

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

# The Transposition of Recast Directive 2006/54/EC

## Update 2011

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# The Transposition of Recast Directive 2006/54/EC

## Update 2011

Susanne Burri and Hanneke van Eijken

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# Part I

## The Transposition of the Recast Directive 2006/54/EC Update 2011

Susanne Burri<sup>\*</sup>

### 1. Introduction

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation (recast) consolidates a few existing directives on gender equality.<sup>1</sup> The objective of the Recast Directive is to combine the main existing provisions on gender equality as covered by this Directive as well as by relevant case law (Recital 1) in a single text. According to the Commission, such a text should increase clarity and should modernise and simplify the provisions of directives linked by their subject in order to make Community legislation clearer and more effective.<sup>2</sup> Gender equality law should in this way be more accessible for a broader public.<sup>3</sup>

The legal basis of Directive 2006/54/EC is Article 141(3) EC, (now Article 157(3) of the Treaty on the Functioning of the European Union (TFEU)). The directives that form part of this recasting exercise are Directive 75/117/EEC<sup>4</sup> on equal pay between men and women; Directive 76/207/EEC<sup>5</sup> as amended by Directive 2002/73/EC<sup>6</sup> on equal treatment for men and women in the access to employment, vocational training and promotion and working conditions; Directive 86/378/EEC,<sup>7</sup> as amended by Directive 96/97/EC<sup>8</sup> on equal treatment for men and women in

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<sup>1</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), *OJ L* 204, 26 July 2006, pp. 23–36.

<sup>2</sup> COM (2004) 279. p. 2.

<sup>3</sup> See for an overview of EU gender equality law: S. Burri & S. Prechal, *EU Gender Equality Law*, European Commission, Luxembourg: Office for Official Publication of the European Communities, KE-80-08-432-EN-C, 2008 (available in English, French and German); see for an electronic version: [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication), accessed 15 June 2011.

<sup>4</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, *OJ L* 45, 19 February 1975, pp. 19–20.

<sup>5</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, *OJ L* 39, 14 February 1976, pp. 40–42.

<sup>6</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, *OJ L* 269, 5 October 2002, pp. 15–20.

<sup>7</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, *OJ L* 225, 12 August 1986, pp. 40–42.

<sup>8</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, *OJ L* 46, 17 February 1997, pp. 20–24.

occupational social security schemes; and Directive 97/80/EC<sup>9</sup> on the burden of proof. The recasting exercise thus did not include the directives on the principle of equal treatment between men and women in statutory social security (Directive 79/7/EEC),<sup>10</sup> self-employment<sup>11</sup> (Directive 86/613/EEC, now repealed by Directive 2010/41/EU)<sup>12</sup> or the access to and supply of goods and services (Directive 2004/113/EC).<sup>13</sup> The same is true for the directives on pregnancy and maternity leave (92/85/EEC)<sup>14</sup> and on parental leave (96/34/EEC, now repealed by Directive 2010/18/EU),<sup>15</sup> which have a different legal basis.<sup>16</sup>

The Recast Directive should have been transposed in the EU Member States by 15 August 2008 at the latest (Article 33) and the directives that are consolidated in this Directive were repealed one year later (Article 34). Member States had up to one additional year to comply with the Recast Directive (Article 33), if it was necessary to take particular difficulties into account. The Recast Directive is incorporated in the EEA agreement and therefore applies to Iceland, Liechtenstein and Norway.<sup>17</sup>

According to the preamble of this Directive, the obligation to transpose the Recast Directive into national law should be confined to those provisions that represent a substantive change compared to the earlier directives. The obligation to transpose the provisions that are substantially unchanged arose under the earlier directives (Recital 39 and Article 33).

The European Network of Legal Experts in the Field of Gender Equality produced a report on the transposition of Directive 2006/54/EC in 2009.<sup>18</sup> The main conclusion of this report was that the lack of transposition or partial transposition of the

<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* 14, 20 January 1998, pp. 6–8.

<sup>10</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, 10 January 1979, pp. 24–25.

<sup>11</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L* 373, 21 December 2004, p. 37–43. However, some provisions in the Recast Directive apply to self-employment; see for example Article 2(1)(f), Article 6 and Article 14(1)(a).

<sup>12</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, *OJ L* 180, 15 July 2010, pp. 1–6.

<sup>13</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *OJ L* 373, 21 December 2004, pp. 37–43.

<sup>14</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 L* 348, 28 November 1992, pp. 1–8. A proposal to amend this Directive is pending: see <http://www.europarl.europa.eu/oeil/file.jsp?id=5697042>, accessed 14 June 2011.

<sup>15</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), *OJ L* 68, 18 March 2010, pp. 13–20.

<sup>16</sup> See on the reasons why some directives were discarded: Commission Staff working paper SEC (2004) 482, p. 14.

<sup>17</sup> Decision no. 33/2008 of the EEA Committee of 14 March 2008, *OJ L* 182, 10 July 2008, pp. 30–31.

<sup>18</sup> See European Network of Legal Experts in the Field of Gender Equality, Susanne Burri and Sacha Prechal, *The Transposition of Recast Directive 2006/54/EC*, European Commission, February 2009, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed 17 March 2011.



‘novelties’ and ‘clarifications’ of the Recast Directive in some of the Member States was mainly due to the fact that the specific obligations arising from the Recast Directive were not immediately clear. Many Member States assumed that they had already fulfilled their obligations under the directives that are part of the recasting exercise. Most national experts of the Network did not feel that the Recast Directive had contributed to the simplification and modernisation of the relevant gender equality law at the national level. This outcome was not very surprising, given the fact that the recasting process was aimed at combining EU Directives into one single instrument at the EU level and did not have a similar aim at the national level. Most countries did not seize the opportunity to modernise relevant national law in addition to transposing the Recast Directive. The fact that the recasting exercise often concerned many different acts of law at the national level was a further complicating factor. Sometimes, the lack of transparency at the national level was even increased by the transposition of the Recast Directive. Also, it would seem that the recasting exercise had not really resulted in any significant simplification or reduction in administrative burden.

The purpose of the present report is to provide an updated overview of the measures that the Member States, the EEA countries (Iceland, Norway, and Liechtenstein) and the candidate countries Croatia, FYR of Macedonia and Turkey have taken in order to transpose some ‘novelties’ and ‘clarifications’ of the provisions of the Directive and an analysis of whether the transposing national provisions are in compliance with the Directive. Specific attention is paid to the purpose of the Directive, which includes the implementation of the principle of equal opportunities, in addition to the principle of equal treatment of men and women. Information is provided on the implementation of the prohibition of discrimination in relation to gender reassignment, the definition of pay, the scope of the provisions on occupational pension schemes and the scope of the so-called horizontal provisions of the Directive, and the concept of positive action. Attention is also paid to the role of the social partners in view of facilitating the reconciliation of work and private life, whether a periodical assessment is carried out of exclusions regarding genuine occupational requirements and the transposition of the provisions on judicial procedures. Additional information on the transposition of the Directive is provided when relevant.

The main provisions of the Recast Directive are described in relation to the relevant EU legal context in the next Section (2), while Section 3 provides a summary of the findings of the national reports. Section 4 offers some conclusions. The second part of the report includes the 33 country reports by the independent experts of the European Commission’s European Network of Legal Experts in the Field of Gender Equality. In these national contributions, some problematic issues arising from the incomplete and/or incorrect transposition of the Recast Directive are highlighted within the specific national (legal) context.

## **2. The Recast Directive and related provisions in EU law**

### ***2.1. The EU Law Context***

The preamble of the Recast Directive recalls that ‘equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a ‘task’ and an ‘aim’ of the Community and impose a positive obligation to promote it in all its activities’ (Recital 2). Since the

entry into force of the Lisbon Treaty on 1 December 2009, similar provisions are now included in the Treaty on European Union (TEU) in the Articles 2 and 3(3) TEU. Article 2 TEU reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3(3) TEU stipulates that the EU ‘shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.’

In addition, Articles 8 and 10 TFEU contain so-called gender-mainstreaming obligations. Article 8 stipulates that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’ and Article 10 clarifies that ‘in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’ These provisions underline in both Treaties that equality between men and women is a fundamental principle of EU law.<sup>19</sup>

Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union is binding (Article 6(1) TEU). Different provisions of the Charter are of particular importance in relation to the issues covered by the Recast Directive.<sup>20</sup> In Title III on equality, a specific provision is included in Article 23 on equality between men and women in addition to the general prohibition of discrimination on *inter alia* sex in Article 21. A reference to these two provisions of the Charter is made in the preamble of the Recast Directive (Recital 5). Article 23 of the Charter reads:

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

In Title IV of the Charter on solidarity, provisions against unfair dismissal (Article 30) and on fair and just working conditions (Article 31) are also relevant in conjunction with similar provisions of the Recast Directive. The same is true for Article 33 on family and professional life that reads:

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<sup>19</sup> See Sophia Koukoulis-Spiiotopoulos ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’ *European Gender Equality Law Review* No. 1/2008, p. 15 and Evelyn Ellis, ‘The Impact of the Lisbon Treaty on Gender Equality Law’, *European Gender Equality Law Review* No. 1/2010, p. 7, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed on 15 June 2011.

<sup>20</sup> On the reasons why not more references to Articles of the Charter were included see COM (2005) 380, p. 14.

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

### ***2.1. The Recast Directive***

The Recast Directive is divided into four titles. The first title on general provisions includes a description of the aim of the Directive and definitions of different concepts such as direct and indirect discrimination, harassment and sexual harassment. The purpose of the Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation in relation to access to employment, including promotion, and to vocational training; working conditions, including pay; and occupational social security schemes. The definitions in the Recast Directive are similar to the definitions that are included in the directives adopted since 2000.<sup>21</sup> Direct discrimination is defined as:

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

Article 2(2)(c) clarifies that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC is prohibited. In addition, Article 15, on the return from maternity leave, stipulates in accordance with case law of the ECJ that ‘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 allows provisions concerning the protection of women, particularly in relation to pregnancy and maternity (Article 28). Indirect discrimination is defined as:

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

In the preamble of the Directive, specific attention is paid to the prevention and prohibition of harassment and sexual harassment, which are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex. This prohibition applies not only in the workplace, but also in the context of access to employment, vocational training and promotion and should be subject to effective, proportionate and dissuasive penalties (Recital 6). In addition, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice (Recital 7). The importance of prevention of discrimination

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<sup>21</sup> See Directive 2000/43/EC, the so-called Race Directive; Directive 2000/78/EC, the so-called Framework Directive; Directive 2003/73/EC, the amended equal treatment Directive and Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services.

is stressed in Article 26 of the Directive, in particular in relation to harassment and sexual harassment.

Harassment is defined in Article 2(1)(c) as:

where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Sexual harassment is defined in Article 2(1)(d):

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

Both harassment and sexual harassment amount to discrimination prohibited by the Directive; and the same is true for any less favourable treatment based on a person's rejection of or submission to such conduct (Article 2(2)(a)). An instruction to discriminate is also prohibited (Article 2(2)(b)).

Positive action is not mandatory, but allowed according to Article 3, that stipulates that Member States may maintain or adopt measures within the meaning of Article 157(4) TFEU with a view to ensuring full equality in practice between men and women in working life.

The second title of the Recast Directive includes provisions on equal pay, equal treatment in occupational social security schemes and equal treatment as regards access to employment, vocational training and promotion and working conditions. The definition of pay is the same as in Article 157(1); see Article 2(1)(e):

the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.

Article 4 prohibits discrimination in the field of pay, stipulating that:

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.

Occupational pensions schemes are also defined and include schemes not governed by Directive 79/7/EEC on statutory social security schemes,

whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

Chapter 2 of this title mainly includes existing provisions on occupational pension schemes and codifies case law.

In the chapter on equal treatment as regards access to employment, vocational training and promotion and working conditions, the scope of prohibition of direct and indirect sex discrimination in the public or private sectors (including public bodies) is described and includes according to Article 14(1):

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

An exception for genuine occupational activities is allowed (Article 14(2)). Article 16 allows Member States to recognise rights to paternity and/or adoption leave. In addition, when such rights exist, protection against dismissal and unfavourable treatment has to be ensured.

The third title brings together so-called horizontal provisions, such as provisions on remedies and enforcement, including penalties, the burden of proof, victimisation, the promotion of equal treatment through equality bodies, social dialogue and dialogue with NGOs. This title also includes general provisions on the prevention of discrimination, gender mainstreaming and the dissemination of information, for example. The last title includes the final provisions on reports to the Commission, the implementation period and the repealing of older directives.

### **2.3. Substantive changes**

As already mentioned, the obligation to transpose the provisions of the Recast Directive into national law should be confined to those provisions that represent a substantive change compared with the earlier directives.<sup>22</sup> Such substantive changes should therefore be first identified. According to the correlation table, only one Article (Article 7(2)) has no correlate in earlier directives that are part of the recasting exercise. This Article concerns the application of the provisions on pension schemes to civil servants. At first sight, Directive 2006/54/EC does not, therefore, impose any further obligations on the Member States other than those arising out of earlier directives. This impression might have been confirmed by the rather scarce academic literature on the potential impact of the Recast Directive (see Annex II). It is certainly true that the Recast Directive brings only modest changes and clarifications compared to the directives included in the recasting exercise.

However, a closer look at the provisions of the Recast Directive in comparison with earlier directives shows various clarifications and novelties, and the explanatory memorandum of the Commission's proposal highlights the 'principal innovations' of the proposal.<sup>23</sup> This suggests that there are 'innovations,' and even more than those listed. The principal innovations mentioned in the Commission's proposal concern the

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<sup>22</sup> Part of this section has been published earlier, see S. Burri, 'Coherent Codification? A case study in EU equal treatment legislation', in: L. Besselink, F. Pennings & S. Prechal, *The Eclipse of Legality Principle in Europe*, European Monographs 75, Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011.

<sup>23</sup> European Commission, COM (2004) 279, pp. 5-6.

integration of some case law of the ECJ in the first place. Second, the scope of application of several provisions is extended, in particular, a few provisions applicable to the access to work and working conditions (Directive 76/207/EEC, as amended by 2002/73/EC) apply now to all the areas covered by the Recast Directive, thus, also to occupational social security schemes, for example. Finally, a re-examination clause was added, which permits the Commission to propose any amendments necessary after the Commission has reviewed the operation of the Directive (by 15 February 2011 at the latest).<sup>24</sup>

The question of whether these ‘principal innovations’ represent substantive changes is not explicitly addressed in the Commission’s proposal. During the legislative process, the European Parliament (EP) proposed many amendments to the Commission’s proposal.<sup>25</sup> Some amendments were included in the second proposal of the Commission; others were rejected.<sup>26</sup> It is interesting to note that the Commission rejected a few amendments of the EP, arguing that they would amount to a substantive change. For example, amendments regarding the social dialogue and obligations of employers (Article 23 of the first proposal) were rejected with the following arguments: ‘These amendments have in common the objective of transforming the obligation of Member States to *encourage* certain measures to be taken either by the social partners (promote equality between women and men, conclude agreements laying down anti-discrimination rules) or by employers (planned and systematic promotion of equality, prevention of discrimination) into an obligation to *ensure* that such measures are taken. This modification cannot be endorsed as it would amount to *considerable substantive changes going beyond what can be reasonably done within the framework of a recasting exercise* (emphasis added)’.<sup>27</sup> In the author’s view, such a statement shows that the Commission had no intention of including substantive changes in the Recast Directive or at least no *considerable* substantive changes. This does not, however, clarify what the (nature of the) obligations of Member States are as regards the issues mentioned as amounting to ‘innovations’ in the Commission’s proposal. Therefore the question of whether the Recast Directive implies substantive changes, and if so, which substantive changes, should be answered by a thorough analysis of the provisions of the Recast Directive in the light of earlier adopted directives that are part of this recasting process and the relevant case law of the ECJ.

A closer look at the different provisions of the Recast Directive reveals more ‘novelties’ or ‘clarifications’ compared to the provisions of the earlier directives. These mainly concern the following issues:

- The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities; see the title of the Directive and Article 1;
- The Directive also applies to gender reassignment; see Recital 3;
- The uniform definition of the concept of indirect discrimination in Article 2(1)(b) of the Recast Directive replaces the definition of the Burden of Proof Directive;

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<sup>24</sup> European Commission, COM (2004) 279, pp. 5-6.

<sup>25</sup> European Parliament, T6-0283/2005.

<sup>26</sup> European Commission, COM (2005), 380.

<sup>27</sup> The Commission rejected with the same argument a proposal of the EP to modify references to parental leave (in addition, the Commission pointed at the fact that Directive 96/34/EC is no part of the recasting exercise) and a proposal to amend Article 141(4) EC in order to place on Member States an obligation to adopt positive measures: COM (2005) 380, 13 and 15.

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

Because the obligation to transpose the Recast Directive only applies to provisions that represent a substantive change as compared to the earlier directives, the implementation at national level may turn out to be complicated. No EU list of ‘clarifications’ or ‘novelties’ has been published to attract the explicit attention of implementing authorities in the Member States and EEA countries.

In the national reports of the experts of the European Network of Legal Experts in the Field of Gender Equality, particular attention is paid to these ‘novelties’ or ‘clarifications’ in order to provide an overview of the measures that the EU Member States, The EEA countries (Iceland, Norway and Liechtenstein), and Croatia, FYR of Macedonia and Turkey have taken in view to comply with their obligations to transpose into national law the provisions of the Recast Directive which represent a substantive change from earlier directives and to analyse whether they have fulfilled their obligations or not. The next section offers a short summary of findings with an overview of the countries that have transposed the provisions of the Recast Directive explicitly, implicitly or partially. Specific attention is paid to the transposition of most of the above-mentioned ‘novelties’ or ‘clarifications’ of the Recast Directive.

### **3. Summary of findings**

#### ***3.1. Transposition of the Directive and correlation tables***

The national reports of the experts, based on a questionnaire of the European Commission (see Annex I), illustrate how complicated the transposition process of various anti-discrimination directives is at the national level due to the different legal and/or political contexts. Generally speaking, the Recast Directive has been transposed in the 27 Member States of the EU, albeit in different ways. It should be noted that an assessment of a correct transposition of the Recast Directive is sometimes difficult when it depends to a certain degree of the implementation of the directives that are part of the recasting exercise (in this respect, see in particular the national contribution on France). The national reports show that only little attention has been paid to the ‘clarifications’ and/or ‘novelties’ of the Recast Directive as listed

above. The impact of the Recast Directive on the national law of the Member States therefore remains limited.

The methods of transposition of the 33 countries subject of this report can be described as follows. Some countries have explicitly transposed Directive 2006/54/EC either with new legislation or with substantive amendments to existing legislation (Cyprus, Croatia, Czech Republic, Estonia, Greece, Italy, Lithuania, Slovakia, Slovenia, Sweden, and UK). The Recast Directive was sometimes transposed together with earlier directives (France, Poland, Turkey). Transposition was not considered necessary by some countries, due to the fact that earlier directives had already been transposed. Nevertheless, sometimes amendments were made to existing national equal treatment legislation (Austria, Belgium, Finland, Germany, Iceland, Latvia, Luxembourg, Malta, the Netherlands, Norway, and Spain). In Romania, no specific legal norm transposes the Directive according to the national expert and no information regarding the transposition of the Recast Directive is available to the public. The same is true for Hungary. However, most provisions of earlier directives were already transposed in Romanian legislation. A few experts consider that the transpositions did not include all the provisions of the Recast Directive (Bulgaria, FYR of Macedonia, Iceland, and Portugal). The incomplete transposition of the Recast Directive in Bulgaria, for example, is partially due to the fact that occupational pension schemes as described in the Recast Directive (in Title III, Chapter 2) do not seem to exist. In Denmark, the partial lack of transposition is remedied by the general rule that Danish law must be interpreted in conformity with EU law. The same principle applies in Norwegian law. In Liechtenstein, a proposal aimed at transposing the Directive is pending.

According to Recital 41, the Member States are encouraged to draw up tables illustrating the correlation between this Directive and the transposition measures and to make them public. Most countries have not published such tables, except Cyprus, Estonia,<sup>28</sup> Slovakia, and the UK. Bulgaria and FYR of Macedonia have drawn up such tables without publishing them. In Romania, references have been included in other (amended) Acts.

### ***3.2. Transposition of ‘novelties’ or ‘clarifications’ in the Recast Directive***

In most of the countries that have transposed the Recast Directive, only a few ‘novelties’ or ‘clarifications’ have been explicitly transposed, mainly because Member States believed that some ‘clarifications’ or ‘novelties’ did not need any specific transposition. In some countries, this is true, for example for the prohibition of discrimination on the grounds of gender reassignment. Some experts mention that according to case law – in particular of the European Court of Justice – such prohibition is part of the ban on sex discrimination (e.g. Austria, Denmark, Estonia, Finland, France, Germany, Ireland, the Netherlands, Portugal and Spain). In these countries, the prohibition of discrimination on the ground of gender reassignment has not been explicitly included in legislation. Sometimes, references to gender reassignment are included in the explanatory memorandum of a proposal (e.g. Liechtenstein and Luxembourg). The legislation of some countries does not include a limitative list of discrimination grounds and thus discrimination on the ground of gender reassignment is covered by the legislation (e.g. Latvia, Romania and Turkey). Finally, in Slovenia, discrimination on the ground of ‘other personal circumstances’ is prohibited, this could include gender reassignment. This example illustrates the

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<sup>28</sup> In the explanatory memorandum.



different ways the countries have interpreted their obligations to transpose the ‘novelties’ and ‘clarifications’ of the Recast Directive.

In the following subsections, the main issues in the transposition process concerning specific ‘novelties’ or ‘clarifications’ are highlighted. The national contributions provide more details of specific problematic matters in the relevant national context.

### *3.2.1. Equal opportunities and equal treatment between men and women*

The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities, see the title of the Directive and Article 1. Article 1 stipulates that to that end, the Directive contains provisions to implement the principle of equal treatment in access to employment, including promotion, and to vocational training, working conditions, including pay and occupational social security schemes. Both concepts are therefore closely linked in this provision. In addition, Recital 4 recalls that Article 157(3) TFEU provides a legal base to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women.

The Recast Directive does not define the principles of ‘equal opportunities’ and ‘equal treatment’. In academic literature, the concept of equal opportunities or equality of opportunity is often described as a step from a pure formal approach to equality to a more substantive approach. Peters distinguishes four different notions of equality in her analysis of EC equality and positive action law: the prescription of equal treatment, the offering of equal opportunities, the guaranties of equal effects of rules and measures for both men and women and finally, the equal representation of the sexes.<sup>29</sup> She recalls that in academic literature, equal treatment is often understood as the absence of legal discrimination, and that means the application of one uniform standard to men and women. According to many feminist writers, this standard is often a male standard. In addition, from an equal treatment approach, the focus is on individual rights and the social context is often neglected. Equal rights might then generate different outcomes. Peters submits that the concept of equal opportunities could perhaps avoid such shortcomings. The principle of equal opportunities is then seen as a step that moves beyond a formal approach and an equal treatment principle. It is linked to equality in fact, in practice: ‘While equal treatment is understood as an individualist, legalist concept, equal opportunity denotes collective and factual equality’.<sup>30</sup> She also states that an instrument to realise factual equal opportunities is positive action. Equality in fact amounts to real equality or substantive equality, which requires differentiation.<sup>31</sup> Fredman defines equal opportunities as ‘a middle ground between formal equality and equality of results’.<sup>32</sup> Equal treatment against a

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<sup>29</sup> Anne Peters, ‘The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law—A Conceptual Analysis’, *European Law Journal*, Vol. 2, No. 2, pp. 177-196, at p. 179.

<sup>30</sup> Anne Peters, ‘The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis’, *European Law Journal*, Vol. 2, No. 2, pp. 177-196, at p. 182.

<sup>31</sup> See Christopher McCrudden & Sacha Prechal, European Network of Legal Experts in the Field of Gender Equality, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach*, European Commission, November 2009, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm), accessed 15 June 2011.

<sup>32</sup> S. Fredman, *Discrimination Law*, Clarendon Law Series, Oxford: Oxford University Press 2002, p. 14.

background of past and structural discrimination can perpetuate disadvantage, according to the proponents of this view. Equal opportunity aims at equal starting points, at removing existing obstacles. A substantive interpretation of the principle of equal opportunities requires that positive measures are taken.<sup>33</sup> A similar definition is used by Howard.<sup>34</sup>

The national experts of the European Network of Legal Experts in the Field of Gender Equality have rather diverging views on the meaning and the relation between the concepts of ‘equal opportunities’ and ‘equal treatment’. According to two experts, the differences between the notion of ‘equal treatment’ and ‘equal opportunities’ are far from clear (Belgium, Luxembourg). Some experts link the principle of equal opportunities to *de facto* equality and/or to pro-active measures, including positive action. In their view, the new wording suggests an active promotion of equality, not only a prohibition of discrimination (Croatia, Denmark, Finland, the Netherlands, Portugal, Poland, Spain, and the UK). In addition, the Croatian expert suggests that the stronger emphasis on equal opportunities calls for a more thorough reassessment of the extent to which existing evaluation criteria and distribution standards in employment reflect a particular view or lifestyle favourable to male gender. The Hungarian expert sees a shift from the principle of equal treatment to a principle of equal opportunities, which could be interpreted in a similar way as in the above-mentioned literature. The Austrian expert raises the question of the relation between EU law and CEDAW, and thus interpretation of EU law with the aim of achieving substantive equality. These experts seem to adopt a similar view on the relation between equal opportunities and equal treatment as in the above-referred academic writings, which imply an added value of the inclusion of the principle of equal opportunities in legislation and case law.

A different view is developed by the Greek expert in her interpretation of the link between the concepts of ‘equal opportunities’ and ‘equal treatment’ in Article 1 of the Directive. She submits that the concept of ‘equal treatment’ seems wider than the concept of ‘equal opportunities’, the latter being an aspect of the former and equal treatment is required regarding, *inter alia*, opportunities. In her view, the crucial and comprehensive concept, as in the other gender equality directives, is that of ‘equal treatment’, i.e. of ‘equality’ of men and women, in the sense of substantive equality. She recalls that the latter is an EU fundamental value and horizontal objective and a fundamental right (Arts. 2 and 3(3) TEU, Article 8 TFEU, Article 23 of the Charter) in all areas of EU jurisdiction, including, but not limited to, those covered by the Directive. She concludes that the addition of ‘equal opportunities’ to the title and Article 1 of the Directive seems a mere formality, probably due to Article 157(3) being the Directive’s legal basis. It does not seem to have any theoretical or practical implication for the principle that the Directive aims to implement or the scope or content of the Directive’s rules.

The German expert explains that in German constitutional doctrine, equal treatment and equal opportunities are both components of the overarching principle of equality, which is understood to cover formal and substantive equality. Equal treatment refers to the means by which equality is to be achieved, while the principle

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<sup>33</sup> See also S. Fredman, European Network of Legal Experts in the Field of Gender Equality, *Making Equality Effective. The role of proactive measures*, European Commission, December 2009, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm) (accessed 15 June 2011).

<sup>34</sup> E. Howard, ‘The European Year of Equal Opportunities for All-2007: Is the EU Moving Away From a Formal Idea of Equality?’, *European Law Journal*, Vol. 14, No. 2, p. 168-185, at p. 171.

of equal opportunities reflects the purpose of equality: it intends to ensure that women and men enjoy, in law and in fact, equal rights and freedoms. For this purpose, women do not only need the same rights as men (formal equality), but also need *de facto* equal starting conditions (substantive equality) so as to exercise their freedoms on an equal footing with men. This requires the abolition of discriminatory structures and stereotypes. From this perspective, neither ‘equal opportunities’ nor ‘equal treatment’ is preferable; both terms conflate. Therefore, the omission of the term equal opportunities in the German General Equal Treatment Act is not problematic.

It is submitted that the inclusion of the principle of equal opportunities in addition to the principle of equal treatment in the Recast Directive explicitly requires a broader and more pro-active interpretation of the purpose of the Directive. This view seems not only predominant among academic writers, but also among the national experts of the European Network of Legal Experts in the Field of Gender Equality. A specific reference to the principle of equal opportunities in national provisions and/or explanatory memoranda emphasises such interpretation, in addition to the required interpretation of the national provisions in conformity with the provisions of the Recast Directive (in particular, Article 1). However, at the end of the day, an interpretation of the concepts of equality, equal treatment and equal opportunities in a substantive way might amount to the same result as an explicit reference to ‘equal opportunities’ in national legislation.

The concept of equal opportunities is explicitly mentioned in the legislation of Bulgaria, Cyprus, Estonia, FYR of Macedonia, Greece, Iceland, Italy, Lithuania, Norway, Romania, Slovenia, Spain, Sweden, and the UK. In Austria, the provisions are aimed at realising *de facto* equality, which includes the concept of equal opportunities. Mentioning the principle of equal opportunities in legislation is seen as a step forward by the Icelandic expert, but this does not mean that specific measures are taken in practice. In two countries, a rather formal approach is followed, even if the concept of equal opportunities is mentioned (Lithuania and Malta).

Some problems might arise from the inclusion of definitions of the principle of equal opportunities. In Slovenia, for example, two different laws deal with equality between men and women. One deals with equal opportunities, the other one with equal treatment. Only one law was modernised in order to comply with several directives, including the Recast Directive. The definitions in both laws are now not the same and the legislation on the whole thus may lack the coherence required by the Recast Directive. In Romania, the definition of ‘equal opportunities between men and women’ tends to emphasise differences between men and women and could thus even reinforce stereotypes regarding the respective roles of men and women in society.

### 3.2.2. Gender reassignment

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

The national legislation of the following countries explicitly prohibits discrimination on the ground of gender reassignment: Belgium, Czech Republic, Greece, Hungary,<sup>35</sup> Norway, Slovakia<sup>36</sup> and the UK. Legislative proposals are

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<sup>35</sup> Discrimination on the ground of sexual identity is prohibited.

<sup>36</sup> Discrimination on the ground of sexual or gender identification is prohibited.

expected in Finland and Iceland. In Finland, the Equality Ombudsman has given guidelines on the matter and stated that until legislation on the matter is in place, the Act on Equality between Women and Men is to be applied to discrimination of all transgender persons, not only persons that have undergone gender reassignment.

As mentioned above, in some countries the prohibition of discrimination on the ground of gender reassignment is not (yet) explicitly included in national legislation, but such discrimination amounts to sex discrimination according to case law of either the ECJ<sup>37</sup> or national courts (e.g. Austria, Croatia, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, the Netherlands, Portugal and Spain). References to gender reassignment might be made in the explanatory memorandum of an implementing Act, a pending proposal or in discussions (e.g. Liechtenstein, Luxemburg and the Netherlands). When the list of prohibited discrimination grounds is not limited in national legislation, gender reassignment is probably also covered (e.g. Latvia, Poland, Romania and Turkey). The same is true when a ground of discrimination includes ‘personal circumstances’, as in Slovenia. The only country where discrimination on the ground of gender reassignment is not yet covered is FYR of Macedonia.

Sometimes, problems arise on the legal gender status of a transgender person and/or a person who is undergoing gender reassignment (e.g. in Austria). However, in some cases, the national courts provide a broad protection in the light of the European Convention of Human Rights and its interpretation by the European Court of Human Rights (ECHR). In Austria for example, surgical treatment is not required for obtaining a formal legal status (name) in the sex/gender desired.

On the contrary, in Croatia, the administration refuses to issue new identification documents reflecting the fact that a person reassigned their gender without a proof that that person underwent surgical gender reassignment.

In Malta, the right to marry after having undergone gender reassignment is problematic: the Constitutional Court has just held that no remedy exists under Maltese law for the refusal to permit a transgender person to marry,<sup>38</sup> and the relevant case now has to go before the European Court of Human Rights in Strasbourg. According to the Hungarian expert, transsexuals are still exposed to discriminatory situations as long as clear regulation of both medical and legal factors does not exist, even if gender reassignment surgery is available and it is possible to change the name and sex in the official registry.

In Lithuania, the question of gender reassignment is intensely debated. The Civil Code of 2000 for the first time introduced a right to gender reassignment surgery, but the corresponding special law was not adopted. The legal situation was condemned by the ECHR<sup>39</sup> in relation to a claim by a transsexual who was prevented from completing his gender transition. After the judgment, Lithuania decided to pay damages instead of implementing the new legislation on gender reassignment within three months, as ruled by the ECHR. According to the national expert, it is unlikely that such legislation will be adopted and a recent proposal even aims at repealing the provision on the right to gender reassignment surgery in the Civil Code.

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<sup>37</sup> See in particular Case C-13/94 *P v S and Cornwall County Council* [1996] ERC I-2143.

<sup>38</sup> *Joanne Cassar v Government of Malta*, Constitutional Court on appeal from Civil Court First Hall, 23 May 2011.

<sup>39</sup> ECHR Judgment of 11 September 2007, *L. v Lithuania*, Application no. 27527/03.

### 3.2.3. Definition of pay

Article 2(2) of the Recast Directive defines pay in the same way as Article 157(2) TFEU (first sentence). 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/her employment from his/her employer.

In most countries, the concept of pay is defined in national legislation and corresponds with this definition (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, France, FYR of Macedonia, Greece, Hungary, Iceland, Ireland, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, Spain and Turkey).

In Belgium, the legal definition of equal pay does not mention work of the same value. However, the updated Collective Agreement No. 25 (1975) on equal pay for male and female workers applies to the private sector and can serve as a handbook for equal pay, including for work of the same value.

In Romania, the concept of '*work of equal value*' is also defined as 'the paid activity that, following comparison basis of utilising the same indicators and the same measurement units with another activity, reflects the usage of similar or identical professional knowledge and skills, and performing of similar or identical work effort.' The concept of equal value is also defined in Croatian legislation. The criteria that can be taken into account include professional qualifications, skills, responsibilities, conditions under which the work is performed and whether the work is of physical nature.

In some countries, the lack of a legal definition of pay does not seem problematic (Estonia, Finland, Italy, Sweden and the UK). Even if the legal definition is not similar to the definition of the Directive in the Netherlands, no problems arise due to the interpretation by the national courts in line with ECJ case law. Differences between the EU definition and the national definition in Poland do not seem problematic either.

The German situation, on the contrary, presents some problems. The General Equal Treatment Act does not contain a definition of 'pay' and it does not explicitly lay down the principle of equal pay for the same work or work of equal value as reaffirmed in Article 4(1) of the Recast Directive. However, as that principle is already contained in European primary law and is directly applicable, the lack of a specific implementing provision does not constitute a legal lacuna. Nevertheless, according to the German expert, its lack is generally problematic as it contravenes the rule according to which European directives must be implemented in a way that results in a transparent set of legal norms. Moreover, the lack of a national provision equivalent to Article 4(1) also constitutes a violation of the prohibition of reducing the level of protection as laid down in Article 27(2) of the Recast Directive. This is so because Article 612a(3) of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*), which was repealed by the General Equal Treatment Act, expressly prohibited sex discrimination through payment of a lower wage for the same work or work of an equal value. The Act, however, does not contain a provision that clarifies that wage discrimination also extends to work of equal value. In addition, neither the General Equal Treatment Act nor any other statute contains a prohibition of sex-discriminatory job classification systems as required by Article 4(2) of the Recast Directive. Even though this prohibition is brought about by the direct applicability of primary EU law,

the lack of a specific provision violates the obligation to transpose directives in a transparent way.

In Latvia, the situation is problematic as well. Due to the lack of a definition of pay and the principle of equal pay, the national courts do not know which concept of pay they should apply: the concept as defined in Labour law or another concept? This even led to an incorrect ruling by the Supreme Court<sup>40</sup> regarding the concept of pay within the meaning of equal pay between men and women, which was later 'corrected'.<sup>41</sup>

#### *3.2.4. Occupational social security schemes*

Article 7(2) of the Recast Directive on the material scope of the provisions on equal treatment in occupational social security schemes incorporates some well-established case law of the Court of Justice of the European Union (ECJ). It reads:

This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

The national experts were invited to answer the question whether the implementing legislation on occupational pension schemes also covers pension schemes for a particular category of workers, such as public servants. In most countries, the material scope also covers a particular category of workers, such as public servants. This is the case in Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, FYR of Macedonia, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Turkey and the UK. In Liechtenstein and Romania legislative proposals on this issue are pending.

In a few countries, even if the occupational pension schemes also apply to particular categories of workers, problems remain. These concern, in particular, the nature of occupational pension schemes and the relation between different Acts and provisions. This is the case in Greece. According to the Greek expert, the provisions of the Act on occupational schemes mostly merely copy the Directive's provisions, without clarifying which Greek schemes are occupational. Moreover, these provisions are not linked to legislation predating the Act by five months, which provided for the equalisation of the conditions for granting pensions to men and women within certain transition periods. Therefore, the transposition of the Directive's provisions on occupational schemes does not create the legal certainty required by well-established ECJ case law, thus being rendered inadequate.

In Hungary, the Act on occupational pension schemes was adopted to comply with EU law, but this Act is hanging as an alien body in the legislation and not put in practice. Legislation adopted in order to implement this provision did actually not amend the existing text.

In Lithuania, discrimination on the grounds of sex, when establishing and applying social security provisions including those that amend or supplement the state social insurance system, is prohibited in the Equal Opportunities Act for Women and Men (EOAWM). However, the special laws on state pensions and public servants

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<sup>40</sup> Decision of the Supreme Court (3 July 2009) in case No.SCK-589/2009.

<sup>41</sup> Decision of the Supreme Court (15 December 2010) in case No.SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed on 1 April 2011.

state pensions were not amended accordingly. Public servants' pensions are covered but the principle of non-discrimination is provided not in the pension legislation itself, but in the EOAWM. In Croatia, the approach is partly similar. The Pension Insurance Act, the most important part of the pension law, does not prohibit sex discrimination. However, such a provision is included in another act regulating the mandatory and voluntary funding of pension funds and thus applies to fund membership. Different pensionable ages for men and women are also prohibited.

In some countries, Article 7(2) of the Recast Directive was not transposed (Iceland), or there were no specific amendments adopted in order to transpose this provision (Ireland and Malta). In Bulgaria, such schemes are part of the third and even fourth pillar of social insurance and hardly exist in practice. Such schemes supplement the voluntary private pension funds regulations and the participation is voluntary. Most of the sectors of the economy are not covered by occupational old-age schemes. In Latvia, occupational pension schemes are also scarce in practice. However, private insurances companies offer old-age insurance under life insurance schemes and employers use them as occupational schemes by providing such 'life-old-age' insurance to their employees. The problem lies in fact that Latvia has opted to retain differences in actuarial factors between men and women and such schemes seem to fall under Directive 2004/113/EC, not the Recast Directive. In addition, the implementing measures do not cover long-term service pension schemes applicable to certain categories of persons in service in the public sector, although they do qualify as occupational social security schemes.

In the Czech Republic, the Anti-discrimination Act implemented the provision on equal treatment in occupational social security schemes;<sup>42</sup> however, particular categories of workers such as public servants are not covered. In the relevant Italian legislation, the application of the principle of non-discrimination to public servants' benefits paid by reasons of the employment relationship (Article 7.2), which is the main issue of the ECJ decision in Case C-46/07,<sup>43</sup> is not mentioned at all. However, following this particular ECJ decision, the pensionable age of men and women in the civil servants sector has been equalised to 65 years as from 2012.<sup>44</sup> Nonetheless, the Decree fails to implement the Recast Directive regarding the pensionable age outside public employment, which is different for men and women.

### *3.2.5. Scope of horizontal provisions*

The so-called horizontal provisions of the Recast Directive in the Articles 17-22, such as defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, and dialogue with non-governmental organisations also apply to occupational social security schemes. In this Section, the question is addressed whether the national legislation implementing these Articles applies to the entire scope of the Directive, thus including the area of occupational social security schemes.

In most countries, Articles 17-22 of the Recast Directive have been transposed in the relevant legislation and apply to occupational social security schemes. This is the case in Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark,<sup>45</sup>

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<sup>42</sup> See on this issue Case C-41/08, *Commission v Czech Republic*, [2008] ECR I-175 (summary).

<sup>43</sup> Case C-46/07, *Commission v Italy*, [2008] ECR I-151 (summary).

<sup>44</sup> Act No.102/2009, as modified by Act No. 122/2010.

<sup>45</sup> However, some horizontal provisions are not explicitly mentioned. According to the expert, the principle that Danish law must be interpreted in conformity with underlying EU law (Article 4(3) TEU) is, however, so well established in Denmark that it probably doesn't make any difference.

Estonia, France, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Slovakia, Slovenia, Spain, Sweden and the UK. In Liechtenstein the pending proposal aims at such transposition. In Turkey, not all horizontal provisions have been transposed. For example, interest groups whose aim it is to help victims of discrimination or to combat discrimination have no access to the courts. In addition, there is no equality body yet and the role of social partners in the development of equality issues is negligible.

In some countries, the horizontal provisions do not apply to occupational social security schemes. The Finnish expert explains that although the prohibition of discrimination in the Act on Equality between Women and Men has a broad general scope, the provisions on judicial remedies (compensation) do not cover social security, to which in the Finnish way of thinking all statutory pension insurance schemes belong. While the alleged victim may be entitled to compensation on the basis of other legal provisions, such as the Tort Liability Act, these provisions are less advantageous to the victim. Therefore, the transposition of horizontal provisions on remedies and burden of proof in the Recast Directive is problematic concerning the public sector pensions. The remedies, procedures and compensation rules in cases involving discrimination related to public sector statutory pensions do not seem to fulfil the requirements of the Recast Directive. In the German legislation, the horizontal provisions do not apply to occupational pension schemes. The area of occupational pension schemes is explicitly excluded from the General Equal Treatment Act, while the Act on Occupational Pension Schemes (*Betriebsrentengesetz*, BetrAVG) does not contain rules reflecting the horizontal provisions (defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, dialogue with non-governmental organisations).

In FYR of Macedonia, problems arise in the area of the defence of rights, due to different provisions in different laws that are not coherent in the case of discrimination claims. In addition, the effectiveness of the Equality Body might be questioned. Governmental initiatives to further the social dialogue and the dialogue with non-governmental organisations on equality issues are lacking. Specific measures promoting the social dialogue are also lacking in Croatia.

The Irish legislation complies in general with Articles 17-22 of the Recast Directive. However, the Irish expert points at some difficulties, in particular in relation to compensation, when a ceiling of two years' remuneration applies in some cases in employment matters in first instance. It is submitted that this ceiling on compensation may not be in compliance with the Directive. In Latvia, a problematic issue concerns long-term service pensions, which are to be considered as occupational social security schemes. Administrative procedures apply and administrative courts are competent on occupational social security schemes. No specific national provisions apply in these cases, except the generally applicable provisions, concerning the defence of the rights and remedies as deriving from EU gender equality law. In Poland, it is not clear whether the horizontal provisions of the Recast Directive apply to occupational social security schemes. An explicit transposition of the horizontal provisions in relation to occupational social security could remedy the existing legal uncertainty.

The situation in Portugal is unique, as the Recast Directive has not been specifically transposed in relation to occupational social security schemes. Therefore it is submitted that the horizontal provisions of the Directive do not apply directly to occupational social security schemes. The national legislation on these issues is only included in the Labour Code and therefore applicable to labour relations, not to social



security relations. According to the expert, it is quite uncertain whether, for example, the reversal of the burden of proof and the intervention of equality bodies are transposed in the area of occupational social security schemes, at least throughout direct provisions in national law.

Two countries (Luxemburg and Romania) have not transposed at all the horizontal provisions of the Recast Directive in relation to occupational social security schemes.

### *3.2.6. Concept of positive action*

The concept of positive action as described in Article 3 has been broadened in its substantive field of application because the scope of the Recast Directive is broad and also includes occupational pension schemes. Recitals 21 and 22 are relevant in this respect:

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

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

The national experts were required to answer the question whether positive action measures are possible with respect to occupational pension schemes. Some experts remark that it is not clear what positive action in relation to occupational pension schemes would mean in practice (Ireland and the UK). The Norwegian expert suggest that an important measure would be an obligation imposed on the pension systems to provide annual reports on facts on the systems offered and thus reveal patterns that may constitute structural discrimination. This is already possible under the duty to monitor and report according to section 1a in the Norwegian Gender Equality Act. According to the Latvian expert, positive action in relation to occupational pension schemes would infringe the labour law's equal pay principle.

Having said that, in a majority of the countries subject to this report, the concept of positive action also applies to occupational pension schemes, at least in theory (e.g. the Netherlands). No specific restrictions in relation to occupational pension schemes exist in Austria, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Greece, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal,<sup>46</sup> Slovakia,<sup>47</sup> Slovenia, Spain, and the UK. Such possibility is also included in the pending proposal on the transposition of the Recast Directive in Liechtenstein. In Denmark, an interpretation in conformity with EU law would allow such positive action. In Croatia, positive action measures with respect to pension schemes would be possible, but would have to be explicitly defined by legislation.

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<sup>46</sup> However not explicitly, but it could be based on a Constitutional provision.

<sup>47</sup> Not on the ground of sex, but on the ground of 'social and economic disadvantage'.

In many countries, the concept of positive action does not apply to occupational pension schemes. This is the case in Cyprus, Germany, Hungary, Iceland, Ireland, Latvia, Lithuania, Romania and Turkey. In Sweden, different rules on positive action exist, but the rule opening up for positive action in the area of employment does not, however, apply to matters of 'pay or other terms of employment' including occupational pension schemes. Regarding public social security schemes, there is no rule on positive action on the grounds of sex but there is an exception rule permitting special rules on widow's pensions, wife's supplement or payment of child allowance. Such rules do exist to some extent, but only as transitory rules for small and well-defined groups. The anti-discrimination legislation of FYR of Macedonia allows positive action. However, as the relation between this law and other laws (among them the pension related laws) is unclear, it is hard to expect implementation of positive action measures to occupational pension schemes according to the expert.

### *3.2.7. Reconciliation of work, private and family life*

The issue of reconciliation of work, private and family life is explicitly mentioned in the some recitals and provisions of the Recast Directive. The following recitals are relevant in this respect:

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

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

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

In addition, Article 9(1)(g) stipulates that suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons that are granted by law or agreement and are paid by the employer is contrary to the principle of equal treatment. Finally, social partners should be encouraged to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life (see Article 21(2)).

The question addressed in this section is whether explicit references are included in national legislation transposing the Recast Directive on the issue of reconciliation of work, private and family life and whether these provisions had any other impact at national level. These questions are generally answered negatively by the national experts and the Recast Directive does not seem to have an impact on national law in this respect. Most provisions existed already or were adopted in line with national policies. This is the case in Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech

Republic, Denmark, Estonia, Finland, France, FYR of Macedonia, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Turkey and the UK. The same is true for the proposal aimed at transposing the Recast Directive in Liechtenstein.

In Latvia and Lithuania, a provision ensuring the right of an employee on maternity leave to benefit from any improvement in working conditions to which she would have been entitled during her absence because of maternity leave was inserted in the Labour Code. In Slovenia a general obligation is imposed on employers to enable an easy reconciliation of work and family life and allow flexible work arrangements. However, no provision to encourage the social partners to promote equality and flexible work arrangements in collective arrangements has been adopted. The same is true in Latvia.

Some national experts signal specific problems. In Belgium, Article 16 of the Recast Directive has not been fully transposed. The national provision that implements Article 16 does not offer protection against dismissal in relation to the right to paternity leave.

The Act transposing the Recast Directive in Greece contains several provisions on the reconciliation of work, private life and family life. Article 16 of the Act, under the title 'Return to work after maternity leave', mostly copies Article 15 of the Directive.

In Latvia, the right to adoption leave is only granted to one of the parents and no protection is afforded in case of suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer (Article 9(1)(g)). However, Article 149(6) of the Labour Law stipulates that after returning from any leave (including maternity, paternity, childcare and adoption leave) a worker is entitled to all improvements in working conditions.

The Maltese expert signals problems when maternity leave of a female teacher and summer holidays overlap. In such a situation, a female teacher cannot enjoy part of the holidays otherwise enjoyed by her colleagues.

### *3.2.8. Periodical assessment of exclusion regarding genuine occupational requirements*

According to Article 31(3) of the Recast Directive, Member States are obliged to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements. Only three countries have taken steps to comply with this obligation (Cyprus, the Netherlands<sup>48</sup> and the UK). In the Bulgarian and Estonian legislation, such obligation is included, but there is no information available whether the required assessment of the exclusions as regards genuine occupational requirements has been carried out. No public data are available on this issue for Austria and Hungary. In Portugal, the obligation to assess the exclusions only applies to the private sector, not to the public sector. In Bulgaria and the UK, specific attention has been paid to the position of women in the armed forces.

In two countries (Greece and Norway), no exceptions are allowed. An assessment is thus unnecessary. In France and Italy, there are only few exceptions and no assessment was carried out. No assessment took place either up to now according to the national experts in the following countries: Croatia, Denmark, Finland, FYR of

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<sup>48</sup> However, an evaluation and reporting, as required in Article 31(3) of the Recast Directive, seems not to have taken place after 2006.

Macedonia, Germany, Iceland, Ireland, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and Turkey. Such obligation is also not included in the proposal with the aim of transposing the Recast Directive in Liechtenstein. In Belgium, the Royal Decree that should define genuine and occupational requirements according to the Gender Act has not yet been adopted and no assessment has taken place. In Latvia, no provisions exist regarding particular 'male' or 'female' professions. Article 29(2) of the Labour Law merely states that sex may constitute determining occupational requirements.

### 3.2.9. *Judicial procedures*

In contrast to Directive 2002/73, which referred to 'judicial and/or administrative procedures (...) for the enforcement of obligations under this Directive', the Recast Directive requires that Member States ensure availability of judicial procedures, after possible recourse to other competent authorities. Thus, Member States no longer have a choice between administrative and judicial means, and need to ensure access to judicial procedures in any case (see Article 17 (1)). Let us, however, note that the disjunctive conjunction 'or' (which was absent in Directive 76/207) was inconsistent with well-established ECJ case law, which required an effective '*judicial remedy*', by virtue of the *general principle of effective judicial protection*. This principle confers on all persons 'the right to obtain an effective remedy in a competent court'.<sup>49</sup>

Access to judicial procedures is ensured as required by the Recast Directive in most countries (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey and UK).

However, experts point at different kinds of problems, in particular when different laws have not been harmonised. In FYR of Macedonia, parallel claims have to be lodged to different institutions, equality bodies and courts in order not to miss any deadline. In Greece, the procedural rules regarding the burden of proof and the *locus standi* of organisations are only included in the Act transposing the Recast Directive; they have not been inserted in the procedural codes, with the consequence that the specific rules of the gender equality directives remain unknown to judges, lawyers, organisations and individuals concerned, generally speaking. The provision on the burden of proof in the Maltese Act on Equality between Men and Women seems to put a higher onus on the plaintiff compared to the wording of Article 19(1) of the Recast Directive. The high costs of litigation form another threshold to start judicial procedures for individuals, in particular when free public legal aid is lacking (Norway, the UK). The long waiting periods for a hearing are also a problem (Ireland). The length of procedures is also a problem in Greece. In addition, provisions on the legal standing of organisations in Greece do not comply with the requirements of the Recast Directive (see Article 17(2)). The *consent* of the person wronged by violations of the gender equality legislation is required, not the *approval* as stipulated in Article 17(2) of the Directive. Under Greek law, approval might be given afterwards, while consent has to be given on forehand. Obtaining such consent might cost time, while there are often short time limits to file a complaint. The lack of compensation in social security issues in the Finnish Act on Equality is problematic as well. Finally, the proposal for the transposition of the Recast Directive in

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<sup>49</sup> Case 222/84, *M. Johnston v the Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663, points 17-21.

Liechtenstein still contains the choice between judicial and administrative procedures and therefore does not comply with the wording of Article 17(1) of the Directive.

### *3.2.10. Other novelties?*

Attention is paid in the national reports to some additional aspects related to the transposition of the Recast Directive. One aspect concerns the lack of protection of employees who return from maternity, adoptive or parental leave, in particular in the private sector. Dismissal might occur on return from leave when a reorganisation took place during the leave, the length of the maternity leave might then also play a role (Ireland). However, in Latvia, the requirement on gender mainstreaming is implemented formally, but not substantially. An example of the non-application of gender mainstreaming is the adoption of a Law on Remuneration on the State and Municipal Institutions, which provide for a uniform pay system in all the public sector, but excludes school teachers, who are mainly women.

On the contrary, in some countries, the protection of the horizontal provisions of the Directive has been extended in case of less favourable treatment related to pregnancy or maternity leaves, paternity or parental leave in national law (Italy, Poland). The Lithuanian Act on Equal Opportunities for Women and Men contains now definitions of direct discrimination and indirect discrimination in line with the Directive and the exception on genuine occupational requirement is amended. The prohibition of discrimination in Article 14(1)(d) in relation to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations, is now transposed in Estonia and Lithuania.<sup>50</sup> In some countries, amendments concern the equality body (Italy, Lithuania and Sweden). Protection against victimisation is enhanced in Italy by extending the scope of access to judicial remedies.

### *3.2.11. Additional problems*

The national experts point at diverse additional problems occurring in their country and the list of problems is in some reports rather long (FYR of Macedonia). In some countries, experts signal that there are problems with the burden of proof (Austria, Croatia, FYR of Macedonia, Hungary, Latvia and Slovakia). Often, the burden of proof is not regulated in a consistent manner (Croatia and Slovakia) and/or its application in practice poses problems (Croatia, FYR of Macedonia, Hungary, Latvia). The problem of rather short time limits exists in Cyprus. Anti-discrimination legislation is sometimes complicated and contains many exceptions (Czech Republic and Ireland). In Germany, a requirement of fault applies for a claim for compensation or reparation due to sex discrimination that is inconsistent with case law of the ECJ. In Italy, measures aimed at preventing discrimination are weak and the level of independence of the equality body is problematic.

## **4. Some conclusions**

Sex equality legislation certainly needed an update in order to harmonise provisions and to fill gaps with other anti-discrimination directives, particularly the so-called

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<sup>50</sup> This does not mean that in other countries this provision has not been transposed. Information is only available concerning these two countries on this point.

Race Directive (2000/43/EC)<sup>51</sup> and the Framework Employment Directive (2000/78/EC).<sup>52</sup> A first step was taken with the amended second Directive (2002/73/EC), and four years later with the Recast Directive (2006/54/EC). Meanwhile, a Directive on the principle of equal treatment between men and women in the access to and supply of goods and services was adopted (2004/113/EC). All these directives now have a similar format, which reflects the efforts of the EU institutions to harmonise the anti-discrimination legislation at the EU level. This certainly contributes to a more coherent codification of equal treatment law at the EU level.

At the national level, the impact of the transposition of the Recast Directive remains however rather limited. This is probably mainly due to the fact that the aim of this Directive was to bring together, modernise and simplify provisions of existing directives. Therefore many Member States assumed that they had already fulfilled their obligations under the directives that are part of the recasting exercise. In most of the countries that have transposed the Recast Directive, only a few ‘novelties’ or ‘clarifications’ have been explicitly transposed. Relevant national law has in most cases not been modernised and transposition was in some countries not considered necessary, due to the fact that earlier directives were already transposed. It should be recalled that the obligation to transpose the provisions of the Recast Directive is confined to those provisions that represent a substantive change. No list of such substantive changes was made available at the EU level and the correlation table falls short in this respect. Such changes had thus to be identified, requiring a close reading of all relevant provisions. In some countries, transposition was also not considered necessary when case law of the ECJ clarified an issue, for example, regarding the protection against discrimination on the ground of gender reassignment. When the transposition is linked to the transposition of other directives, it is sometimes difficult to assess the specific transposition of provisions of the Recast Directive. The obligation to transpose the Recast Directive offered an opportunity to improving equality law at national level, which however was not seized in the great majority of countries. This does not mean that no improvements at all took place, but these are generally speaking rather limited.

The national reports of the experts of the European Network of Legal Experts in the Field of Gender Equality illustrate how complicated the transposition process of various anti-discrimination directives is at the national level. Generally speaking, the Directive has been transposed in the 27 Member States, albeit in different ways and not always explicitly. National equality law became sometimes even more complicated, due to a lack of consistent transposition in all relevant acts. In a few countries, not all the provisions of the Recast Directive were transposed. Such incomplete transposition can be remedied by the application of the general rule that national law must be interpreted in conformity with EU law (see Article 4(3) TEU). This obligation applies to all Member States, but seems more commonly accepted by all legal actors in some Member States (e.g. Denmark) than in others. It should be noted that the nature of the obligations of the Member States is not always clear. This is the case for the value of the principle of equal opportunities, which is not defined in the Directive, in addition to the concept of equal treatment, for example. It is submitted that the inclusion of the principle of equal opportunities in the Recast

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<sup>51</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin *OJ L* 180, 19 July 2000, pp. 22–26.

<sup>52</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *OJ L* 303, 2 December 2000, pp. 16–22.

Directive explicitly allows a broader and more pro-active interpretation of the purpose of the Directive. At the national level, the interpretation of the concepts of equality, equal treatment and equal opportunities in a substantive way – even if there is no explicit reference to equal opportunities in national law – might amount to the same broader approach. The Recast Directive can then be seen as a dynamic instrument that promotes a more substantive approach to equality even if at first sight, its impact at the moment remains rather limited.





## Part II

### National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – *Neda Bei*

#### 1. Transposition of the Directive

##### 1.1. Transposition

As the legal standards on gender equality – essentially equal treatment legislation – in Austria, in principle, have been in conformity with EU law since 2004, a special transposition of the Recast Directive was not considered necessary. In other words, the Recast Directive was considered as transposed before 15 August 2008.

As to the amendment of the Federal Act on Equal Treatment entered into force on 1 August 2008,<sup>1</sup> the materials refer to the Recast Directive 2006/54/EC but parenthetically in the context of minor amendments to the provisions on harassment and on minimum rates for certain damages.<sup>2</sup> Thus, *Hopf/Mayr/Eichinger* resume in their commentary:

‘According to Article 33 para. 2 the Member States’ obligation to transpose [Directive 2006/54/EC] is limited to those provisions of the Directive which imply material changes in comparison to the former directives. So far the Austrian legislator did obviously not deem adjustments of the national equal treatment legislation to Directive 2006/54/EC (recast) necessary.’<sup>3</sup>

##### 1.2. Correlation tables

There was no explicit transposition of the Recast Directive. Austria has not drawn up and published tables (Recital 41; see 1.1. above).

#### 2. Novelties

##### 2.1. Purpose of the Directive

As Paragraph 2 of the Austrian Equal Treatment Act explicitly states that the provisions on gender equality are aimed at ‘de facto equality’ (*‘Gleichstellung’*) between women and men, which entails the principle of equal opportunities, this requirement has already been fulfilled by the amendment of the Equal Treatment Act OJ. No. I 66/2004, which was dedicated to the implementation of Directive 2002/73/EC.

It seems the principle of equal opportunities dates back to the 1970s and can be understood as a classically liberal concept (*Chancengleichheit*). Equal opportunities are put into effect when people have the same or comparable possibility to do or gain something, thus the notion seems to be limited to achieving mere equal possibilities,

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<sup>1</sup> OJ. No. I 2008/98.

<sup>2</sup> RV 415 BlgNR 23. GP 5.

<sup>3</sup> H. Hopf et al. *GlBG. Gleichbehandlung – Antidiskriminierung* Vienna, Manz 2009, p. 84.

not actually equal conditions. Furthermore, there is the well known question of the relation of the EU equality directives to CEDAW i.e. the question of interpreting EU law with the aim of achieving equality in a material sense.

## **2.2. Gender reassignment**

The prohibition of discrimination on grounds of gender reassignment has not explicitly been transposed. Such discrimination will be covered by interpretation in conformity with EU law and considered as discrimination on grounds of sex/gender according to the jurisprudence of the ECJ, specifically: Case C-13/94 *P v S and Cornwall County Council* [1996] ERC I-2143.<sup>4</sup>

However there are two problems. The scope of Article 14 Directive 2006/54/EC refers to employment and occupation. In practice, however, one of the most urgent questions the legal system has to answer is the personal legal gender status of transient or transgender persons especially while in transition.<sup>5</sup> Though this might be interrelated to employment, or to getting or keeping a job, it is clear that this is a legal issue on its own and discrimination occurring in this area is not covered by the Directive. Secondly the recent jurisprudence as well of the Austrian Constitutional Court<sup>6</sup> as of the High Administrative Court<sup>7</sup> surpasses the standards of the ECJ insofar as both Austrian Courts rule in accordance with the case law of the ECHR that surgical treatment is not required for obtaining a formal legal status (name) in the sex/gender desired.

## **2.3. Definition of Pay**

In principle, the definition has been covered by Austrian legislation since 1979, the original version of the Equal Treatment Act, OJ. No. 179 / 108. Although there is no legal definition of 'pay', the generally acknowledged concept of 'pay' (*Entgelt*) in Austrian labour law as developed by courts and academia is comprehensive and relevant to the interpretation of the Equal Treatment Act; it comprises any equivalent in money or in kind an employee receives for placing his or her labour (*Arbeitskraft*) at the employer's disposal.

## **2.4. Occupational social security schemes**

Actual entitlements to occupational social security schemes established according to the relevant legislation are considered as pay ('*thesauriertes Entgelt*').<sup>8</sup> Usually such

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<sup>4</sup> H. Hopf et al. *GLBG. Gleichbehandlung – Antidiskriminierung* Vienna, Manz 2009, p.203.

<sup>5</sup> The medical state of the art in Austria considers a year of psychotherapeutic assistance indispensable for deciding upon gender-assignment by surgical treatment; as to reimbursement of such a prescribed psychotherapy by social security see B. Karl 'Der krankenversicherungsrechtliche Leistungsanspruch psychisch Kranker', *DRdA 2006* pp. 152 ss. As to the recognition of social security benefits (pension) with retrospective effect see Supreme Court, OGH 21. 4. 2009, 10 Ob S 29/09a – rejection – § 261c ASVG, H. Ivansits 'Bonifikation einer Alterspension nach Geschlechtsumwandlung', *DRdA 2011* pp. 17 ss.

<sup>6</sup> VfGH 26.04.2011 B 42/10 RIS JFT\_09899574\_10B00042\_00; VfGH 3. 12. 2009, B 1973/08, VfSlg 18929/2009.

<sup>7</sup> VwGH 15. 9. 2009, 2008/06/0032; VwGH 17. 2. 2010, 2009/17/0263, ZfVB 2010/1407 (No. 5/2010) p. 863.

<sup>8</sup> Enterprise Pension Act (*Betriebspensionsgesetz – BPG*), OJ. No. 282/1990 as amended in 2005, Article 8 Federal Act OJ. No. I 8/2005 transposing Directive 2003/41/EC; Pension Scheme Act (*Pensionskassengesetz – PKG*), OJ. No. 281/1990 as amended. See: O. Farny & J. Woess *Betriebspensionsgesetz Pensionskassengesetz*, Vienna, ÖGB-Verlag 1992, p.37; R. Resch, *Betriebspensionsgesetz – BPG*, in: M. Neumayr & G.P. Reissner (eds) *Zeller Kommentar zum Arbeitsrecht* pp. 1349 – 1405 (1350 ss.), Vienna, Manz 2006.

occupational pension schemes covering the risks of age and incapacity to work are based on collective agreements between the employers' and employees' representatives, either at the sector or plant level, or via individual agreements. All these agreements provide for promises of benefits, which usually are based on the length of employment. Legislation implementing Directive 2004/113/EC in the insurance sector applies to occupational pension and social security schemes.<sup>9</sup> Accordingly 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. Since 1990 § 18 of the Enterprise Pensions Act provides for a general principle of equal treatment for employees or groups of employees and it forbids arbitrary and non-justified differentiations.

The social security systems for civil servants of the federal government and the provincial governments are part of the second pillar as the pension payments to civil servants are considered to be 'pay' within the meaning of the case law of the ECJ. 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 regarding either the sex of the civil servant or 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 caregiver for a maximum period of 48 months – equally for female and male civil servants.

### ***2.5. Scope of horizontal provisions***

As entitlements to occupational pension and social security schemes are considered as pay, Austrian equal treatment legislation covers, in principle, the entire scope of the Directive.

### ***2.6. Concept of positive action***

Based on Paragraph 8 of the Austrian Equal Treatment Act, the concept of positive action has applied to all areas of the labour market since 2004. Positive action measures with respect to occupational pension schemes are therefore possible.

### ***2.7. Reconciliation of work, private and family life***

The provisions of the Recast Directive about the reconciliation of work, private and family life are not comprehensive. The aspects covered by Articles 15 and 16 can be considered as transposed by previous Austrian legislation.

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<sup>9</sup> Insurance Contract Act (*Versicherungsvertragsgesetz – VersVG*), OJ. No. 2/1959 as amended in 2006, OJ. No. I 95/2006; Insurance Control Act (*Versicherungsaufsichtsgesetz – VAG*), OJ. No. 569/1978 as amended in 2006, OJ. No. I 95/2006; *Versicherungsrechts-Änderungsgesetz – VersRÄG* 2006, OJ. No. I 95/2006 with explicit reference to Directive 2004/113/EC.

### **2.8. Periodical assessment of exclusions regarding genuine occupational requirements**

The obligation to assess and to report to the Commission about the exclusions from the application of the principle of equal treatment between men and women regarding genuine and determining occupational requirements has not been enacted in equal treatment legislation. As this provision is applicable only between the state and the EU and it does not constitute an individual right, the state assumes that there is no legal necessity to transpose this into law. As to the de facto compliance by the competent Austrian authorities, there are no public data available.

### **2.9. Judicial procedures**

In conformity with Article 17(1) of the Directive, access to judicial procedures in any case is guaranteed in Austria. Rights provided for by equal treatment legislation are considered to be civil rights within the meaning of Article 6 European Convention on Human Rights (ECHR) which is incorporated into the Austrian Federal Constitution; in principle access to courts in equal treatment matters had been guaranteed since 1979, though explicit grounds for actions were not introduced into equal treatment legislation before 1990 and 1992 (implementation of earlier directives). Actually Article 6 ECHR, making the access to courts mandatory, is the reason why administrative equality bodies (the Equal Treatment Commission) cannot give but unenforceable opinions, which can not stand against a *res iudicata* by courts.

As entitlements to occupational pension and social security schemes are considered as pay (and therefore as civil rights within the meaning of Article 6 ECHR) individual employees may take action before courts and/or take complaints to the Equal Treatment Commission. Insofar as occupational pension or social security schemes are based on collective agreements, the partners of these agreements may seek legal redress by the courts and/or by arbitration (*Einigungsamt*); furthermore, workers' representatives may inform the financial authorities that monitor occupational insurance schemes.

### **2.10. Other novelties?**

As there has been no explicit transposition of the Recast Directive, there is no visible impact of this Directive in Austria.

### **2.11. Additional problems**

The issue of burden of proof is a persisting problem. Austrian equal treatment legislation provides for a balance of probabilities on both sides. Some experts hold the opinion that this kind of legislation was not in conformity with the wording of the earlier directives and the case law of the ECJ which required full proof by the employer or by the alleged perpetrator of a discrimination. The Austrian Federal Ministry of Justice has always been very firm about the proof by probability being sufficient and in conformity with Community Law.

Another persisting problem is the dialogue with non-governmental organisations. Regrettably, Article 22 of the Directive is a rather vague provision and offers no help to institutionalise or promote such a dialogue.

## 1. Transposition of the Directive

### 1.1. Transposition

Formally, the Directive hardly seems to have been transposed into the Belgian legislation as neither the new federal ‘Gender Act’ of 10 May 2007, explicitly aimed at transposing the whole set of EU Directives concerning gender equality within the federal jurisdiction, nor the new *decreet* of the Flemish Community and Region and *ordonnances/ordonnanties* of the Brussels Capital Region refers to Directive 2006/54/EC. Only the latest bits of legislation (the *décrets* of the Walloon Region and the French-speaking Community) finally did so. As to the German-speaking Community, its *Dekret* of 2004 remained unamended.

The explanation of such deficiencies lies either in carelessness or in cumulative misunderstandings. The various authorities only realised very late that Directive 2002/73 had to be implemented, and finally started focusing on that task. In the case of the Federal Act, the draft was written before Directive 2006/54 appeared in the *Official Journal*, but the federal Government could easily have amended the text to include a reference to Directive 2006/54 while the bill of law was discussed in Parliament. It is also possible that Directive 2006/54 was dismissed as a mere exercise of consolidation, not worth any particular notice.

*Substantively*, quite a good deal of attention was paid at the federal level to the transposition of Directive 2002/73 and to the case law of the ECJ. Consequently, one may consider that the Recast Directive has been transposed by the federal parliament. As to the federate authorities, the reference to EC law is more dutiful than enthusiastic, and copying the federal legislation was evidently regarded as a safe way to perform the duty.<sup>10</sup>

### 1.2. Correlation tables

As the Gender Act does not refer formally to Directive 2006/54 (see above), there is no such correlation table, nor even with the ‘unrecast’ directives.

## 2. Novelties

### 2.1. Purpose of the Directive

The differences between the two notions ‘equal treatment and equal opportunities’ are far from clear. As to the transposition, the whole set of legislation of 10 May 2007 is aimed at ‘combating discrimination’; unlike the previous acts aimed at implementing EC gender legislation (Acts of 4 August 1978 and 7 May 1999), the word ‘equality’ is hardly used at all, except in the references to the Directives. On the other hand, the Mainstreaming Act of 12 January 2007 mentions ‘the promotion of equality between men and women’.

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<sup>10</sup> Relevant legislation: federal: Gender Act of 10 May 2007; Flemish Community and Region: *decreten* of 8 May 2002 and 10 July 2008; German-speaking Community: *Dekret* of 17 May 2004; Brussels Capital Region: *ordonnances/ordonnanties* of 4 September 2008; Walloon Region: *décret* of 6 November 2008; French-speaking Community: *décret* of 12 December 2008; all available (in French and Dutch) on <http://www.juridat.be>, accessed on 11 April 2011.

## **2.2. Gender reassignment**

Adverse treatment related to gender reassignment is prohibited as direct discrimination (Article 4(2) of the Gender Act). Actually, the ECJ's stand in *Cornwall* C-13/94 [1996] had already been included in the previous Act of 7 May 1999.

## **2.3. Definition of Pay**

The Gender Act (Article 6(2)) transposes the Directive adequately, except for the mention of work of the same value, which has been forgotten. Given the extremely desiccated style of the Act, it is fortunate that the social partners decided to update their Collective Agreement No. 25 (1975) on equal pay for male and female workers by way of Collective Agreement No. 25ter of 9 July 2008. Although it is only applicable in the private sector, the new Collective Agreement can serve as a handbook for equal pay, including for work of the same value.

## **2.4. Occupational social security schemes**

The Act of 10 May 2007 (Article 6(3)) contains a carbon copy of the relevant provisions of the Directive (however, see 4 below.). Also, the Occupational Pension Schemes (Employees) Act of 28 April 2003 complies with the Directive.

As to civil servants, there is an obvious formal contradiction between Article 7(2) of the Directive and the Gender Act, although this probably induces no practical effect. There is unanimity in Belgian legal opinion to regard the statutory pension schemes for tenured staff members of the public services, all of which are based on the 'Civilian and Ecclesiastical Pension Act' of 21 July 1844 (this is no typographical error) as statutory social security. Such an analysis has been adopted in the Gender Act (Section 14 of Article 5) quite deliberately, as the ECJ's contrary case law (in Case C-7/93 *Beune* [1994], etc.) was well known. However, given that all the general provisions of the Act are horizontal, no negative effect on the defence of a claimant's rights (including dependant's rights such as a survivor's pension) is possible.

## **2.5. Scope of horizontal provisions**

Indeed, all relevant provisions of the Gender Act are fully horizontal.

## **2.6. Concept of positive action**

Article 16 of the Gender Act is a horizontal provision and as such is applicable to occupational pension schemes as well.

## **2.7. Reconciliation of work, private and family life**

The Gender Act makes no reference to the issue of reconciliation. Indeed, Article 16 of the Directive remains without transposition concerning the paternity leave, given that Article 30 of the Employment Contracts Act of 3 July 1978, which introduced a right to a 10-day paternity leave, does not provide for a protection against dismissal, as required by Article 16 of the Directive. The Gender Act failed to remedy this defect.<sup>11</sup>

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<sup>11</sup> A proposal for an amendment to Article 30 has been adopted by the House of Representatives (first House of the federal Parliament) on 7 April 2011; the promulgation is expected: *Parliamentary Documents*, n°53/0632, available (in French and Dutch) on <http://www.lachambre.be> or [www.dekamer.be](http://www.dekamer.be), accessed on 6 June 2011.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

While Article 13 (1) of the Gender Act allows that a ‘direct distinction grounded on sex’ may be justified by genuine and determining occupational requirements, Article 13(3) provides that the latter must be defined by a Royal Decree. Four years after the Gender Act came into force, no such decree has yet been adopted, so that ancient regulations (Royal Decrees of 8 February 1979, 9 November 1984 and 29 August 1985) based on the first gender equality legislation, the Act of 4 August 1978, are still applied, although their validity seems questionable.

With such a background, the failure to transpose Article 31 (3) of the Directive in the Gender Act is certain, yet slightly abstract.

## ***2.9. Judicial procedures***

Access to judicial procedures in all cases falling within the scope of the Directive has been guaranteed since the first Act of 4 August 1978. The only issue worth mentioning under this Section concerns the division of jurisdiction between the judiciary courts (i.e., the Labour Courts) and the *Conseil d'État* (administrative Court); some care was taken to make it clear in the Gender Act that a claimant may rely on this Act before the *Conseil d'État* as well as before the Labour Courts.

## **3. Additional information**

The failure of the federal government to adopt ancillary Royal Decrees on ‘gender as a necessary requirement’ and on positive action keeps hampering the effective application of the Gender Act.

# **BULGARIA – Genoveva Tisheva**

## **1. Transposition of the Directive**

### ***1.1. Transposition***

According to expert opinions,<sup>12</sup> the Recast Directive was not fully transposed in Bulgaria before 15 August 2008.

Pursuant to the statement of the Bulgarian Government, the Recast Directive was fully transposed into Bulgarian law by this date, with the exception of Article 15 ‘Return from maternity leave’. Due to this positive self-assessment, no real measures for further transposition were taken, except for this particular provision. The transposition of this article was ensured by January 2009, through amendments of the Labour Code and of the Protection against Discrimination Act (PADA).

As a whole, the compliance and transposition are ensured through the provisions of the PADA, the Labour Code, and the Code on Social Insurance.

No transposition efforts have been made by the Bulgarian Government for the harmonisation with the provisions of Title III Chapter 2 ‘Promotion of equal-treatment dialogue’. This challenge has been systematically avoided by the Bulgarian Government due to its reluctance to adopt a special law on gender equality. According to expert opinion from women’s NGOs, there is no compliance with the provisions related to the equality bodies under Article 20 of the Directive.

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<sup>12</sup> Experts from the Bulgarian Gender Research Foundation.

Another area of non-implementation is in occupational social security schemes envisaged in the Recast Directive. Despite the provisions for such schemes in the Bulgarian Code on Social Insurance, they are not of the type existing in the EU and are not developed at all in practice.

### ***1.2. Correlation tables***

Tables illustrating the correlation between this Directive and the transposition measures were drawn up within the Ministry of Labour and Social Policy as a result of the work of a special working group for assessing compliance by August, 2008. The tables have not been made public yet, although they can be made available to experts interested in the issue.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The notion of ‘equal opportunities’, along with ‘equal treatment’ already exists in the PADA (in force since January 2004) and its adoption is not related to the transposition of the Recast Directive. According to Article 2 of the PADA, achieving equal opportunities is one of the objectives of the law. The PADA constitutes the general framework of anti-discrimination, so it should be applicable also to all fields of employment and occupation.

In the field of the provisions on the specific types of occupational social security schemes in Bulgaria, the principle of non-discrimination is explicitly stipulated in Article 231 of the Code on Social Insurance. In case of insurance under professional scheme any discrimination – direct or indirect, on the grounds of sex, especially with regards to the marital or family status – shall also be prohibited, in particular to:

1. the application scope of the schemes and the terms of access to them;
2. the obligation for deposition of the insurance payments and their calculation;
3. the calculation of the pension payments, including the increase, due to spouses and persons, entitled to maintenance, and the conditions, determining the duration and the retention of the right of pension payment.

The fact that the principle of ensuring equal opportunities is imbedded in the general legislation shows the potential (though it is not yet used enough) for providing for different types of positive action, where needed. Theoretically, but also in practical terms, it can make the basis for conceptualising and adopting special legislation on gender equality in order to be in full compliance with the Directive.

### ***2.2. Gender reassignment***

Bulgarian legislation does not contain any specific reference to the application of the principle of equal treatment to cases of gender reassignment.

### ***2.3. Definition of Pay***

Article 14 paragraph 2 of the PADA provides that equal pay shall apply to all remuneration paid directly or indirectly, in cash or in kind. The provision, as whole, is in compliance with the definition of the Directive, although instead of ‘the ordinary basic or minimum wage or salary and any other consideration’ the Bulgarian law relates the notion of ‘pay’ with just ‘remuneration’.



#### ***2.4. Occupational social security schemes***

The Bulgarian legislation does not provide for occupational social security schemes of the type of those regulated and practised in the EU, as part of the second pillar of social security. In the chapter of the Code on Social Insurance ‘Funds for additional voluntary pension insurance’ (Article 214 and following) the occupational social security schemes are regulated as one of the types of this additional voluntary pension insurance. So in Bulgaria such schemes are part of the third and even fourth pillar of social insurance. The practice of occupational old-age pension schemes is still very limited. It was introduced in Bulgarian legislation as a result of the accession process and supplements the voluntary private pension funds regulations. The participation is voluntary. Most of the sectors of the economy are not covered by occupational old-age schemes.

Using the sex as an actuary factor when estimating the amount of the lifetime pension shall be allowed, provided that the pension insurance company uses reliable and regularly updated public statistical information, in which the determining significance of the sex is obvious.

At present there is no public information on collective agreements starting and regulating an occupational scheme. Civil servants are covered by the PAYG / Pay-As-You-Go / pillar of the social insurance system and the contributions are paid by the state.

#### ***2.5. Scope of horizontal provisions***

As a matter of principle, the horizontal provisions shall apply to all corresponding spheres of employment and occupation, targeted in the Directive. There is no exclusion explicitly provided. Although in practice these provision cannot yet apply to the occupational social security schemes in Bulgaria.

#### ***2.6. Concept of positive action***

The concept of positive action in view of the promotion of equality of women and men in working life existed in Bulgarian legislation before the Recast Directive was adopted. This principle makes part of the general anti-discrimination law and is valid for all spheres of social life. The sphere of the occupational social security schemes is not excluded, but for the reasons mentioned above, it has no practical application.

#### ***2.7. Reconciliation of work, private and family life***

There are no explicit references to this issue in the national legislation. Reconciliation is mentioned in the policy documents related to gender-equality strategies, programmes, and plans of action.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The obligation for such an assessment every three years had already been included in the Law on Protection from Discrimination, prior to the Recast Directive.

There is no such practice established, though. Despite that, it is worth noting that at the end of 2010, the limitations for women in positions in the armed forces were removed, as the respective regulatory act was repealed by the Minister of Defence. This was not the result of a process of regular assessment, but clearly of the pressure of civil society – through a discrimination case brought by two female law students claiming they would like to become part of the National Guard.

## **2.9. Judicial procedures**

As provided in the Directive, access to judicial procedures is ensured in all cases.

### **CROATIA – Goran Selanec**

## **1. Transposition of the Directive**

### **1.1. Transposition**

Although Croatia is not an EU Member State, the Directive 2006/54/EC has been transposed into the Croatian legal system during the process of EU accession negotiations. The most important law in that regard has been the 2008 Sex Equality Act (SEA) that transposed most of the Recast Directive provisions.<sup>13</sup> In addition to the SEA, the 2006/54 Directive is also transposed through the 2009 Labour Code (LC)<sup>14</sup> and the 2008 Elimination of Discrimination Act (ELD).<sup>15</sup>

### **1.2. Correlation tables**

Croatia has not drawn up and published the Recital 41 tables illustrating the correlation between this Directive and the transposition measures.

## **2. Novelties**

### **2.1. Purpose of the Directive**

The purpose of the 2006/54 Directive explicitly aiming for the implementation of the principle of equal opportunities in addition to the principle of equal treatment of men and women in matters of employment and occupation, has been reflected to some extent in the Croatian implementing legislation. Article 5 SEA explicitly states that sex equality entails that women and men are equally present in all areas of social life, have equal status and equal opportunities to effectively realise all rights and equal benefits from the achieved results. The Article 5 definition is a strong expression of the substantive conception of sex equality. Equality is not reduced to consistent application of the same standards of treatment on men and women. Rather, it requires deliberate action aiming at results that will guarantee real-life equality of women. In practical terms, the emphasis on the notion of equality of opportunities should allow a broader scope for positive-action measures. Moreover, the stronger emphasis on the equality of opportunities calls for a more thorough reassessment of the extent to which existing evaluation criteria and distribution standards in employment reflect a particular view or lifestyle favourable to the male gender. It would particularly be desirable if this explicit attention given to equality of opportunities led to more effective measures aiming to ensure balanced distribution of childcare responsibilities between men and women. There are several practical implications of this normative approach found in the Croatian legislation. First, SEA provides a wide scope for positive action. Furthermore, it requires all levels of government to consider the practical effects of their decisions and actions on the social position of women in the

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<sup>13</sup> Zakon o ravnopravnostipolova, NarodneNovine br. 82/08 [Sex Equality Act, Official Gazette no.82/08].

<sup>14</sup> Zakon o radu, NarodneNovine br. 149/09 [Labor Act,Official Gazette no. 149/09].

<sup>15</sup> Zakon o suzbijanju diskriminacije, Narodne Novine 85/08 [Elimination of Discrimination Act, Official Gazette no. 85/08].

society. In addition to employment, special attention is also given to the manner in which media and education shape public perception of women and their position in Croatian society. Unfortunately, Croatia has not paid sufficient attention to the issue of inequality of the traditional distribution of childcare responsibilities between men and women.

## **2.2. Gender reassignment**

Croatian sex equality legislation did not explicitly ensure that prohibition of discrimination based on sex applies also to discrimination arising from gender reassignment. However, Article 4 SEA explicitly prohibits any interpretation of the sex-equality guarantees contrary to their meaning in the EU legal order. At the same time, there have been reports concerning problems in applying the transposed sex-equality guarantees to cases of gender reassignment. The Croatian administration is refusing to issue new identification documents reflecting the fact that a person reassigned their gender without a proof that that person underwent a sex-change operation.

## **2.3. Definition of Pay**

The definition of 'pay' introduced in Article 2(e) of the 2006/54 Directive is incorporated, almost word-for-word, into Article 83(3) LC. Moreover, the LC elaborates the meaning of the terms 'equal work' and 'work of equal value'. In that sense Article 83/2 provides that *'two individuals of a different sex perform equal work or work of equal value if: 1) they perform the same job under the same or similar conditions or they can replace each other in relation to the job that they perform; 2) the work one of them performs is of a similar nature to the work performed by the other and differences between the performed jobs and the conditions under which they are performed are of no relevance in light of the nature of the job on the whole or they occur so rarely that they do not affect the nature of the job on the whole; 3) the work performed by one of them is of equal value as the work performed by the other taking into account criteria such as professional qualifications, skills, responsibilities, conditions under which the work is performed and whether the work is of a physical nature.'* In addition to the Labour Act, the guarantee of equal pay between the sexes can be found in Article 13/1/4 of the SEA. A general equal-pay guarantee is also provided by Article 10 of the State Officials Act.

## **2.4. Occupational social security schemes**

There are no special pension schemes for special categories of workers. The existing legislation regulating pension schemes applies to all workers in the public and private sectors. Antidiscrimination guarantees provided by the SEA apply to all areas of social life including the pension schemes. Unfortunately, the Pension Insurance Act, as the most important part of the pension law, does not include the sex equality guarantee.<sup>16</sup> However, the Act on Mandatory and Voluntary Pension Funds (MVPFA) explicitly prohibits any type of direct or indirect discrimination on grounds of sex in relation to fund membership.<sup>17</sup> The sex-based differences as regards pensionable ages

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<sup>16</sup> Zakon o mirovinskom osiguranju, Narodne Novine 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07 [the Pension Insurance Act, Official Gazette no. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 92/05, 43/07].

<sup>17</sup> Zakona o obveznim i dobrovoljnim mirovinskim fondovima, Narodne Novine 49/99, 63/00, 103/03, 177/04, 71/07 [Mandatory and Voluntary Pension Funds (MVPFA), Official Gazette no. 49/99, 63/00, 103/03, 177/04, 71/07].

are explicitly prohibited by Article 111/7 and 111/8 of the MVPFA as well as Article 28a of the Pension Insurance Associations Act.<sup>18</sup>

### ***2.5. Scope of horizontal provisions***

Horizontal provisions in Articles 17-22 of the Directive (defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, dialogue with non-governmental organisations) are incorporated into the SEA and the ELD. Both acts apply to almost every area of social life, including the area of occupational social security schemes. Consequently, the Directive's horizontal provisions have been given a wide scope of application in the Croatian legal system. The defence of rights guarantee has been implemented through Article 17 EDA. Article 17 provides four different judicial complaints available to individuals who believe they were discriminated against. The compensation of damages guarantee has been transposed through the Law on Obligatory Relations (LOR). LOR allows financial compensation of damages caused by discrimination. However, it does not explicitly provide that the compensation must be 'real and effective' or 'dissuasive'. At the same time, SEA provides that no sex equality guarantee can be interpreted opposite to EU sex equality acquis. The burden of proof guarantee has been implemented both through Article 30(4) SEA and Article 20 EDA. It applies in any judicial proceeding based on one of the available discrimination complaints regardless of the benefit at stake. There are no specific national provisions explicitly transposing the 2006/54 Directive provisions on social dialogue and dialogue with NGOs. However, there is nothing in the Croatian legal system preventing the implementation of these provisions. So far, there have been no specific measures promoting a dialogue with labour unions or NGOs in the sense of Directive's Articles 21 and 22.

### ***2.6. Concept of positive action***

The SEA includes the special chapter on positive measures (Chapter III – Arts 9-12). Article 9 defines positive measures as specific benefits granted to members of a specific sex aiming to ensure equal participation in public life, remove existing inequalities or secure rights that were denied to them. They are introduced on a temporary basis and cannot be considered as constituting discrimination. Although this is not explicitly stated, Article 9 can easily accommodate positive-action measures involving sex-related preferences and/or quotas. The Chapter III SEA is also applicable with respect to occupational pension schemes. However, any positive action measure with respect to pension schemes would have to be explicitly defined by legislative act.

### ***2.7. Reconciliation of work, private and family life***

Although the issue of reconciliation of work, private and family life is explicitly mentioned in the 2006/54 Directive (Recitals 11, 26, 27 and Article 9(1)(g) and Article 21(2)) there are no explicit references to this issue in Croatian legislation transposing the Recast Directive. It is fair to say that these provisions had no impact in Croatia.

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<sup>18</sup> Zakon o mirovinskim osiguravajućim društvima i isplati mirovina na temelju individualne kapitalizirane štednje, Narodne Novine 106/99, 63/00, 107/07. [Act on pension insurance associations and payment of pensions based on individual capitalized saving, Official Gazette No.106/99, 63/00, 107/07].

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Not applicable to Croatia at this point.

## ***2.9. Judicial procedures***

The Croatian legal system provides a rather favourable access to courts to the victims of discrimination. Victims of discrimination are offered a choice. They can bring discrimination claims in the proceedings regarding the protection of some separate right violated by discriminatory behaviour. However, they are also offered protection through specially designed antidiscrimination proceedings. In such proceedings, a plaintiff can ask the court to 1) declare that her right to equal treatment was violated; 2) prohibit actions that violate or threatens to violate her right to equal treatment; 3) determine the compensation for material and immaterial damages; and/or 4) order the defendant to publish the ruling in media (Article 17 EDA). These claims can be filed independently or cumulatively. In principle all discrimination claims will be decided before the civil courts. Of course, if a plaintiff desires to use the offered protection of the misdemeanour law it will have an access to the misdemeanour courts.

Furthermore, the SDA offers standing not only to the victims of discrimination. There are two situations in which the SDA grants standing to any institution or organisation, public or private, dealing with the protection of the right to equal treatment between men and women. First, such organisations are granted standing as a ‘supporting’ party in the antidiscrimination proceeding. In such cases they are can operate only within the framework of the plaintiffs claim. Second, they are granted a right to file the so-called ‘joint’ complaint. If they can demonstrate that their claim is probable this instrument allows them to sue those individuals who discriminated more than one person.

## ***2.10. Other novelties?***

There are no other novelties related to the Recast Directive.

## ***2.11. Additional problems***

Unfortunately, distribution of the burden of proof in antidiscrimination proceedings is not consistently regulated in Croatian law. On the one hand, the SEA provides that the burden of proof shifts to respondent once the plaintiff presents the facts justifying a suspicion that discriminatory treatment occurred. However, the SDA provides that the plaintiff has an obligation to demonstrate that it is *likely* that discrimination occurred. Only at this point the burden of proof shifts to the defendant. Such a high threshold threatens to make this guarantee redundant and it is hardly consistent with the requirements of Article 19 of the 2006/54 Recast Directive. Furthermore, the Croatian courts have been rather sceptical towards this guarantee so far. Dominant view among Croatian courts is that the burden of proof requirement is not particularly useful since courts have a duty to decide disputes based on ‘their own judgment of which facts they consider to be proven according to their persuasion, on the basis of conscious and careful evaluation of every evidence individually and all evidences taken together and on the basis of the result of the whole procedure.’<sup>19</sup>

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<sup>19</sup> See Decision of the Croatian Supreme Court No. Revr 350/09-2 dated July 16, 2009.

### 3. Additional information

There is no other additional information that is relevant with regard to the transposition of the Recast Directive 2006/54.

## CYPRUS – *Lia Efstratiou-Georgiades*

### 1. Transposition of the Directive

#### 1.1. Transposition

The following amendment Laws and Regulations transposed into national legislation the provisions of Recast Directive 2006/54/EC, which is related to the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation:<sup>20</sup>

1. Law No. 38(I)/2009 (basic Law on Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed, No. 177(I)/2002);
2. Law No. 39(I)/2009 (basic Law on Equal Treatment of Men and Women as regards Access to Employment and Vocational Training, No. 205(I)/2002);
3. Law No. 40(I)/2009 (basic Law on Equal Treatment of Men and Women in Occupational Social Insurance Schemes, No. 133(I)/2002); and
4. Regulations 176/2009 for the Provision of Independent Assistance to Victims of Discrimination (under Articles 23(2)(a) and 34 of Law No. 205(I)/2002 and Law No. 39(I)/2009 respectively).

#### 1.2. Correlation tables

Cyprus has drawn up and published tables illustrating the correlation between the Directive and the transposition measures only with regard to Law No. 205(I)/2002.

### 2. Novelties

Law No. 38(I)/2009 (basic Law on Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is Attributed, No. 177(I)/2002) does the following:

1. replaces/amends the definitions of ‘direct’ and ‘indirect’ discrimination, of ‘discrimination on the ground of sex’, of ‘pay’ and of ‘group of companies’;
2. prohibits discrimination in pay between the two sexes;
3. extends the comparison of pay between workers in companies of the same group if there is no comparable worker in the same company;
4. encourages the giving of information by the employers to the employees or their representatives regarding salaries and differences in salaries in the various levels of the company; and
5. provides independent assistance to victims of discrimination.

Law No. 39(I)/2009 (basic Law on Equal Treatment of Men and Women as regards Access to Employment and Vocational Training, No. 205(I)/2002) does the following:

1. clarifies the definitions of ‘direct discrimination’, ‘indirect discrimination’ and ‘discrimination on the ground of sex’;

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<sup>20</sup> Also see: [www.cygazette.com](http://www.cygazette.com), on 20 April 2011.

2. ensures the principle of equal treatment of men and women in participating in workers' and employers' organisations and in the benefits provided by such organisations,
3. clarifies the provisions relating to judicial and/or administrative protection and the reversal of the burden of proof;
4. provides that all the above provisions apply even in cases where the employment relation has ended; and
5. improves the composition of the Gender Equality Committee in Employment and Vocational Training and makes it more independent so as to enable it to provide independent assistance to victims of discrimination.

Law No. 40(I)/2009 (basic Law on Equal Treatment of Men and Women in Occupational Social Insurance Schemes, No. 133(I)/2002) does the following:

1. replaces/amends the definitions mentioned in Law No. 38(1)/2009 above; and
2. replaces the definition of 'Occupational Social Insurance Scheme' by a new definition which describes a scheme which provides for benefits to employees and self-employed persons in the same company or group of companies which supplement or replace the benefits under the Social Insurance System.

Regulations 176/2009 for the Provision of Independent Assistance to Victims of Discrimination (under Articles 23(2)(a) and 34 of the Law 205(I)/2002 – 39(I)/2009) have the purpose to establish the nature, the kind, the content and the procedure for the provision of independent assistance to victims of discrimination by the Gender Equality Committee, including advice on matters of discrimination and legal aid and representation of the victims before the Court or administrative body.

### ***2.1. Purpose of the Directive***

The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities. The amendments of the legislation reflect the principle of equal opportunities and equal treatment. The establishment of appropriate procedures makes more effective the implementation of the principle of equal opportunities in practice because they help the victims of discrimination to seek compensation and/or reparation.

### ***2.2. Gender reassignment***

There is no provision on gender reassignment.

### ***2.3. Definition of Pay***

In Article 2(a) of the amendment Law No. 38(I)/2009 (basic Law on Equal Pay between Men and Women for the Same Work or for Work of Equal Value No. 177(I)/2002), the definition has been covered and it corresponds to the definition in Article 3(e) of the Directive.

### ***2.4. Occupational social security schemes***

In Article 2(a) of the amendment Law No. 40(I)/2009 (basic Law on Equal Treatment of Men and Women in Occupational Social Insurance Schemes No. 133(I)/2002), replaces the definition of 'Occupational Social Insurance Scheme' by a new definition that describes a scheme providing for benefits to employees in public and private sectors and to employees and self-employed persons in the same company or group of

companies, which supplement or replace the benefits under the Social Insurance System.

Article 3 of the basic law (Law No. 133(I)/2002) was amended by the addition of a new section, which aims at ensuring the effective implementation of the principle of equal opportunities and equal treatment between men and women in occupational social security schemes; and by the addition of a new section (1A), which states that this Law is applicable to all working population including self-employed persons, workers whose activity is discontinued because of illness, maternity, accident or unemployment and to persons who are job-seekers, pensioners and disabled workers as well as to those who derive their rights from any law or labour agreement.

### ***2.5. Scope of horizontal provisions***

Article 4 of the basic Law No. 133(I)/2002 as amended by Law No. 40(I)/2009 provides that ‘men and women enjoy equal treatment and any direct or indirect discrimination is not allowed’. Article 5 has been replaced and provides for court or out-of-court protection and reverses the burden of proof to the other party when the party affected by the violation of the law establishes the real facts that constitute the violation (except in criminal procedure).

Article 6 gives jurisdiction to the Labour Disputes Tribunal to award to the claimant either fair and reasonable compensation or compensation for all the loss suffered including remuneration overdue and for any moral or bodily harm, plus legal interest from the day of the damage, whichever is the greatest.

A new article was added (Article 11), which provides for the representation of the claimant, with his/her consent, by a group of persons, workers’ organizations or other organizations or legal persons, whose constitutional rules provide for the elimination of discrimination on ground of sex and for the promotion of equality between men and women. Furthermore, the following new Articles were added: Article 11B, which provides for independent advice to victims; Article 11C, which provides for social dialogue between employers and employees for the promotion of the equality principle; and Article 11D, which provides for dialogue with non-governmental organizations whose constitutional rules have provisions for combating discrimination on the ground of sex for the purpose of promoting the principle of equality between men and women as provided in this law.

### ***2.6. Concept of positive action***

There are no positive action measures with respect to occupational pensions schemes.

### ***2.7. Reconciliation of work, private and family life***

Article 2 of Law No. 38(I)/2009 amended Article 2 of the basic law (Law No. 177(I)/2002) by the addition of a new definition of ‘discrimination on ground of sex’, which means ‘direct or indirect discrimination on ground of sex and includes the order for discriminatory treatment of a person because of sex and any less favourable treatment of a woman because of pregnancy or maternity leave’.

Article 2 of Law No. 39(I)/2009 amended article 2 of the basic Law (Law No. 205(I)/2002) by the addition of a new definition of ‘discrimination on ground of sex’ and also states, among other provisions, that ‘any less-favourable treatment of a woman which is related to pregnancy, childbirth, breastfeeding, maternity or illness related to pregnancy or childbirth but not including positive actions and any order for discriminatory treatment of a person because of sex, constitutes discrimination on ground of sex.’



Article 2 of Law No. 40(I)/2009 amended article 2 of the basic Law (Law No. 133(I)/2002) as regards the definition of ‘direct discrimination on ground of sex’ and gives the definition of the principle of equal treatment, which means the absence of any discrimination on ground of sex either direct or indirect, mainly in relation to the married or family situation as regards the application of the Law.

Paternity leave has not been included in the law.

There are positive indications in favour of women, but on the other hand it is necessary to encourage men to seek parental leave because it is without pay and men do not take advantage of it.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Law No. 205(I)/2002 as amended by Law No. 39(I)/2009 provides for periodical assessment and report to the Commission every four years.

### ***2.9. Judicial procedures***

Out-of-Court procedures: The Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 as amended gives the alleged victims of discrimination on the ground of sex the right to submit the complaint either to the inspectors of the Ministry of Labour and Social Insurance (Equality Committee), who will conduct a court-style investigation or to the Ombudsman (Equality Authority) who acts as an independent body. As the law now stands, a worker can apply to both institutions, which will carry out simultaneous investigations on the same issue, with the possible result being two contradictory decisions.

Court procedures and sanctions: Article 14 of Law No. 205(I)/2002 as amended provides that the alleged victim of discrimination on the ground of sex has the right to apply to the Industrial Disputes Tribunal.

The Industrial Disputes Tribunal shall award a fair and reasonable compensation, which covers at least all real damage, including overdue benefit and pecuniary satisfaction for any moral or bodily damage of the plaintiff caused by the offender, and in every case, legal interest shall be added to the above awarded amount, from the date of the contravention until the full payment of the compensation.

In case of dismissal in contravention of the provisions of this Article, the Industrial Disputes Tribunal, in addition to the award of compensation as above, and without examining the good or bad faith of the employer, shall order the re-employment of the employed person and oblige the employer to accept his services, if the employed person has requested it as therapy.

### ***2.10. Other novelties?***

No.

### ***2.11. Additional problems***

According to Article 10A of the Annual Holidays with Pay Law 1967 to 2005,<sup>21</sup> an application to the Industrial Disputes Tribunal should be submitted within 12 months from the date when the claim was raised. According to Article 27(2) of the Equal Treatment of Men and Women in Employment and Vocational Training Law, those who refer complaints of discrimination to the inspectors do not lose this twelve-month deadline for claiming compensation from the Tribunal. However, those who submit

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<sup>21</sup> No. 8/67 as amended, last amendment Law No. 18(I)/2005.

complaints to the Equality Authority face the risk of losing the right to apply to the Industrial Disputes Tribunal for compensation if there is a delay by the Equality Authority. This may amount to a breach of Article 17 of Directive 2006/54/EC.

## **CZECH REPUBLIC – *Kristina Koldinská***

### **1. Transposition of the Recast Directive into national law**

#### ***1.1. Transposition***

The transposition of Recast Directive has been completed by the adoption of the Antidiscrimination Act – Act No. 198/2009 Coll. The measures of Recast Directive already included into previous directives have been transposed also by the Act. No. 262/2006 Coll., Labour Code, Act No. 435/2004 Coll., on employment and by some specialized acts.

#### ***1.2. Correlation tables***

No tables have been published to illustrate the correlation between this Directive and transposition measures. There are two web pages, where such tables should have been published: the web page of Czech Government ([www.vlada.cz](http://www.vlada.cz)) and the web page of the Czech Ministry of Labour and Social Affairs ([www.mpsv.cz](http://www.mpsv.cz)). None of them presents such a table.

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

The extension of the purpose of the Directive to the principle of equal opportunities is not specifically reflected in the implementing legislation. The Antidiscrimination Act only states that it implements the EU law and principles enacted in the Charter of Fundamental Rights and Freedoms and that it defines the right to equal treatment and ban on discrimination in several areas, including employment and occupation (see Art. 1 of the Act No. 198/2009 Coll.).

#### ***2.2. Gender reassignment***

As the Directive applies also to gender reassignment, the Antidiscrimination Act states that the prohibition of discrimination based on sex applies also to discrimination arising from gender reassignment (see Article 2 paragraph 4 of the Act No. 198/2009 Coll.). As far as it is known, this provision has not yet been applied, so there are no special problems to be reported in this regard.

#### ***2.3. Definition of Pay***

The definition of pay is provided by the Act No. 262/2006 Coll., Labour Code, which states in Art. 109 that the wage is a monetary and in kind consideration provided to an employee for work done. A salary is a wage provided to employees employed by publicly financed employers (see Art. 109 par. 2). All the employees are entitled to receive equal pay (wage or salary) for the same work or work of equal value (see Art. 110). Further provisions of the Labour Code respect the spirit of the definition of pay provided by the Recast Directive.

#### ***2.4. Occupational social security schemes***

The Antidiscrimination Act implemented the provision on equal treatment in occupational social security schemes, which is not otherwise included in the Czech legislation. Therefore, the Czech Republic was brought by the Commission before the ECJ (Case C-41/08 *Commission of the European Communities v Czech Republic* [2008]).

The Antidiscrimination Act does not cover pension schemes for a particular category of workers, such as public servants.

### ***2.5. Scope of horizontal provisions***

The national legislation, which implements Articles 17-22 of the Directive, is the Antidiscrimination Act. As this is the only act, which applies to equal treatment in occupational social security schemes (see above), its Articles 8 and 9 are the only ones that implement the extended scope of the Recast Directive. The Antidiscrimination Act also therefore includes occupational schemes and prohibits discrimination in them. The Act also implements the horizontal provisions of the Recast Directive. These horizontal provisions included into the Antidiscrimination Act also therefore apply to occupational social security schemes.

### ***2.6. Concept of positive action***

The positive action measures are legislated in the Article 7 of the Antidiscrimination Act. The provision reads:

‘Measures aimed at preventing or compensating for disadvantages resulting from a person’s membership of a group of persons defined by any of the grounds specified in Section 2 (3) and ensuring equal treatment and equal opportunities for that person shall not be considered to be discrimination.’

A similar provision can be found in Section 4 Paragraph 4 of the Employment Act (No. 435/2004 Coll.).

From the structure of the Antidiscrimination Act it seems to be clear, that the positive action measures are possible also with respect to occupational pension schemes.

The Antidiscrimination Act includes also a special provision regarding pensionable age in occupational pension systems. The Article 9 paragraph 2 reads:

‘The employer’s obligation to comply with the principle of equal treatment of men and women shall not preclude an employer from granting to persons who have already reached retirement age for the purposes of granting a pension by virtue of an employee scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement. The pension supplement serves to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age’.

### ***2.7. Reconciliation of work, private and family life***

Even if the Recast Directive in several provisions explicitly mentions the reconciliation of work, private and family life, there are no explicit references in national legislation to this topic. It is not yet used very much in collective bargaining to introduce any reconciliation provisions into collective agreements.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

As far as it is known, the Czech Republic has not taken any steps yet to comply with its obligation which follows from the Article 31 paragraph 3 of the Recast Directive.

## ***2.9. Judicial procedures***

The Antidiscrimination Act guarantees access to judicial procedure in Section 10 of the Antidiscrimination Act. It reads as follows:

‘(1) In the event of a violation of the rights and obligations following from the right to equal treatment or of discrimination, the person affected by such act shall have the right to claim before the courts, in particular, that the discrimination be refrained from, that consequences of the discriminatory act be remedied and that (s)he be provided with appropriate compensation. (2) Should a remedy under paragraph 1 above not appear sufficient, particularly due to the fact that a person’s reputation or dignity or respect in society has been harmed, the person shall also have the right to monetary compensation for non-material damage.’

## ***2.10. Other novelties?***

There are no important other novelties, which would be worth mentioning.

## ***2.11. Additional problems***

On the one hand, the Antidiscrimination Act is quite chaotic and not very easy to understand; on the other hand, it makes use of all possible exceptions from the equal treatment principle. Therefore, it could be concluded that the Recast Directive has not have as strong an impact in the legislation and especially in practice, as it should have had.

# **DENMARK – Ruth Nielsen**

## **1. Transposition of the Directive**

### ***1.1. Transposition***

The Danish Equal Pay Act (consolidated Act no. 899 of 5 September 2008) was amended in 2008 in order to implement the Recast Directive (2006/54) in matters of equal pay. In the preparatory work for the proposal amending the Equal Pay Act, the Minister for Employment stated that the provisions in the Recast Directive on other matters than pay had either already been implemented in the Equal Treatment Act (consolidated act no. 734 of 28 June 2006) or were to be implemented in the Act on equal treatment of men and women in occupational social security schemes (consolidated act no. 775 of 29 August 2001). The latter Act was amended by Act no. 517 of 17 June 2008 whereby the definitions in the Recast Directive, a provision on compensation and on gender mainstreaming were inserted into the then Act on equal treatment of men and women in occupational social security schemes.<sup>22</sup> In Denmark, Directive 2002/73 was implemented by Act no. 1385 of 21 December 2005 amending

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<sup>22</sup> In 2009, by Act no. 133 of 24 February 2009, the title of that Act was amended to Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits in connection with implementation of Article 5 in Directive 2004/113/EC. The amendment came into force on 21 December 2009.

the Equal Treatment Act. The Equal Treatment Act deals with gender equality with regard to access to employment, promotion and dismissal. The Equal Treatment Act was not amended again in connection with the transposition of the Recast Directive, since the Recast Directive was not interpreted as requiring any substantial changes compared to Directive 2002/73, which had already been implemented in 2005. The Danish transposition of Directive 2002/73 by amendments to the Equal Treatment Act was described in an earlier report and is not repeated in this report on the Danish implementation of the Recast Directive.

The Equal Pay Act and the (then) Act on equal treatment of men and women in occupational social security schemes (which later in connection with transposition of another Directive (2004/113) changed its title into the Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits) are the only Acts which were amended in 2008 in order to transpose the Recast Directive. The Equal Pay Act deals with gender equality in matters of pay. The (then) Act on equal treatment of men and women in occupational social security schemes (which later in connection with the transposition of another Directive (2004/113) changed its title into the Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits) dealt with occupational social security. State social security is not covered by that Act. In 2009, the scope of the Act was extended so as to also cover equal treatment of men and women in connection with insurance, pensions and similar financial benefits in connection with implementation of Article 5 in Directive 2004/113/EC.

Since 2002, by virtue of Directive 2002/73 (amending Directive 76/207/EEC, repealed since 15 August 2009), the Member States have been obliged to designate equality bodies. Similar provisions are found in the Recast Directive (Article 20 in Directive 2006/54) and the Supply of Goods and Services Directive (2004/113/EC). The European Commission has commenced infringement proceedings against Denmark over the issue of independent bodies. On 20 November 2009, the Commission sent a reasoned opinion to Denmark. On 30 November 2010, the Minister for Employment presented a proposal to Parliament to amend the Act on the Danish Institute of Human Rights so as to extend the Institute's competence to also cover gender equality. On 15 March 2011, the Act entered into force (Act no. 182 of 8 March 2011). According to a footnote to the Act, it implements Article 20 in the Recast Directive and Article 12 in the Supply of Goods and Services Directive (2004/113/EC).

There is no explicit mention in Danish legislation of the other horizontal provisions in the Recast Directive. The principle that Danish law must be interpreted in conformity with underlying EU law (Article 4(3) TEU) is generally accepted by all legal actors in Denmark. It will probably always be possible to find some general rule in Danish law that can be interpreted in accordance with the Recast Directive in situations where there is no explicit mention of a provision from the Recast Directive in Danish law. This is, in my view, sufficient, in particular when it concerns a Recast Directive. There is no duty for the Member States to copy the text of the Directive verbatim. Recasting directives is the right way to clarify, tidy up and improve the systematization of directives and inclusion of case law from CJEU, but not to introduce new substantive rules.

## ***1.2. Correlation tables***

Denmark has not drawn up and published tables illustrating the correlation between the Recast Directive and the transposition measures.

As described above, the Danish Equal Pay Act was amended in 2008 in order to implement the Recast Directive (2006/54) in matters of equal pay. The amendment came into force on 15 August 2008.

Section 1 of the Danish Equal Pay Act was amended so as to follow the wording of Article 4 of the Recast Directive closely.<sup>23</sup>

The definitions of discrimination in Article 2 of the Recast Directive were inserted almost verbatim in a new Section 1(a) in the Danish Equal Pay Act.

Article 29 on gender mainstreaming of the Recast Directive was implemented by a new Section 1(b) in the Danish Act.

Article 18 of the Recast Directive on compensation or reparation was implemented by a new Subsection 2 in Section 2 of the Danish Equal Pay Act.

Article 24 of the Recast Directive on victimisation was implemented through an amendment of Section 3 in the Danish Equal Pay Act

A new Section 4(a) in the Danish Equal Pay Act provides for damages or compensation in cases of unequal pay. According to the Preparatory Works to the Danish Equal Pay Act Section 4(a) in the Danish Act implements Article 17 of the Recast Directive.

As indicated above, the Act on equal treatment of men and women in occupational social security schemes (consolidated act no. 775 of 29 August 2001) was amended by Act no. 517 of 17 June 2008. Section 3(a) in the Act implements the definitions of discrimination in Article 2 of the Recast Directive. Section 11 in the Act provides for compensation in accordance with Article 18 of the Recast Directive. Section 18a of the Act implements Article on gender mainstreaming of the Recast Directive.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The purpose of the Recast Directive is worded differently from the way it was worded in the earlier directive. That is not mentioned in Danish law in connection with the transposition of Directive 2006/54. In my view the new wording of the purpose provides an argument for interpreting the Recast Directive as providing for some kind of active promotion of equality and not just elimination of discrimination.

### ***2.2. Gender reassignment***

Gender reassignment is not explicitly mentioned in Danish implementing legislation, but Danish equal treatment law has always been interpreted in Danish case law as also covering gender reassignment.

### ***2.3. Definition of Pay***

Section 1(a)(3) of the Danish Equal Pay Act is, after the amendment in 2008, identical to the definition provided for in the Danish language version of the directive.

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<sup>23</sup> Article 4 of the Recast Directive reads: *Equal pay*. Prohibition of discrimination. For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

#### ***2.4. Occupational social security schemes***

The Act on equal treatment of men and women in occupational social security schemes (consolidated act no. 775 of 29 August 2001) was amended by Act no. 517 of 17 June 2008 whereby a provision on compensation and on mainstreaming were inserted into the Act. The Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits, which has been the new title of the above Act since 2009, covers occupational pension schemes for all categories of workers without specifically mentioning any particular category of workers, e.g., public servants. Statutory pension schemes are not covered by this Act. In my view, the Danish implementation of the Recast Directive is sufficient, see above in part 1 and below in part 2.5.

#### ***2.5. Scope of horizontal provisions***

As mentioned, the Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits does not explicitly mention other horizontal provisions in the Recast Directive than the definitions of discrimination, the provision on compensation and on mainstreaming. There is no explicit mention in Danish legislation on social security schemes of the other horizontal provisions in the Recast Directive. The principle that Danish law must be interpreted in conformity with underlying EU law (Article 4(3) TEU) is, however, so well established in Denmark that it probably does not make any difference. For example, there is no doubt that there is access to the Institute of Human Rights in its capacity as independent body within the meaning of Article 20 of the Recast Directive. As mentioned above, there is explicit reference to Article 20 of the Recast Directive in a footnote to the relevant legislation. Under Danish law, it is obvious that a Danish Act implementing a Directive will be interpreted in conformity with the Directive.

#### ***2.6. Concept of positive action***

Positive action measures are not explicitly mentioned in the Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits nor are they mentioned in the Equal Pay Act. Under section 13 of the Danish Equal Treatment Act the responsible minister may within his/her area of responsibility 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. That provision can, in my view – at least in order to interpret Danish law in conformity with the Recast Directive – be constructed as covering all employment conditions including occupational social security. There is no case law to this effect.

#### ***2.7. Reconciliation of work, private and family life***

The issue of reconciliation of work, private and family life is not explicitly mentioned in Danish legislation transposing the Recast Directive on this issue. Those provisions in the Directive have not had any impact in Denmark.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Assessment and report on the exclusions were not mentioned in connection with the amendment of the Equal Treatment Act in 2005 or the Equal Pay Act in 2008. As far as I know Denmark has taken no steps to comply with Article 31(3) of the Recast Directive.

## ***2.9. Judicial procedures***

Access to judicial control with all legal matters is guaranteed in Denmark. In the preparatory work for the amendment of the Equal Pay Act, it is stated that Article 17 of the Recast Directive can be regarded as already having been implemented by Danish procedural law.

## **ESTONIA – Anneli Albi**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

Directive 2006/54/EC has mainly been transposed by the Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act (317 UA I, hereinafter the Draft Act).<sup>24</sup> The main purpose of this Act was to transpose the requirements of the Directives 2002/73/EC, 2004/113/EC and 2006/54/EC. These amendments took effect on October 23, 2009. However, it should be noted that the scope of the Gender Equality Act (hereinafter the GEA) is wider than the scope of respective directives, and accordingly some of the new provisions of Directive 2006/54/EC were included in the text of the GEA already earlier (such as the principle of equal opportunities [Article 1(1) of the GEA, Chapter 3 of the GEA] and the principle of equal treatment with regard to the occupational pension schemes [Articles 2(1) and 6(2)(3) of the GEA]).

#### ***1.2. Correlation tables***

The table, illustrating the correlation between the respective Directives, including Directive 2006/54, was annexed to the explanatory memorandum of the Draft Act 317 SE.<sup>25</sup>

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

The text of the GEA includes the principle of equal opportunities. Article 1(1) of the GEA stipulates that the purpose of the GEA is to ensure equal treatment arising from the Constitution of the Republic of Estonia and to promote equality between men and women as a fundamental human right and for the public good in all areas of social life. Article 3(1)(1) of the GEA provides that gender equality means the equal rights, obligations, opportunities and liability of men and women in professional life, upon acquisition of education and participation in other areas of social life.

Chapter 3 of the GEA regulates the promotion of gender equality. The GEA establishes the tasks of the state and local government agencies, of educational and research institutions and of employers in the promotion of gender equality (Articles 9, 10 and 11 of the GEA).

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<sup>24</sup> The text of the Draft Act with explanatory memorandum is available on the Parliament webpage [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian), accessed 1 May 2011.

<sup>25</sup> Annex 1 to the Draft Act to amend Gender Equality Act, Civil Service Act and Labour Contracts Act (317 SE, 317 UA), available on: [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian), accessed 1 May 2011.



## ***2.2. Gender reassignment***

It is not explicitly regulated in the text of the GEA that the provisions concerning gender discrimination also apply to gender reassignment. This issue was not dealt with in the Draft Act to amend GEA, Civil Service Act and Labour Contracts Act to transpose the provisions of the Directive 2006/54/EC. This issue could be overcome by way of interpretation, so that prohibition of discrimination based on sex applies would include discrimination arising from gender reassignment.

## ***2.3. Definition of Pay***

The concept of 'pay' is not directly defined in the national legislation. According to Article 6(2)(3) of the GEA, the activities of an employer are deemed to be discriminatory if the employer establishes conditions for remuneration or conditions for the provision and receipt of benefits related to employment relationship which are less favourable regarding an employee or employees of one sex compared with an employee or employees of the other sex doing the same work or work to which equal value is attributed. Thus this provision covers both the remuneration and benefits related to the employment relationship and the conditions for receiving the remuneration and receipt of benefits, and thus corresponds to the substantive aspects of the concept of 'pay' as set forth in Article 2(e) of Directive 2006/54/EC.

## ***2.4. Occupational social security schemes***

The implementing legislation did not directly address the issue of occupational social security schemes. However, the occupational social security schemes as such are covered by Article 6(2)(3) and thus fall under the scope of the GEA.

## ***2.5. Scope of horizontal provisions***

The horizontal provisions apply to the entire scope of the GEA, including in the area of occupational social security schemes.

The scope of the respective provisions was extended by the Draft Act to amend Gender Equality Act, Civil Service Act and Labour Contracts Act. In particular, Article 13 of the GEA was amended by removing the restriction that the claim for compensation could be submitted only with regard to discrimination in employment relationships. According to the earlier version of the GEA, the principle of shared burden of proof applied only to employment-related situations (as specified in Articles 6 and 8 of the GEA). The respective Article 4(1) of the GEA was amended so that the principle of shared burden of proof does not apply to employment-related discrimination only.

## ***2.6. Concept of positive action***

According to Article 5(2)(5) of the GEA, application of temporary special measures which promote gender equality and grant advantages for the less-represented gender or reduce gender inequality are not deemed to be direct or indirect discrimination based on sex. According to Article 2(1) of the GEA, the requirements of the GEA apply to all areas of social life.<sup>26</sup> The scope of Article 5(2)(5) is not limited by any concrete field of action and could thus in principle be applied to all aspects falling within the scope of the GEA, including occupational pension schemes.

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<sup>26</sup> The law stipulates two exceptions: professing and practising faith or working as a minister of a religion in a registered religious association, and relations in family and private life.

### ***2.7. Reconciliation of work, private and family life***

Article 11(1)(3) of the GEA provides that in the promotion of equal treatment of men and women, employers have to create working conditions which are suitable for both women and men and support the combination of work and family life, taking into account the needs of employees. Thus, the question of reconciliation of work and family life is explicitly provided for in the GEA. This obligation was introduced by the GEA as of 2004.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Article 5(2)(4) stipulates that as regards access to employment, it is not deemed to be direct or indirect discrimination based on sex if a difference of treatment is based on a characteristic related to sex, where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Thus this provision is set forth in the national law in a way that is identical to the text of the Directive. The national law does not specify any concrete jobs or fields of activities where this exception could be applied. There is no information available in which situations this exception has been used in practice and this provision is yet to be applied in court practice in order to assess the scope of the exception. There is no information that the state would have taken any steps to assess the implementation of the respective provision.

### ***2.9. Judicial procedures***

Article 12 of the GEA stipulates that discrimination disputes shall be resolved by a court or a labour dispute committee. Discrimination disputes shall also be resolved by the Chancellor of Justice by way of conciliation proceedings.

According to Article 35<sup>15</sup>(1) of the Chancellor of Justice Act, if conciliation proceedings are terminated or the Chancellor of Justice has stated failure to reach an agreement, the petitioner has, within thirty days as of the receipt of the notice, the right of recourse to a court or to an authority conducting pre-trial proceedings as provided by law for the protection of his or her rights.

Thus the law provides alternative proceedings for resolving discrimination disputes, but there is no duty for the victim to use conciliation or turn to the labour dispute committee before submitting a complaint to the court. The victim can also turn to the court if he or she does not agree with the decision of the labour dispute committee or the parties have failed to reach to the agreement in the framework of the conciliation proceedings.

### ***2.10. Other novelties?***

The GEA was amended to transpose Article 14(1)(d) of the Recast Directive. Article 6(3) of the GEA stipulates that less favourable treatment of a person on grounds of sex in connection with his or her membership of an organisation of employees or employers, or any organisation whose members carry on a particular profession, including in connection with the person's participation in their work and the benefits provided for by such organisations, shall also be deemed to be discrimination.

### **2.11. Additional problems**

By the Draft Act to amend Gender Equality Act, Civil Service Act and Labour Contracts Act the following amendments were additionally made to the GEA.

Article 4 of the GEA was amended to bring the concept of shared burden of proof in line with the requirements of the Directives. Earlier the respective provision merely placed upon the respondent an obligation to give an explanation rather than the obligation to prove that discrimination has not occurred, once a *prima facie* case has been established by the applicant.

Further, the concept of 'sexual harassment' was defined in line with the definition set forth in the Directive 2006/54/EC and the concept 'harassment related to the sex of a person' was introduced in the GEA. According to Article 3(1)(5) 'sexual harassment' occurs where any form of unwanted verbal, non-verbal or physical conduct or activity of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment. Article 3(1)(6) provides that 'harassment related to the sex of a person' occurs where unwanted conduct or activity related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment.

The scope of the protection against victimization was widened so that it also applies to other fields of discrimination; earlier it applied to the employment-related victimization only (Article 5(1<sup>1</sup>) of the GEA). According to the amendment, the scope of protection is broadened so as to include persons who have supported another person in defence of their rights.

## **FINLAND – Kevät Nousiainen**

### **1. Transposition of the Directive**

#### **1.1. Transposition**

The Directive is transposed by the Act on Equality between Women and Men (1986/609). The authorities responsible for preparing the transposition assumed that the Recast Directive did not create a need for legislative amendments. Two ministries, the Ministry for Social Affairs and Health (responsible for equality legislation and social insurance) and the Ministry of Employment and the Economy (responsible for labour legislation) were parties to the assessment of the measures needed for transposition, and came to the conclusion that no legislative amendments were necessary.

#### **1.2. Correlation tables**

No tables illustrating the correlation between the Directive and transposition measures have been drawn up, as far as I could find out from the officials I sounded out on the matter.

### **2. Novelties**

#### **2.1. Purpose of the Directive**

The Finnish Act on Equality between Men and Women, as well as the Finnish Constitution (Section 6 (4)), frame the issue of gender equality in terms of both equal

treatment and as the outcome to be achieved by positive action. The latter aspect refers to equal opportunities, but goes further than that in terms of considering de facto equality as concomitant with the procedure of promoting equality. No amendment was considered necessary.

## ***2.2. Gender reassignment***

So far, there is no legislative provision on the position of persons undergoing or having undergone gender reassignment, or other transgender persons. When the Act on Equality between Women and Men was amended in 2005, the parliamentary standing Employment and Equality Committee remarked in its statement that, following the case law of ECJ, discrimination on the grounds of sex also covers discrimination based on gender reassignment. Other aspects of discrimination of transgender persons were discussed by the Employment and Equality Committee, but no conclusions were drawn besides stating that their position was to be made clear by deciding whether it was to be placed under the Act on Equality between Women and Men, or the Non-Discrimination Act which covers other discrimination grounds than gender. The Equality Ombudsman has given guidelines on the matter and stated that until legislation on the matter is in place, the Act on Equality between Women and Men is to be applied to discrimination of all transgender persons, not only persons that have undergone gender reassignment.<sup>27</sup> Law preparation on these issues is underway, but will proceed only after a new Government has been nominated.

## ***2.3. Definition of Pay***

The Act on Equality between Women and Men contains no definition of pay.

## ***2.4. Occupational social security schemes***

The scope of the Act on Equality is broad, and includes social security issues. Article 7(2) of the Directive is not problematic as to material pension legislation, because the major review of pension legislation a few years ago, including the State Pension Act, was materially based on the principle of equal treatment. The Finnish pension system is atypical in the sense that the main occupational pension schemes are statutory, although in the case of private sector pension schemes, the funds are administrated by private bodies. The public sector pension schemes are similar to the private sector ones, except that the funds are administrated by public bodies. Under Article 7(2) of the Recast Directive, pension schemes for ‘a particular category of worker such as that of public servants’ are within the scope of the Directive, if the benefits are paid by reason of the employment relation with the public employer.’ The wording seems to include the statutory state pension schemes, municipal pension schemes and possibly the pension schemes of the Lutheran church, but not very similar schemes in the private sector.

## ***2.5. Scope of horizontal provisions***

Although the prohibition of discrimination in the Act on Equality between Women and Men (1986/609) has a broad general scope, the provisions on judicial remedies (compensation) do not cover social security, to which in the Finnish way of thinking all statutory pension insurance schemes belong. Therefore, the horizontal provisions on remedies and burden of proof in the Recast Directive are problematic concerning the public sector pensions. The remedies, procedures and compensation rules in cases

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<sup>27</sup> At <http://www.tasa-arvo.fi/syrjinta/sukupuolivahemmistot>, accessed 20 April 2011.

involving discrimination related to public sector statutory pensions do not seem to fulfil the requirements of the Recast Directive.

## ***2.6. Concept of positive action***

The Act on Equality between Women and Men 1986/609 contains several provisions on positive action, or rather, they lay a positive duty to promote gender equality to various actors, such as authorities (Section 4 and 4 a). Section 5 of the Act provides for a duty to promote gender equality in educational institutions, consisting of a duty to ensure that women and men have equal opportunities for education (including professional education), and that the teaching materials in use support this aim. Section 6 contains a positive duty of all employers to promote gender equality, understood to mean that employers are obligated to promote equality planning. The duty is further specified to include a duty to encourage that both women and men apply for jobs, that both sexes have equal opportunities for promotion, that they have equal employment conditions, especially as to pay, that attention is paid to reconciling work and family life, especially concerning working time, and that discrimination is prevented beforehand. Section 6a contains a more extensive positive duty for employers of 30 or more employees. The positive duty does not specify the type of positive action that is required to be undertaken very clearly, except that the duty to promote equality by means of equality planning of the employers with 30 or more employees specifies that equality planning needs to present information on the positions and pay of women and men, as well as other appropriate information. The most concrete type of positive action prescribed by the Act on Equality is Section E a, which requires that municipal and state committee type bodies have a quota of minimum 40 percent of women and men. Otherwise, the legislative concept of positive action is not defined in a certain manner, and many types of actions may be adopted in the mandatory or non-mandatory promotion of equality and equality planning.

## ***2.7. Reconciliation of work, private and family life***

One of the positive duties laid to all employers under Section 6 of the Act on Equality mentions the duty of the employer to facilitate reconciliation of work and family life, especially by paying attention to working arrangements. Reconciliation of work, private and family life is and has traditionally been on the agenda of the social partners' dialogue.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

There is no systematic mandatory periodical assessment of whether there are exclusions on the basis of gender that would not be genuine occupational requirements.

## ***2.9. Judicial procedures***

No special attention was paid to the shift to judicial procedures only in the transposition of the directive. The judicial procedure available to the victims of discrimination is the remedy of compensation under Act on Equality, combined with remedies that may be available under other pieces of legislation, such as the Employment Contracts Act, or Tort Liability Act. The obligations under the Recast Directive are covered by these remedies, except that there is no compensation for discrimination in social security issues in Act on Equality.

## 1. Transposition of the Directive

### 1.1. Transposition

The Recast Directive has been partially transposed in France by the Anti-Discrimination Act of 27 May 2008. However, the main aim of this Act was not to transpose the Recast Directive but to complete the implementation of all relevant EC Directives on discrimination including Directives 2000/43/EC, 2000/78/EC, 2002/73/EC, and to transpose Directive 2004/113/EC (and the Recast Directive 2006/54/CE in time). Thus, the Act intends to take into account the observations of the European Commission on the French situation and to avoid an infringement procedure, and at the same time to transpose the 2006/54 Directive on time. Therefore, in the Act it is difficult to distinguish what the provisions strictly dealing with the transposition of the Recast Directive are and what the missing elements of the various transpositions of the other Directives are.

### 1.2. Correlation tables

Until now, France has not drawn up or published tables illustrating the correlation between this Directive and the transposition measures.

## 2. Novelties

### 2.1. Purpose of the Directive

There is no specific provision in the 2008 Act to deal with the principle of equal opportunities. This does not mean that there are no provisions in general on this issue. For example, under French law there is an obligation to negotiate on the pay gap.

### 2.2. Gender reassignment

There is no specific provision on gender reassignment in French law. However, sex discrimination includes discrimination based on gender reassignment. Thus, in a decision concerning gender reassignment discrimination (a worker was dismissed just after he told his employer of his intention to undergo gender reassignment surgery), the HALDE (High Authority for combating discrimination and for equality), referring to Directive 2006/54 and to its Recital 3, stated that discrimination based on gender reassignment is discrimination on the ground of sex and should be prohibited.<sup>28</sup> Following this deliberation, the Court of Appeal of Montpellier admitted the existence of a discrimination in this case and stated that the dismissal was null and void.<sup>29</sup>

### 2.3. Definition of Pay

Article L3221-3 of the Labour code defines the notion of ‘pay’ in the same terms than the Article 2(e) of the Directive. Pay is defined as 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.

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<sup>28</sup> Deliberation No. 2008-29 of 18 February 2008.

<sup>29</sup> CA Montpellier, 3 June 2009, n° 08/06324.

#### ***2.4. Occupational social security schemes***

Concerning occupational social security schemes, the 2008 Act contains a very general provision according to which there shall be no difference based on sex in the obligations to contribute and in the calculation of contributions. The case law of the Court of Justice has been implemented and the legislation covers pension schemes for public servants.

#### ***2.5. Scope of horizontal provisions***

No specific changes were made as far as the horizontal provisions of the Directive are concerned. However, as the general scope of the anti-discrimination provisions has been extended by the 2008 Act, the scope of the French provisions concerning the burden of proof, remedies and the competencies of the Equality Body have also been extended and include the area of occupational social security.

#### ***2.6. Concept of positive action***

There are no references to any positive action in the 2008 Act. In the private sector, the Labour code provides that temporary measures in favour of women to promote equal opportunity for men and women, in particular by removing existing inequalities that affect women's opportunities are possible (Article L. 1142-4). The revision of the Constitution adopted in July 2008 could also favour positive actions. Thus a new Bill has just been adopted the 27<sup>th</sup> January 2011<sup>30</sup> in order to improve the representation of women in company boards. The bill intends to improve the representation of women in company boards and it imposes a quota of women. The firms will have to ensure women have at least 20% of boardroom seats within 3 years and 40% in six years.<sup>31</sup> Positive action measures are also possible with respect to occupational pension schemes.

#### ***2.7. Reconciliation of work, private and family life***

Here again there are no provisions in the 2008 Act regarding the issue of reconciliation of work, private and family life. However, several provisions in labour law on part-time work, working time and pay negotiation deal with this issue.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

I am not aware that France has taken any steps to comply with the obligation to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women. However, these exclusions are very few. In the private sector, only actors and top models are concerned. In the public sector, it seems that the Navy has not yet opened posts on submarines to women. A few exceptions also exist in a specific police force (*gendarmérie mobile*).

#### ***2.9. Judicial procedures***

The access to judicial procedures for the enforcement of obligations of the Directive is guaranteed.

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<sup>30</sup> Loi n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle publiée au Journal Officiel du 28 janvier 2011.

<sup>31</sup> See Rapport n° 2205 de Mme Marie-Jo Simmermann, 22 décembre 2009, and also the parliamentary debates on this issue <http://www.senat.fr/dossier-legislatif/ppl09-223.html>, accessed 17 February 2011.

## 1. Transposition of the Directive

### 1.1. Transposition

There is no specific act of legislation for transposing Directive 2006/54/EC in Germany. Numerous issues contained in the Recast Directive are covered by the 2006 General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*);<sup>32</sup> after that, no particular action was considered necessary to fully implement the Recast Directive.

### 1.2. Correlation tables

The German Government has not published a table illustrating the correlation between this Directive and the transposition measures.

## 2. Novelties

### 2.1. Purpose of the Directive

The General Equal Treatment Act aims at implementing the principle of equal treatment of, *inter alia*, men and women, in matters of employment and occupation as well as in the matters covered by Directive 2004/113/EC. The Act makes no reference to the principle of equal opportunities.

In German constitutional doctrine, equal treatment and equal opportunities are both components of the overarching principle of equality, which is understood as covering formal and substantive equality. Equal treatment refers to the means by which equality is to be achieved, while equal opportunities reflect the purpose of equality: It intends to ensure that women and men enjoy, in law and in fact, equal rights and freedoms. For this purpose, women do not only need the same rights as men (formal equality), but also need *de facto* equal starting conditions (substantive equality) so as to exercise their freedoms on an equal footing with men. This requires the abolition of discriminatory structures and stereotypes. From this perspective, neither ‘equal opportunities’ nor ‘equal treatment’ is preferable; both terms conflate. Therefore, the omission of the term equal opportunities in the General Equal Treatment Act is not problematic.

### 2.2. Gender reassignment

The General Equal Treatment Act does not explicitly mention gender reassignment as a prohibited discrimination based on sex. However, legal doctrine has accepted the holding of the ECJ according to which discrimination based on gender reassignment is discrimination based on sex. Hence, it is covered by the Act. As of today, there is no German court decision on the issue.

### 2.3. Definition of Pay

The General Equal Treatment Act does not contain a definition of ‘pay’. It does not explicitly lay down the principle of equal pay for the same work or work of equal value as reaffirmed in Article 4(1) of the Recast Directive. However, as that principle is already contained in European primary law and is directly applicable, the lack of a

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<sup>32</sup> All Statutes referred to in this part are available (in German) at: <http://www.gesetze-im-internet.de>, searchable by their (German) title.



specific implementing provision does not constitute a legal lacuna. Nevertheless, its absence is problematic as it contravenes the rule that states European directives must be implemented in a way that results in a transparent set of legal norms.

Moreover, the lack of a national provision equivalent to Article 4(1) also constitutes a violation of the prohibition of reducing the level of protection as laid down in Article 27(2) of the Recast Directive. This is so because Article 612a(3) of the Civil Code (*Bürgerliches Gesetzbuch, BGB*), which was repealed by the General Equal Treatment Act, expressly prohibited sex discrimination through payment of a lower wage for the same work or work of an equal value. The Act, however, does not contain a provision that clarifies that wage discrimination also extends to work of an equal value.

In addition, the General Equal Treatment Act (not any other statute) contains a prohibition of sex-discriminatory job classification systems as required by Article 4(2) of the Recast Directive. Even though this prohibition is brought about by the direct applicability of primary EU law, the lack of a specific provision violates the obligation to transpose directives in a transparent way.

#### ***2.4. Occupational social security schemes***

The Act on Occupational Pension Schemes (*Betriebsrentengesetz, BetrAVG*). It applies to benefits for retirement, invalidity, or for surviving family members under occupational pension schemes set up by private employers. For public servants, the applicable law is the Act on Pensions for Public Servants (*Beamtenversorgungsgesetz, BeamtVG*), which establishes the conditions for pensions. The law does not contain a prohibition on sex discrimination, as discrimination based on sex is already covered by Article 3(3) of the Constitution, which is directly applicable in the relationship between the State and a (former) public servant.

#### ***2.5. Scope of horizontal provisions***

The General Equal Treatment Act does not apply to the area of occupational pensions; that area is explicitly excluded by Article 2(2)(2). The Act on Occupational Pension Schemes (*Betriebsrentengesetz, BetrAVG*) does not contain rules reflecting the horizontal provisions (defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, dialogue with non-governmental organisations).

#### ***2.6. Concept of positive action***

For the same reason, positive action measures are not possible with respect to occupational pension schemes. There is also no provision in the Act on Pensions for Public Servants permitting positive action with respect to occupational pensions for public servants.

#### ***2.7. Reconciliation of work, private and family life***

Neither the General Equal Treatment Act nor the two Acts on occupational pensions explicitly mentions reconciliation of work, private and family life. Moreover, the Act on Collective Bargaining (*Tarifvertragsgesetz, TVG*) does not contain obligations for the social partners to facilitate the reconciliation of work, private and family life.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

So far, Germany has not taken any steps to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men

and women as regards genuine and determining occupational requirements is explicitly included in Article 31(3).

### **2.9. Judicial procedures**

Judicial procedures are available for all violations of subjective rights created by the Recast Directive (or its predecessors).

### **2.10. Other novelties?**

No.

### **2.11. Additional problems**

The requirement of fault for a claim for compensation or reparation due to sex discrimination is inconsistent with the case law of the ECJ.<sup>33</sup> Moreover, it constitutes a reduction of the level of protection granted before its entry into force, and hence violates Article 27(2) of the Recast Directive. Before the AGG entered into force, Article 611a of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) provided for a right to reparation and compensation irrespective of fault.

The limitation of the right to compensation for gross negligence or fault on the part of the employer if the discrimination is caused by the application of a collective agreement is in violation of the no-fault requirement under the case law of the ECJ.

## **GREECE – Sophia Koukoulis-Spiliotopoulos**

### **1. Transposition of the Directive**

#### **1.1. Transposition**

Directive 2006/54 was transposed by Act 3896/2010<sup>34</sup> ('the Act'), which is divided into three parts. The first part is entitled 'Transposition of the provisions of Directive 2006/54/EC into the Greek legal order'. Every Article of this part bears, under its title, the number of one or more articles of the Directive that it is meant to transpose. The second part is entitled 'Measures of the national legislator for the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. Several articles of this part also mention the number of one or more articles of the Directive that they are meant to transpose. The third part is entitled 'Repealed – final provisions'. There is yet no case law on this act.

#### **1.2. Correlation tables**

There are no tables on the correlation between the Directive and the Act. Article 30 of the Act, included in its third part (section 1.1 above), contains general clauses, by which any legislative or administrative provisions, clauses of collective agreements, internal regulations and individual contracts of employment conflicting with the Act are repealed. It also repeals the legislation transposing the directives that were recast

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<sup>33</sup> ECJ, Case C-177/88 (*Dekker*), [1990] ECR I-3941, paragraphs 24-25, confirmed by ECJ, Case C-180/95 (*Draehmpaehl*), [1997] ECR I-2197, paragraphs 17-19.

<sup>34</sup> Act 3896/2010 'implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – Harmonisation of existing legislation with Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 and other related provisions', OJ A 207/8.12.2010.

in the Directive, i.e., Act 3488/2006<sup>35</sup> transposing Directive 2002/73/EC (except for three provisions of that Act which are not related to gender equality); Decree 87/2002, transposing Directive 86/378/EEC as amended by Directive 96/97/EC (occupational schemes);<sup>36</sup> and Decree 105/2003 transposing Directive 97/80/EC (burden of proof).<sup>37</sup> The last Article (Article 38) provides that the Act enters into effect as from the date of its publication in the Official Journal (OJ) (8 December 2010), except if a different date is fixed by another provision of the Act, which is not the case of any of its provisions on gender equality.

## 2. Novelties

### 2.1. Purpose of the Directive

The Act is entitled ‘implementation of the principle of *equal opportunities and equal treatment* of men and women in matters of employment and occupation’; moreover, Article 1 stipulates that ‘the purpose of this Act is to ensure the implementation of the principle of *equal opportunities and equal treatment* of men and women in matters of employment and occupation’.<sup>38</sup>

However, the Act does not use this (longer) version of the principle in all its provisions. It uses it alternately with its shorter version (‘equal treatment’), as in the Directive and Article 157 TFEU. Thus, equal opportunities seem to be a component of equal treatment; in other words, equal treatment is required regarding *inter alia* opportunities (e.g. access to employment and promotion and to vocational training). Therefore, the comprehensive concept, as in the other gender equality directives, is that of ‘equal treatment’, i.e. of ‘equality’ of men and women, in the sense of substantive equality. The latter is an EU fundamental value and horizontal objective and a fundamental right (Articles 2 and 3(3) TEU, Article 8 TFEU, Article 23 of the Charter) in all areas of EU jurisdiction, including, but not limited to, those covered by the Directive. Thus, the addition of ‘equal opportunities’ seems a mere formality, probably due to Article 157(3) being the Directive’s legal basis. It does not seem to have any theoretical or practical implication for the principle, scope or content of the Directive’s rules, or of the corresponding national rules.<sup>39</sup>

### 2.2. Gender reassignment

Article 3 of the Act copies paragraph 2(a) of Article 2 of the Directive, adding: ‘any less favourable treatment related to gender reassignment also constitutes sex discrimination’. We have found no relevant cases. This may be due to the Act’s being very recent (it entered into effect on 8 December 2010, section 1.2 above). However, there is an interesting decision of the Single Member First Instance Court of Athens (No. 79646/2910), predating the Act. This decision upheld the application of the ‘Greek Transgendered Support Association’ for registration in the public registry for non-profit associations, on the basis of Article 12 of the Constitution (freedom of association) and Articles 11 and 14 ECHR. It noted that the association’s aims (promotion of the equal treatment of transgendered people, elimination of

<sup>35</sup> Act 3488/2006, OJ A 191/11.9.2006.

<sup>36</sup> Decree 87/2002, OJ A 66/2002.

<sup>37</sup> Decree 105/2003, OJ A 96/2003.

<sup>38</sup> Emphasis added.

<sup>39</sup> See S. Koukoulis-Spiliotopoulos ‘The Amended Equal Treatment Directive (2002/73/EC): An Expression of Constitutional Principles/ Fundamental Rights’, *Maastricht Journal of European and Comparative Law* (2005) 12 MJ 4, pp. 327-368 (334-336).

discrimination on the grounds of gender identity, development of solidarity among transgendered people), as set out in its statute, are non profit and not contrary to legislation, morals or public order.<sup>40</sup>

### **2.3. Definition of Pay**

Article 2(e) of the Act contains a definition of pay that copies in essence the definition in Article 2(e) of the Directive. Article 4 of the Act, entitled ‘Prohibition of discrimination in pay’, provides in paragraph 1 that ‘men and women are entitled to equal pay for the same work or work of equal value’, thus repeating the principle enshrined in Article 157(1) TFEU as well as in Article 22(1)(b) of the Constitution.<sup>41</sup> Paragraph 2(a) requires that ‘when a professional classification system is used, it must be based on common criteria for men and women and be applied so as to exclude discrimination based on sex’. Instead of ‘professional classification,’ the term ‘*job* classification’ should be used, as in Article 4(2) of the Directive. Paragraph 2(b) of Article 4 requires that ‘in the planning and application of systems of personnel evaluation related to wage evolution, the principle of equal treatment be complied with and no discrimination on grounds of sex or family status be allowed’. The term ‘*job* evaluation’ should be used, so as to make it clear that it is the nature of the job that matters. This is very important, as there is still no awareness of the notion of equal value, and therefore no relevant case law and no monitoring of job classification.

### **2.4. Occupational social security schemes**

#### **2.4.1. General remarks**

The Act is meant to cover all workers affiliated with occupational schemes. Article 17 of the Act (‘Scope of application’) makes it applicable to all persons employed in the private and the public sector on any employment relationship; hence also to those in the civil and the military service, who are covered by the Civil and Military Pensions Code.<sup>42</sup> However, the provisions of the Act on occupational schemes mostly merely copy the Directive’s provisions, without clarifying which Greek schemes are occupational. Moreover, these provisions are not linked to legislation predating the Act by five months, which provided for the equalisation of the conditions for granting pensions to men and women within certain transition periods. Therefore, the transposition of the Directive’s provisions on occupational schemes does not create the legal certainty required by well-established CJEU case law, thus being rendered inadequate. In order to grasp the problems created by these provisions, one must have in mind in particular the antecedents of the Act.

#### **2.4.2. The ECJ judgments against Greece and the confusion regarding occupational schemes**

On 14 December 2000, the ECJ found Greece in breach of Directive 96/97 for failing to transpose it within the prescribed period.<sup>43</sup> That judgment was followed by Decree

<sup>40</sup> See the decision on <http://www.transgender-association.gr>, accessed 22 April 2011.

<sup>41</sup> Article 22(1)(b) of the Constitution: ‘All workers, irrespective of sex or other distinction, shall be entitled to equal pay for work of equal value’.

<sup>42</sup> Decree 169/2007: ‘Codification, under the title “Civil and Military Pensions Code” of the provisions in force regarding civil and military pensions’ (Κώδικας Πολιτικών και Στρατιωτικών Συντάξεων), OJ A 80/2007.

<sup>43</sup> ECJ Case C-457/98 *Commission v. Greece* [2000] ECR I-11481.

87/2002, which was aimed at transposing Directive 86/378 as amended by Directive 96/97. This Decree merely copied the provisions of the Directive, without clarifying which Greek schemes were occupational or providing any criteria for depicting such schemes. It remained thus virtually unknown. It did not affect Greek occupational schemes and was never invoked in any case, while non-awareness of the notion of ‘occupational scheme’, along with gender discrimination in such schemes, persisted. Thus, Decree 87/2002 was a typical example of inadequate transposition.

On 26 March 2009, the ECJ, considering the Civil and Military Pensions Code occupational, found Greece in breach of Article 141 TEC (157 TFEU), due to different retirement ages and *minimum* service requirements for men and women.<sup>44</sup>

Until this particular ECJ judgment, all Greek governments constantly maintained (even before the ECJ, in all Greek social security cases) that there were hardly any occupational schemes in the Greek legal order. The only schemes acknowledged as occupational were those run by the so-called ‘occupational social security funds’, whose establishment is provided by Article 7 of Act 3029/2002.<sup>45</sup> These are non-profit legal persons governed by private law, which may offer supplementary social security coverage for any risk, including old age, death and invalidity; they grant benefits in kind or in cash, periodically or as a lump sum. Affiliation is not compulsory. Very few such schemes have been established. However, there are several other pension schemes that are occupational, though not governed by Article 7 of Act 3029/2002, such as those of banks and public corporations. An example is provided by the *Evrenopoulos* case where the ECJ found that the Public Power Corporation scheme was occupational.<sup>46</sup> There are also occupational schemes for the self-employed.

#### 2.4.3. *The equalisation of pension conditions by legislation predating the Act*

Two Acts predating the Act transposing the Recast Directive by five months (Acts 3863/2010<sup>47</sup> and 3865/2010<sup>48</sup>) provided for the gradual equalisation of the *minimum* length of service and the pensionable age for men and women in all schemes, by levelling them up within short transition periods, starting, as a rule, from 2011. They did not however change the basic features of the schemes concerned, nor did they acknowledge the distinction between statutory and occupational schemes.

For workers on a private law contract (who are covered by statutory and occupational schemes), the equalisation will be achieved by 2015 (Act 3863/2010); for those in the civil and military service (whose schemes are occupational), by 2013 (Act 3865/2010). Thus, by 2015, there will be a uniform pensionable age for men and women in all schemes; this is however irrelevant to the qualification of the schemes.<sup>49</sup> Act 3863/2010 is aimed, according to its Explanatory Report,<sup>50</sup> at coping with the financial problems of social security schemes and ensuring their viability in the context of the economic crisis and in compliance with the support programme for

<sup>44</sup> ECJ Case C-559/07 *Commission v Greece*, [2009] <http://curia.europa.eu>, accessed 25 April 2011, and ECR I-47 (summary).

<sup>45</sup> Act 3029/2002: ‘reform of the social security system’ OJ A 160/11.7.2002.

<sup>46</sup> Case C-147/95 *Dimossia Epicheirissi Ilektrismou (DEI) v E. Evrenopoulos* [1997] ECR I-2057.

<sup>47</sup> Act 3863/2010, ‘New social security system and related provisions, regulation of employment relationships’, OJ A 115/15.7.2010.

<sup>48</sup> Act 3865/2010 ‘Reform of the pension system of the State and related provisions’, OJ 120/21.7.2010.

<sup>49</sup> ECJ Case C-46/07 *Commission v Italy* [2008] <http://curia.europa.eu>, point 38, accessed 25 April 2011, and ECR I-151 (summary).

<sup>50</sup> See this Explanatory Report on: <http://www.hellenicparliament.gr>, accessed 25 April 2011.

Greece agreed with the Euro area Member States, the Commission and the International Monetary Fund. There is no reference to gender equality or EU law in the Act or its Explanatory Report. However, as the Act equalises pension conditions for men and women, *inter alia*, in occupational schemes, it must be deemed as also implementing the occupational social security provisions of the recast Directive.

Act 3865/2010 concerns the Code of Civil and Military Pensions scheme, which the ECJ, in its March 2009 judgment (section 2.4.2 above) considered occupational. The Explanatory Report<sup>51</sup> states that the Act aims to harmonise the state social security system with the provisions of the (then) bill (which became Act 3863/2010), as well as to comply with the above ECJ judgment and implement Directive 2006/54.

#### *2.4.4. Why is the transposition of the chapter on occupational schemes inadequate?*

##### *2.4.4.1. The Act does not specify which schemes are occupational*

Arts 5-10 of the Act, which form a chapter entitled ‘Equal treatment in occupational social security schemes’, mostly merely copy Articles 5-13 of the Directive; they thus make no sense in Greek social security law. The definition of the term ‘occupational scheme’ in Article 2 of the Act, which was copied from the Directive, does not suffice to clarify the situation, as no provision of the Act or any other piece of legislation specifies which Greek schemes are occupational or includes any criteria that could help in finding such schemes. Thus, the method applied for transposing Directive 86/378 as amended by Directive 96/97 (Decree 87/2002, section 2.4.2 above) was repeated. This makes the transposition inadequate, the more so as Recital 12 of the Directive stresses the necessity to adopt specific measures to ensure the implementation of the equal treatment principle in occupational schemes and define its scope more clearly.

##### *2.4.4.2. There is still no awareness of the concept of ‘occupational scheme’*

The Act will perpetuate legal uncertainty especially as, even after the March 2009 ECJ judgment, there is still a general impression that besides the civil servants’ scheme at issue in that judgment, the only other occupational schemes are those of the ‘occupational social security funds’ established under Act 3029/2002 (section 2.4.2 above).

This impression is reinforced by recent official statements, such as those made by the Deputy Minister for Employment and Social Security during the debate on the bill transposing the Recast Directive, in the competent parliamentary Commission<sup>52</sup> and in the Plenum of Parliament,<sup>53</sup> regarding the provisions on occupational schemes. According to the Deputy Minister, the schemes of public corporations and banks are not occupational, as they were merged into IKA-ETAM,<sup>54</sup> the most important statutory scheme, while civil servants will also be affiliated with IKA-ETAM as from 1.1.2011 (see section 2.4.4.3(b) below). He concluded that the provisions of the bill

<sup>51</sup> See this Explanatory Report, on: <http://www.hellenicparliament.gr>, accessed on 25 April 2011.

<sup>52</sup> Mr. George Koutroumanis: Hellenic Parliament, 13<sup>th</sup> Period, Session B, Permanent Commission for Social Affairs, Minutes, 16 November 2010, Commission’s archives, obtained on 20 November 2010.

<sup>53</sup> Hellenic Parliament, 13<sup>th</sup> Period, Session B, 28<sup>th</sup> Sitting, Thursday 25 November 2010: <http://www.hellenicparliament.gr>, speech of Mr. George Koutroumanis, accessed 20 April 2011.

<sup>54</sup> ‘Ιδρυμα Κοινωνικών Ασφαλίσεων (IKA) governed by Act 1846/1951. On its English website, it calls itself the ‘Social Security Institute’: <http://www.ika.gr/en/home.cfmmlast>, last visited on 20 April 2011. ETAM means ‘Unified Insurance Fund for Salaried Workers (Ενιαίο Ταμείο Ασφάλισης Μισθωτών).

(now the transposing Act) on occupational schemes concern only the ‘occupational social security funds’ established under Act 3029/2002 (above 2.4.2). The rapporteur of the parliamentary majority made a similar statement in the Plenum of Parliament,<sup>55</sup> while none of them referred to the schemes for the self-employed. Above statements reflect a misunderstanding of the impact of the developments that they mention on essential features of the occupational schemes, as it will be shown below.

#### 2.4.4.3. There is no awareness of the number of existing occupational schemes

##### *a) Several occupational schemes were grouped together, but retained their nature*

In fact, several occupational schemes for salaried workers were grouped together, albeit for administrative purposes only; they were not merged. Thus, by virtue of Articles 1-6 of Act 3655/2008,<sup>56</sup> seven occupational pension schemes (of public corporations and banks, including the scheme at issue in *Evrenopoulos*, section 2.4.2. above) were grouped together with IKA-ETAM. However, the scheme of each public corporation and bank still covers the same category of workers (each one’s employees); the benefits are still paid by reason of the employment relationship and are directly related to the period of service completed; the conditions for entitlement to a pension are still a *minimum* length of service and a pensionable age (which were only increased by virtue of Act 3863/2010, section 2.4.3 above). The pension amounts paid by each public corporation and bank scheme will be calculated on the basis of the final salary or the average salary of the last five years.<sup>57</sup> Thus, IKA-ETAM remains a statutory scheme, while the other schemes grouped with it remain occupational.

Also, Articles 25-38 of Act 3655/2008 created groups of schemes for the self-employed, such as a group under the title ‘Unified Fund for Independently Working Persons’ (ETAA),<sup>58</sup> which includes schemes for the self-employed of the same area of economic activity or occupational sector or group of such sectors (lawyers, persons employed in the health sector and engineers), hence occupational schemes.<sup>59</sup> Each of these schemes still covers the same category, thus retaining its occupational character.

<sup>55</sup> Ms Helen Tsiaoussi: Hellenic Parliament, 13<sup>th</sup> Period, Session B, 28<sup>th</sup> Sitting, Thursday 25 November 2010: <http://www.hellenicparliament.gr>, accessed 20 April 2011.

<sup>56</sup> Act 3655/2008: ‘administrative and organisational reform of the social security system’ OJ A 58/3.4.2008.

<sup>57</sup> According to Article 2(11a) of Act 3029/2002, the final salary is taken into account for the part of the pension that corresponds to the period of affiliation until 31 December 2007. The part of the pension. RTD eur RTD eur corresponding to the period of affiliation from 1<sup>st</sup> January 2008 onward is calculated on the basis of the average salary of the last five year. Furthermore, by virtue of Act 3863/2010 (Arts. 1-4), employees who fulfil the conditions for a pension after 1.1.2015, will be granted a ‘proportional’ pension from their scheme, corresponding to the total amount of contributions paid from 1.1.2011 onward. This pension will be calculated by reference to the total amount of pay received during the whole period of insured service, divided by the total number of months of service. Where the other criteria, which make a scheme occupational, also exist (as in the schemes grouped with IKA-ETAM), this pension will remain occupational (cf. ECJ Case C-46/07 *Commission v Italy* [2008] <http://curia.europa.eu>, point 52, and I-151 (summary)). In addition to this pension, a ‘basic’, state-funded, non-contributive pension will also be paid by each scheme, from 1.1.2015 onward, to those who fulfil the conditions for a pension applying to each particular scheme. The amount of this pension is fixed by law (Act 3863/2010: EUR 360, subject to indexation). It is means-tested for those who are members of a scheme for less than 15 years and at least 65 years old. It does not seem that the pension, which will be partly ‘proportional’ and partly ‘basic’, will lose its occupational character, as even its ‘basic’ part will be subject to the fulfilment of the conditions for the ‘proportional’ pension.

<sup>58</sup> *Ενιαίο Ταμείο Ανεξάρτητα Απασχολουμένων* (ETAA).

<sup>59</sup> See Article 1 of Directive 86/378, not amended by Directive 96/97.



In any event, according to Article 7(2) of the Directive, ‘the fact that [a] scheme forms part of a general statutory scheme shall be without prejudice [to its occupational nature]’.

*b) Acts 3863/2010 and 3865/2010 did not change the nature of the schemes they cover*  
Act 3863/2010 equalises pension conditions for men and women in both statutory (e.g., IKA-ETAM) and occupational schemes (e.g., those grouped with IKA-ETAM, schemes for the self employed, such as those grouped in ETAA (section 2.4.4.3 (a) above) and supplementary pension schemes for public servants and bank employees). Act 3865/2010, besides equalising pension conditions for men and women, provides in Article 2 for persons who will be appointed to the civil or military service from 1.1.2011 onward to be obligatorily and *ipso jure* affiliated with IKA-ETAM for their main pension. However, the (occupational) scheme of the Civil and Military Pensions’ Code (section 2.4.2 above) will still exist for those appointed until 31.12.2010, who are granted the option either to either remain affiliated with it or join IKA-ETAM.

#### 2.4.4.4. The Act does not link its provisions on occupational schemes to previous relevant legislation

The Act does not link its provisions on occupational schemes to Acts 3863/2010 and 3865/2010 (section 2.4.3, 2.4.4.3(b) above), in particular to their (extremely complicated) transitory provisions. Nor does it make any reference to other legislation that restructured social security schemes, such as Act 3655/2008 (section 2.4.4.3(a) above).

2.4.4.5. Public expression of concerns about the legal uncertainty created by the Act  
In view of the above, the Act may well create even greater legal uncertainty than Decree 87/2002 transposing Directive 86/378 as amended by Directive 96/97 (section 2.4.2 above). The National Commission for Human Rights (NCHR)<sup>60</sup> and the Parliament’s Scientific Service,<sup>61</sup> in their respective comments on the relevant bill, drew attention to this. This was also stressed, to no avail, in the competent parliamentary Commission<sup>62</sup> and in the Plenum of Parliament<sup>63</sup> by opposition MPs, who invoked the above comments.

2.4.4.6. Specific problems created by certain provisions of the Act  
Characteristic examples of confusing provisions are those of Articles 6, 8 and 9, in conjunction with Article 7(1)(c) and (f) of the Act. Disregarding the fact that these

<sup>60</sup> The NCHR, an independent body established according to the UN ‘Paris Principles’ (UN General Assembly, 85<sup>th</sup> Plenary Assembly, 20 December 1993, A/RES/48/134), gives non formally binding opinions to the Government on matters related to human rights: <http://www.nchr.gr>, accessed 24 April 2011. Regarding the bill aimed at transposing the Recast Directive, see Letter to the Minister of Labour and Social Security dated 31 October 2010: <http://www.nchr.gr> accessed 25 April 2011.

<sup>61</sup> The Parliament’s Scientific Service drafts Reports on the compatibility of bills with the Constitution, ratified international conventions and EU law, once they are submitted to Parliament. See its Report of 24.11.2010 on the bill aimed at transposing the recast Directive: Parliament’s website: <http://www.hellenicparliament.gr>, accessed 24 April 2011.

<sup>62</sup> See speech of the speaker for the major opposition party (Nea Demokratia), Ms. E. Tsoumani-Spentza, Hellenic Parliament, 13<sup>th</sup> Period, Session B, Permanent Commission for Social Affairs, Minutes of 16 November 2010, archives of this Commission, obtained on 24 April 2010.

<sup>63</sup> Speaker for the major opposition party, Ms. E. Tsoumani-Spentza, and speaker for the Coalition of the Radical Left (SYRIZA), Mr. M. Kritsotakis: Hellenic Parliament, 13<sup>th</sup> Period, Session B, 28<sup>th</sup> Sitting, Thursday 25 November 2010: <http://www.hellenicparliament.gr>, accessed 23 April 2011.



provisions make no sense, as the distinction between statutory and occupational schemes is not clear, let us look into some practical problems that they create.

Article 6 of the Act, entitled 'scope of the prohibition', prohibits any direct or indirect gender discrimination in occupational schemes as regards the matters listed in Article 5 of the Directive, 'subject to the conditions provided in the provisions which follow'. Article 6 applies, like all other transposing provisions of the Act, as from the latter's publication in the OJ (8 December 2010) (section 1.2 above).

#### *a) Self employed persons*

Article 8 of the Act is entitled 'Application to the self-employed'. Its Paragraph 1 aims to implement the requirement of Article 10(1) of the Directive that Member States revise gender discriminatory provisions of schemes for the self-employed by 1<sup>st</sup> January 1993. It thus provides that 'provisions of occupational social security schemes for self employed persons contrary to the principle of equal treatment, cease to apply as from 1.1.1993'. Among the provisions concerned are those conflicting with Article 7(1)(c) and (f) of the Act (*minimum* service requirements and pensionable ages). However, Article 8(1) is too general and vague to constitute a 'revision' in the sense of the Directive. In particular, the following questions arise: what 'ceases to apply'? The higher or the lower age? The longer or the shorter *minimum* service period?

It was rather Act 3863/2010 that made a 'revision' in the sense of the Directive. That Act specifically provided for the gradual increase of service requirements and pension ages for women, from 2011 until 2015, *inter alia*, in schemes for the self employed, such as those of ETAA (section 2.4.4.3(a) above). This Act retained the right to an earlier pension for women who fulfilled the previously provided (more favourable) conditions until 31 December 2010. Thus, in our opinion, the date in Article 8(1) (1.1.1993) has no sense and must be ignored. However, this is not clear; hence RTD eur RTD eur Article 8(1) constitutes an inadequate transposition.

Article 8(2) of the Act, aims to make use of the possibility provided by Article 10(2) of the Directive to retain rights and obligations provided by provisions predating the 'revision'. It provides that 'rights and obligations relating to a period of affiliation to an occupational scheme for self employed persons prior to 1.1.1993 continue to be governed by the provisions of that scheme, in force during that period'. However, if it is considered that it was Act 3863/2010, rather than the transposing Act that made the 'revision', as mentioned above, the date of 1.1.1993 has again no sense and must be ignored, but this is not clear; hence Article 8(1) constitutes an inadequate transposition.

Article 8(3) of the Act aims to make use of the option provided by Article 11(a) of the Directive; it provides that 'the application of the principle of equal treatment in occupational schemes for self employed persons regarding pensionable age (...) is deferred until the date on which equal treatment is achieved in statutory schemes'.

However, the above date is already fixed by Act 3863/2010, which gradually equalises pension ages of men and women from 2011 to 2015, *inter alia*, in statutory schemes. Thus, Article 8(3) of the Act would only make sense if it referred to the relevant provisions of Act 3863/2010. As it stands, it is unnecessary, and can only create confusion. Moreover, Act 3863/2010 fixes explicitly a date for achieving the equalisation of *minimum* service requirements and pensionable age in schemes for the self-employed, such as those of ETAA (section 2.4.4.3(a) above): 31 December 2015. So, what is the legal situation of the self-employed affiliated with an occupational scheme regarding entitlement to an old age pension? In our opinion, it is the transition

period provided by Act 3863/2010, rather than the date of 1.1.1993 that applies, since the Directive does not allow the Act to worsen the existing legal situation. This is the more so, as Act 3863/2010 also implements the recast Directive (above 2.4.3). Consequently, the rights of self-employed women to an old age pension, as provided by Act 3863/2010, are not affected by the Act. This, of course, does not prejudice the right of men to claim an earlier pension before the courts, subject to the conditions applying to women. However, all this is not clear; hence the transposition of the recast Directive regarding the occupational schemes for the self-employed is inadequate.

*b) Salaried workers*

Similar problems arise regarding salaried workers: Article 9 of the Act, entitled 'Retroactive application to salaried workers', provides that 'the provisions of this chapter regarding salaried workers cover all benefits due in respect of periods of employment subsequent to 17 May 1990 and apply retroactively to that date, without prejudice to the rights of workers or those deriving rights from them, who have, before that date, initiated legal proceedings under the legislation in effect. In that event, the provisions of this Act apply retroactively to 1.1.1981 (date of accession) and cover all benefits due for periods of employment after that date'.

It must be recalled that, by virtue of Article 17 of the Act, which makes this Act applicable to persons employed in the private and the public sector, irrespective of the nature of the employment relationship, Article 9 also applies to persons covered by the (occupational) scheme of the Code of Civil and Military Pensions (above 2.4.1). Article 9 of the Act repeats in essence Article 12 of the recast Directive. However, this Act does not mention the date fixed by Article 3(1) of Directive 96/97 for its implementation (1<sup>st</sup> July 1997), which was not modified by the recast Directive, as it results from Article 33(3) of this Directive. It is only in connection with that date that the date of 17 May 1990 might make sense, but this is not the case.

As already mentioned (above 2.4.4.3(b)), Act 3863/2010 gradually equalises pension conditions (pensionable age and service requirements), in (occupational and statutory) schemes for workers on a private law contract, from 2011 until 2015. Act 3865/2010 gradually equalises these conditions in the Pensions' Code, which covers persons employed on the basis of a public law employment relationship, from 2011 until 2013. Thus, legislation predating the Act provides for two different transition periods, which end in 2015 or 2013, depending on the legal nature of the employment relationship of the persons covered, irrespective of the (occupational or statutory) nature of the schemes concerned. Both these Acts came into effect in July 2010 (above 2.4.3) and none makes it possible for any benefit based on its provisions to be retroactively claimed.

How can then Article 9 of the Act be combined with the provisions of Acts 3863/2010 and 3865/2010, in view, moreover, of the fact that Act 3865/2010 was explicitly aimed at complying with the March 2009 ECJ judgment, while Act 3863/2010 must also be considered to implement the recast Directive (section 2.4.3 above)?

In our opinion, for the reasons invoked above (2.4.4.6(a)) in connection with the self-employed, it is the transition periods provided by Acts 3863/2010 and 3865/2010 that apply, since the Directive does not allow the Act to worsen the already existing legal situation. This means that neither the pension rights of women employed on a private law contract of employment nor the pension rights of women in the civil and military service are affected by the Act. This, of course, does not prejudice the right of men to claim an earlier pension before the courts, subject to the conditions applying to

women. However, this is not clear; hence the transposition of the provisions of the Recast Directive on occupational schemes for salaried workers is inadequate.

#### 2.4.4.7. Concluding remarks on the provisions dealing with occupational schemes

We have attempted a first approach to the legal situation in the area of occupational social security, as created by the Act transposing the Recast Directive, in conjunction with legislation predating it by five months, which brings about important modifications of the Greek social security system (Acts 3863/2010 and 3865/2010). This was a quite difficult task, in view of the great complexity of previous legislation and of the whole social security system, of the fact that the provisions of the transposing Act on occupational schemes are unclear and not linked to previous legislation. The obvious result is confusion and legal uncertainty, which makes the transposition of the Recast Directive regarding occupational schemes inadequate and not in conformity to the requirements of ECJ case law on the transposition of directives.

### 2.5. *Scope of horizontal provisions*

Arts. 22 (legal protection) transposing Article 17 of the Directive, Article 23 (civil, administrative and penal sanctions) transposing Articles 18 and 25 of the Directive, Article 24 (burden of proof) transposing Article 19 of the Directive, Article 25 (equality body), transposing Article 20 of the Directive, and Article 29 (social dialogue and dialogue with civil society) transposing Arts. 21, 22 and 29 of the Directive, cover the entire scope of the Act and the Directive, including the area of occupational schemes. This results clearly from the reference made to ‘the provisions of this Act’ (Article 22) or to ‘discrimination prohibited by this Act’ (Article 23) or to ‘the scope of this Act’ (Article 24) or to ‘the application and promotion of the principle of equal opportunities and equal treatment of men and women’ (Arts. 25 and 29).

### 2.6. *Concept of positive action*

Article 116(2) of the Constitution<sup>64</sup> (Const.) requires positive measures, in particular in favour of women, in all areas, even beyond those falling within EU jurisdiction, with a view to promoting substantive gender equality. This provision was inspired by a landmark judgment, by which the Council of State (Supreme Administrative Court – CS)<sup>65</sup> also invoking Directive 76/207/EEC and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), held that the constitutional gender equality norm (Article 4(2)) guarantees not merely formal, but also substantive gender equality, positive measures in favour of women being necessary for remedying their inferior position in society. Article 116(2) Const. was also inspired by Article 141(4) TEC (157(4) TFEU), as authentically interpreted by Declaration No. 28

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<sup>64</sup> Article 116(2) Const.: ‘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 which exist in practice, in particular those detrimental to women’. See the constitutional provisions quoted in this report on the Greek Parliament’s website, in English: <http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma>, accessed 23 April 2011.

<sup>65</sup> CS 1933/1998 (Full Court). All CS judgments quoted in this report are in the NOMOS database, accessible to those registered only: [http://lawdb.intrasoftnet.com/nomos/3\\_nomologia.php](http://lawdb.intrasoftnet.com/nomos/3_nomologia.php), accessed 23 April 2011.

annexed to the Amsterdam Treaty,<sup>66</sup> and Article 3(2) TEC (8 TFEU), in conjunction with Article 4(1) CEDAW. The legislature and all other state authorities must take the positive measures in favour of women that are necessary, adequate and sufficient for achieving substantive gender equality, in all areas where women are in an inferior position.<sup>67</sup> Thus, such measures are also possible, and even required, in the field of pensions, provided they are necessary, adequate and sufficient. This was not the case with lower pensionable ages for women, as the March 2009 ECJ judgment held (section 2.4.2 above).

The CS landmark judgment, Article 116(2) Constitution and Article 3(2) TEC (8 TFEU) use the term '*inequalities*'. The notion of 'inequality' is different in nature from and broader than the notion of 'discrimination'. Gender inequalities are *de facto* situations affecting mainly women, due to 'prejudices and stereotypes',<sup>68</sup> which, by infiltrating socio-economic structures, made the inequalities structural and systemic. Therefore, for eliminating inequalities and promoting gender equality, as required by Article 116(2) Constitution and the Treaty, the eradication of gender discrimination does not suffice; *positive measures are necessary*, in particular in favour of women.<sup>69</sup>

Article 19 of the Act reads: 'Adoption or maintenance of special measures aimed at eliminating eventually existing discrimination against the underrepresented sex and at achieving substantive equality in the areas included in the scope of this Act, as this scope is more particularly specified in the provisions of the first part, do not constitute discrimination.' The first part also includes the chapter on occupational schemes.

This Article is stronger than Article 3 of the Directive in that it explicitly states, in accordance with Article 116(2) Constitution, that positive measures do not constitute discrimination. However, it does not go to the full extent provided Article 157(4) TFEU, in light of Article 8 TFEU and Declaration No. 28, in particular since: it only refers to 'the underrepresented sex', omitting the prevention or compensation for 'disadvantages in professional careers' mentioned in Article 157(4) TFEU; it requires the elimination of 'discrimination', while Article 8 TFEU requires the elimination of 'inequalities'; it does not require that positive measures favour 'in the first instance women'. Although the latter provision prevails over any statutory provision, the NCHR proposed that Article 19 repeat the provision of Art 116(2), for reasons of legal certainty.<sup>70</sup>

This wording would also promote legal certainty regarding positive action under EU law. Indeed, as Article 31(2) of the Directive states that Member States '*shall*' every four years communicate the texts of positive measures as well as reports on these measures and their implementation, to be assessed in the light of Declaration No. 28, Member States do not seem to be free to take or refrain from taking positive

<sup>66</sup> Declaration No. 28, on Article 119(4) TEC (157(4) TFEU): 'When adopting measures referred to in Article 119(4) [TEC], Member States should, in the first instance, aim at improving the situation of women in working life.' This Declaration is referred to in Article 31(2) of the Recast Directive in connection with the Member States' reports on positive measures to be submitted to the Commission.

<sup>67</sup> See in particular CS 1933/1998 (Full Court), 2832-2833/2003, 192/2004, 2388/2004, 1667/2009.

<sup>68</sup> ECJ Cases C-158/97 *Badeck and others v Hessischer Ministerpräsident* [2000] ECR I-1875, point 21; C-409/95 *H. Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, points 29, 30.

<sup>69</sup> See A. Yotopoulos-Marangopoulos *Affirmative Action: Towards Effective Gender Equality*, Athens/Brussels, Marangopoulos Foundation for Human Rights, Ant. N. Sakkoulas/Bruylant 1998; S. Koukoulis-Spiliotopoulos *From Formal to Substantive Gender Equality. The Proposed Amendment of Directive 76/207; Comments and Suggestions* pp. 24-29 Athens/Brussels, Marangopoulos Foundation for Human Rights, Ant. N. Sakkoulas/Bruylant 2005.

<sup>70</sup> NCHR Letter to the Minister of Labour and Social Security, dated 31 October 2010: <http://www.nchr.gr>, accessed 20 April 2011.

measures, while these must be appropriate and effective and primarily in favour of women.

## **2.7. Reconciliation of work, private and family life**

The Act contains several provisions on the reconciliation work, private and family life. An explicit mention of this expression is only made in Article 26 of the Act, which sets out the competences of the Gender Equality Service of the Ministry of Labour and Social Security (this Service has, *inter alia*, the legislative initiative for rules concerning the reconciliation of professional, private and family life). However, well established CS case law on parental leave relies on the ‘general principle of harmonisation of professional and family life’, in conjunction with Article 21(1) Constitution, which requires the protection of the family, marriage, motherhood and childhood. The CS, quoting ECJ case law,<sup>71</sup> recalls that this principle is a ‘natural corollary to gender equality’ and a condition for its substantive achievement. It also mentions that Directive 96/34 (parental leave) constitutes a particular expression of this principle.<sup>72</sup>

Article 16 of the Act, under the title ‘Return to work after maternity leave’, mostly copies Article 15 of the Directive. This Article requires, in accordance with the Directive ‘no less favourable’ conditions of work. This means ‘the same’ or ‘more favourable’. Thus, the protection is stronger than the protection provided by Act 3488/2006 transposing Directive 2002/73, which required ‘the same conditions’. This provision is very important in view of the fact that adverse treatment of women in this situation is widespread in practice.<sup>73</sup>

Article 20 of the Act, under the title ‘Protection of maternity, paternity and family life’, mostly repeats provisions of Acts 3488/2006 and 1414/1984, which transposed Directives 2002/73 and 76/207, respectively. Paragraph 1 stipulates that the Act is without prejudice to provisions regulating the protection of pregnancy, maternity, paternity or family life. Paragraph 2 prohibits the refusal to hire on grounds of pregnancy or maternity.

Paragraph 3 extends the protection, which Article 16 of the Act provides to women returning from maternity leave (above), to workers who make use of any leave for the birth, raising or adoption of a child. Our comments on Article 16 also apply here.

Paragraph 4 refers to Article 15 of Act 1483/1984, which prohibits dismissal during pregnancy and one year after childbirth or during the woman’s absence for a longer period due to illness having its source in pregnancy or childbirth, except on a serious ground unrelated to pregnancy; it also specifies that eventual decrease of the woman’s output due to pregnancy may not be considered a serious ground. This protection, extended by three months, also applies to women making use of an additional six months’ leave provided by Article 142 of Act 3655/2008. Thus, these women will be protected from dismissal for a total period of fifteen months. Paragraph 5 extends the parental leaves of absence to part-timers, which are provided by Articles 7 and 9 of Act 1483/1984 in cases of illness of a dependent family

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<sup>71</sup> Cases C-243/95 *K. Hill and A. Stapleton v the Revenue Commissioners and the Department of Finance* [1998] ECR I-3739; C-1/95 *H. Gerster v Freistaat Bayern* [1997] ECR I-5253.

<sup>72</sup> See in particular CS 1 and 2/2006, predating the Recast Directive.

<sup>73</sup> See Ombudsman *Equal Treatment of Men and Women in Employment and Labour Relations*, Special Report November 2009: [http://www.synigoros.gr/diakriseis/pdfs\\_01/8657\\_1\\_1-92\\_ENG\\_FULL\\_2010\\_FINAL.pdf](http://www.synigoros.gr/diakriseis/pdfs_01/8657_1_1-92_ENG_FULL_2010_FINAL.pdf) (in English); *Second Special Report* December 2010: <http://www.synigoros.gr/diakriseis/index.htm> with a summary in English, accessed 25 April 2011.

member and for school visits. This extension was already made by Act 3488/2006, transposing Directive 2002/73.

## **2.8. Periodical assessment of exclusions**

The Act, contains no provision allowing exclusions from the application of the principle of equal treatment. The reason for this is the following: Article 116(2) Constitution, in its original version, allowed derogations from the gender equality principle ‘for sufficiently justified reasons, in cases specifically provided for by statute’. Following the landmark CS judgment on substantive gender equality and a strong campaign by women’s NGOs, this provision was replaced, in 2001, by a provision requiring positive measures (above 2.6). Thus, since the Constitution does not allow derogations anymore, the Directive’s provision on exclusions was not transposed.

## **2.9. Judicial procedures**

Directive 2002/73 referred to ‘judicial and/or administrative procedures’. However, the disjunctive conjunction ‘or’ was inconsistent with well established ECJ case law, according to which victims of discrimination must have access to an effective ‘judicial remedy’. This is a requirement of the *general principle of effective judicial protection*, a general principle of EC/EU law, which confers to all persons ‘the right to obtain an effective remedy in a competent court’.<sup>74</sup> The use of ‘or’ might give the wrong impression that there was no need for a judicial remedy, once administrative procedures were available. The conjunction ‘or’ was not used in the corresponding provisions of previous gender equality directives, such as Article 2 of Directive 75/117, Article 6 of Directive 76/207, Article 9 of Directive 86/613 or Article 10 of Directive 86/378. It thus seemed to be due to a material error. The European Women Lawyers Association (EWLA) stressed this in its comments on the proposal for a Recast Directive, which also contained the conjunction ‘or’ in Article 17.<sup>75</sup> This material error was remedied in the final version of Article 17(1), which, like Article 6 of Directive 76/207, requires judicial procedures ‘after possible recourse to other competent authorities’.

Article 22 (‘legal protection’), which transposes Article 17 of the Directive, requires that access to both judicial and administrative procedures be ensured to individual victims of violations of the Act and to organisations. This was also required by Article 12 of Act 3488/2006 transposing Directive 2002/73. However, the wording of Article 22 may restrict the standing of organisations. More particularly:

Paragraph 2 of Article 22 reads: ‘Legal persons and unions of persons which justify a relevant legitimate interest may, with the *consent* of the person wronged by violations of this Act, have recourse to the competent administrative or judicial authorities. They may also intervene in his/her support before administrative or judicial authorities’.<sup>76</sup> Article 17(2) of the Directive requires the ‘*approval*’, not the ‘*consent*’ of the wronged person. Under Greek law, the ‘consent’ must be given

<sup>74</sup> Case 222/84, *M. Johnston v the Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663, points 17-21.

<sup>75</sup> See EWLA *Comments on the proposal for a Recast Directive on gender equality*: <http://www.ewla.org/ResolutionsAndStatements/20002006>, accessed 25 April 2011; S. Koukoulis-Spiliotopoulos ‘The Amended Equal Treatment Directive (2002/73/EC): An Expression of Constitutional Principles/ Fundamental Rights’, *Maastricht Journal of European and Comparative Law* (2005) 12 MJ 4, pp. 327-368 (365-367).

<sup>76</sup> Emphasis added.



before the lodging of a judicial remedy or intervention, while the ‘approval’ can be given afterwards.<sup>77</sup> Thus, until the consent is obtained, the remedy may well be time barred (e.g. a dismissal can be challenged within three months of its notification and an administrative act within sixty days of the date on which the wronged person took cognisance of it). The NCHR requested, in vain, the replacement of ‘consent’ by ‘approval’.

The NCHR also repeated a recommendation that it always makes (albeit in vain) regarding the transposition of EU procedural rules (burden of proof, *locus standi* of organisations to bring claims of wronged individuals). These rules may be seen as acting counter to well established national principles. Thus, as long as the provisions transposing them are not correctly and clearly worded and incorporated into the relevant procedural codes, they remain unknown to judges, lawyers, organisations and individuals concerned. There are no judicial decisions applying these rules. This is a very serious problem in Greece.<sup>78</sup> The fact that judges and lawyers ignore these rules and that even when they are informed about them they are reluctant to apply them, is constantly confirmed, for example on the occasion of conferences and seminars. A more general serious problem is the excessive length of procedures, due to which the ECtHR has repeatedly condemned Greece and has even given a recent ‘pilot judgment’.<sup>79</sup>

## **HUNGARY – Csilla Kollonay Lehoczky**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

There has been no piece of legislation adopted with the specific aim of transposing the Recast Directive. A check of existing legislation to ascertain that it is in compliance with the provisions of the Recast Directive seems to have been made.

#### ***1.2. Correlation tables***

Correlation tables were not made public in the past.

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

Because there was no specific, implementing legislation adopted, nothing on the purpose of the Directive was published by the legislative or responsible administrative organs that would suggest or reflect such a progressive purpose (i.e., equal opportunities in addition to equal treatment).

A shift from the principle of equal treatment to the principle of equal opportunities can be considered progress. However, this is not enough. It is already commonplace that formal equal (“sex-blind”) treatment has to be shifted by substantive equality that includes the equalisation of opportunities by adequate means. In addition, the approach should progress towards a genuine diversity at the

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<sup>77</sup> See Articles 236-238 of the Greek Civil Code for the meaning of ‘consent’ and ‘approval’.

<sup>78</sup> See NCHR Comments on the bill transposing Directive 2006/54 and Letter to the Minister of Labour and Social Security dated 31 October 2010: <http://www.nchr.gr>, accessed 25 April 2011, as well as EGELR, No. 1/2008, Greece.

<sup>79</sup> ECtHR *Athanasίου v. Greece*, 21 December 2010 (final since 21 March 2011).

workplace and at all spheres of society (including family). Such an approach should remove all hidden stereotypes and equally distribute both workplace and family duties.

## ***2.2. Gender reassignment***

No provision has been adopted regarding gender reassignment, and it is unlikely that the issue would be addressed. Sexual identity is listed as prohibited ground of discrimination in the Equal Treatment Act of 2003. Sex-reassignment surgery and the change of the name and sex in the official registry are available. However, because of the lack of clear regulation of both the medical and the legal factors, transsexuals are exposed to discriminatory situations that have not changed.

## ***2.3. Definition of Pay***

The identical definition from Article 141 of the Amsterdam Treaty was copied and translated into Section 142/A, Subsection. (3): ‘For the purposes of Subsection (1) (the provision laying down the equal-pay obligation – the CKL) ‘wage’ shall mean any remuneration provided to the employee directly or indirectly in cash or kind, as well as social benefits, based on his/her employment.’ There is no difference in the concepts.

## ***2.4. Occupational social security schemes***

There was no implementing legislation, and there is no special scheme for any category of workers. (Apart from the lack of formal implementation of the Recast Directive, the law on occupational pension schemes – adopted under pressure to comply with EU law – is hanging as an alien body in the legislation; it is not put into practice).

Seemingly there was implementation; however, a closer look reveals that this was not the case. Act CIII of 2008 has “amended” section 34, subsection (8) of Act CXVII of 2007 on occupational pension schemes, and referred to that as an implementation of Directive 2006/54/EC. However, the ‘amended’ and the ‘amending’ text are literally identical, i.e., there was no amendment. Second, this unchanged text is practically the authorisation to provide gender-differentiated services, which were not legitimate opportunities before Act CXVII of 2007 (adopted quickly in December 2007 to have the opportunity to still be in compliance with the directive).

## ***2.5. Scope of horizontal provisions***

The content of Articles 17-22 of the Directive are supposed to have already been transposed into the Hungarian legal system by the Equal Treatment Act of 2003. No additional legislative step was considered necessary in order to implement the Recast Directive. The material scope of this act covers all areas addressed by the Recast Directive. (As to the occupational pension schemes, see the previous (2.4) subtitle)

## ***2.6. Concept of positive action***

Legislative (and also judicial) approaches to positive action have been restrictive in the past. The government in power adopted measures to ‘support women’ (retirement opportunity for women after 40 years of service, including childcare years), ‘job sharing’ (part-time) job opportunities for those returning from childcare and those who were substituting for them. However, these are not positive actions in the sense of promoting equality. As occupational pension schemes are not applied in practice, the question is not applicable.



### ***2.7. Reconciliation of work, private and family life***

Employers who hire employees returning from maternity or parental leave for half-time work (20 hours per week) hire for the other 20 hours per week either the former substitute for the absent worker or another person on a part-time basis, only have to pay 20% instead of 27% of the workers' salary as the total social security contribution. The upper limit of the benefit is double the amount of the minimal wage. If salaries exceed this amount, the general 27% contribution has to be paid.<sup>80</sup> This amendment made no reference to the Recast Directive.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Exceptions were restricted to the least possible in the process of accession and the harmonisation with the equality legislation, which was carried out by a strict scrutiny of the existing legislation. Therefore there was not much to report. However, exceptions might increase, (see 2.6. above). It is difficult to know how the government complies with its reporting duty.

### ***2.9. Judicial procedures***

Since 2004, an administrative procedure has joined the available court procedure (labour courts in employment cases and general courts in other cases, such as services, etc.). Thus, both procedures are available, either alternatively or consecutively. If a court procedure is in process when the Equal Treatment Authority starts its procedure, the ETA suspends its procedure.

### ***2.10. Other novelties?***

None

### ***2.11. Additional problems***

The lack of taking seriously the issue of gender discrimination and equal opportunity of men and women is a persisting problem without any difference between the shifting consecutive governments, which also extends to the government. This might be the reason for which the transposition of the Recast Directive received much less attention than the general equality regulation accompanying the accession process.

The burden-of-proof problem persists in the case law of the courts, primarily by the repeated references to the 'employers' discretion' that is perceived as an area where the employer is 'free' to decide; however, it is exactly the area where the non-discrimination principle has to be observed.

## **ICELAND – *Herdís Thorgeirsdóttir***

### **1. Transposition of the Directive**

The EEA Joint Committee-made Directive 2006/54/EC (hereinafter Recast Directive) is part of the EEA Agreement outlined by its decision of 14 March 2008. The Recast Directive has however not been transposed into Icelandic law. The reason provided by authorities is that such transposition is not necessary as the Act on Equal Status and

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<sup>80</sup> Act no. CXXIII of 2010, in force since 1 January 2011.

Equal Rights of Women and Men No. 10/2008 – the gender equality act (hereinafter GEA No. 10/2008) – covers the provisions of the Recast Directive in substantive law.

### ***1.1. Transposition***

National legislation appears to be in line with the requirements of the Recast Directive. The GEA No. 10/2008 is regarded as sufficiently transposing the Recast Directive into Icelandic law.

### ***1.2. Correlation tables***

As no transposition has taken place, the Government has not considered it necessary to publish tables illustrating the correlation between this Directive and provisions in the GEA.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The principle of equal opportunities is entrenched in Article 1 of the GEA No. 10/2008 stating inter alia that: all individuals shall have equal opportunities to benefit from their own enterprise and to develop their skills irrespective of gender. This aim shall be reached by the following means, amongst others:

1. Observing gender equality perspectives and working towards gender mainstreaming in policy-making in all spheres of society;
2. Working to secure equal influence of women and men in society;
3. Specifically improving the position of women and increasing their opportunities in society;
4. Working against wage discrimination and other forms of gender-based discrimination on the employment market;
5. Enabling both women and men to reconcile their work and family life;
6. Increasing education and awareness-raising on gender equality;
7. Analysing statistics according to gender;
8. Increasing research in gender studies;
9. Working against gender-based violence and harassment;
10. Changing traditional gender images and working against negative stereotypes regarding the roles of women and men.

Uniform definitions of the terms ‘indirect discrimination,’ ‘harassment’ and ‘sexual harassment’ are provided for in Article 2 of the GEA no. 10/2008.

The theoretical implications of having this principle of equal opportunities explicitly set forth in the law is of course of value. The gap between theory and practice with regard to equal opportunities is, however, still great and the applicability of the law to bridge that gap with grand statements like ‘specifically improving the position of women and increasing their opportunities’ is still very uncertain with regard to rendering the objective of equality effective as no explicit implementation measures are required.

### ***2.2. Gender reassignment***

The GEA No. 10/2008 does not address discrimination based on gender reassignment. Article 65 of the Constitution No. 33/1944 prohibits discrimination based on sex and other status but does not mention gender reassignment. The said provision was inserted into the Constitution with amendments in 1995.

The Parliament Ombudsman (*Althing Ombudsman*) in an opinion in case No. 4919/2007<sup>81</sup> deemed it necessary to revise current legislation with regard to the rights of individuals undergoing gender reassignment to change their name and sexual identity in the national register. The Ombudsman decided to take up the matter for investigation<sup>82</sup> in the wake of a complaint by a man whose claim to have his name changed from a male name to a female name was refused by the Ministry of Justice on basis of Act No. 45/1996 on personal names. The refusal by the Ministry was based on the premises that the man had not completed his medical gender reassignment process. The man complained to the Ombudsman holding that his right to privacy according to Article 71 of the Constitution No. 33/1944 had been violated as well as his rights according to Article 8 of the European Convention on Human Rights. The Ombudsman concluded that there was lack of legal prescription on whether and on what condition individuals in the above category could apply for changes in the public registration of their name and sex and that this legal deficiency might have a serious impact on their private and family life. The Ombudsman finally stated that if there would be resort to a comprehensive investigation of whether it was necessary to revise the law with regard to the change of names other spheres of legislation might come under scrutiny with regard to the rights of transgender individuals.<sup>83</sup>

There is no current legislation explicitly addressing gender reassignment. The Minister of Welfare appointed a committee in March this year to come up with remedies for improving the situation of transgender individuals before the end of 2011.<sup>84</sup>

### **2.3. Definition of Pay**

Definition of payment as set forth in Article 1 of the GEA No. 10/2008 corresponds to the definition introduced in the Directive (Article 2 (e)). Article 1 of the GEA states: ‘Wages are ordinary remuneration for work and further payments of all types, direct and indirect, whether they take the form of perquisites or other forms, paid by the employer to the employee for his/her work.’ Wage equality is stipulated in Article 19 which states that: ‘Women and men working for the same employer shall be paid equal wages and enjoy equal terms of employment for the same jobs or jobs of equal value.’ ‘Equal wages’ means that wages shall be determined in the same way for women and men. The criteria on the basis of which wages are determined shall not involve gender discrimination. ‘Equal value’ has been interpreted by the Supreme Court as applying to different types of jobs depending on a contextual evaluation. A novelty was inserted in the GEA No. 10/2008 permitting workers, *upon their choice*, to disclose their wage terms (Article 19 GEA No. 10/2008).

<sup>81</sup> See <http://umbodsmaduralthingis.is/skyrslur/skoda.asp?Lykill=1280&Skoda=Mal>, accessed 26 April 2011.

<sup>82</sup> In accordance with Act No. 85/1997 on the Althing Ombudsman. Article 5 of that Act deals with cases of initiative.

<sup>83</sup> See coverage in main newspapers [http://www.mbl.is/frettir/innlent/2009/04/28/endurskoda\\_tharf\\_reglur\\_um\\_kynskipti/](http://www.mbl.is/frettir/innlent/2009/04/28/endurskoda_tharf_reglur_um_kynskipti/), accessed 26 April 2011.

<sup>84</sup> <http://www.velferdarraduneyti.is/frettir-vel/nr/32723>, accessed 26 April 2011.

#### **2.4. Occupational social security schemes**

The provisions of the recast have not been transposed into the Act on Mandatory Pension Insurance and the Activities of Pension Funds No. 129/1997, amended with law No., 13/2009.

The Social Security Act No. 100/2007 stipulates a certain degree of social protection for everyone residing in Iceland for a certain length of time. Income and family circumstances can also have an effect. The statutory public pension scheme is a tax-financed public plan that provides a flat-rate or means-tested basic pension to which every individual belongs. The social insurance is financed from the State Treasury by tax payments into the treasury and payroll taxes paid by employers and independently working individuals, but there is no other specific premium paid for social insurance. The public pension is paid as basic pension and supplementary additions to single or low-income earners.

A comprehensive pension reform that took place in 1997 and 1998 resulted in the current Act on Mandatory Pension Insurance and the Activities of Pension Funds No. 129/1997, amended with law No. 13/2009.

Every wage earner working is obliged to contribute a minimum of 12% of his/her salary to an occupational fund, in most cases a fund predetermined by his/her trade union. The employer contributes a minimum of 8% of the total contribution. A similar arrangement exists in the public sector.<sup>85</sup> The pension funds pay a pension because of old age and disability and death grants. The right to payments from a pension fund depends on the paid-in premiums of fund members and the length of the payment period. Further information about these rights is obtained from the relevant pension fund. The occupational pension funds on the general labour market are defined-contribution schemes and they have been age-related since 2006. Prior to that, an equal accrual of rights prevailed; i.e., fund members accrued the same entitlement for the same contribution, regardless of their age when the contribution was paid. When the age-related scheme was adopted by the occupational funds, the rights accrued are determined by the age of the fund member when the contribution is made. Younger fund members, thus, accrue more rights than older members for the same contribution. Some funds reasoned that linking entitlement to age ensured equality between fund members in their accrual of entitlement over their working life. This system does, however, constitute indirect discrimination towards many women who usually do not have a continuous work life to the same extent as men. In many cases, women have had interrupted careers in the labour market because of having and raising children albeit that changed with the Act on Maternity/Paternity and Parental leave No. 95/2000.

Civil servants have a special position on the Icelandic labour market. A special law, Act no. 70/1996, applies to their rights and duties. Additionally, Act no. 94/1986 addresses the wage agreements of civil servants. The principal role of the Pension Fund for State Employees (LSR),<sup>86</sup> is to pay pensions to its members upon retirement and throughout their lives and ensure their families with a pension following a loss of income due to impaired ability to work or death.

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<sup>85</sup> In 1998 the minimum rate of contribution was 10% of total salaries, 4% for employees and 6% for employers. In 2005, the rate was increased to 11% and again to 12% at the beginning of the year 2007; the minimum share of the employers now being 8% instead of 6%.

<sup>86</sup> LSR *Lífeyrissjóður starfsmanna Ríkisins* (An abbreviation for the Occupational Fund of Public Servants).

### ***2.5. Scope of horizontal provisions***

Articles 17j-22 of the Directive are implemented in the GEA No. 10/2008. The GEA entails remedies in defence of rights. The Gender Equality Complaints Committee examines cases on violations of the GEA and delivers rulings that are binding for the parties to each case. The parties may refer the Committee's rulings to the courts (Article 5 of the GEA No. 10/2008). If a ruling of the Gender Equality Complaints Committee is in the plaintiff's favour but the respondent does not accept the Complaints Committee's ruling and brings an action to have it annulled by the courts, the plaintiff's legal costs, both at the district court and Supreme Court level, shall be paid by the Treasury (Article 5 of the GEA No. 10/2008).

Individuals, enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members who consider that they are victims of violations of the GEA, may submit their case to the Gender Equality Complaints Committee. The Committee shall deliver its rulings at the earliest opportunity, and no later than three months after receiving the case.

Compensation for financial and non-financial loss is covered by Article 31 of the GEA No. 10/2008. In cases of alleged discrimination at work and on engagement in employment, the respondent bears the burden of proof (Article 26 of the GEA No. 10/2008).

One of the novelties of the GEA No. 10/2008 is to strengthen and make more explicit the authority of Centre for Gender Equality to monitor the implementation of the Act, enabling the Centre to impose a daily fine in certain instances to enforce the law (Article 4 of the GEA No. 10/2008). The Centre for Gender Equality may request that the Gender Equality Complaints Committee examine a case (paragraph 5 of Article 4 of the GEA No. 10/2008).

The social dialogue (Article 21 of the Recast Directive) is entrenched in the principles set forth in Article 1 of the GEA stipulating gender mainstreaming in policy-making and decision-making in all spheres of society and increasing education and awareness – raising on gender equality as well as changing traditional gender images and working against negative stereotypes regarding the roles of women and men.

Regarding Article 22 of the Recast Directive dialogue with non-governmental organisations (NGOs), the Gender Equality Council (Article 8 of the GEA No. 10/2008) is appointed by the Minister of Social Affairs after each parliamentary election of eleven representatives of various NGOs.

### ***2.6. Concept of positive action***

The need to adopt positive action schemes is recognised in Article 15 of the GEA No. 10/2008 regarding participation in governmental and municipal committees, councils and boards stipulating that when appointments to these bodies are made, care shall be taken to ensure as equal a representation of men and women as possible. This shall also apply to the boards of publicly owned limited companies and enterprises in which the state or a municipality is the majority owner. Regarding rights and obligations in the labour market, Article 18 of the GEA No. 10/2008 provides that employers and trade unions shall work deliberately to place women and men on equal footing in the labour market. Employers shall work specifically to place women and men on equal footing within their enterprise or institution and to take steps to avoid jobs being classified as specifically women's or men's jobs. Particular emphasis shall be placed on achieving equal representation of women and men in managerial and

influential positions. There is no mention of the need for special measures or positive action with respect to occupational pension schemes.

### ***2.7. Reconciliation of work, private and family life***

The issue of reconciliation of work, private and family life is set forth in Article 1 of the GEA No. 10/2008(e), enabling both women and men to reconcile their work and family life. These issues precede the Recast Directive as they were already entrenched in the prior gender equality act No. 96/2000. Article 21 of the current GEA No. 10/2008 (Article 16 of the previous GEA) deals explicitly with reconciliation of work and family life stating that employers shall take the measures necessary to enable women and men to reconcile their professional obligations and family responsibilities. The stated aim of the Act on Maternity/Paternity Leave and Parental Leave No. 95/2000 is according to Article 2 to ‘enable both women and men to co-ordinate family life and work outside the home’.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

As the Recast Directive has not been transposed into Icelandic law the obligation entailed in its Article 31(3) does not apply to Icelandic authorities and they have hence not taken any steps to comply with this obligation. Any exclusion related to sex by reason of the nature of the particular occupational activities must meet the text of objectivity, legitimacy and proportion.

### ***2.9. Judicial procedures***

The GEA No. 10/2008 provides scope for the availability of judicial procedures, after possible recourse to other competent authorities. Individuals, enterprises, institutions and non-governmental organisations, either in their own name or on behalf of their members who consider that they are victims of violations of the GEA No. 10/2008 may submit their case to the Gender Equality Complaints Committee (Article 6 of the GEA No. 10/2008). The Committee’s rulings are binding for the parties to each case. The parties may refer the Committee’s rulings to the courts. At the request of a party, the Committee may deliver a ruling deferring the legal effect of its own ruling if it deems it reasonable. A request to this effect shall be presented not later than ten days after the publication of the ruling. The deferral of the legal effects of a ruling shall be subject to the condition that the party to the case will refer the matter to the courts within thirty days of the publication of the ruling deferring the legal effects, and will then request that it receives swift treatment. If a request for swift treatment is rejected, then the case shall be litigated as quickly as possible after the rejection is announced and not later than thirty days following the judge’s rejection. The deferral of the legal effects of a ruling shall expire if the matter is not referred to the courts within thirty days of the publication of the ruling deferring the legal effects, or if no action is instituted within thirty days of the rejection by a judge of the request for speedy treatment. If a case concerning a Committee’s ruling is litigated, the Committee may defer its treatment of comparable pending cases until judgment has been delivered in the case (Article 5 of the GEA No. 10/2008).

### ***2.10. Other novelties?***

See 2.5 above. No other novelties relevant.

### **2.11. Additional problems**

As current legislation is regarded to be in compliance with the Recast Directive, there is nothing to add here.

## **IRELAND – Frances Meenan**

### **1. Transposition of the Directive**

#### **1.1 Transposition**

The Minister for Justice, Equality and Law Reform stated to Parliament in October 2008 that the national law was in compliance with Directive 2006/54/EC.<sup>87</sup> However, it is arguable that Irish legislation is not completely in compliance with the Directive. First, there is no reference in the Employment Equality Acts 1998 to 2008 to gender reassignment. Second, in order to succeed in an equal pay claim, the complainant must nominate a comparator of the opposite gender and succeed in showing that they do ‘like work’ within the three years that precede and follow the date of the claim. Third, compensation under the legislation is subject to a ceiling that is not ‘dissuasive and proportionate to the damage suffered’. Fourth, in addition, there is no reference to the principle of equality and to reconciliation of work and family life.

There was no specific transposition of Directive 2006/54/EC as it was considered that the Recast Directive was already provided for in legislation<sup>88</sup> as follows:

1. Employment Equality Acts 1998 to 2010<sup>89</sup> transposed Directive 75/117/EEC (equal pay), Directive 76/207/EEC (equal treatment), Directive 2002/73/EC (amending 76/207/EEC equal treatment), (‘the Employment Equality Acts’ or the ‘1998 Act’);
2. Pension Acts 1990 to 2009 transposes Directive 86/378/EEC (occupational schemes excluding statutory schemes), Directive 96/97/EC (amending Directive). The Pensions Act 1990 was amended *inter alia* by the Social Welfare (Miscellaneous Provisions) Act 2004 and subsequent legislation; references to pensions refer to the Pensions Act 1990 as amended;
3. Maternity Protection Acts 1994 and 2004 (‘the Maternity Acts’);
4. Adoptive Leave Acts 1995 and 2005 (‘the Adoptive Leave Acts’); and
5. Parental Leave Acts 1998 and 2007 (‘the Parental Leave Acts’).

#### **1.2. Correlation tables**

Ireland has not drawn up and published tables illustrating the correlation between Directive 2006/54/EC and the transposition measures.

### **2. Novelties**

#### **2.1. Purpose of the Directive**

The principle of equality is not specifically provided for in the Employment Equality Acts or in other implementing legislation. The Employment Equality Acts 1998 to 2010 are anti-discrimination legislation and the long title to the Employment Equality

<sup>87</sup> <http://historical-debates.oireachtas.ie/D/0663/D.0663.200810140164.html>. accessed 30 April 2011.

<sup>88</sup> All Acts are available at <http://www.irishstatutebook.ie/>.

<sup>89</sup> As amended by the Equal Status Act 2000, the Equality Act 2004, the Intoxicating Liquor Act 2003, the Civil Law (Miscellaneous Provisions) Act 2008 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Act 1998 refers to its being ‘an Act to make further provision for the promotion of equality between employed persons; to make further provisions with respect to discrimination in, and in connection with, employment ...’. An equality clause is implied into every contract of employment. Discrimination for the purposes of the Acts shall be taken to occur when a person is being treated less favourably than another person or the person has been or would be treated less favourably than the other person. Discrimination may also be imputed to a person. There may also be discrimination by association. One<sup>90</sup> of the discriminatory grounds is where one person is a woman and the other person is a man (the gender ground). The terms ‘equal treatment’ and ‘equal opportunities’ are not specifically defined in the employment equality legislation. In respect of positive action on equal opportunities, there is reference to ‘full equality in practice’.

The guarantees in the Constitution of Ireland 1937 are limited and do not affirm a wider concept of sex equality.<sup>91</sup> The discussion and application of the concept of equality is considered in respect of constitutional actions whilst the application of the anti-discrimination principle is applied within the context of legislation. Anti-discrimination legislation in the main results from the transposition of the relevant EU employment Directives. It is considered that equality is generally understood to address more than direct discrimination and that it also has implications for indirect discrimination, that is, rules or practices that are ostensibly neutral but which in practice impact disproportionately on one group when compared to another.<sup>92</sup> The terms direct and indirect discrimination are statutorily defined in the Employment Equality Acts 1998 to 2010, the Equal Status Acts 2000 to 2010<sup>93</sup> and the Pensions Acts 1990 to 2009.

There are some practical implications in respect of anti-discrimination legislation; for example, in an equal pay claim there must be a female complainant and a male comparator and *vice versa*. Furthermore, in respect of an equal pay claim, there is no provision for a ‘hypothetical’ comparator. The Irish High Court in an equal-pay case<sup>94</sup> stated that there must be ‘an actual concrete real life comparator of the other sex’ performing ‘like work’ in the same establishment or service. The complainant and the comparator need not be employed contemporaneously but they must have been employed either three years prior to the date of the claim and/or three years following the date of the claim.<sup>95</sup> Arising from the fact that there must be a comparator of the opposite sex, there are inevitable difficulties in bringing equal-pay cases in segregated employment and thus, there is arguably a continuation of the gender pay gap in female segregated employments.<sup>96</sup>

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<sup>90</sup> There are eight other grounds namely civil status, family status, sexual orientation, religion, age, disability, race and the Traveller community (people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland) grounds.

<sup>91</sup> Alpha Connelly *Gender and the Law in Ireland* Chapter 2 *The Constitution* Alpha Connelly, Oaktree Press, Dublin, 1993.

<sup>92</sup> G.W. Hogan and G.F. Whyte *J.M. Kelly: The Irish Constitution*, 4<sup>th</sup> Ed. Lexis Nexis Butterworths Dublin 2003 at page 1324fn7.

<sup>93</sup> Equal treatment in respect of goods and services.

<sup>94</sup> *Brides v Minister for Agriculture* [1998] 4 IR 250 at 270.

<sup>95</sup> Frances Meenan and Owen Garvey *The Gender Pay Gap in Ireland – A Legal Review* (2010) 17(11) CLP 225.

<sup>96</sup> Eg. *Buckley v HSE EDA* 1113 (on appeal) <http://www.labourcourt.ie/labour/labour.nsf/lookuppagelink/HomeRecommendations>. accessed 30 April 2011.



## 2.2. Gender reassignment

There is no reference in the Irish legislation to gender reassignment.<sup>97</sup> The new Irish Government in the Programme for Government of March 2011 provides ‘We will ensure that transgender people will have legal recognition and extend the protections of the equality legislation to them’. Under the current legislation, if a complainant considers that they have been discriminated against in relation to gender reassignment, they must bring their claim on both the gender and disability grounds. In a recent case, where a complainant, who had been diagnosed with gender identity disorder and is a male to female transsexual, maintained that she was subjected to discriminatory treatment. In this case, the complainant claimed discrimination both on the gender and on the disability ground. The complainant succeeded in her case and the Equality Tribunal followed the ECJ case of *P v S and Cornwall County Council*.<sup>98</sup> The Irish Employment Equality Acts are silent on gender reassignment. Whilst the complainant was in receipt of significant compensation (79 weeks’ remuneration), nonetheless, the Equality Tribunal stated that there was a *prima facie* case of discrimination on the gender and disability grounds and thus awarded the compensation.<sup>99</sup> In 2007, there were two settlements relating to transgender/gender identity disorder: one in employment and one concerned with the reissuing of the leaving certificate (final school examination) to reflect the presenting gender. In the case of *Foy v An T-Ard Chlaraitheoir, Ireland* (Registrar General of Births, Marriages and Deaths),<sup>100</sup> the High Court noted the difficulty in Ireland in respect of registering under a different gender and that it was a matter for parliament to change the law as was done in the United Kingdom.

## 2.3. Definition of Pay

The definition of ‘remuneration’ in the Employment Equality Act 1998<sup>101</sup> is word for word the same as in the definition in Article 2. However, it excludes pension rights. Pension rights are provided for in the Pensions Act 1990 as amended by the Social Welfare (Miscellaneous Provisions) Act, 2004.<sup>102</sup> In the 2004 Act, there is a definition of ‘Occupational Benefit Scheme’ and ‘Occupational Benefits’ which means ‘benefits (other than remuneration to which the Employment Equality Act 1998 applies), in the form of pensions, payable in cash or in kind in respect of: (a) termination of service, (b) retirement, old age or death, (c) interruptions of service by reason of sickness or invalidity, (d) accidents or injuries or deceases arising out of or in the course of a person’s employment, (e) unemployment, or (f) expenses incurred in connection with children or other dependents and, in the case of a member who is an employee, includes any other benefit corresponding to a benefit provided by virtue of the Social Welfare Acts, the Maternity Protection Act 1994 or the Health Acts 1947 to 2001 which is payable to or in respect of the member as a consequence of his employment’.

<sup>97</sup> The Equality Authority noted in its annual report of 2007 that in 2004, it had stated that it was clear from the developing case law of the Court of Justice that it was obliged to introduce legislation to give legal recognition to the position of transsexuals and that discrimination of persons with a gender identity disorder and/or transsexual people constitutes discrimination on the gender ground.

<sup>98</sup> (Case C-13/9) [1996] IRLR347

<sup>99</sup> *Hannon v First Direct Logistics Limited* DEC-S2011-066. <http://www.equalitytribunal.ie/Database-of-Decisions/2011/Employment-Equality-Decisions/DEC-E2011-066-Full-Caase-Report.html>. accessed 30 April 2011.

<sup>100</sup> [2002] IEHC116 and [2007] IEHC470.

<sup>101</sup> Section 2.

<sup>102</sup> Section 22.

Whilst fragmented this latter definition appears to cover the definition of ‘remuneration’ in the Directive.

#### **2.4. Occupational social security schemes**

However, to date, such review has not been published. Social security is provided for under the Social Welfare (Consolidation) Act 2005 (as amended) and there were no specific amendments in respect of the Directive.<sup>103</sup>

#### **2.5. Scope of horizontal provisions**

In general the Irish legislation complies with Articles 17 to 22 of the Directive. However Article 17 (2) provides that associations, organisations or other legal entities may ‘engage, either on behalf or in support of the complainant, with his/her approval (...)’. This appears to suggest that a trade union for example can be the actual complainant in proceedings on behalf of a person. Whilst the Equality Authority may act on behalf of any individual, it is the complainant who is the actual ‘complainant’ in the proceedings. The complainant is named except the name of the complainant may not be on the decision (as published) so that their identity is not disclosed in cases of sexual harassment, for example. However, in any other type of proceedings the names of the parties to the proceedings are stated on the actual decision/determination, as appropriate. It should be noted that the Equality Authority may act in its own name in cases where the Authority wishes to seek a restraining order (injunction) against a newspaper with a discriminatory advertisement, for example.

There are difficulties in relation to compensation under the Employment Equality Acts. If a complainant brings a claim on the gender ground to the Equality Tribunal, the maximum award is two years remuneration or the complainant may elect to bring the claim to the Circuit Court where the complainant, if successful, may be awarded a sum in respect of the discrimination for the period of six years prior to the bringing of the claim. In other words, the Labour Court can award open-ended compensation. However, there are further difficulties in that if a person brings a claim and is successful on two separate grounds of discrimination for example, gender and age discrimination, they may still only be in receipt of two year’s compensation from the Equality Tribunal. There is a further difficulty in that only gender claims may go before the Circuit Court so if a complainant has a claim on two grounds, they must bring their claim into separate *fora*. Accordingly, the ceiling on compensation may not be in compliance with the Directive.

In the event that a complainant succeeds in a claim of discrimination, he or she may, as stated above, be in receipt of two year’s compensation but if he or she brings a separate claim for victimisation and is successful in relation to that claim, he or she may be in receipt of compensation in excess of two year’s remuneration, i.e., up to four years’ remuneration.

There is a maximum award of EUR 12697.38 if the claimant is not an employee, e.g., discrimination at a job interview. It is submitted that such a limit prevents real and effective compensation.

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<sup>103</sup> The Minister for Social Protection referred to the Directive in Parliament stating that there would be a review of the Directive in relation to social security entitlements. The issue arose out of a parliamentary question, the details of which were retained for confidentiality. The question was answered in relation to child or family benefits that does not relate to employment.  
<http://debates.oireachtas.ie/dail/2008/10/22/00128.asp>, accessed 30 April 2011.

In the event that an employee is not permitted to return to work following maternity leave, the Maternity Protection Act provides that such a claim should be brought under the Unfair Dismissals Acts 1977 – 2007 and then there is a limit of 104 weeks' remuneration. Of course, however, the complainant could bring a claim under the Employment Equality Acts instead.

## ***2.6. Concept of positive action***

There is provision in the 1998 Act for positive action, however there is no equivalent provision in the Pensions Act 1990. I am not sure as to how there can be positive action in relation to pension schemes. More particularly, given the economic depression in Ireland, pension schemes are closing and people have to make their own provisions with personal retirement savings accounts with certain income tax allowances thereto.

It should be stated, however, that the concept of positive action is receiving considerable attention from the new government that came into office on 9 March 2011. In the Programme for Government, state boards are to have 40 % of each gender. The Minister for the Environment announced on 1 June 2011 that there is to be legislation providing that political parties will lose 50 % of their state funding unless 30 % (and 40 % after the next election) of the party's candidates are female under the Electoral Amendment Political Funding Bill 2011 (to be published).

## ***2.7. Reconciliation of work, private and family life***

There are no explicit references to 'reconciliation of work, private and family life'. However, there is a Code of Practice (only) adopted in respect of the Protection of Employees (Part Time Work) Act 2001, which refers to the work life balance in its Preamble.<sup>104</sup>

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

This has not been transposed into Irish law.

## ***2.9. Judicial procedures***

There is a provision for mediation should the parties agree to this procedure. There is, of course, access to the Equality Tribunal or the Circuit Court (in gender cases only). However, given the large number of cases (which are not purely based on the gender ground), there is an extremely long waiting period between the initiation of a claim and the date for a hearing; it could be up to 18 months. This can cause particular difficulties for a claimant and indeed for a respondent given that a matter cannot be heard speedily or resolved between the parties. As stated above, it is questionable as to whether Irish legislation includes 'real and effective compensation'. There are sufficient criminal sanctions in the event of certain breaches of the employment equality legislation.

## ***2.10. Other novelties?***

All the novelties or points of clarification in the Directive that have not been transposed have been mentioned above. There is a presumption in the Directive that there is adequate access to justice. Presently in Ireland, due to a lack of resources and

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<sup>104</sup> Industrial Relations Act 1990 (Code of Practice on Access to Part Time Working) (Declaration) Order 2006 SI No.8 of 2006.

the volume of equality claims (on all the none grounds), a complainant has to wait about 18 months to for the initial hearing before the Equality Tribunal.

The Directive is having an impact, however, in relation to increased discussion on quotas on State boards and now in relation to election candidates and also in relation to the provision of statistics on the gender pay-gap.

### ***2.11. Additional problems***

It is not considered that there are any particular problems about the transposition of Directive 2006/54/EC, save for the absence of gender reassignment, the issue of the hypothetical comparator in equal pay cases and a question mark over sufficient compensation in the Irish legislation.

There is a practical difficulty in the transposition of this Directive in that the Irish legislation is 'composite' legislation in relation to nine grounds of discrimination with a separate part of the Act legislating for gender discrimination.

As stated above, it is considered that the Recast Directive has been transposed into Irish law, but on the above review, it is considered that the Directive has not been fully implemented into Irish law.

The Recast Directive has had no particular impact in Ireland and, save for an aspiration to have 40% of women on State boards, it is not envisaged that there will be any significant legal changes in relation to employment equality generally in the foreseeable future.

## **ITALY – Simonetta Renga**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

Decree No. 5 of 25 January 2010 implemented the Recast Directive in Italy. The Decree was approved some months after the deadline for the implementation of Directive 54/2006/EC but finally ensured an overall positive accomplishment of this task. Decree no. 5/2010 provides for several amendments of Decree no. 198/2006, known as the *Code of Equal Opportunities Between Men and Women*. However, before the entry into force of Decree no. 5/2010, several legislative interventions issued in the last twenty years, had already brought about a good level of implementation of earlier EU directives in our country. Sometimes domestic legislation had gone even further than EU law in this regard.

#### ***1.2. Correlation tables***

No tables illustrating the correlation between this Directive and the transposition measures exist.

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

As a consequence of the implementation of the Recast Directive, the title and the text of Article 1 of the Code of Equal Opportunities now refer not only to the ban on discrimination but also to equal opportunities between men and women as well as to gender mainstreaming. In particular, the text of the Article provides for a general obligation to consider the objective of equality between men and women when

formulating and implementing laws, regulations, administrative provisions, policies and activities at all levels and by all subjects/actors. It is probably too early to evaluate the impact of this provision; however, it has to be stressed that even before entry into force of Decree no. 5/2010, the Code of Equal Opportunities was already expressly aimed at combining all provisions on equal opportunities between men and women and not only equal treatment in matters of employment and occupation. Indeed, the Code is divided into four parts. The first part regards the promotion of equal opportunities in general and outlines the bodies set up for this aim, such as the Commission for Equal Opportunities, the Committee for Equal Opportunities and the Equality Advisers. The second part concerns the field of ethic and social relationships. The third part is devoted to equal opportunities in economic relationships (i.e., employment, occupation, self-employment and entrepreneurship) and finally, the fourth part discusses civil and political relationships but only includes the rule on political elections for the European Parliament.

## ***2.2. Gender reassignment***

Italian legislation on equal opportunities never expressly refers to gender reassignment, although the latter can probably be included in a wide concept of sex discrimination as referred to by Recital 3.

Decree no. 216/2003 implementing Directive 78/2000/EC expressly included sexual orientation but not gender reassignment among the grounds of discrimination. Nevertheless, the Decree has not been transposed into the Code of Equal Opportunities of 2006.

Gender reassignment, therefore, should be included among the grounds of discrimination. We had no case-law involving gender reassignment.

## ***2.3. Definition of Pay***

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. This definition corresponds with that of the Recast Directive. Decree no. 5/2010 has slightly rephrased art. 28 of the Code of Equal Opportunities on pay discrimination, but has not introduced a definition of pay. The rephrasing of the rule does not involve substantial changes but rather only formal ones. The prohibition concerning equal pay should therefore be technically improved by an express reference to all aspects and conditions of remuneration.

## ***2.4. Occupational social security schemes***

Decree no. 5/2010 also addressed occupational pension schemes. The Decree states that there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular regarding: a) the scope of such schemes and the conditions of access to them; b) the obligation to contribute and the calculation of contributions; c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

The Decree also allows the setting of different levels of benefits insofar as may be necessary to take account of actuarial calculation factors, which differ according to sex in the case of defined-contribution schemes. In the case of funded defined benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time

when the scheme's funding is implemented. The decree states that actuarial factors used must be sound, relevant and accurate; the Commission of Vigilance on Pensions (COVIP) and the Equal Opportunities National Committee (EONC) are called upon to control the legitimacy and the non-discriminatory nature of the actuarial factors used. The limits of Article 9.1 of Directive 2006/54/EC are fulfilled; the legislation goes even further providing a control on the use of these factors.

On the other hand, the Decree does not provide anything on the personal and material scope of the principle of non-discrimination, on its implementation as regards self-employment and on retroactive effects of the measures introduced.

In particular, in relation to the material scope, the application of the principle of non-discrimination to public servants benefits paid by reasons of the employment relationship (Article 7.2 of Directive 2006/54/EC), which is the main issue of the ECJ decision in Case C-46/07, *Commission v Italy*, [ OJ C 82, 14.4.2007, is not mentioned at all. Although, following this particular ECJ decision, the pensionable age of men and women in the civil servants sector has been equalised to 65 years as from 2012 (Act No.102/2009, as modified by Act No. 122/2010).

Last but not least, the Decree fails to implement the Recast Directive regarding pensionable age outside public employment, which is different for men and women.

### ***2.5. Scope of horizontal provisions***

This is not relevant in Italy, as in relation to horizontal provisions there is no separation between occupational social security legislation and labour law. Regarding judicial remedies, there are slight differences between the two areas of legislation and these do not include discriminatory features. Therefore, national legislation implementing Articles 17-22 of the Directive apply to the entire scope of it, including the area of occupational social security.

### ***2.6. Concept of positive action***

Regarding positive action, the Decree only provides that the evaluation of plans by the EONC – a crucial step in the effective implementation of equal opportunities – must be carried out with a method that enables an objective and technical assessment.

However, in our system, positive actions are not merely permitted but also promoted and sustained by the allocation of a specific fund, both in the private and in the public sector. Furthermore, funds have been allocated for the promotion of self-employed women and entrepreneurship by women and for the reconciliation of working life with family/private life. Positive actions, in the form of a plan set out to remove discrimination, are also the possible consequence of both an attempt of conciliation promoted by the Equality Advisor and of ordinary proceedings for collective discrimination, where the court can order the adoption of the positive action plan in its decision ascertaining collective discrimination. The civil service sector 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 at levels where women are under-represented. Infringement of this provision prevents civil service from recruiting new personnel.

Furthermore, on 15 March 2011, the *Senato* (one of the two Chambers of Parliament) approved the bill on the introduction of a quota system for the appointment of managing directors of listed companies presented by Lella Golfo (who is a centre-right Member of Parliament) together with Alessia Mosca (who is a centre-left Member of Parliament), as modified according to the amendments presented by

the Government after the strong opposition of the employers' industry and bank associations.<sup>105</sup>

The bill, which would be provided by an article of the Code of the merchant banking, is aimed at ensuring a balance in gender representation on company boards by providing that the statute of companies (including state subsidiary companies) shall require that directors and auditors of one sex cannot be elected in a proportion higher than one-third compared to the directors and auditors of the opposite sex. This rule shall be enforced for three mandates, but for the first time the percentage will be of one-fifth and it will come into force only at the first change of board after one year after the approval of the law. In case of infringement of the rule, the *Consob* (The National Commission for Listed Companies, an independent administrative authority set to control the trading market) is due to issue a warning to apply the quota system within four months; a pecuniary sanction in case of non-compliance is provided. If necessary, a second warning is to be issued within three months and includes the penalty of dissolution of the company board. The statute shall also rule cases of substitution of members of the company board as to assure the balanced participation of the two sexes provided by the law. Some complexities arise from the absence of a similar provision for the board of auditors. Moreover, for the latter, pecuniary sanctions in case of infringement of the quota system are also lower than those provided for boards of directors.

This provision involves a remarkable change in our system, where women are scarcely represented on company boards of directors and auditors. Actually its implementation is largely assigned to the *Consob* (or to an analogous authority for state-owned companies), which will play a crucial role in the effectiveness of the quota system by the issue of regulations. Although the text is very 'soft,' only providing for a gradual implementation of this temporary measure, it was still strongly criticised by some politicians of the centre-right parties and met with a certain opposition from the entrepreneurship. The success of the bipartisan effort of the two promoters of the bill, which was approved with very large majority (203 pro, 14 con and 33 abstentions), also risks erasure by the present crises of the government, as it has yet to be approved by the other Chamber of Parliament.

In this context, positive actions can also be used in the area of occupational funds. Among the objectives of positive actions, in particular, there is that of changing work conditions, organisation and distribution that cause different gender impacts on pay: in the concept of pay can be included both the contribution to and the benefits of the occupational funds.

## **2.7. Reconciliation of work, private and family life**

The Decree of transposition does not mention reconciliation.

We must say, however, that Italian legislation ensures a good level of conciliation of private and family life with working life insofar as it provides specific and express rights, such as short-term and long-term care.

Moreover, Act no. 53/2000 on Sustenance of Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordination of Hours in the Town's Public Services explicitly refers to reconciliation. Specifically, Article 9 of Act No. 53/2000, as modified by Art. 38 of Act No. 69/2009, provides for an important measure for the promotion of reconciliation, namely, the allocation of a part of the Fund for Family

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<sup>105</sup> Bill No. S2482 approved by *Senato* on 15 March 2011, published on <http://www.ilsole24ore.com/art/notizie/2011-03-15/quote-rosa-aula-senato-174042.shtml?uuid=Aa5YolGD>, accessed 4 April 2011.



Policies to public or private undertakings and also to associated undertakings that enforce collective agreements on the targeted positive actions: adopting a flexible working schedule through part-time, telework, home-work, flexitime and other measures; providing for innovative systems of job evaluation of those who are involved in family care activities in order to avoid their marginalisation; re-inserting workers in the labour market after a period of leave; organising innovative services which answer to the workers' necessities of reconciliation, and through the coordination of hours within the town, with the participation of undertakings, trade unions and public authorities. These projects are addressed to both parents and those engaged in the care of those disabled within the family.

Further development in reconciliation measures took place very recently: the Minister of Labour, Maurizio Sacconi signed an Agreement for the Sustenance of Reconciliation Policies, following the Middle Term Program for the increasing of women's participation in the Labour Market on 7 March 2011,<sup>106</sup> together with all social parties. This was issued by the same Minister, together with the Minister for Equal Opportunities, Mara Carfagna in December 2009.<sup>107</sup> The Agreement refers to all measures already provided by art. 9 of Act No. 53/2000 to improve the reconciliation. The subscribers of the Agreement declared to share the value of a family-friendly flexibility, to be assured mainly by collective agreement at the working place, and committed themselves to improve all existing good practices. To this end, they set up a technical board, which is charged with verifying the possibility to put into force the good practices highlighted by the Observatory of the National Equality Adviser. The impact of the agreement will be monitored after one year. Although the agreement is not fully clear with regards to both its steps of implementation and the actual relevance of the list of reconciliation measures provided, it could actually spur all social parties to improve this kind of voluntary intervention. The agreement also suggests to pay attention to evaluation criteria for productivity, which should be decided taking into account the increasing productivity of workers who benefit from reconciliation measures. This is obviously a central point in order to avoid a gender pay gap.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

No specific provision has been issued to assess the occupational activities referred to in Article 14(2), in order to decide whether there is justification for maintaining the exclusions concerned.

However, with regard to exclusions and exceptions to the principle of equal treatment, Italian law is very rigorous. It does not allow any general *a priori* exclusion of women from any occupation. It only allows two exceptions: gender requirement in hiring people for artistic and fashion activities and in public performance, when such a requirement is essential to the nature of the work/job; and specific exceptions, provided by collective agreements, to the ban on discrimination in access to work for women exist in cases of particularly heavy jobs.

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<sup>106</sup> Agreement of 7 March 2011 between the Minister of Labour and Social Parties for the Sustenance of Reconciliation Policies, <http://www.lavoro.gov.it/NR/rdonlyres/2748948A-8B47-49BC-83C7-70B51AFB441A/0/20110308TESTOCONCILIAZIONEFIRMATO.pdf>, accessed 4 April 2011.

<sup>107</sup> Middle Term Program for the increasing women's participation in the Labour Market, December 2009, [http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201\\_Piano\\_Azione\\_Italia2020.htm](http://www.lavoro.gov.it/Lavoro/PrimoPiano/20091201_Piano_Azione_Italia2020.htm), accessed 4 April 2011.



### **2.9. Judicial procedures**

In the area of judicial remedies, there were no gaps in the implementation of the EU Directive. We point out that Act No. 101/08 allowed, in addition to Equality Advisers and Trade Unions, associations and organisations promoting the respect for equal treatment between workers to act on their behalf in case of gender discrimination. This change was important as it strengthened the remedies system.

Decree No. 5/2010 introduced some formal changes aimed at improving the wording of the legislation in order to make it clearer. Moreover, criminal sanctions instituted for cases infringing upon the prohibition on discrimination have been increased.

### **2.10. Other novelties?**

Decree No. 5/2010 also introduces some slight changes aimed at improving the efficacy of the equality bodies' action, although it keeps the action within the present budget constraints. New tasks are entrusted to the Equality Advisers, which are to conduct independent surveys, publish independent reports and make recommendations on the implementation of gender equality. The tasks of the EONC have been integrated and specified as well. With regard to the evaluation of the positive action plans by the EONC, the Decree provides a method that enables an objective and technical assessment. The Decree also entrusts the EONC with the task of stimulating social dialogue on equality issues; the EONC is then required to exchange information with the EU bodies that operate in the field of equal treatment and to promote the dialogue with non-governmental organisations.

Further remarkable changes regard the notion of discrimination and in particular Article 25 of the Code for Equal Opportunities, for example with less-favourable treatment related to pregnancy, motherhood or fatherhood (including adoptive parents), as well as to the respective rights received there from, are finally considered as direct gender discrimination. Similarly, less-favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment shall be considered discrimination under Article 26, as amended by the Decree. The Decree introduces some minor changes regarding the ban on discrimination in 'access to work,' which now more clearly includes professional training, one's career and all working conditions. Similarly the ban on discrimination related to marital or family status or pregnancy is also extended to motherhood and fatherhood, including adoptive parents.

As regards victimisation, art. 24 of the Recast Directive has been transposed into a very broad meaning. Judicial remedies provided by the Code have been extended to employees and all other persons who are victims of detrimental treatment by their employers in reaction to obtaining compliance with the principle of equal treatment between men and women.

### **2.11. Additional problems**

A 'weak' transposition of the recast Directive regards the prevention of all forms of discrimination. Indeed, the new Article 50-bis of the Code, introduced by Decree No. 5/2010, merely provides that collective agreements can adopt specific measures, including guidelines and codes of best practice, but it does not mention any kind of incentive for this.

Last but not least, with regard to the functions of bodies charged with the promotion of the respect for the principle of equal treatment, the problem of their low level of independence remains. The law states that equality bodies shall perform

independent activities, 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 actual lack of independence of the National Equality Advisor was shown by the Decree of 30 October 2008 from 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. Her claim was rejected by the Regional Administrative Tribunal of 19 June 2009 and the State Council of 29 July 2010. Both courts stated that the National Adviser can be removed if it is not 'tuned' with the Government's policies, under the spoil system provided by art. 6 of Act No. 145/2002; this because the National Adviser is not to be regarded as an independent body, despite her/his wide autonomy of organisation. The State Council also rejected the point of inconsistency with EU and constitutional principles advanced by the claimant. Although the text of the Directive itself is a little ambiguous on the concept of independence, an infringement procedure is the only hope to assure the equality body is free from political conditioning and to grant its status of a technical body with functions of guarantee.

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 cited to in what scanty case law exists on indirect discrimination. Regarding the use of quantitative/statistical data, the Code of Equal Opportunities goes further than EU law as it requires companies with more than one hundred employees to draw up (and to deliver to the company union representatives and to the Regional Equality Advisers) reports on the workers' situation (male and female) every two years with regard to recruitment, professional training, career opportunities, remuneration, dismissal and retirement.

## **LATVIA – Kristine Dupate**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

The institution responsible for the transposition of the Recast Directive is the Ministry of Welfare. This institution currently has no plans for the implementation of the Recast Directive, because after the assessment of the requirements of this legal document, the conclusion was drawn that the Recast Directive does not provide any new provisions.

#### ***1.2. Correlation tables***

Tables illustrating the correlation between this Directive and the transposition measures have not been published. According to the information provided by Ministry of Justice, the institution that is in charge of implementation of all EU law, Latvian government has decided not to draft any detailed correlation tables.<sup>108</sup>

### **2. Novelties**

First, as described above, the Ministry of Welfare has not detected any new provisions in the Recast Directive.

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<sup>108</sup> Telephone interview with official from the Ministry of Justice on 21 April 2011.

Second, Latvia joined the EU seven years ago. EU non-discrimination law is still new for the Member States. There are still gaps regarding formal and substantial implementation of the earlier Directives and considerable gaps regarding effective enforcement.

Consequently there are no novelties or clarification in the national law deriving from the Recast Directive

### **2.1. Purpose of the Directive**

The only provision containing term ‘equal opportunities’ appears in Unemployed and Jobseekers Assistance Law; however, it was not implemented on account of requirements of Directive 2006/54.<sup>109</sup>

### **2.2. Gender reassignment**

No provision has been adopted regarding gender reassignment and there have been no relevant cases detected.

### **2.3. Definition of Pay**

The definition of pay within the meaning of equal pay has not been explicitly implemented into national law. Because of this, the national courts get confused on the applicable concept of pay: national (as defined by Article 59 of the Labour Law) or other? Moreover, due to the lack of implementing measures on the EU law concepts, the existence of different substantial meaning of the same concepts under national and the EU law frequently remains unknown. This situation has even led to an incorrect ruling by the Supreme Court<sup>110</sup> regarding the concept of pay within the meaning of equal pay between men and women, which was later ‘corrected’.<sup>111</sup>

### **2.4. Occupational social security schemes**

Formally almost all equal treatment provisions regarding occupational social security schemes might seem inapplicable because traditional private pension funds in Latvia operate as ‘saving banks’. They collect contributions, which, after attainment of the retirement age (since 2008 equal for both sexes), makes the savings available to the retired worker. The savings are paid out once by the request of the respective person. In other words, private pension funds do not provide a payout of the monthly private pensions according to biometric data.

At the same time, there is an alarming practice undertaken by the insurance companies. They provide old-age insurance under life insurance schemes and employers use them as occupational schemes by providing such ‘life-old-age’ insurance to their employees. The problem lies in fact that Latvia has opted to retain differences in actuarial factors between men and women,<sup>112</sup> and consequently there is unequal treatment in occupational social security schemes although it concerns minor part of working population because occupational social security schemes are not widespread. This example demonstrates how respective national provisions are

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<sup>109</sup> OG No. 80, 26 May 2002.

<sup>110</sup> Decision of the Supreme Court (3 July 2009) in case No.SCK-589/2009.

<sup>111</sup> Decision of the Supreme Court (15 December 2010) in case No.SKC-694/2010, available in Latvian on <http://www.at.gov.lv/files/archive/departments/2010/694-10.pdf>, accessed on 1 April 2011.

<sup>112</sup> The Cabinet of Ministers Regulation No. 1002 ‘Regulation on the use of differential treatment in defining premiums and benefit in insurance’ (*Noteikumi par atšķirīgas attieksmes izmantošanu apdrošināšanas prēmijas un apdrošināšanas atlīdzības noteikšanā*), OG No. 145, 11 September 2009.

identified to fall within the scope of Directive 2004/113 but not within the scope of Directive 2006/54.

The implementing measures do not cover long-term service pension schemes applicable to certain categories of persons in service in the public sector, although they do qualify as occupational social security schemes.

### ***2.5. Scope of horizontal provisions***

As far as occupational social security schemes concern private employment sector and public sector, with exception of long-term service pensions, the Labour Law provisions on enforcement and remedies are applicable. The problematic issue is long-term service pensions, which are to be considered as occupational social security schemes. The latter issues fall within the competence of administrative process and administrative courts and there are no special national provisions, apart from those generally applicable, concerning defence of the rights and remedies deriving from the EU gender equality law.

### ***2.6. Concept of positive action***

Latvian law does not provide for the concept of 'positive action'. In total it provides two legal norms on soft quotas. There are no legal norms on positive action measures in the field of occupational social security schemes and such actions may not be taken by employers in practice because it would formally run contrary equal pay principle provided by the Labour Law.

### ***2.7. Concept of work, private and family life***

There are no horizontally applicable legal norms providing for obligation to respect issues of reconciliation of work, private and family life. At the same time, since 2007 fathers of new-born babies have a right to 10-calendar-day paid paternity leave, but the right to adoption leave is granted to the one of the parents who does not correspond to the idea provided by Recital 27 of the Recast Directive. At the same time, the Labour Law provides the right to return to the same or equal work on the same employment conditions and right to all more favourable working conditions implemented during absence on account of leave.

The Latvian law does not protect against discriminatory treatment provided by Article 9(1)(g). Latvia has also not taken any steps to encourage social partners to promote gender equality especially with regard to reconciliation of work, private and family life.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Latvian labour law provides that there is no discrimination if the sex of an employee constitutes a determining and objective factor. Latvian law does not contain any particular provision on the professions and occupations where sex would be a determining and objective factor. It is left for each employer to determine whether the sex of an employee is a determining factor for the performance of the work.

### ***2.9. Judicial procedures***

Judicial procedures are available in all cases where there is a particular individual who has presumably suffered from discrimination.

However, under Latvian procedural law it would be problematic to obtain legal standing in case person could not prove that she/he or the legal person (NGO) has

been individually concerned, for example in case of discriminatory commercials/job offers.<sup>113</sup>

### **2.10. Other novelties?**

The principle of gender mainstreaming has not been implemented in substance and is not applied in practice. Internal legal acts and instructions of the Cabinet of Ministers regulating the drafting of normative acts require that the Act on equal treatment be assessed. However, in practice, this requirement does not seem to be applied effectively, because drafters of normative acts frequently lack the skills to conduct such assessments. Normative acts regulating the adoption of laws by the Parliament do not contain obligations on gender mainstreaming. Recently the obligation of gender mainstreaming in the field of employment has not been carried out. In 2009 the Parliament adopted the Law on Remuneration in the State and Municipal Institutions,<sup>114</sup> which provides for uniform pay system in all public sector with exception to schoolteachers. The schoolteachers were excluded on account of financial difficulties of the state budget. The reason given was that there are many schoolteachers and expenses for their remuneration according to the new law would be too high. Neither the Parliament nor the Cabinet of Ministers took into account the principle of gender mainstreaming in a situation where the absolute majority of schoolteachers are women.

### **2.11. Additional problems**

The principle of the reversed burden of proof in discrimination cases has been implemented in all respective Latvian law. However, it is stated in general terms, which does not seem to ensure proper application. In practice it frequently turns a usual civil procedure of competition between the parties. So, correct application depends to a great extent on the national courts. Recently the Supreme Court in a decision expressed additional concerns about the effective application of the principle of the reverse burden of proof and about understanding of the substance of such concept.

Under Latvian law the reversed burden of proof also applies in cases on unlawful dismissal. The burden of proof in such cases formally lies on an employer. Namely, it is up to employer to prove the lawfulness of the dismissal if an employee has brought the claim before a court.<sup>115</sup> However, the Supreme Court in a recent decision gave following interpretation of the respective provision (Article 125) of the Labour Law: although Article 125 of the Labour Law requires an employer to prove lawfulness (of a notice) of dismissal, nevertheless it is for an employee to prove unlawfulness of the circumstances of the notice of dismissal according to the usual civil procedure rules on competition between parties, if he/she contests them, in particular, evidence submitted by an employer.<sup>116</sup> Such interpretation given by the Supreme Court is applicable by analogy to discrimination cases too, and in substance renders the application of the concept of the reversed burden of proof unenforceable.

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<sup>113</sup> Case 54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding vFirma Feryn NV*, [2008] OJ C 223 30 August 2008, p.11

<sup>114</sup> OG No. 199, 18 December 2009.

<sup>115</sup> Article 125

<sup>116</sup> Decision of the Supreme Court of Latvia in case No.SKC-1084, 8 December 2010, available in Latvian on <http://www.at.gov.lv/lv/info/archive/departments1/2010/> (accessed on 25 March 2011)

### **3. Additional information**

The Recast Directive provides a legal basis to require substantial implementation and enforcement of the principle of equal treatment. Such a legal document is also a good argument for NGOs to insist on necessity of gender equality ‘umbrella’ law, which would be more oriented toward obligations of the state power in this field, in particular, with regard to mainstreaming in process of adoption of any legal acts, for example, in state budget matters. Besides, the Recast Directive ensures more convenient accessibility to existing EU gender equality law.

## **LIECHTENSTEIN – Nicole Mathé**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

The status of transposition of Directive 2006/54/EC in Liechtenstein is still at the law proposal stage of the government to the Parliament dated from 16 November 2010.<sup>117</sup> The law shall soon follow this proposal. Nevertheless my report is based on the actual law proposal mentioned. The new provisions will be part of the Equality Act (GLG).<sup>118</sup>

#### ***1.2. Correlation tables***

The law proposal does not include such tables illustrating the correlation between this directive and the transposition measures.

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

The purpose of the directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities is not reflected explicitly in the implementing law proposal. It cites only the whole title of the directive, which contains this purpose in its wording. The proposal points out that it has to be clearly stated by law that the prohibition of discrimination according to this Directive applies also to the return to the workplace after maternity leave.

#### ***2.2. Gender reassignment***

As far as it could be read in the law proposal the future law will not contain any explicit wording, but in the comment of the text to the proposal it is separately mentioned that the principle of equality between men and women shall not only apply to the natural sex but also includes discriminations on the ground of gender reassignment with reference to Recital 3 of this directive.

#### ***2.3. Definition of Pay***

A definition of pay will be newly introduced according to the law proposal and corresponds to the wording of this directive.

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<sup>117</sup> BuA no 132/2010.

<sup>118</sup> LGBI. 1999/96.

#### ***2.4. Occupational social security schemes***

The commenting text to the law proposal explicitly mentions that future legislation shall also cover pension schemes for the particular category of workers of public servants.

#### ***2.5. Scope of horizontal provisions***

The commenting text to the law proposal mentions that the prohibition of discriminations covers statutory as well as occupational social security schemes. The future law itself shall newly contain a definition of social security systems existing in Liechtenstein.

#### ***2.6. Concept of positive action***

As far as I can tell from reading the text commenting on the law proposal and the future law itself, the concept of positive action of Art. 3 (4) (a) GLG is already applicable and then also with respect to occupational pension schemes.

#### ***2.7. Reconciliation of work, private and family life***

Surprisingly the law proposal does not refer to this aspect. It even denies any inclusion to this directive of reconciliation of work, private and family life. This can be read very clearly in the commenting text because it was meant to be an answer to statements of institutions during the evaluation process of the law proposal by implied stakeholders.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

To my knowledge, Liechtenstein has not yet taken steps to comply with this obligation.

#### ***2.9. Judicial procedures***

Future and existing provisions of the GLG concerning judicial procedures still contain the choice between judicial or administrative procedures for the enforcement of obligations under this directive.

#### ***2.10. Other novelties?***

It shall be mentioned that the law proposal newly includes the possibility for organisations to bring in a claim under the name of the concerned person or to participate in the name of that person or only to participate in the procedure to help the concerned person. Up until now such organisations only have the possibility to bring in the claim under their own name and ask the court to state that discrimination has been fulfilled.

#### ***2.11. Additional problems***

Unfortunately case law is still lacking in Liechtenstein with regard to gender equality legislation. Therefore any serious description of persisting problems when applying gender equality law cannot be made at the time being.

### **3. Additional information**

Liechtenstein has made a serious effort to implement the Recast Directive 2006/54/EC even if it took longer than allowed. The text commenting on the law proposal referred

also to the procedure of the EFTA Surveillance Authority against the country in 2010 because this Directive must have been implemented until 1 February 2009. Based on close thematic connections with Directive 2004/113/EC, which was to have been implemented until 30 June 2010, Liechtenstein waited to implement both directives by the same piece of legislation.

Finally it is expected that the future law will be passed and will enter into force in the near future.

## **LITHUANIA – Tomas Davulis**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

For the transposition of the Recast Directive, major amendments were introduced to the Equal Opportunities Act for Women and Men (hereinafter: EOAWM):<sup>119</sup>

- Law of 18 December 2007<sup>120</sup> on the Amendment of Sections 2, 3, 4, 5, 6, 7, 9, 12, 24 and 27 of the EOAWM;
- Law of 19 June 2008 (in force since 3 July 2008)<sup>121</sup> on the Amendment of Sections 3, 12, 13, 25 and Supplement with new Sections 5-3, 7-3 of the EOAWM; and
- Law of 14 July 2009 (in force since 23 July 2009)<sup>122</sup> on the Amendment of Section 12 of the EOAWM.

#### ***1.2. Correlation tables***

Lithuanian authorities have not drawn up and published tables illustrating the correlation between the Recast Directive and national legislation.

### **2. Novelties**

#### ***2.1. Purpose of the Directive***

There was no amendment to the text of the EOAWM as far as purpose of the Act is concerned.

Upon its adoption in 1998, the Lithuanian law on equal treatment was named the Act on Equal Opportunities of Men and Women, but the approach of ‘equal opportunities’ played and still plays a very formal and nominal role. Equal opportunities for women and men are perceived as the implementation of human equality rights (Section 2(1) EOAWM) and the purpose of the Act remains to ensure the implementation of equal rights for women and men guaranteed by the Constitution of the Republic of Lithuania, and to prohibit any type of discrimination on grounds of sex, by reference in particular to marital or family status (Section 1(1) EOAWM). No particular additional emphasis on equal opportunities was placed on the ‘principle of equal opportunities’ in the course of transposition of the Recast Directive. This fact mere shows that in Lithuania there are no theoretical and practical implications of this difference in wording.

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<sup>119</sup> State Gazette, 1998, no. 112-3100.

<sup>120</sup> State Gazette, 2007, no. 140-5755.

<sup>121</sup> State Gazette, 2008, no. 75-2923.

<sup>122</sup> State Gazette, 2009, no. 87-3665.



## **2.2. Gender reassignment**

The transposition law does not mention gender reassignment; therefore, under Lithuanian law the prohibition of discrimination based on sex is not applicable to discrimination arising from gender reassignment.

The question of gender reassignment still sparks intense debates in Lithuania. The Civil Code of 2000 for the first time introduced a right to gender reassignment surgery but the corresponding special law was not adopted. The legal situation was condemned by the ECHR<sup>123</sup> because of the claim by a transsexual who was prevented from completing his gender transition. After the judgment, Lithuania decided to pay damages instead of implementing the new legislation on gender reassignment within three months, as ruled by the ECHR. The recently elected conservative-liberal coalition is not likely to be in any hurry to adopt the required legislation. There is even a recent proposal (no. XIP-2988) registered within Parliament from two influential conservative MPs to repeal the provision of Art. 2.27 (1) of the Civil Code, which explicitly permits gender reassignment only if medically possible.

## **2.3. Definition of Pay**

The definition of pay was not introduced in the EOAWM therefore the definition established by the Section 186(2) of the Labour Code will be applicable. It states that the wage shall comprise the basic salary and all additional payments directly paid by the employer to the employee for the work performed. This definition does not mention the indirect payments, i.e., the payment made by/to third parties. Secondly, Section 186(4) of the Labour Code restricts the possibility to avoid payment in kind. In practice, this restriction may be wrongly perceived as eliminating remuneration in kind from the notion of pay.

The legislator, however, has made some corrections in EOAWM. It has extended obligations of the employer not to discriminate against employees in the area of promotion (Section 5, paragraph 1 EOAWM) and the payment of all supplements and all additional payments (Section 5, paragraph 3 EOAWM);

## **2.4. Occupational social security schemes**

The Amendments of 19 June 2008 for the first time prohibited discrimination on the grounds of sex when establishing and applying social security provisions including those that amend or supplement the state social insurance system (Section 5-3 EOAWM). The special laws on state pensions and public servants state pensions were not changed accordingly. Public servants pensions are covered, but the principle of non-discrimination is provided for not in the pension legislation itself but in the EOAWM.

## **2.5. Scope of horizontal provisions**

No specific changes were made as far as horizontal provisions are concerned. Generally, Sections 5-3 and 7-3 are incorporated in EOAWM in such a way that they do not need supplementing specific horizontal provisions in EOAWM. In other words, the horizontal provisions will cover also newly incorporated sections of EOAWM. However, there is a common problem with transposition of EU legislation. The pension legislation was not changed in a way to include the principle of non-discrimination. This principle is established only in EOAWM.

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<sup>123</sup> ECHR Judgment of 11 September 2007, *L. v Lithuania*, Application no. 27527/03.

## **2.6. Concept of positive action**

No changes.

Section 2(3) EOAWM stipulates that direct discrimination on grounds of sex means passive or active conduct expressing humiliation and contempt, also restriction of rights or granting of privileges by reason of the person's sex, except when relating to (...) *special temporary measures* foreseen in the laws, which are applied to accelerate the implementation of *de facto* equality between women and men and are to be cancelled when equal opportunities for women and men are realised (point 5). This wording requires formal introduction of those measures in special law. This law has never been adopted or proposed.

## **2.7. Reconciliation of work, private and family life**

The Labour Code was amended on 17 July 2009<sup>124</sup> to include the right of employee on maternity leave to benefit from any improvement in working conditions to which she would have been entitled during her absence because of maternity leave.

No other changes were made. As a matter of national social policy, the right to paid paternity leave was introduced on 8 June 2006 and the period of paid parental leave was extended from one to two years on 4 December 2007.

## **2.8. Periodical assessment of exclusions regarding genuine occupational requirements**

The exception related to the genuine and determining occupational requirements was improved in the EOAWM Amendments of 17 December 2007, although it contains no obligation for state authorities to assess or report on justifications in certain occupational activities. The courts and the Office of Equal Opportunities will have to assess the legality of practices while examining individual cases or investigating complaints. There are no noted cases of application of this exception so far.

## **2.9. Judicial procedures**

The access to judicial procedures is explicitly guaranteed in most cases. Section 24 (1) of the EOAWM states that the person who has experienced discrimination based on sex, harassment or sexual harassment may claim damage in accordance with the Civil Code of the Republic of Lithuania. The actions and claims not related to compensation of damages are not mentioned here but the Labour Code and the Law on Public Service clearly consolidate the right to initiate judicial proceedings in case of the breach of all types of employee's or servant's rights.

## **2.10. Other novelties?**

### *Direct discrimination*

A new definition of direct discrimination was introduced. Direct discrimination is now defined as the treatment where one person is treated less favourably on grounds of gender than another is, has been or would be treated in a comparable situation (Section 2(4) EOAWM).

### *Indirect discrimination*

The Amendments of 18 December 2007 brought the definition of indirect discrimination in line with the Directive providing that indirect discrimination means

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<sup>124</sup> State Gazette, 2009, no. 87-3664.

an act or omission, legal provision, assessment criterion or practice that formally are the same for women and men, but whose implementation or application would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless such act or omission, legal provision, assessment criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Section 2(5) EOAWM).

#### *Elaboration of the work-related exception*

Section 2(4), paragraph 5 EOAWM newly formulated a work-related exception from the principle of equal treatment. For a certain job that can be performed only by a person of a particular sex, where, due to the nature of a specific professional activity or the conditions of its fulfilment, the sex is an essential (unavoidable) and determinant professional requirement, this treatment is legitimate and the requirement is appropriate (proportionate).

#### *Membership in organisations*

There is a new prohibition of discrimination based on sex with regard to membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided for by such organisations (Sections 5-2 and 7 EOAWM);

#### *Rights of organisations*

There is also a newly introduced right for organisations of workers and employers and for other legal persons having a legitimate interest to defend the rights of the victims of discrimination in administrative and court proceedings, if they obtain written consent from the victim (Section 9(2) EOAWM).

#### *Competence of Ombudsman*

The EOAWM has extended the competence of the Ombudsman of Equal Opportunities giving him/her the right to provide victims of discrimination with objective and impartial advice (Section 12(1) EOAWM).

### **2.11. Additional problems**

#### *Coverage of the EOAWM*

The EOAWM was initially targeting the employment relationship *stricto sensu*, i.e., the employment relationship only in the meaning of the labour law. The big novelty of the EOAWM Amendments of 19 June 2009 concerns inclusion of self-employed persons and public servants within the scope of application of certain provisions. However, those provisions are related only to the area of social security schemes – the self-employed, public servants and other categories of state employees who are covered by State pensions system (officers, soldiers, scientists and judges) will fall under the application of the principle of non-discrimination. This provision does not solve the general problem concerning the scope of application of the EOAWM: neither public servants nor self-employed persons are explicitly addressed in other areas of EOAWM (conclusion, execution or termination of the employment).

### 3. Additional information

The implementation of the Recast Directive has had a reverse effect – it seems that the Recast Directive has become more transparent than domestic transposition law. The structure of the EOAMW and the language of its provisions have become more difficult to follow. On 17 June 2008, the new version of another legal instrument – the Equal Opportunities Act – was adopted and it contains a set of rules aiming at the prohibition of discrimination on the grounds of *inter alia* sex. Therefore, the relationship between EOAMW and Equal Opportunities Act has become totally unclear.

#### LUXEMBOURG – Anik Raskin

### 1. Transposition of the Directive

#### 1.1. Transposition

Directive 2006/54/EC has not been transposed by a specific act yet (as of April 2011). The Ministry of employment and labour, which is in charge of the transposition, estimates that Luxembourg legislation already complies with the Directive. As far as known, the European Commission was informed about this by Luxembourg government.

#### 1.2. Correlation tables

No national correlation tables have been published.

### 2. Novelties

#### 2.1. Purpose of the Directive

The concept of equal opportunities is not mentioned in national law, which always refers to equal treatment between women and men.

In fact, the two concepts are seen as the same in current language. The Ministry in charge of gender equality is the *Ministère de l'Égalité des chances* (Ministry of equal opportunities) and in its documents and policies, the concept of equal opportunities is mostly, but not exclusively, used.

Thus, it is quite difficult to say what the theoretical and practical implications could be if the concept of equal opportunity was explicitly mentioned in Luxembourg legislation as there is apparently confusion about the two concepts.

#### 2.2. Gender reassignment

Gender reassignment is not mentioned in Luxembourg legislation. Protection of transsexuals may be deduced by referring to the comments attached to the draft law implementing Directive 2004/113/EC, which refer to it.

The protection of transsexuals and transgender people was not widely discussed until about two years ago in Luxembourg. It started to seep into the national conscious by awareness raising campaigns from the foundation of a non-profit association that lobbies in this specific field. The subject is nowadays taken into consideration by a small part of the population, mainly associations and bodies that deal with gender equality.

### ***2.3. Definition of 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.

This definition corresponds to the definition in Article 2(e) of Directive 2006/54/EC.

### ***2.4. Occupational social security schemes***

In Luxembourg, the legal framework for occupational pension schemes was introduced by the Law on occupational pension schemes of 8 June 1999.

The principle of autonomy prevails with regard to occupational pension schemes. However, the law only applies to schemes covering all employees or a precise category of employees working in a company.

Regarding illness insurance, there is no similar regulation. However, private mutual insurances do exist. Everybody can subscribe to these mutualities as an individual.

### ***2.5. Scope of horizontal provisions***

As there have been no specific acts adopted in order to transpose Directive 2006/54/EC, the horizontal provisions of the Directive have not been transposed in Luxembourg national legislation. Thus, the Law on occupational schemes of 1999 does not include these provisions.

On 18 December 2007, Parliament adopted a law that transposes Directive 2004/113/EC.

This 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. Since the adoption of the law, no platform of dialogue has taken place. This shows that, even when a member state transposes specific proposals in national law, this doesn't necessarily mean that it meets the aim of European legislation.

### ***2.6. Concept of positive action***

Since July 2006, the Luxembourg Constitution states 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. This provision enables positive actions in all areas.

### ***2.7. Reconciliation of work, private and family life***

There are no specific provisions in national legislation because no act for transposing Directive 2006/54/EC has been adopted.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

There is no legal provision on this issue. There is no information available to the public on any measure taken in order to comply with this obligation.

### ***2.9. Judicial procedures***

The access to judicial procedures is guaranteed by national legislation.

## 1. Transposition of the Directive

### 1.1. Transposition

The Recast Directive has been partly transposed into Macedonian legislation. In the broader sense, Directive 2006/54/EC is transposed by the Anti-discrimination Law<sup>125</sup> and the Gender Equality Law.<sup>126</sup> The transposition is mentioned and could be directly linked to the Labour Law<sup>127</sup> and the Law on Employment and Social Protection during Unemployment (Employment Law).<sup>128</sup>

Transposition of the Directive is precisely mentioned in the proposal for changes in the Labour Law concerning its Article 6. In the explanations<sup>129</sup> of the Proposal for change of the Labour Law, it is stated that the amendments function to transpose parts of several EU directives (among which is Directive 2006/54/EC). According to this explanation, the transposition of the Directive will directly affect Article 6 paragraph 2.<sup>130</sup>

The transposition is also mentioned in the National plan of action for gender equality (NPAGE).<sup>131</sup> According to NPAGE, Directive 2006/54/EC will be transposed into two laws: the Labour Law and the Employment Law. With the changes done in 2010<sup>132</sup> in the Employment Law, two new articles were introduced according to which:

- Everybody has access to employment without any restrictions according to the principle of equal treatment set in the Labour Law and other laws.
- In case of direct and indirect discrimination, the citizen has a right to demand compensation; and the burden of proof is on the employer.

### 1.2. Correlation tables

Tables illustrating the correlation between the Recast Directive and the transposition measures are set in the proposal for changes of the Labour Law and the Employment Law (related to the changed articles). The tables are also mentioned in the National Programme for Adoption of the *Acquis Communautaire*.<sup>133</sup> However, none of the

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<sup>125</sup> The Law on Prevention and Protection against Discrimination which was adopted in April 2010, and published in Official Gazette No. 50/2010.

<sup>126</sup> Law on Equal Opportunities (Possibilities) of Woman and Man, Official Gazette No. 66/2006 & 117/2008.

<sup>127</sup> Law on Labour Relations (revised), Official Gazette, No. 146/2010.

<sup>128</sup> The Law on amendments of the Law on employment and security in the case of unemployment, Official Gazette of the Republic of Macedonia No. 50/2010.

<sup>129</sup> June 2010.

<sup>130</sup> 'Women and men have to have equal opportunities and equal treatment related to:

- Access to employment including promotion and vocational training;
- Working conditions;
- Equal pay for equal work;
- Professional social security schemes;
- Leave from work;
- Working hours; and
- Terminating the work agreement.

<sup>131</sup> NPA (2007-2012) <http://www.mtsp.gov.mk/WBStorage/Files/NPARR-finalen%20dokument.pdf>, (last accessed 13.06.2011).

<sup>132</sup> Official gazette 50/2010.

<sup>133</sup> The National Programme for Adoption of the *Acquis Communautaire* (revision 2009). It is claimed that with these changes the Macedonian legislation is completely harmonized with the EU's one.

tables (set in the proposal for changes of the law and in the National Programme) is published and therefore the level and scope of the said transposition cannot be found.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

#### ***2.1.1. Access***

The general non-discrimination article in the Labour Law<sup>134</sup> encompasses selection criteria, recruitment conditions, treatment at work, promotion, professional training and other benefits, as well as ending employment. A specific ban on discrimination in vacancy announcements is regulated by Article 24 of the Labour Law (the only exception is on the ground of sex).

None of the provisions in the non-discrimination articles should be interpreted as restrictions on the employer's right to refuse to hire a person who does not meet the occupational requirements in that particular field, as long as the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary (Article 8).

The prohibitions against discrimination in access to vocational guidance, (continuing) professional training, and practical work experience is stipulated in the general prohibition on discrimination in the Labour Law (Article 7), and laws on different stages of education. In the area of higher education, it is envisaged that everyone has equal rights to acquire higher education and to be educated throughout their lives, and everyone has equal rights to lifelong learning.<sup>135</sup>

#### ***2.1.2. Equal pay***

In the Labour Law, there is only one provision (Article 108) stating that for equal work and for work of equal value workers should be equally paid. The only category specifically mentioned is women.

The Law on Civil Servants has a whole range of provisions introducing so-called salary scales. Salaries are elaborated in detail; but no specific category of employees is mentioned by name.<sup>136</sup>

No cases of discrimination have been reported in the area of salaries.

#### ***2.1.3. Occupational social security schemes***

There are three laws dealing with pensions in Macedonia (which are covering occupational pensions as well).<sup>137</sup> There are no articles on discrimination or equality in the framework Law on Pensions and Disability Insurance<sup>138</sup> and in the Law on Mandatory Fully Funded Pension Insurance (last amended in 2009). The only one is Article 59:<sup>139</sup> 'The form of contract for membership under paragraph (1) of this Article is the same for all members of the pension fund that manages the company'. Only in the Law on Voluntary Fully Funded Pension Insurance (related to

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<sup>134</sup> Article 6, Law on Labour Relations (revised), Official Gazette, No. 146/2010.

<sup>135</sup> Article 3, Law on University Graduate Education, Official Gazette, No. 35/08.

<sup>136</sup> Law on State Servants (revised), Official Gazette, No. 108/2005.

<sup>137</sup> Law on Pension and Disability Insurance, Official Gazette, No.80/93, Law on Voluntary Fully Funded Pension Insurance, Official Gazette, No.7/2008, Law on Mandatory Fully Funded Pension Insurance, Official Gazette, No.29/2002.

<sup>138</sup> Law on Pension and Disability Insurance, Official Gazette, No.80/93 (in the period 1993-2009, 19 changes were made to this law).

<sup>139</sup> Law on Mandatory Fully Funded Pension Insurance, Official Gazette, No.29/2002

occupational pension schemes also) is the prohibition of discrimination mentioned explicitly (in Article 3).

In all these provisions (2.1.1 – 2.1.3), there is no mentioning of ‘equal opportunities’ and ‘appropriate procedures’. The only law that speaks of equal opportunities is the Gender Equality Law.<sup>140</sup>

## **2.2. Gender reassignment**

Gender reassignment is not explicitly mentioned in the Macedonian legislation. However, the wording in some laws could be understood as opposing the Directive. For example, in the new antidiscrimination legislation Article 5, there is an explanatory definition of marriage as: community exclusively of one man and one woman.<sup>141</sup> The same exclusivity could be perceived in the Pension Law.<sup>142</sup> Having in mind that the sexual orientation was rejected as a ground for discrimination in the Anti-discrimination Law, it is very likely that the court practice will not ensure prohibition of discrimination based on sex to be applied also to discrimination arising from gender reassignment.

## **2.3. Definition of Pay**

The definition of ‘pay’ introduced in the Directive (Article 2(e)) is covered by the Labour Law<sup>143</sup> and corresponds to the definition in Article 2(e).

## **2.4. Occupational social security schemes**

There are no new provisions transposing Article 7(2) of the Recast Directive regarding the material scope of the provisions and consequently extending the scope of the horizontal provisions in the Macedonian Pension Law. The implementing legislation covers pension schemes as well as occupational pension schemes for all categories of workers (among them, public servants).

So far, age is the only requirement for retirement (62 for women and 64 for men). Sex is a determining factor combined with age. Trade unions are initiating changes that should include different grounds and particular conditions based on professional essentials (among which sex may be used as a determining factor)<sup>144</sup> However, there is still not a positive reaction from the Government side (nevertheless, the association of employers supported these initiatives).

## **2.5. Scope of horizontal provisions**

### **2.5.1. Defence of rights**

An individual that believes he or she has suffered discrimination has multiple options in defending his/her rights. Yet, it is not a coherent system. Possibilities exist in

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<sup>140</sup> Law on Equal Opportunities (Possibilities) of Woman and Man, Official Gazette No. 66/2006 & 117/2008.

<sup>141</sup> Article 5, The Law on Prevention and Protection against Discrimination, Official Gazette No. 50/2010.

<sup>142</sup> Law on Pension and Disability (‘invalidsko’) Insurance, Official gazette No. 80/1993 and changes 2000-2009 (<http://www.pravo.org.mk/documentDetail.php?id=493>, (last accessed 13.06.2011) there is no explanation or link which will related the social security benefits that are granted to the spouse or the registered partner of the worker to trans individuals.

<sup>143</sup> Article 105 (type of payment), Article 106 (basic salary, work performance and supplements), Article 107 (lowest salary) and Article 108 (equal payment for men and women).

<sup>144</sup> See, <http://www.kss.mk/08022011.php>, (last accessed 13.06.2011)



accordance with different laws. Since there is no synchronisation of these laws, it could be rather misleading for the discrimination victims.

In accordance with the Labour Law (Article 181), if a worker believes that he or she has been discriminated against, the first step (in 8 days) is to inform the employer giving him/her a chance to resolve the issue. If this is not done within the following 8 days, the worker can lodge a lawsuit against the employer (within the next 15 days). This last deadline is directly applicable in cases of dismissal and rejection in the recruitment process due to discrimination. Mediation is an optional instrument at the judge's disposal in any litigation. There is no record that it has been used in a discrimination case.

The Anti-Discrimination Law (which also covers sex discrimination) also envisages two defending levels: an administrative procedure before the Commission for Protection against Discrimination; and litigation before a regular court (Articles 34 & 35) based on the provisions of this Law including specific requests that should be contained in the legal suit (Article 36).

The residual competence lies with the Administrative Court. The 2006 Law on Administrative Dispute<sup>145</sup> devotes Chapter VIII to the protection of the rights and freedoms guaranteed by the Constitution, provided there is no protection from another court. In such circumstances, the Administrative Court deals with the '*proposal for protection from unlawful activity*' through a panel of three judges and in urgent procedure. A second appellate level of protection is provided by the Supreme Court.

Finally, the Constitution<sup>146</sup> itself has anti-discrimination provisions that, in theory, could serve as a basis for initiating procedures in front of the Constitutional Court. In practise, this mechanism does not function as expected. Namely, according to the records, in the period 1996 to 2010 there were 253 individual petitions complaining of discrimination (excluding cases of disputing legislation), and the Constitutional Court rejected all of them. In the last five years, there has been a dramatic fall in the use of this constitutional mechanism. In 2006, as well as in 2007 only six cases per year were initiated, five in 2008, ten in 2009, and only three in 2010. In the decisions, the dominant reason for rejecting the cases is legal technicalities, followed by the determination of the Constitutional Court not to act as a supervisory third level court, and finally, a failure by the petitioner to present sufficient evidence. The last also means that the Court does not implement the shift of the burden of proof; i.e., the burden of proof still lies with the plaintiff, despite the changes that began in 2006 (the Gender Equality Law etc.).

### 2.5.2. Compensation/Reparation

In labour cases' court procedures (as well as any other litigation in civil courts), compensation can be claimed. The same goes for the court procedures invoked based on the Anti-Discrimination Law. The administrative procedures of both of these laws envisage possibility for rectifying the violation (i.e., the discrimination) within 30 days (the Antidiscrimination Law) and 7 days (the Labour Law).

Formally, there are no limits on compensation stipulated by law. Thus, the amount fully depends on the court verdict.

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<sup>145</sup> Law on Administrative Dispute, Official Gazette No. 62/2006.

<sup>146</sup> 1991 Constitution of the Republic of Macedonia, Official Gazette No. 91/2001.

### 2.5.3. *Burden of proof*

The shift of the burden of proof was introduced step-by-step. Initially, it was introduced in the Gender Equality Law, in 2006,<sup>147</sup> then in 2008 in the Labour Law (Article 11), and finally, in 2010, in the Antidiscrimination Law (Article 38). The wording is in accordance with the Recast Directive.

### 2.5.4. *Equality bodies*

Under the Gender Equality Law (Chapter 6, Articles 23-32), the procedure for detection of unequal treatment of women and men is conducted at the Ministry of Labour and Social Politics, by a special state agent, which (or who) should act as a *gender equality body*. The wording of the law gives the impression that this agent is an individual person (one of the employees at the Ministry), without any independence and without power for independent investigation, monitoring and reporting.

During the past year, there has not been a single complaint submitted to this agent and there have been no publicly announced reports on the situation regarding discrimination based on sex/gender by this agent. According to the information received from the Ombudsperson's office, in the years 2009 & 2010 there were no complaints based on the Gender Equality Law presented to his office, and no cases were transferred from the agent for equal opportunities.

So far, practice has shown that the Gender Equality Law is not actually used as instrument of protection from discrimination, which could be due to a misunderstanding regarding the content of the Directive concerning the need of independent equality bodies.

In the area of protecting the constitutional and legal rights of citizens when violated by state bodies and other authorities and organisations with public powers, the equality body (including gender equality) is the institution of the Ombudsman.<sup>148</sup>

According to the Anti-Discrimination Law, the Commission on Protection from Discrimination was established as an 'autonomous and independent body'. The work of the commission also applies to sex discrimination. The establishment of the Commission was burdened with electing political appointees as members of the Commission.

### 2.5.5. *Social dialogue*

Governmental institutions do not have an objective to promote dialogue with social partners in order to give effect to the principle of equal treatment within the workplace. No initiatives have been undertaken to involve trade unions and employers' organisations in social dialogue on the principle of equal treatment in the workplace. Only very recently have some of the trade unions given signals that they try to incorporate these issues in their scope of interest.

### 2.5.6. *Dialogue with non-governmental organisations (NGOs)*

Governmental institutions do not have as an objective promoting dialogue with NGOs to give effect to the principle of equal treatment within the workplace.

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<sup>147</sup> Almost at the same time, it was introduced as well in the Law on Social Protection (Article 23) and the Child Protection Law (Article 9-i).

<sup>148</sup> Article 77, Constitution.

## ***2.6. Concept of positive action***

The concept of positive action is set in the Labour Law (Article 8). Paragraph 2 extends the application of the Labour Law on the cases covered by other laws only for some categories and situations (people with disabilities, protection of maternity, elders, pregnant women, and parents).

The concept of positive action, in a broader connotation, is also introduced in the Anti-discrimination Law. According to Article 13, affirmative action undertaken by the authorities, administration, organs of local-self government, public institutions and persons that are justifiable, will not be considered as discrimination until reaching factual equality. However, as there is no explanation of the relations between this law and other laws (among them the pension related laws), it is hard to expect implementation of positive action measures to occupational pension schemes.

## ***2.7. Reconciliation of work, private and family life***

The Labour Law has various provisions concerning protection of parental rights. In the Article 120, working overtime is forbidden for women based on pregnancy, birth and parenthood, while a mother with a child up to three years of age and a single parent with child up to six years of age can work overtime only if they give a voluntary agreement in writing.<sup>149</sup> Furthermore, there is a ban on working under dangerous circumstances for a mother during pregnancy and one year after giving birth to a child.

Concerning pregnancy, birth and parental leave,<sup>150</sup> the Labour Law in Article 165, stipulates nine months' leave for one child, and one year for more than one child (twins, triplets, etc.). Later in the same article, it is allowed for the parent to interrupt the leave due to health reasons of the children; once it is over, the parent has right to continue with the leave. The same article regulates adoption leave practically under same conditions as maternity leave, while Article 167 stipulates the same rights for a father or foster father in case the mother decides not to exercise these rights.

The Labour Law also has provisions on prolonging the parental leave due to stillborn child, child with developmental problems or special educational needs etc.

All these rights, according to the Article 8(2) of the Labour Law, are not considered discrimination.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

So far there are no assessments and reports on the exclusions.

## ***2.9. Judicial procedures***

As described in 2.5 above, the Macedonian legislation is clear that it is not a choice between administrative and court procedures, but that the legal solution is that in case the administrative procedure fails, there is possibility of court procedure. From that perspective, it could be concluded that the access itself is guaranteed.

Yet there is a problem since the different laws are not harmonised—there are no provisions on concurring competences of the different courts or synchronisation of the deadlines for lodging the complaints. Thus, in practice, if a civil servant believes himself or herself to be a victim of gender discrimination in the labour area, he or she

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<sup>149</sup> This written approval is also present in the Article 15(1) of the Anti-discrimination Law, and was contested in front of the Constitutional Court. The Court, with its Decision U No. 111/2010-0-0 of 03.11.2010 rejected it.

<sup>150</sup> The traditional term 'maternity leave' in 2005 was changed into 'parental leave'

should actually have to lodge parallel complaints, in order to avoid that the application is rejected due to missing deadlines to several institutions, equality bodies and courts (including the employer, the Gender Equality Body, the Ombudsman, the Commission on Protection from Discrimination, and then the regular courts in two different procedures (the labour and civil/antidiscrimination one), and as contingency planning the Administrative Court, and finally – the Constitutional Court). Any omission might lead to being rejected on the grounds of legal technicalities.

## **2.10. Other novelties?**

None.

## **2.11. Additional problems**

Lack of comprehensive correspondent tables results in number of shortcomings in transposition of the Directive that are not perceived or are deliberately ignored:

- One of the main problems (which is a widespread problem related to implementation of many laws in Macedonia) is connected with obligations under the Recast Directive's Article 1 (development of provisions which will ensure that implementation is made more effective by the establishment of appropriate procedures). As usual in the Macedonian legislation, there is lack of such provisions and it is unclear what are the procedures that should be followed to ensure implementation.
- Contrary to Recast Directive's Article 9, according to the main pension legislation (which refers to occupational pension schemes) there are different retirement ages for men and women (62 versus 64).
- Even though the change of burden of proof related to cases on discrimination is set in several laws, it remains as a big problem in practice. Even the Constitutional Court very clearly rejects this change as shown in the analyses of the court decisions on discrimination.
- The existing anti-discriminatory and gender equality bodies, designed to protect victims of discrimination, are not fulfilling the minimum requirements according to the Recast Directive. They are not independent, and they do not have institutional and financial capacity for carrying out independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination.
- Additional problems are penalties (Recast Directive's Article 25). Macedonian legislation is still not offering effective procedures and penalties specifically in cases of discrimination.
- There is a need of program and plan for dissemination of information (related to Recast Directive's Article 30). So far information is available for small number of concerned persons.

**MALTA – Peter G. Xuereb**

## **1. Transposition of the Directive**

### **1.1. Transposition**

In Malta, there was no one piece of legislation adopted in order to transpose Directive 2006/54. Rather than general amendment of the primary law, i.e., the Employment

and Industrial Relations Act of 2002<sup>151</sup> (henceforth ‘EIRA’) or the Equality for Men and Women Act of 2003<sup>152</sup> (henceforth EMWA), which are the two main pieces of legislation, new secondary legislation, or amendments thereto, made under those Acts have generally reflected the novelties in the Recast Directive in terms of the scope (public and private sector) of the legislation, definitions (such as of direct and indirect discrimination, equal pay, harassment and sexual harassment) and so on. Examples include the Equal Treatment in Employment Regulations of 2004<sup>153</sup> (henceforth ‘ETE Regulations’) and the Access to Goods and Services and Their Supply (Equal Treatment) Regulations.<sup>154</sup> In my opinion, the primary legislation needs to be amended in order that the whole more clearly reflects the Recast Directive.

## **1.2. Correlation Tables**

If such tables have been drawn up, they have not been published.

## **2. Novelties**

### **2.1. Purpose of the Directive**

The primary legislation (the Acts) does not yet adequately reflect the purpose of the Recast Directive as to the principle of equal opportunities. In my view, this lacuna leads to a rather woolly approach to the question of positive action. The law permits positive action but places no clear obligations either on the government or on public bodies, or on private employers to make effective provisions that ensure proper representation of women in the workplace or on company boards. In short, the emphasis is on formal equality rather than on substantive equality within and outside the workplace. The result is a perpetuation of stereotypes running throughout Maltese society and its institutions, which seems anachronistic to be heard in such institutions today.

### **2.2. Gender reassignment**

The national legislation does not guarantee full equality in this regard. While equality legislation has no doubt had an indirect impact on the mind-set of judges and on Maltese law in general (for example with our Courts ordering the amendment of birth certificates in order to reflect gender reassignment), the main problematic cases in this area have concerned the right to marry after gender reassignment. The Constitutional Court has just held that no remedy exists under Maltese law for the refusal to permit a transgender person to marry,<sup>155</sup> and the relevant case now has to go before the European Court of Human Rights in Strasbourg. A major case<sup>156</sup> on this is still pending before the Constitutional Court, after the appeal court overturned a judgment at first instance that had recognised the right to marry for a person who had had

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<sup>151</sup> Laws of Malta, Chapter 452. Laws of Malta can be accessed on <http://www2justice.gov.mt/lom> accessed 15 June 2011.

<sup>152</sup> Laws of Malta, Chapter 456.

<sup>153</sup> Legal Notice 461 of 2004 as amended by Legal Notices 53 and 338 of 2007 and 127 of 2008, made under the EIRA. Legal Notices can be accessed on [www.doi.gov.mt](http://www.doi.gov.mt) accessed 15 June 2011.

<sup>154</sup> Legal Notice 181 of 2008.

<sup>155</sup> *Joanne Cassar v Government of Malta*, Constitutional Court on appeal from Civil Court First Hall, 23 May 2011.

<sup>156</sup> The case of Joanne Cassar, judgment in which case has been scheduled for May 2011. See *Joanne Cassar files submissions in sex change case*, Times of Malta Tuesday 15 February 2011, at <http://www.timesofmalta.com/articles/view/20110215/local/joanne-cassar-files-submissions-in-sex-change-case.350382>, accessed 19 April 2011.

gender reassignment surgery. It has to be said that the Union gender acquis, insofar as Union competence does not clearly cover such matters, has not had a significant impact in such areas. A private member's bill, titled the Gender Identity Bill,<sup>157</sup> has been tabled in Parliament, and provides in Article 6 that the indication of the person's gender in his or her amended birth certificate shall have effect 'for all purposes of law'. Even if adopted, this would be a roundabout way of legislating for non-discrimination in employment matters, and it is not clear that the primary and secondary legislation will not continue to speak of 'sex' and 'sexual orientation' (such as in Regulation 1 of the ETE Regulations) with no elaboration and no specific reference to gender reassignment and its specific effects in relation to employment matters.

### ***2.3. Definition of Pay***

The EIRA itself, or the EMWA, did not contain a definition of pay. However, the ETE Regulations do. The definition provision, Regulation 2 (1), defines 'pay' as meaning 'the ordinary basic salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly in respect of his or her employment from his or her employer'. Article 4 paragraph 2 of the Directive, covering job classification schemes and their design, is specifically reflected in Regulation 3A of these regulations.

### ***2.4. Occupational social security schemes***

The matter is covered by Legal Notice 317 of 2005,<sup>158</sup> which implemented Council Directives 86/378/EEC and 96/97/EC. It does not appear to have been revised after 2005. Certain discrepancies occur. For example, in Regulation 4(2)(d) and (k) –which otherwise follow the pattern and wording of Article 9 (1) paragraphs (d) and (k) of the Recast Directive – paragraphs (d) and (k) include paragraph (i) (setting different levels for workers' contributions) as an exception.

### ***2.5. Scope of horizontal provisions***

There is no specific reference to Articles 17-22 of the Recast Directive in the relevant Legal Notice 317 of 2005. However, it is thought that the general provisions in the primary legislation referred to above relating to the matters therein covered apply also in this context.

### ***2.6. Concept of Positive Action***

This concept is known to the Constitution of Malta and was generally included in the EIRA. Further, the ETE Regulations were expressly amended in 2007 in order to transpose the relevant provision in Article 3 of the Directive. The key provision is Regulation 6 paragraph 3 of the ETE Regulations. This provision saves the lawfulness of any act done 'in connection with maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers with a view to ensuring full equality in practice between men and women in working life.' However, Maltese law does not impose any obligation clearly on the State itself to take such measures or ensure that they are taken.

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<sup>157</sup> See [http://parlament.mt/motion11\\_198](http://parlament.mt/motion11_198), accessed 20 April 2011.

<sup>158</sup> The Equal Treatment in Occupational Security Schemes Regulations 2005. <http://www.doi.gov.mt/EN/legalnotices/2005/09/LN317.pdf>, accessed 20 April 2011.

### 2.7. Reconciliation of work, private and family life

The issue of reconciliation of work, private and family life is high on government's list of priorities in the employment field, and certain measures have been taken to improve the situation. It is a matter of national debate as to whether enough is being done.

Women's organisations say not enough is being done, for example in relation to child-care provision at affordable cost or teleworking and other flexible work arrangements. Overall, insufficient progress appears to have been registered, except in the area of parental leave, for the matters raised by Recital 11 of the Directive and in particular with regard to the gender pay gap. Paternity leave provision has improved in the public sector but remains scarce or poor in the private sector (Recital 26 refers). Adoption gives rise to parental rights equivalent to those that arise regarding childbirth, but Maltese law does not go beyond that. It follows the requirements regarding the retention or acquisition of rights during maternity leave or leave for family reasons (Article 9(g) of the Directive), but the National Council of Women had pointed out that the law did not appear to protect women from dismissal by reason of pregnancy during the probationary period, contrary to what was required by Directive 92/85, in that it did not require the giving of reasons for dismissal during this period. However, the Court of Appeal had indicated that if pregnancy appeared to have been the reason then dismissal would be unfair, even during the probationary period.<sup>159</sup> This issue is now regulated by the new Article 12A of the Protection of Maternity (Employment) Regulations.<sup>160</sup>

Further, it appears that a female teacher who takes maternity leave during the stipulated summer holidays is in practise denied rollover into term time, so that she in effect forfeits part of the holidays otherwise enjoyed as such by her colleagues.<sup>161</sup> In my opinion, Article 14(2) of the Directive is not transposed into Maltese law as clearly as it might have been. The relevant provision in EMWA is Article 2(5),<sup>162</sup> which omits the phrase 'including the training leading thereto'; it also omits the words 'the nature of' (the particular occupational activities) and the words 'and determining' (occupational requirement); further, it concludes with the wording 'and where such treatment remains within the limits of what is appropriate and necessary in the circumstances', which does not exactly reflect the wording of Article 14(2), namely 'provided that its objective is legitimate and the requirement is proportionate'. It may seem that this is remedied by the combined effect of certain provisions of the ETE Regulations; Regulation 1 (4) provides that these Regulations apply to all persons in relation, inter alia to '(a) conditions for access to employment....(b) access to all types and to all levels of vocational guidance, vocational training, advanced

<sup>159</sup> *Anabelle Cumbo v. Float Glass Ltd.*, Court of Appeal, 8 October 2008. See LAWmail – Issue No.6 [http://www.lawatwork.com.mt/uploads/65/8/LAWmail\\_MLA-\\_\\_Issue\\_no\\_6\\_-\\_October\\_08\\_MB.pdf](http://www.lawatwork.com.mt/uploads/65/8/LAWmail_MLA-__Issue_no_6_-_October_08_MB.pdf), accessed 19 April 2011.

<sup>160</sup> Legal Notice 439 of 2003, as amended by Legal Notices 3 of 2004, 427 and 431 of 2007, and 130 of 2011. Available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=11225&l=1>, accessed on 19 April 2011.

<sup>161</sup> It has proved difficult to obtain inside information, even from the Teachers' Union, which appears to have gone along with the practice. However, the author did get oral confirmation of this from a contact in the Malta Union of Teachers. See also: Ivan Camillieri, 'Malta in trouble with Brussels over teachers' maternity leave', *Times of Malta*, 19 October 2010, available at: <http://www.timesofmalta.com/articles/view/20101019/local/malta-in-trouble-with-brussels-over-teachers-maternity-leave.331962>.

<sup>162</sup> See this law at <http://www.equality.gov.mt/filebank/imagebank/wordbank/chapt456.pdf>, accessed 19 April 2011.



vocational training and retraining, including practical work experience'; and Regulation 4 (4) effectively reproduces Article 14 (2) of the Directive word for word. Yet, one might argue that legal certainty would have required greater precision in the primary legislation, namely the EMWA itself.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

There is no express provision in Maltese law obliging the Government to assess and report upon the exclusions from the application of equal treatment as regards genuine and determining occupational requirements (Article 31(3) of the Directive). On the other hand, this would fall under the statutory obligations of the Equality Body (the National Commission for the Promotion of Equality, henceforth the 'NCPE') in virtue of the Equality for Men and Women Act of 2003. One would expect that if there had been any case of application of such it would have been reported by the NCPE, but the NCPE's annual reports<sup>163</sup> do not make mention.

## ***2.9. Judicial procedures***

Provision for judicial remedies is made both in EIRA and in EMWA. Further, the ETE Regulations were amended in 2007 in the process of transposing the Recast Directive. Regulation 10 of the ETE Regulations makes it clear that individuals have access both to the Industrial Tribunal and to the Civil Court, and to the latter in any event. Regulation 10 paragraph (2) makes clear provision for the award of compensation for damage suffered. As to onus of proof, Regulation 10 paragraph (3) shifts the burden of proof to the employer to show that there has been no breach of the principle of equal treatment where the person who considers him/herself to have been wronged 'establish facts from which it may be presumed that there has been direct or indirect discrimination.' Paragraph (4) of the same regulation extends this rule to situations covered by the Protection of Maternity (Employment) Regulations, the Parental Leave Entitlement Regulations and the Urgent Family Leave Regulations. However, the main legislation, the EMWA, is not in the same terms. Therefore, as to burden of proof, Maltese primary law continues to address this issue in terms different from those used in the Directive and, in my view, in such a way as to not accurately render the Directive (Article 19). Thus, Section 19(2) of EMWA provides that 'it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities', with the defendant then having to prove that such less favourable treatment was justified in accordance with the provisions of this Act. In my opinion, this appears to put a higher onus on the plaintiff than is permitted by the Directive, appearing to eliminate the space within which the presumption as set out in Article 19(1) can come into play. Different wording, more in line with the Directive, is used in the Access to Goods and Services Regulations.

Conciliation procedures are made available through the Equality Body, the National Commission for the Promotion of Equality (NCPE), in accordance with EMWA, while as a matter of statutory provision judicial procedures are available, both under EMWA and under the EIRA, as well as under the delegated legislation. However, Section 18 of EMWA provides that the Minister may make regulations governing investigations, and that such regulations may provide the arrangements

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<sup>163</sup> Available at the website of the NCPE, at <http://equality.gov.mt/page.asp?p=8655&l=1>, accessed 20 April 2011.



whereby the Commission may itself refer (the matter) to the competent civil court or to the Industrial Tribunal for redress. Comprehensive general regulations were therefore expected to be made, but to date have not been made. Otherwise Section 19 of EMWA saves the relevant provisions of the EIRA and also further provides for the right of access to the competent court for an injunction and for compensation for damage suffered. The Access to Goods and Services Regulations of 2008 are somewhat clearer and fuller on the question of remedies, but their material scope is, of course, narrower.

### **2.10. Other novelties**

There would appear to be no other major issues.

### **2.11. Additional Problems**

The field of vocational training and guidance is still an area of difficulty in practise, such as in relation to access to non-stereotyped vocational guidance in schools and generally.<sup>164</sup> A further issue may be that several of the most important provisions of the Directive, including definitions such as those relating to discrimination, direct and indirect, or pay, have been implemented through regulations (that is delegated legislation) rather than by amendment of the primary legislation (EIRA or EMWA). This may create a level of legal uncertainty; at the very least, this possibility cannot be excluded. A correlation table would show this rather clearly.

Another problem raised in a previous report had noted that Maltese law had not at that time been brought into line with the Directive in so far as the relevant legislation was not made applicable to civil servants and was unclear as to access to justice for the self-employed. These matters were remedied by amendments to the Equal Treatment in Employment Regulations of 2007,<sup>165</sup> and indeed in November 2009 the Commission closed its infringement proceedings against Malta on these counts.

## **3. Additional information**

In my opinion, while Malta can be said to be broadly in line with the Directive, Malta has not yet fully taken the opportunity presented by the Recast Directive to revisit its main equality legislation (which is now some nine years old) and, while fully updating the law, to take the opportunity to drive forward societal change.

Gaps remain in relation to actual application or utilisation of the laws implementing the Directive, but also in terms of access to law and to justice. These mainly relate to the fact that all these provisions (pre-recast and recast) are relatively new and that society takes its time to absorb the culture on which they are premised, as well as to the need to develop the role of the Equality Body in such a way as to make it more clearly available and effective. Awareness of rights needs to be heightened even further.

Where the Government (Member State) is exhorted to ‘encourage’, sometimes by working with the other social partners, the results are not that obvious. For example, there has been progress in terms of alternative work systems such as teleworking in the public sector, but relatively little in the private sector, and there would appear to

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<sup>164</sup> See for example, Malta and the European Social Charter, Council of Europe factsheet, February 2011, at [http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/Malta\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/Malta_en.pdf), accessed 19 April 2011.

<sup>165</sup> By Legal Notice 53 of 2007 and Legal Notice 54 of 2007. Available at [www.doi.gov.mt/en/legalnotices/2007/default.asp](http://www.doi.gov.mt/en/legalnotices/2007/default.asp), accessed 22 April 2011.

have been little or no serious consideration of policy measures that would change the ‘opportunity environment’, such as any new thinking on school-term dates (the summer holiday period, especially, is very long) and school hours (somewhat short).

Moreover, the penalties imposed on employers as sanctions for non-compliance are generally perceived to be weak, so that the legislation risks failing the acid test of effectiveness in terms of remedies and of deterrence.

Finally, for those who hope that law will change culture, the evidence that this is happening in this case is not strong. Most women still do not work in demanding careers or even in full-time employment, and while the participation rate of the younger single female age cohort has risen, it then falls back among women who marry and have children without such loss being recouped later by re-entry into the working population. Women who take career breaks can find that they are then entirely outside the social security system in terms of pension provision in particular. There have been improvements; however, the underlying social dynamics, based on a particular value-bias towards a particular brand of family life, would appear not to have been altered much. Many would say that this was all for the good, preserving traditional family values and benefiting children in their early years. Others would wish to see the freer exercise of rights and freedoms. They would wish to see better efforts by Government and the social partners to address the root causes of low female participation in the work-place and in self-employment. Almost all would agree that the Directives, and this includes the Recast Directive, have improved the situation for women who wish to work. Many, but not all, would like to see women’s opportunities and participation rates further facilitated through the Government and social partners doing more to bring about the changes that may be required. This leaves us in need of the fullest and clearest transposition of the Recast Directive and a full follow-up of its exhortations as well as of the obligations that it has engendered.

## **THE NETHERLANDS – Rikki Holtmaat**

### **1. Transposition of the Directive**

#### **1.1. Transposition**

In the Dutch Government’s view, transposition of Directive 2006/54/EC was not necessary, as the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, hereinafter ‘GETA’), the Equal Treatment Act Men and Women in Employment (*Wet Gelijke Behandeling mannen en vrouwen*, hereinafter ‘ETA’) and Book 7 of the Civil Code (*Burgerlijk Wetboek Boek 7*) already cover the provisions of the Recast Directive in substantive law.<sup>166</sup> According to the Government, all necessary transposition measures had already been taken, either voluntarily or as part of the implementation of previous Directives.

#### **1.2. Correlation tables**

As no transposition has taken place, the Government has not considered it necessary to publish tables illustrating the correlation between this Directive and provisions in Dutch equal treatment law.

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<sup>166</sup> *Kamerstukken II* (Parliamentary Papers), 21 109, no. 179; Appendix, p. 56) and *Staatscourant* (Government Gazette), 20 May 2008, no. 94 / p. 25.

## 2. Novelties

### 2.1. Purpose of the Directive

The principle of equal opportunities is not mentioned explicitly in Dutch equal treatment legislation.<sup>167</sup> In theory, one could say that the principle of equal treatment may be considered as an instrument to realise *de facto* equal opportunities. The terminology of equal opportunities is most often used in the context of (academic and court room) discussions about the legal acceptability of positive action or preferential treatment measures. The principle of equal opportunities is regularly mentioned by the Equal Treatment Commission as a major goal of the implementation of the principle of equal treatment.<sup>168</sup>

### 2.2. Gender reassignment

The prohibition of discrimination based on gender reassignment is not explicitly covered in Dutch equal treatment legislation. Implicitly, this ground is captured under the ground sex. However, this does not cause any problems since the Equal Treatment Commission (*Commissie Gelijke Behandeling*, hereinafter ‘ETC’) regularly applies sex equality norms on discrimination arising from gender reassignment.<sup>169</sup> There are no (published) cases of the regular court system in which discrimination on this ground was at stake. Therefore, it is unknown whether civil and administrative courts would follow the same policy.

### 2.3. Definition of Pay

The definition of Article 2(2) Recast Directive has not been transposed literally in the Dutch equal treatment legislation. There is a definition of pay in the ETA (Article 7, paragraph 2): ‘Pay... is the remuneration that the employer owes the employee in relation to the labour of the latter.’<sup>170</sup> Many possible elements of pay were mentioned by the Minister of Social Affairs in the Bill of this act in 1973, including the restitution of expenses.<sup>171</sup> The ETC has held that also remunerations ‘in kind’ (e.g., the use of a lease car of the company) are included in the concept of pay.<sup>172</sup> Dutch courts and the ETC closely follow the ECJ case law regarding the meaning and scope of the concept of pay.<sup>173</sup>

### 2.4. Occupational social security schemes

The provision of Article 7(2) of the Directive has not been transposed literally into Dutch equal treatment legislation. However, according to article 12a of the ETA, both

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<sup>167</sup> Dutch equal treatment laws do not have an elaborate Preamble in which principles and goals are exemplified, sometimes they have a short ‘heading’ in which it is said that they are meant to implement anti-discrimination standards in the Constitution, in International Law or in EU Directives.

<sup>168</sup> See, e.g., the web home-page of the ETC, where it explicitly states that equal treatment legislation is meant to enhance equal opportunities for all and to take away barriers to equal participation. <http://www.cgb.nl/home> (last accessed on 13 April 2011.)

<sup>169</sup> See, e.g., ETC, Opinions of 30 November 2010 (2010-175), 1 October 2008 (2008-116), 9 March 2006 (2006-33) and 17 November 2003 (2003-139).

<sup>170</sup> My translation. No official translation available. This provision is similar to the general definition of pay in the Civil (Labour) Code.

<sup>171</sup> *Kamerstukken II*, 1973/74, 13 031, nr. 3, p. 4.

<sup>172</sup> ETC Opinion 200-45.

<sup>173</sup> See I.P. Asscher-Vonk & W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer: Deventer 2002, p. 195.

civil and public occupational pension schemes are covered under the prohibition to discriminate on grounds of sex in these schemes.

### **2.5. Scope of horizontal provisions**

As a consequence of the Barber judgment<sup>174</sup> and Directive 96/97, the ETA was amended in 1998. Several new provisions concerning occupational pension schemes were included (Articles 12a -12e ETA). Under Dutch equal treatment law, occupational social security schemes are usually seen as employment conditions (to which the prohibition of discrimination applies). In addition, Article 12b also prohibits discrimination on grounds of sex in occupational social security schemes by all parties other than the private or public employer. This construction, therefore, meets the requirements of the broadened scope as formulated in Article 7(2) of the Recast Directive. The exceptions in this legislation also comply with the Directives.

### **2.6. Concept of positive action**

The GETA and the ETA allow for positive action under strict conditions.<sup>175</sup> In theory, positive action measures are possible in relation to advertising for and hiring of new personnel and to all employment conditions, including occupational pension schemes. However, no examples of the latter are known to us.

### **2.7. Reconciliation of work, private and family life**

There are no explicit references in national legislation transposing the Recast Directive on this issue. Article 1 ETA provides that any distinction on the grounds of pregnancy, childbirth and maternity constitutes *direct* distinction on the grounds of sex. This provision brings along that benefits deriving from pension schemes or any other scheme (like the right to paid holiday) may not be affected negatively by pregnancy and maternity leaves. As far as Article 21(2) of the Directive is concerned, it must be observed that social partners play an important role in setting the conditions of labour including flexible labour conditions, although this has not been regulated in the equal treatment laws. The provisions of the Recast Directive seem to have no specific impact.

### **2.8. Periodical assessment of exclusions regarding genuine occupational requirements**

The provisions concerning genuine occupational requirements in the GETA and ETA<sup>176</sup> were evaluated in an academic research report in 2002,<sup>177</sup> i.e. before the adoption of the Recast Directive. According to my informant at the Ministry of Social Affairs, this report was also sent to the European Commission. The Decree in which this exception is specified and which contains a list of professions for which sex may be a genuine occupational requirement, was amended for the last time in 2005.<sup>178</sup> An

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<sup>174</sup> See Barber, ECJ Case 262/88, [1990] ICR 616.

<sup>175</sup> See my contribution to the Network Report on Positive Action Measures of 2011.

<sup>176</sup> See Article 2(2a) GETA and Article 5(2) ETA. See also the Decree 'Besluit van 19 mei 1989, houdende vaststelling van een algemene maatregel van bestuur inzake beroepsactiviteiten waarvoor het geslacht bepalend kan zijn.' In this Decree, a list of professions for which sex may be a determining occupational requirement is included.

<sup>177</sup> Mies Monster e.o.: Een bepaald geslacht; een onderzoek naar de regelgeving inzake beroepsactiviteiten waarvoor het geslacht bepalend is. University Nijmegen, 2002. To be downloaded from: [http://docs.szw.nl/pdf/35/2003/35\\_2003\\_3\\_3564.pdf](http://docs.szw.nl/pdf/35/2003/35_2003_3_3564.pdf) accessed on 26 April 2011.

<sup>178</sup> See: Staatsblad 2005, 529. The Decree was also changed in 2004, see Staatsblad 2004, 163.

evaluation and reporting, as required in Article 31(3) of the Recast Directive, seems not to have taken place after 2006.

## **2.9. Judicial procedures**

Access to the courts is guaranteed for victims of discrimination. Also, interest groups whose aim it is to help victims of discrimination or to combat discrimination, have access to courts. Before bringing a case before the Court, victims (and interest groups) can bring a case before the ETC, the national equality body. The ETC can give an Opinion, but its recommendations are not binding. Access to the ETC is free of charge.

## **2.10. Other novelties?**

No other novelties.

## **2.11. Additional problems**

We have some doubts about the statement of the Government that all necessary transposition measures had already been taken, either voluntarily or as part of the implementation of previous Directives. In the publication *The implementation of EU Gender Equality Law in 30 Countries*,<sup>179</sup> we have mentioned that there are some discrepancies between the Sex Equality Directives and Dutch equal treatment legislation. This concerns the definitions of direct and indirect discrimination<sup>180</sup> and harassment as well as the restricted interpretation of the instruction to discriminate. Also, we have some doubts concerning statements that were made by the Government while implementing the Amended Equal Treatment Directive (2002/73/EC), maintaining that Dutch law includes the right to return after maternity leave (Article 7 of the Amended Equal Treatment Directive), that under equal treatment legislation effective damages can be claimed (Articles 6[2]) and that the system of sanctions (Article 8d) complies with the requirements set by this Directive.<sup>181</sup> In addition to this, it must also be remarked that the provisions regarding the (partly reversed) burden of proof do not apply in cases of victimisation.<sup>182</sup>

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<sup>179</sup> See European Network of Legal Experts in the field of Gender Equality, *The implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission, available at: [http://ec.europa.eu/employment\\_social/gender\\_equality/index\\_en.html](http://ec.europa.eu/employment_social/gender_equality/index_en.html), accessed on 26 April 2011

<sup>180</sup> NB: as a result of an Infringement Procedure by the European Commission, the Government is now in the process of amending the GETA and ETA and bringing the definitions in line with the Directives. See *Kamerstukken I I*, 2008-2009, 31 832, nrs 1-3 and *Kamerstukken I I*, 2009-2010, 31 832, nr 4-8.

<sup>181</sup> Law of 5 October 2006, *Staatsblad* (Bulletin of Acts and Decrees) 2006, 469. See also *Kamerstukken II*, 2005-2006, 30 237, no. 3, pp. 7-9.

<sup>182</sup> Article 8a GETA. See also M. Ambrus, 'The concept of victimization in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment. In: *Nederlands Tijdschrift voor de Mensenrechten*, NJCM-bulletin, 2011 (1), pp 9-23., at p. 20.

## 1. Transposition of the Directive

### 1.1. Transposition

The EEA Committee made Directive 2006/54/EC part of the EEA Agreement by its decision of 14 March 2008.

The Norwegian Ministry of Children and Equality evaluated the Directive and concluded that Norwegian legislation already was in line with the requirements of the Recast Directive. None of the ‘novelties’ or ‘clarifications’ in the Recast Directive has been transposed into national law on the basis that these novelties were already transposed under the current legislation.

### 1.2. Correlation tables

No documents/tables illustrating the correlation between this Directive and the transposition measures have been published.

## 2. Novelties

### 2.1. Purpose of the Directive

The principle of equal treatment of men and women in all areas of society has been part of the general aim of the Gender Equality Act of 1978(GEA), section 1.<sup>183</sup> Section 1 states that the Act shall promote gender equality and aims in particular at improving the position of women and that women and men shall be given equal opportunities in education, employment and cultural and professional advancement. The principle of equal opportunities entails, for example, that in education girls and boys should be taught that they have the same skills and potential in education and later work in life regardless of sex. This was not how girls and boys were portrayed in the textbooks at some Christian Private Schools, see the Tribunals case 1 /2003 (ACE).<sup>184</sup> The school was ordered to amend the textbooks.

This broad approach of the Act, i.e., its not being limited only to the employment market/relationships, constitutes a legislative tool – a door-opener for the use of proactive measures in order to attack the structural barriers that result in gender stereotypes and basis for discrimination at the individual level. One example here is the introduction of the requirement of gender balance on company boards through amendments in the company acts.

### 2.2. Gender reassignment

National legislation ensures that prohibition of discrimination based on sex applies also to discrimination arising from gender reassignment; see the Working Employment Act section 13-1 and the Gender Equality Act.

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<sup>183</sup> Gender Equality Act of 9 June 1978 no 45 section 1: [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19780609-045.html&emne=likestilling\\*&&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19780609-045.html&emne=likestilling*&&), accessed 2 May 2011.

<sup>184</sup> See the ACE-case (Klagenemnda for likestilling) 1/2002: <http://websir.lovdata.no/cgi-lex/wiftsok?txt=text&button=%A0+S%D8K+%A0&emne1=ACE&emne2=&emne3=&emne4=&instans=&dato=&publisert=&saksgang=&parter=&forfatter=&trunker=on>, accessed 2 May 2011.



There are no court cases regarding discrimination because of gender reassignment to date. There is one case from the Norwegian Equality Tribunal,<sup>185</sup> where a woman claimed to be a victim of discrimination due to age as well as gender after gender reassignment some years ago. The Tribunal found that no discrimination had taken place as the employer proved a thorough selection process among many applicants.

### **2.3. Definition of Pay**

The definition of 'pay' as stated in article 2 (e) has been covered by the national legislation as interpreted by courts as well by the Ombud and the Tribunal.

### **2.4. Occupational social security schemes**

The Gender Equality Act covers occupational social security schemes and applies equally for all categories of workers, including public servants.

### **2.5. Scope of horizontal provisions**

National legislation implementing Articles 17-22 of the Directive apply to the entire scope of the Directive, including the area of occupational social security schemes.

### **2.6. Concept of positive action**

Positive action measures are possible with respect to occupational pension schemes under the Gender Equality Act section 1 and section 3a. One important measure would be to impose on the pension systems to provide annual reports on facts on the systems offered and thus reveal patterns that may constitute structural discrimination. This is possible already under the duty to monitor and report according to section 1a in the Gender Equality Act. The weakness today is that the Gender Equality and Anti-Discrimination Ombud do not have sufficient funding or staff to perform these controls on a broad scale. In addition the consequences for being in breach of the law are not harsh, as the Ombud does not have the competence through the law to invoke economic sanctions.

### **2.7. Reconciliation of work, private and family life**

Reconciliation of work, private and family life is a common theme in the legislation under the Working Employment Act,<sup>186</sup> National Insurance Act<sup>187</sup> and the Gender Equality Act, especially as regards the maternity leave and the father's quota. A big effort has been placed on reshaping the traditional roles of care for young children, making it more natural for fathers to take part of the care work. This has been in form of gradually extending the fathers quota up to 12 weeks starting 1 July 2011. In addition to changing attitudes about the parents, the employers are now increasingly seeing that leave is not something that only happens to female employees but also male employees. CEDAW (see especially article 5a) is part of legislative picture as

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<sup>185</sup> See case 19/2008:

<http://www.diskrimineringsnemnda.no/wips/2094117726/module/articles/smId/537438366/smTemplate/Fullvisning/>, accessed 2 May 2011.

<sup>186</sup> Arbeidsmiljøloven of 17 June 2005 no 62: [http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-20050617-062.html&emne=arbeidsmiljlov\\*&&](http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-20050617-062.html&emne=arbeidsmiljlov*&&), accessed 2 May 2011.

<sup>187</sup> Folketrygdloven of 28 February 1997 no 19: [http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-19970228-019.html&emne=folketrygdlov\\*&&](http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-19970228-019.html&emne=folketrygdlov*&&), accessed 2 May 2011.

part of the Human Rights Act.<sup>188</sup> Reconciliation of work, private and family life is also the core of the various suggestions in order to combat unequal pay.<sup>189</sup> However, Norway has at present a strong gender-segregated employment market, which of course is a product of strong gender stereotypes – a product of family structures, traditional, cultural and religious attitudes – attitudes that are presumably also reproduced through the education system. Norway has a high employment rate among women, but 43% of all employed women are part-time workers. This is because the care for home and children still is seen as the woman's responsibility.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Norway has made no exclusions following article 14 no. 2 and thus there are no assessments by the Norwegian State regarding the directive article 31(3). The understanding is that the opening for proactive measures as described under the Directive article 14 no 2, already exist under the Gender Equality Act section 3a. There exists a regulation regarding proactive measures to enhance the number of male teachers in kindergartens.<sup>190</sup>

## ***2.9. Judicial procedures***

Judicial procedures are ensured under Norwegian law as all persons/organisations that claim to be victim of discrimination may present their claim to a court. In addition there is the free-of-charge access to the Ombud/Tribunal system. However, a court case may very soon be a costly affair and these kinds of cases should in order to ensure effectiveness, be qualified of free legal aid, which at present they are not.

# **POLAND – Eleonora Zielińska**

## **1. Transposition of the Directive**

### ***1.1. Transposition***

In Poland, the transposition of the Recast Directive (2006/54/EC) was mainly performed by two legal acts: the Act of 21 November 2008, amending several regulations of the Labour Code, which entered into force on 19 January 2009,<sup>191</sup> and the Act of 3 December 2010 on the implementation of selected provisions of the European Union in the field of equal treatment,<sup>192</sup> in force since 1 January 2011. Both

<sup>188</sup> Menneskerettsloven of 21 May 1999 no 30: [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19990521-030.html&emne=menneskerettslov\\*&&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-19990521-030.html&emne=menneskerettslov*&&), accessed 2 May 2011.

<sup>189</sup> Proposition to the Parliament on equal pay in 2011: <http://www.regjeringen.no/nb/dep/bld/dok/regpubl/stmeld/2010-2011/meld-st-6-20102011.html?id=625636> as well as NOU 2008:6 <http://www.regjeringen.no/nb/dep/bld/dok/nouer/2008/nou-2008-6.html?id=501088>, accessed 2 May 2011.

<sup>190</sup> See Regulation of 17 July 1998 no 622: [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/for/sf/bl/bl-19980717-0622.html&emne=menn\\*&&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/for/sf/bl/bl-19980717-0622.html&emne=menn*&&), accessed 2 May 2011.

<sup>191</sup> Dziennik Ustaw (Journal of Laws of Republic of Poland) 2008 No. 223 item 1460, <http://isip.sejm.gov.pl/prawo/index.html>, accessed 26 April 2011. Hereafter cited as Dz.U.

<sup>192</sup> The Law of 3 December was published in Dz.U. 2010 No. 254, item 1700, <http://isip.sejm.gov.pl/DetailsServlet?id=WDU20102541700>, accessed 26 April 2011. Hereafter the law will be cited as Law of 2010.



of these acts also purport to transpose other directives, in addition to Recast Directive 2006/54 EC.<sup>193</sup>

### **1.2. Correlation tables**

Despite initial declarations that the correlation tables will be prepared,<sup>194</sup> ultimately Poland failed to publish such tables.

## **2. Novelties**

### **2.1. Purpose of the Directive**

The Labour Code<sup>195</sup> as amended by the Law of 2008, as well as the Law of 2010, both speak about equal treatment without making any reference to the notion of equal opportunities.<sup>196</sup> Additionally, the law of 2010 provides for the definition of unequal treatment<sup>197</sup> and the definition of principle of equal treatment.<sup>198</sup> The notion of equal opportunities seems to appear<sup>199</sup> in the case law of the Constitutional Tribunal, which, in the context of preferential (privileged) treatment of women, pointed out that such treatment is justified as far as it serves to equalise the factual inequalities resulting from biological and social differences between women and men.<sup>200</sup>

### **2.2. Gender reassignment**

Neither the Labour Code, nor the Law of 2010, explicitly refers to gender reassignment. None of those legal documents ensures that the prohibition of discrimination based on sex is to be applied also to discrimination arising from gender reassignment. The problem of applying the implementing legislation to cases of gender reassignment has yet to be tested in practice. However such a case may soon occur in connection with a claim, lodged within the Office of Plenipotentiary for Equal Treatment by two non-governmental organisations (NGO's), (the Campaign

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<sup>193</sup> The law of 21 November 2009 the following directives: 76/207/EEC, 89/391/ECC, 2000/43/EC, 2000/78/EC, 2002/73/EC and 2003/88/EC. The law of 3 December 2010 the following directives: 76/207/EEC, 86/613/EEC, 2000/43/EC, 2000/78/EC, 2002/73/EC, 2004/113/EC. The law refers to Directive 86/613/EEC, while Directive 2010/41/EU now repeals the Directive 86/613/EEC.

<sup>194</sup> According to the information received in 2009 from Department for Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy, correlation tables have been elaborated for internal use, with reference to the first versions of the Draft Law on Equal Treatment.

<sup>195</sup> Labour Code Act of 26 June 1974, Unified text: Dz.U. 1998 No. 21 item 92 with further amendments. Hereafter the code will be cited as LC.

<sup>196</sup> The draft Law of 22 December 2008 referred to the need to ensure equal opportunities for all only once ('thereby to extend participation of different subjects in social, economic and culture life'). However this reference has disappeared in the final version of the Law of 2010.

<sup>197</sup> By unequal treatment is understood the treatment of a physical person by one or several behaviours, which constitute direct or indirect discrimination, harassment and sexual harassment or any less favourable treatment of such person, based on a person's rejection or submission to harassment or sexual harassment or the instruction or order to discriminate (Article 3 (5) of the Law of 2010).

<sup>198</sup> The principle of equal treatment means the lack of the conduct constituting unequal treatment (Article 3 (6) of the Law of 2010).

<sup>199</sup> The Tribunal in this context is not using the notion of equal opportunities. This notion has been applied in another decision (Kw 5/91) in relation to the law providing for earlier retirement age of women in academia resulting in automatic dismissal from work, which has been considered as unconstitutional because of imposing unjustified restriction of women's professional equal opportunities.

<sup>200</sup> See for example: Decision of 15 July 2010, S 2/10. Similar in many earlier judgments for example: K 15/97, K 35/99. <http://www.trybunal.gov.pl/OTK/otk.htm>, accessed 28 April 2011.

against Homophobia and Trans-fusion), relating to the Regulation of the Ministry of Defence of 25 April 2004, which excludes transsexual and pseudohermaphrodite persons from military service.<sup>201</sup>

### **2.3. Definition of Pay**

Pursuant Article 18<sup>3c</sup>(2) LC (introduced in 2001<sup>202</sup> and amended in 2003<sup>203</sup>), the term remuneration is understood to include all possible components, irrespective of their description or nature, as well as other benefits related to employment (work) which are granted to workers as payment, either in money or in kind (Article 18<sup>3c</sup>(2) LC). Although this definition does not fully correspond with the wording of Article 2(e) of the Recast Directive<sup>204</sup> it seems that it might be interpreted accordingly.

### **2.4. Occupational social security schemes**

The Polish Law on Occupational Pension Schemes of 20 April 2004<sup>205</sup> may also be applied to particular categories of workers, such as public servants, as the definition of ‘employee’ contained in this law covers among others also persons employed on the basis of appointment, election and nomination.

### **2.5. Scope of horizontal provisions**

The law of 2010 doesn’t explicitly state that its horizontal provisions apply to the Law on Occupational Pension Schemes of 20 April 2004.<sup>206</sup> Such a possibility is provided exclusively in reference to the Law of 29 April 2004 on promotion of employment and institutions of the labour market.<sup>207</sup> At the same time, Article 6 of the Law of 2010 prohibits unequal treatment in access to social security, based among others on sex and Article 13 states that every person, whose principle of equal treatment has been violated, has the right to claim compensation in the civil proceedings. Pursuant to Article 14, this proceeding is conducted with a reversed burden of proof. However, the omission of direct indications that horizontal protective provisions of the Law of 2010 do apply in case of unequal treatment in social security,<sup>208</sup> (with direct reference to the Law on promotion of employment, as mentioned above), gave rise to a serious uncertainty as to the existing legal situation, with regard to the applicability of those

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<sup>201</sup> Biuletyn Monitoringu dyskryminacji osób LGBT w Polsce (Bulletin for Monitoring of Discrimination of Lesbian/Gay, Bi and Transsexual Persons in Poland) No. 10/2011, [www.monitoring.kph.org.pl](http://www.monitoring.kph.org.pl), accessed 27 April 2011.

<sup>202</sup> Act of 24 August 2001, Dz.U. 2001, No. 128, item 1405. These provisions entered into force on 1 January 2002.

<sup>203</sup> Act of 14 November 2003, Dz.U.2003, No. 213, item 1081.

<sup>204</sup> Since it does not differentiate the wages and salaries on basic and minimum as well as, while speaking about benefits, fails to stress that it covers both consideration received directly and indirectly.

<sup>205</sup> Dz.U. No. 116, item 1207.

<sup>206</sup> Dz.U. No. 116, item 1207 (old age retirement benefits) regardless of sex, race, ethnic origin, nationality, civil and family status. However also in this case the horizontal provisions of the law of 2010 can’t be applied.

<sup>207</sup> Dz.U. 2008 No. 69, item 415.

<sup>208</sup> It should be stressed that the Law of 2010 does not introduce any amendments to the Law on Occupational Pension Schemes. At the same time it introduced the legal guarantees of equal treatment into the law on social security system of 13 October 1998 (Dz.U. 2009 No 205 item 1585 with further amendments) and into the Law on capital pensions of 21 November 2008 (Dz.U. No 228 item 1507) without providing any reference to remedies and enforcement what may raise the similar doubts as in case of Law on Occupational Pension Schemes.

provisions in the field of occupational pension schemes. This inconsistency might be avoided by correct transposition of the Recast directive.

## ***2.6. Concept of positive action***

The Article 11 of the Law of 2010 provides that undertaking of activities aimed at prevention of unequal treatment or equalisation of discomfort deriving from unequal treatment, based on sex, race, ethnic origin and nationality, does not constitute a violation of the equal treatment clause.

The 2010 Law provides the legal basis for positive action measures, among others in the fields of: professional training, conditions of employment and the performance of work in other forms than employment contract, access to and the functioning of trade unions, organisation of employers and professional corporations, access to and conditions for the enjoyment of publicly available instruments of the labour market, the social security system and access to goods and services, including housing, as well as the provision of electricity.

## ***2.7. Reconciliation of work, private and family life***

There is no explicit reference in the Polish legislation transposing the Recast Directive, to the issue of reconciliation of work, private and family life; however, several measures have been already introduced, which may facilitate such reconciliation.

The Labour Code for instance provides for regulations of flexible time arrangement, as well as the system of telework,<sup>209</sup> a system that enables both women and men to better combine their family obligations with work. The new paid paternity leave and the modified parental leave arrangements, introduced in 2008,<sup>210</sup> include the right of the employee entitled to parental leave to continue working according to a shortened time schedule, among others. The so-called ‘nursery bill’ of 4 February 2011<sup>211</sup> introduced new forms of care for children under the age of three years, including crèches, group babysitters, day clubrooms and legally employed nannies. The law also encourages employers to open in-house nurseries in exchange for a tax allowance.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The provision of Article 14 (2) of the Recast directive has been transposed properly already in 2008.<sup>212</sup> Article 18<sup>3b</sup>(2) point 1 LC states, that refusal to employ a person, based on one or more of characteristics related to sex, age, race, ethnic origin, religion etc., does not constitute a violation of the principle of equal treatment, if, by reasons of the nature of a particular kind of work or conditions in which it has to be carried out, such a characteristic constitutes a genuine and determining occupational requirement. The Polish provision also refers to the notions of legitimacy of the objective and the proportionality of the requirement.

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<sup>209</sup> The new chapter of the Labour Code, dealing with telework (IIB) has been introduced by the Act of 24 August 2007, Dz.U. 2007 No. 181 item 1288.

<sup>210</sup> The Law of 6 December 2008 on the Amendments of the Labour Code and Some Other Laws, Dz.U. 2008 No 234 item 1654; [http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630\\_-u.htm](http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630_-u.htm), accessed 12 March 2009.

<sup>211</sup> Dz.U. 2011 No. 45 item 67 <http://orka.sejm.gov.pl/SQL.nsf/ustawyall?OpenAgent&6&91>, accessed 28 April 2011.

<sup>212</sup> Act of 21 November 2008 on amendment of the Labour Code, Dz.U. 2008 No. 223 item 1460.

The obligation to assess and to report to the Commission of exclusions from the application of the principle of equal treatment of men and women, as regards genuine and determining occupational requirements, has not been enshrined into Polish law.

It seems that Poland has not also taken any practical steps in order to comply with this obligation.<sup>213</sup>

## ***2.9. Judicial procedures***

The Law of 2010 ensures that the court procedure, reverse burden of proof, financial compensation and protection against secondary victimisation, will be available to every person who considers her/himself wronged by the failure to apply the principle of equal treatment.

## ***2.10. Other novelties?***

The Law of 2010 transposes the Provision 2(2)c of the Recast Directive in its Article 12, stating that all horizontal protective provisions (claim to court for compensation, reverse burden of proof) are to be applied in case of less-favourable treatment related to pregnancy or maternity, paternity or parental leaves. In addition, the provision of Article 183<sup>2</sup> of the Labour Code guarantees every person (women or men) the return from maternity/paternity or parental leaves to the previous position, or to an equivalent position or other post corresponding with his/hers professional qualifications, with a salary such person would be entitled to, if he/she wouldn't take the leave.

## ***2.11. Additional problems***

The regulation of the burden of proof in the Law of 2010 (Article 14) copies the regulation of Article 19 (1) of the Recast Directive. Although it differs from the wording used in relation of the reverse burden of proof in Article 18<sup>3b</sup> (1) LC,<sup>214</sup> the application rule seems to be similar. It is sufficient for the employee to indicate only the facts from which it can be presumed that direct or indirect discrimination has occurred. The employer has to prove that there were objective reasons for resigning of equal treatment.

## **3. Additional problems**

The main problem connected with the analysis and assessment of the Polish provisions transposing the Recast Directive derives from the fact that the legislator tried to encompass the transposition of more than one equality directive in a single legal act, dealing with differentiated material scope and with different grounds of discrimination. As a result, although the Law constitutes a verbatim implementation of the directives, its provisions do not comply with requirements of legislative technique and are far from clear. In particular, it is hard to find any logic in the sequence of principles as to the application of the law and exceptions, which are divided into in two different Chapters: 1 and 2.<sup>215</sup>

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<sup>213</sup> The Plenipotentiary for Equal Status seems not to be aware of such obligation. The person eventually responsible for fulfilment of this obligation, within the Ministry of Labour and Social Policy, has not been identified yet.

<sup>214</sup> Introduced in 2003, in force since 1 January 2004.

<sup>215</sup> For example, in Chapter 1, entitled 'General provisions', the Law provides for the description of the material scope of its application as well as some exclusions of its application in relation to specified kinds of grounds and protected areas (genuine and determining occupational requirement,

## 1. Transposition of the Directive

### 1.1. Transposition

The transposition of Directive 2006/54/EC into national legislation must be considered separately for labour issues and for social security issues.

Where labour issues are concerned, the transposition of Directive 2006/54/EC into Portuguese legislation was made by the new Labour Code (LC), approved by Law No. 7/2009, of 2 February 2009. Article 2 (o) of this Law explicitly refers to the transposition of this Directive.

The LC deals with these issues in a specific section, divided into three subsections dedicated to: non-discrimination in general (Articles 23 to 28), harassment (Article 29), and gender equality (Articles 30 to 32).

These rules are applicable to workers of the private sector and refer to the operative notions related to these issues (like the notions of direct and indirect discrimination, equal work and work of the same value, and remuneration). They include the several factors of discrimination, and relate to non discrimination in access to employment, promotion and training, and pay, as well as rules regarding the burden of the proof, positive action, the right to damage compensation in case of discriminatory practises, and harassment and sexual harassment.

Regarding workers in the public sector, there is no explicit mention of the transposition of this Directive into the national regulation, despite the fact that legislation was approved in 2008.

These issues are addressed in Law No. 59/2008, of 11 September 2008 (Articles 13 to 23 of the ‘Regime’, and Articles 5 to 15 of the *Regulamento*).<sup>216</sup> These rules are applicable not only to civil servants that have a specific labour contract (*contrato de trabalho em funções públicas*), which is the vast majority, but also to nominee civil servants (due to the extension provision of Article 8 b) of Law No. 59/2008, of 11 September 2008.

The issues of discrimination in this piece of legislation are dealt with in two sections, one related to non-discrimination in general and the other related to gender equality. The rules concerning workers of the private and public sectors in this area

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employers with an ethos based on religion or belief, nationality discrimination, exception related to discrimination on the ground of age, and exceptions related to the individual freedom to choose a contractual partner as long as an individual choice is not based on that person’s sex, race or ethnic origin). However, some of those exclusions are conditional in nature and therefore should rather be included in the next Chapter (2), entitled ‘The principle of equal treatment and legal measures aimed at its protection’. Again, the Law here, although this time in the form of prohibitions, prescribes unequal treatment in indicated areas on selected grounds (Section 6-8(1)). In addition to the exclusions contained in Chapter (1), Chapter (2) includes further exclusions, in relation to some areas and grounds. E.g. Section 8(2) provides for an exception to the prohibition of unequal treatment on the ground of religion, belief, ideology, disability, age and sexual orientation if such unequal treatment is necessary with regard to the rule of law for the protection of public security, public order, protection of health, protection of the rights and freedoms of others, as well as prevention of criminal offences. The regulation of Chapter 2 gives the impression that, in relation to the area subjected to its regulation, some prohibitions (e.g. on the ground of sex) have an absolute character. This is not the case, however, given that the exceptions included in Chapter 1 apply as well (e.g. genuine and determining occupational requirement).

<sup>216</sup> Law No. 59/2008 is divided in two parts: the first one is the ‘Regime’ and the second one is the ‘Regulamento’. The regulation of many issues is distributed between these two parts of the Law.

are similar but not exactly the same, since the new LC is more updated than Law No. 59/2008.

Regarding independent workers, Directive 2006/54/EC was transposed into national legislation by Law No. 3/2011, of 15 February. This Law establishes a broad concept of independent work, and non-discrimination in this area is directly related to equal opportunities, that must be granted in the access to independent work, in professional training, and in the conditions under which the work is performed. Where social security issues are concerned, Directive 2006/54/EC was also not explicitly transposed.

Gender equality in professional social security schemes is governed at the national level by Decree-Law No. 307/97, of 11 November 1997, that made the transposition of Directives 86/378/EEC and 96/97/EC and although the national legislation is in general consistent with European law, it has not incorporated the novelties of Directive 2006/54 in this area.

### ***1.2. Correlation tables***

We have no knowledge regarding the drawing and publications of such tables in Portugal.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The purpose of the Directive to implement not only the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities is also reflected in the implementing national legislation, and corresponds to the Portuguese constitutional and legal tradition in this area.

In fact, Articles 47 No. 2 and 58 No. 2(b) of the Portuguese Constitution (from 1976) already establish the right of men and women to equal opportunities in access to employment. The new LC, as the previous legislation, has the same approach, considering the right to equal treatment at work and the right to equal opportunities in access to employment (Article 24 No. 1 of the LC) together. The same principle is applicable to public servants (Article 13 No. 1 («Regime»)) of Law. No. 59/2008, of 11 September 2008).

For the Portuguese system, the implications of the new wording of Directive 2006/54 to this respect are not significant, since our national tradition in this respect goes in the same way. However, had this not been the case, the most significant difference for us would have been the fact that the specific reference to equal opportunities gives a stronger basis to all actions directed to the elimination of barriers or obstacles in access to work, related to gender, not only at an individual level but also at a collective level (for instance, by implementing positive action).

### ***2.2. Gender reassignment***

Portuguese legislation does not explicitly mention that the prohibition of discrimination based on sex also applies to discrimination arising from gender reassignment.

However, the provision of the LC that indicates the discriminatory factors for the purposes of the non-discrimination principle (Article 24 No. 1) has a very wide content, not only in the sense that many discriminatory factors are indicated but also because the factors mentioned are expressly referred to as examples of discrimination. Therefore, there is no legal obstacle to considering discriminatory practises due to

gender reassignment as discrimination and the qualification of this discrimination as gender discrimination by the Directive will be sufficient to treat it as gender discrimination at national level.

The same reasoning is applicable to public servants, under the provision of Article 13 No. 2 ('Regime') of Law. No. 59/2008, of 11 September 2008, which goes in the same sense.

I am not aware of specific problems in Portugal in applying the implementing legislation to cases of gender reassignment.

### ***2.3. Definition of Pay***

The national definition of 'pay' for the purpose of equality principle is established in Articles 24 No. 2(c) and 31 No. 2 of the LC. This notion is wider than the general notion of pay, established by Article 258 No. 1 of the LC, and is in compliance with the wide notion of pay introduced in Directive 2006/54.<sup>217</sup>

In relation to public servants, the national concept of remuneration is established also in a broad way by Article 67 of Law No. 12-A/2088, of 27 February of 2008 (applicable to all public servants). Regarding the principle of equal pay, this notion must be combined with Articles 19 ('Regime') and 11 No. 2 (*Regulamento*) of Law. No. 59/2008, of 11 September 2008, and it is compliance with the definition of pay in the Directive.

### ***2.4. Occupational social security schemes***

As observed, where social security issues are concerned, Directive 2006/54/EC was not explicitly transposed into national law. Gender equality in professional social security schemes is regulated at the national level by Decree-Law No. 307/97, of 11 November 1997, which transposed Directives 86/378/EEC and 96/97/EC.

This legislation is generally applicable, draws no exception for particular categories of workers (Article 3) and it also does not cover specific pension schemes for a particular category of workers, such as public servants.

From a practical point of view, occupational social security schemes are rare in Portugal and not applied in the public sector. However, if such schemes were to be implemented, for instance in public companies, they would fall under the scope of this legislation and therefore would submit to the gender equality principle.

### ***2.5. Scope of horizontal provisions***

In our view, because Directive 2006/54/EC has not been transposed into the Portuguese legislation specifically in relation to the area of occupational social security schemes, the horizontal provisions of the Directive, in Articles 17 to 22 (defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, dialogue with non-governmental organizations) do not apply directly to occupational social security schemes. National legislation regarding horizontal provisions is only found in the LC and is therefore applicable to labour relations alone and not to social security relations.

The legislation regarding these schemes (Decree-Law No. 307/97, of 11 November 1997) also integrates some horizontal provisions, such as a general right to access the courts for the purposes of the defence of rights, namely for purposes of damage compensation (Article 15) and a provision imposing administrative fines on

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<sup>217</sup> We emphasize the evolution in this area in the new LC, since the previous LC had a very uncertain concept of remuneration for this purpose, that was narrower than the European concept of remuneration, as it came out of Treaty. The new LC has eradicated this problem.

grounds of discriminatory practises (Article 16). On the other hand, occupational social security schemes can be established in collective agreements (Article 478 No. 2 of the LC); in that sense, social dialogue may be developed in this area.

However, it is quite uncertain that other horizontal provisions of the Directive, such as the reversal of the burden of proof and the intervention of equality bodies, are applicable in this particular area, at least throughout direct provisions in national law. Of course it can be argued that, given the broad sense of remuneration for the purposes of gender equality rules (mainly Article 24 No. 2(c) of the LC), professional social security schemes integrate ‘pay’ for equality purposes and therefore still fall under the scope of the horizontal provisions of the LC regarding equality. However, it will be difficult to sustain that these general provisions prevail over the special law concerning equality in professional social security schemes, based on the fact that this law is inappropriate or incomplete.

## ***2.6. Concept of positive action***

In Portugal, positive action has both a constitutional and a legal ground.

The constitutional ground is Article 9 of the Portuguese Constitution, regarding the fundamental tasks of the State that considers as one of these tasks the ‘promotion of equality between men and women’ (Article 9(h)).

The legal ground of these actions is Article 27 of the LC, so the substantive field of application of these actions, is of labour relations. These actions also apply to civil servants, since there is similar concept in the legislation regarding this category of workers (Article 16 (‘Regime’) of Law. No. 59/2008, of 11 September 2008).

The fact that the legal notion of positive action is not developed in relation to occupational pension schemes in the specific legislation that deals with these schemes (Decree-Law No. 307/97, of 11 November 1997) makes it difficult to sustain the extension of these measures to this area, at least on the basis of the legal notion of positive action in the LC.

Nevertheless, we think that positive action in this area, namely actions of a legislative nature, may be based directly on the Constitution, since the provision of Article 9(h) is binding to the State.

## ***2.7. Reconciliation of work, private and family life***

In Portugal, the issue of reconciliation of work, private and family life is traditionally bound to the issue of gender equality. In this sense, like the previous legislation, several provisions of the LC address the relation between the two issues:

- Article 24 No. 3(b) of the LC explicitly states that equality principle is without prejudice to rules concerning the protection of pregnancy, maternity and paternity, adoption and other situations related to the reconciliation of family and working life;
- Article 25 No. 6 of the LC explicitly extends the reversal of the burden of proof in allegations of discrimination related to pregnancy, leaves of absence in relation to the preparation of child-birth, paternity and maternity, adoption, and other leaves of absence for care reasons;
- Article 31 No. 3 of the LC states that absences and leaves related to maternity and paternity cannot justify any difference in pay between men and women; and
- Article 65 No. 1 of the LC states that all long leaves and leaves of absences due to maternity, paternity or care reasons are to be taken without prejudice of the workers rights and statute.



These rules are also applicable to civil servants (Article 22 of Law No. 59/2008, of 11 September 2008).

Under these circumstances, the references to this issue in the Recast Directive did not have a special impact in Portugal, because they are in line with the national tradition on this issue.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Following Article 31 No. 3 of Directive 2006/54/EC, the LC states the ‘legal provisions or collective agreements provisions regarding exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements must be periodically examined and eradicated if they lose their justification’ (Article 25 No. 4 of the LC). However, up until now, we are not aware of any steps taken by Portugal to comply with this obligation.

Also, in a more practical provision, Article 479 of the LC entitles the Commission for Equality at Work and in Employment<sup>218</sup> (the national agency for equality in employment, depending from the Government but working with the social partners on a three-party structure) with the competence to survey the content of collective agreements in order to spot and denounce any discriminatory clauses. Exception clauses concerning occupational requirements are included in this survey, so a regular overview of these clauses can be put in practice by this Commission. However, up until now we have no news on the results of these surveys.

We underline that these provisions are not applicable to the public sector but only to the private sector, since they have been introduced only by the LC of 2009, and the legislation regarding public servants is from 2008. This is one of the issues where the public sector legislation is not updated.

## ***2.9. Judicial procedures***

In Portugal, access to judicial procedures, mainly for the purposes of compensation for material or moral damages caused by discriminatory practises is traditionally recognised. Presently, this right is established by Article 28 of the LC and, in what concerns the occupational social security schemes, by Article 15 of Decree-Law No. 307/97, of 11 November 1997.

This right is granted independently of the eventual administrative complaint of the worker to public inspection authorities in the labour area<sup>219</sup> or to the Commission for Equality at Work and in Employment.

In this sense, the provision of the Directive regarding this issue had no impact in Portuguese.

## ***2.10. Other novelties?***

No.

## ***2.11. Additional problems***

No.

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<sup>218</sup> ‘Comissão para a Igualdade no Trabalho e no Emprego’.

<sup>219</sup> ‘Autoridade para as Condições de Trabalho’.

### 3. Additional information

Given the fact that the Portuguese legislation complies, in general, with the rules of Directive 2006/54, the main obligations of the State regarding this directive are fulfilled. Of course there are some points that should be more developed (for instance, the need to promote equality issues in collective bargaining) but, on the whole, the Portuguese legal system is consistent with the ruling of the Recast Directive.

The exception to this general conformity is the issue of professional social security schemes, especially in what concerns horizontal provisions. In our view, this area represents the main gap of the Portuguese legislation concerning the Recast Directive.

## ROMANIA – Roxana Teşiu

### 1. Transposition of the Recast Directive into national law

#### 1.1. Transposition

Directive 2006/4/EC has now entered into effect, and Act No. 202 of 2002 on equal opportunities<sup>220</sup> has been enacted. The Directive's provisions were also transposed through the provisions of the Emergency Ordinance No. 67 of 2007 on equal treatment between men and women within professional social security schemes,<sup>221</sup> although the Law on occupational pensions' scheme is still pending.

#### 1.2. Correlation tables

So far, there are no correlation tables published under laws and regulations in Romania that contain express reference to transposing the Recast Directive. Still there are references in laws currently enforced in Romania to the Directives that were repealed by the Recast Directive. For example, the Act No. 202 of 2002 on equal opportunities and equal treatment between women and men has suffered several changes and modifications after entering into force and it has been republished on 1<sup>st</sup> March 2007. The reference of transposition is made to a number of Council Directives repealed by the Recast Directive, such as Council Directive 75/117/EEC, Council Directive 76/207/EEC and Council Directive 97/80/EC.

### 2. Novelties

#### 2.1. Purpose of the Directive

Article 1(2) of the republished Act No. 202 of 2002 on equal opportunities states that 'For the purpose of this law, by *equal opportunities between women and men*, it is to be understood the consideration of abilities, needs and goals that are different for women and men, and their equal treatment.' The difference in wording is extremely important with regard to the different needs of women and men in order to seek a harmonised set

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<sup>220</sup> Act No. 202 of 19 April 2002 on equal opportunities and equal treatment between women and men republished, Official Gazette No. 150 of 1 March 2007. Law No. 202 of 19 April 2002 was republished based on Article III of the Emergency Ordinance No. 56 of 2006 on the completion and modification of Law No. 202 of 19 April 2002, published in Official Gazette No. 768 of 8 September 2006. Upon republication, the texts were given new numbering. The Emergency Ordinance No. 56 of 2006 was approved with modifications and completions by Law No. 507 of 2006, published in Official Gazette No. 10 of 8 January 2007.

<sup>221</sup> Emergency Ordinance No. 67 on equal treatment between men and women within professional social security schemes published in the Official Gazette No. 443 of 29 June 2007.

of measures to address such different needs in areas of employment and occupation, through more complex public policies than those seeking for equality in treatment only.

However, reference to different abilities and different goals of women and men in the above definition of the concept of *equal opportunities* should not be made by the law, as that is built on the assumption that the two sexes are given and recognised to have different abilities and capacities based on social expectations. Such a legal formulation preserves the stereotypes related to different capacities and abilities that shall be attributed to women and men and thus, further justifies the segregation in employment by choosing predefined professional careers, for example. The same is relevant for the wording making reference to different goals. Human beings have different goals and that is applicable to all individuals, no matter what gender. Maintaining reference to different goals of women and men leads to the assumption that there are some generic goals particular for women and men that are ultimately to be found in certain career options, for example. By way of example: the appropriate formulation of the *equal opportunities* concept shall be ‘the consideration of different abilities, needs and goals of human beings, and their equal treatment’.

## **2.2. Gender reassignment**

The principle of equal opportunities and equal treatment of men and women in matters of employment and occupation as transposed the Romanian legislation does not refer specifically to gender reassignment as specified in Recital 3 of the Recast Directive. However, it may be construed that the legal provisions of Ordinance No. 137<sup>222</sup> as provided in Article 2(1) also cover the specific context of the gender reassignment: ‘In accordance with the ordinance herein, discrimination encompasses any difference, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, age, handicap, non contagious chronic disease, HIV infection, belonging to a disfavoured category, *as well as any other criterion aiming to or resulting in the restriction or elimination of the recognition, use or exercise, in conditions of equality, of human rights and fundamental liberties or of rights granted by law in the political, economic, social and cultural field or in any other domains of public life.*’

## **2.3. Definition of Pay**

The definition of ‘pay’ is properly transposed within the Romanian legal framework. Although the Romanian legal framework does not provide for the concept of ‘pay’, instead defining the concept of ‘salary’, its definition is in line with the Recast Directive requirements. Article 6(3) of the republished Labour Code<sup>223</sup> defines the ‘salary’ as representing the pay for the work performed by the employee based on the individual labour agreement. The salary comprises base salary, indemnities, allowances and other premiums. The salary is paid in cash. Payment in kind for a

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<sup>222</sup> Governmental Ordinance No. 137 of 2000 regarding the prevention and punishment of all forms of discrimination published in the Official Gazette No. 431 of 14 September 2000. See also Law No. 48 of 2002 concerning the adoption of the Governmental Ordinance No. 137 of 2000 regarding the prevention and punishment of all forms of discrimination and Governmental Ordinance No. 77 of 2003 for the amendment of the Governmental Ordinance No. 137 of 2000 regarding the prevention and punishment of all forms of discrimination. See also Law No. 27 of 2004 concerning the adoption of the Governmental Ordinance No. 77 of 2003 for the amendment of the Governmental Ordinance No. 137 of 2000 regarding the prevention and punishment of all forms of discrimination.

<sup>223</sup> Law No. 53 of 24<sup>th</sup> January 2003 on Labour Code, republished in the Official Gazette No. 345 of 18<sup>th</sup> May 2011.

portion of the salary is possible only if the same is provided in the individual labour agreement or in the applicable collective bargaining agreement. Article 6(3) of the republished Labour Code stipulates that ‘On all elements and conditions of remuneration any sex based discrimination is forbidden for equal work or work of equal value.’

Related to the concept of ‘equal pay’ as provided for by the Recast Directive, Article 4(f) of Act No. 202 of 2002 on equal opportunities defines the concept of ‘*work of equal value*’ as representing ‘the paid activity that, following comparison basis of utilising the same indicators and the same measurement units with another activity, reflects the usage of similar or identical professional knowledge and skills, and performing of similar or identical work effort.’ Furthermore, article 7(c) provides that the equality of opportunities and treatment for women and men implies non-discriminatory access to equal incomes for work of equal value.

#### ***2.4. Occupational social security schemes***

Emergency Ordinance No. 67 of 2007 provides for equal treatment between men and women within professional social security schemes. However, the Law on occupational pensions’ scheme is still pending. The Ordinance does not cover pension schemes for a particular category of workers, such as public servants.

#### ***2.5. Scope of horizontal provisions***

These provisions are not applicable to Romanian legislation with respect to occupational pension schemes.

#### ***2.6. Concept of positive action***

The concept of positive action is not defined with respect to occupational pensions’ schemes.

#### ***2.7. Reconciliation of work, private and family life***

The issue of reconciliation of work, private and family life is not explicitly mentioned in Act No. 202 of 2002 on equal opportunities.

#### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The obligation of Romania to report on the results of assessing the occupational activities referred to in Article 31(3) of the Recast Directive is not explicitly provided for in the current Romanian legal framework. Romania undertook no step so far to comply with such an obligation.

#### ***2.9. Judicial procedures***

With regard to the availability of judicial procedures for the enforcement of obligations imposed by Article 17(1) of the Recast Directive and conciliation procedures where appropriate, these measures are already provided for by national legislation, so there is no need for formal transposition of this rule.

### **3. Additional information**

Recital 38 of the Recast Directive provides for the equal treatment of men and women in matters of employment and occupation to not be restricted to legislative measures. Romania as a Member State should promote public awareness on the matter of equal

treatment for women and men. It is of particular concern that the matter of equal treatment and equal opportunities for women and men lost public visibility in Romania down to becoming inexistent in the public discourse or as part of the public policies or programs initiated by the state authorities. The public agenda is currently being articulated around profound economic and social difficulties of the country following the consequences of the economic crisis that affected the country since the beginning of 2010. As such, issues such as budget cuts and the set of measures adopted for reducing the pension burden on the budget, including by cutting the public pensions have prevailed in the public agenda.

## **SLOVAKIA – Zuzana Magurová**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

On the basis of the government resolution, the Ministry of Labour has become the central coordinating body responsible for the transposition of the Recast Directive. It was obliged to fulfil this task by 15 May 2008 in cooperation with the Ministry of Defence (responsible for the Act on State Service of Customs Officers), the Minister of Justice and the Deputy Prime Minister for knowledge society, European affairs, human rights and minorities (responsible for the Antidiscrimination Act). The Ministry of Labour is responsible for the amendments to the Labour Code.

The Recast Directive was transposed to the following legislation:

Act No. 99/1963 Coll. The Code of Civil Procedure as amended;

Act No. 2/1991 Coll. on Collective Bargaining as amended;

Act No. 308/1993 Coll. on establishing the Slovak National Centre for Human Rights as amended;

Act No. 73/1998 Coll. on the State Service of Members of the Police Force, the Slovak Intelligence Service, the Prison Wardens and Judiciary Guards Corps of the Slovak Republic, and of the Railway Police as amended;

Act No. 311/2001 Coll. the Labour Code as amended;

Act No. 315/2001 Coll. on the Fire Fighting and Rescuing Corps as amended;

Act No. 461/2003 Coll. on Social Insurance as amended;

Act No. 552/2003 Coll. On Works Performed in Public Interest as amended;

Act No. 553/2003 Coll. on Rewarding Some Employees when Performing Work in the Public Interest, as amended;

Government Regulation No. 341/2004 Coll. on Catalogues of Jobs to be Performed in the Public Interest, as amended;

Act No. 5/2004 Coll. on Employment Services and on Amending Certain Other Laws as amended;

Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination (Antidiscrimination Act) Amending Certain Other Laws;

Act No. 346/2005 Coll. on the State Service of Professional Soldiers of the Armed Forces of the Slovak Republic as amended;

Act No. 124/2006 Coll. on Occupational Safety and Health Protection and on Amendment of Certain Laws as amended;

Act No. 125/2006 Coll. on Labour Inspection and on amendment of the Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and Amending Certain Other Laws as amended; and

Act No. 400/2009 Coll. on State Service and Amending Certain Other Laws as amended.

### **1.2. Correlation tables**

The compliance tables that illustrate the correlation between this Directive and the transposition measures and index of the legal acts in which this Directive is transposed have always formed a part of the quoted Acts in the form of annexes.

## **2. Novelties**

### **2.1. Purpose of the Directive**

The principle of equal opportunities is not regulated yet. The Act on Equal Treatment in Certain Areas and Protection against Discrimination, Amending Certain Other Laws (*Anti-discrimination Act*)<sup>224</sup> provides for the application of the principle of equal treatment and lays down the means of legal protection in the case of violations of this principle.

### **2.2. Gender reassignment**

The prohibition of discrimination arising from gender reassignment was transposed into the Article 2(a)(11)(a) of the Anti-discrimination Act : ‘Discrimination based on sex also means discrimination related to pregnancy or maternity, as well as discrimination on the ground of sexual or gender identification’.

### **2.3. Definition of Pay**

Definition of pay is covered by the Labour Code, and is corresponding to the definition contained in Recast Directive. The situation has improved in the definition of wages in the amendment<sup>225</sup> of the Labour Code,<sup>226</sup> effective from 1 September 2007. It was an essential reform by which the definition of the wage contained in Article 118 was changed and the principle of equal remuneration for equal work and for work of equal value was laid down in new Article 119a.

Within the meaning of the Article 118, the wage shall be financial consideration or consideration of a financial value (wages in kind), provided by an employer to an employee for work. Considerations provided in relation to employment according other provisions of the Labour Code, or special regulations, in particular wage compensation, severance allowance, discharge benefit, travel reimbursement, contributions from the social fund, revenues from capital stocks (shares) or bonds, tax bonuses, wage compensation for the employee’s temporary incapacity for work and compensation for work stand-by, shall not be considered as wages. Other considerations provided to an employee by an employer paid of net profit shall likewise not be considered as wages.

Following the decision of the ECJ concerning the interpretation of the term ‘remuneration,’ Article 119a,<sup>227</sup> provides that the pay conditions must be agreed upon

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<sup>224</sup> Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination, Amending and Supplementing Certain Other Laws, as amended.

<sup>225</sup> Act No. 348/2007 Coll. amending the Act No. 311/2001 Coll. Labour Code.

<sup>226</sup> Act No. 311/2001 Coll. Labour Code, as amended.

<sup>227</sup> Article 119a *Pay for like work and work of equal value*

(1) *Pay conditions must be agreed without any form of sex discrimination. The condition in the first sentence applies to all remuneration for work and benefits that are paid or will be paid in relation to employment according to the other provisions of this act or special regulations.*

without any form of sex discrimination. This condition applies to all remuneration for work and benefits that are paid or will be paid in relation to employment according to the provision of the Labour Code (Article 118) or according special regulations (in particular wage compensation, severance allowance, discharge benefit, travel reimbursement, contributions from the social fund, revenues from capital stocks (shares) or bonds, tax bonuses, wage compensation for the employee's temporary incapacity for work and compensation for work stand by, which are not considered as wages according to Article 118).

The Labour Code subsidiary also applies to employment relations of civil servants and public servants, unless stipulated otherwise by a special regulation. Examples of such special regulations are the Act on State Service, for civil servants, and the Act on Performing Work in the Public Interest, the Act on Rewarding Some Employees when Performing Work in the Public Interest and Government Regulation on Catalogues of Jobs to be performed in the Public Interest, for public servants.

Pay and employment conditions of civil servants are covered only by separate laws. The *Act on State Service*<sup>228</sup> covers civil servants: clerk of courts, judicial trainees of courts, judicial trainees of prosecution. This act does not relate to the constitutional representatives - members of the Parliament, the President, government members, the president and vice-president of the Supreme Audit Office, judges of the Constitutional Court, judges, prosecutors and public guardian of rights (ombudsman), director of the Bureau of National Security, for whom remuneration is regulated in separate laws.

Legislation including the remuneration for specific groups of civil servants, such as members of the Police Corps, Slovak Intelligence Service, Bureau of National Security, Corps of Prison and Judicial Guard, Railway Police, custom officers, professional soldiers (so-called 'power branches') is contained in separate laws. According to the position to which civil servants are appointed and the function to which they are assigned, they receive a tariff salary based on the relevant salary class. The salary class is specified according to the most demanding activity to be performed in the relevant civil service employment post, in compliance with Annex 1, which contains the description of particular salary classes.

The Act on Performing Work in the Public Interest<sup>229</sup> covers public servants: employees of state administration authorities (except those falling under the civil service), municipalities, regional bodies, legal entities set up by any of the previous bodies, etc.

The Act on Rewarding Some Employees when Performing Work in the Public Interest<sup>230</sup> regulates the salaries of public servants, their ranking in salary classes and

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(2) *Women and men have the right to equal pay for like work or work of equal value. Like work or work of equal value is considered to be work of the same or comparable complexity, responsibility and urgency, which is performed in the same or similar working conditions producing the same or comparable productivity and results of work for the same employer.*

(3) *If the employee implements a system of job valuation, the valuation must be based on the same criteria for men and women without any sexual discrimination. In the valuation of the work of women and men, employers may use other objectively measurable criteria in addition to those given in Paragraph 2 if they can be applied to all employees without regard to sex.*

(4) *Paragraphs 1 to 3 shall also apply to employees of the same sex if they perform like work or work of equal value.*

<sup>228</sup> Act No. 400/2009 Coll. on State Service and on amending and supplementing certain other acts as amended.

<sup>229</sup> Act No. 552/2003 Coll. on Works Performed in Public Interest, as amended.

<sup>230</sup> Act No. 553/2003 Coll. on Rewarding Some Employees when Performing Work in the Public Interest, as amended.

in salary degrees. For each salary class within the public service, there are specific rules relating to the qualifications required and work difficulty, which are determined through criteria such as complexity, responsibility and physical/mental efforts. The ranking of public servants in salary degrees depends on the length of their experience.

The Government Regulation on Catalogues of Jobs to be performed in the Public Interest<sup>231</sup> contains the details of all activities that are covered by the individual job classes. They are divided according to whether mental or physical work prevails in each particular job.

#### **2.4. Occupational social security schemes**

In Slovakia, there is no a specific regulation of occupational social security schemes. The social security system is based on three schemes: social insurance, which secure decent in old age, invalidity, survivor, pregnancy, disease; state social benefits, which are direct financial contributions by the state to aid in overcoming and undesirable fall in the population's standards of living due to the occurrence or lasting of certain events in the lives of families (dependent children) and citizens; and social assistance, which is the approach of the state to the citizen in need, where the role of the state is only to assist the citizen in overcoming his/her crisis situation. It is expected that the citizen will actively seek out his/her crisis situation.

Social insurance consists of a mandatory public insurance component (based on mandatory contributions and defined benefit) governed by the Act on Social Insurance,<sup>232</sup> mandatory/voluntary, saving component governed by the Act on Old-age Pension Saving<sup>233</sup> and a voluntary private saving, which is a supplementary component governed by the Act on Additional Pension Saving.<sup>234</sup>

The scope of social insurance according to the Act on Social Insurance consists of five independent sub-schemes: sickness insurance, pension insurance (old-age insurance and invalidity insurance), accident insurance, guarantee insurance and unemployment insurance.

The Act on Social Insurance covers employees: public servants, civil servants, constitutional representatives, public guardian of rights (ombudsman), employees in labour relation according to the Labour Code, members of co-operatives, etc.

This law does not relate to the so called 'power branches', i.e., specific groups of civil servants, such as members of the Police Corps, Slovak Intelligence Service, Bureau of National Security, Corps of Prison and Judicial Guard, Railway Police, custom officers, professional soldiers. The schemes of these groups of professionals are regulated by separate laws. Their employer (Ministry of Defence, Ministry of Interior) pays contributions to special funds associated with ministerial budget chapters.

The Slovak social insurance system does not contain a specific regulation of occupational pension schemes. Some provisions of the Act on Additional Saving however, could be considered as laying down conditions for such schemes. The aim of this act is to enable an insured person, e.g., an employee according to Labour Code and professional dancer, to gain an additional pension income in old age or during invalidity and to enable his or her survivors to gain additional pension income for case of death of the insured person. In Article 7, the Act prohibits discrimination when

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<sup>231</sup> Government Regulation No. 341/2004 Coll. on Catalogues of Jobs to be Performed in the Public Interest.

<sup>232</sup> Act No. 461/2003 Coll. Act on Social Insurance, as amended.

<sup>233</sup> Act No. 43/2004 Coll. Act on Old-age Pension Saving as amended.

<sup>234</sup> Act No. 650/2004 Coll. on Additional Pension Savings, as amended.



performing additional pension savings referring to the Antidiscrimination Act (including the provisions on legal protection and proceedings in matters concerning the violation of the principle of equal treatment). Discrimination on the ground of sex shall not be deemed to mean the setting of a different level of a) benefits in which actuarial factors differing to sex are taken into account, or b) contributions whose aim is to balance the level of benefits for both sexes. It also states that provisions of the collective agreement connected with additional pension savings, employer's agreement, participant's agreement, plan of endowments/payments, bylaws of the additional pension fund not being in full compliance with the principle of equal treatment are invalid. Pursuant to Article 34 of this Act, the additional pension savings company is obliged to, inter alia, apply the principle of equal treatment in relationship to all savers.

### ***2.5. Scope of horizontal provisions***

In Slovakia, there is no a specific regulation of occupational social security schemes.

### ***2.6. Concept of positive action***

The amendment to Antidiscrimination Act has repeatedly introduced the positive action (literally a 'balancing measure') for disadvantaged groups. During the adopting process, the Parliament refused to include adoption of balancing measures on the grounds of sex and ethnic or racial origin. Instead it replaced these grounds by 'social and economic disadvantage'.

### ***2.7. Reconciliation of work, private and family life***

The Labour Code contains several provisions that have the potential to contribute to the harmonisation of the professional and family life of the employees. Many of these provisions are related to time management and/or division of working time. The flexible forms of the working time available in our labour market provided for by legislation include the following: overtime work, shift work, flexible working time, part-time work, home work and tele-work. Only a low percentage of the employees use these options for their work. In the case of part-time work, there are significant differences in its use by men and women, whereby women are the majority of the users of this type of work. The primary cause of the lack of interest by workers in part-time work is financial: most families need to secure two full incomes for their budget. Tele-work was introduced into the Labour Code only on 1st September 2007 but still is not common and is limited to certain economic sectors and occupations. In the framework of harmonisation of the family and professional life, certain other amendments were made to the Labour Code, e.g., those relating to the parental leave. The legislation is still missing the regulation of an individual and non-transferable right to paternity leave.

An entitlement to maternity and parental leave is equally granted to a women or a man who (on the basis of a legal decision of a court or relevant authority) takes a child into their care in substitution for parental care, and is aimed to a future adoption or fostering care.

When employees return to work following their maternity (women) or parental leave (men) (after the duration of 34 weeks or 37 weeks in the case of single mothers or 43 weeks in the case of multiple births), they are entitled to return to their original work and working position. If this is not possible, in the case that the 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. According to the

amendment<sup>235</sup> to the Labour Code effective since the 1<sup>st</sup> April 2011, when an employee (women or men) returns from parental leave (up to when the child attains the age of three or up to the age of six if the child is chronically and seriously disabled), the employer is obliged to offer the employee the original job and working position.

The government has made several reports and strategies in which it addresses the issue of reconciliation of work, private and family life. The measures in these reports and strategies are outlined roughly and are not always supported by appropriate analyses that would support feasibility of these measures. Furthermore all documents are missing gender aspects. The government has shifted a substantial portion of responsibility for implementation of this issue onto the social partners, and rather scarcely outlines tasks in its strategic documents that should be carried out by the government itself or by its institutions. For example, the National Labour Inspectorate with its powers to cover certain areas of this agenda has no funds or capacities for regular monitoring.

There are no regulations in the Labour Code about the support for child-care facilities. There is lack of accessible and affordable child-care facilities and care for dependent persons.

Trade unions contribute to the social assistance of their members. The social fund that is allocated according to statutory requirements is mostly used for company cafeterias and services for regeneration of labour, transport to work place or for social assistance.

- (1) There is not available any analysis of collective agreements. No one is systematically monitoring these agreements so there is a lack of information concerning their concrete provisions. According to the available information on collective agreements, they usually contain provisions concerning the cooperation and communication between the trade union and the management, employment and working conditions, wages and remuneration including pay increase, remuneration based on work performance, paid leave, redundancy payments, payment of special bonuses, supplementary pension contributions and payment of 13<sup>th</sup> and 14<sup>th</sup> month's wage. Trade unions primarily try to negotiate the highest possible increase in wages and greatest job security for employees. Reconciliation issues, which have been included in collective agreements, were mostly concerning the working conditions of pregnant women and employees taking care of young children.
- (2) Tele-work, which is regulated in the Labour Code, is not very spread and not the issue of collective bargaining. Some collective agreements contained also provisions related to flexible organisation of working time, but they are very general and relate mostly to weekly or daily flexible working time.
- (3) The Project of the social audit, 'The Family and Work', implemented by the Ministry of Labour, Social Affairs and Family, has been designed to motivate employers to create family-friendly working conditions sensitive to employees with caring responsibilities in order to facilitate the reconciliation of family and professional responsibilities of employees. In the context of the project, the Ministry began to organise an annual competition, from 2000, entitled 'The Family-friendly Employer'. The competition comprises three categories: family policy, equality of opportunities for women and men and the most original family friendly measure adopted.

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<sup>235</sup> Act No. 48/2011 Coll. amending the Act no. 311/2001 Coll. Labour Code.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The possibility of such exclusions is regulated in Anti-discrimination Act and since the 1<sup>st</sup> April 2011 also in the Labour Code.<sup>236</sup> The differences of treatment must be objectively justified by the nature of occupational activities or the circumstances under which such activities are carried out, provided that the extent or form of such differences of treatment are legitimate and justified in view of these activities or circumstances under which they are carried out.

There is no assessment available of these exclusions yet.

## ***2.9. Judicial procedures***

According to the Anti-discrimination Act, every person who considers himself or herself wronged in their rights because the principle of equal treatment has not been applied to them may pursue their claims by judicial process.

Disputes concerning the breach of the principle of equal treatment are covered particularly by the Anti-discrimination Act (as a special regulation) and subsidiary by the Civil Procedure Code<sup>237</sup> (as a general regulation on civil proceedings). The Anti-discrimination Act includes an 'indirect' amendment to the Code of Civil Procedure and the Act on Administrative Procedure and in separate part (Article 9) regulates the legal protection and proceedings concerning the violation of the principle of equal treatment, which shall be governed by the Code of Civil Procedure. The Anti-discrimination Act contains two differences when compared to the Civil Procedure Code: institute of shift of the burden of evidence and option for the parties to be represented by a legal person (in classic litigation proceedings a party may be represented by a physical person only). According to the Anti-discrimination Act (Article 10) in proceedings in cases of breach of principle of equal treatment, a party to the proceedings can be represented by a legal entity with such authorisation under a special law (Slovak National Centre for Human Rights), or by legal entity whose aim or scope of activity is protection against discrimination (e.g., non-governmental organisation).

Persons who consider themselves wronged in their rights or interests protected by law and/or their freedoms by an infringement of the principle of equal treatment may, in particular, seek that the person violating the principle of equal treatment be made to refrain from such conduct (for example, to stop the harassment, to stop discrimination encouraged) and, where possible, rectify the illegal situation (for example to pay the difference in salary that was paid in an inadequate amount due to unequal treatment) or provide adequate satisfaction (for example an apology). Should failure to observe the principle of equal treatment result in substantial harm to dignity, social respect, or social position of the victim and adequate satisfaction proven not to be sufficient, the victim may also claim non-pecuniary damages in money (the amount will be set by the court with regard to the extent of non-pecuniary damage and to all circumstance under which it occurred).

The application of this provision in practice so far has shown that the enforcement of court protection in the 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 damage financial compensation. In many cases in which women are discriminated against, only the claim to adequate compensation is

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<sup>236</sup> According the Act No. 48/2011 Coll., amending the Act No. 311/2001 Coll. Labour Code.

<sup>237</sup> Act No 99/1963 Coll. on Civil Procedure Code, as amended.

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. A lot of women discriminated against are therefore discouraged from filing a complaint with the court, as the high court fees often constitute a real barrier in protection of their right to equal treatment and protection from discrimination

Article 13 of the Labour Code, which was amended by the Anti-discrimination Act also sets the right of employee to submit a complaint to his/her employer against the infringement of the principle of equal treatment. The employer is obliged to respond to such a complaint without undue delay, examine it, abstain from such conduct in the future and eliminate the consequences thereof. However, the effect of such a remedy is questionable and it is not used in the practice. Any employee who considers that his/her legally protected rights or interests are affected by the non-appliance of principles of equal treatment may go before a civil court (there are no special labour courts for discrimination cases in the area of employment) and seek legal protection as provided under the separate Anti-discrimination Act.

The Anti-discrimination Act further regulate in a similar way amendments to the other Acts, including legislation concerning the civil service, works performed in the public interest, customs officers, military personnel, police officers, the Slovak Intelligence Service, prison guards, the fire brigade, licensed trades, public prosecutors, employment offices, primary, secondary and higher education, social insurance and welfare, healthcare and health insurance, consumer protection and state-run schools.

#### ***2.10. Other novelties?***

No.

#### ***2.11. Additional problems***

The ‘shifted burden of proof’ is applied in proceedings concerning the violation of the principle of equal treatment on basis of the Anti-discrimination Act. Such 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 lack of evidence.

### **3. Additional information**

Although the amendments of the quoted Acts have largely harmonised the legislation with the Directive and Slovakia has fulfilled the obligation of its transposition, the following weaknesses persist:

- the Antidiscrimination Act does not provide for the possibility of taking positive measures based on sex;
- the paternity leave have not yet been regulated;
- the shifted burden of proof is applied in proceedings concerning the violation of the principle of equal treatment on basis Antidiscrimination Act. Such regulation is not contained in the Code of Civil Procedure); and
- the obstacle to the access to justice due to the high legal fees continues.

## 1. Transposition of the Directive

### 1.1. Transposition

In Slovenia the Recast Directive was transposed by the Act amending the Act Implementing the Principle of Equal Treatment<sup>238</sup> (hereinafter the AIPET-A and the new Employment Relationship Act<sup>239</sup> (hereinafter the ERA-A).

### 1.2. Correlation tables

Slovenia has not drawn up and published tables illustrating the correlation between the Recast Directive and the transposition measures.

## 2. Novelties

### 2.1. Purpose of the Directive

In Slovenia two laws deal with equality between women and men. The first one, the Act on Equal Opportunities for Women and Men<sup>240</sup> (hereinafter the AEOWM), was adopted in 2002 and deals with equal opportunities for women and men. It was not changed when implementing the Recast Directive. The second one, the AIPET-A, further upgraded the legal basis for ensuring equal treatment of persons in all areas of social life irrespective of personal circumstances, including gender. It only deals with equal treatment of all persons in all fields of social life and was changed in 2007 in order to implement Directive 2002/73/EC and the Recast Directive. The purpose of the Recast Directive to implement the principle of equal treatment of men and women in matters of employment and occupation and the principle of equal opportunities is therefore reflected in the implementing legislation. The only problem I see is that only the AIPET-A, dealing with equal treatment of all persons, was changed in order to comply with several directives, including Directive 2002/73/EC and the Recast Directive and the AEOWM was not. That is to say that we modernised one part of the equality legislation and left one behind because the emphasis in recent years was on the principle of equal treatment of all persons. As a result, our gender equality legislation is not clearer and more effective as it should be since we have two laws, one dealing with the principle of equal treatment and other with the principle of equal opportunities for women and men, with some definitions contained in one law and other definitions in the other law. The situation is indeed a bit confusing. Both principles strive towards the same goal: to achieve gender equality. According to the Recast Directive, bringing together in a single text relevant provisions from directives relating to this subject, including both fundamental legal principles of the Community legislation, equal opportunities and equal treatment for women and men, our gender equality legislation should be more coherent and easy to use.

### 2.2. Gender reassignment

Gender reassignment is not explicitly mentioned in the AIPET-A or the AEOWM. However, AIPET-A prohibits discrimination based on 'other personal circumstance', which could cover gender reassignment as well. Up until now, there have not been

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<sup>238</sup> Act amending the Act Implementing the Principle of Equal Treatment, Official Gazette RS, No. 61/2007.

<sup>239</sup> Employment Relationship Act, Official Gazette RS, Nos 42/02, 103/07.

<sup>240</sup> Act on Equal Opportunities for Women and Men, Official Gazette RS, No. 59/02.

any problems regarding discrimination arising from gender reassignment, as those cases are very rare.

### ***2.3. Definition of Pay***

According to the ERA-A 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, stipulated by the Collective Agreement. This definition corresponds to the definition in Article 2(e) of the Recast Directive.

### ***2.4. Occupational social security schemes***

Slovene old age pension system is not different for civil servants and therefore covers their pensions as well.

### ***2.5. Scope of horizontal provisions***

According to Article 2 of the AIPET-A, equal treatment shall be ensured irrespective of sex in relation to social protection, including social security and health care. The national legislation implementing horizontal provisions, therefore, applies to the entire scope of the Directive, including the area of occupational social security schemes.

### ***2.6. Concept of positive action***

According to the AIPET-A, special measures may be taken in various fields of social life in order to ensure actual equality of persons placed in a less-favourable position due to their sex. Furthermore, the AIPET-A gives a wide determination of bodies that may adopt proactive measures. Positive action measures may be therefore adopted by state authorities, employers, educational and schooling institutions, political parties, civil society organisations and other subjects regarding the nature of their work and their area of activity. That means positive action measures are possible with respect to occupational pension schemes.

### ***2.7. Reconciliation of work, private and family life***

According to the ERA-A reconciliation of work, private and family life is explicitly addressed in Article 187/3 which imposes a general obligation on employers to enable workers easy reconciliation of their work and family life and in some other articles concerning flexible working arrangements. Unfortunately, there is no provision on encouraging the social partners to promote equality between women and flexible working arrangements in collective agreements, which is the aim of Article 21 of the Recast Directive. Those provisions had no other impact in Slovenia.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

No steps have been taken in Slovenia in order to comply with the obligation to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women regarding genuine and determining occupational requirements included in Article 31(3).

### ***2.9. Judicial procedures***

According to Article 22 of the AIPET-A, in cases of violations of the ban on discrimination, discriminated persons have the right to request the hearing of a case of violation in judicial and administrative proceedings as well as before other competent bodies, under the conditions and in a manner determined by law, and shall thereby be

entitled to compensation according to the general rules of civil law. That means that access to judicial procedures is guaranteed in any case in Slovenia. Besides in all cases which justify the likelihood that the ban on discrimination has been violated, the alleged offender must prove that he or she did not violate the principle of equal treatment or the ban on discrimination in the case at hand.

#### ***2.10. Other novelties***

There are no other novelties or clarifications.

#### ***2.11. Additional problems***

There are no other additional problems.

### **SPAIN – *Berta Valdés de la Vega***

## **1. Transposition of the Directive**

### ***1.1. Transposition***

The fourth and final provision of Law 3/2007, of 22 March 2007, for the effective equality of women and men establishes that Directive 2002/73 and Directive 97/80/EC are incorporated into Spanish Law. Although Law 3/2007 does not make direct reference to Directive 2006/54/EC, the Spanish Government considers that with Law 3/2007 for equality, the Recast Directive has already been transposed in Spain.

### ***1.2. Correlation tables***

The above-mentioned law does not include tables illustrating the relation between the Recast Directive and the transposition measures.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The aim of Article (1) of the Law is to implement the principle of equal opportunities between women and men in matters of employment and occupation. Article (5) indicates that this principle of equal opportunities will be guaranteed in the access to employment in the private sector, to employment in the public sector and also in self-employment, in vocational training, in professional promotion and in the conditions of work.

In my opinion, the difference in wording connects formal equality with substantive or real equality as the Constitutional Court has done when interpreting article 14 (Principle of equality and non-discrimination) together with article 9.2 of the Constitution (Judgment 128/1987 of the Constitutional Court).

### ***2.2. Gender reassignment***

The law that regulates the equality between women and men does not include any reference to the change of sex as discrimination, though case law interprets it in this respect.

Case law from the Constitutional Court dealing with gender reassignment includes this ground as one of the prohibited grounds of discrimination (judgment 176/2008 of the Constitutional Court: although gender reassignment is not included in article 14 of the Constitution, the principle of equality and non-discrimination must be

interpreted broadly, considering that an illegal deprived of rights due to being transsexual constitutes a ground of discrimination prohibited by the Constitution).

### ***2.3. Definition of Pay***

The definition of pay of the Directive is covered by the definition on article 26 and 28 of the Workers' Statute. This last one states that 'the employer is obliged to pay the same amount for work of equal value, rendered directly or indirectly, whichever is its nature, salary or different from salary, without discrimination on grounds of sex or for any other reason, element or condition in this work relationship'.

### ***2.4. Occupational social security schemes***

Occupational schemes are voluntary and do not belong to the Public Social Security System. They are regulated by collective agreements as improvements of the basic statutory Social Security System and therefore they can contemplate a particular category of workers, such as public servants.

### ***2.5. Scope of horizontal provisions***

The extension of the scope of the horizontal provisions to the occupational social security schemes is possible as these schemes are, in general, the result of a collective agreement.

### ***2.6. Concept of positive action***

Law 3/2007 establishes a general frame for the adoption of measures of positive action, including any action that aims to correct situations of inequality of women compared to men. Positive actions may be taken by the public authorities, but also by individual persons, and moreover it is specifically allowed to introduce measures of positive action by means of collective labour agreements to facilitate the effective implementation of the principle of equality of treatment and non-discrimination in working conditions between women and men. In Spain the occupational pension schemes are usually established through a collective labour agreement and from this point of view it could also be possible to take positive action in this field.

### ***2.7. Reconciliation of work, private and family life***

The issue of reconciliation of work, private and family life also has some novelties introduced by Law 3/2007, such as the right to paternity leave or a new suspension of the contract for risk while breastfeeding. Also some aspects of the regulation of maternity leave, of the leave for the care of relatives and of the reduction or adjustment of working hours have been extended and improved.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The Spanish law of equality states the possibility to exclude from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, but there is no explicit mention of the obligation to assess and to report to the Commission on the exclusions.

### ***2.9. Judicial procedures***

The judicial procedures for the implementation of the principle of equal treatment are also available for situations in which the relationship where the discrimination is alleged to have occurred has already ended.



## 1. Transposition of the Directive

### 1.1. Transposition

The Recast Directive is transposed by the (2008:567) Discrimination Act (DA) entering into force on 1 January 2009 – compare note 2 of the Act. Before that, no specific transposition measures were undertaken to meet the deadline of implementation 15 August 2008. Swedish legislation then in place, such as the (1991:433) Equal Opportunities Act (EOA), the (1995:584) Parental Leave Act (PLA) and the (2003:307) Prohibition of Discrimination Act (PDA) were regarded to meet the requirements of the Recast Directive already before August 2008. The 1991 EOA and the 2003 PDA ceased to exist when the DA entered into force, whereas the PLA continues to apply besides the DA.

The 2008 DA – together with the PLA – is considered to fully implement the Recast Directive and thus all provisions. This does not mean that every provision is covered explicitly. A number of provisions are tacitly included or implied by national provisions. For example, there is no definition of wages/pay (Article 2.1.e) nor of occupational social security schemes (Article 2.1.f). Article 2.2.c on discrimination on the grounds of pregnancy, etc. is not explicitly implemented but tacitly covered by the general ban on (sex) discrimination. Article 1 is also not implemented explicitly but implied to be covered by the general ban on discrimination (on all grounds) in employment, education/vocational training, etc.

To give a description of the new provisions and amendments is quite hard to do since the 2008 DA is a new ‘horizontal’ non-discrimination act covering all grounds (sex, transsexual identity/expression, ethnicity, religion and other belief, sexual orientation, disability and age) and divided in chapters on definitions (Chapter 1), prohibitions of discrimination area by area (Chapter 2), active measures (Chapter 3) and so on. That is, *all provisions in the DA are ‘new’ and – at least formally – implement Community Law provisions in a new way, as compared to before*. Despite this, no major substantial changes have been made – or are meant to take place – as compared to former non-discrimination legislation.

### 1.2. Correlation tables

There is no table illustrating the correlation between this Directive and the transposition measures in place, to my knowledge.

## 2. Novelties

### 2.1. Purpose of the Directive

The general clause in Chapter 1 Section 1 of the 2008 DA covers – as indicated above – all grounds and areas of society and thus addresses a lot of issues outside the Recast Directive. It does mention as its purpose to ‘counteract discrimination and in other ways support equal rights and opportunities’.

From a Swedish point of view, the new wording of the directive (title and Article 1) does not seem to imply any real change. It was always the Swedish tradition to have a proactive approach – compare the former act being titled *Jämställdhetslagen*, Equal Opportunities Act – and a legislated scoop for positive action. This is also what characterises the 2008 DA.

To me, it makes an important – theoretically as well as politically – difference that the Directive expressly mentions the duty to actively promote equal opportunities. Whereas the ban on discrimination tends to relate to the concept of formal equality, the promotion of equal opportunities relates to the search for substantive equality.

## ***2.2. Gender reassignment***

The 2008 DA, as indicated above, covers not only sex but also transsexual identity or expression and a number of other grounds. However, in accordance with case law of the ECJ, it is expressly stated in Chapter 1 Section 5 Paragraph 2 that a person who is about to reassign or has reassigned his/her sex is covered by the provisions on sex discrimination.

So far, there is no case law on gender reassignment and no implications of special problems in this area.

## ***2.3. Definition of Pay***

There is no explicit definition of pay as such in the DA, but the ban on discrimination in working life is known to cover pay as defined by the Directive. Section 2 in Chapter 3 DA on Active Measures in Working Life talks of pay and equal opportunities for men and women and in its second paragraph, it contains a definition of ‘work of equal value’.

## ***2.4. Occupational social security schemes***

There are no such systems as indicated in Article 7.2. Chapter 2 Section 14 of the DA bans discrimination in (all) public social security schemes with an exceptional rule regarding widows’ pensions. However, private occupational schemes are only implicitly covered by the (also implicit) ban on wage/pay-discrimination and this goes for the public as well as the private sector.

## ***2.5. Scope of horizontal provisions***

The DA implements the horizontal provisions in Articles 17-22 of the Directive ‘equally’ to its whole scope, including occupational and public social security schemes.

## ***2.6. Concept of positive action***

The 2008 DA does not contain a provision simply implementing Article 3 of the Recast Directive but a complex structure of different provisions for positive action by area (and for different grounds). Regarding sex/gender there are such provisions opening up possibilities for positive action in the area of employment (Chapter 2 Section 2.2), education (including vocational training) (Chapter 2 Section 6.1), labour-market political activities and employment exchange (Chapter 2 Section 9.1), self-employment and professional occupational activities (Chapter 2 Section 10 Paragraph 3), membership of certain organisations (Chapter 2 Section 11 Paragraph 2.) and some other areas not covered by the Recast Directive.

The rule opening up for positive action in the area of employment does not, however, apply to matters of ‘pay or other terms of employment’ including occupational pension schemes. Regarding public social security schemes, there is no rule on positive action on the grounds of sex but there is an exception rule permitting special rules on widow’s pensions, wife’s supplement or payment of child allowance. Such rules do exist to some extent but only as transitory rules for small and well-defined groups.

### ***2.7. Reconciliation of work, private and family life***

Only discrimination on the grounds of pregnancy and maternity leave are covered by the 2008 DA and then implicitly by the ban on discrimination on the grounds of sex (compare the case law of the ECJ). This far-from-transparent way to implement the Recast Directive deserves to be criticised. On the other hand, the rights to paternity leave and parental leave, so essential for the reconciliation of family life and work, are regulated by the 1995 PLA in combination with the public parental leave benefit scheme regulated in Part B, Family benefits, II Chapters 10-13 of the Social Security Code (2010:110). Those provisions, in my opinion, effectively meet the ambitions and requirements of the Recast Directive. Generally speaking, they were ‘in place’ already before the adoption of the Recast Directive.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Chapter 2 Section 2.1 of the 2008 DA includes an express exception to the ban on discrimination in employment when genuine and determining occupational requirements apply. There are no legislated specific exceptions of this kind in Sweden but the rule is applied on an ad hoc basis. To my knowledge, the application of this rule has not yet been reported upon. There is little to report on its application since there is, so far, no case law.

### ***2.9. Judicial procedures***

According to the 2008 DA, as of 1 January 2009 there is a single Discrimination Ombudsman (DO) for all grounds, replacing among others the former Equal Opportunities Ombudsman (EOO, *JämO*). The new DO is competent to represent victims in any alleged case of discrimination. In the field of work, the trade unions have a primary right, however, to represent their members in cases of discrimination. There is always the possibility for the individuals to take a claim to court should their trade union/DO not take an interest in representing them. A novelty in the 2008 DA is the new rules on the right for NGOs to take a case of alleged discrimination to court: Chapter 6 Section 2.

Regarding judicial procedures proper, claims concerning working life are dealt with under the Labour Disputes Act (1974:371) and in the last instance by the Swedish Labour Court, whereas claims concerning other areas are examined within the ordinary court system or by a District Court, then a Court of Appellation and – in the last instance – the Supreme Court.

### ***2.10. Other novelties?***

As indicated, the 2008 DA has merged four different ombudsmen, covering different grounds of discrimination, into one single body, the DO. This may turn out to simplify things for employers when monitoring the implementation of the Act. This cannot be regarded as a consequence of the Recast Directive, however.

### ***2.11. Additional problems***

As indicated above, a number of provisions is tacitly included or implied by the national provisions. Thus, the ban on discrimination in employment (Chapter 2 Section 1) is phrased very generally and implicitly covers all employer decisions without any explicit reference to Article 1 of the Recast Directive. Article 2.2.c on discrimination on the grounds of pregnancy etc. is not explicitly implemented but tacitly covered by the general ban on (sex) discrimination. Nor is there a definition of

wages/pay (Article 2.1.e) or of occupational social security schemes (Article 2.1.f) – these forms of discrimination are also tacitly covered by the ban in Chapter 2 Section 1. This far from transparent way to implement the Recast Directive deserves to be criticised, in my opinion, and this is especially true with regard to discrimination on the grounds of pregnancy and maternity.

## **TURKEY – Nurhan Süral**

### **1. Transposition of the Directive**

#### **1.1. Transposition**

The Recast Directive is regarded as a consolidating piece of legislation. It is not seen as a directive any different than the directives being recast. Turkey has taken steps to transpose not only the Recast Directive, but also the directives recast by it. The main pieces of legislation attempting to transpose the directives that have been recast are the Constitution,<sup>241</sup> Labour Act<sup>242</sup> and Civil Servants' Act.<sup>243</sup>

#### **1.2. Correlation tables**

There is no table illustrating the correlation between the Recast Directive and the transposition measures in Turkey.

### **2. Novelties**

#### **2.1. Purpose of the Directive**

There is no awareness of such a difference between the Recast Directive and the directives it recasts.

So far, these terms have been used but not defined. Article 10 of the Constitution on equality before the law now has an addendum that allows positive discrimination: 'Precautions taken with this goal cannot be considered violations of the principle of equality.'<sup>244</sup> Article 10 now affirms that measures taken to achieve substantive equality are not to be deemed contradictory to the principle of equality, thus potentially providing for the greater use of temporary special measures. A 2010 Prime Ministerial circular<sup>245</sup> on enhancement of female employment and the provision of equality of opportunities, envisages gender equality mainstreaming. The circular starts by stating that the principles of the enhancement of female employment and the provision of equal wages are essential to strengthen women's socio-economic status, to assure equality between women and men in society, and to achieve sustainable economic growth and social development. In the National Action Plan - Gender Equality 2008-2013,<sup>246</sup> revising the existing Labour Act in order to incorporate

<sup>241</sup> *Anayasa*, Law No. 2709, Official Gazette 9 November 1982, 17863bis.

<sup>242</sup> *İş Kanunu*, Law No. 4857, Official Gazette 10 June 2003, No. 25134.

<sup>243</sup> *Devlet Memurları Kanunu*, Law No. 657, Official Gazette 23 July 1965, No. 12056.

<sup>244</sup> Law No. 5982, Official Gazette 13.05.2010, No. 27580. A referendum on a package of 26 constitutional amendments addressing a human rights agenda won approval by a wide margin with a vote of 57.9% on a high turnout of 78% on 12 September 2010.

<sup>245</sup> *Başbakanlık Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Genelgesi*, Official Gazette 25.05.2010, No. 27591.

<sup>246</sup> *Toplumsal Cinsiyet Eşitliği Ulusal Eylem Planı 2008-2013*. Under the scope of the 'Promoting Gender Equality Project-Strengthening Institutional Capacity Twinning Project', implemented jointly by the General Directorate on the Status of Women and the Directorate of International

definitions based on gender equality is stated as one of the strategies for action to combat gender discrimination in the labour market and to decrease the gender pay gap.

## ***2.2. Gender reassignment***

There is no separate non-discrimination legislation in Turkey. Article 5 of the Labour Law is the most extensive provision on the prohibition of discrimination. This article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. 'Any such considerations' implies that the listing is non-exhaustive. For example, gender reassignment and sexual orientation have not been specified in the article, but upon a possible validation of a claim of discrimination on such a basis, the judiciary will, most probably, consider the case as falling under 'sex discrimination' 'any such considerations' or the 'right to equal treatment'

## ***2.3. Definition of Pay***

'Pay' has been defined in Article 26 of the Labour Act and this largely corresponds to the definition in Article 2(e) of the Recast Directive. 'Pay' may consist of two parts: cash and kind. 'Real (main) pay' is the part that has to be paid in cash in national currency but never in kind, and it may not be lower than the minimum wage. The difference is that the definition mentions third persons in addition to the employer. This is because 'percentage wages' are paid by third persons and distributed among the workers in places such as restaurants, cafes, and bars. If the share of a worker from the percentage wages is less than the minimum wage, then the employer has to pay the remaining amount.

## ***2.4. Occupational social security schemes***

Due to the gender-neutral character of the laws on occupational pensions, they were not reviewed in the light of the Recast Directive.

## ***2.5. Scope of horizontal provisions***

Sanctions in cases of discrimination are applied by the courts. Access to the courts is ensured for victims of discrimination, but interest groups whose aim is to help victims of discrimination or to combat discrimination do not have access to the courts. The concerned worker can claim particular types of compensation and if he/she is one with increased job security,<sup>247</sup> he/she 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. If not reinstated, he/she can claim pecuniary damages under the system of sanctions in general labour law. There are attempts to establish an equality body. Social partners do not play a role and the role of collective agreements in the development of equality issues has never been really relevant.

## ***2.6. Concept of positive action***

Occupational pension schemes are gender neutral. There are no positive action measures possible with respect to occupational pension schemes.

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Affairs of the Ministry of Social Affairs and Employment of the Netherlands, the National Action Plan - Gender Equality has been prepared with the participation of all parties in order to constitute a base for public policies. For the full text in English see: [http://www.ksgm.gov.tr/Pdf/NAP\\_GE.pdf](http://www.ksgm.gov.tr/Pdf/NAP_GE.pdf).

<sup>247</sup> Workers employed in establishments where at least thirty workers are employed enjoy increased job security when compared with workers employed in smaller businesses.

### ***2.7. Reconciliation of work, private and family life***

The so-called ‘Sack Law’ (a law amending quite a number of laws is called a sack law) became effective on 25 February 2011.<sup>248</sup> This law introduced generous paternity, parental (entitled not ‘parental’ but ‘excuse leave’ and ‘sickness and patient companionship leave’ that may be used for family-related reasons) and adoption leaves. The law also made generous extensions in the current family-related leaves. The law was inspired not by the Recast Directive but the directives being recast by it and the practices in various European countries but went far beyond them. The main idea here was not only ‘compatibility’ but also the establishment of a ‘most favourable and ideal’ environment for female labour. A circular on the deterrence of mobbing in public bodies and institutions and private workplaces has recently been issued by the Prime Minister. The circular is a code of conduct by the Prime Ministry. It draws on Directive 2002/73/EC and the Recast Directive.

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

Turkey is a negotiating country and there has been no periodical assessment of exclusions regarding genuine occupational requirements.

### ***2.9. Judicial procedures***

There are only judicial and administrative procedures but no possible recourse to other competent authorities.

### ***2.10. Other novelties?***

No.

### ***2.11. Additional problems***

Article 5 of the 2003 Labour Act drew on Directive 97/80/EC. The article regulates *prima facie* cases of discrimination and is compatible also with Article 19 of the Recast Directive.

## **UNITED KINGDOM – Aileen McColgan**

### **1. Transposition of the Directive**

#### ***1.1. Transposition***

The provisions transposing Directive 2006/54/EC are now to be found in the Equality Act 2010, though neither that Act nor the Sex Discrimination Act 1975 (as amended; hereinafter the SDA) which preceded it were adopted for the purposes of transposition.

#### ***1.2. Correlation tables***

The correlation table is found at [http://www.equalities.gov.uk/pdf/transposition\\_note\\_-\\_recast\\_directive.pdf](http://www.equalities.gov.uk/pdf/transposition_note_-_recast_directive.pdf). The provisions of the SDA to which that table refers have been replaced by the Equality Act 2010.

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<sup>248</sup> Official Gazette 25.02.2011, No. 27857 bis.

## **2. Novelties**

### ***2.1. Purpose of the Directive***

The correlation table pertaining to the Recast Directive states, in relation to Article 1 of the Directive, ‘No implementation required’. Having said this, the Equality Act 2010 goes beyond a prohibition on discrimination between men and women and, like the SDA, imposes a duty on public authorities to have ‘due regard’ to the need to eliminate unlawful sex discrimination and to promote equal opportunity between men and women in the exercise of all their public functions. In addition, the positive action permitted by the Equality Act 2010 goes well beyond that previously allowed by the SDA, Sections 158 and 159 permitting, respectively, the adoption of any proportionate steps to enable or encourage women (or men) to overcome or minimise any disadvantage connected to sex, or to meet the needs specifically of women or men, or to enable or encourage the participation of women (or men) in activities in which their participation is low. These steps do not extend to preferential treatment of women (or men) at the point of recruitment or promotion to jobs, but Section 159 of the Act allows such treatment where it is a proportionate means of encouraging or enabling women (or men) to overcome sex-related disadvantage or increase their participation, as long as the persons favoured by such preferential treatment are as qualified for the employment at issue as are those over whom they are favoured.

It seems to me that the inclusion of ‘equal opportunities’ as well as ‘equal treatment’ in the title and Article 1 of the Directive must be taken to mean that ‘equal opportunities’ may require differential treatment, if only to equalise the starting positions of men and women such that ‘equal treatment’ may then be appropriate.

### ***2.2. Gender reassignment***

National legislation deals in detail with gender reassignment, Section 7 of the Equality Act 2010 now provides that:

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment –
  - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
  - (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

‘Gender reassignment’ being defined as a ‘protected characteristic’, the Equality Act 2010 then prohibits direct and indirect discrimination, harassment and victimisation, etc., related to that ground.

Some difficulty has arisen in relation to gender reassignment where an individual has complained of treatment arising in the course of the gender reassignment process, in particular, of not being permitted (in the case of a male-to-female transitioning person) to use the female toilets prior to the completion of the reassignment process.

In *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045, [2003] IRLR 592<sup>249</sup> the Court of Appeal ruled that a tribunal had been correct to decide that the Royal Mail had not discriminated on grounds of sex against a pre-operative transgendered male to female who was not permitted to use the women's toilets during the period in which, as part of her reassignment process, she was living exclusively as a woman. Ms Croft had worked for the Royal Mail for many years as a man and her female colleagues had indicated informally that they would not be happy sharing a toilet with her. The employers took the view that she should use the unisex disabled toilets prior to completing gender reassignment surgery. The Court of Appeal agreed with the employment tribunal and Employment Appeal Tribunal that, although the SDA (now Equality Act 2010) protects persons at all stages of gender reassignment from discrimination on grounds of gender reassignment, it does not require that all such persons are immediately treated as members of the sex to which they are transitioning.

### **2.3. Definition of Pay**

The Equality Act 2010 does not define 'pay'. It entitles women to equal treatment as regards contractual terms (including but not limited to pay) with appropriate male comparators (i.e., those who are employed in the same work, work rated as equivalent or work of equal value, and who work (broadly) for the same employer in the same workplace). These provisions, which were in the Equal Pay Act 1970, now form Part 5, Chapter 3 of the Equality Act 2010. In addition, and as a result of lobbying by those who argued that the inclusion of 'pay' within the working conditions which the Recast Directive prohibits discrimination in relation to by reference to a real or hypothetical comparator, Section 71 of the Equality Act now allows a complaint to be made of direct discrimination in contractual terms (including, but not limited to, pay) by reference to a hypothetical comparator if no real comparator exists for the purposes of an Equal Pay Act-like claim.

The Equality Act 2010 also prohibits discrimination between men and women regarding non-contractual benefits and so regulates discrimination in relation to all aspects of 'pay' as it is defined in Article 2(e) ('the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/ her employment from his/her employer').

### **2.4. Occupational social security schemes**

The Equality Act 2010 regulates all discrimination between men and women in occupational pension schemes (Part 5, Chapter 2). These provisions apply to occupational pension schemes that apply to any category of worker, whether in the public or the private sector.

### **2.5. Scope of horizontal provisions**

No difference is made in the implementing legislation between occupational pension schemes and other areas covered by the Directive as regards the implementation of Articles 17-22 of the Directive.

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<sup>249</sup> The first of these references is the 'neutral citation' or official case number, the second relates to the *Industrial Relations Law Reports* which are widely available.



## ***2.6. Concept of positive action***

Positive action measures are permitted, so far as is relevant in this context, by Section 158 of the Equality Act 2010, which (except in relation to recruitment/ promotion to particular jobs) permits the adoption of any proportionate steps to enable or encourage women (or men) to overcome or minimise any disadvantage connected to sex, or to meet the needs specifically of women or men, or to enable or encourage the participation of women (or men) in activities in which their participation is low. This would appear to allow positive action to be taken in relation to occupational pension schemes, though in the absence of any litigation in relation to this very new area of law, it is difficult to predict with any degree of confidence what this might mean in practice.

## ***2.7. Reconciliation of work, private and family life***

The Equality Act 2010 does not in specific terms address the reconciliation of work, private and family life, though it is clear from decades of case law that measures which disadvantage women by virtue of their mothering role will amount (subject to the possibility of justification) to indirect sex discrimination. In addition to the Equality Act, there are a number of measures of domestic law designed to facilitate the reconciliation of work and family life, among them measures permitting individuals to request flexibility regarding hours and/or place of work to enable them to balance work with care of a child or dependent adult. These measures appear to have been driven by the domestic agenda rather than any recognition that the Recast Directive may require of them.

## ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

As a result of the Equality Act 2010, the previous approach taken to genuine occupational requirements (GORs) by the SDA (that is, the inclusion of a list of cases in which being of a particular sex was accepted as being a determining occupational requirement) was replaced with a GOR defence in line with that established by the Directive. Schedule 9, Part 1, paragraph 1 now provides that requiring an employee to be of a particular sex does not breach the Equality Act if the discriminator ‘shows that, having regard to the nature or context of the work – (a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom [the discriminator] applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)’. In addition, more generous provision is made for discrimination on grounds of sex in relation to ‘employment for the purposes of an organized religion’ where the discrimination is carried out to comply with the doctrines of the religion or to avoid conflict with the beliefs of a significant number of the religion’s followers (Schedule 9, Part 1, paragraph 2).

While there is perhaps room for discussion as to whether paragraph 2 is broader than might be permitted, it is difficult to see how the UK Government could engage in a process of review of the more general GOR applicable to sex, as the approach taken appears to be exactly in line with that set out in the Directive itself. Even the exception now applicable to the prohibition of sex discrimination in relation to the armed forces now contains a proportionality requirement, Schedule 9, Part 1, paragraph 4 provides that:

- (1) A person does not contravene [the prohibition on sex discrimination] by applying in relation to service in the armed forces a relevant requirement if the person

shows that the application is a proportionate means of ensuring the combat effectiveness of the armed forces.

- (2) A relevant requirement is –
- (a) a requirement to be a man;
  - (b) a requirement not to be a transsexual person.

In 2009 it was announced that the Government, in compliance with EU requirements, would review the ban that had been applied to women serving in front line infantry roles in the armed forces. The previous review had been in 2002 when it was decided that the policy of using only male personnel in close-combat roles would be retained, women also continuing to be prohibited from service in infantry battalions, the Royal Armoured Corps, the Royal Marine General Service, the Household Cavalry and the RAF Regiment. By this stage, women were serving in the Royal Artillery, whose members frequently perform frontline functions, and as forward observation officers, forward air controllers, and in combat medical teams. At the time of the 2009 review, 70% of army jobs, 71% of Royal Navy and 97% of RAF roles were open to women.

It was suggested in January 2010 that women would be permitted to serve on submarines for the first time but in November 2010 the Ministry of Defence announced that women soldiers would continue to be barred from situations in which they could engage and potentially kill the enemy. While it was acknowledged that there was no evidence that women lacked the courage or skill to take part in active combat, there were concerns that ‘*group cohesion* could be compromised in the intense environment of a fire fight.’ According to a newspaper report: ‘The review said: ‘The consequences of opening up these small tactical teams in close-combat roles to women are unknown. Other nations have very mixed experiences.’<sup>250</sup>

## **2.9. Judicial procedures**

Access is guaranteed in theory to the courts for all claims of sex discrimination that fall within the Equality Act 2010. In practice the situation is more problematic. While costs are not generally awarded against unsuccessful claimants by employment tribunals, with the effect that the threat of paying the employer’s costs (if the claim is unsuccessful) do not operate as a deterrent, the fact is that success in a claim is unlikely in the absence of expert legal representation, and such representation is expensive and must be paid for by the claimant her or himself (unless she can rely, for example, on the assistance of a trade union). Public legal assistance is all but unavailable.

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<sup>250</sup> ‘Ban on women in armed combat in forces to continue’ *Daily Telegraph* 29 November 2010. The review is at [http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report\\_review\\_excl\\_woman\\_combat.pdf](http://www.mod.uk/NR/rdonlyres/B358460B-4B2A-4AB5-9A63-15B6196B5364/0/Report_review_excl_woman_combat.pdf), accessed 25 April 2011.

## **Annex 1**

### **Questionnaire for the report *The Transposition of the Novelties of the Recast Directive (2006/54/EC) on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation***

#### **European Network of Legal Experts in the Field of Gender Equality**

The Recast Directive had to be implemented by 15 August 2008 at the latest, or 15 August 2009 if the Member State had an additional year for the transposition (see Article 33).<sup>1</sup> According to the preamble of this Directive the obligation to transpose the Directive into national law should be confined to those provisions which represent a substantive change compared to the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arose under the earlier Directives (Recital 39 and Article 33).<sup>2</sup>

The European Network of Legal Experts in the Field of Gender Equality produced a report on the transposition of this Directive in 2009.<sup>3</sup> Because the obligation to transpose the Recast Directive only applies to provisions which represent a substantive change as compared to the earlier Directives, the implementation may turn out to be complicated. This is the reason why Annex 2 of the Recast Directive contains a correlation table between the different Articles of the relevant Directives.

The purpose of the present report is to provide an overview of the measures that the Member States, the EEA countries (Iceland, Norway, and Liechtenstein), Croatia, FYR of Macedonia and Turkey have taken in order to transpose the novelties of the provisions of the Directive and an analysis of whether the transposing national provisions are in compliance with the Directive.

The report will consist of two parts. Part 1 will include an introduction with a summary of findings. Part 2 will consist of 33 national reports.

## **QUESTIONNAIRE**

### **1. Transposition of the Directive**

#### **1.1. Transposition**

Which legislation transposes Directive 2006/54/EC in your country?

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<sup>1</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), OJ 2006, L 204/23.

<sup>2</sup> Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EEC.

<sup>3</sup> See European Network of Legal Experts in the Field of Gender Equality, Susanne Burri and Sacha Prechal, *The Transposition of Recast Directive 2006/54/EC*, European Commission, February 2009, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, last accessed 17 March 2011.

### ***1.2. Correlation tables***

Has your Member State/country drawn up and published tables illustrating the correlation between this Directive and the transposition measures (see Recital 41)?

## **2. Novelties**

Have any of the following ‘novelties’ or ‘clarifications’ in the Recast Directive as compared to the provisions of the earlier Directives which were part of the recast exercise been transposed into national law? Please provide details.

### ***2.1. Purpose of the Directive***

The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities, see the title of the Directive and Article 1.

Is this reflected in the implementing legislation?

What are in your view the theoretical and practical implications of this difference in wording?

### ***2.2. Gender reassignment***

The Directive also applies to gender reassignment (see Recital 3).

Does national legislation ensure that prohibition of discrimination based on sex applies also to discrimination arising from gender reassignment? Have there been any problems in your Member State in applying the implementing legislation to cases of gender reassignment? If so, please explain.

### ***2.3. Definition of Pay***

The definition of ‘pay’ was introduced in the Directive (see Article 2(e)).

Has the definition been covered by the national legislation and does this correspond to the definition in Article 2(e)? If not, please explain the differences.

### ***2.4. Occupational social security schemes***

Article 7(2) of the Recast Directive on the material scope of the provisions on equal treatment in occupational social security schemes incorporates some well-established case law of the Court of Justice of the European Union.

Does implementing legislation cover pension schemes for a particular category of workers, such as public servants?

### ***2.5. Scope of horizontal provisions***

The extension of the scope of the Directive to the area of occupational social security schemes leads to an extension of the scope of the horizontal provisions (defence of rights, compensation or reparation, burden of proof, equality bodies, social dialogue, dialogue with non-governmental organizations).

Does national legislation implementing Articles 17-22 of the Directive apply to the entire scope of the Directive, including the area of occupational social security schemes?

### ***2.6. Concept of positive action***

The concept of positive action as described in Article 3 has been broadened in its substantive field of application because the scope of the Recast Directive is broad and also includes occupational pension schemes for example (see also Recitals 21 and 22).

Are positive action measures possible with respect to occupational pension schemes?

### ***2.7. Reconciliation of work, private and family life***

The issue of reconciliation of work, private and family life is explicitly mentioned (see in particular Recitals 11, 26, 27 and Article 9(1)(g) and Article 21(2)).

Are there explicit references in national legislation transposing the Recast Directive on this issue? Have those provisions had any other impact in your country?

### ***2.8. Periodical assessment of exclusions regarding genuine occupational requirements***

The obligation for Member States to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements is explicitly included in Article 31(3).

Has the Member State taken any steps to comply with this obligation yet? Please provide details.

### ***2.9. Judicial procedures***

In contrast to directive 2002/73, which referred to ‘judicial and/or administrative procedures (...) for the enforcement of obligations under this Directive’, the recast Directive requires that Member States ensure availability of judicial procedures, after possible recourse to other competent authorities. Thus, Member States no longer have a choice between administrative and judicial means, and need to ensure access to judicial procedures in any case (see Article 17 (1)). Is this access guaranteed in your country?

### ***2.10. Other novelties?***

Would you like to point out any other ‘novelty’ or ‘clarification’ in the Recast Directive?

### ***2.11. Additional problems***

Would you like to point out any other persisting problems with regard to the transposition of Directive 2006/54, including the transposition of the provisions present in earlier Directives, notably with regard to the issue of burden of proof?

## **3. Additional information**

Is there any additional information that you would consider relevant with regard to the transposition of the Recast Directive 2006/54?



## Annex II

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