

Overview of Community Legislation on Equal Treatment for Men and Women

EC Treaty

- Articles 2, 3 and 13: purposes and activities of the European Union
- Article 137: health and safety at work
- Article 141: equal pay

Directives

- Recast directive 2006/54/EC, which repeals and replaces the directives on equal pay, equal treatment in employment, training, promotion and working conditions, social security schemes and burden of proof.
- Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
- Directive 86/613/EEC 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. There is currently a proposal to amend this directive.
- Directive 92/85/EC 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. There is currently a proposal to amend this directive.
- Directive 96/34/EC on the Framework Agreement on Parental Leave concluded by the social partners in 1996. The social partners concluded a new framework agreement on 18 June 2009.
- Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Equality between Women and Men:

The Recast Directive

Extract from Wuiame N, Markey L, Jacqmain J "L'égalité entre les femmes et les hommes, la loi du 10 mai 2007 au regard de la directive 'refonte'", *Chroniques de droit social*, 01/2008, 1

Introduction

Dating back to the Treaty of Rome, Europe has provided a major legal framework for equality between men and women, in particular through Article 119 (now Article 141 of the EC Treaty), which establishes the principle of equal pay ("*equal pay for equal work*"). Ever since then, there has been a proliferation of normative instruments designed to ensure equal rights and opportunities in the fields of employment, vocational training and social protection. Until recently, thirteen European directives made up the legal corpus governing gender equality: twelve in the field of employment and one with its focus elsewhere (equal treatment for women and men in access to and supply of goods and services)¹.

This abundance of protective sources, and the continual evolution of case-law at the European Court of Justice, eventually prompted the European legislative to consider recasting these directives as a single text. The purpose of drawing up an integrated equality directive is to "*simplify, modernise and improve the Community law in the area of equal treatment between men and women*" in employment and occupation.² The aim is to make available a single document that will be clearer and more practical for all citizens and to enhance the *acquis communautaire* by incorporating the case-law from the Court of Justice. Three options were shortlisted, namely:

- simplify without updating: codification without substantial changes;

¹ The principal directives are as follows: 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, O.J.E.C., 19 February 1975; Directive 76/207/EEC of 9 February 1976, amended by Directive 2002/73 of 23 September 2002 (O.J.E.C., 5 October 2002) 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, O.J.E.C., 14 February 1976; 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, O.J.E.C., 10 January 1979; Directive 86/378 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, amended by Directive 96/97, O.J.E.C., 12 August 1986; Directive 86/613 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, O.J.E.C., 19 December 1986; Directive 97/80 on the burden of proof in cases of discrimination based on sex, O.J.E.C., 20 January 1998; Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J.E.C., 21 December 2004; Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J.E.C., 26 July 2006

² Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) of 21/04/2004, COM(2004) 279 final

- simplify and update, improving the existing legislation by clustering a series of directives and amending them so as to create a single document;
- simplify, update and improve the legislation by adding (not envisaged in the second option) provisions from Directive 92/85/EEC on maternity protection.³

The second option was chosen and the “recast” directive 2006/54/EC was duly promulgated on 5 July 2006. It was designed to coordinate six directives relating to equal pay for men and women, equal treatment for the sexes in employment, training, promotion, working conditions, social security schemes and the burden of proof – all within a single text.

Aims of the directive

As outlined in the explanatory memorandum, the purpose of the “recast” directive from the European Parliament and Council is:

“to ensure the implementation and application of the principle of equal opportunities and equal treatment of men and women in matters regarding access to employment, vocational training and promotion, and working conditions, including the principle of equal pay for equal work or work of equal value,

and

to ensure that the measures taken by the Member States to implement the principles of equal pay and of equal treatment are made more effective, in order to enable all persons who consider themselves wronged, because these principles have not been applied to them, to have their rights established/asserted by judicial process after possible recourse to other competent bodies.”⁴

To this end, the directive pursues the following aims:

- to achieve readability and accessibility through codification that results in a sole legislative instrument: the option for codification retained implies that there can be no fundamental change in the philosophy of protecting gender equality;
- to integrate points of evolving case-law from the Court of Justice of the European Communities, in particular with regard to the concept of pay;
- to apply consistent definitions, with the concepts of direct discrimination, indirect discrimination, harassment and sexual harassment defined in the general provisions. Similarly, protection for the injured parties is reinforced, even if they have ceased to be in the employment relationship (Article 17).

³ European Commission impact assessment of 21 April 2004, annexed to the procedure, COD/2004/0084.

⁴ Basic legislative document of 21 April 2004, COD/2004/0084.

- To establish provisions that apply across the entire spectrum, such as those on legal remedies, burden of proof and promoting equality. These provisions extend, moreover, to issues of access to employment, training and career development, as well as to working conditions and pay, including occupational social security benefits. The rules relating to burden of proof are also extended to these benefits (Article 19).

Moreover, the directive introduces a duty for Member States to “take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive”.

Material scope

This European effort to coordinate the directives on equality between male and female workers is confined to recasting six directives, namely directives 75/117/EEC (pay), 76/207/EEC amended by 2002/73/EC (working conditions), 86/378/EEC amended by 96/97/EEC (occupational social security schemes) and 97/80/EEC⁵ (burden of proof). This “consolidates” the texts on equal treatment for men and women in employment and work that are currently founded on Article 141 (3) TEC.

It follows that the project does not cover the directives relating to statutory social security schemes (79/7/EEC), self-employed workers and their assisting spouses (86/613/EEC), pregnant women (92/85/EEC), parental leave (96/34/EC) or goods and services (2004/113/EC). The formal reason for excluding them is that those directives are founded on different clauses in the EC Treaty, but as a result the partial recast has largely failed to achieve its purpose of simplifying and harmonising. The flaw is clearly illustrated by the references to maternity protection and parental leave in Articles 2, 19 and 28. We will come back to this later.

Personal scope

Reading the directive, we are obliged to observe that none of its general provisions of cross-the-board relevance explicitly define its personal scope. The only mention of personal scope is in Article 6 of the directive, which relates specifically to occupational social security schemes.

We have to conclude from this that, apart from occupational social security benefits, the directive can apply to anyone, whether self-employed, employed or otherwise, without limit – as long, of course, as they are appropriately affected.

⁵ For the sake of completeness, we should also mention Council Directive 98/52/EC of 13 July 1998 extending to the United Kingdom of Great Britain and Northern Ireland Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, *O.J.*, no. L 205 of 22/07/1998, p. 0066.

In relation to occupational social security schemes, the directive borrows the definition of personal scope from Directive 86/378⁶.

Article 6 of the recast directive is worded as follows: *“This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.”*

Article 8 then lists exceptions to Article 6. In the field of occupational social security schemes, non-discrimination rules shall not apply to individual contracts for self-employed persons, to single-member schemes for self-employed persons, to insurance contracts for workers to which the employer is not a party, to optional provisions of occupational social security schemes, or to occupational social security schemes financed by contributions paid by workers on a voluntary basis.

We should add a few words about this notion of the working population. The term is not used only in the recast directive, but also in Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Court of Justice, when dealing with a question about how to interpret this term, argued: *“Article 2 of Directive 79/7 must be interpreted as meaning that the Directive does not apply to persons who have not had an occupation or have had an occupation which was not interrupted by one of the risks referred to in Article 3(1)(a) of the Directive and are not seeking work.”*⁷

General concepts

Common definitions

One aim of this directive is to apply definitions contained in Directive 2002/73 to all areas addressed by the recast directive:

direct and indirect discrimination; harassment and sexual harassment; instruction to discriminate.

Maternity protection

The preamble to Directive 2002/73/EC declares a commitment to clarifying matters by extending protection for pregnant workers to all terms and conditions, beyond the simple right to return to the same or an equivalent

⁶ Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ*, no. L 225 of 12 August 1986.

⁷ ECJ 27 June 1989, *Achterberg-te Riele*, Cases 48, 106 and 107/88, *ECR*, 1963.

post. This intention currently features in recital 25 of the preamble to the recast directive.

In this sense, one might call this a lost opportunity. The recast directive, far from clarifying the link between maternity protection and equality, has actually confused matters further. Given that the directive was intended to simplify Community law, here was a perfect chance to put an end to the divergent interpretations from the Court of Justice on implementing maternity protection in working conditions and in questions of pay.

Two recent judgments illustrate this contradiction. In the McKenna case (C-191/03)⁸, the Court held that Community law, and more specifically Article 141 and Directive 75/117, does not preclude a sick-pay scheme for public servants which does not distinguish between absence that is pregnancy-related and absence that is not when offsetting days of illness against the worker's total entitlement of leave. However, in the Sarkatzis Herrero case (C-294/04)⁹, which clearly related to Directive 76/207 (later modified by Directive 2002/73) and hence equality in working conditions, the Court maintained that European law was contravened by a rule for calculating the seniority of service of a recently recruited public servant that did not take account of her maternity leave.

The recast directive does not tackle the issue of maternity protection in the chapter on equal pay, and under working conditions Article 15 merely addresses the return to work: "*A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.*" The directive then borrows the provisions introduced by Directive 2002/73 on paternity and adoption leave, including protection from dismissal.

Nevertheless, the general provisions on the prohibition of discrimination include (in Art. 2 (2c)) "*any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC*". This reference, added after a proposed amendment from the European Parliament, seems to extend maternity protection in a general fashion to all terms and conditions, including conditions of pay¹⁰, as this is a general provision, i.e. one which applies to across the board to all matters covered by the recast text.

⁸ Judgment of 8 September 2005, *ECR*, I, 7631.

⁹ Judgment of 16 February 2006, *ECR*, I, 1513.

¹⁰ See also Article 1b, which defines the purpose of the directive and targets pay within the framework of working conditions.

Finally, in the “general horizontal” provisions¹¹, Article 28 on the relationship to Community and national provisions repeats in its first paragraph that “*this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity*”.

In the light of the increasingly divergent case-law from the Court of Justice, depending whether maternity protection relates to working conditions or to pay, extending maternity protection to all the fields covered by the directive would have both simplified things and also enhanced judicial security, notably in the context of Belgian law, which includes pay under working conditions.

It remains to be seen how the Court of Justice will interpret the different articles of this directive and whether the reference to maternity protection in the general and horizontal provisions will provoke a shift and a more global approach to maternity protection, embracing all the fields covered by the recast directive.

Positive action

Article 3 of the recast directive provides that, pursuant to Article 141 (4) of the EC Treaty, Member States may maintain or adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Positive action, therefore, is patently possible in all the fields that fall within the scope of the directive. It is difficult to imagine, however, what new types of positive action might be taken, for example, with regard to occupational social security schemes.

Bodies charged with promoting the principle of equal treatment and social dialogue

The directive incorporates the new provisions introduced by directive 2002/73, which in turn resemble those introduced in the anti-discrimination directives of 2000, adopted on the basis of Article 13 TEC, namely:

- the designation by Member States of bodies whose role is to promote the principle of equal treatment for men and women, to monitor Community legislation and to help the victims of discrimination;
- encouragement for the role of the social partners and NGOs in promoting the principle of equal treatment.

¹¹ It is difficult to comprehend the structure of the directive, which both begins with a section of general provisions and ends with a section of horizontal provisions.

Equal pay

Before analysing the text of the recast directive, we should remember that equal pay is the “flagship” behind which the principle of gender equality has been defended within the European Union. This principle of equality has been pursued ever since 1957 and the Treaty of Rome.

Article 119 of the Treaty of Rome was then complemented by Directive 75/117. The latter merely set out to define clearly the scope of this protection and the duties of Member States to promote this principle of equality and to punish its violation.

Article 119 of the Treaty of Rome in its current version as Article 141 TEC prescribes that:

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

Taking these provisions as its point of departure, the Court of Justice has defined the terms “pay” and “work of equal value”. As indicated in the recitals of the recast directive, the term “pay” is treated to a broad understanding.

It is settled case-law at the Court of Justice that “pay” is taken to mean any consideration paid directly or indirectly to the worker by the employer in return for the work that he or she has performed in the course of employment. This definition includes all present and future benefits paid in relation to past or present employment.¹²

These benefits include¹³:

- payments made by the employer under agreed occupational pension schemes deriving from a contract,¹⁴
- survivors’ pensions granted under an occupational scheme,¹⁵
- continued payment of wages during illness,¹⁶
- a bridging pension paid to employees choosing early retirement.¹⁷

As to the notion “work of equal value”, this necessarily implies that situations must be compared. The Court of Justice has emphasised that a wage situation cannot be compared with a hypothetical case. The comparison may not, therefore, be performed in abstracto. It is not essential, however, for the situations that are being compared to occur simultaneously.¹⁸ Similarly, the comparison may involve work of different value for which the same remuneration is received.¹⁹

The directive itself provides in Article 4 that all discrimination is prohibited. It is worded as follows:

“For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”

Of course, this provision in the recast directive continues to co-exist with Article 141 of the EC Treaty. The protection of equal pay for men and women is not overturned by this rehashing of the text and no incompatibility, contradiction or difficulty will be identified by the adoption of this provision. Nevertheless, we might lament the fact

¹² ECJ, Garland judgment of 9 February 1982, C-12/81, *ECR*, 359; judgment Newstead of 7 December 1987, C-192/85, *ECR*, 4753; Kowalska judgment of 27 June 1990, C-33/89, *ECR*, I, 2591.

¹³ The list is only exemplary.

¹⁴ ECJ, Bilka judgment of 13 May 1985, C-170/84, *ECR*, 1607; Barber judgment of 17 May 1990, C-262/88, *ECR*, I, 1889.

¹⁵ ECJ, Ten Oever judgment of 6 October 2003, C-109/91, *ECR*, 14879.

¹⁶ ECJ, Rinner-Kühn judgment of 13 July 1989, C-171/88, *ECR*, 2743.

¹⁷ ECJ, Roberts judgment of 9 November 1993, C-132/92, *ECR*, 5579.

¹⁸ ECJ, Macarthy judgment of 27 March 1990, C-129/79, *ECR*, 1277.

¹⁹ ECJ, Mary Murphy judgment of 4 February 1988, C-157/86, *ECR*, 673.

that the wording of Article 4 does not single out equality as its cardinal principle, but prefers the notion of discrimination.

Equal treatment in access to employment

A move towards clarity and judicial security had already been taken in the process of adopting Directive 2002/73, which amended Directive 76/207, by integrating a number of judgments by the Court of Justice into its provisions. In this chapter, the “recast” directive borrows the key provisions of that directive with regard to eliminating discrimination and admissible exceptions to the principle of equality in relation to essential gender-related characteristics *“where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate”* (Article 14) and also the provisions on protection in the case of maternity, paternity and adoption leave.

The other provisions from Directive 2002/73 have been integrated into the recast directive under the general provisions (definition, positive action) and the horizontal provisions (remedies, gender mainstreaming, etc).

Equality in occupational social security schemes

The provisions of the recast directive (Title II, chapter 2) reflect word for word those of Directive 86/378 amended by Directive 96/97, including exclusions from the material scope and the options for exceptions.

Nevertheless, two comments spring to mind. Firstly, the validity of exceptions linked to the use of different actuarial factors for each sex (and only in pension regimes) was challenged by the Court of Justice in the Lindorfer judgment²⁰. Although it relates to the Regulations for staff of the European institutions, this ruling condemns resorting to gendered actuarial factors as contrary to the fundamental principle of equality between men and women, and moreover as unhelpful, given that the use of non-gendered factors would permit the same results. Secondly, the recast directive enshrines (Article 7 (2)) settled case-law from the Court of Justice according to which pensions schemes for public servants should be deemed to be occupational in the light of Article 141 TEC.

²⁰ Judgment of 11 September 2007, C-227/04.

Protection for injured parties

Civil penalties and legal remedies

Article 23b of the recast directive stipulates that Member States must take all necessary measures to ensure that:

- any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished. In so doing, the Member State is called upon to apply the principle of gender mainstreaming already required by Directive 76/207.
- provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are declared null and void or amended;
- occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

This same directive also imposes a duty on Member States to take measures to protect employees against victimisation and to establish a system of penalties.

Burden of proof

When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

We should note that the term “indirect discrimination” has evolved over time. Whereas under Directive 97/80 there is indirect discrimination if an apparently neutral provision, practice or criterion affects a substantially higher proportion of the members of one sex, under Directives 2000/43, 2000/78 and 2006/54 it is sufficient that this measure would put persons of one sex at a particular disadvantage compared with persons of the other sex. It follows that, whereas under Directive 97/80 evidence must be provided that the neutral measure affects a substantially higher proportion of the members of a specific group, under Directives 2000/43, 2000/78 and 2006/54 evidence must be provided that this measure would put specific persons at a disadvantage. It is likewise useful to note that there is a semantic difference in the French versions between the formulation used in the Directives 2000/43, 2000/78 and the one in Directives 76/207, 2006/54. While the former refer to measures “susceptibles d’entraîner un désavantage particulier”, the latter talk of measures that “désavantagerait particulièrement des personnes d'un sexe”.

Implementation by Member States (Article 33)

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive. Member States shall take all necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.

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