

# **An introduction to Community Legislation on Equal Treatment and the “Novelties” of the “Recast” Directive**

**Presentation for ERA, Trier  
7-8 December 2009**

## **I. Primary law on equal treatment for women and men**

Treaty of Rome (1957): equal pay for men and women doing equal work (Article 119):

*Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.*

*For the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment.*

*Equal remuneration without discrimination based on sex means:*

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

*(b) that remuneration for work at time-rates shall be the same for the same job.*

Article 141 TEC: legal basis for European rules on employment and work (paragraph 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.*)

Article 2 TEC: promotion of equality for men and women given as one of the tasks of the Community, obliging the latter to implement common policies to pursue this promotion.

Article 3, paragraph 2, TEC: eliminating inequalities and promoting equality between men and women in practically all the areas covered by Community policy.

Article 13 TEC: legal basis for combating all forms of discrimination, including on grounds of sex, outside the employment context:

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

## II. Law derived from equal treatment for women and men

From 1975 until the present: ten directives on equal treatment for men and women have been adopted, two of which have since been amended. These directives address access to employment, equal pay, maternity protection, parental leave, social security and occupational social security schemes, the burden of proof in cases of discrimination and self-employment.

Directive 75/117/EEC<sup>1</sup> on equal pay and clarifying the scope of application of former Article 119.

Directive 76/207/EEC<sup>2</sup> on equal treatment in employment. This directive goes beyond former Article 119, constituting together with Directive 75/117/EEC the first secondary legislation from the Community in the field of equal treatment for men and women.

Directive 79/7/EEC<sup>3</sup> on statutory social security schemes.

Directive 86/378/EEC<sup>4</sup> on the principle of equal treatment for men and women in occupational social security schemes. This directive was amended in 1996 by Directive 96/97/EC<sup>5</sup> following the Court's judgment in the *Barber*<sup>6</sup> case.

Directive 86/613/EEC<sup>7</sup> on applying the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity.

Directive 92/85/EEC<sup>8</sup> on protecting pregnant workers to promote the health and safety of women at work.

Directive 97/80/EC<sup>9</sup> on the burden of proof. Article 4 of the Directive sets out clearly that in the case of direct or indirect discrimination, persons who consider themselves wronged need merely establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, whereas the respondent must prove that there has been no breach of the principle of equal treatment.

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<sup>1</sup> 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.

<sup>2</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

<sup>3</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6 of 10/1/1979).

<sup>4</sup> Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

<sup>5</sup> 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.

<sup>6</sup> ECJ 17/5/1990 – C-262/88 *Barber*, ECR 1990, p. I-1889 (1993).

<sup>7</sup> 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.

<sup>8</sup> 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 348 of 28/11/1992.

<sup>9</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 12 of 20/1/1998.

Framework agreement on parental leave (Directive 96/34/EC<sup>10</sup>) between the European cross-industry organisations. The text provides essentially for non-transferable parental leave of at least three months for both mothers and fathers.

Directive 2002/73/EC<sup>11</sup> which in significant ways amends Directive 76/207/EEC on equal treatment in employment:

- it defines indirect discrimination more broadly than Directive 97/80;
- it furthermore defines the concepts of harassment and sexual harassment;
- the application of less favourable conditions following pregnancy or maternity leave is seen as discrimination;
- protection against reprisals is enshrined in Article 7;
- Article 6 establishes the right of associations, organisations and other legal entities to engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure;
- Article 8a provides for the designation of bodies for the promotion, analysis, monitoring and support of equal treatment (“equality bodies”) and defines their tasks.
- Article 8b commits Member States to promoting social dialogue between the social partners with a view to fostering equal treatment;

Directive 2004/113/EC<sup>12</sup> addresses the implementation of the principle of equal treatment for men and women in the access to and supply of goods and services. This directive prohibits direct and indirect discrimination and harassment on grounds of sex and also sexual harassment. Different treatment is unacceptable unless it can be justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.

Directive 2006/54/EC (recast)<sup>13</sup> in order to make European legislation on gender equality more readable and accessible. It combines 6 directives into a single legal text<sup>14</sup>. Since 15 August 2009 the directives recast in this manner have been repealed.

### → Why “recast”?

The “Recast” Directive simplifies, modernises and updates Community law in the field of equal treatment for men and women by combining six existing directives into a single text and incorporating the case law established by the Court of Justice of the European Communities.

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<sup>10</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

<sup>11</sup> 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.

<sup>12</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

<sup>13</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>14</sup> The directives combined in this way are Directive 75/117/EEC on equal pay, Directive 76/207/EEC on equal access to employment, training, promotion and working conditions, Directive 2002/73/EC amending Directive 76/207/EEC, Directive 86/378/EEC on occupational social security schemes and Directive 96/97/EC amending this, and finally Directive 97/80/EC on the burden of proof in cases of discrimination.

→ **The “novelties” of the “Recast” Directive:**

Apart from merging the above-mentioned directives into one, the Recast Directive also contains a few amendments:

- by adding a reference to “equal opportunities”;
- by harmonising definitions;
- by integrating established case law from the ECJ relating to the scope of application of the equal treatment principle in occupational social security schemes, which – under certain conditions – includes civil service pensions;
- by extending some of the provisions in Directives 2002/73 and 97/80 to occupational social security schemes;
- by referring to the reconciliation of work and private life;
- by introducing discrimination founded on a person’s gender reassignment.

### **III. The Court of Justice of the European Communities and equal treatment for women and men**

Article 220 TEC: *The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.*

The Court performs this task by means of references for a preliminary ruling (Article 234 TEC<sup>15</sup>) and actions for failure to fulfil obligations (Article 226 TEC<sup>16</sup>). The Court’s interpretation of primary and derived Community legislation is binding on all Member States.

Most cases (9/10) which come before the Court of Justice do so in the form of references for a preliminary ruling submitted by national courts.

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<sup>15</sup> *The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

*(a) the interpretation of this Treaty;*

*(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;*

*(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.*

<sup>16</sup> *If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

*If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.*

#### **IV. The European Commission and equal treatment for women and men**

##### **→ Proceedings for failure to fulfil obligations:**

Actions for failure to notify or to fulfil an obligation (Articles 226 and 228 TEC).

Every Directive adopted specifies a time limit for implementing its objectives in national law, and all Member States are legally bound to respect this deadline unless an alternative or exception has been agreed.

The procedure for these proceedings falls into three periods: a formal letter of notice is issued to the Member State (2 months), a reasoned opinion is then sent to the Member State (2 months) and finally the matter may be referred to the Court of Justice of the European Communities.

Action for failure to notify: the Member State is put on notice that it has not notified the European Commission of the national measures it has taken to implement Community legislation by the prescribed date.

Action for failure to fulfil: the Member State is put on notice by the European Commission that the measures taken nationally do not comply with the directive.

##### **→ Proposed legislation:**

Proposal for a directive on maternity leave amending Directive 92/85/EEC (“Safety and health at work: pregnant workers, workers who have recently given birth or are breastfeeding”) – 3 October 2008.

Proposal for a directive on the situation of self-employed women repealing Directive 86/613/EEC (“Equal treatment for men and women: the self-employed and assisting spouses”) – 3 October 2008.

#### **!! Little novelties resulting from the Treaty of Lisbon**

##### **More information?**

→ <http://ec.europa.eu/social>

→ [http://curia.europa.eu/jcms/jcms/Jo1\\_6308/](http://curia.europa.eu/jcms/jcms/Jo1_6308/)