities of the State General Administration.

10. Brief assessment

The starting point of gender equality legislation in Spain is Article 14 of the Constitution, enriched by the interpretation of the Constitutional Court in equality and non-discrimination. Lately Law 3/2007 on the effective equality of men and women has brought an important development and fulfils the basic standards of EU gender discrimination law, in particular the definitions of the main concepts of direct and indirect discrimination, positive action, harassment and sexual harassment. Law 3/2007 states also the obligation of social partners to negotiate equality plans in companies and this will probably bring some interesting improvements in gender equality achieved through collective agreements.

SWEDEN

1. Implementation of central concepts

As of 1 January 2009 hitherto non-discrimination legislation in Sweden is ‘merged’ into the new 2008:567 Discrimination Act, covering discrimination on the grounds of gender, trans-sexual identity/expression, ethnicity, religion and other belief, sexual orientation, disability and age.

The 2008 Discrimination Act contains a general set of definitions in its Chapter 1. The Act is truly ‘horizontal’ in that the general definitions cover all grounds of discrimination within the scope of the Act which thereafter states the prohibitions of discrimination in employment, education, etc., area by area.

Direct discrimination is to disfavour somebody by treating him or her less favourably than someone else is treated, has been treated or would have been treated in a comparable situation if the disfavour is connected to *sex*, transsexual identity/expression, ethnicity, religion or other belief, disability, sexual orientation or age.

Indirect discrimination is to disfavour somebody by applying a provision, a criterion or a method of approach that appears to be neutral but which in practice especially disfavours persons of a particular *sex*, unless the provision, criterion or method can be objectively justified owing to a reasonable goal and the means are appropriate and necessary in order to achieve the goal.

Instructions to discriminate are defined as orders or instructions to discriminate against an individual as described in the former paragraphs of Section 4 that are given to someone who is either in a subordinate or dependent position relative to the person who gives the orders or instructions or who has undertaken to act on that person’s behalf.

Harassment is defined as conduct that violates a person’s dignity and that is associated with any one of the grounds covered by the Act whereas **sexual harassment** is defined as a conduct of a sexual nature that violates a person’s dignity.

Positive action (*positiv särbehandling*) is not a concept used by the Swedish legislator. Chapter 3 of the 2008 Discrimination Act deals with what is called ‘active measures’ in working life and education, respectively. Here we are talking about proactive measures such as equality plans, etc. Affirmative actions proper are dealt with in Chapter 2 on the bans of discrimination. According to Chapter 2 Section 2.2 the prohibitions against discrimination do not apply ‘if the treatment of the person concerned is part of an effort to promote equality [between men and women] in working life and is not a matter of applying pay terms or other terms of employment’. A later section on education contains a similar permissive rule related to recruitment in forms of education other than basic schooling. Also the bans on discrimination in labour-market political activities and professional access and activities contain an opening for efforts to promote equality between the sexes, whereas the rule on membership of certain organisations permits benefits for members of a certain sex provided this is a similar effort to promote equality.

2. Access to work, working conditions

Community law as regards working life is mainly implemented by Chapter 2 of the 2008 Discrimination Act. An *employer* – whether in the public or private sector – is prohibited from discriminating against (1) an employee, (2) somebody making a request regarding employment or who is applying for employment, (3) somebody applying for or performing a practice/training period, or (4) somebody who is

available as or acting as a temporary agency worker with the employer. Thus these are the persons protected whereas the act relates to *any decision* made by the employer (or anybody acting on his or her behalf).

The Swedish legislator has made use of the exception in Article 2.6 of Directive 2002/73/EC. The prohibitions on discrimination do not apply in connection with decisions on employment, promotion or training for promotion where a particular characteristic related to sex, etc., by reason of the nature of the work or of the circumstances in which it is carried out constitutes a genuine and determining occupational requirement with a legitimate objective and the requirement is adequate and necessary for attaining that objective.

The bans on gender discrimination in vocational training, etc., are also implemented by Chapter 2 Section 5 on education whereas Chapter 2 Sections 9, 10 and 11 implement the discrimination bans on labour-market political activities, professional activities and membership of trade unions and other professional organisations, respectively.

3. Pregnancy and maternity protection; parental leave

The 1995 Parental Leave Act contains the central rules on parental leave including maternity and paternity leave. The 1995 Act stipulates the right to leave of absence in relation to the employer whereas the right to pay during such leave is covered by the general social security parental leave benefit scheme (regulated in the 1962 General Insurance Act). However, 'extra parental wages' paid by the employer according to a collective agreement are especially important to large groups of salaried employees since there is an upper 'ceiling' to the social security benefits scheme.

There are six different types of leave: maternity leave of fourteen weeks before and/or after giving birth and during breastfeeding, full leave with or without parental benefit until the child is 18 months old (or during 18 months following adoption), partial leave with parental benefit, partial leave without parental benefit, leave with temporary parental benefit for the sake of caring for a sick child and full or half-time leave with municipal care support.

Parental benefits are paid during 480 days for each child (also adopted); 390 days at sickness benefit level and another 90 days at the (guaranteed) minimum level. 60 days at sickness benefit level are non-transferable between the parents. Parental benefit at sickness-benefit level is income-related and thus requires prior employment but there is also a basic guarantee level parental benefit scheme for parents not complying with this condition. The scheme is extremely flexible in that it is possible to take partial benefits (down to 1/8) during a considerable amount of days until the child is 8 years of age.

Parental leave with temporary parental benefit is provided with a maximum of 60 days a year per child when caring for a sick child. Such leave is also provided as paternity leave during 10 days after the birth of a child. Following the adoption of a child the parents have 10 such days of leave together. As of 1 July 2008 a care support of SEK 3 000 (EUR 319) per month was introduced. Such support is provided at municipality level and the introduction of such benefits is voluntary.

Maternity leave is always granted during seven weeks prior to and seven weeks after giving birth as well as when breastfeeding – two weeks of such leave is compulsory. A parent is also always entitled to full leave for the care of a child until the child reaches 18 months (or within 18 months of adoption), irrespective of whether the parent receives parental benefit. There is also always a right to partial leave without parental benefit in the form of a reduction in normal working hours by

up to one quarter for the care of a child which has not reached the age of eight years. Additionally, there is always a right to parental leave whenever one receives benefits from the social security parental benefit scheme or municipal care support.

The Parental Leave Act contains rather detailed rules on notice and decisions regarding leave. There is a general prohibition on unfair treatment (*missgynnandeförbud*) for reasons connected with parental leave under the Act covering protection against dismissal on the grounds of maternity, paternity and parental leave as well as deteriorated working conditions. There is also an express right to discontinue the leave and resume working to the same extent as prior to the period of leave. Maternity leave is not only covered by this general prohibition of unfair treatment but is also – as is pregnancy – covered by the ban on direct gender discrimination in Chapter 2 Section 1 the 2008 Discrimination Act. This is, however, not clearly stated anywhere but is a matter of interpreting the ECJ's case law treating discrimination related to pregnancy and maternity leave as direct discrimination. There is no strict prohibition against dismissal during pregnancy or leave for unrelated reasons, but the notice period cannot be made effective until the worker is actually back in work.

4. Equal pay

The 2008 Discrimination Act does not contain an express ban on pay discrimination – it is implicitly and tacitly covered by the ban on discrimination in working life including pay and other conditions. In the application of the law the parties and the courts are presumed to interpret the concept of pay in accordance with the ECJ's case law. The concept of equal pay is dealt with, however, in relation to the requirement of periodical action plans for equal pay in Chapter 3: 'work is to be considered equal in value to other work if, based on an overall assessment of the nature of the work and the requirements imposed on the worker, it may be deemed to be of similar value. Assessments of work requirements shall take into account criteria such as knowledge and skills, responsibility and effort. When the nature of the work is assessed, particular regard shall be taken of the working conditions'.

There is no express legislation on the justification of pay differences. A number of cases have been heard by the (Swedish Supreme) Labour Court, though. The negative outcome of most of these cases has been criticised claiming that the Labour Court has too willingly accepted 'the market argument' made by employers as an excuse for pay differentials, thereby failing to live up to the standards of Community law. Nevertheless, some of these cases reflect important progress as regards the possibilities to instigate legal claims based on a comparison of work of equal value. For example, the work of nurses has been considered comparable to that of hospital technicians. It is worth noting that the rules on active measures include quite far-reaching requirements on periodical action plans for equal pay by employers with 25 or more employees. It is also worth mentioning, however, that these requirements were weakened by the introduction of the 2008 Act. Now plans are required every three years as compared to every year and the threshold as regards the number of employees has thus increased from 10 to 25 employees.

5. Occupational pension schemes

There is no express legislation as regards occupational schemes and gender discrimination. In accordance with the ECJ's case law such private schemes (i.e. apart from public social security pension schemes) are seen as pay and are thus covered by the general ban on discrimination in working life described above. Generally

speaking, occupational pension schemes are known to be gender neutral in their design.

6. Statutory schemes of social security

Chapter 2 Section 14 of the 2008 Discrimination Act implements Directive 79/7/EEC. A prohibition on (among other grounds) gender discrimination covers the social insurance system and related benefit systems including the unemployment insurance and the public student aid system. The second paragraph of Section 14 expressly states that the prohibition concerning social insurance and related benefit systems does not prevent an obstacle to the application of remaining provisions concerning widow's pension, wife's supplement and child allowance payments. Generally speaking, the current public social security pension scheme is gender neutral and the express exception rule refers to transitional rules applicable to a small group of women.

7. Self-employed and helping spouses

There is a ban on discrimination in the 2008 Discrimination Act in connection with qualification, certification, authorisation, registration, approval or similar arrangements including rights to initial financing that are needed or may be of importance in enabling an individual to engage in a certain occupation. This ban does not prevent positive action as part of an effort to promote equality, however. There are also prohibitions on discrimination as regard labour market political activities and membership of certain organisations, respectively. Moreover, the concept of self-employed does not have a clear-cut meaning in Swedish law. The Swedish concept of an employee is quite broad and may cover situations which in an EC context are considered to concern self-employment or helping spouses. The rules on discrimination in working life apply to this extent.

8. Goods and services

According to the 2008 Discrimination Act a prohibition on discrimination applies to anyone (or his/her representative) who (1) outside private and family life provides goods, services or housing for the public, or (2) arranges a public meeting/gathering. There is, however, also an express exception for gender discrimination related to the provision of insurance services as well as other services or housing if the different treatment can be justified by a legitimate aim and the means are appropriate and necessary for achieving this aim. One example is sheltered housing for women having experienced violence and another 'single-sex' housing for students in accordance with the conditions of a donation.

9. Enforcement and compliance

The bans on **victimisation** in the different directives are implemented by Chapter 2 of the 2008 Discrimination Act. Section 18 concerns employers and Section 19 other actors covered by the different prohibitions on discrimination and they ban the victimisation of any individual because he or she has reported or drawn attention to the discrimination or taken part in an investigation into discrimination as well as rejected or accepted **harassment** or **sexual harassment** from the alleged discriminator. Corresponding rules have long existed but have not been the subject of any important case law.

A general rule on the reversed **burden of proof** is contained in Chapter 6 Section 3. It covers all types of alleged discrimination or victimisation within the scope of the Discrimination Act.

Remedies and sanctions are regulated by Chapter 5 of the 2008 Discrimination Act. Section 1 introduces a new type of indemnity, ‘discrimination indemnity’, which is exclusive for cases of discrimination. Its function is to compensate for the ‘degradation’ caused by any type of discrimination or harassment and to have a preventive effect on discriminatory behaviour in society. The general aim of introducing this new type of indemnity is to make the general courts change their practices and award higher indemnities. An indemnity to cover economic loss is additionally paid in the case of discrimination or victimisation by an employer. Such an indemnity is not possible, though, in relation to decisions on appointments or promotions. Here, respect for the ‘hiring at will’ doctrine in Swedish law impedes the payment of an economic indemnity! Chapter 5 Section 3 contains a rule on the invalidity of discriminatory decisions or conditions. In cases of a discriminatory dismissal the rules on reinstatement in the 1982 Employment Protection Act apply.

The Discrimination Ombudsman (*Diskrimineringsombudsmannen*, DO) is the new **equality body** covering all groups within the scope of the Discrimination Act (Chapter 4). This new body is ‘a merger’ of the former four different ombudsmen, among them the Equal Opportunities Ombudsman (*Jämställdhetsombudsmannen*, JämO). It has the task of monitoring compliance with the Act generally, but may also bring an action on behalf of an individual claiming discrimination of any type. This requires the consent of the individual in question. The DO decides whether there is a sufficient reason to bring a claim, such as that a ruling in the dispute is of importance for the application of the law. The 2008 Act introduces a new possibility also for certain NGOs to bring an action to court provided they have the concerned individual’s consent. Both the DO’s and the NGOs’ right to bring such an action is secondary to the right of any trade union to represent their members. The remedies as regards non-compliance with the rules on active measures are fines and there is a special Commission against Discrimination to monitor this upon the request of the DO.

The **rules on litigation** are contained in Chapter 6 of the 2008 Discrimination Act. Alleged discrimination in working life is dealt with according to the Labour Disputes Act which means that the Swedish Labour Court rules in the last – and usually also the first – instance. Only when an individual who is not a member of any trade union and is not represented by the DO brings a claim does he or she start out in the general District Court, the Labour Court serving as the appeal court. As regards discrimination in any other area of society, claims are brought to the general court system.

The Swedish labour market – both public and private – is to a great extent covered by **collective agreements**. However, there is no such thing as generally applicable collective agreements; from a legal point of view collective agreements are only binding upon the employers/unions entering into them and their members. On the other hand, there is an obligation for the employer bound by an agreement to apply the conditions of the applicable agreement to all employees in the activities covered. Collective agreements are not known to contain general regulations on gender discrimination but do frequently address gender as regards wage-setting principles, extra wages during parental leave, etc.

10. Brief assessment

Generally speaking, the 2008 Discrimination Act implements most of the directives covered by this report including the Recast Directive. Directives 92/85/EC and 96/34/EC are mainly implemented through the Parental Leave Act. The Swedish legislator has taken a rather keen interest in the implementation of Community discrimination regulation in recent years and has even preceded Community law on occasion. The implementation of gender law generally speaking sufficiently meets the requirements of Community law. This also holds true for the implementation of central concepts.

Swedish law has been criticised by the Commission, however, as not having included an express rule indicating that discrimination related to pregnancy and maternity leave proper is regarded as sex discrimination. Other gaps in the Swedish implementation of Community gender regulations have been identified by the Commission as regards the implementation of Directive 76/207/EEC as amended by Directive 2002/73/EC in respect of limited rights to compensation as well as lacking rights for NGOs to represent claimed victims. The Government – not necessarily in agreement with the Commission – has remedied these allegations through the 2008 Act. Moreover, the introduction of the special ‘discrimination indemnity’ can be expected to result in a welcome increase in the levels of indemnities. However, a question mark can be posed as regards the situation of discrimination in hiring and promotion. Even if discrimination is proven, there is thus no right to the position/promotion as such or to compensation for economic loss. Arguably, with regard to transparency, etc., one can also question the technique of the 2008 Act to prohibit any discriminatory decision in working life without expressly mentioning access to employment, etc., in parallel with Article 3 Directive 2002/73/EC.

Swedish legislation goes beyond the requirements of Community law with its prohibition on discrimination regarding basic schooling and higher education. The rules on rights to parental leave are quite extensive and to a great extent related to social security benefits and are protected by a general prohibition on unfair treatment for reasons connected with *parental* leave. It is also worth mentioning that according to Chapter 2 Section 13 of the 2008 Discrimination Act gender discrimination is outlawed concerning healthcare and social services, which goes beyond the requirements of Community law.

UNITED KINGDOM

1. Implementation of central concepts

A Single Equality Bill is due to be published in the next few weeks which is expected to bring together all British discrimination law dealing with sex, ethnicity, disability, sexual orientation, religion or belief and age. Until any such Bill becomes law, the main implementing measure for the EU gender discrimination law in the United Kingdom is the Sex Discrimination Act 1975 (SDA), which predates Directive 76/207/EEC and other EU gender equality legislation but which has been amended periodically in attempts to make it compliant with the requirements imposed by relevant EU law. The Equal Pay Act 1970 (EqPA), which covers inequality in contractual conditions rather than simply in pay, is also very important. The SDA regulates direct and indirect discrimination including positive action, instructions to discriminate, harassment and sexual harassment. It explicitly covers not only discrimination against women and men but also discrimination against a person ‘on

the ground that [he or she] intends to undergo, is undergoing or has undergone gender reassignment' (s.2A), discrimination related to pregnancy and maternity and (in the field of employment) discrimination on the ground that a person is married or in a civil partnership.

Direct discrimination is defined (s.1) as less favourable treatment 'on the ground of [a person's] sex' etc.¹²⁸ 'Except in the case of pregnancy/maternity, comparison is required between the treatment of the claimant and that which was or would have been received by a (real or hypothetical) comparator in similar circumstances'.

In *Equal Opportunities Commission v Birmingham City Council*¹²⁹ the House of Lords ruled that the Council had discriminated directly against schoolgirls in setting a higher mark for success in the '11 plus' examination (by which children were selected for grammar schooling) for girls than for boys, because there were fewer grammar school places available for girls. Their Lordships ruled that it was unnecessary to establish an intention or motive on the part of the council to discriminate against girls. Shortly afterwards, in *James v Eastleigh Borough Council*¹³⁰ their Lordships ruled that the proper approach to the test for direct discrimination was to ask (in a case in which a man challenged discrimination on grounds of (discriminatory) state pensionable ages) whether 'but for' his sex he would have been more favourably treated. The benefit of the 'but for' test is that it excludes arguments (as in the *EOC* case) that less favourable treatment was motivated by factors other than an intention to discriminate against the disfavoured group, such as customer preference, chivalry, etc.¹³¹

The requirement that less favourable treatment be shown for comparators (real or hypothetical) in similar circumstances to those of the claimant has given rise to some difficulties as regards the characterisation of an appropriate comparator where women claim, for example, discrimination on interconnected grounds of race and sex.¹³² It also created significant difficulties in pregnancy cases in which, prior to the decision of the ECJ,¹³³ the domestic courts struggled to find appropriate comparators for pregnant women.

The SDA provides that, in respect of matters falling within the scope of EU law, **indirect discrimination** occurs where a person applies 'a provision, criterion or practice which (...) applies or would apply equally to' men and women, but 'which puts or would put' persons of one sex at a particular disadvantage when compared with persons of the other sex, which puts a particular person at that disadvantage and 'which he cannot show to be a proportionate means of achieving a legitimate aim'. There is some controversy as to whether the test for justification is adequate to comply with EU law, and whether its adoption was regressive, the test prior to the implementation of Directive 2002/73/EC being that established by the ECJ in cases such as *Bilka v Kaufhaus*.¹³⁴ It appears from the application of a materially identical test applicable to race discrimination that the courts will interpret the new test so as to

¹²⁸ 'Etc.' refers here to gender reassignment and the other protected grounds.

¹²⁹ [1989] AC 1155.

¹³⁰ [1990] 2 AC 751.

¹³¹ See also *R (on the application of European Roma Rights Centre & Ors) v Immigration Officer at Prague Airport & Ors* [2005] 2 WLR 1.

¹³² See, in particular, *Bahl v Law Society* [2004] EWCA Civ 1070; [2004] IRLR 799.

¹³³ Case C-32/93 *Webb v EMO* [1994] ECR I-03567.

¹³⁴ Case C-170/84 *Bilka v Kaufhaus* [1994] ECR I-03567 [1986] ECR I-01607].

give effect to the EU approach to the extent that this is more demanding than the words of the domestic provision.¹³⁵

The ‘but for’ approach to direct discrimination has the effect that less favourable treatment on the ground of sex is prohibited by the SDA, in the absence of a specific provision, even where its purpose is to ameliorate existing disadvantages and/or past discrimination (**positive action**). The exceptions provided by the SDA are very narrow and apply in the employment context only to permit the provision of training to, and encouraging applications from, women or men where they are very under-represented in the relevant work. No discrimination is permitted at the point of recruitment or in connection with employment. In addition, trade unions are permitted to have reserved positions for women (or men) in their elected bodies ‘where in the opinion of the organisation the provision is in the circumstances needed to secure a reasonable lower limit to the number of members of that sex serving on the body’.

The SDA prohibits the issue of **instructions to discriminate** by ‘a person who has authority over another person, or in accordance with whose wishes that other person is accustomed to act’ (s.39). In addition, the Act prohibits such persons from procuring or attempting to procure the doing of unlawful acts by those who are under their actual or *de facto* authority. These provisions may be enforced only by the Equality and Human Rights Commission (EHRC) and there is no significant case law.

The SDA prohibits **harassment and sexual harassment** broadly along the lines of Directive 76/207/EEC as amended, though the definition covers unwanted conduct whose purpose or effect is to violate a person’s dignity *or* (rather than *and*) to create an intimidating, hostile, degrading, humiliating or offensive environment for her (s.4A). The Act imposes a soft objective test for conduct whose *effect* rather than *purpose* is relied upon, s.4A(2) providing that ‘[c]onduct shall be regarded as having the [relevant] effect (...) only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect’. Harassment ‘on the ground that [a person] intends to undergo, is undergoing or has undergone gender reassignment’ is also prohibited.

2. Access to work, working conditions

The SDA applies, in the context of work, to those employed ‘under a contract of service or of apprenticeship or a contract personally to execute any work or labour’, and applies also to partners, office holders and agency workers who are protected from discrimination by both agency and (where they are ‘employed’ by the agency) by the employer with whom they are placed. It does not however apply to those who are engaged under a contract which does not require the personal execution of work, such as the claimant in *Mirror Group Newspapers Ltd v Gunning*,¹³⁶ who complained that a newspaper group had refused to transfer a distribution agreement from her father to her on the latter’s retirement. Also of general interest is the 2005 decision of the House of Lords in *Percy v Church of Scotland*¹³⁷ in which their Lordships accepted (contrary to previous case law) that a minister of religion was employed for the purposes of an SDA claim.

The SDA applies in relation to ‘employment (...) at an establishment in Great Britain’ (materially identical provisions cover Northern Ireland) as regards arrangements for appointment, decisions whether to appoint and the terms offered, as

¹³⁵ *R (E) v Governing Body of the Jews Free School and Couronne & Ors v Crawley Borough Council & Ors* [2008] All ER (D) 54, *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213.

¹³⁶ [1986] ICR 145.

¹³⁷ [2005] UKHL 73 [2006] ICR 134.

well as to ‘access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services’, dismissal or subjection to harassment or ‘any other detriment’. It does not apply to the terms and conditions of employment, including pay, which are regulated by the Equal Pay Act 1970 discussed below. The SDA explicitly applies to harassment by third parties in the course of employment where the harassment has occurred to the knowledge of the employer on at least two previous occasions and s/he subsequently failed to take such steps as would have been reasonably practicable to prevent further harassment. It applies to post-employment discrimination, including victimisation. ‘Employment at an establishment in Great Britain’ includes cases in which the worker works wholly or partly in Great Britain, or works wholly outside Great Britain for the purposes of business carried out by the employer at an establishment in Great Britain, and was or is ordinarily resident in Great Britain at the time when s/he applied for or was offered the employment, or at any time during the course of the employment. There is no distinction between private and public employment.

The SDA provides exceptions ‘where sex is a genuine occupational qualification’ (ss.7, 7A and 7B), providing not a general exception along the lines of Directive 76/207/EEC as amended but, instead, specific exceptions relating, *inter alia*, to physiology, ‘decency or privacy’, live-in jobs and jobs in single-sex institutions. Some of these specific exceptions are likely to be compatible with the Directive in their application but others are more questionable, chief amongst them perhaps being the exception permitting discrimination on grounds of sex where ‘the job is one of two to be held by (i) a married couple, (ii) by a couple who are civil partners of each other, or by (iii) a married couple or a couple who are civil partner of each other. Also questionable are exceptions permitting differential treatment of men and women police officers in connection with uniform and equipment requirements, allowances in lieu of uniform or equipment, pensions, and certain categories of volunteer ‘special constables’ and police cadets. Finally, religious organisations may discriminate on grounds of sex in appointing ministers of religion and the Act does not ‘render unlawful an act done for the purpose of safeguarding national security’ (s.52). This is a broader exception than is provided by the other anti-discrimination legislation and is of questionable compatibility with the directives.¹³⁸

3. Pregnancy and maternity protection; parental leave

Discrimination on the ground of pregnancy or maternity leave is prohibited by the SDA broadly in line with EU law (s.3A), but there is no prohibition as such on the dismissal of pregnant women for reasons not associated with pregnancy. All pregnant women are entitled to reasonable paid time off for prenatal care. All pregnant employees are entitled to 52 weeks’ maternity leave during which all normal contractual entitlements other than wages or salary are maintained. Special protection is provided against redundancy arising during maternity leave, with women on leave being entitled to be offered any suitable alternative vacancy which is available. If a woman on maternity leave is made redundant her maternity leave period comes to an end. Payment during maternity leave is generally at 90 % of normal salary for six weeks followed by 33 weeks at a fixed rate (GBP 123.06 from April 2009 or 90 % of salary, whichever is less).

Adoption leave is similar to maternity leave except that either adopting parent can take it, pay is at GBP 123.06 or 90 % of salary, whichever is less, for 39 of the total

¹³⁸ See in particular Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR I-01651.

52 weeks available and return to work is in line with that applicable after more than 26 weeks' maternity leave regardless of the period of leave taken. Paternity leave is fixed at two weeks paid at GBP 123.06 or 90 % of salary, whichever is less, and is subject to a qualifying period of 26 weeks' employment. Employees are entitled to return to the same job. Parental leave is fixed at 13 weeks per parent per child (18 weeks in the case of disabled children), which is to be taken in minimum periods of one week, subject to a maximum four weeks in any one year, unpaid, in the first five years of the child's life (18 years in the case of disabled children). All leave is available only to employees and notice requirements apply.

4. Equal pay

The EqPA applies to contractual benefits whether or not they consist of 'pay' as it is defined in the legislation and case law of the EU. It applies to the same broad category of workers as the SDA. The Act provides that a claimant can demand the insertion of an 'equality clause' into his or her contract of employment to bring it into line with that of her/his 'comparator', in the event of a successful claim. The Act defines as an appropriate 'comparator' for these purposes a person of the opposite sex who is employed by the same employer; in the same establishment or one at which broadly similar terms and conditions apply, on 'like work', 'work rated as equivalent' (e.g. by a job evaluation scheme undertaken by the employer) or 'work of equal value'. Claims by reference to comparators falling outside these strict categories may be made by reference to Article 141 TEC. The employer can block an equal pay claim by pleading the 'GMF' defence, that is, by showing that any difference is genuinely due to a material factor (or factors) which is 'not the difference of sex' (s.1(3)). A pay-related factor which is indirectly discriminatory can succeed as a defence only if it is justified in accordance with EU law; directly discriminatory pay-related factors cannot be justified; and sex-neutral pay-related factors do not have to be justified. There are difficulties in the case law concerning the recognition of indirectly discriminatory pay factors¹³⁹ and the domestic approach to comparators is highly restrictive with, for example, the recent decision in *Bewley v Walton Centre for Neurology and Neuro Surgery NHS Trust*¹⁴⁰ denying a claim by reference to a successor in employment.

5. Occupational pension schemes

The Pensions Act 1995 and Occupational Pension Schemes (Equal Treatment) Regulations 1995 apply to occupational pensions as the Equal Pay Act 1970 does to other forms of pay, and impose equivalent obligations on trustees of pension schemes as well as employers to give effect to EU law. Domestic law broadly adopts the exceptions permitted by EU law.

6. Statutory schemes of social security

Generally speaking the statutory social security scheme does not discriminate directly on grounds of sex except insofar as the state pensionable age is still in the process of being equalised, and meanwhile some benefits remain linked with the differential pensionable ages. Discrimination as regards survivors' benefits is also being phased out. Women can, however, be rendered ineligible for benefits by the earnings or benefit entitlement of those with whom they cohabit. This is not a problem directly

¹³⁹ See for example *Cumbria County Council v Dow (No. 1)* [2008] IRLR 91.

¹⁴⁰ [2008] All ER (D) 341.

linked to sex as the rules are sex-neutral, but it is the result of the statutory security scheme being premised on a model of female dependency, and serves disproportionately to disadvantage women by reinforcing their economic dependency.

7. Self-employed and helping spouses

I am not aware of any measures adopted to implement this Directive though self-employed women may be entitled to maternity benefit from the state. In addition (see the discussion of *Mirror Group Newspaper v Gunning* at 2 above), those ‘self-employed’ women who provide work under contracts ‘personally to execute any work or labour’ will be protected by the SDA and its Northern Irish equivalent. Relevant questions will include whether the ‘self-employed’ woman in fact provides work under a contract (however short-term) under which she is responsible for the personal execution of the work which the contract covers.

8. Goods and services

The SDA prohibits discrimination across the substantive scope of cover under Directive 2004/113/EC, and has done so for the most part since 1975. Some amendments have been made to give effect to the Directive, in particular, as regards harassment, and discrimination in relation to goods and services on grounds of pregnancy and gender reassignment. The SDA goes beyond the Directive in applying to some extent to education (though it permits single-sex schools) and the content of media and advertisements.

9. Enforcement and compliance

All employment-related cases are heard by employment tribunals at which costs are not generally recoverable (by contrast with the normal position that costs are awarded to the successful party). Cases relating to goods and services are heard by county courts where judges have little expertise in discrimination claims. Such claims are very rare.

The SDA prohibits **victimisation** in connection with claims brought under that Act or the EqPA (s.4), and applies to victimisation, as to other types of discrimination, which occurs after the end of an employment or other relationship covered by the SDA and ‘arises out of or is closely connected to the relevant relationship’ (s.21A). The **burden of proof** in relation to victimisation is subject to the normal rules on reversal.¹⁴¹ The case law is complex but, for the most part, a ‘but for’ approach is adopted which is similar to that described above in relation to **direct discrimination**.

The rules on the burden of proof are modelled on those in the Directive, the burden passing where the claimant establishes facts from which an inference of discrimination might be drawn. The courts are struggling with what exactly is required in order to shift the burden but this is significantly a question of fact rather than law.

The SDA provides for declarations, recommendations ‘that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates’, and (unlimited) **compensation** in relation to employment-related discrimination (s.65), the main shortcoming being that recommendations apply only in respect of ‘*the adverse effect on the complainant*’

¹⁴¹ S,63A SDA reverses the burden in cases of ‘discrimination’, Section 4 defining victimisation as discrimination. Cf (under the Race Relations Act 1976) *Oyarce v Cheshire County Council* [2008] ICR 1179.

(emphasis added). Compensation can be significant. Outside the employment context declarations, damages and injunctive relief are available but the legislation provides (s.66(3)) that no damages will be payable in respect of indirect discrimination ‘if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on the ground of his sex’. With the possible exception of this provision remedial provisions are open to criticism mainly on the ground that they apply to so few cases in practice: the individual complaints-based model adopted by domestic law means that most sex discrimination goes unchecked.

As to whether **access to the courts** is safeguarded for victims of discrimination, victimisation, although unlawful, is commonplace in employment-related cases and potential claimants fear destroying their careers by taking action. The Equality and Human Rights Commission can support claimants, as can trade unions and other voluntary bodies. But cases cannot be taken ‘on behalf of’ claimants, much less on behalf of anonymous claimants. The Commission does have powers of ‘formal investigation’ which could uncover widespread discrimination in particular sectors etc. but the exercise of these powers by the Commission’s predecessor bodies was constrained by the courts in a number of cases and formal investigations are in practice very difficult to carry out as a result. It is possible for interest groups to challenge sex discrimination by way of judicial review if they can show a sufficient interest in the case but the overall answer would have to be that the very individual operation of the law in practice is insufficient to protect from sex discrimination.

The **Equality and Human Rights Commission**, which came into being in 2007 as a single body in place of the various equality commissions, seeks to implement the requirements of EU law. **Trade unions** do not have any formal legal role in the implementation of gender equality law, though in practice they are responsible for supporting many of the cases which reach the courts (particularly in the area of equal pay). In the UK **collective agreements** are not used as means to implement EU gender equality law as they are non-binding and increasingly reached only at the level of the enterprise.

10. Brief assessment

The main difficulties with the existing domestic law relate to complexity and the individual model of enforcement, as well as to the very narrow comparator-driven approach to equal pay claims.

Annex I: Directives

- 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 L 45, 19.2.1975, p. 19–20*.
- 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, 5.10.2002, p. 15–20*.
- 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, 10.1.1979, p. 24–25*.
- Council Directive 96/97/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 L 46, 17.2.1997, p. 20–24*.
- Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood *OJ L 359, 19.12.1986, p. 56–58*.
- 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, 28.11.1992, p. 1–8*.
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC *OJ L 145, 19.6.1996, p. 4–9*.
- 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, 21.12.2004, p. 37–43*.
- 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, 26.7.2006, p. 23–36*.

Annex II: Selected Bibliography

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Links

See also for information on Gender Equality the website of the European Commission: <http://ec.europa.eu/social/main.jsp?catId=418&langId=en>

See also for further information on anti-discrimination legislation and policies the website of the European Commission:

<http://ec.europa.eu/social/main.jsp?catId=423&langId=en>

See for other EU documents the database Eurlex, available at:

<http://eur-lex.europa.eu/en/index.htm>

Annex III: Most Important Implementing Legislation

AUSTRIA

Official Journals, court decisions, initiatives for legislation and other parliamentary materials are available in German on the Internet at: <http://www.ris.bka.gv.at>. The author cannot not give a more detailed link to the relevant acts, because reference can only be made to single paragraphs of each act, but not to the whole piece of legislation in its updated version.

- Federal Constitution 1920
- Act on the Federal Budget
- Equal Treatment Act, OJ I 66/2004
- Federal Equal Treatment Act, OJ I 65/2004
- Maternity Protection Act
- Fathers' Leave Act
- Child Care Allowance Act
- Act on Private Pensions
- Act on Business Pensions
- Act on Pensions 1965
- General Pensions Act
- General Social Insurance Act
- Unemployment Insurance Act
- Act on Social Security for Persons Engaged in Trade and Commerce
- Act on Social Security for Farmers
- Act on Social Security for Self-employed Persons
- Act on Social Security for Notaries
- Act on the Social Insurance Fund for Artists
- Act on the Regulation of Businesses of 1994
- Civil Code
- Business Support Act
- Act on Insurance Contracts 1958
- Insurance Monitoring Act
- Labour Court Act
- Act on the Constitution of Work

BELGIUM

- Constitution of Belgium, consolidated on February 17th 1994
- Act of 10 May 2007 aimed at combating discrimination between women and men (colloquially, the 'Gender Act')
- Well-Being at Work Act of 4 August 1996
- Working Conditions Act of 16 March 1971
- Healthcare and Sickness Insurance Act (consolidated) of 14 July 1994 (including maternity benefits)
- Occupational Pension Schemes (Employees) Act of 28 April 2003
- Royal Decree No. 38 of 27 July 1967 concerning the social security scheme for the self-employed
- *Décrets* (legislative acts) of the federate authorities: 8 May 2002 (Flemish Community), 17 May 2004 (German-speaking Community), 19 May 2004 (French-speaking Community), 27 May 2004 (Walloon Region).

All those instruments are accessible at <http://www.juridat.be>, in French and Dutch. Mentioning the publication references would be pointless as they would not lead to updated versions if the original texts have been subsequently amended.

- Collective Agreement No. 25 of the National Labour Council of 15 October 1975, concerning equal pay for male and female employees, made generally binding by the Royal Decree of 9 December 1975 and amended by Collective Agreement No. 25ter of 9 July 2008: accessible at <http://www.cnt-nar.be>

BULGARIA

- Law on Protection from Discrimination – entered into force on 01.01.2004/SG 86/30 Sept. 2003/, last amended by SG 100/ 30 Nov. 2007, <http://lex.bg/laws/ldoc.php?IDNA=2135472223>, English version on the web page of the Commission for PDF, http://www.kzd-nondiscrimination.com/index.php?option=com_content&task=view&id=15&Itemid=30
- Social Security Code – entered into force on 01.01.2000/SG 110/17 Dec. 1999, last amended by SG 33/28 March 2008, <http://lex.bg/laws/ldoc.php?IDNA=1597824512>
- Labour Code – entered into force on 01.01.1987/ SG 26/ 1 April 1986, last amended by SG 104/11 Dec. 2007, <http://lex.bg/laws/ldoc.php?IDNA=1594373121>

CYPRUS

- Constitution of Republic of Cyprus 1960 as amended by laws Nos. 95/89, Official Gazette 2419 of 17 June 1989, 106(I)/1996, Official Gazette 3102 of 29 November 1996, 115(I)/1996, Official Gazette 3110 of 28 December 1996, 104(I)/2002, Official Gazette 3620 of 05 July 2002, 127(I)/2006, Official Gazette 4090 of 28 July 2006
- The Equal Treatment for Men and Women as regards Access to Employment and Vocational Training Law No. 205(I)/2002, Official Gazette 3658 of 6 December 2002, No. 176(I)/2007, last amendment Law No. 39(I)/2009.
- The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed Law No. 177(I)/2002, Official Gazette 3638 of 27 September 2002, Law No. 193(I)/2004, last amendment Law No. 38(I)/2009.
- The Maternity Protection Law No. 100(I)/1997, Official Gazette 3207 of December 1997.
- The Maternity Protection (Amendment) Law No. 64(I)/2002, which entered into force on 31 May 2002, Official Gazette 3608 of 31 May 2002, last amendment Laws Nos. 8(I)/2008 Official Gazette 4189 of 18 April 2008 and 43(I)/2008 Official Gazette 4170 of 04 July 2008.
- The Parental Leave and Time Off Work on Grounds of Force Majeure Law of 2002 – Law No. 69(I)/2002, which entered into force on 1 January 2003, Official Gazette 3610 of 7 June 2002.
- The Social Insurance (Amendment) (No. 2) Law No. 51(I)/2001, Official Gazette 3487 of 6 April 2001 last amendment Law No. 22(I)/2009, Official Gazette 4198 of 20 March 2009.
- The Equal Treatment for Men and Women in Occupational Social Insurance Schemes Law No. 133(I)/2002, which entered into force on 1 January 2003, Official Gazette 3623 of 19 July 2002, last amendment Law No. 40(I)/2009.
- The Provident Funds (Amendment) Law of 2002 – Law No. 130(I)/2002, which entered into force on 1 January 2003, Official Gazette 3623 of 19 July 2002 last amendment 75(I)/2005 Official Gazette 4010 of 08 July 2005.
- The Establishment registration, operation and supervision of the occupational retirement benefits fund Law No. 146(I)/2006 Official Gazette 4097 of 17 November 2006.

- The implementation of the principle of equal treatment of men and women as regards access to and supply of goods and services Law No. 18(I)/2008, Official Gazette 4162 of 2 May 2008.

CZECH REPUBLIC

All these texts can be consulted at the official web site of the Czech Collection of Laws, <http://aplikace.mvcr.cz/archiv2008/sbirka/index.html>

- Proposal for an Act on equal treatment and legal instruments of protection against discrimination.
- Act No. 262/2006 Coll., labour code.
- Act No. 435/2004 Coll., on employment.
- Act No. 187/2006 Coll., on sickness insurance (it will enter into force as from 1 January 2009).
- Act No. 155/1995 Coll., on pension insurance.
- Act No. 42/1994 Coll., on state-contributory supplementary pension.
- Act No. 266/2006 Coll. on employees' accident insurance (it will enter into force as from 1 January 2010)

DENMARK

All Danish legislation is published electronically in Danish by the Danish State in the Retsinformation, www.retsinfo.dk where it is available free of charge (tax-financed). The Danish Official Journal (Lovtidende) is no longer published on paper but only electronically. It contains links to the Retsinformation.

- Equal Pay Act, Consolidation Act No. 899 of 5.9.2008
- Equal Treatment Act, Consolidation Act No. 734 of 28.6.2006
- Equality Act, Consolidation Act No. 1095 of 19.9.2007
- Maternity, Paternity and Parental Leave and Benefit Act, Act No. 566 of 9.6.2006
- Act on reimbursement of pregnancy, etc payments in the private sector, Act No. 417 of 8.5.2006
- Act on equal treatment of men and women in occupational social security schemes, – Consolidation Act No. 775 of 29.8.2001

ESTONIA

All legal acts that follow are available in the electronic database of legislative acts at the website www.riigiteataja.ee; this is the official source of the publication of legislation in Estonia.

- Gender Equality Act (GEA), adopted in 2004
- Labour Contract Act (LCA), 1992, with subsequent amendments
- Wages Act, 1994, with subsequent amendments
- Holidays Act, 2001, with subsequent amendments
- Parental Benefit Act, 2003, with subsequent amendments
- Health Insurance Act, 2000 (RT I 2002, 62, 377), with subsequent amendments
- Occupational Health and Safety Act, 1999, with subsequent amendments
- Unemployment Insurance Act, 2001, with subsequent amendments
- State Pension Insurance Act, 2001, with subsequent amendments
- Earned Years Pensions Act, 1992, with subsequent amendments
- Favourable Conditions Pensions Act, 1992, with subsequent amendments
- Insurance Activities Act, 2004, with subsequent amendments
- Chancellor of Justice Act, 1999, with subsequent amendments

- Government Regulation No. 45 approving the Statute of the Gender Equality Commissioner, 2005
- Government Regulation No. 34 approving the Statute of the Gender Equality Council, 2005
- Government Regulation No. 50 on Occupational Health and Safety Requirements for Work of Pregnant and Breastfeeding Women, 2001

FINLAND

*The updated legislation is available in electronic form at: <http://www.finlex.fi/fi/laki/ajantasa/>
Some but not all acts are available in an English translation at: <http://www.finlex.fi/fi/laki/kaannokset/>*

- *Laki naisten ja miesten välisestä tasa-arvosta* 8.8.1986/609 (Act on Equality between Women and Men), with amendments in 1992, 1995, 1997, 2001, 2005
- *Laki tasa-arvovaltuutetusta ja tasa-arvolautakunnasta* 8.8.1986/610 (Act on the Equality Ombudsman and Equality Board), with amendments in 1995, 1999, 2000
- *Työsopimuslaki* 26.1.2001/55 (Act on Employment Contracts), Chapter 4 on family-based leave
- *Sairausvakuutuslaki* 21.12.2004/1224, Chapter 9 on family leave-related benefits
- *Valtion eläkelaki* 22.12.2006/1295 (State Pensions Act)
- *Kunnallinen eläkelaki* 13.6.2003/549 (Municipal Pensions Act)
- *Kansanedustajain eläkelaki* 14.7.1967/329 (Act on Pensions of Members of Parliament)
- *Kansanedustajain perhe-eläkelaki* 9.2.1990/107 (Act on Members of Parliament's Family Pensions)
- *Maatalousyrittäjän eläkelaki* 22.12.2006/1280 (Act on Agricultural Entrepreneurs' Pension)
- *Maatalousyrittäjien lomituspalvelulaki* 20.12.1996/1231 (Act on Agricultural Entrepreneurs' temporary replacements)
- *Vakuutusyhtiölaki* 28.12.1979/1062 (Act on Insurance Companies), Chapter 18, Sections 6d-6f, amended 5.10.2007/870

FRANCE

All of these texts can be consulted at the legifrance website: <http://www.legifrance.gouv.fr/>

- Act No. 2008-496, 27 May 2008, implementing the various directives on discrimination, JO No. 123, 28 May, p. 8801
- Act No. 2007-1774 du 17 December 2007 implementing various European provisions in economic and financial fields, JO No. 293, 18 December 2007 p. 20354
- Act No. 2006-340 of 23 March 2006 on Equal Pay between Men and Women, JO No. 71, 24 March 2006 p.4440
- Act No. 2004-1486 of 30 December 2004 creating the High Authority Against Discrimination and for Equality, JO No. 304, 31 December 2004, p. 22567
- Act No. 2003-775 of 21 August 2003 reforming pensions, JO No. 193, 22 August 2003, p. 14310
- Act No. 2001-1066 of 16 November 2001, concerning the fight against discrimination, JO No. 267, 17 November 2001, p. 18311
- Act No. 2001-397 of 9 May 2001, on Equality between men and women, JO No. 108, 10 May 2001, p.7320
- Act No. 83-635 of 13 July 1983, 'Roudy' Act, JO 14 July 1983, p.2176
- Also see the Labour Code: Article L.1131-1 to Article L.1134-4 on discrimination, Article L.1141-1 to Article L.1144-3 on equality between men and women, Article L.1151-1 to Article L.1155-4 on harassment, Article L.1225-1 to L.1225-72 on

pregnancy, maternity protection and on maternity, parental and paternity leave, Article L.3221-1 to L.3222-2 on equal pay between women and men.

GERMANY

BGBI. refers to the Bundesgesetzblatt = Official Journal of the Federal Republic; its part I contains the laws enacted on the federal level.

- *Allgemeines Gleichbehandlungsgesetz* (AGG, General Act on Equal Treatment), of 14 August 2006, BGBI. 2006 I, 1897, last amended on 5 February 2009, BGBI. 2009 I, 160, <http://www.gesetze-im-internet.de/bundesrecht/agg/gesamt.pdf>, last visited 19 April 2009
- *Betriebsrentengesetz* (BetrAVG, Law on Occupational Pension Schemes), of 19 December 1974, BGBI. 1974 I, 3610, last amended on 21 December 2008, BGBI. 2008 I, 2940, <http://www.gesetze-im-internet.de/bundesrecht/betravg/gesamt.pdf>, last visited 19 April 2009.
- *Bundesbeamtengesetz* (BBG, Federal Law on Civil Servants), of 5 February 2009, BGBI. 2009 I, 160, , http://www.gesetze-im-internet.de/bundesrecht/bbg_2009/gesamt.pdf, last visited 19 April 2009
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- Constitution, Articles 4(2) gender equality; 21(1) (protection of the family, marriage, maternity and childhood; 22(1)(b) equal pay; 116(2) positive measures, Greek Parliament's website, translation in English: <http://www.parliament.gr/english/politeuma/syntagma.pdf>
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- Act CXXV of 2003 on equal treatment and equal opportunity referring to all relevant directives, <http://www.egyenlobanasmod.hu/data/SZMM094B.pdf>
- Act XXII of 1992 on the Labour Code, <http://huachen.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex4.pdf>
- For a collection of equality provisions see: <http://www.ilo.org/public/english/employment/gems/eo/law/hungary/lc.htm>
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- Act LXXXII of 1997 on private pensions and private pension funds (without reference), <http://siteresources.worldbank.org/INTPENSIONS/Resources/395443-1122047906143/PenLegHungary1997.pdf>
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- Act CXXXVII of 2007 on the ‘amendment of certain laws on financial services with a view to their harmonization with EU law’ amending among others Act CXVII of 2007 on the employer’s pension and its institutions, Act XCVI of 1993 on Voluntary Mutual Insurance Funds and Act LX of 2003 on insurers and insurance activity – each

- implementing the sex-specific calculations from Directive 2004/113/EC
<http://www.complex.hu/kzldat/t0700137.htm/t0700137.htm> (in Hungarian)
- Act IV of 1991 on employment and assisting the unemployed (without reference), http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100004.TV (in Hungarian)
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<http://eng.forsaetisraduneyti.is/acts-of-law/>

- Constitution of the Republic of Iceland, No. 33/1944
- Administrative Procedure Act No. 37/1993, <http://eng.felagsmalaraduneyti.is/legislation/>
- Gender Equality Act No. 10/2008
- Act on Maternity and Paternity Leave and Parental Leave No. 45/2000
- Act on Working Environment, Health and Safety in Workplaces, No. 46/1980 with subsequent amendments
- The Working Terms and Pension Rights Insurance Act, No. 55/1980
- Family Responsibilities Act No. 27/2000
- Act on Social Security, No. 100/2007
- Regulation No. 931/2000 on measures to enhance safety and health in the workplace for pregnant women, women who have just given birth or are breastfeeding, <http://www.ministryoffinance.is/legislation/>
- The Act on Mandatory Insurance for Pension Rights and on Activities of Pension Funds No. 129/1997, <http://www.vinnueftirlit.is/vinnueftirlit/is/english/legislation/>
- Regulation No. 1000/2004 on measures against harassment (bullying)

IRELAND

All Acts from 1922-2008 (with links to Acts for 2009) and statutory instruments (from 1922 – 2007 with links for 2007, 2008 and 2009) are available at <http://www.irishstatutebook.ie/home.html>. Accessed 17 April 2009.

- Employment Equality Act 1998 which came into operation on 18 October 1998, thereby repealing the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977.
- Equal Status Act 2000 which came into operation on 25 October 2000 and amended the 1998 Act and as amended by the Equality Act 2004 and the Intoxicating Liquor Act 2003 (claims in respect of licensed premises only) and the Civil Law (Miscellaneous Provisions) Act 2008 (see below).
- Equality Act 2004 which came into operation on 18 July 2004 and amended both the 1998 Act and also the Act of 2000 (the Employment Equality Acts 1998 to 2008 and the Equal Status Acts 2000 to 2008).
- Maternity Protection of Employees Act 1994 which came into operation on 30 January 2005 and was amended by the Maternity Protection of Employees (Amendment) Act

- 2004 which came into operation on 18 October 2004 (the Maternity Protection Acts 1994 and 2004) and as amended by the Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006 (SI No. 51 of 2006)
- Adoptive Leave Act 1995 which came into operation on 20 March 1995 and was amended by the Adoptive Leave Act 2005 (the Adoptive Leave Acts 1995 and 2005) and as amended by the Adoptive Leave Act 1995 (Extension of Periods of Leave) Order 2006 (SI No. 52 of 2006)
 - Parental Leave Act 1998 which came into operation on 3 December 1998 and was amended by the Parental Leave (Amendment) Act 2006 which came into operation on 18 May 2006 (Parental Leave Acts 1998 and 2006)
 - Social Welfare (Consolidation) Act 2005 as amended.
 - The Pensions Act 1990 – the equal treatment provisions came into effect on 1 January 1993 – was replaced by the Social Welfare (Miscellaneous Provisions) Act 2004
 - Civil Law (Miscellaneous Provisions) Act 2008 (relevant sections) which came into operation on 20 July 2008 amends the Employment Equality Acts 1998 to 2008 and the Equal Status Acts 2000 to 2008 (see above)

ITALY

- Act No. 101/2008, Implementation in an Act with modifications of Decree No. 59/2008 on the implementation of EU obligations and Court of Justice decisions, published in OJ No. 132 of 7 June 2008, <http://www.parlamento.it/leggi/elelenum.htm>, last visited 15 June 2008
- Decree No. 196/2007, on the implementation of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, published in OJ No. 261 of 9 November 2007, <http://www.parlamento.it/leggi/elelenum.htm>, last visited 15 June 2008
- Decree No. 116/2007, Regulations of the Commission for Equal Opportunities between Men and Women, following Article 29 of Decree No. 223/2006, as converted by Act No. 248/2006, published in OJ No. 177 of 1 August 2007, <http://gazzette.comune.jesi.an.it/2007/177/index.htm>, last visited 15 June 2008
- Decree No. 198/2006, Code of Equal Opportunities between Men and Women under Article 6 of Decree No. 246/2006, published in OJ No. 125 of 31 May 2006, <http://www.parlamento.it/leggi/deleghe/06198dl.htm>, last visited 15 June 2008
- Decree No. 145/2005, implementing EU Directive 2002/73/EC 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, published in OJ No. 173 of 27 July 2005, <http://www.gazzettaufficiale.it/guri/attocompleto?dataGazzetta=2005-07-27&redazione=005G0169&service=0&ConNote=2>, last visited 15 June 2008
- Article 57 of Decree No. 165/2001 on the working relationship in the public sector, published in OJ No. 106 (S.O. No. 112) of 9 May 2001, <http://www.parlamento.it/leggi>, last visited 15 June 2008
- Decree No. 151/2001 on Sustaining Motherhood and Fatherhood, published in OJ No. 96 of 26 April 2001, <http://www.parlamento.it/leggi/deleghe/06198dl.htm>, last visited 15 June 2008
- Act No. 53/2000, on Sustaining Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordinating Hours of the Public Services of Towns, published in OJ No. 60 of 13 March 2000, <http://www.parlamento.it/leggi/deleghe/06198dl.htm>, last visited 15 June 2008
- Decree No. 645/1996, implementing EU Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, published in

OJ No. 299 of 21 December 1996, <http://www.parlamento.it/leggi/deleghe/dlattcee.htm#1996>, last visited 15 June 2008

LATVIA

Acts available in Latvian at www.likumi.lv

- Labour Law – adopted in 2001, OG No. 105, 06.07.2001
- Law on the Civil Service – amendments OG No. 180, 09.11.2006
- Law on the Service of Officers of the Ministry of the Interior Affairs and the Prison System – adopted in 2006, OG No. 101, 30.06.2006
- Law on Social Security – amendments OG No. 205, 22.12.2005
- Law on the State Social Insurance – amendments OG No. 416/419, 15.12.1999.
- Law on Maternity and Sickness Insurance – adopted in 1995, OG No. 182, 23.11.1995
- Law on State Pensions – amendments OG No. 386/387 23.11.1999
- Law on Associations and Foundations – amendments 2006, OG No. 180, 09.11.2006
- Law on Private Pension Funds – adopted in 1997, OG No. 150/151, 20.06.1997
- Administrative Violations Code – amendments OG No. 91, 07.06.2007
- Criminal Law – amendments OG No. 107, 05.07.2007
- Ombudsman Law – adopted in 2006, OG No. 65, 25.04.2006

LIECHTENSTEIN

The following legislation can also be found on the Internet

<http://www.gesetze.li/Seite1.jsp?clearsvs=true&clearlrs=true>

- Act on Gender Equality Law (*Gleichstellungsgesetz, GLG*), LGBl. 1999 No. 96 as amended by LGBl. 2006 No. 152
- Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), LGBl. 1967 No. 34, see the currently relevant version
- Labour Code (*Arbeitsgesetz*), LGBl. 1967 No. 6
- Sickness Insurance Act (*Krankenversicherungsgesetz, KVG*), LGBl. 1993 No. 95.
- Occupational Schemes Act (*Gesetz über die betriebliche Personalvorsorge, BPVG*), LGBl. 2007 No. 13
- Invalidity Insurance Act (*Invalidenversicherung, IVG*), LGBl. 2006 No. 244
- Old-age Insurance Act (*Alters- und Hinterlassenenversicherung, AHVG*), LGBl. 2006 No. 24.
- Accident Insurance Act (*Unfallversicherung, UVersG*), LGBl. 2006 No. 89
- Unemployment Insurance Act (*Arbeitslosenversicherung, ALVG*), LGBl. 2006 No. 155
- Marriage Act (*Ehegesetz*), LGBl. 1993 No. 53

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- The Labour Code of 4 June 2002. State Gazette, 2002, No. 64-2569, http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=287667
- Equal Opportunities Act of Women and Men of 1 December 1999. State Gazette, 1998, No. 112-3100, http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=324376&p_query=&p_tr2

LUXEMBOURG

To consult the legislation: www.legilux.lu, sub Mémorial A

- Règlement grand-ducal du 10 juillet 1974 relatif à l'égalité de rémunération entre les hommes et les femmes ([Mém. A - 56 du 22 juillet 1974](#), p. 1275).
- Loi du 15 décembre 1986 relative à la mise en oeuvre progressive du principe de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale et portant modification de certaines dispositions légales en matière de législation sociale ([Mém. A - 101 du 22 décembre 1986](#), p. 2343)
- Loi du 7 juillet 1998 portant modification a) de la loi du 3 juillet 1975 concernant 1. la protection de la maternité de la femme au travail; 2. la modification de l'article 13 du code des assurances sociales modifié par la loi du 2 mai 1974, B) de l'article 25 du code des assurances sociales ([Mém. A - 61 du 11 août 1998](#), p. 1066)
- Loi du 8 juin 1999 relative aux régimes complémentaires de pension et portant modification a) de la loi modifiée du 4 décembre 1967 concernant l'impôt sur le revenu, b) de la loi du 24 mai 1989 sur le contrat de travail, c) de la loi modifiée du 18 mai 1979 portant réforme des délégations du personnel et d) de la loi du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes ([Mém. A – 74 du 17 juin 1999](#))
- Règlement grand-ducal du 25 octobre 1999 fixant la composition et le fonctionnement du Comité des Actions Positives ([Mém. A -140 du 25 novembre 1999](#), p. 2561)
- Règlement grand-ducal du 26 octobre 1999 relatif aux modalités de mise en oeuvre des critères d'éligibilité des projets d'actions positives dans les entreprises du secteur privé ([Mém. A - 140 du 25 novembre 1999](#), p. 2561).
- Loi du 31 juillet 2006 portant introduction d'un Code du Travail ([Mém. A - 149 du 29 août 2006](#))
- Loi du 21 décembre 2007 portant 1. transposition de la directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en oeuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services; 2. modification du Code pénal; 3. modification de la loi modifiée du 27 juillet 1997 sur le contrat d'assurance ([Mém. A – 232 du 21 décembre 2007](#))
- Loi du 13 mai 2008 portant 1. transposition de la directive 76/207/CEE du Conseil (...) telle que modifiée par la directive 2002/73/CE du Parlement Européen et du Conseil du 23 septembre 2002; 2. modification du Code du travail; 3. modification de (...) du congé d'accueil; 4. modification de la loi (...) fixant le statut général des fonctionnaires de l'Etat; 5. modifiant la loi (...) fixant le statut général des fonctionnaires communaux; 6. modifiant la loi du 28 novembre 2006 portant (...) ([Mém. A – 70 du 26 mai 2008](#))

MALTA

Laws (Acts of Parliament) are accessible via: <http://www2.justice.gov.mt/lom/home.asp>

Legal Notices are accessible via: www.doi.gov.mt/EN/legalnotices/

- Employment and Industrial Relations Act 2002 (Chapter 452 of the Laws of Malta) as amended
- Equality for Men and Women Act 2003 (Chapter 456 of the Laws of Malta) as amended
- Social Security Act 1987 (Chapter 318 of the Laws of Malta)
- Equal Treatment in Employment Regulations 2004, Legal Notice 461 of 2004 (as amended by the Equal Treatment in Employment (Amendment) (No. 2) Regulations of 2007, Legal Notice 338 of 2007)
- Equal Treatment in Occupational Social Security Schemes Regulations 2005, Legal Notice 317 of 2005

THE NETHERLANDS

- Article 1 of the Dutch Constitution (*'Grondwet'*, enacted 1815, the current Article 1 dates from the revision of 1983, Stb. (*'Staatsblad'*) 1983, 70, as most recently amended: Stb. 2005, 52) enshrines a constitutional equality and non-discrimination guarantee
- The General Equal Treatment Act (*Algemene Wet Gelijke Behandeling, 'GETA'*, enacted 1994, Stb. 1994, 230) prohibits, among other things, sex discrimination in employment and in the supply of goods and services
- The Equal Treatment Act for Men and Women in Employment (*Wet gelijke behandeling van mannen en vrouwen bij de arbeid, 'ETA'*, enacted 1980, Stb. 1980, 86) as a *lex specialis* to the GETA, regulates, among other things, the topic of equal pay
- The Dutch Civil Code (*Burgerlijk Wetboek, 'BW'*, enacted 1992) contains specific articles prohibiting sex discrimination in labour contracts (Articles 7:646-7:647 Stb. 1980, 86)

NORWAY

All acts and regulations are available at: <http://www.lovdata.no/>

- The Gender Equality Act (GEA) of 9 June 1978 No. 45, see <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-relating-to-Gender-Equality-the-.html?id=454568>
- Act on the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal (The Anti-Discrimination Ombud Act) of 10 June 2005 No. 40, see <http://www.regjeringen.no/en/doc/Laws/Acts/The-Act-on-the-Equality-and-Anti-Discrim.html?id=451952>
- Act relating to working environment, working hours and employment protection, etc. (Working Environment Act) (WEA) of 17 June 2005 No. 62, see <http://www.arbeidstilsynet.no/binfil/download.php?tid=42156>
- Act on National Insurance (NIA), Act of 28 February 1997 No. 19
- Regulations regarding the organisation and activities of the Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal, of 16 December 2005 No. 1524, see <http://www.regjeringen.no/en/dep/bld/Documents/Laws-and-rules/Regulations/2006/Regulations-regarding-the-organisation-a-2.html?id=92611>

POLAND

All the mentioned acts are available (in Polish) online at: <http://www.sejm.gov.pl/prawo/prawo.html>

- Constitution of the Republic of Poland of 2 April 1997 (published in: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Journal of Laws of the Republic of Poland; hereinafter: JoL) 1997 No. 78 item 48, with amendments
- Labour Code Act of 26 June 1974, Unified text: JoL 1998 No. 21 item 92 with amendments. The amendments to the Labour Code enacted in order to implement the equality directives were mainly included in the following regulations:
 - Act of 24 August 2001, JoL 2001 No. 128 item 1405
 - Act of 21 December JoL of 2001 No. 154 item 1805
 - Act of 14 November 2003 JoL. No. 213 item 2081
 - Act of 18 October 2006 JoL 2006 No. 217 item 1587
 - Act of 21 November 2008 JoL 2008 No. 223, item 1460
 - Act of 6 December 2008 JoL 2008 No. 234 item 1654
- Law of 1 June 2004 on the Promotion of Employment and Institutions of the Labour Market, JoL 2004 No. 99 item 1001 with amendments
- Law of 13 October 1998 on the Social Insurance System, JoL 1998 No. 137 item 887 with amendments

- Law of 17 December 1998 on Pensions from the Social Insurance Fund, consolidated text: JoL 2004 No. 39 item 353 with amendments
- Act of 20 December 1990 on Social Security for Farmers, consolidated text in JoL 1998 No. 7 item 25 with amendments
- Law on Occupational Pension Schemes of 20 April 2004 JoL 2004, No. 116 item 1207 with amendments

PORTUGAL

All legislation can be consulted at www.dre.pt

- Portuguese Constitution, from 1976
- Labour Code (LC), approved by Law No. 7/2009, from 12 February 2009
- Law regarding employment in public services - Law No. 59/2008, from 11 September 2008
- Social Security General Law – Law No. 4/2007, from 16 January 2007
- Decree Law No. 329/93, from 25 September 1993, with the changes introduced by Decree Law No. 35/2005, from 19 February 2005 – Old-age and invalidity pensions for dependant workers
- Decree Law No. 328/93, from 25 September 1993, as amended by Decree Law No. 119/2005 – Old-age and invalidity pensions for independent workers
- Decree Law No. 28/2004, from 4 February 2004, as amended by Decree Law No. 146/2005, from 26 August 2005 – Sickness allowance
- Law No. 100/97, from 13 September 1997 – Accidents at work and occupational diseases (complementary to the Labour Code)
- Decree Law No. 89/2009, from 9 April 2009 – Family allowances, related to maternity, paternity and adoption (complementary to the Legislation concerning public servants with a labour contract)
- Decree Law No. 91/2009, from 9 April 2009 – Family allowances, related to maternity, paternity and adoption (complementary to the Labour Code)
- Decree Law No. 220/2006, from 3/11/2006 – Unemployment
- Law No. 14/2008, from 12 March 2008 - Gender equality in access to goods and services

ROMANIA

- Law No. 202 of 2002 reissued on the basis of Article V of Government Ordinance No. 84 of 2004 for the amendment and completion of Law No. 202 of 2002 on equal opportunities between women and men, published in the Official Gazette of Romania, Part I No. 799 of 30 August 2004 and approved, with subsequent amendments, by Law No. 501 of 2004, published in the Official Gazette of Romania, Part I No. 1.092 of 24 November 2004, renumbering the text
- Act No. 44 of 19 March 2008 for approving Emergency Ordinance No. 67 of 27 June 2007 referring to the application of the principle of equal treatment for men and women in occupational social security schemes, published in the Official Gazette No. 227 of 25 March 2008
- Law No. 53 of 24 January 2003, Labour Code, published in the Official Gazette No. 72 of 5 February 2003
- 2007-2010 National Collective Contract No. 2895 of 2006 published in the Official Gazette Part V No. 5 of 29 January 2007

SLOVAKIA

All these acts are available on the website www.zbierka.sk

- Act No. 365/2004 Coll. of Laws on equal treatment and protection from discrimination in some areas, changing and amending other laws (Anti-discrimination Act) as amended by Constitutional Court decision No. 539/2005 Coll. of Laws, Act No. 326/2007 Coll. of Laws, Act No. 85/2008 Coll. of Laws, Act No. 245/2008 Coll. of Laws and Act No. 384/2008 Coll. of Laws (*Antidiskriminačný zákon*)
- Act No. 311/2001 Coll. on the Labour Code (*Zákonník práce*)
- Act No. 5/2004 Coll. on employment services (*Zákon o službách zamestnanosti*).
- Act No. 552/2003 Coll. on Works Performed in the Public Interest (*Zákon o výkone práce vo verejnom záujme*)
- Act No. 553/2003 Coll. on Rewarding Some Employees when Performing Work in the Public Interest (*Zákon o odmeňovaní niektorých zamestnancov pri výkone práce vo verejnom záujme*)
- Act No. 312/ 2001, on State Service (*Zákon o štátnej službe*)
- Act No. 650/2004 Coll. on Supplementary Pension Insurance (*Zákon o doplnkovom dôchodkovom sporení*)
- Act No. 461/2003 Coll. on Social Insurance (*Zákon o sociálnom poistení*)
- Act No. 250/2007 Coll. on Consumer Protection (*Zákon o ochrane spotrebiteľa*)
- Act No. 8/2008 Coll. on Insurance (*Zákon o poisťovníctve*)

SLOVENIA

- Employment Relationship Act (*Zakon o delovnih razmerjih*), Official Gazette RS, No. 42, 15 May 2002, p. 4075, and No. 103, 13 November 2007, p.13905, http://www.mdds.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/zakon_o_delovnih_razmerjih/
- Act Implementing the Principle of Equal Treatment (*Zakon o uresničevanju načela enakega obravnavanja*), Official Gazette RS, No. 93, 12 October 2007, p. 12471, <http://www.uradni-list.si/1/objava.jsp?urlid=200793&stevilka=4600>
- Act on Equal Opportunities for Women and Men (*Zakon o enakih možnostih žensk in moških*), Official Gazette RS, No. 59, 5 July 2002, p. 6104, <http://www.uradni-list.si/1/objava.jsp?urlid=200259&stevilka=2837>
- Parental Care and Family Benefits Act (*Zakon o starševskem varstvu in družinskih prejemkih*), Official Gazette RS, No. 110, 26 October 2006, p. 11412, <http://www.uradni-list.si/1/content?id=76045>
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- Public Servants Act (*Zakon o javnih uslužbencih*), Official Gazette RS, No. 63, 13 July 2007, p. 8789, <http://www.uradni-list.si/1/content?id=81343>
- Criminal Code (*Kazenski zakonik*), Official Gazette No. 95, 27 August 2004, p. 11441, <http://www.uradni-list.si/1/content?id=51064>

SPAIN

All laws are published in the Spanish Official Gazette or Bulletin, Boletín Oficial del Estado (BOE), which can be consulted at the website <http://www.boe.es>

- *Constitución Española* (BOE 29 December 1978)
- *Ley 3/2007 para la igualdad efectiva de mujeres y hombres* (BOE 23 March 2007)
- *Real Decreto Legislativo 1/1995, por el que se aprueba la ley de Estatuto de los Trabajadores* (BOE 29 March 1995)

- *Ley 56/2003 de Empleo* (BOE 17 December 2003)
- *Texto Refundido de la Ley General de Seguridad Social* (BOE 29 June 1994)
- *Real Decreto 295/2009, de 6 de marzo, por el que se regulan las prestaciones económicas de la Seguridad Social por maternidad, paternidad, riesgo durante el embarazo y riesgo durante la lactancia natural* (BOE 21 Marzo 2009).
- *Ley 31/1995 de prevención de riesgos laborales* (BOE 10 November 1995)
- *Ley 7/2007 del Estatuto Básico del Empleado Público* (BOE 13 April 2007)
- *Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el Texto Refundido de la Ley de Procedimiento Laboral* (BOE 11 April 1995)
- *Real Decreto Legislativo 1/2002, de 29 de noviembre, por el que se aprueba el texto refundido de la Ley de Regulación de los Planes y Fondos de Pensiones* (BOE 13 December 2002)
- *Real Decreto 304/2004, de 20 de febrero, por el que se aprueba el Reglamento de planes y fondos de pensiones* (BOE 25 February 2004)
- *Real Decreto 1684/2007, de 14 de diciembre, por el que se modifican el Reglamento de planes y fondos de pensiones aprobado por el Real Decreto 304/2004, de 20 de febrero y el Reglamento sobre la instrumentación de los compromisos por pensiones de las empresas con los trabajadores y beneficiarios, aprobado por Real Decreto 1588/1999, de 15 de octubre* (BOE 15 December 2007)
- *Real Decreto 1361/2007, de 19 de octubre, por el que se modifica el reglamento de Ordenación y Supervisión de los Seguros Privados y de desarrollo de la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, en materia de factores actuariales* (BOE 23 October 2007)

SWEDEN

Swedish full-text versions of the indicated acts can be found (by the indicated number, 2008:567, etc.) at www.notisum.se. The homepage of the current Discrimination Ombudsman includes an English version of the 2008 Discrimination Act at www.do.se.

- The Discrimination Act – *Diskrimineringslagen* (2008:567)
- The Parental Leave Act – *Föräldraledighetslagen* (1995:584)
- The General Insurance Act – *Lagen* (1962:381) *om allmän försäkring*

UNITED KINGDOM

- The Sex Discrimination Act 1975 as amended.
- The Equal Pay Act 1970 as amended.
- The Pensions Act 1995 as amended.
- The Occupational Pension Schemes (Equal Treatment) Regulations 1995. There is no Government-issued consolidated version but the Act is widely available in commercially published statute books (e.g. the annually published Butterworths *Employment Law Handbook*), on westlaw and on lexis nexis (both commercial services, available at www.westlaw.co.uk and www.butterworths.co.uk respectively).



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