



Gender equality in employment and occupation

Directive 2006/54/EC

European Implementation Assessment

STUDY

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In September 2014, the Committee on Women's Rights and Gender Equality (FEMM) of the European Parliament decided to undertake an implementation report on the application of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. MEP Anna Záborská was appointed rapporteur.

Implementation reports of EP committees are now routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the European Parliament's Directorate-General for Parliamentary Research Services.

Abstract

The principle of equal pay is anchored in the EEC founding Treaty of 1957. Directive 2006/54/EC was a recast of secondary law dating back to 1975 pursuing gender equality in (access to) employment and it 'consolidated' case law in this area developed by the European Court of Justice. In many resolutions, the European Parliament has called for rendering legislation more effective in reducing or eliminating the persistent gender pay gap (GPG) and, more generally, in guaranteeing equal conditions for men and women at work and equal opportunities for access to work.

For this European Implementation Assessment, input was received from four independent groups of experts on discrete aspects of the application of the Recast Directive:

- legal aspects and in particular direct and indirect discrimination;
- effectiveness of the Directive in tackling the equal pay and pension gap;
- proper consideration of the role of job evaluation and classification systems;
- necessary protection of pregnancy and the role of maternity leave and related schemes in view of gender equality at work and for careers.

The introduction compares the findings of the Commission's impact assessment of 7 March 2014 to the Commission's recommendation of 7 March 2014 on reducing the GPG. Then the findings and recommendations of the research papers are presented in a condensed form. The conclusion is that there is a very strong case for immediate and vigorous actions at EU level, going beyond voluntary measures, in line with EP resolutions.

The four research papers are included in full as annexes.

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- Dorota Szelewa PhD, University of Warsaw.

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Research paper by I. M. Welpé/P. Brosi/T. Schwarzmüller
- IV. The role of maternity leave and parental leave in view of gender equality in employment and occupation.**
Research paper by D. Szelewa

Introduction

The current assessment is based on input from four research papers on discrete aspects of the implementation of Directive 2006/54/EC, commissioned specifically for the purpose and provided by:

- Prof. Dr Susanne Burri, senior lecturer, Utrecht School of Law and co-ordinator of the European Network of Legal Experts in the Field of Gender Equality, for analysing the legal aspects of the application of the Directive, and in particular for the aspects of direct and indirect discrimination;
- Prof. Dr Marcella Corsi, Sapienza University of Rome, for analysing the effectiveness of the Directive in tackling the equal pay and pension gap;
- Prof. Dr Isabell M. Welpé (team Dr Prisca Brosi/Tanja Schwarzmüller), Technische Universität München, Munich, for analysing the effectiveness of the Directive with respect to job evaluation and classification;
- Dorota Szelewa PhD, University of Warsaw, for analysing the role of maternity leave and parental leave in view of gender equality in employment and occupation.

These research papers were presented and discussed at the FEMM meeting of 31 March 2015. In the same meeting rapporteur Anna Záborská presented her draft report.

This European Implementation Assessment comes two years after the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS), published the European Added Value Assessment on 'Equal pay for men and women for equal work for equal value', underpinning the 'Bauer-report' on the application of the principle of equal pay for male and female workers for equal work or work of equal value, adopted as European Parliament resolution on 24 May 2012.

a) The Recast Directive and the EC report

The provision that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied', now article 157(1) TFEU, was already part of the founding Treaties of 1957 (article 119 EEC Treaty).

Since 1975 the European legislator adopted various directives in order to combat gender discrimination in employment, and the European Court of Justice contributed case law concerning the interpretation and application of these directives. With the purpose of consolidating, updating and modernising Community law in respect of gender equality in employment and occupation, the Commission initiated a recast of several of these directives in one text (COM(2004)279 of 21.04.2004). The legislative process ended as 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 (the 'Recast Directive').

The Commission report¹ of 6.12.2013 on the application of the Recast Directive noted still open 'questions for most Member States, to be 'clarified as a matter of priority, if necessary through infringement proceedings', and stated that 'the practical application of

¹ COM(2013)861

equal pay provisions in Member States seems to be one of the Directive's most problematic areas', 'illustrated by the persistent gender pay gap'.

This Commission report on the application of the Recast Directive had been drawn up following the obligation arising from article 31(1) of the Recast Directive. Article 32 of the directive required the Commission also to 'review the operation of this directive and if appropriate, propose any amendments it deems necessary.' However, neither the Commission report of December 2013 nor any other report of the Commission seems to have considered a review of the operation of the Recast Directive nor proposed any amendments.

This is surprising as the European Parliament resolution of 24 May 2012 with recommendations to the Commission on application of the principle of equal pay for male and female workers for equal work or work of equal value² expressly requested the Commission 'to review Directive 2006/54/EC by 15 February 2013 at the latest, in accordance with Article 32 thereof, and to propose amendments to it on the basis of Article 157 TFEU, following the detailed recommendations set out in the annex to this resolution, at least in relation to the following aspects of the gender pay gap issue:

- definitions,
- analysis of the situation and transparency of results,
- work evaluation and job classification,
- equality bodies and legal remedy,
- social dialogue,
- prevention of discrimination,
- gender mainstreaming,
- sanctions,
- streamlining of EU regulation and EU policy;'

b) The EC recommendation with its impact assessment

On the 2014 International Women's Day (7 March 2014) the Commission published its 'Recommendation on strengthening the principle of equal pay between men and women through transparency'³, accompanied by an impact assessment⁴. This Commission recommendation as well as the impact assessment made explicit reference to the European Parliament resolutions adopted on 18 November 2008 and 24 May 2012 on equal pay between men and women with recommendations on how to better implement the principle of equal pay.

The impact assessment was based on a wide range of Commission internal and external studies including the European Added Value Assessment of the application of the principle of equal pay for men and women for equal work of equal value of June 2013 which followed the Bauer report and the European Parliament resolution of 24 May 2012.

The impact assessment examined the benefits and costs of the following measures to enhance the transparency of pay:

- Entitlement for employees to obtain information on pay levels upon request;
- Regular reporting of companies on pay levels;

² [T7-0225/2012](#) (based on the 'Bauer-report' [A7-0160/2012](#))

³ [C\(2014\)1405\(71 kB\)](#), published in OJ L 69/112 on 8.3.2014

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1430898182715&uri=CELEX:32014H0124>

⁴ [SWD\(2014\)59](#) (363kB) , [SWD\(2014\)58](#) (69 kB)

- Pay audits (on wage structures of companies with more than 250 employees and considering job evaluation and classification system);
- Consideration of equal pay as a separate issue by social partners in collective bargaining.

For each one of these possible measures the Commission impact assessment assessed two options:

- introduction of the measure as a **binding** legislation in the form of a directive, and
- introduction of the measure as a **non-binding** initiative, i.e. a recommendation.

Based on the wide range of internal and external studies it considered, the Commission Impact Assessment arrived at a clear conclusion: **Introduced by binding legislation in the form of a directive, these measures would produce substantially larger benefits than if introduced on the basis of a non-binding initiative in the form of a Commission Recommendation.**⁵

More precisely, the figures presented by the impact assessment show the following:

1. Introduced in the form of directives, the measures would have an annual positive EU-wide effect of € 49 000 million, compared to only € 17 000 million if introduced by voluntary measures.
2. The administrative cost for the companies is less than 2% of this gain in gross domestic product (GDP), and the benefit for the companies themselves in terms of accrued female work force and competence has not even been considered in these calculations.

For the estimation of the overall EU-wide gain in terms of GDP the Commission Impact Assessment based itself on several studies amongst which a study by Matrix Insight of 2012⁶ and a European Added Value assessment of 2013⁷ and used an assumption that each 1% reduction in the gender pay gap would translate into an increase in the EU GDP of 0.1%. This - at first sight astonishing - relation appears however explained and justified e.g. by the chapters on the economic impact of GPG on GDP in annex II of the European Added Value study.⁸ It even appears that the above-mentioned ratio between reduction of GPG and increase of GDP is a rather conservative approach as some of the studies discussed there arrived at an even stronger relationship.^{9 10}

Given the almost threefold GDP benefit of the binding measures compared to the voluntary ones (see the following table), **one would have expected the Commission to**

⁵ [SWD\(2014\)58](#) (69 kB) (chapter 6. Comparison of Options/Preferred Option)

⁶ 'Study to assess possible measures to tackle the pay gap between women and men', Final Report, April 2012, by Matrix Insight for European Commission DG Justice, 169 pages

⁷ 'Equal pay for men and women for equal work for equal value', European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Edit Bauer MEP), by European Added Value Unit, Micaela del Monte, DG EPRS, European Parliament

[www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET\(2013\)504469](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JOIN_ET(2013)504469)

⁸ *ibidem* pages II-19 to II-25, discussing the findings of several studies world-wide.

⁹ For example, the Australian National Centre for Social and Economic Modelling (NATSEM) at the University of Canberra estimated that the Australian economy could grow by 0.5 % of GDP if the gender pay gap was reduced by 1%.

¹⁰ These calculations did not yet consider the positive impact an enhanced protection of pregnancy and maternity could have not only on reducing the GPG but also on reducing Europe's long term dramatic **demographic** problems.

decide in favour of initiating a legislative proposal for a directive or for amending the Recast Directive so as to implement the envisaged measures for reducing the GPG. This would have been compatible with the Commission's 2020 strategy, i.e. with the EU's growth strategy for the coming decade, striving for "a smart, sustainable and inclusive economy."¹¹

Furthermore, deciding in favour of the binding measures would be in line with the request of the European Parliament for tackling the GPG by a review or a recast of Directive 2006/54/EC, re-iterated in various resolutions.^{12, 13}

Cost and benefit of some measures reducing the Gender Pay Gap¹⁴				
Policy option	Binding/ voluntary	Annual net positive EU-wide economic effect in € billion	Annual administrative burden for companies EU-wide in € billion	Decrease in GPG (in %)
				min.- max.
Employees' entitlement to obtain information on pay levels	voluntary	3	0.009	0.33 - 0.5%
	binding	8	0.258	1% - 1.5%
Regular reporting of companies on pay levels	voluntary	6	0.038	0.66 - 1.5%
	binding	18	0.244	2 - 3%
Pay audits (with considering job evaluation and classification)	voluntary	7	0.188	0.66 - 2%
	binding	20	0.440	2 - 4%
Consideration of equal pay as a separate issue by social partners in collective bargaining	voluntary	1	0.012	0 - 0.33%
	binding	3	0.036	0 - 1%
Total of the measures if voluntary (i.e. as a recommendation)		17	0.247	1.65 - 4.33 %
Total of the measures if binding (i.e. as a directive)		49	0.978	5 - 9.5 %

Source: Author, based on the Commission Impact Assessment SWD(2014)59, p. 50

¹¹ http://ec.europa.eu/europe2020/index_en.htm

¹² See footnote 2; more recently e.g. EP resolutions [P7_TA\(2013\)0375](#) of 12 September 2013, [P7_TA\(2013\)0247](#) of 1 June 2013.

¹³ Resolution of 10 March 2015 on Progress on equality between women and men in the EU in 2013, www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0050 : '12. ... urges the Member States to give full effect to the rights provided for under Directive 2006/54/EC, including the principle of equal pay and pay transparency, and to revise their national laws on equal treatment with a view to the simplification and modernisation thereof; calls on the Commission to keep the transposition of gender equality directives under regular review and invites the Commission to propose a recast of Directive 2006/54/EC as soon as possible, in accordance with Article 32 thereof and on the basis of Article 157 TFEU, following the detailed recommendations set out in the annex to Parliament's resolution of 24 May 2012;'

¹⁴ Based on the Commission Impact Assessment SWD(2014) 59 of 7 March 2014 (p. 50)

c) Calculation of the GPG

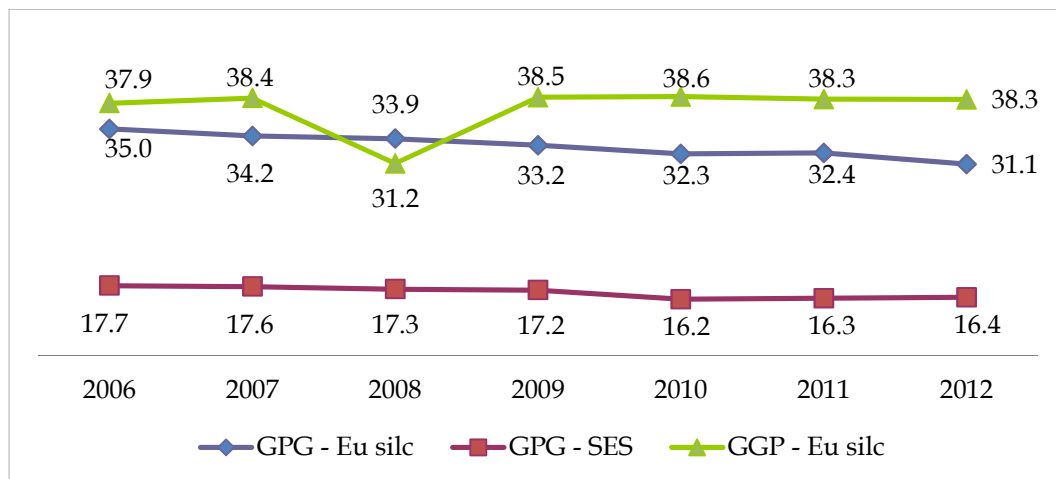
In the Commission’s impact assessment accompanying the recommendation, the calculation of the gender pay gap was calculated on the methodology of the Structure of Earnings Survey (SES), for the years 2006 to 2011. According to Prof. Corsi (see her contribution as annex II of this Implementation Assessment) SES is a considerable improvement on previous measures for comparing the GPG of EU Member States, but has still some shortcomings like insufficient consideration of women’s employment in smaller firms and in the public sector of some MSs, as well as of matching earnings at individual level with personal and household characteristics.

Therefore, she has calculated the GPG in EU27 and in the individual Member States also with the so-called EU-SILC (European Union Statistics on Income and Living Conditions) data. With the SES data, the GPG average for EU27 fell from 17.3% in 2008 to **16.5% in 2012**, whereas with the EU-SILC data, the figures for the GPG in EU27 fell from 33.9% in 2008 to **31.1% in 2012**.

Furthermore, using EU-SILC data she detects an upward trend of the GPG in Austria, Germany, Hungary, Norway and Poland, and, by contrast, a reduction of the GPG in Spain, Italy, Portugal, Greece, Cyprus, Ireland and United Kingdom. Furthermore, she finds the lowest GPG values in countries which joined EU recently like Slovenia, Croatia, Romania, Lithuania and Latvia, whereas the values for ‘old’ MSs like Germany, Austria and the Netherlands are above EU27 average (31.1%).

These figures, trends and disparities between MSs as well as the persistence of high GPG values (further elaborated in Corsi's paper in the annex) underline the necessity to envisage strong and appropriate measures for decreasing the GPG so as to properly implement the remit of Article 157 TFEU which goes back to the 1957 Treaty of Rome, by further strengthening and fine-tuning, by way of amendments or recast, of the existing directives in favour of gender equality in employment and occupation.

The Gender Pay Gap and Gender Pension Gap for EU27 for 2006-2012



Source: Corsi, elaborations on SES and EU-SILC; see annex II p.24

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* *

In this context, consideration of the four research papers in the annexes is very helpful. They analyse various aspects of the implementation of Directive 2006/54/EC and were commissioned specifically for this Implementation Assessment. They were written by the following academic experts who have a sound track of professional and practical expertise in the areas of their contributions:

- Prof. Dr Susanne Burri, senior lecturer, Utrecht School of Law and co-ordinator of the European Network of Legal Experts in the Field of Gender Equality, analysing the legal aspects of the application of the Directive, and in particular for the aspects of direct and indirect discrimination;
- Prof. Dr Marcella Corsi, Sapienza University of Rome, analysing the effectiveness of the Directive in tackling the equal pay and pension gap;
- Prof. Dr Isabell M. Welpé (team Dr Prisca Brosi/Tanja Schwarzmüller), Technische Universität München, Munich, analysing the effectiveness of the Directive in respect to job evaluation and classification;
- Dorota Szelewa PhD, University of Warsaw, analysing the role of maternity leave and parental leave in view of gender equality in employment and occupation.

These research papers were presented and discussed at the FEMM meeting of 31 March 2015. The following two chapters reproduce their key findings and recommendations in one condensed text. The quotes refer to the respective full papers in the annex.

Key findings on the implementation of Directive 2006/54/EC

1. General issues

1.1 Transposition and Implementation of the Directive (Burri p. 15)

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

1.2 'Novelties' (Burri p. 19)

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

1.3 Enforcement (Burri p.46)

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

1.4 Definitions and concepts (Burri p. 26)

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

2. Sectorial issues

2.1 Equal pay (Burri p. 36)

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

2.2 Causal factors for unequal pay (Corsi, p.25)

- Both Gender Pay Gap (GPG) and Gender Gap in Pensions (GGP) have decreased over the period 2006-2012 in those countries where the Directive has been applied.
- The impact of the introduction of the Directive has to be evaluated considering structural elements of national labour markets that influence the evolution of unequal pay over time (choice of educational path, horizontal and vertical segregation, parenthood and elderly care responsibilities, broken careers, etc.).
- Increasing shares of female employees with secondary and tertiary education push up the gender pay gap, because high skilled workers experience major differentials in pay and best-paid jobs.
- Sectorial employment structure has a major effect on pension gaps in fact increasing shares of men employed in education, health and public administration, which are typically "female-oriented" sectors, decrease the pension gaps between men and women. By contrast, a higher proportion of female workers in services drives up GGP.
- Institutional factors matter. Major pay differentials are detected in those countries characterised by a higher segregation in terms of care activities, which is also reflected in terms of pension gaps. As expected, a worsening position at country level for economic power, namely equal representation as members of boards in the largest quoted companies or as members of the central bank, increases GPG. Surprisingly, those countries performing worst in terms of gender mainstreaming register lower gender pay gaps. Conversely, political commitment towards gender mainstreaming is reflected on lower pension differentials.

2.3 Occupational social security schemes (Burri p. 41)

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

2.4 Promotion of equal treatment and social dialogue (Burri p. 49)

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

3. Implementation of the Directive for aspects of maternity leave

(Szelewa, p. 31)

3.1 Different implementation in MS of specificities

- While the protection of pregnant workers or of persons using maternity leave, parental leave or adoption leave is comprehensive, in all the Member States, important differences can be observed when it comes to specificities.
- One example is the **moment, when the protection starts** and if the employer has to be notified. In some countries, such as in Poland, Spain or Italy, the protection against dismissal is in force irrespective of a notification. In Cyprus, the protection runs from the moment of a written notification of an employer, while in Austria and Hungary some form of a notification is required. In some countries the protection is extended beyond the length of a maternity leave. This is the case of Cyprus, and similar provisions regarding extended protection exist in Germany or Italy. Croatia provides significantly extended protection, as it provides a ban on dismissal during pregnancy, maternity leave, parental and adoption leave, as well as part-time work or reduced working hours due to care for a disabled child.

3.2 Different implementation by sectors and by size of company

- Sectoral differentiation: in principle, more protection is granted in the public sector, compared with the private one. The size of a company matters: discriminatory measures decline with the size of a company (the smaller the company, the more discrimination). Of some importance, though only in some countries, is the protection of workers who are employed on the basis of a typical

contract. If the protection principles are embedded in the labour law, and this type of regulation does not cover such persons, then the possibility of a loophole arises. A similar phenomenon can be observed in the case of the self-employed, which in some countries constitutes an ambivalent category in the labour market.

3.3 Widespread practice of termination of fixed-term contracts

- An important issue relates to a widespread practice of termination of fixed-term contracts in the protection period. The CJEU has maintained that the refusal to extend a fixed-term contract in the case of pregnant worker is an instance of direct discrimination. As the authors state, such practices remain in place in several countries, such as Greece, Luxembourg, the Netherlands, Germany, Austria and Croatia). At the same time, in Italy, the workers tend not to extend their contract. Such practices also occur in the public service sector.

3.4 The practice of litigation against unlawful dismissals is relatively rare

- It is remarkable that while the protection is strongly embedded in the national legislation, the practice of litigation against unlawful dismissals is relatively rare. While the comprehensive statistics regarding both personal experiences of dismissals, as well as litigation, are missing, one can argue that only in the fraction of unlawful dismissal cases, do they reach the judicial system. It is especially striking, given the fact that the issue of dismissals is the major focus of cases related to maternity and pregnancy.
- There are multiple reasons for such limited litigations.
 - Firstly, such cases often lack the supporting evidence, which makes litigation challenging.
 - Secondly, there is a fear related to victimisation or the stigma of a trouble-maker, in particular, during the period of crisis. Moreover, individuals are afraid to be exposed, especially in smaller settlements. In some countries, individuals refrain from taking a case to court as they are aware that the procedure will be difficult and costly, while it does not guarantee success.
 - Thirdly, the common practice is to induce the voluntary job resignation of a pregnant worker. This has been the case of Italy, where specific measures (such as a third party - a representative of the Ministry of Labour - presence at the termination of the contract is required) have been established in order to restore the protection of parents of children under three.
- To sum up, at least two conditions need to be met in order to safeguard the protection of vulnerable individuals. These conditions are:
 - An efficient judiciary system friendly towards the potential claimants;
 - Widespread social awareness (understood as the knowledge of rights, but also knowledge of case laws etc.). One can argue, that the higher the awareness, the more litigation and a more efficient judiciary system, a better and real protection for individuals. Unfortunately, both of them remain under-researched, as we are missing the comparative data on the legal awareness of societies, but we also lack the systematic knowledge on the functioning of the legal and judiciary systems.

Recommendations

1. Recasting and/or amending the Directive ¹⁵

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

1.1 References to relevant international law

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

1.2 Recitals on mainstreaming

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

1.3 Reference to multiple discrimination

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

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

1.4 Incorporation of the Commission Recommendation

Provisions of the Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU)

¹⁵ Burri p. 53-55

could also be incorporated in this Chapter in order to enhance wage transparency by providing specific tools to tackle the gender pay gap.

1.5 Incorporation of case law

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

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

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

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

1.6 Occupational social security schemes

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

1.7 Different pensionable ages between men and women

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

1.8 Recast of the directives addressing gender specific forms of leaves

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

1.9 Rights of job applicants

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

2. Improving the effectiveness of the Directive¹⁶

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

2.1 Mainstreaming, preventing and monitoring

2.1.1 Mainstreaming and monitoring

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

2.1.2 Prevention of discrimination

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

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

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

2.2 Concepts

2.2.1 Substantive equality

The result pursued by the Directive in matters of employment and occupation is substantive equality. This should be emphasized and the substantive equality approach should be further explained in publications and campaigns of the European Commission aimed at combatting sex discrimination. Such information could be provided in particular on the website of the European Commission. MS also have a role in disseminating such information.

2.2.2 Pregnancy discrimination

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

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

¹⁶ Burri p. 55-57

information should be disseminated to relevant stakeholders on the prohibition of direct sex discrimination, in particular in relation to pregnancy and maternity.

2.2.3 Gender reassignment

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

2.2.4 Indirect discrimination

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

2.3 Burden of proof

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

2.4 Equal pay

2.4.1 Information campaigns and wage transparency

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

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

2.4.2 Beneficiaries of positive actions¹⁷

The case for taking action on unequal pay is important for women as individuals for equity reasons, for the economic well-being of their children and families, but also for society at large as an improvement of the position of women in the labour market – including pay equality – is crucial for economic growth.

2.4.3 Involve the different actors

Tackling the unequal pay is necessarily a long-term objective that requires: i) a combination of a variety of strategies and policies; ii) the involvement of different actors and stakeholders at different levels. A key role for the European Union is to bring together this variety of initiatives and multiple actors involved in promoting equality in the labour market.

¹⁷ For this and the following four paragraphs: Corsi, p.36

2.4.4 Simultaneous actions at different levels

The work for removing unequal pay should be carried on simultaneously and in close collaboration at the European, national, sectorial and organizational level.

2.4.5 Removing gender gap in pensions

In focusing the work specifically towards removing gender gap in pensions, the European Parliament can play a decisive role: to place the issue on the agenda and, through benchmarking, help to galvanise the type of national initiatives that would be in a position to deal with actions ameliorating the worse effects. As for the European Commission work, once sufficient visibility is given to a benchmarking exercise, the question could be put to each member state to 'respond' by explaining and projecting its own national issues

2.5 Self-employment

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

2.6 Enforcement

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

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

3. On job evaluation and classification ¹⁸

3.1 For **ensuring gender-neutrality of job evaluation / classification**, the description of gender-neutral job evaluation and classification systems in the Directive should be complemented by the following guidelines.

- In each organisation, an *evaluation committee* for conducting job evaluation / classification, which is *mixed-sex, trained, critical and accountable*, should be set up.
- Job evaluations should be made for all positions described by *gender-neutral job titles*, using *clearly defined* sub-factors generated from *structured free recall procedures*. They should be based on *standardized interviews* from various perspectives including both *male and female interviewees*, which should be translated into factor points by *several members of the evaluation committee*.
- Internal and external weighting should be controlled for gender-neutrality by means of a *weighting grid*.
- Job classification should be conducted by *blind assignment of point levels* to job classes (before job evaluation) and *checked* for gender-neutrality.

¹⁸ Welpé/Brosi/Schwarz Müller, p. 7, 8

3.2 For **increasing female access to employment**, gender-neutral selection processes can be created by using job descriptions from job evaluation / classification for the following steps in the recruitment and selection process.

- Generation of *objective, behaviourally-based job descriptions*.
- Formulation of *gender-neutral job advertisements*.
- Creation of gender-neutral assessments of participants' competence including *work samples and behaviourally-anchored rating scales*.

3.3 For **reducing the gender pay gap**, the following steps should be taken in addition to increasing gender-neutrality in the application of job evaluation / classification.

- *Transparency on starting wages* should be increased and the *salience of gender* in pay negotiation processes should be reduced.
- The principles of gender-neutrality for job evaluation / classification should be transferred to *performance-based pay*.
- The notion of "*equal pay for work of equal value*" should include the notion of "*equal pay for equal performance*".

3.4 **Governments, social partners and equality bodies in Member States** should

- Support the *preventive examination* of gender neutrality in pay schemes.
- Provide *clear and unambiguous guidelines* on the necessary steps to implement gender-neutral job evaluation / classification systems.
- *Governments should establish databases* including (sub-)factors and point ratings for specific jobs and occupations on national level and/or databases should be established on European level by the European Commission.

3.5 Recommendations on **strengthening the principle of equal pay through transparency** should include the *transparency of human resource processes*.

3.6 **Monitoring of the implementation of the Directive 2006/54/EC** should include

- *Surveys on the application of job evaluation / classification* in organisations across European countries.
- *Longitudinal examinations* of the implementation in discrete time intervals.
- *Analysis of internal and external weighting* of factors and sub-factors on a national or European level.

4. On protection of maternity¹⁹

A stronger monitoring of the Directives' implementation is recommended. It is especially important, that the vast majority of the Member States conform to the Directives' provisions, to observe the less visible aspects, such as litigations, the issuance of fines and other administrative measures. A specific form of monitoring should cover the functioning of the legal system and its dissuasive effects regarding the different forms of discrimination.

Therefore,

4.1 *the European Commission should*

- ensure that the legal standards in all the Member States are in line with the European provisions;

¹⁹ Szelewa, p. 42 and p.6

- closely monitor the cases of discrimination in the field and occupation, with regard to their number, character, and following legal redress. The latter is of special importance, as while the legal framework present in the Member States in the great majority is in line with the Directives' provisions, the sanctions in the case of equal treatment breach significantly differ;
- undertake actions regarding the improvement of the knowledge on the experience of harassment/discrimination among European citizens specifically related to pregnancy, maternity leave, parental leave, paternity leave and adoption leave. A suitable platform for such repeated actions could be the Eurobarometer survey;
- increase its knowledge about the scale of awareness on the rights of pregnant workers, and maternity leave and paternity leave and parental leave takers.

4.2 the European Parliament should

- consider further steps regarding the monitoring and evaluation of the Directives' impact on fighting discrimination against pregnant workers, and maternity leave and paternity leave and parental leave takers;
- continue to take initiatives aimed at pointing out the loopholes from the Member States' legal systems, causing differential treatment of certain categories of workers ('atypical' workers, self-employed). This applies especially to workers not covered by labour laws.

4.3 the social partners should

- become more active in ensuring the protection of pregnant workers and parents, and actively engage, both in the prevention of discrimination and in the process of legal actions if discrimination occurs.

4.4 the European Institute for Gender Equality should:

- pay more attention to the analysis of reasons behind the gender discrimination in the field of maternity, paternity, parental and adoption leave;
- take into account the socio-legal impact of the individual sanctions on the practice of gender discrimination in a wider context;
- create and maintain the database of good practices in this field of combating gender discrimination in the workplace.

4.5 Finally, **the Council should** take the necessary steps to adopt the new Maternity Leave Directive as soon as possible, in order to strengthen the rights of working parents.²⁰

²⁰ Cf. European Parliament resolution of 20 May 2015 on maternity leave (2015/2655(RSP))

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-IA-2015-0207%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

See also European Parliament Press release of 20 May 2015

<http://www.europarl.europa.eu/news/en/news-room/content/20150513IPR55443/html/Maternity-leave-MEPs-urge-Council-to-restart-talks>

MEPs pressed the European Commission not to withdraw the draft EU directive on maternity leave, despite four years' deadlock over it in the EU Council of Ministers, in a resolution voted on 20 May 2015. They also urged the ministers to resume talks and agree an official position.

Conclusion

Progress in reducing the gender pay gap is still extremely slow. The gender gap in pensions tends even to increase. This jeopardises social justice and makes substantial parts of society vulnerable to poverty.

Therefore, measures for assuring gender equality in employment and occupation, and in particular for reducing the gender pay gap and the gender gap in pensions, should be pursued vigorously.

This holds so much the more as the Commission Impact Assessment of March 2014 on costs and benefits of measures to enhance the transparency of pay showed that certain binding measures in form of directives are much more effective than mere voluntary measures for reducing the GPG. The other good news of the impact assessment was that such measures also have a strong positive effect on economy as a whole.

Therefore, the Commission recommendation of March 2014 was only a step in the right direction but failed to launch the legislative procedure for the vigorous necessary measures. The Commission can still do so²¹ and should do so, for this would not only be in favour of gender equality at work but also beneficial for the EU economy as a whole. This will be in line with Article 157 TFEU, with numerous EP resolutions and with the current FEMM committee report on the application of the Recast Directive 2006/54/EC.

²¹ In his opening statement of 15 July 2014 [A new start for Europe: My agenda for Jobs, Growth, Fairness and Democratic Change](#) the Commission President elect said: 'In future there will be no adjustment programmes unless they are preceded by a thorough social impact assessment' and: 'Discrimination must have no place in our Union, whether on the basis of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, or with regard to people belonging to a minority.'

In the case of transparency measures for gender equality in employment, impact assessments have been done in abundance; now the conclusions need to be drawn coherently and vigorously.

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Gender equality in employment and occupation

European Implementation Assessment

ANNEX I

Legal aspects and direct and indirect discrimination

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

Abstract

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

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

AUTHOR

This study has been written by Dr Susanne Burri of the Utrecht University School of Law, at the request of the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament. Prof. Dr Linda Senden and Alice Welland (LL.M) have collaborated to this study.

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

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Executive summary

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

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

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

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

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

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

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

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

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

Chapter 1 Introduction

I - Background to the request of the European Parliament

The European Parliament's Committee on Women's Rights and Gender Equality (FEMM) has issued an own-initiative report on the application of Directive 2006/54/EC (hereafter: 'the Directive' or 'the Recast Directive') of the Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.² The Committee on Employment and Social Affairs has requested the application of Rule 54 of the Rules of Procedure of the European Parliament to this report (procedure with associated committees). The Ex-Post Impact Assessment Unit (IMPT) of Directorate C - Impact Assessment and European Added Value (within Directorate General for European Parliament Research Services, DG EPRS) was requested to provide a 'Detailed European Implementation Assessment' on the situation in respect of this Directive. This research paper was commissioned by the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value of the European Parliament (DG EPRS).

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

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

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

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L* 204, 26 July 2006, pp. 23–36.

³ COM (2013) 861 final.

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

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

II - Methodology

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

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

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

III - Outline

The chapters of this paper address:

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

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

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

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

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

Chapter 2 Background and structure of the Directive

Key findings

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

I - Background of the Directive

Since 1975, the European legislator has adopted various Directives in order to combat sex discrimination in (access to) employment. The CJEU⁸ has answered many preliminary questions from the national courts of the Member States regarding the interpretation and application of these sex equality directives. Some of these directives were narrower in scope and outdated compared to more recently adopted directives, which cover not only discrimination on the grounds of sex, but also discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation. This broadening of the scope of EU non-discrimination law was only enabled by the introduction of Article 13 EC by the Treaty of Amsterdam (now Article 19 TFEU), providing the necessary legal basis for this. Sometimes the interpretation of crucial concepts by the Court - for example, the concept of pay - had the effect that some provisions of directives were no longer relevant (see Chapter VII). This was one of the reasons why the European Commission started a so-called recasting of some sex equality directives in order to modernise, simplify and harmonise previously adopted directives, and in order to consolidate case law of the Court. The result was Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), the so-called Recast Directive. In this Directive, a number of directives in the field of equal pay and equal treatment of men and women in employment were consolidated. Its aim is, according to the European Commission in its initial proposal, to

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

⁸ Previously the European Court of Justice (ECJ).

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

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

II - Recasting some sex equality Directives

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

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

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

¹⁰ Ibid.

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

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

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

¹⁴ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 39*, 14 February 1976, pp. 40-42.

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

¹⁶ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ 29*, L 225, 12 August 1986, pp. 40-42.

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

¹⁸ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *OJ 18*, L 45, 19 February 1975, pp. 19-20.

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

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

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

III - Structure of the Directive

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

²⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ L 6*, 10 January 1979, pp. 24–25.

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

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

²² Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, *OJ L 180*, 15 July 2010, pp. 1–6.

²³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *OJ L 373*, 21 December 2004, pp. 37–43.

²⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *OJ L 348*, 28 November 1992, pp. 1–8. A proposal to amend this Directive is pending: see <http://www.europarl.europa.eu/oeil/file.jsp?id=5697042>, accessed 14 June 2011. There is however little chance that this proposal will be adopted; the Council of the EU has not reached a decision on this proposal up to now and if there is no agreement before mid-2015, the proposal will be withdrawn according to the Commission's work programme for 2015, see COM (2014) 910 final, p. 12.

²⁵ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), *OJ L 68*, 18 March 2010, pp. 13–20.

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

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

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

Chapter 3 Transposition and implementation of the Directive

Key findings

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

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

I - Transposition obligations for the MS limited to substantive changes

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

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

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

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

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

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

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

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

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

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

³⁰ European Parliament, T6-0283/2005.

³¹ European Commission, COM (2005), 380.

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

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

III - Consolidation of existing case law or substantive change?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁹ COM (2013) 861 final, p. 5.

Chapter 4 Novelties

Key findings

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

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

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

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

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

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

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

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

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

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

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

Chapter 5 The purpose and scope of the Directive

Key findings

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

I - Human rights and fundamental rights

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

In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.

And Recital 3 reads:

The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

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

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

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

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

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

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

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

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

II - Equal treatment and equal opportunities

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

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

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

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

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

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

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

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

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

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

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

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

III - Employment and occupation

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

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

[...] to that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

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

1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, *to self-employment or to occupation*, including selection criteria and recruitment conditions, whatever the branch of

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

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

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

IV - Self-employment

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

- (a) self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law;
- (b) the spouses of self-employed workers or, when and in so far as recognised by national law, the life partners of self-employed workers, not being employees or business partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.

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

⁵⁰ OJ 2010 L 180, p. 6.

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

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

http://ec.europa.eu/justice/gender-equality/files/your_rights/personal_scope_eu_sex_equality_directive_final_en.pdf, accessed 11 February 2015 and European Network of Legal Experts in the Field of Gender Equality, C. Barnard & A. Blackham *Self-Employed. The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European Commission 2015, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/self_employed_en.pdf, accessed 15 April 2015.

⁵³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004, L 373, pp. 37-43.

Chapter 6 Definitions and concepts

Key findings

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

I - Direct discrimination

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

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

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

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

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

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

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

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

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

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

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

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

II - Indirect discrimination

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

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

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

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

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

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

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

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

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

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

The Court also considered in *Roks* that:

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

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

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

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

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

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

The concept of indirect discrimination is a very important concept, as it allows to address more hidden forms of discrimination. However, it is difficult to apply in practice, and at national level some problems occur. The report on the transposition of gender equality directives of the European Network of Legal Experts in the Field of Gender Equality *Gender Equality Law in 33 European Countries: How are EU rules transposed into national law? (update 2013)* highlights some of these problems.⁶⁵ In Hungary, for example, the concept of indirect discrimination is narrower than the EU definition by stipulating a 'considerably larger disadvantage' compared to a 'particular disadvantage' as mentioned in Article 2(1)(b) of the Recast Directive. In Greece, the notions of indirect discrimination and instruction to discriminate have not yet been applied in practice. In addition, in Bulgaria for example, case law up to now has mainly addressed direct discrimination. In many countries, there is only scarce case law on indirect sex discrimination and when at stake, courts face difficulties when applying this concept. However, the Spanish Constitutional Court considered disadvantages faced by part-time workers in relation to pensions a form of indirect sex discrimination.⁶⁶

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

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

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

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

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

III - Harassment and sexual harassment

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

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

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

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

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

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

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

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

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

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

In Recital 7 and Article 26 employers and those responsible for access to vocational training shall be encouraged by MS to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion. This is a rather weak provision. It is submitted that examples of preventive measures that can be taken should be disseminated.

IV - Instruction to discriminate

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

V - Sex or gender discrimination

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

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

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

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

⁷¹ COM (2013) 861 final, pp. 5-6.

VI - Positive action

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

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

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

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

This Article applies to all issues covered by the Recast Directive, also occupational pension schemes for example. Recital 21 specifies that: 'Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.'

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

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

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

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

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

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

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

Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 7 Equal pay

Key findings

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

I - Article 157 TFEU

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

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

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

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

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

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

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

II - The concept of pay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰³ COM (2013) 512 final.

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

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

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

¹⁰⁷ COM (2013) 861 final, p. 7.

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

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

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

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

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

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

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

¹⁰⁸ OJ L 69, pp. 112-214.

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

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

Chapter 8 Occupational social security schemes

Key findings

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

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

schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

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

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

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

¹¹¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ L 6*, 10 January 1979, pp. 24–25.

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

II - Actuarial factors

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

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

III - Different pensionable ages for men and women

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

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

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

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

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

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

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

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

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

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

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

Key findings

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

I - Material scope

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

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

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

membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

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

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

II - Return from maternity leave

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

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

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

III- Paternity and adoption leave

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

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

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

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

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

Chapter 10 Enforcement

Key findings

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

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

I - Defence of rights

According to Article 17(1) of the Directive, Member States have the obligation to ensure that judicial procedures are available to all persons who consider themselves wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. The reference to conciliation procedures in this provision is new.

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

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

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

II - Sanctions, compensation and reparation

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

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

III - Burden of proof

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

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the

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

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

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

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

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

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

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

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

Chapter 11 Promotion of equal treatment and social dialogue

Key findings

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

I - Equality bodies

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

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

II - Social dialogue and dialogue with NGOs

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

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

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

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

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

The Recast Directive further stipulates in Article 21(2):

Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, (...) and to conclude, at the appropriate level, agreements laying down antidiscrimination rules (...).

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

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

III - Victimisation

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

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives, provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to

¹²³ COM (2013) 512 final.

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

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

IV - Prevention of discrimination

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

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

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

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

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

Chapter 12 Conclusions and recommendations

I - Conclusions

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

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

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

II - Summary of recommendations

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

1. Recasting and/or amending the Directive

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

1.1 References to relevant international law

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

1.2 Mainstreaming

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

1.3 Multiple discrimination

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

1.4 Gender reassignment and transgender persons

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

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

1.5 Equal pay

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

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

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

1.6 Occupational social security schemes

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

1.7 Different pensionable ages between men and women

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

1.8 Leaves

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

1.9 Time limits

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

1.10 Rights of job applicants

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

2. Improving the effectiveness of the Directive

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

2.1 Mainstreaming, preventing and monitoring

2.1.1 Mainstreaming and monitoring

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

2.1.2 Prevention of discrimination

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

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

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

2.2 Concepts and burden of proof

2.2.1 Substantive equality

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

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

2.2.2 Pregnancy discrimination

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

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

2.2.3 Gender reassignment

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

2.2.4 Indirect discrimination

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

2.2.5 Burden of proof

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

2.3. Equal pay

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

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

2.4 Self-employment

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

2.5 Enforcement

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

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

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Annex I Questionnaire

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

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

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

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

Questionnaire:

I - Implementation of the Directive

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

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

Question 1:

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

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

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

Question 2:

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

Question 3:

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

II - The purpose and scope of the Directive

Question 1:

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

Question 2

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

Question 3

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

III - Definitions and concepts

Question 1

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

Question 2

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

Question 3

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

Question 4

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

Question 5

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

Question 6

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

Question 7

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

Question 8

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

IV - Application and enforcement of the Directive

Question 1

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

V - How to proceed further? Recommendations

Question 1

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

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

Question 6

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

Annex:

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

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

Annex II

FRANCE - H el ene Masse-Dessen

I - Implementation of the Directive

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Overall impact of the Recast Directive

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

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

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

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

5. Indirect discrimination

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

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

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

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

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

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

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

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

IV - Application and enforcement of the Directive

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

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

2. Recommendations to the stakeholders

To implement effectively temporary special measures.

3. Recommendations to the social partners

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

4. Recommendations to the legislator in your country

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

5. Recommendations to the European Commission?

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

6. Any remaining issues?

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

LATVIA – Kristīne Dupate

I - Implementation of the Directive

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

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

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

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

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

3. Overall impact of the Recast Directive

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

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

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

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

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

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

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

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

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

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

5. Indirect discrimination

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

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

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

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

¹³⁰ Reference is not publicly available.

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

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

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

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

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

IV - Application and enforcement of the Directive

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

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

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

2. Recommendations to the stakeholders

No specific recommendations.

3. Recommendations to the social partners

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

4. Recommendations to the legislator in your country

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

5. Recommendations to the European Commission?

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

6. Any remaining issues?

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

SLOVAKIA – Janka Debreceniová

I - Implementation of the Directive

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

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

Amendments to the Anti-Discrimination Act

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

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

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

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

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

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

3. Overall impact of the Recast Directive

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

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

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

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

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

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

5. Indirect discrimination

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

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

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

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

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

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

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

IV - Application and enforcement of the Directive

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

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

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

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

2. Recommendations to the stakeholders

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

3. Recommendations to the social partners

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

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

4. Recommendations to the legislator in your country

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

5. Recommendations to the European Commission?

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

6. Any remaining issues?

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

SPAIN – María-Amparo Ballester-Pastor

I - Implementation of the Directive

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

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

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

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

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

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

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

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

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

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

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

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

3. Overall impact of the Recast Directive

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

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

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

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

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

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

5. Indirect discrimination

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

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

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

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

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

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

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

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

Same answer as above.

IV - Application and enforcement of the Directive

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

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

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

2. Recommendations to the stakeholders

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

3. Recommendations to the social partners

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

4. Recommendations to the legislator in your country

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

5. Recommendations to the European Commission?

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

THE NETHERLANDS – Marlies Vegter

I - Implementation of the Directive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Overall impact of the Recast Directive

The Directive has had very little impact.

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

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

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

¹³⁷ NIHR Opinion no. 2010-62.

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

This issue is not really discussed in the Netherlands.

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

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

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

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

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

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

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

5. Indirect discrimination

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

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

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

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

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

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

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

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

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

IV - Application and enforcement of the Directive

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

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

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

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

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

2. Recommendations to the stakeholders

No suggestions.

3. Recommendations to the social partners

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

4. Recommendations to the legislator in your country

Legal aid should be more affordable and accessible.

5. Recommendations to the European Commission?

No specific recommendations.

6. Any remaining issues?

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

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

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

SWEDEN – Ann Numhauser-Henning

I - Implementation of the Directive

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

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

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

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

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

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

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

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

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

3. Overall impact of the Recast Directive

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

II - The purpose and scope of the Directive

1. Reference to human rights and international conventions

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

2. The scope of the implementing legislation

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

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

3. Substantive equality as aim of the legislation?

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

III - Definitions and concepts

1. Direct discrimination

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

2. Absence of comparator in cases of pregnancy discrimination

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

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

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

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

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

No specific difficulties.

5. Indirect discrimination

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

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

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

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

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

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

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

IV - Application and enforcement of the Directive

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

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

V - How to proceed further? Recommendations

1. Recommendations to the European Parliament

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

2. Recommendations to the stakeholders

No specific recommendations.

3. Recommendations to the social partners

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

4. Recommendations to the legislator in your country

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

5. Recommendations to the European Commission?

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

6. Any remaining issues?

No other issues.

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

Gender equality in employment and occupation

European Implementation Assessment

ANNEX II

Gender Pay and Pension Gap

**Research paper
by Marcella Corsi**

Abstract

This research paper explores the Gender Pay Gap and the Gender Pension Gap in the European Union and the policy responses and initiatives available for the future. After introducing the concept of 'pay', the first chapter provides a background concerning the effectiveness of the current gender equality framework on equal pay for equal work. The second chapter reviews recent progress at the European level, while the third one brings together causal factors for unequal pay and the fourth one outlines the principles for addressing the issue of equal pay in the EU, drafting specific recommendations.

AUTHOR

This study has been written by **Prof. Marcella Corsi** of the University of Rome “La Sapienza”, at the request of the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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

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Executive summary

The evaluation of the gender pay gap (GPG) and the gender gap in pension (GGP) in the EU needs suitable comparable data.

Estimates based on EU-SILC data over the period 2006-2012 show an upward trend for GPG in Austria, Germany, Hungary, Norway and Poland, while Spain, Italy, Portugal, Greece and Cyprus, but also Ireland and United Kingdom, have experienced **a reduction in the gender pay gap.**

There is empirical evidence that the public sector guarantees equal pay more than the private sector. However, both mean and median values of public and private gender pay gap at EU level have been decreasing over time (2006 – 2012).

By contrast, **the evolution of the gender pension gap over the same period suggests a small increase at EU level.** If we compute the gender pension gap relying only on the private pension recipients, we obtain a higher gender gap compared to the one estimated on total pensions. This result is partly explained by the importance of survivor's benefits, mostly paid to women for demographic reasons.

From a statistical point of view, there is a weak positive relationship between both forms of gender gap. However, those countries experiencing higher values of gender pay gap are also showing the highest gender pension gap, such as Austria, Germany, the Netherlands and United Kingdom.

The impact of the introduction of the Directive 2006/54/EC has to be evaluated considering structural elements of national labour markets that influence the evolution of unequal pay over time (choice of educational path, horizontal and vertical segregation, parenthood and elderly care responsibilities, broken careers, etc.)

In our analysis, increasing shares of female employees with secondary and tertiary education push up the gender pay gap, because high skilled workers experience major pay differentials and best-paid jobs.

Sectoral employment structure has a major effect on pension gaps in fact increasing shares of men employed in education, health and public administration, which are typically "female-oriented" sectors, decrease the pension gaps between men and women. By contrast, a higher proportion of female workers in services drives up the gender gap in pensions.

Institutional factors matter. Major pay differentials are detected in those countries characterised by a higher segregation in terms of care activities, which is also reflected in terms of pension gaps. As expected, a worsening position at country level for economic power, namely equal representation as members of boards in the largest quoted companies or as members of the central bank, increases the gender pay gap. Surprisingly, those countries performing worst in terms of gender mainstreaming register lower gender pay gaps. Conversely, political commitment towards gender mainstreaming is reflected on lower pension differentials.

The case for taking action on unequal pay is important for women as individuals for equity reasons, for the economic well-being of their children and families, but also for society at large since an improvement of the position of women in the labour market – including pay equality – is crucial for economic growth.

Tackling the unequal pay is necessarily a long-term objective that requires: i) a combination of a variety of strategies and policies; ii) the involvement of different actors and stakeholders at different levels.

The work for removing unequal pay should be carried on simultaneously and in close collaboration at the European, national, sectoral and organizational level. As already suggested by the so-called Bauer report, policy directions recommended to remove unequal pay can be grouped around four key concepts:

- *awareness*: initiatives to increase awareness on the gender pay gap;
- *gender roles*: initiatives to break traditional stereotypes (gender roles in society, in employment, in educational choices);
- *legislative measures*: analysis of costs and benefits of new legislations;
- *promotion of equal pay in companies*: through different actions such as charters, awareness-raising activities and trainings.

There is a lot to learn from the experiences accumulated over time through the strategies and measures implemented at various levels so far. **A key role for the European Union is to bring together this variety of initiatives and multiple actors involved in promoting equality in the labour market.**

In focusing the work specifically towards removing gender gap in pensions, main efforts should be directed to increase the awareness of the problem.

The European Parliament can play a decisive role in removing this form of unequal pay, by reducing the lack of visibility, mostly due to the lack of reliable data. Moreover, through benchmarking, it could galvanise the type of national initiatives dealing with positive actions.

It is already possible to hint some policy alternatives to those that, by compensating disadvantages, end up perpetuating them. For example, it is important to stop measures encouraging women to leave the labour market early, with the consequent permanent reduction in pension income. By contrast, policies such as credits for child-rearing should be supported as a way of creating a level playing field between women and men.

As for the European Commission work, once sufficient visibility is given to a benchmarking exercise, it should involve each member state in a kind of structured dialogue, like the one that has been undertaken with some success in the context of the Open Method of Coordination in pensions. It is a context in which the European Commission has fruitful experience to share, and can be usefully adapted for this purpose.

Chapter 1 – General information

Key findings

- Directive 2006/54/EC consolidates and modernises the EU acquis in the field of gender equality.
- The principle of equal pay aims to eradicate pay discrimination, taking into account also occupational pension schemes.
- Equality bodies have as their tasks the promotion, analysis, monitoring and support of equal treatment of all persons without any gender discrimination.
- One of the major concerns in relation to equality bodies is their capacity to perform their tasks independently. Another concern is that where they deal with multiple grounds of discrimination, gender discrimination might be marginalized.
- EIGE's indicators show that in the majority of EU Member States, gender equality as a policy area is carried out by a limited number of staff members, not always placed at a highest level in the governmental hierarchy.
- Social partners and civil society organisations are increasingly involved in the activities and tasks of equality bodies, in most cases concerning the dissemination of information and awareness-raising activities.
- From 2005, the number of Member States in which gender impact assessment and gender budgeting is widely used has actually doubled, but monitoring and evaluation is used as a tool for gender mainstreaming to a limited extent.

I - What is 'pay'

On 5 July 2006, the European Parliament and the Council adopted Directive 2006/54/EC *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation* ('the Directive'). **This Directive consolidates and modernises the EU *acquis*** in this area ('Equal Pay legislation') by merging previous directives and introducing the definition of pay, which is taken into account in this study.

The Directive defines *pay* in the same terms as Article 157 of the Treaty on the Functioning of the European Union (TFEU), i.e. 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/her employment from his/her employer'. As stated in European Commission (2013, p. 4), 'in most Member States, the concept of pay is defined in national legislation and corresponds to this definition'.¹ Thus, like at the EU level, in most countries **pay may include remuneration proper, in cash or in kind,**

¹ BE, BG, CZ, DK, IE, EL, ES, FR, HR, CY, LT, LU, HU, MT, PT, RO, SI, SK. In other Member countries, the legal definition of pay is not identical to that in the Directive, but the overall effect appears to be the same (EE, PL). Cfr. European Commission (2013).

but also various bonuses, tips, accommodation, marriage gratuities, redundancy and sickness payments, as well as overtime payments and other fringe benefits.

The Court of Justice of the EU (CJEU) has made clear that **occupational pension schemes are to be considered as pay**, thus the principle of equal pay applies to these schemes as well.

As recalled by Burri and van Eijken (2014), different conditions applied in relation to access to occupational pension schemes might be indirectly discriminatory, for example the requirement of a large number of years of continuous employment (e.g. Germany), the application of a minimum threshold of working hours (e.g. Ireland) or a minimum period of employment (e.g. Poland). In Hungary, the employer can limit access to an occupational pension scheme to a selected group of employees, often those in managerial and key functions. In some countries, occupational pension schemes are scarce (e.g. Latvia, Lithuania and Portugal).

II - The role of equality bodies

Since 2002, by virtue of Directive 2002/73/EC, the Member States are obliged to designate equality bodies. The tasks of these bodies are 'the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex' (now article 20(1) of the Recast Directive). These bodies must have the competence to provide independent assistance to victims of gender discrimination, to conduct independent surveys concerning gender discrimination and to publish independent reports and make recommendations (Article 20 of the Recast Directive and Article 12 of Directive 2004/113/EC).²

One of the major concerns in relation to equality bodies is their independence or at least their capacity to perform their tasks independently. In this context, what really matters, inter alia, are the procedures for appointing the staff of the bodies, their autonomy vis-à-vis the Government, their mandate, their investigative powers and, last but not least, their funding. For example, Italy has various bodies that could qualify as equality bodies under EU law, but it is not evident whether they satisfy the EU requirements, in particular that of operating independently.

Another matter of concern is that where equality bodies deal with multiple grounds of discrimination, gender discrimination might be marginalized (Krizsán et al. 2012).

As stressed by Burri and van Eijken (2014), 'competences exist which go beyond what the directives require, but which are of great importance for the enforcement of gender equality law' (p. 40).

Some equality bodies have the authority to hear complaints on gender equality and, in some cases, to give a non-binding opinion (for instance, in Austria, the Czech Republic, Denmark, Estonia, France, Greece, Iceland, Lithuania, Malta, the Netherlands, Spain, Sweden and the United Kingdom). Some others may challenge discrimination in court,

² Cfr. Holtmaat (2007).

on behalf of a particular victim and sometimes even without an actual victim. They may sometimes do so on their own initiative and in the general interest (for instance, in Belgium, Bulgaria, Latvia and Spain).

III - Factors impacting the effectiveness of institutional mechanisms for gender equality

There are several factors that affect the effectiveness of equality bodies' action. **The political orientation of the government** affects not only the existence of institutions and their budgets, but can also influence the continuity of their work (McBride and Mazur 2010).

The current economic crisis is another significant factor influencing the structure of institutional mechanisms for gender equality in the EU. Bettio et al. (2012) has stressed that the economic crisis has influenced the gender equality machinery in several countries: '[...] in several Member States cuts in public budgets are seriously affecting the functioning of gender equality infrastructures. However, other Member States have decided not to reduce resources devoted to gender equality institutions and/or projects, or even to increase them' (p.14). EIGE (2014) also reveals that cuts affected projects' funding and human resources, 'eventually leading to the downgrading or provisional closure of central gender equality and/or gender mainstreaming structures' (p.14).

Decentralisation, that is the dispersal of mandates on gender equality among regional governmental institutions, has had a positive impact on equality bodies, for example, by strengthening the institutional mechanisms as a whole in Belgium, Finland, Italy, Spain, Sweden and United Kingdom (Outshoorn and Kantola 2007).

A multi-disciplinary approach to addressing inequalities may be effective because it can improve the policies and strategies that address inequalities (European Commission 2007). The importance of the approach stems from 'acknowledging the heterogeneity of women in terms of age, class, disability, ethnicity/race, religion and sexual orientation', and this represents a crucial step towards the recognition of diversity among women (Council of European Union 2009).

IV - Measuring effectiveness

EIGE (2014) proposes some specific indicators to assess the effectiveness of institutional mechanisms for gender equality.

Status of governmental responsibility in promoting gender equality

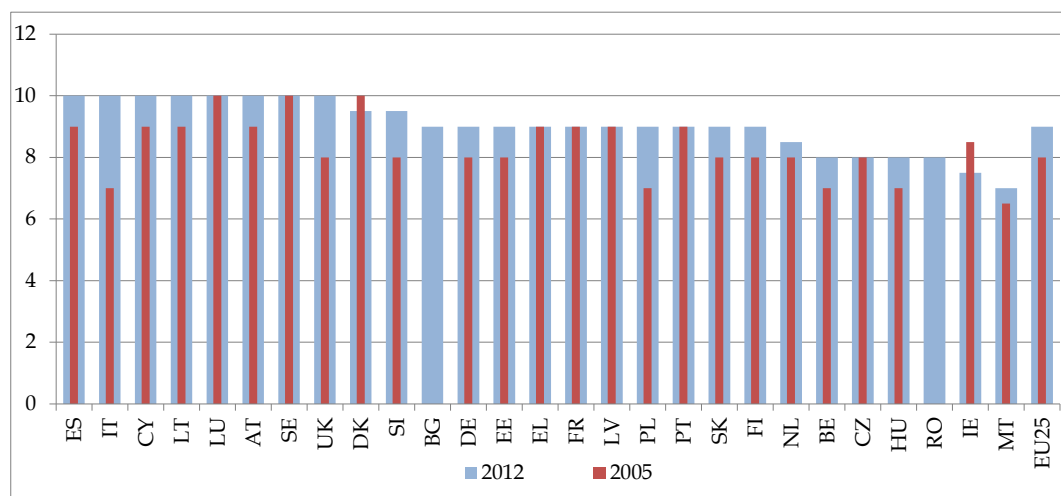
The political context specific to each Member State helps or hinders the sustainability and efficiency of equality bodies.

According to EIGE (2014), although recognised as a fundamental value of the EU and as a policy area in its 28 Member States, **gender equality has seen its status decline since 2005**: 'there are fewer governments with cabinet ministers responsible for gender equality and more governments with deputy ministers and assistant ministers responsible for

gender equality. Italy placed the responsibility for promoting gender equality within an advisory body to the Government and not within any ministry. In Poland, responsibility for promoting gender equality is vested in the Government Plenipotentiary for Equal Treatment, which reports directly to the Prime Minister' (p.81).

The situation appears as critical concerning **the hierarchical location of the governmental equality bodies**. 'In three Member States the location of the governmental equality bodies even decreased, while in 18 Member States the level of location remained the same. One third of 28 EU Member States still do not have the governmental equality body at the highest hierarchical level' (p.79).

Figure 1. Indicators of effectiveness - Governmental responsibility



Source: EIGE (2014)

The number of Member States that have adopted governmental action plans for gender equality (GAPGE) has increased. At the same time, **reporting on the activities to implement gender mainstreaming and reach gender equality to the legislative authority has been established in 26 Member States.**³

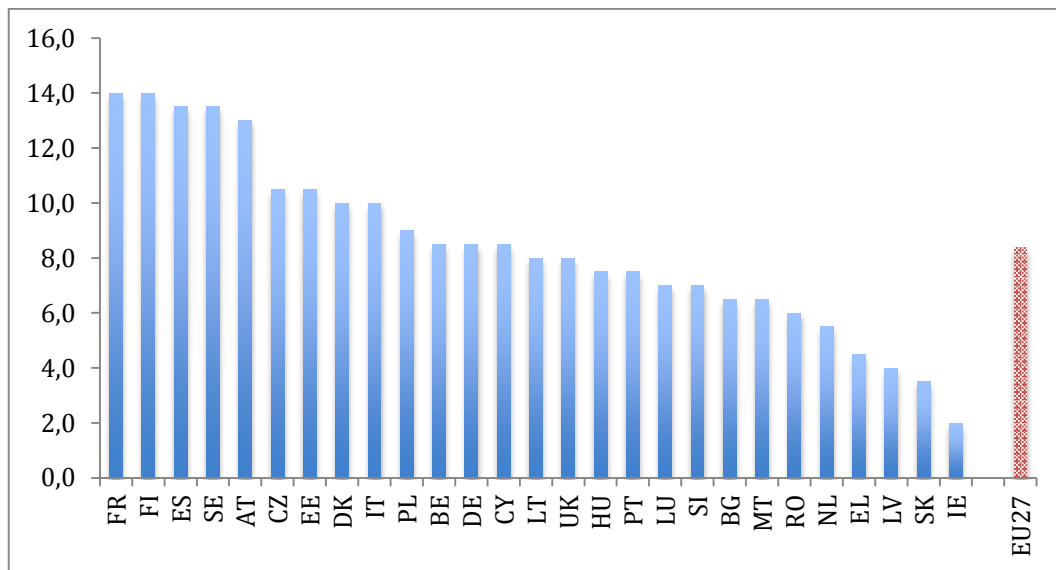
In all 28 EU Member States, **different types of civil society organisations (women's organisations, social partners, others) are systematically consulted,** involved and engaged in cooperation with equality bodies. As stressed by EIGE (2014), 'Member States are increasingly involving civil society organisations - especially women's organisations - in the development of policies, reporting, and evaluations. Civil society organisations are increasingly co-operating in the informational and awareness-raising activities of the governmental equality bodies. The representatives of women's organisations from the Member States considered that their involvement in and consultation by the government on gender equality policies is limited, ad-hoc or even non-existent' (p.79).

³ Only in the Czech Republic and Hungary reporting is not yet taking place.

Gender mainstreaming

In the last decade, all EU Member States declared a commitment to implement gender mainstreaming, although with different degrees: in 2005, 36% of Member States had a legal obligation regarding gender mainstreaming; this number increased to 47% in 2012.⁴ As stressed by EIGE (2014), 'only three Member States have no structures to implement gender mainstreaming. The majority of Member States have contact persons for gender mainstreaming in the ministries. In more than a half of the Member States an inter-departmental coordination structure is in place in the government to coordinate or stimulate gender mainstreaming' (p.80).

Figure 2. Indicators of effectiveness - Gender mainstreaming



Source: EIGE (2014)

Despite a slight improvement in the application of gender mainstreaming tools and methods, key methods (such as training and capacity building, gender impact assessment, gender budgeting and monitoring and evaluation) are not institutionalised. As stated by EIGE (2014), '**gender impact assessment** is rare or not used at all in the majority of Member States and is either an unknown concept or is still at an initial stage of application. **Gender budgeting** has become a legal obligation in only eight Member States, out of which gender budgeting is widely used by the ministries in just three countries. In a few other Member States gender budgeting was used only by some ministries and in the rest gender budgeting is an unknown concept and thus not implemented' (p.81).

Thus, there is not enough evidence to assess the effective implementation of gender mainstreaming, 'leading to the conclusion that commitments are not always translated into action' (EIGE 2014, p.81).

⁴ It is important to remember that EIGE's indicators are based on the self-assessments of the governmental officials responsible for gender equality in the Member States. Despite these methodological limitations, the empirical evidence nevertheless demonstrates a strengthened commitment on the part of the Member States and shows that new structures have been created to implement gender mainstreaming in most if not all Member States.

Chapter 2 - Gender Pay Gap and Gender Pension Gap over time

Key findings

- The evaluation of the gender pay gap and the gender pension gap in the EU needs suitable comparable data.
- Estimates based on EU-SILC data show that the public sector guarantees equal pay more than the private sector. However, both mean and median values of public and private gender pay gap have been decreasing over time (2006 - 2012).
- The evolution of the gender pension gap over the period 2006-2012 suggests a small increase at European level. If we compute the gender pension gap relying only on the private pension recipients, we obtain a higher gender gap compared to the one estimated on total pensions. This result is partly explained by the importance of survivor's benefits, mostly paid to women for demographic reasons.
- From a statistical point of view, there is a weak positive relationship between both forms of gender gap. However, those countries experiencing higher values of gender pay gap are also showing the highest gender pension gap, such as Austria, Germany, the Netherlands and United Kingdom.

I - Gender pay gap

To understand changes in the Gender Pay Gap (GPG) over time, one must realise that factors influencing it are diverse, some of which tend to increase the pay gap while others may decrease it. The impact of each factor may differ widely across countries. As stressed by Corsi (2014), **factors may be clustered into individual characteristics, establishment and industry characteristics, and institutional characteristics.**

Education, for example, is an individual factor. In most countries, workers with better education have on average higher earnings. Thus, if the share of high-educated women in the female labour force in a country increases faster compared with the share of better-educated men in the male labour force, the GPG should decrease.

Firm size is an establishment factor. In general, workers in larger firms have on average higher earnings. Thus, if, in a country, the share of women working in large firms increases faster compared with the share of men doing so, the GPG should decrease.

Minimum wages are an institutional factor.⁵ Assuming compliance with minimum wage regulation, these can be assumed to raise the wage floor. As more women are paid low wages compared with men, minimum wage-setting is assumed to decrease a country's GPG.

⁵ As far as institutional factors are concerned, European Commission (2013) stresses that equal pay is hindered by a number of factors. These include a lack of transparency in pay systems, a lack of

The GPG is related in a complex way to *women's labour market participation rates*. Depending on the initial situation of a country, an increase in women's participation rates may affect GPG differently. If relatively large groups of poorly-educated women enter the labour market, the GPG will increase, assuming a stable stock of male workers. If relatively large groups of well-educated women enter the labour market, the GPG will decrease. Furthermore, in a country with low participation rates, on the one hand, the GPG may be low because the participating women might be well educated, gaining most financially from participating, as their earnings are relatively high. On the other hand, the participating women might be the ones with poor education and low earnings because they need to work to make ends meet. In this case, the GPG is expected to be wide, as concentration in low-paid jobs suppresses women's average wages.

In most countries, the increase in women's participation rates is predominantly due to the employment growth in the services sector and in the public sector. As Tijdens and Van Klaveren (2012) show, in many countries, the average wages in these sectors are higher compared to average wages especially in agriculture and manufacturing. Thus, countries witnessing these changes can expect a decrease of the GPG, assuming all other factors remain constant. However, a strong **occupational segregation** may allocate women into the low paid jobs within these industries and as a consequence, the GPG may increase.

Child rearing has a large impact on women's average wages and thus on GPG. In some countries, women withdraw from the labour market when marrying or giving birth while returning after a couple of years. A re-entry mostly goes along with an allocation into lower paid jobs than women had before their career break, with an allocation into part-time jobs, or into dead-end jobs. This is called 'women's child-penalty'. Therefore, a **raising share of re-entering women** is likely to cause an increase in GPG. However, in some countries where women withdraw from the labour market and do not re-enter, the GPG is likely to decrease.

Workers in unionised sectors are better protected against gender pay gaps and against poor compliance with minimum wage regulation (Tijdens and Van Klaveren 2012). **Sectors that are traditionally unionised tend to have lower pay gaps, such as the public sector.** Those with low unionisation rates and low wage levels, such as retail, hotels and restaurants, and agriculture, tend to have relatively higher gender pay gaps. This suggests that these sectors suffer from low levels of compliance with minimum wage regulations. Male-dominated sectors such as construction have the smallest gender pay gaps. This is mainly attributed to the low numbers of women working in this sector combined with a relative higher level of education. Domestic workers show the lowest level of earning and the largest average gender pay gaps. This is mainly due to their low level of unionisation and the fact that many female workers live in the house of their

legal clarity in the definition of work of equal value, and procedural obstacles. Such obstacles are, for example, the lack of information for workers necessary to bring a successful equal pay claim or including information about pay levels for employee categories. Increased wage transparency could improve the situation of individual victims of pay discrimination, who would then be able to compare themselves more easily to workers of the other gender.

employers, with an average wage in cash much lower than the one of their male colleagues.

Data and methodology

The evaluation of the gender pay gap in the EU needs suitable comparable data. Most studies rely on the Structure of Earnings Survey (SES), a EU harmonized source (Eurostat, 2009). The use of the SES is a considerable improvement on previous measures for comparing EU Member States. However, as stressed by Smith (2010), some shortcomings affect this dataset:

1. some areas where women's employment tends to be concentrated – smaller firms and in some Member States the public sector – are not represented;⁶
2. the exclusion of employees in firms with less than ten employees is likely to underestimate the gender pay gap in the SES, since firm size has a negative impact on pay, particularly for women (Eyraud and Vaughan-Whitehead, 2007);
3. data do not allow matching earnings at individual level with personal and household characteristics.

Given these shortcomings, we estimate GPG relying on the European Statistics on Income and Living Conditions (EU-SILC), which provides a wide range of information at individual level ensuring comparability across countries.⁷ EU-SILC is a questionnaire-based survey that draws on a random sample covering the entire population and is conducted annually across all 27 EU Member States. Considerable effort is made to standardize answers' categories to make them internationally comparable. The latest available data are based on the survey conducted in 2012; given that the questions refer to the previous year, the situation reflected in the data is that pertaining to 2011.

In order to construct the measure of the gender pay gap, we define "employees" those receiving a *non-zero gross employee cash or near cash income for the income reference period (year)*.⁸ Furthermore, to improve the comparability of gender pay gap built on EU SILC and SES data, we consider only those workers employed in manufacturing and services.⁹ Unfortunately, we do not have information on the firm size where employees work. From this point of view, our estimates on EU-SILC data are not perfectly comparable with SES ones, which are based on all paid employees working in enterprises with 10 employees or more. A second major difference between our estimates and the ones based on SES concerns the unit of measurement of the gender pay gap. While SES considers gross earnings *per hour*, EU SILC refers to gross employee cash or near cash income at individual level *per year*.

⁶ To be more precise, the public sector is included only since 2010.

⁷ The same survey is used to construct other EU structural indicators, most notably those connected with social inclusion and the risk of poverty; its properties, advantages and disadvantages are well understood.

⁸ Incomes data have been deflated by the Consumer Price Index in order to allow intertemporal comparisons. All values are in euro.

⁹ Sectors: Nace Rev.1, C-K and M-O; Nace Rev.2, B-N and P-S. For a detailed list of sectors included in the analysis, see table A1 in the appendix.

To compute the gender pay gap, we apply the following formula:

$$(1) \quad \left(1 - \frac{\frac{\sum_{i=1}^F (PY010G_i) w_i}{\sum_{i=1}^F w_i}}{\frac{\sum_{j=1}^M (PY010G_j) w_j}{\sum_{j=1}^M w_j}} \right) * 100$$

where $PY010G$ is the gross employee cash or near cash income at individual level, F is the subsample of women and M the subsample of men. As a result GPG is computed as the difference between mean gross earnings of male paid employees and of female paid employees, expressed as a percentage of mean gross earnings of male paid employees.

Moreover, we compute the gender pay gap based on median values at country level, in order to control for the distribution of pay between men and women. If we rank earnings from the lowest to the highest, the median earning is the one located at the middle of the distribution:

$$(2) \quad \left(1 - \frac{(PY010G_{ik}) w_i}{(PY010G_{jr}) w_j} \right) * 100$$

where k corresponds to $\frac{\sum_{i=1}^F w_i}{2}$ and r is equal to $\frac{\sum_{j=1}^M w_j}{2}$. In a so-called “normal” distribution median and mean are equal, consequently the gender pay gap estimated by the mean values would be equal to the one computed on the median values.

Comparing mean and median values of women’s and men’s pay provides information on the effective earnings distribution. In simple words, a median pay smaller than a mean pay implies a big proportion of employees on the left side of the mean, receiving a pay lower than the average one. Conversely, a median pay higher than the mean one implies a big proportion of employees on the right side of the mean, earning a higher pay than the average one.

The current picture

Table 1 allows comparing the gender pay gap estimated on EU SILC data with the one computed on SES data. At a first look, the gender pay gap based on SES data is significantly lower than the one estimated on EU SILC data. Differences between the two sources of data arise even in terms of time trends. Over the period 2006-2012 (i.e., after the adoption of the Directive) focusing on EU-SILC data we detect an upward trend for GPG in Austria, Germany, Hungary, Norway and Poland. By contrast, Spain, Italy, Portugal, Greece, Cyprus, but also Ireland and United Kingdom have experienced a reduction in the gender pay gap. A possible explanation relies on a “forced” participation of women in the labour market as a reaction to the massive job losses experienced by male-oriented sectors, due to the first impact of the crisis (the so-called *he-session*).

If we focus on the last available year (figure 3), we find GPG at the lowest values in “young” EU countries, like Slovenia, Croatia, Romania, Lithuania and Latvia, while the “old” Europe, e.g. Germany, Austria, and the Netherlands, registers GPG above the EU27

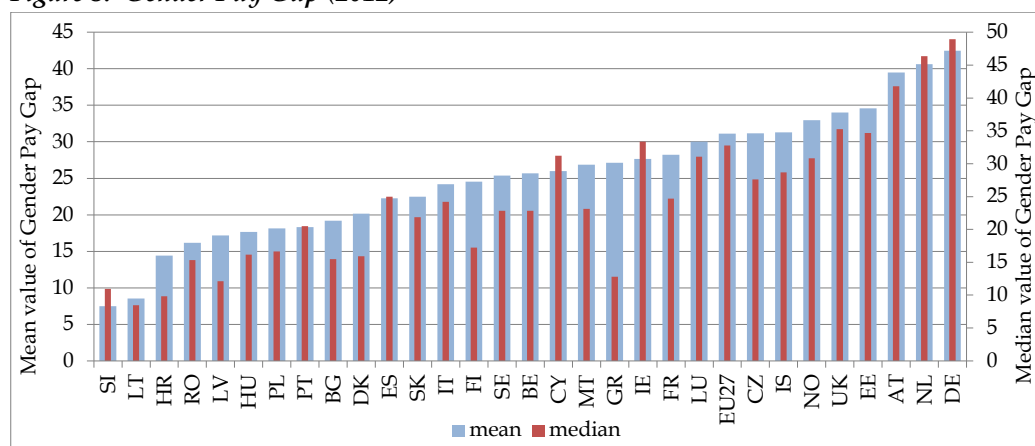
average (31.1%). Furthermore, figure 3 provides useful insights on the distribution of earnings between women and men.

Table 1. Gender Pay Gap in the European Union (2006-2012)

	EU-SILC							SES						
	2006	2007	2008	2009	2010	2011	2012	2006	2007	2008	2009	2010	2011	2012
AT	35.0	36.8	35.0	39.1	37.9	37.5	39.5	:	25.5	25.1	24.3	24.0	23.7	23.4
BE	30.7	30.2	29.6	27.9	26.7	27.0	25.7	:	10.1	10.2	10.1	10.2	10.2	10.0
BG	:	21.2	20.2	19.7	15.7	17.8	19.2	10.8	12.1	12.3	13.3	13.0	13.0	14.7
CY	28.6	30.7	28.7	27.2	26.2	26.9	26.0	22.2	22.0	19.5	17.8	16.8	16.4	16.2
CZ	31.3	31.8	32.7	31.1	30.4	31.2	31.2	23.1	23.6	26.2	25.9	21.6	22.6	22.0
DE	41.3	41.5	42.6	41.4	41.2	41.4	42.5	:	22.8	22.8	22.6	22.3	22.2	22.4
DK	23.7	24.2	24.9	23.1	18.2	19.0	20.1	17.6	17.7	17.1	16.8	15.9	16.3	14.9
EE	34.1	36.4	33.6	34.1	29.9	33.0	34.6	28.4	30.9	27.6	26.6	27.7	27.3	30.0
ES	31.7	29.1	29.1	26.3	24.6	22.6	22.2	:	18.1	16.1	16.7	16.2	17.8	17.8
FI	24.8	27.2	27.8	27.9	24.5	22.4	24.6	21.1	20.2	20.5	20.8	20.3	19.6	19.4
FR	28.4	30.8	27.9	28.7	28.1	26.5	28.2	:	17.3	16.9	15.2	15.6	15.6	15.4
GR	:	:	29.3	27.7	25.6	24.9	27.1	:	21.5	22	:	15.0	:	:
HR	:	:	:	:	:	15.8	14.4	:	:	:	:	15.5	17.6	18.0
HU	16.2	12.1	16.5	16.3	14.6	16.1	17.7	14.6	16.3	17.5	17.1	17.6	18.0	20.1
IE	31.8	37.4	36.2	28.9	28.6	27.2	27.7	17.6	17.3	12.6	12.6	13.9	11.7	14.4
IT	:	26.3	25.8	23.7	24.5	25.7	24.2	:	5.1	4.9	5.5	5.3	5.8	6.7
LT	19.3	23.5	28.5	26.1	6.3	2.4	8.5	16.7	22.6	21.6	15.3	14.6	11.9	12.6
LU	36.8	36.8	39.7	35.1	34.3	34.3	30.0	:	10.2	9.7	9.2	8.7	8.7	8.6
LV	:	28.4	25.8	20.6	15.3	18.3	17.2	13.4	13.6	11.8	13.1	15.5	13.6	13.8
MT	:	:	21.5	27.1	26.6	24.0	26.9	:	7.8	9.2	7.7	7.2	6.2	6.1
NL	47.1	47.9	45.8	45.1	41.7	40.5	40.7	23.1	19.3	18.9	18.5	17.8	17.9	16.9
PL	14.9	19.5	20.9	20.2	17.0	16.1	18.1	7.2	14.9	11.4	8.0	4.5	5.5	6.4
PT	:	18.4	23.6	20.1	18.9	20.5	18.3	:	8.5	9.2	10.0	12.8	12.5	15.7
RO	:	16.9	15.9	15.7	15.5	16.2	16.2	6.5	12.5	8.5	7.4	8.8	11.0	9.7
SE	28.3	28.3	28.3	29.6	27.3	25.6	25.4	16.4	17.8	16.9	15.7	15.4	15.8	15.9
SI	12.5	11.9	12.3	12.8	10.5	8.5	7.5	7.5	5.0	4.1	-0.9	0.9	2.3	2.5
SK	24.0	26.4	27.7	26.2	26.9	23.0	22.5	25.2	23.6	20.9	21.9	19.6	20.5	21.5
UK	39.8	41.0	41.1	41.0	39.4	43.0	34.0	24.0	20.8	21.4	20.6	19.5	20.1	19.1
EU27	35.0	34.2	33.9	33.2	32.3	32.4	31.1	:	:	17.3	17.2	16.2	16.4	16.5

Source: Own elaborations on SES and EU-SILC datasets

Figure 3. Gender Pay Gap (2012)



Source: Own elaborations on EU-SILC data.

For the majority of countries, the gender pay gap computed on the median pay for women and men is lower than the one estimated on the mean value. Greece deserves special attention because the median gender pay gap is considerably lower than the mean gender pay gap. This is probably due to the fact that a large segment of the female and male working populations receive a pay below the mean level. In some countries, like Germany, the Netherlands, Ireland, Cyprus and Slovenia, the gender pay gap estimated on the median wage is higher than the mean gender pay gap suggesting different shapes of the wage distribution for women and men. In these cases, a high value for the median pay gap underlines a higher concentration on the right side of the mean value meaning a major proportion of men receiving a wage above the mean value compared to women.

Data shown in Table 2 confirm the almost stability of the gender pay gap, but highlight the relevance of individuals' characteristics as well. In particular, it must be noticed that GPG for employees working part-time has increased, from 8% to 16%, while it has partly narrowed (from 26% to 25%) for those working full time. A similar trend applies to GPG by type of contract (temporary *vs.* permanent jobs).

The age of employees makes a major difference for the gender pay gap, i.e. GPG increases with age. As stated by Hough and McGuinness (2014), behind this trend there might be factors that affect women's pay when they are in their 30s or 40s, such as maternity leave and prolonged career breaks, suggesting that a higher GPG persist in the life course. Another possible explanation is that generational differences account for the larger gap among older workers, in which case the gaps might reduce as younger generations move through the labour market.

GPG varies markedly depending on occupation. In part, this may reflect variation across different occupations in the proportion of women employees, as an effect of "horizontal segregation". The lowest GPG is recorded for 'service workers and shop and market assistants', followed by 'administrative and secretarial jobs'.

Table 2. Gender Pay Gap by workers' characteristics (2006-2012)

	2006		2007		2008		2009		2010		2011		2012	
	Mean	Median	Mean	Median	Mean	Median	Mean	Median	Mean	Median	Mean	Median	Mean	Median
Age														
18-21	18.7	38.9	20.5	38.0	21.3	36.0	18.1	35.9	23.1	34.8	23.0	34.3	24.3	33.9
22-29	14.4	36.5	16.6	34.3	17.6	32.9	17.0	32.6	15.5	32.1	15.0	31.1	17.8	30.9
30-39	34.8	37.4	33.9	35.9	34.0	34.7	31.3	33.8	29.8	32.4	30.3	32.0	27.6	31.3
40-49	41.1	39.2	39.5	37.6	39.1	36.7	38.9	35.6	37.2	35.3	36.9	35.2	35.4	34.2
50-59	38.9	37.7	38.4	36.7	37.0	35.8	38.2	34.6	37.1	33.6	37.3	33.5	36.9	33.1
over 60	45.5	37.4	43.2	35.6	40.3	34.0	36.0	32.7	38.0	32.8	38.0	33.3	34.2	32.1
Type of contract														
Permanent	25.7	38.2	26.7	36.6	27.2	35.8	26.4	34.6	25.5	34.5	26.2	34.9	25.0	33.8
Short term	8.1	31.3	12.2	30.0	13.9	29.2	16.2	29.7	11.9	31.3	17.9	30.3	16.1	32.3
Hours worked														
Full time	25.7	40.5	26.7	40.1	27.2	39.0	26.4	38.2	25.5	37.7	26.2	37.7	25.0	37.0
Part time	8.1	40.4	12.2	36.9	13.9	35.1	16.2	35.3	11.9	34.7	17.9	35.8	16.1	35.0

Industry														
Mining-														
Manufacturing-Energy	37.3	43.3	38.5	43.8	37.7	39.2	36.5	41.5	36.0	40.9	34.7	41.7	37.1	41.4
Construction	16.3	32.6	8.9	31.5	6.2	32.6	11.6	29.1	10.4	28.0	7.3	28.5	1.9	22.9
Wholesale and retail	41.2	40.8	40.6	39.7	39.5	32.4	38.7	37.9	39.8	37.2	39.0	37.8	36.1	36.4
Hotels and restaurants	39.5	40.7	38.7	40.8	34.1	40.5	34.7	38.3	31.6	34.7	35.4	35.0	32.4	33.7
Transport storage and communications	31.5	41.4	28.7	39.6	31.0	39.9	26.7	35.0	12.0	33.1	20.7	33.1	18.5	33.2
Financial intermediation	45.7	43.4	44.6	41.7	51.2	41.3	46.4	40.5	45.3	40.7	52.3	39.8	42.1	38.7
Real estate	40.5	40.6	40.3	40.1	39.8	38.5	35.5	36.2	32.2	34.8	34.0	35.1	30.9	33.9
Education	34.1	41.9	33.4	40.7	32.2	40.1	33.8	38.7	31.7	38.3	31.0	38.6	32.3	37.1
Health and Social work	33.9	40.1	37.4	37.1	34.6	35.9	34.7	36.2	35.6	35.8	34.1	35.7	35.3	36.2
Other services and public administration	41.5	38.9	42.2	35.7	39.1	36.1	40.7	33.4	42.3	36.6	43.7	36.1	40.6	35.8
Occupation														
Legislators, senior officials, managers	34.5	40.1	36.3	39.2	38.7	39.1	33.7	37.7	30.9	37.3	40.6	37.0	29.1	34.0
Professionals	36.8	44.3	36.8	43.1	34.7	41.8	34.5	40.4	33.9	40.5	32.4	40.0	33.3	36.5
Technicians and associate professionals	32.3	40.4	31.5	38.9	31.0	37.3	30.8	36.6	29.2	35.2	29.8	33.3	32.5	35.9
Administrative and secretarial jobs	30.2	38.8	31.1	37.2	33.0	37.5	32.0	36.1	31.5	35.6	30.7	37.5	31.4	37.2
Service workers and shop and market assistants	30.1	35.8	28.5	34.5	29.2	33.2	28.1	32.0	27.3	31.4	29.4	32.7	36.2	38.5
Skilled agriculture and fishery workers	40.3	40.1	36.1	39.8	42.6	38.1	38.1	33.5	38.9	34.6	47.8	34.2	29.5	31.7
Craft workers	40.8	50.8	51.0	48.4	47.6	45.2	45.3	45.0	42.7	42.0	43.4	43.0	30.2	32.0
Plant and machine operators	38.2	39.9	40.1	40.2	40.7	39.6	39.5	37.6	37.3	35.2	45.9	35.7	43.6	34.5
Elementary occupations	43.8	39.7	41.8	38.1	40.3	35.5	37.4	33.4	40.9	34.5	35.7	35.0	34.3	33.7

Source: Own elaborations on EU-SILC data.

The variation in the gender pay gap is much greater between industries than between occupations, both for full-time and part-time jobs (table 3). This is not surprising as people working in the same occupational group are more likely to be undertaking similar jobs, while people working in the same industry may be doing very different kinds of work. By far, the largest full-time pay gap is in the financial and insurance sector where the full-time GPG is around 40. At the other end is construction, where the full-time GPG is often negative.

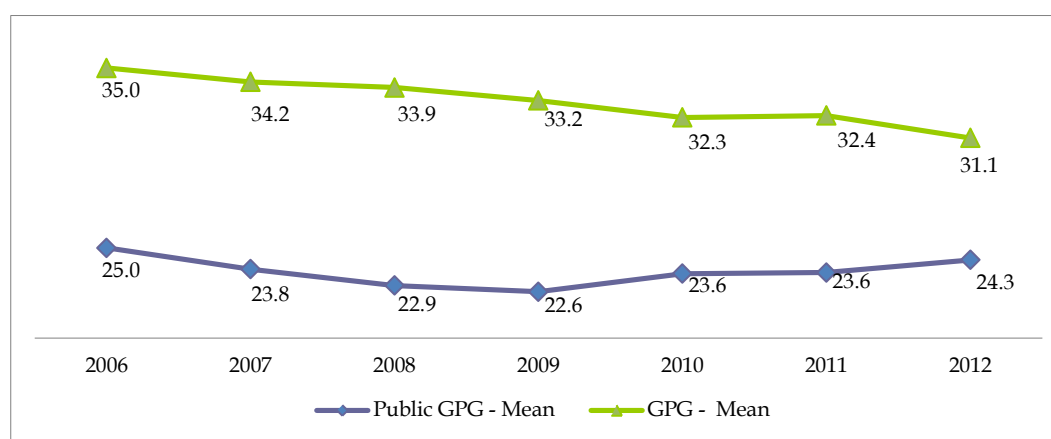
For those working part-time there is a partly different picture. The largest GPG is recorded in manufacturing and energy (42.8%), followed by financial intermediation (22.4%).

Table 3. Gender pay gap by industry and hours worked (2006-2012)

	2006		2007		2008		2009		2010		2011		2012	
	Full time	Part time	Full time	Part time	Full time	Part time	Full time	Part time	Full time	Part time	Full time	Part time	Full time	Part time
Manufacturing and Energy	33.7	16.3	37.2	16.7	36.6	16.3	60.2	13.7	34.1	23.0	33.7	30.7	35.0	42.8
Construction	3.5	-20.2	1.7	-22.3	-2.0	-36.4	22.2	14.0	2.6	-33.9	-3.2	-7.0	-6.4	-30.8
Wholesale and retail	31.0	-3.8	35.5	-3.2	34.3	9.8	58.1	-5.4	35.4	-1.9	34.6	4.9	32.5	-5.7
Hotels and restaurants	33.5	3.7	35.1	16.4	31.8	17.7	56.3	38.5	28.0	54.7	32.2	10.9	27.7	4.9
Financial intermediation	40.1	41.1	39.8	51.0	48.8	29.7	57.0	13.5	42.4	12.5	48.4	37.3	38.5	22.4
Real estate	32.0	15.4	31.7	29.2	32.3	38.3	36.0	30.3	23.8	23.1	26.2	4.4	23.5	14.1
Education	31.6	7.7	31.9	15.5	29.5	17.5	48.4	25.7	28.4	18.8	28.0	20.2	29.5	13.5
Health and Social work	31.7	-6.5	33.8	14.2	30.8	20.8	25.3	25.6	30.3	3.0	30.2	5.3	31.1	12.8
Other services and public administration	27.9	10.9	32.9	23.6	29.0	19.3	23.9	15.9	33.8	27.1	36.0	28.2	32.6	16.1

Source: Own elaborations on EU-SILC data.

A special focus deserves public employment where we may expect a lower value of GPG.¹⁰ Indeed, if we look at the mean and median values of the gender pay gap for public jobs, they are almost 10 percentage points below the mean and median values of private employment (figure 4). As expected, the public sector guarantees equal pay more than private sectors. However, both mean and median values of public and private GPG have been decreasing over time by 5 percentage points on average.

Figure 4. The Gender Pay Gap in Private and Public Employment (2012)

Source: Own elaborations on EU-SILC data.

¹⁰ We define public employment as occupation in public administration, defense and compulsory social security (Nace Rev. 1 - L or Nace Rev.2 - O).

II - Gender gap in pension

Pensions are the single most important component of older people's income, especially for women. Thus, focusing on Gender Gap in Pensions (GGP) is the natural follow-up to a study of gender pay gaps.

As stressed by Bettio et al. (2013) and by Corsi (2014), the structure of pensions is influenced by three sets of factors.

Long-term structural changes: ageing is obviously the most important influence, but today's pensions also reflect past employment history as well as past and present social status (e.g., divorce, widowhood, etc.).

Past pension reforms: Two reforms are most likely to have a disproportionate effect on gender gaps in pensions. Firstly, the switch from public ('first pillar') pensions to occupational ('second pillar') pensions: the overall effect tends to tighten the link between contributions and benefits. Secondly, the emphasis on working longer; there may be relevant effects in the medium term leading to lower pensions for those who do not respond to the pension requirement (mostly women, due to their broken careers).

Short-term pressures connected with the current economic crisis: these pressures vary from country to country but could lead to important swings in gender pension gap, both in first and second pillars pensions.¹¹

Data and methodology

In the analysis of GGP a key consideration concerns the comparability of data at European level. If the analysis were based at country level, the natural way to measure gender gaps in pensions would be by using administrative data. However, for sake of comparability, we rely on the European Statistics on Income and Living Conditions (EU-SILC), as we did for computing gender pay gaps.¹² EU-SILC asks households detailed questions about the income sources of all their members, whether from employment, from property or social transfers. In terms of social transfers, EU SILC allows to focus on:

- 1) first-pillar (State) and second-pillar (occupational) pensions, which cannot be distinguished;
- 2) third pillar pensions (individually negotiated pension packages);
- 3) survivors' pensions paid to individuals older than 65, classified as "old age protection".

We consider the sum of the three variables (named from now on 'pensions') instead of each of them separately due to problem of comparability among countries.¹³

¹¹ Cfr. Corsi et al. (2011).

¹² There are some basic differences between EU-SILC survey data and administrative data: 1) administrative data would of necessity cover only those receiving a pension; 2) in multi-pillar systems, statistics for the pension total may be hard to get; 3) administrative data are frequently produced separately by types of pension: old age, disability, survivors may produce separate statistics.

¹³ The sum of the three components is more reliable and meaningful than each of them taken

The study of the gender pension gap implies two main points: 1. the decision of whom to include in the definition of ‘pensioner’; 2. the definition of who is a pensioner.

From the first point of view, individuals decide by themselves when to retire. They decide whether to apply for a pension as a conscious decision, depending on a number of factors related to the parameters and regulations of the pensions system in place (e.g., minimum retirement ages) and ultimately whether they prefer to become pensioners rather than to carry on working. Following Bettio et al. (2013), we investigate a ‘homogeneous group of people defined in such a way that the transition from work to retirement is complete, and for whom pensions have settled into the relationship with other income that will characterize the rest of their retirement’ (p.31). To achieve this, the simplest way is to focus on the group of people aged over 65. Moreover, the use of 65 as a cut-off age is the conventional statistical start for ‘old age’ and will thus allow the indicator to be harmonized with a large number of other works in the area.

From the second point, a pensioner is ‘any person who appears to be drawing a pension as his/her own income’ (p.37), i.e. individuals with non-zero values of pensions. This excludes from the definition individuals aged over 65 who are not beneficiaries of pensions, and whose pension income is zero. The definition of who is a pensioner is thus sensitive to the definition of what is a pension. The GGP is computed in the simplest possible way:

$$(3) \quad \left(1 - \frac{\frac{\sum_{i=1}^F (PY080G_i + PY100G_i + PY110G_i) w_i}{\sum_{i=1}^F w_i}}{\frac{\sum_{j=1}^M (PY080G_j + PY100G_j + PY110G_j) w_j}{\sum_{j=1}^M w_j}} \right) * 100$$

where *PY080G* are regular pensions from individual private plans, *PY100G* old age benefits and *PY110G* survivor’s benefits,¹⁴ *F* are the women in subsample, *M* are the men in subsample and w_i is the EU-SILC personal cross-sectional weight. In brief, it is the percentage by which women’s average pension is lower than men’s, or, in other terms, it measures how much women pensioners are lagging behind men pensioners. In order to define both women’s and men’s average pension income we take into account the following assumptions:

- 1) we consider the subsample of individuals in the EU-SILC dataset, who are 65 years old at the beginning of the income reference period (t-1) of the EU-SILC wave concerned (t);
- 2) within the subsample of individuals, we select those who have at least one positive income value of old age benefits, regular private pensions or survivors’ benefits.

As for the gender pay gap, we consider both mean and median values in order to check for the distribution effects.

separately. The inability to distinguishing survivors’ pensions and second-pillar pensions, may be thought of as ‘blind spots’ of EU-SILC in the context of the analysis of gender gap in pensions. Cfr. Bettio et al. (2013).

¹⁴ See appendix for a detailed description of the variables included in the definition of pensions.

Current picture

The evolution of GGP over the period 2006-2012 suggests a small increase at European level (table 4). More in detail, an upward trend is detected for Austria, Germany, Finland, France, Ireland, Netherlands and Poland. As for the gender pay gap, highest values of GGP characterize Northern Europe. Below the level of 20% we find some Eastern countries (Czech Republic, Estonia, Hungary, Lithuania, and Latvia), while Southern European countries experience a gender gap in pension above 30% contributing to push up the average European GGP.

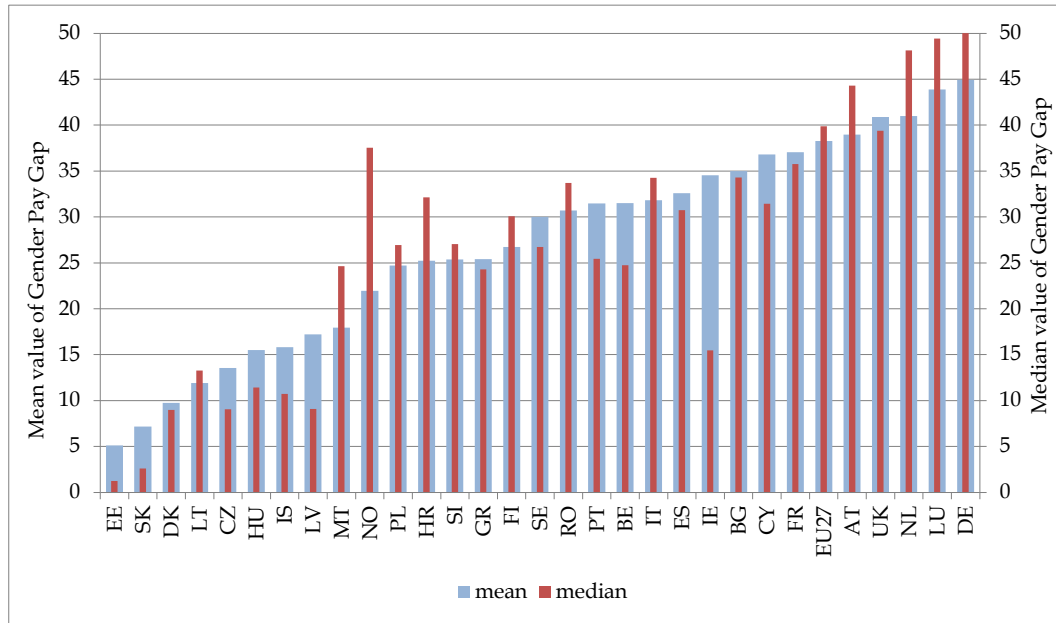
Table 4. Gender Pension Gap in the European Union (2006-2012)

	2006	2007	2008	2009	2010	2011	2012
EU27	37.9	38.4	31.2	38.5	38.6	38.3	38.3
AT	35.4	33.7	33.8	34.9	33.9	40.2	39.0
BE	33.2	30.5	29.6	32.2	31.0	27.8	31.5
BG	..	31.4	26.8	30.5	32.7	31.1	35.0
CY	41.0	44.1	41.2	40.8	38.0	40.1	36.8
CZ	12.9	10.6	10.4	10.7	12.8	13.8	13.5
DE	43.1	43.1	42.3	44.2	43.5	43.8	44.9
DK	17.1	16.8	16.7	20.2	18.2	11.0	9.8
EE	7.0	3.9	3.4	4.7	4.3	2.8	5.1
ES	34.4	34.8	33.1	33.2	33.2	32.6	32.6
FI	24.1	24.2	24.8	25.3	24.7	26.7	26.7
FR	32.7	36.4	:	38.6	38.9	36.7	37.0
GR	:	:	38.5	36.9	36.4	31.0	25.4
HR	:	:	:	:	:	25.9	25.2
HU	16.9	16.0	14.0	15.3	15.0	15.8	15.5
IE	30.4	30.7	32.3	35.0	36.3	38.2	34.6
IS	15.6	14.7	16.7	23.3	24.5	22.3	15.8
IT	:	33.3	32.7	32.4	31.0	33.1	31.8
LT	18.2	16.9	16.7	17.7	15.3	12.2	11.9
LU	45.7	45.5	45.3	43.1	47.1	46.5	43.9
LV	:	17.0	14.9	10.8	9.3	14.4	17.2
MT	:	:	19.1	19.2	21.1	24.4	17.9
NL	36.9	37.8	38.4	40.1	40.9	41.3	41.0
NO	30.9	30.9	28.4	30.7	30.0	29.0	21.9
PL	23.6	22.5	21.9	21.2	23.2	24.0	24.7
PT	:	35.9	34.5	35.4	34.0	31.0	31.5
RO	:	31.7	31.6	31.3	31.2	30.7	30.7
SE	31.7	31.7	30.4	32.0	32.3	31.9	30.0
SI	30.2	28.5	29.2	27.8	28.3	28.3	25.4
SK	20.1	10.4	11.6	9.8	7.7	15.0	7.2
UK	41.1	43.2	37.6	40.5	42.4	41.1	40.9

Source: Own elaborations on EU-SILC data.

Focusing our attention on the last available year (2012), we almost confirm the same rank detected for the gender pay gap with Northern and Central European countries, namely Germany, Luxembourg, the Netherlands, Austria and United Kingdom, with a GGP above the European mean (figure 5).

Figure 5. The Gender Pension Gap (2012)

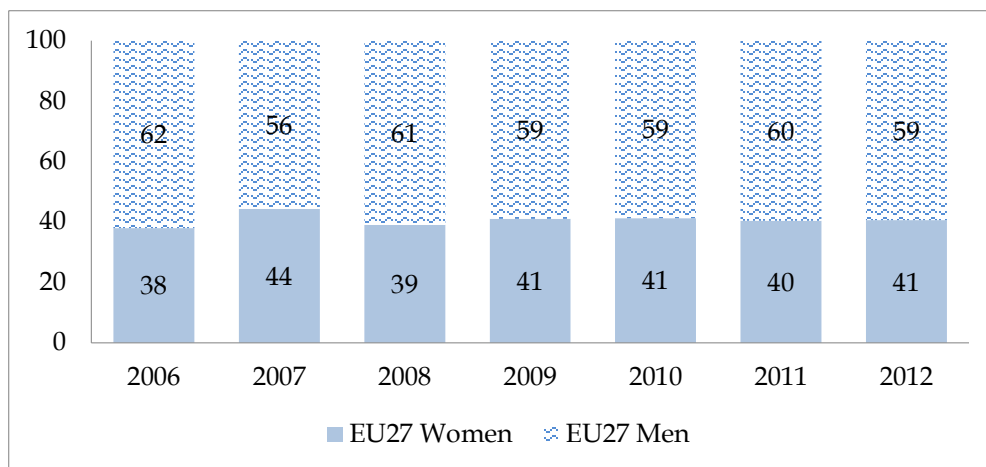


Source: Own elaborations on EU-SILC data.

Looking at the mean and median values, we see a difference of about 5 percentage points between both measures at the top of the rank. Those countries experiencing higher gender pension gaps are also characterized by higher median pension gap stressing major differences in terms of pension distributions between women and men. The median value for men is much higher than the women’s one.

Our measure of the gender gap in pensions needs to be detailed considering the share covered by private pension plans. If we consider only pensioners receiving private pensions, we find that a higher share of men than women, almost constant over time (figure 6) cover alone more than 70% of European private pension recipients.

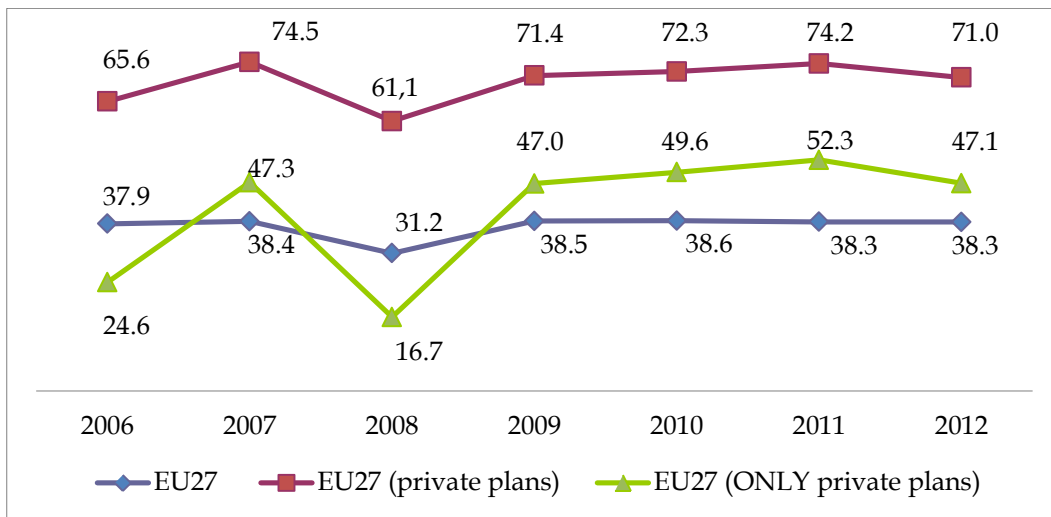
Figure 6. The Gender Distribution of Private Pensions (2006-2012)



Source: Own elaborations on EU-SILC data.

As expected, GGP estimated on private pensions is higher compared to the standard gender gap in pension. This result is driven by the asymmetric gender distribution of private pensions for men. Furthermore, the European mean reflects the unequal distribution of private pension schemes in Europe favoring Northern countries like Germany, Finland, Sweden and United Kingdom. Those countries If we compute the gender pension gap relying only on the private pension recipients, we obtain a higher gender gap compared to the one estimated on total pensions (figure 7). This result is partly explained by the importance of survivor's benefits, mostly paid to women for demographic reasons. Survivors' benefits reduce the gender gap estimated on the total of pensions; conversely private pensions mostly paid to men push the gender pension gap up. Apart from a decrease registered in 2008, the gender pension gap both in private and total pension has remained almost stable over time, showing a flat trend.

Figure 7. Gender Pension Gap and Gender Private Pension Gap Over Time

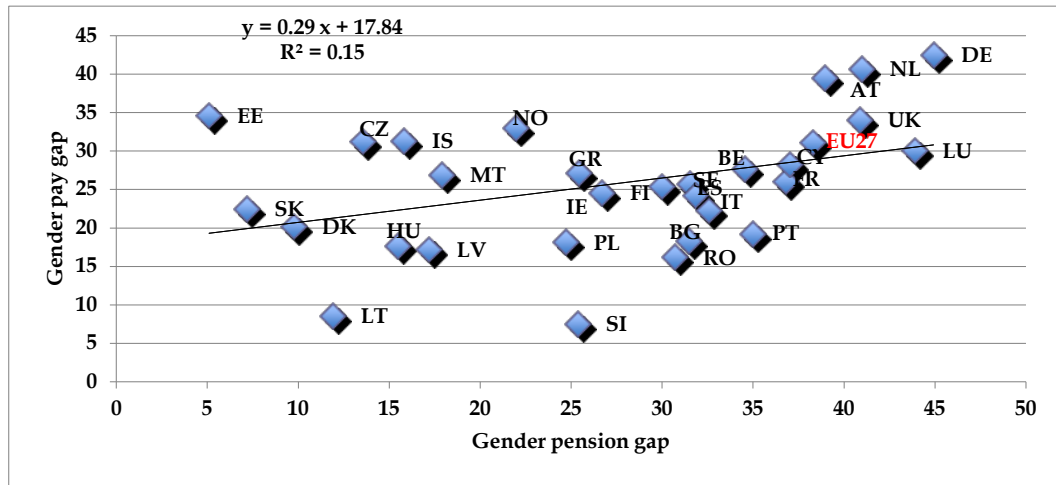


Source: Own elaborations on EU-SILC data.

III - Gender pay gap and gender pension gap: is there a link?

As last step of this descriptive analysis, we correlate gender pay gap and gender pension gap in order to verify the existence of a relationship between what women and men earn during their working life and what they receive at the end of the career in terms of pension.

Figure 8. The relationship between the Gender Pay Gap and the Gender Pension Gap

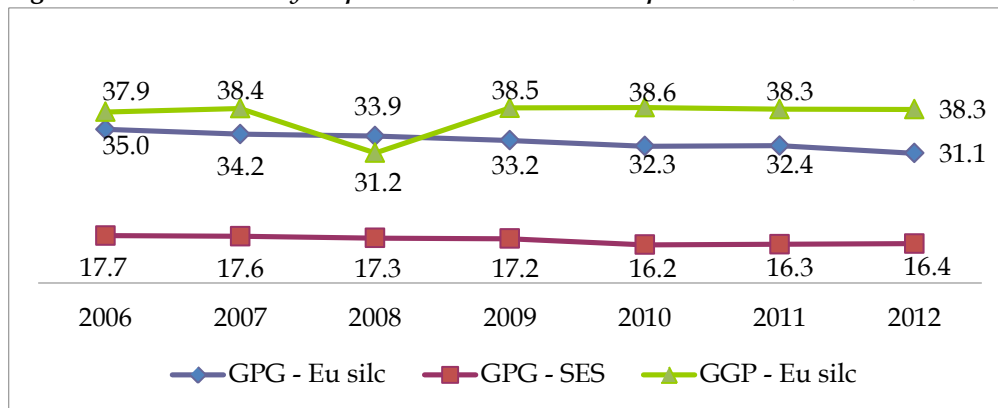


Source: Own elaborations on EU-SILC data.

Figure 8 shows the existence of a **weak positive relationship between both forms of gender gap**. However, those countries experiencing higher values of gender pay gap are also showing the highest gender pension gap, such as Austria, Germany, the Netherlands and United Kingdom.

Looking at the evolution over time of GPG and GGP, we detect a **systematic higher gender pension gap over the entire period**, with the only exception of 2008. Furthermore, the gender pay gap has decreased in the last years, at least from 2009, probably due to massive job cuts experienced by male-oriented sectors. Also GPG estimated with SES data, follow the same trend; the systematic difference between the two measures of GPG is due to the divergence in terms of the definition of “pay”.

Figure 9. The Gender Pay Gap and Gender Pension Gap over time (2006-2012)



Source: Own elaborations on SES and EU-Silc.

Chapter 3 – Causal factors for unequal pay

Key findings

- Both GPG and GGP have decreased over the period 2006-2012 in those countries where the Directive has been applied.
- The impact of the introduction of the Directive has to be evaluated considering structural elements of national labour markets that influence the evolution of unequal pay over time (choice of educational path, horizontal and vertical segregation, parenthood and elderly care responsibilities, broken careers, etc.)
- In our analysis, increasing shares of female employees with secondary and tertiary education push up the gender pay gap, because high skilled workers experience major differentials in pay and best-paid jobs.
- Sectoral employment structure has a major effect on pension gaps in fact increasing shares of men employed in education, health and public administration, which are typically “female-oriented” sectors, decrease the pension gaps between men and women. By contrast, a higher proportion of female workers in services drives up GGP.
- Institutional factors matter. Major pay differentials are detected in those countries characterised by a higher segregation in terms of care activities, which is also reflected in terms of pension gaps. As expected, a worsening position at country level for economic power, namely equal representation as members of boards in the largest quoted companies or as members of the central bank, increases GPG. Surprisingly, those countries performing worst in terms of gender mainstreaming register lower gender pay gaps. Conversely, political commitment towards gender mainstreaming is reflected on lower pension differentials.

I - Current obstacles to reducing gender pay gaps

As shown in the previous chapters, there are a number of interrelated factors that cause unequal pay, of which one can be recognized as **direct discrimination**, in the sense that some women are paid less than men for doing the same job. The Directive has specifically addressed this type of discrimination at the European and Member States level. **But how does the Directive interact with the other factors influencing the gender pay gap and the gender gap in pensions?**

To study these interactions we have to deal with two main issues.

First, **the existence of a relationship between GPG and GGP over the entire life course must be taken into account**. This issue has been quite unexplored in the literature due to the fact that a proper analysis aiming at linking both dimensions of pay differentials, namely wages and pensions, requires administrative data that follow individuals over

the entire life course. The unavailability of such type of information has limited the accuracy of the analysis leading researchers to leave open such a question.

Although the relationship between GPG and GGP is rather weak (figure 8), we can still test the presence of some forms of correlation between different forms of unequal pay over the life course, at country level, assuming that a higher gender pay gap experienced during the working life corresponds to a higher gender pension gap during retirement.¹⁵ From this point of view, we choose to study the relationship between macro factors and gender pay and pension gaps by using a SUREG (seemingly unrelated regression) model, which adequately allows controlling for correlated error terms.¹⁶

Second, **the impact of the introduction of the directive has to be evaluated considering structural elements of national labour markets that influence the evolution of unequal pay over time.** From this point of view, we test the relationship between the adoption of the directive at national level and other causal factors possibly increasing or decreasing pay gaps.

Table 5. Average variation of GPG and GGP (2006-2012, percentage points)

	<i>Application of the equal pay provision in practice</i>	<i>Absence of application of the equal pay provision in practice</i>
Variation in GPG	-2.62	-2.8
Variation in GGP	-3.03	1.1

Overall, both GPG and GGP have decreased over the period 2006-2012 in those countries where the Directive has been applied (table 5).¹⁷

More in detail, while the gender pay gap has decreased by 2.6 percentage points, the gender pension gap has decreased faster by almost 3 percentage points. However, also countries where the directive has not been adopted have experienced a decreasing gender pay gap.¹⁸ By contrast, the variation of the gender pension gap is positive over the period for those countries where the directive has not been adopted.

¹⁵ It must be noted, of course, that today's pay gap and today's pension gaps refer to different groups of people. If evaluated today, pension gaps average income sources of a different generation than the one currently earning income in the labour market. In the study of ageing, a key distinction is between *age* groups and *cohorts* (i.e. people born at a particular time period). Today's 60-year olds (born around 1950) may behave differently than the 60 year-olds of 1990 (who had been born around 1930). At any one time, however, the two concepts coincide. One should always be careful of making generalisations based solely on age, as these may be due to a cohort effect and hence not hold in the future.

¹⁶ We can reject at 5% of confidence level the absence of correlation between error terms of gender pay and pension gaps.

¹⁷ According to European Commission (2013), some Member States have explicitly transposed the Directive either with new legislation or with substantive amendments to existing legislation (CZ, DK, EE, EL, HR, IT, CY, LT, PT, SI, SK, SE, UK). In two Member States, the Directive was transposed together with other non-discrimination directives (FR, PL). In two other Member States, transposition was considered necessary only in relation to occupational social security schemes (RO) and return from maternity leave (BG). Transposition was not considered necessary by some Member States because transposition of earlier directives was sufficient to comply with the requirements of the Directive (BE, DE, IE, ES, LV, LU, HU, MT, NL, AT, FI).

¹⁸ The difference between the mean of both groups of countries is not statistically significant at 5%

II - Factors to be analysed

Several factors influence directly, either the gender pay gap or the gender gap in pensions.

Gender pay gap

Traditions and gender stereotypes are the main hindrances to closing of not only pay gap but ensuring economic and social equality of men and women. Whilst in some cases this may reflect personal choices, traditions and stereotypes on the roles and expectations of women and men may influence, for example, **the choice of educational path** and consequently professional careers, particularly for girls and women leading them towards typically female professions which are less well paid.

The **occupational and sectoral segregation** (horizontal segregation) of women and men into different types of job is an important factor explaining the persistence of the gender pay gap in the life course. While legislation might rule out direct discrimination, when women and men are concentrated into different sectors and occupations the chances for differences in remuneration expand, with inevitable repercussions in terms of gender pension gaps. Non-discriminatory pay differential can exist alongside a gender pay gap as long as women and men are not evenly distributed across high and low paying sectors occupations (Robinson 2001:158). Since the men and women are frequently found in different jobs the gender pay gap captures the different valuation of the roles attached to these jobs.

This segregation of job opportunities into male and female areas also captures the roots of gendered disadvantage on the labour market – the fact that women and men are often operating in quite different sectors where the rewards are also quite different. Women’s jobs, particularly those in caring professions and those with ties to childrearing or domestic activities, are consistently undervalued (Bettio and Verashchagina 2009, Colgan and Ledwith 1996).

Vertical segregation of the labour market also remains a factor in determining the gender pay gaps. Within the same sector or company women predominate in lower valued and lower paid occupations. Furthermore, there is evidence from across Europe of within occupation hierarchy and pay differentials from painters (Clarke et al 2005:168) to solicitors (Wass and McNabb 2005). Women are frequently employed as administrative assistants, shop assistants or low-skilled or unskilled workers – these occupations accounting for almost half of the female workforce. Many women work in low paying occupations (e.g.: cleaning and care work), and, even **in feminised sectors, men tend to be over represented in high positions**, for example, in teaching (Healy and Kraithmen 1996). Sectoral analysis of earnings and employment shows that men dominate the higher paying jobs even in female-dominated sectors (EuroFound 2006).

of confidence level.

Another important factor that bears the roots to unequal pay is **part-time work**. Female part-time workers are paid less compared to male part-time workers. Moreover, the gender pay gap among part-timers is wider than among full-timers (Grimshaw and Rubery 2001). The increase in part-time employment has been a common trend in many European countries over the last 10 years. Women are however, four times more as likely as men to take up part time jobs. Part-time jobs are typically low paid, with fewer prospects for promotion and access to training. It is the interaction between low pay, part-time work, and the separation of men and women into different types of jobs, which hits women hard.

The **impact of parenthood and of elderly care responsibilities** make women more prone to taking up part-time jobs. Apart from the lower pay associated with working part time, parenthood – or more particularly motherhood – impacts upon the gender income gap over the life course through the ‘costs’ of years out of the labour market and reduced hours while working part time (Grimshaw and Rubery 2001). However, the impact of these elements on lifetime earnings does vary between Member States depending on the level of support afforded to working parents (Joshi and Davies 1992).

Individual factors such as age and education are also positively correlated with the size of gender pay gaps (Blau and Kahn 2000). According to Plantenga and Remery (2006), in comparison to a representative sample of the total population, the gender pay gap is lower if only a sample of new entrants in the labour market is investigated. This means that the gender pay gap tends to widen with age, which is often a result of career breaks experienced by women during their working life especially by older women who could not benefit from specific equality measures because those did not exist when they started to work.

A “motherhood penalty” is clearly in evidence for women over the age of 40 years, as older women are more likely to have career breaks to care for children (and elderly parents), impacting on their level of work experience and in turn affecting pay. The resulting pay gap starts to appear about 10 years after women start work.

In the case of **migrant workers**, they suffer double disadvantage owing to their origins and gender. Studies have shown that migrant women not only earn less than migrant men, but also that they earn less than native-born women for doing the same work. Adserà and Chiswick (2007) shows that an immigrant worker, at the time of his/her arrival earns 40% less than what a native born worker would earn for doing the same. Another study by Antón et al. (2010) shows that the earnings gap between women natives and migrants, amounts to roughly 20 percent.

Gender pension gap

Few studies have tried to identify the factors explaining the gender gap in pensions, mainly focusing on specific institutional features or reforms.¹⁹ Broadly speaking, GPG

¹⁹ See Horstmann and Hülsman (2009); Brugiavini et al. (2013).

may be considered the result of three factors: women participate less in the labour market; they work fewer hours and/or years; they receive lower wages.²⁰

An important hypothesis explaining gender gaps in pensions is that they are to a large extent a reflection of women's low and intermittent previous involvement with paid labour. In particular, especially in recent decades, a large number of women dropped out of the labour force in order to fulfil their family responsibilities. This may have reflected personal choice but may also have been imposed on them by insufficient childcare facilities, inadequacies in maternity leave, etc.

To define what a broken career means, and to classify women into categories according to labour force attachment, is quite a complex task. Following Bettio et al. (2013), it can be assumed that women with a number of years of employment greater than the median years²¹ for their country do not have a broken career problem. To classify the remainder it is sufficient to note that in those countries that base their system on social insurance principles, the cut-off for pension entitlement ('vesting') is usually 15 years. Thus it makes sense to define three groups: (1) women with years of employment between 0-15 years (distinguished into two subgroups in Table 6);²² (2) those between 15 and the median; (3) greater than the median. Many (perhaps most) women who have fewer than 15 years' work experience would have worked after leaving school and at the early stages of building a family; thus at the age of 65 their involvement in employment may only be a distant memory. Given that many pension systems have vesting requirements, a woman who may have worked in the 1970s for 4-5 years would, for social insurance purposes, be treated in the same way as someone who has never worked.²³ Both would only receive an old-age pension, or a means-tested 'standard' pension at the age of 65. This is the reason for aggregating the 'never worked' group (0 years) with those with a few years of payments.

Table 6 shows the classification of women into the three groups. It further breaks down the low category into those with 0-10 and those with between 11 and 14 years' employment. In nine countries (Luxembourg, Cyprus, France, Greece, Ireland, Spain, Italy, Belgium and Slovenia), more than one in four women had been in employment for less than 14 years. On the contrary, in most Eastern European countries (with the possible exception of Poland and Romania), broken careers (in the sense of a large number of women with fewer than 15 years' work) appear to be less of an issue.

²⁰ See Jefferson (2009).

²¹ The (un-weighted) median value of years in paid work in the EU as a whole (but excluding Sweden, Denmark and Finland which do not report this variable in the SILC survey) is 28 years for men, 21 for women, with little change if we average out the single country's median values in lieu of calculating the median at the aggregate EU level. For women, however there is considerable dispersion across countries: from 10 years in Malta and 16 in the Netherlands, to 29 years in the Czech Republic and 30 years in Hungary.

²² If the years worked data were of better quality, or if there could be access to administrative data, it would have made sense to distinguish 'no work' with even a small number of years.

²³ A recent judgment of the Court of Justice of the European Union in Case C-385/11 ruled that Spanish legislation on contributory pensions discriminates against women on account of the higher prevalence of part-time work and is thus contrary to Council Directive 79/7/EEC.

Table 6. Classification of women over 65 according to broken careers status (%)

Country	0-10 years	11 - 14 years	15-median	>median
BE	39.5	3.4	7.9	49.2
BG	1.3	0.5	50.3	47.9
CZ	1.8	0.1	49	49.1
DK	..	..	..	..
DE	18.8	6.1	25.4	49.7
EE	0.8	0.3	57.5	41.4
IE	46.1	4.3		49.6
GR	26	1.3	23.1	49.6
ES	40.4	4.6	5.5	49.5
FR	28.6	4.7	17.6	49.1
IT	29.5	2.8	19.4	48.3
CY	43	3.5	3.9	49.6
LV	1.1	0.2	53.2	45.5
LT	..	..	..	..
LU	43.4	7.2		49.4
HU	9.6	1.9	42.4	46.1
MT	52			48
NL	50.3			49.7
AT	20.7	3.6	25.8	49.9
PL	11.3	1.7	38.3	48.7
PT	12.4	2.3	36.8	48.5
RO	15.4	1.1	35.8	47.7
SI	23.9	0.6	29.2	46.3
SK	4.7	0.5	50.3	44.5
FI	..	..	..	..
SE	..	..	..	..
UK	14.3	11.1	26.1	48.5

Source: Bettio et al. (2013), p.71

It can therefore be concluded that **broken careers appear to be a major issue in explaining gaps in pensions**. In almost all countries, women with a working life of less than 14 years exhibit a significantly greater Gender Gap in Pension income (table 7).²⁴ In Germany for instance, women who had been in employment for less than 14 years appear to have twice as high a Gender Gap in Pensions income (64.1%) compared with women with the 'median' working life (31.8%). The trend is also to be seen in France, Austria and to a lesser extent in Spain. The 'dominant pattern' holds with broken careers being associated with greater pension gaps; as years of employment increase, pension gaps shrink. However, in Bulgaria and in Poland, there appears no significant variation

²⁴ To apply this categorization in order to compute gender gaps for each gradation of broken career and in order to get around the problem that broken careers are an exclusively women's issue, the average pension for women in each broken career category is compared to the overall mean pension for all men. In this way all three computed gender gaps in pension have the same denominator.

across different working life categories. Greece is the main exception where, remarkably, gender gaps are higher for women with the 'median' working life. This extraordinary result may well be an artefact of the fragmentation of the system into occupational categories, each with very different generosity. Portugal is a partial exception since it records the lowest gap among women having spent between 15 years and median years in employment.

Table 7. Gender gaps in pension by broken careers (%)

Country	0 - 14 years	15-median	>median
BE	37.8	43	18.8
BG	34.5	35.2	11.4
CZ	31	13.5	89.6
DK	..	..	..
DE	64.1	48	31.3
EE	14	8.3	-1.4
IE	43.4	..	26.3
GR	28.2	24.2	45.1
ES	39.9	41.8	26.8
FR	56.9	47.4	22.5
IT	41.7	37.9	20.9
CY	52.4	40.5	26.2
LV	12.8	14.4	3.1
LT	..	..	..
LU	59.2	..	33.8
HU	34.1	17.9	7.5
MT	23.4	..	17.3
NL	38.6	..	29.5
AT	50	43.1	21.3
PL	26.9	25.5	19.7
PT	51.3	16.5	40
RO	47.7	32.8	25.1
SI	50.7	31.1	11.5
SK	23	9.6	3.9
FI	..	..	..
SE	..	..	..
UK	50.2	47.3	36

Source: Bettio et al. (2013), p.72

III - Going deep

In order to carry out our evaluation, we include in the analysis some indicators related to the factors impacting on unequal pay. Among them, we consider the **employment structure in terms of educational attainments** (share of women and men with secondary

and tertiary education),²⁵ **occupational structure by macro sectors** (industry, services and public administration), **professional groups** (share of women working as managers), **hours worked** (share of women working part time) and **labour supply factors such as the share of foreign women** (extra EU) in employment. Furthermore, we include some ranking variables in order to control for **institutional and occupational structure of labour market** at national level ²⁶: (see next page)

Educational segregation	Gender gaps in the percentage of the population that has achieved third-level education in selected segregated sectors (Education, Health and welfare, Humanities and art).
Unpaid work	Gender gaps in the proportion of women and men that spend an hour or more every day in caring for and educating children and/or grandchildren, as well as on domestic tasks such as cooking and housework.
Economic power	Gender gaps in the percentage of women and men as members of boards in the largest quoted companies and as members of the central bank.
Gender Mainstreaming	The indicator includes five aspects: status of the governmental commitment to gender mainstreaming in public administration; existence of structures and methods for use in gender mainstreaming; gender impact assessment in law drafting.
Intersecting inequalities: Older workers	Gender gaps in employment rates among older workers (aged 55 to 64).
Intersecting inequalities: Lone parents/carers	Gender gaps in employment rates among people in households consisting of a single adult with one or more children.
Occupational segregation	Share of employed population that would need to change occupation (sector) in order to bring about an even distribution of men and women among occupations or sectors (Karmel and MacLachlan Index).
Status of governmental responsibility in promoting gender equality	Dummy variable based on an indicator that takes into account the highest responsibility for promoting gender equality at the governmental level; the existence and permanence of a governmental body; the position of the governmental gender equality body
Minimum wages	Monthly minimum wage legislation (dummy variable)
Directive transcription	Application of the equal pay directive in practice (dummy variable)

²⁵ The base category is represented by the share of male and female employees with primary level of education.

²⁶ Most of these ranking are computed on the basis of EIGE indexes (EIGE 2013, 2014). Data concerning minimum wages come from Eurostat dataset, while the occupational segregation index has been computed by Bettio and Verashchagina (2009).

Overall, our findings confirm the general evidence on pay discrimination between men and women, but we also find some controversial results concerning the relation between GPG and GGP.²⁷

Factors affecting the gender pay gap over time are diverse, some of which tend to increase GPG (hours worked, education) while others may decrease it (equal subdivision of tasks in care activities, lowering gender gaps in employment rates among people in households consisting of a single adult with one or more children, etc).

At this step of the analysis what clearly emerges is a **decreasing gender pay gap for those countries that have introduced the equal pay directive**.²⁸

In terms of **education**, in most countries workers with better education have on average higher earnings, therefore we should expect that a faster increase in the share of high-educated women in the female labour force should reduce the GPG. **In our analysis, increasing shares of female employees with secondary and tertiary education push up the gender pay gap because major differentials in pay are experienced for high skilled workers and best paid jobs.** We explicitly control for the share of women covering managerial positions. From this point of view, it is not unusual to detect a positive effect on the gender pay gap, namely a worsening of pay differentials, as the literature on the *glass ceiling* currently points out.

Sectoral employment structure has a major effect on pension gaps in fact increasing shares of men employed in education, health and public administration, which are typically “female-oriented” sectors, decrease the gender gap in pensions. By contrast, a higher proportion of female workers in services drives up GGP.

As expected, an increase in the proportion of women **working part-time** pushes up the pension gap, while a higher share of male part-time workers positively impacts on pay gaps.

Finally, **institutional factors** matter. Major pay differentials are detected in those countries characterised by a higher segregation in terms of care activities, which is also reflected in terms of pension gaps. As expected, a worsening position at country level in terms of women’s economic power increases GPG.

Surprisingly, those countries performing worst in terms of gender mainstreaming (status of the governmental commitment to gender mainstreaming in public administration, existence of structures and methods for use in gender mainstreaming and gender impact assessment in law drafting) register lower gender pay gaps. Conversely, political commitment towards gender mainstreaming is reflected on lower pension differentials. The existence of a legislation on minimum wage positively impacts on the gender pay gap indirectly increasing women inactivity in the labour market.

²⁷ Detailed econometric results are available on request.

²⁸ See chapter 1, footnotes 1, 2 and 3; information based on European Commission (2013).

Overall, although there is a connection between pay gaps over the life cycle, namely wages and pensions, we do not always find the same association between causal factors and pay differentials. This effect can be partly due to the difficulty of detecting differences in pay deriving from institutional patterns, which change over time.

Chapter 4 – What next for the EU

Key findings

- The case for taking action on unequal pay is important for women as individuals for equity reasons, for the economic well-being of their children and families, but also for society at large as an improvement of the position of women in the labour market – including pay equality – is crucial for economic growth.
- Tackling the unequal pay is necessarily a long-term objective that requires: i) a combination of a variety of strategies and policies; ii) the involvement of different actors and stakeholders at different levels. A key role for the European Union is to bring together this variety of initiatives and multiple actors involved in promoting equality in the labour market.
- The work for removing unequal pay should be carried on simultaneously and in close collaboration at the European, national, sectoral and organizational level.
- In focusing the work specifically towards removing gender gap in pensions, the European Parliament can play a decisive role: to place the issue on the agenda and, through benchmarking, help to galvanise the type of national initiatives that would be in a position to deal with actions ameliorating the worse effects. As for the European Commission work, once sufficient visibility is given to a benchmarking exercise, the question could be put to each member state to ‘respond’ by explaining and projecting its own national issues.

I - Current opportunities and obstacles to responding to unequal pay

The case for taking action on unequal pay is important for women as individuals for equity reasons, for the economic well-being of their children and families, but also for society at large as an improvement of the position of women in the labour market – including pay equality – is crucial for economic growth. According to OECD (2012), the EU’s GDP could increase by 12% if women and men were truly equal on the labour market. The return to growth depends crucially on achieving pay equality: Del Monte (2013) shows that a decrease of one percentage point in the gender pay gap would bring about an increase of 0.1% in economic growth.

A levelling up of women’s earnings has the potential to bring gains not only in increased revenue from income taxes and national insurance, but also through a reduction in the payment of benefits and tax credits. It would improve the financial wellbeing not only of women but also of their partners and children, and, most importantly, it would reduce the likelihood of women’s poverty in retirement.

The economic case for equality means that social and economic goals around women in the labour market become more closely integrated. This potential is recalled in the recent EP resolution on the “Progress on equality between women and men in the European Union in 2013” (based on the so-called Tarabella report), that stresses the need to ensure equal pay for equal work and to draw full benefit from European workforces and their productive potential.

A commitment to such an approach has the capacity to move equality from being regarded as a cost or a constraint to one where it has an important role in the development of a productive Europe.

II - Recommendations on advancing equal pay

Unequal pay is a complex problem caused by several interrelated factors. One single policy, however carefully designed and effectively implemented, will not be able to produce significant effects if not combined with other complementary policies. This implies that the tackling of the unequal pay is necessarily a long-term objective that requires:

- a combination of a variety of strategies and policies;
- the involvement of different actors and stakeholders at different levels.

The directions for the policies addressing the issue of unequal pay have already been identified by the so-called Bauer report (European Parliament 2012). These directions can be grouped around four key concepts:

- *awareness*: initiatives to increase awareness on the gender pay gap;
- *gender roles*: initiatives to break traditional stereotypes (gender roles in society, in employment, in educational choices);
- *legislative measures*: analysis of costs and benefits of new legislations;
- *promotion of equal pay in companies*: through different actions such as charters, awareness-raising activities and trainings.

There is a lot to learn from the experiences accumulated over time through the strategies and measures implemented at various levels so far.²⁹

A key role for the European Union in the continued fight against unequal pay is to bring together this variety of initiatives and multiple actors involved in promoting equality in the labour market.

The work for removing unequal pay should be carried on simultaneously and in close collaboration at the European, national, sectoral and organizational level (Smith 2010). It could be focused on:

- *setting targets*: creating definite targets would give direction and priority to the goal of closing gender pay gaps (both GPG and GGP);
- *creating obligations*: by creating obligations on organisations to enforce proactive behaviours when complaints of unfair treatment are received;

²⁹ Cfr. Council of the European Union (2010).

- *promoting transparency*: by improving the availability of monitoring tools;
- *developing local leadership*: by involving more and more social partners to combat unequal pay;
- *combatting low pay*: by setting minimum wage systems that could also help in arresting discrimination on the ground of gender.

Table 8 tries to provide an idea of how different actors could contribute to achieving equal pay.

Table 8. Measures for achieving equal pay

	Targets	Transparency	Developing local leadership	Combating low pay	Obligations
European	Relative gender pay gap targets for Member States.	Promote quality and comparable data for all Member States covering all sectors and firms.	Leading the approach to maintain a high profile for the gender pay gap among EU institutions and initiatives.	Promotion of gender-positive effects of minimum wages.	Duty to monitor and coordinate Member State initiatives for equal pay.
National	Specific concrete targets for equal pay. Possible new legislation.	Publish regular, sex-disaggregated wage statistics.	National governments and equality bodies to lead action against pay gaps.	Protection of minimum wage levels and low paid sectors in response to the crisis.	Proactive duty on national bodies to investigate and address inequalities.
Sectoral	Sectoral targets to address specific pay gaps (e.g. public sector).	Use of sectoral gender disaggregated wage statistics to identify key groups.	Social partners campaigning for reduction of sector-level gaps.	Protection of sectoral minimum wage levels and/or promotion to implement or raise levels.	Duty on sectoral bodies to tackle sector-specific gaps.
Workplace	Involve social partners to focus on closing gaps for specific work places or occupations.	Make publicly available organizational level data on pay gaps.	Social partners promoting actions on specific local gaps.	Identification of low paid groups within occupations and workplaces.	Duty on organizational and workplace managers and employee representatives to act against unequal pay.

In focusing the work specifically towards removing gender gap in pensions, it should be taken into account, at first, the lack of visibility and awareness of the problem. This is partly due to the lack of easily accessible national data, but is also aided by the difficulty of benchmarking national situations against a European norm.

In this report, as an extension of the work by Bettio et al. (2013), we uncovered wide gaps in most countries for the period (2006-2012), a wide dispersion of gaps across Europe, but also an overwhelming complexity, especially when trying to relate empirical evidence to causal influences.

It should be now clear that wide gender gaps in pension are the outcome of a series of overlapping factors, some of which are due to unforeseen and unanticipated consequence of policy decisions made in other contexts. It should be also clear that in many, if not most, cases relying on improvements in pay gaps of the working generation to act on gender gaps in pensions would be insufficient.

As stresses by Bettio et al (2013), when a new concern enters policy 'radar screens' (p.115), understanding proceeds in three steps. The first stage is *awareness* – simply to make the issue visible. With the second phase comes *amelioration* – correcting the worse consequences, after the fact. By the third phase, the source of the problem is sufficiently well understood to proceed to *prevention*.

In the case of gender gaps in pension we are still in stage one – visibility of the issue and an ability to grasp its complexity. It is in this first stage that the **European Parliament can play a decisive role: to place the issue on the agenda and, through benchmarking, help to galvanise the type of national initiatives that would be in a position to deal with actions ameliorating the worse effects.**

It is already possible to hint some policy alternatives to those that, by compensating disadvantages, end up perpetuating them. For example, it is important to remove measures encouraging women to leave the labour market early, with the consequent permanent reduction of pensions and increase of the poverty risk of women. Policies that mitigate disadvantages – relying on survivors' pensions, on 'married bonuses' to men's pensions – can also fall in this category. In contrast, policies that attack the root cause of disadvantage, such as credits for child rearing, can be thought to operate towards creating a level playing field between men and women.

As for the European Commission work, once sufficient visibility is given to a benchmarking exercise, the question could be put to each member state to 'respond' by explaining and projecting its own national issues. This kind of structured dialogue has been undertaken with some success in the context of the Open Method of Coordination in pensions as well as in other fields. It is thus something, which the European Commission has fruitful experience to share, and can usefully adapt for this purpose. It should not be forgotten that the main adequacy challenge acknowledged by the *Pension Adequacy Report* (European Commission 2012) is to give future pensions a strong gender dimension.

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Appendix

Table A1. List of sectors included in the analysis of GPG

NACE Rev. 1.1		NACE Rev. 2	
Section	Description	Section	Description
C	Mining and quarrying	B	Mining and quarrying
D	Manufacturing	C	Manufacturing
E	Electricity, gas and water supply	D	Electricity, gas, steam and air conditioning supply
		E	Water supply, sewerage, waste management and remediation activities
F	Construction	F	Construction
G	Wholesale and retail trade; repair of motor vehicles, motorcycles and personal and household goods	G	Wholesale and retail trade; repair of motor vehicles and motorcycles
H	Hotels and restaurants	I	Accommodation and food service activities
I	Transport, storage and communications	H	Transportation and storage
		J	Information and communication
J	Financial intermediation	K	Financial and insurance activities
K	Real estate, renting and business activities	L	Real estate activities
		M	Professional, scientific and technical activities
		N	Administrative and support service activities
M	Education	P	Education
N	Health and social work	Q	Human health and social work activities
O	Other community, social and personal services activities	R	Arts, entertainment and recreation
		S	Other service activities

Table A2. List of EU SILC variables for computing GGP

Old age benefits (PY100G)
<p>The Old age function refers to the provision of social protection against the risk linked to old age, loss of income, inadequate income, lack of independence in carrying out daily tasks, reduced participation in social life, and so on. Old age benefits cover benefits that provide a replacement income when the aged person retires from the labour market, or guarantee a certain income when a person has reached a prescribed age.</p> <p>It includes:</p> <ul style="list-style-type: none"> • Old age pensions: periodic payments intended to maintain the income of the beneficiary after retirement from gainful employment at the standard age or support the income of old persons • Anticipated old age pensions: periodic payments intended to maintain the income of beneficiaries who retire before the standard age as defined in the relevant scheme or in the scheme of reference. This may occur with or without a reduction of the normal pension. • Partial retirement pensions: periodic payment of a portion of the full retirement pension to older workers who continue to work but reduce their working hours or whose income from a professional activity is below a defined ceiling. • Care allowances: benefit paid to old people who need frequent or constant assistance to help them meet the extra costs of attendance (other than medical care) when the benefit is not a reimbursement of certified expenditure. • Survivor's benefits paid after the standard retirement age. • Disability cash benefits paid after the standard retirement age. • Lump-sum payments at the normal retirement date. • Other cash benefits: other periodic and lump-sum benefits paid upon retirement or on account of old age, such as capital sums paid to people who do not fully meet the requirements for a periodic retirement pension, or who were members of a scheme designed to provide only capital sums at retirement. <p>It excludes:</p> <ul style="list-style-type: none"> • Family allowances for dependent children (which are included under 'Family/children related allowances'). • Early retirement benefits paid for labour market reasons or in case of reduced capacity to work (they are included respectively under 'Unemployment benefits' or under 'Disability benefits'). • Benefits paid to old people who need frequent or constant assistance to help them meet the extra costs of attendance when the benefits are reimbursed against a certified expenditure.
Survivor's benefits (PY110G)
<p>Survivors' benefits refer to benefits that provide a temporary or permanent income to people below retirement age who have suffered from the loss of their spouse, partner or next-of-kin, usually when the latter represented the main breadwinner for the beneficiary.</p>

Survivors eligible for benefit may be the spouse or ex-spouse of the deceased person, his or her children, grandchildren, parents or other relatives. In some cases, the benefit may also be paid to someone outside the family. A survivor's benefit is normally granted on the basis of a derived right, that is, a right originally belonging to another person whose death is a condition for granting the benefit.

It includes:

- Survivor's pension: periodic payments to people whose entitlement derives from their relationship with a deceased person protected by a scheme (widows, widowers, orphans and similar).
- Death grant: single payment to someone whose entitlement derives from their relationship with a deceased person (widows, widowers, orphans and similar).
- Other cash benefits: other periodic or lump-sum payments made by virtue of a derived right of a survivor.

It excludes:

- Family allowances for dependent children (These benefits are included under Family/children related allowance.
- Funeral expenses
- Additional payments made by employers to other eligible persons to supplement the survivors' benefits pay entitlement from a social insurance scheme, where such payments cannot be separately and clearly identified as social benefits (those payments are included under 'gross employee cash or near cash income').
- Survivor's benefits paid after the standard retirement age (these benefits are included under 'Old age benefits')

**Regular pensions from individual private plans
(other than those covered under ESSPROS) (PY080G)**

Regular pensions from private plans (other than those covered under ESSPROS) refer to pensions and annuities received, during the income reference period, in the form of interest or dividend income from individual private insurance plans, i.e. fully organised schemes where contributions are at the discretion of the contributor independently of their employers or government.

It includes:

- Old age, survivors, sickness, disability and unemployment pensions received as interest or dividends from individual insurance private plans.

It excludes:

- Pensions from mandatory government schemes.
- Pensions from mandatory employer-based schemes.

Gender equality in employment and occupation

European Implementation Assessment

ANNEX III

Ensuring equal pay and equal access to employment through gender-neutral job evaluation and classification

Research paper

**by Prof. Dr Isabell M. Welp, Dr Prisca Brosi
and Dipl.-Psych. Tanja Schwarzmüller**

Abstract

This research paper analyses the implementation of Directive 2006/54/EC with a focus on job evaluation / classification. Applying research on gender stereotypes, it analyses 1) the current description of gender-neutral job evaluation / classification, 2) the application of gender-neutral job evaluation /classification for increasing female access to employment, decreasing the gender pay gap and improving occupational social security schemes, and 3) current actions of Member States, social partners, and equality bodies in promoting gender-neutral job evaluation / classification. Based on these analyses, recommendations on the enforcement of the Directive and the promotion of gender-neutral job evaluation and classification are provided.

AUTHORS

This study was written by Prof. Dr Isabell M. Welpé, Dr Prisca Brosi and Dipl.-Psych. Tanja Schwarzmüller of the Technische Universität München, at the request of the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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

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Executive summary

Based on psychological and organisational research on gender stereotypes, this research paper analyses the implementation of Directive 2006/54/EC with a focus on gender-neutral job evaluation / classification.

In short, the description of job evaluation / classification currently includes

- The recommendation to use the same job evaluation system throughout the whole company
- Descriptions of job factors and sub-factors
- Descriptions how job factors and sub-factors should be weighed to derive a summary point score which should be connected to pay levels

Against the background of pertaining horizontal and vertical gender segregation, the gender pay gap and gender differences in occupational social security schemes, we provide the following recommendations on how the application of job evaluation / classification can be enhanced.

For **ensuring gender-neutrality of job evaluation / classification**, the description of gender-neutral job evaluation and classification systems in the Directive should be complemented by the following guidelines.

- In each organisation, an *evaluation committee* for conducting job evaluation / classification, which is *mixed-sex, trained, critical and accountable*, should be set up.
- Job evaluations should be made for all positions described by *gender-neutral job titles*, using *clearly defined* sub-factors generated from *structured free recall procedures*. They should be based on *standardized interviews* from various perspectives including both *male and female interviewees*, which should be translated into factor points by *several members of the evaluation committee*.
- Internal and external weighting should be controlled for gender-neutrality by means of a *weighting grid*.
- Job classification should be conducted by *blind assignment of point levels* to job classes (before job evaluation) and *checked* for gender-neutrality.

For **increasing female access to employment**, gender-neutral selection processes can be created by using job descriptions from job evaluation / classification for the following steps in the recruitment and selection process.

- Generation of *objective, behaviourally-based job descriptions*.
- Formulation of *gender-neutral job advertisements*.
- Creation of gender-neutral assessments of participants' competence including *work samples* and *behaviourally-anchored rating scales*.

For **reducing the gender pay gap**, the following steps should be taken in addition to increasing gender-neutrality in the application of job evaluation / classification.

- *Transparency on starting wages* should be increased and the *salience of gender* in pay negotiation processes should be reduced.

- The principles of gender-neutrality for job evaluation / classification should be transferred to *performance-based pay*.
- The notion of “*equal pay for work of equal value*” should include the notion of “*equal pay for equal performance*”.

Governments, social partners and equality bodies in Member States should

- Support the *preventive examination* of gender neutrality in pay schemes.
- Provide *clear and unambiguous guidelines* on the necessary steps to implement gender-neutral job evaluation / classification systems.
- *Governments should establish databases* including (sub-)factors and point ratings for specific jobs and occupations on national level and/or databases should be established on European level by the European Commission.

Recommendations on **strengthening the principle of equal pay through transparency** should include the *transparency of human resource processes*.

Monitoring of the implementation of the Directive 2006/54/EC should include

- *Surveys on the application of job evaluation / classification* in organisations across European countries.
- *Longitudinal examinations* of the implementation in discrete time intervals.
- *Analysis of internal and external weighting* of factors and sub-factors on a national or European level.

1. Concepts and definitions of the Directive 2006/54/EC

In the following we will outline the basic concepts and definitions of Directive 2006/54/EC that are central to this research paper.

1.1 General description of the Directive 2006/54/EC

Directive 2006/54/EC was adopted by the European Parliament and the Council in July 2006. Its primary goal is to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation throughout the European Union.

1.2 Description of gender-neutral job evaluation/classification systems

Directive 2006/54/EC states that job classification systems for determining pay should be based on the same criteria for both men and women to avoid sex-based discrimination. In line with the description of job evaluation / classification included in Commission Staff Working Document SWD(2013)512, the Bauer report and the Commission Recommendations on Strengthening the Principle of Equal Pay between Men and Women through Transparency point out that Member States should promote the development and use of gender-neutral job evaluation / classification¹. These documents recommend making use of analytical job evaluation methods that analyse and weigh different factors for every position. By analysing the same factors for every position, different positions (e.g., male- and female-typed ones) can be compared and adherence to the principle of “equal pay for work of equal value” can be ensured. The Commission Staff Working Document SWD(2013)512 advises to take into account the following four job evaluation factors (including their respective sub-factors): *Skills* (e.g., knowledge, interpersonal skills, problem-solving), *responsibility* (e.g., for people, goods, information, financial resources), *effort* (e.g., mental and psycho-social, physical) and *working conditions* (e.g., physical, psychological, emotional or organisational environment). After having identified the relevant factors and sub-factors, each of them should be weighted by assigning points relative to their importance for the organisation, meaning that the assigned points will be organisation-specific. Two types of weighting are necessary: (1) *external weighting*, determining the relative importance of each of the four factors with regard to the overall evaluation and (2) *internal weighting*, determining the relative importance of each of the different sub-factors with regard to their respective factor. Based on the weighting of factors and sub-factors, each job is assigned a certain number of points. Jobs with similar amounts of points are then classified into groups, which are finally connected to pay levels.

In order to ensure that job evaluation / classification is actually gender-neutral, the Commission Staff Working Document SWD(2013)512 recommends the following: Using the same job evaluation system throughout the whole company and for male- as well as

¹ The Bauer report further recommends training women on job classification, asking sectors and companies to examine if their job evaluation / classification is gender-neutral and asking Member States to carry out assessments focusing on female-dominated professions. These recommendations are not included in the commission recommendations on strengthening the principal of equal pay between men and women through transparency.

female-dominated jobs, including both typically male as well as typically female requirements, evaluating male- and female-typed requirements according to their real value for the organisation, assessing the same requirement only with one instead of multiple criteria, defining requirements as unambiguously as possible and evaluating requirements closely.

In order to evaluate the success of Directive 2006/54/EC, we will follow a quantitative and qualitative approach and analyse six different focus countries (Germany, France, Malta, Latvia, Sweden, United Kingdom) which have been chosen based on several equality-relevant criteria (i.e., vertical and horizontal access to employment, gender pay gap)².

2. Quantitative analysis of the implementation of the Directive 2006/54/EC

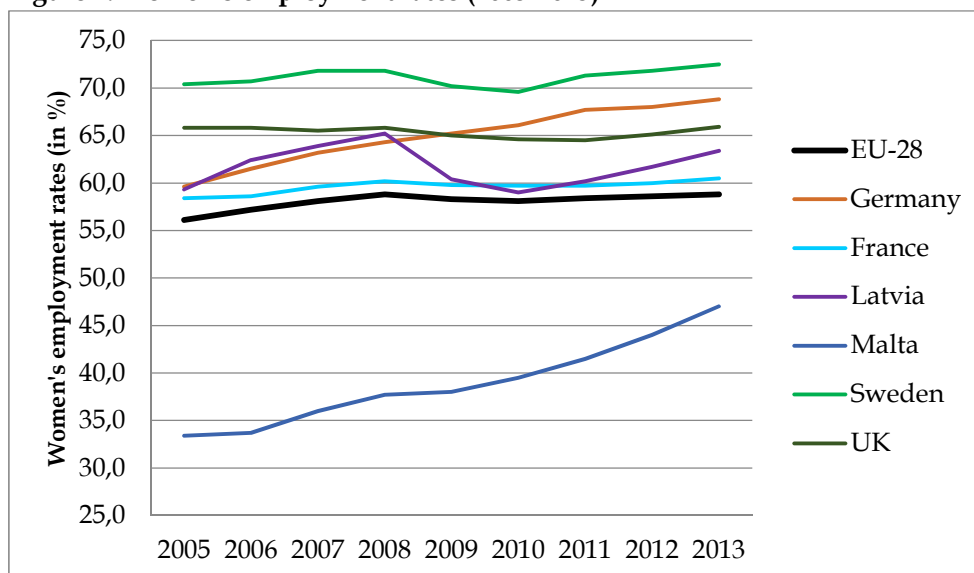
First, we will analyse how access to employment, working conditions and occupational social security schemes have developed in the period from 2005 (before the entry into force of the Directive) to 2013 (newest available data) based on official data from the EU (Eurostat, 2014). Even though developments over time cannot be interpreted in a causal way (e.g., by directly attributing improvements with regard to the gender pay gap to the implementation of the Directive) these data enable us to assess whether the situation in our six focus countries (and the EU as a whole) has improved since the entry into force of the Directive.

2.1 Access to employment

2.1.1 Women's employment rates

Figure 1 shows how women's employment rates have developed over time³.

Figure 1: Women's employment rates (2005-2013)



² For a detailed overview of the methodological approach of this research paper, please see Annex I.

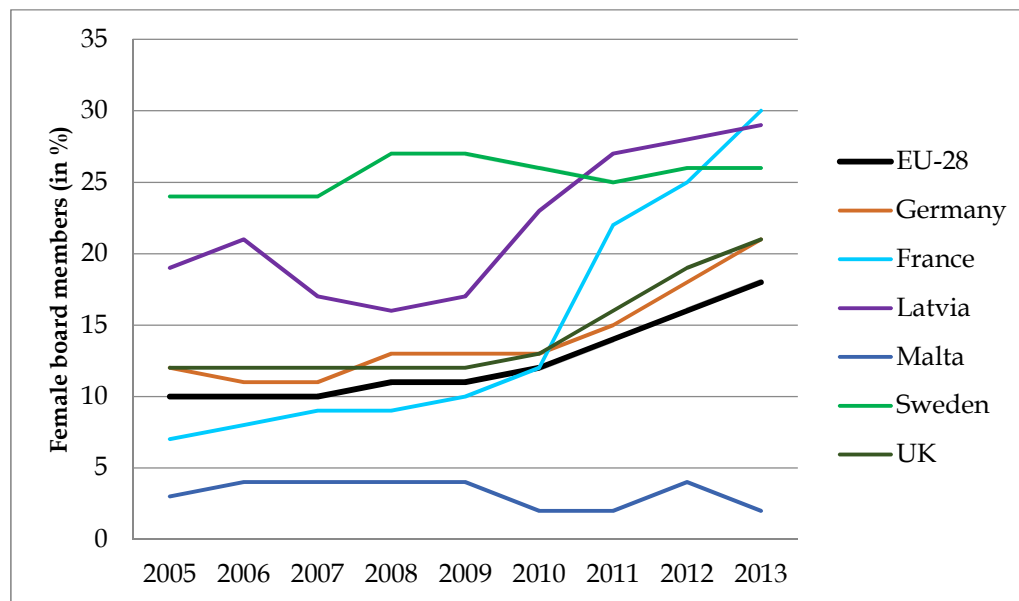
³ Data on EU-level refer to EU-28 if possible; if data for EU-28 are not available, we will refer to EU-27 instead; data include persons aged 15 to 64 years, if not indicated otherwise.

The data indicate that women's employment rates have remained relatively stable over time, with a slightly positive trend in recent years. Women's employment rates have increased most strongly in Malta (13.6 % from 2005 to 2013), whereas there has been a temporary decline of women's employment in Latvia. Sweden and Germany show the highest absolute employment rates for women.

2.1.2 Vertical segregation - Percentage of female board members

Figure 2 shows the degree of horizontal segregation, i.e., the representation of women in high-ranking leadership positions (on corporate boards).

Figure 2: Percentage of women on boards (2005-2013)



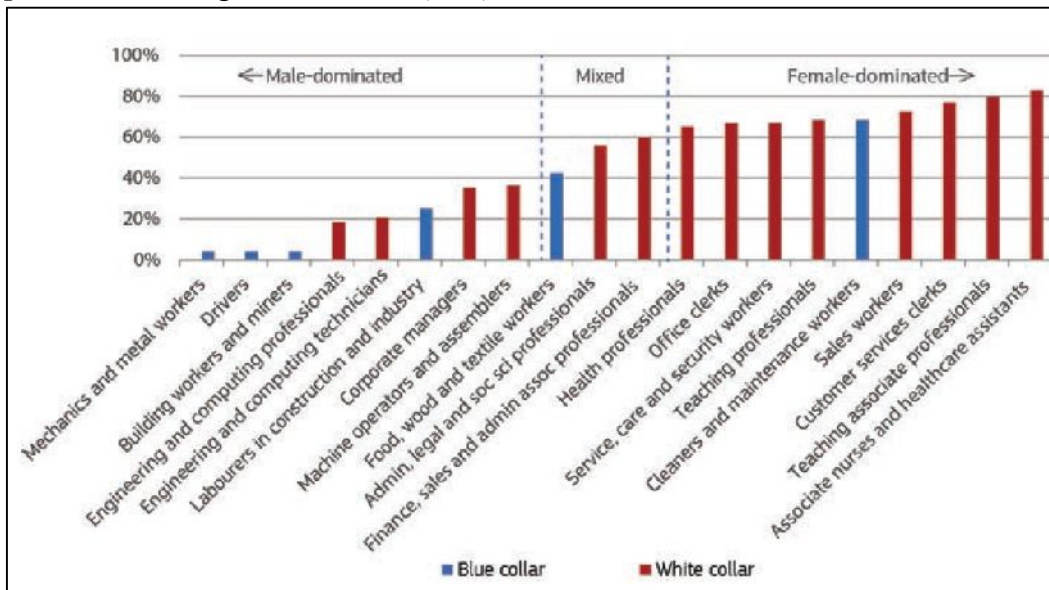
Despite still being below 30%, the percentage of women on boards has substantially increased during the observed time span in all focus countries except for Malta (with the largest increase occurring in France: 23.0 %). Currently, Sweden, Latvia and France have the highest percentage of women on boards.

2.1.3 Horizontal segregation - Employment rates in male- and female-typed domains

Figure 3 displays horizontal segregation of the labour market, i.e., the percentage of women's representation in male-dominated (e.g., mechanic, engineer), neutral (e.g., finance professionals) and female-dominated (e.g., service clerk, nurse) professions throughout the EU-27 in the year 2010 (European Union, 2014)⁴.

⁴ Data on horizontal segregation could not be found on a national level.

Figure 3: Percentage of women in male-dominated, neutral and female-dominated professions throughout the EU-27 (2010)



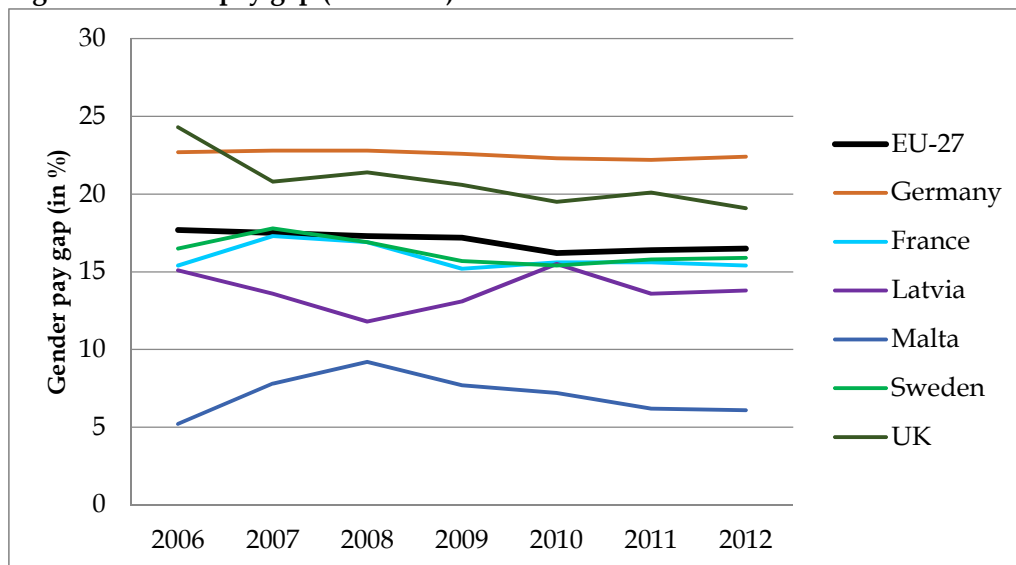
As can be seen from these data, there still is considerable gender segregation in Europe. In total, only 16 % of all employees work in “gender-neutral” (i.e., mixed sex) occupations. Thus, men and women continue to choose or be selected into different jobs.

2.2 Working conditions

2.2.1 Gender pay gap

Figure 4 displays the development of the gender pay gap over time⁵.

Figure 4: Gender pay gap (2006-2012)



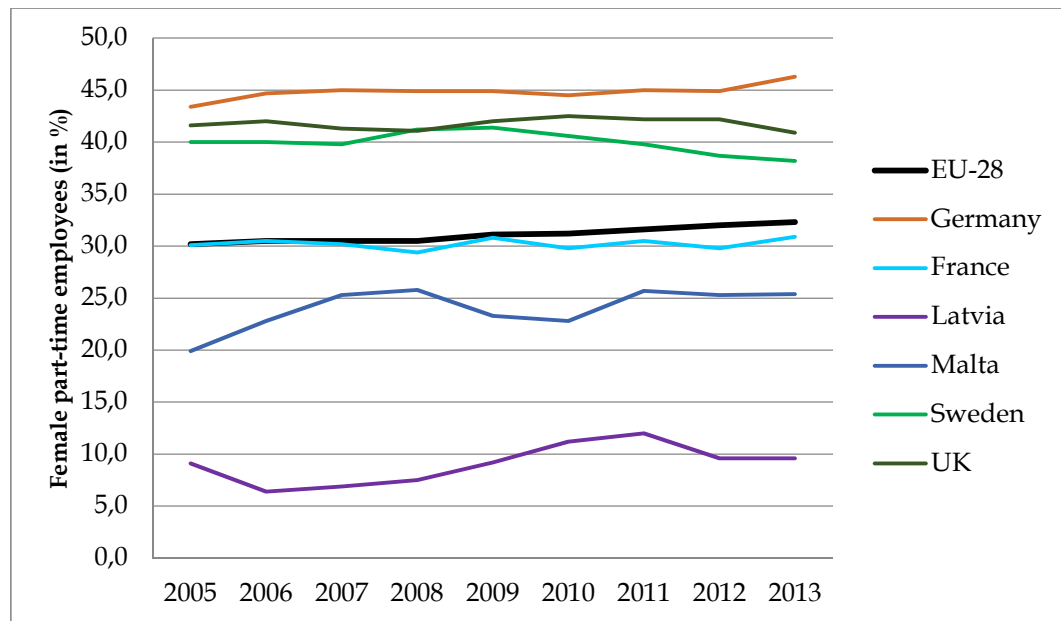
⁵ Data on the gender pay gap are only available for the time span between 2006 and 2012.

As can be seen, the gender pay gap has remained relatively stable over time, with the largest decrease in the UK (5.2 %). The UK and Germany have the highest gender pay gaps of all focus countries, whereas pay differences between the sexes are relatively low in Malta.

2.2.2 Part-time employment

Figure 5 displays the development of women's part-time employment over time.

Figure 5: Percentage of female part-time employees (2005-2013)

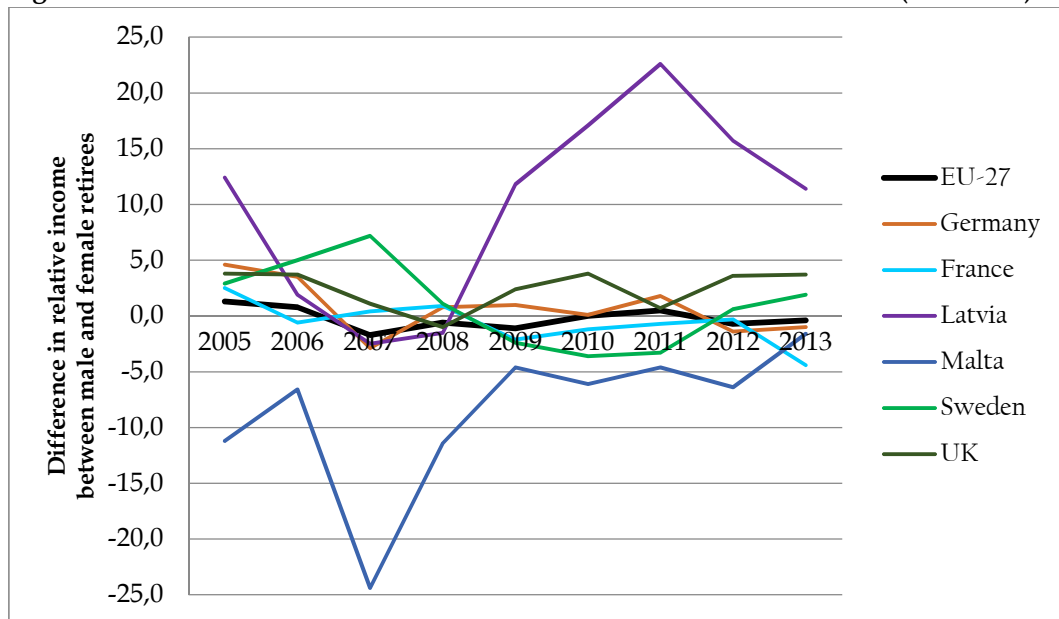


By trend, the percentage of women working part-time has increased over time, with the strongest increase occurring in Malta (5.5%). The percentage of women working part-time is generally highest in Germany and UK.

2.3 Occupational social security schemes

Figure 6 shows the difference in relative income between male and female retirees (persons aged 65 or older).

Whereas in 2005, female retirees were more likely to have a lower income than male retirees in all focus countries except for Malta, this pattern had changed in 2013, when income rates were already more similar between the sexes. Only in Latvia, women today still have a much lower income as retirees than men (11.4 %).

Figure 6: Difference in relative income between male and female retirees (2005-2013)

2.4 Conclusion

The quantitative data outlined above indicate that for the EU as a whole, progress has been made with regard to women's general employment rates, women's representation on boards, and income-differences between men and women in old age. Despite this general progress, especially vertical and horizontal segregation remain on relatively high levels and the gender pay gap still persists. The data also show that there are large differences between the focus countries. Whereas the gender pay gap is currently (as of 2012) still on a high level in Germany (22.4 %), it is way lower in Malta (6.1%). In contrast, whereas all other focus countries have increased the percentage of female board members over the past years, Malta has not made progress in this regard (women's representation on boards remains on a low level: 2.0 % in 2013).

3. Implementation and enforcement of the Directive 2006/54/EC with regard to job evaluation / classification

As outlined above, it is difficult to evaluate the success of the implementation of the Directive on a quantitative basis. Therefore, we will now qualitatively analyse the implementation of the Directive (a) from a scientific point of view and (b) by analysing the activities of relevant stakeholder groups (ministries, equality bodies, trade unions, employer representations) within the specific focus countries.

3.1 Evaluation of job evaluation / classification as described in Commission Staff Working Document SWD(2013)512

In the following sections, we will comment on Commission Staff Working Document SWD(2013)512 accompanying the Commission report on the implementation of Directive 2006/54/EC from the scientific perspective of research on gender stereotypes. The literature defines gender stereotypes as widely shared expectations about the competencies and traits of men and women. Whereas men are usually assumed to be *agentic* (i.e., decisive, independent, forceful), women are seen as *communal* (i.e., nice, caring and sensitive). With these gendered trait ascriptions also come expectations about the social roles men and women are suited for: Whereas men are seen as a good match for high-status roles such as leadership, women are seen as more adept for interpersonal roles such as nurse or teacher (Eagly & Karau, 2002; Heilman, 2001; Schein, 1973, 2001). Thus, expectations about the traits and capabilities of men and women may produce biased evaluations of their respective competencies.

In a similar vein, studies (e.g., Eckes, 2002) have shown that expectations about “typical men” and “career men” are highly similar (with both being characterized by high competence, but only moderate social warmth), whereas expectations about “typical women” and “career women” strongly diverge (with typical women usually seen as high in social warmth, but relatively low in competence, and career women seen as quite competent, but very low in warmth). Thus, by being competent, women lose perceived communality, which in turn often leads to social backlash (e.g., being seen as hostile and therefore being unlikely to be hired or promoted; Heilman, Wallen, Fuchs, & Tamkins, 2004). To sum up, gender stereotypes often lead to indirect discrimination against women.

3.1.1 Benefits of the outlined approach to job evaluation / classification

Several of the measures for gender-neutral job evaluation / classification outlined in the Commission Staff Working Document SWD(2013)512 accompanying the Commission report on the implementation of Directive 2006/54/EC are highly valuable from a scientific point of view. *Analytical approaches* to job evaluation bear less potential for gender biases than non-analytical (i.e., global) ones as they reduce the ambiguity within the job evaluation process. Ambiguity has been reliably demonstrated as a condition fuelling the application of gender stereotypes (Heilman, 2001, 2012). In the same vein, the suggestion of a *clear definition of factors and sub-factors* reduces the ambiguity of the evaluation criteria. Utilising all defined factors for every position in the company and developing only *one job classification system* for the whole company is also in line with scientific recommendations as it avoids shifting standards for different positions (Murtha, 1993). As recommended, different *sub-factors* should *not overlap* (Weiner, 1991) and both *male- and female-typed factors* should be considered in order to avoid overvaluation of male-typed and undervaluation of female-typed jobs (Murtha, 1993). Finally, *gender-neutral job titles* should be chosen in order to encompass both male- and female-typed factors.

3.1.2 Further steps to avoid gender biases in job evaluation / classification

Even though the measures for designing job evaluation / classification systems outlined above provide viable ways to reduce the influence of gender bias, there are additional

aspects on various stages throughout the job evaluation and classification process that should be taken into account in order to ensure gender-neutrality. The main point of improvement from a gender stereotypes perspective is to reduce the ambiguity currently inherent in the process by giving more specific guidelines for implementing gender-neutral job evaluation / classification. These specific details necessary for avoiding indirect discrimination during job evaluation will be outlined below.

3.1.2.1 Establishment of the evaluation committee

Developing a job evaluation / classification system usually starts by establishing an evaluation committee executing the entire process. In order to ensure that there will be no gender biases introduced by the evaluation committee, several aspects have to be considered.

Sex distribution of the evaluation committee: As outlined by a recent meta-analysis, male raters show stronger gender biases than female ones (Koch, D'Mello, & Sackett, 2014). Therefore, it is crucial that the sex distribution of the evaluation committee is balanced. This also carries the advantage of reducing the perceived maleness of the overall setting (Eagly, Karau, & Makhijani, 1995), which might beneficially affect the following process.

Training of the evaluation committee: In addition, the evaluation committee should be trained with regard to gender-neutral job evaluation / classification. As stereotyping is usually an unconscious process (Greenwald & Banaji, 1995) raising awareness about stereotypes is generally important and necessary to motivate subsequent changes of behaviour (Sanchez & Medkik, 2004). Therefore, members of the evaluation committee have to be taught how the influence of gender biases can be avoided in job evaluation / classification (Murtha, 1993). Short but comprehensive checklists (such as provided by Belgium's Institute for the Equality of Women and Men, 2010) that can be handed out to members of the evaluation committee provide a good way of distributing necessary information.

Assigning the role of devil's advocate: As outlined above, biases are unconscious rather than conscious processes (Greenwald & Banaji, 1995). Yet even when people are made aware of their existence, they still tend to have a "bias blind spot" (Pronin, Lin, & Ross, 2002). This means that people are often unable to recognize their own biases - but can see their influence in the evaluations given by others. Therefore, it makes sense to strategically name one or two of the committee's members devil's advocate, whose role it is to critically assess whether processes and criteria are gender-neutral or not.

Enhancing accountability: Finally, the evaluation committee should be made aware of the fact that it will have to justify its evaluation decisions in front of an external party after having completed the process (Brtek & Motowidlo, 2002). Enhancing perceived (and actual) accountability is important as it has been shown to increase raters' motivation to look at decisions carefully and to avoid stereotyping (Koch et al., 2014).

3.1.2.2 Generation of job descriptions

After the evaluation committee has been set up, job descriptions for all the positions in the company need to be developed. In order to do so, factors and sub-factors are selected. Then qualitative information on job positions is obtained for each one of those sub-factors,

on the basis of which ratings on sub-factors for each job position are made. In every step of this process, certain details have to be considered in order to ensure gender-neutrality:

Use of neutral job-titles for all positions: The job-titles of all positions should be framed in a *gender-neutral* way. It is also important to *avoid status-related titles* as these will similarly trigger biased evaluations (so that a 'customer services assistant' might be evaluated as possessing lower overall responsibility than a 'customer services officer'; Equality and Human Rights Commission, 2014; Smith, Hornsby, Benson, & Wesolowski, 1989).

Preselection of factors and sub-factors central to all positions in the company:

As outlined in the Commission Staff Working Document SWD(2013)512, it is important to have a single, company-wide job evaluation system, which encompasses the following factors: Skills, responsibility, effort, and working conditions. Each of these factors has to be further divided into sub-factors, which need to be determined within the job evaluation process. The Commission Staff Working Document SWD(2013)512 outlines that these sub-factors themselves need to be gender-neutral. However, research has already shown that sub-factors usually are not gender-neutral: Whereas for example interpersonal skills are typically seen as female-typed (Heilman, 2012), problem-solving is seen as a rather male-typed skill (Atwater, Brett, Waldman, DiMare, & Hayden, 2004; Martell & DeSmet, 2001). In order to ensure that the selected sub-factors are gender-neutral in sum, it is therefore necessary to include all relevant sub-factors for both male-typed and female-typed factors (Eagly & Karau, 2002).

To do so, *structured free recall* procedures (Baltes, Bauer, & Frensch, 2007; Bauer & Baltes, 2002) should be used when developing company-wide sub-factors. For each factor (e.g., skills), first female-typed (e.g., interpersonal competencies), then male-typed (e.g., analytical problem solving) potential sub-factors should be collected strategically. To ensure that these are representative for all positions in the company, several exemplary male- and female-typed positions ought to be used as examples during this procedure (Weiner, 1991). Such methods would safeguard the implementation of the Commission Staff Working Document SWD(2013)512's advice to take into account both male-typed and female-typed sub-factors.

Once an encompassing list of potential company-wide sub-factors has been developed, it is important to reduce the potential ambiguity of these sub-factors. Each one should receive a *clear definition* in order to avoid evaluators having to rely on their 'gut feeling' when assessing whether it is relevant for a position at hand or not (Heilman, 2012). This definition should break down the rather global sub-factors, which are hard to evaluate (e.g., interpersonal competencies), into more specific behaviours (Flanagan, 1954; Lance, Lambert, Gewin, Lievens, & Conway, 2004). *Examples* for both male- (e.g., negotiating with suppliers) and female-typed behaviours (e.g., calming down upset customers) representing the respective sub-factor should be given (in alphabetical order instead of male-first; Murtha, 1993; Weiner, 1991).

Finally, for each sub-factor, different requirement levels have to be defined. These levels should also be assigned clear labels to facilitate evaluation and reduce ambiguity (e.g., for interpersonal competencies: 1 = *needs to interact only rarely with other people, such as colleagues, customers or suppliers, existing interactions are only of minor importance to the*

company; 7 = successful interaction with other people, such as colleagues, customers or suppliers is extremely frequent and relevant for the company's success; for further examples, please see International Labor Office, 2008, p. 37). To further ensure gender-neutrality, male- and female-typed sub-factors should have the same number of levels (Equality and Human Rights Commission, 2014)

Collecting standardized data for specific positions: To assess specific positions' sub-factor requirement levels, literature on gender stereotypes recommends questioning several persons familiar with the position: Current position holders, their colleagues and leaders (Heilman, 2012; Murtha, 1993). If possible, *both male and female interview partners* should be chosen to ensure a balanced point of view – men and women might talk differently about their positions (Murtha, 1993). To collect the data, *structured interviews or structured questionnaires* ought to be used (for examples, see International Labor Office, 2008, p. 44-47). To restrict the influence of biases, closed-ended questions are the method of choice – even though a preceding thorough search for company-wide sub-factors, as described above, is crucial (Murtha, 1993).

Assessing the degree to which a specific position requires different levels of sub-factors: Finally, based on the answers of the interviewees, the *levels* of the different sub-factors required for a position (described by gender-neutral job titles) should be determined based on the qualitative information retrieved from structured interviews. In order to reduce subjectivity, ratings should be done by several members of the evaluation committee, who should subsequently reach consensus by discussing diverging ratings (Arvey, 1986).

3.1.2.3 Internal and external weighting of factors

After factors and sub-factors have been defined and their position-specific levels have been determined, weighting has to take place. After external weighting, i.e., the determination of the relative importance of each of the four factors with regard to the overall evaluation, internal weighting, i.e., determining the relative importance of each of the different sub-factors with regard to their respective factor, should follow. As outlined in the Commission Staff Working Document SWD(2013)512, this weighting process has to occur in a bias-free way – which is, however, challenging as weighting is a highly subjective process. Nevertheless, there are several means by which indirect discrimination during weighting can be reduced.

Development of a weighting grid: The determined factors and sub-factors need to be assigned points relative to their importance for the mission of the company. Using a total of 1000 points is generally recommended. In order to distribute them, the four main factors first have to be ranked (i.e., how important are skills, responsibility, effort and working conditions for the organisation?). After this first ranking, these factors will be assigned a relative weight (i.e., a percentage). Experts recommend assigning 20% to 35% for qualifications, 25% to 40% for responsibility, 15% to 25% for effort and about 5% to 15% for working conditions. Afterwards, the same procedure (ranking and distribution of percentages) should be repeated for the sub-factors (International Labor Office, 2008, p. 70-72).

Checking the weighting grid for gender-neutrality: As outlined in the Commission Staff Working Document SWD(2013)512, the weighting grid's gender-neutrality needs to be checked. While the Commission Staff Working Document SWD(2013)512 does not state explicitly how this can be done, research suggests the following method: The mean percentages assigned to male-typed versus female-typed sub-factors should be analysed. In case of differences in the weighting of male-typed and female-typed sub-factors (with on average, for example, 15 % assigned to each male, but only 11 % to each female sub-factor), these should be critically questioned and it should be checked whether these can actually be justified (a process that while not eliminating gender bias, does reduce it; International Labor Office, 2008, p. 72-76). This procedure could, e.g., ensure that responsibility for people is rated as highly as responsibility for financial resources (as requested in the Commission Staff Working Document SWD(2013)512 and the Bauer report).

3.1.2.4 Assignment of points to jobs and job classification

After the distribution of points to sub-factor levels has taken place, the final steps of job classification have to be implemented in a gender-neutral way.

Assignment of points to jobs: Based on the specific points just assigned to the sub-factor levels, a point value for each position in the company can be determined (e.g., a secretary might be assigned 342 of 1000 available points; International Labor Office, 2008, p. 76-79). As gender-stereotypes tend to influence the interpretation of available information, this mathematical procedure (summing up points) is an adequate way of reducing the potential effects of biases at this stage (Heilman, in press; McCarthy, Iddekinge, & Campion, 2010).

Job classification: After point values have been assigned to each job, jobs with similar point values will be grouped into classes of similar value – a process called job classification. The design of the job classes offers a lot of ambiguity – and therefore a high potential for biased decisions. Substantiating this notion, research has shown that job classification often only corresponds loosely to the points assigned to specific jobs beforehand (van Sliedregt, Voskuijl & Thierry, 2001). Evaluators might redefine job classes in accordance with gender stereotypes (Uhlmann & Cohen, 2005) – assigning a lower pay class to female-typed jobs and a higher pay class to male-typed jobs, even though the respective number of points assigned to them is actually similar. In order to avoid this redefinition of pay classes and to support the European Commissions' striving for equal pay as expressed in Directive 2006/54/EC, it would be advisable to *assign point levels to job classes before* starting the evaluation process. In addition, it should be checked whether female-typed jobs tend to end up at upper *interval boundaries* whereas male-typed jobs tend to end up at lower interval boundaries as this might indicate biases (i.e., undervaluation of female- and overvaluation of male-typed jobs; International Labor Office, 2008, p. 79).

3.2 Evaluation of job evaluation / classification with regard to access to employment, working conditions and occupational social security systems

3.2.1 Access to employment

Although gender-neutral job evaluation is mainly advocated for reducing the gender pay gap, it can also be the basis for equal access to employment for men and women. In the following, we will outline how results of the job evaluation processes can be applied to enhance gender-neutrality in the personnel selection processes. Additional and more detailed information about gender-neutral personnel selection processes can be found in Welpe, Brosi and Schwarzmüller (2014) and Schwarzmüller, Brosi and Welpe (forthcoming)⁶.

3.2.1.1 Gender neutral job descriptions

Connecting job evaluation with personnel selection processes, the factors and sub-factors developed for all positions in a company need to be translated into very clear, objective job descriptions for personnel selection in a specific position (Viswesvaran, Ones, & Schmidt, 1996).

Developing behaviourally-based job descriptions: To do so, literature has consistently recommended using *behaviourally-based* instead of competency-based *job descriptions* (Flanagan, 1954; Lance et al., 2004). This would mean defining - based on the interviews with current position holders, their colleagues and their leaders conducted during job evaluation - which behaviours characterise someone having high levels of a certain skill (e.g., interpersonal competency) in the specific position to be filled. For a secretary, interpersonal competency might include behaviours such as efficiently calming upset managers or dealing in a friendly and professional way with requests made under time-pressure. In contrast, for a mechanic, interpersonal competency might mean carefully analysing customers' concerns or working together effectively with colleagues when repairing a machine. Thus, developing a clearly defined job description - encompassing all behaviours relevant for successfully filling the open position - reduces ambiguity about the skills required for the position (Heilman, 2012).

3.2.1.2 Designing gender-neutral job advertisements

After having derived a gender-neutral job description, this has to be translated into a gender-neutral job advertisement. Gender-neutral job advertisements reduce the perceived maleness of the position (Gaucher, Friesen, & Kay, 2011), making women more likely to apply for them (Horvath & Sczesny, 2015a) and evaluators more likely to hire them (Horvath & Sczesny, 2015b). Thus, by getting more women into the applicant pool, women's token status is reduced (i.e., high salience due to being one of few women in a group of applicants; Heilman, 1980), especially in male-typed professions. In addition to using the gender-neutral job titles from job evaluation, job advertisements can be made gender-neutral by doing the following.

⁶ Articles available from the authors on request.

Making use of gender-neutral overall wording: Job advertisements can also be made gender-neutral by using *gender-neutral overall wording* (Gaucher et al., 2011).

Gender-neutral overall wording refers to a balanced use of agentic (e.g., “independent, decisive, strategic”) and communal (e.g., “empathic, team, together”) words throughout the job advertisement (Gaucher et al., 2011).

3.2.1.3 Assessments of applicants' competence

A crucial point in personnel selection processes is the assessment of applicants' competence. Thereby, results from job evaluation provide the basis for creating assessments which reduce biases from gender stereotypes.

Designing the right work samples: Studies have consistently shown that having more information about applicants' job-relevant competencies reduces ambiguity and thereby stereotyping (e.g., Heilman et al., 2004). As work samples have been characterized as a good tool to *get individualised information about applicants' work-related competencies* (Blickle, 2011), they should be used in addition to selection interviews. Work samples should be strongly related to results of job evaluations, and should provide the opportunity to evaluate whether applicants are able to show the behaviours identified as necessary for success beforehand.

Use of behaviourally-anchored rating scales: To reduce ambiguity with regard to the evaluation criteria, there should be *behaviourally-anchored rating scales* for each criterion to be judged (Macan, 2009). Thus, which types of behaviour are seen as little versus highly interpersonally competent should be defined and recorded beforehand, based on results from job evaluation. Behaviourally-anchored rating scales should be used for both the assessment of *work samples* and in *highly structured interviews* in which both the questions themselves and their sequence are standardized (Bragger, Kutcher, Morgan, & Firth, 2002). Moreover, all evaluators should be *trained* to ensure a common understanding of the evaluation criteria (Woehr & Huffcutt, 1994).

3.2.2 Working conditions focusing on pay

We will focus on pay within working conditions, because as outlined by the Commission Staff Working Document SWD(2013)512, job evaluation / classification mainly targets at tackling the gender pay gap. For this purpose, its application in the context of working conditions including pay seems to be straightforward: Employees with the same job classification should be assigned to the same pay level.

However, this connection might be more problematic than it seems. Recall that job evaluation builds on factors such as required skills, responsibility, effort and working conditions of the job position. Thus, job evaluation refers to the inputs which are necessary for fulfilling a position. In contrast, organisations often aim to connect pay to the necessary (expected) outcomes, i.e., performance. Specifically, pay fulfils an incentivising effect in organisations, which refers to the impact of pay on employees' motivation in order to increase their performance (Gerhart, Rynes, & Fulmer, 2009). This incentivising effect is used for motivating prospective employees to enter the organisation and for motivating existing employees to exert effort and achieve working

goals. Within the following sections, we will describe why and how these effects appear to be threats to gender equality, and describe potential remedies.

3.2.2.1 Starting pay negotiations

Women are less likely than men to initiate negotiations for starting pay (Babcock, Laschever, Gelfand, & Small, 2003). In consequence, it is not surprising that women have been found to have lower starting pay than men (Gerhart & Rynes, 1991). These gender differences are severe as they have been shown to significantly influence subsequent pay levels (Harris, Gilbreath & Sunday, 2002). Against this background, it has been proposed that women should be trained in negotiation skills (e.g., see the Bauer report) and platforms such as the Austrian wage calculator⁷ aim to create transparency on wages in order to enable women to start pay negotiations. But although these measures are valuable in raising women's awareness about the importance of negotiating their starting pay, research shows that women are confronted with social backlash for initiating pay negotiations (Bowles, Babcock & Lai, 2007; the effect of social backlash is described in section 3.1.). Thus, as long as organisations do not create circumstances which reduce the risk of social backlash for women who start negotiations, these measures will not be effective. In order to create such circumstances, organisations can do the following:

Reduce structural ambiguity: Research shows that reducing structural ambiguity, i.e., enhancing both parties' understanding about the economic circumstances of a negotiation, reduces the influence of gender stereotypes (Bowles, Babcock, & McGinn, 2005). These circumstances relate to factors such as the knowledge of average wages and wage limits. Thus, creating transparency in negotiations about starting pay in terms of average wages and wage limits helps to reduce structural ambiguity. Not only women need this information, especially their negotiation partners should be made aware of it in order to reduce the risk of social backlash.

Reduce the salience of gender: Another factor which increases the probability that initiating a negotiation is followed by social backlash for women is the salience of gender (Kray, Thompson, & Galinsky, 2001). A situational circumstance making gender salient is for example women's token status, i.e., situations in which there are only few women in a group of applicants (Heilman, 1980). Thus, increasing the number of female applicants is not only a desirable outcome itself, but also supports organisations in reducing the gender pay gap.

3.2.2.2 Performance-based pay

Performance-based pay reduces the strength of the connection between job classes and pay, turning job evaluation / classification into a less powerful tool for reducing the gender pay gap. This circumstance has so far been broadly acknowledged (e.g., Equality and Human Rights Commission, 2010) but recommendations on how gender equality can be promoted in performance-based pay schemes are still missing. However, recommendations can be given for increasing gender-neutrality in performance-based pay, which parallel the recommendations for increasing gender-neutrality in job evaluation / classification.

⁷ <http://www.gehaltsrechner.gv.at/>

Reducing gender-stereotypic influences in performance assessments: In general, performance assessments are based either on *behaviour-based criteria*, e.g., supervisor ratings, or *outcome-based criteria*, e.g., productivity, sales volume, and profitability (Rynes, Gerhart & Parks, 2005). Outcome-based criteria are more objective than behaviour-based criteria, but are often not available or do not cover all performance domains of a position. Therefore, many organisations use subjective criteria, which can be influenced by gender stereotypes, resulting in women being judged as performing less well than men (e.g., Joshi, Son, & Roh, in press). A powerful remedy for reducing the influence of stereotypes in performance evaluations is *reducing ambiguity* (Heilman, 2012): *Increasing the quantity and quality of information about performance, increasing the clarity with which performance can be attributed to women and men, increasing the clarity of evaluation criteria, and increasing clarity about the way in which evaluation criteria should be combined to an overall performance assessment* are therefore ways to reduce the influence of gender stereotypes.

Connect performance with performance-based pay: A recent meta-analysis shows that gender differences in rewards (including salary, bonuses and promotions) are fourteen times higher than gender differences in performance assessments (Joshi, Son, & Roh, 2015). This finding highlights the importance of connecting performance-based pay with performance. This principle is further stressed by research showing that leaves or absences, i.e., the usage of family-friendly policies, can lead to long-term consequences in terms of lower salary increases even when controlling for performance (Judiesch & Lyness, 1999). Although this result pertained to men and women, women are more likely than men to make use of gender-friendly policies (e.g., Greenhaus & Powell, 2006). In consequence, especially those measures aiming to support women may backfire, as they might increase the gender pay gap when pay is not firmly connected with performance, such as when managers are given discretion about the allocation of performance-based pay (Rynes, Gerhart & Parks, 2005). Thus, parallel to connecting pay with the results of job evaluations, performance-based pay should be clearly connected with performance criteria.

3.2.3 Occupational social security schemes

In general, it is difficult to make recommendations on social security schemes because of the diverse nature of occupational security systems throughout the Member States (see Burri & Van Eijken, 2014, p. 15-16). Furthermore, job evaluation / classification is usually not directly related to occupational social security schemes, but may indirectly influence occupational social security schemes to the extent that social security schemes are tied to pay. To the same extent, the provided qualitative assessment of the gender pay gap also relates to social security schemes.

4. Implementation of job evaluation / classification in the EU

In order to qualitatively assess the current application of job evaluation / classification in the EU, we will examine the application of job evaluation / classification in organisations, the enforcement of job evaluation / classification by governments, the promotion of job evaluation / classification by social partners and the promotion of job evaluation / classification by equality bodies.

4.1 Implementation of job evaluation / classification in organisations

Comparative analyses of the implementation of job evaluation / classification in organisations are so far scarce. The best data are available for the United Kingdom and show the following points: First, whereas 80% of organisations in the public / voluntary sector make use of formal job evaluation schemes, only about half of the organisations in the private sector (49%) use formal job evaluation schemes (E-reward, 2007). Second, of those organisations using formal job evaluation schemes, 53% use explicitly weighted point-factor schemes and 61% apply progressive (geometrical) scoring systems (E-reward, 2007). Third, across positions, i.e., senior management, middle management, professional, sales, administration or production, about half of respondents judged their job evaluation scheme as ineffective in carrying out the compensation philosophy and/or the purpose of their job evaluation (WorldatWork, 2009). Fourth, job evaluation schemes are widespread in large organisations, but relatively rare in small organisations with fewer than 250 employees (El-Hajji, 2011).

These points provide first indications, but extrapolating from these results to other countries in the EU is difficult, because although job evaluation / classification schemes are well promoted by the government and the equality body in the United Kingdom, the gender pay gap in the United Kingdom is relatively high. In order to provide reliable evidence on the use of job evaluation / classification in organisations across the EU, quantitative research based on primary data collections is necessary.

4.2 Implementation of job evaluation / classification at national level

Overall, two different approaches in which national governments enforce job evaluation / classification could be detected. A first approach includes the definition of criteria for job evaluation / classification such as the complexity of work, responsibility, physical and psychological strain, working conditions, efficiency, experience, skills, qualification and comparable work results. This approach is applied in countries such as the Czech Republic, Hungary and Slovenia (Burri & Van Eijken, 2014). A second approach refers to the definition of gender-neutral processes for job evaluation / classification. Thus, instead of specifying concrete criteria, this approach targets at specifying how job evaluation / classification needs to be conducted in order to deliver gender-neutral results. This approach is for example applied in Belgium (Institute for the Equality of Women and Men, 2010).

For the focus countries, we examined the level of collective bargaining, as collective bargaining often determines the preconditions for legislation, legislation itself – particularly with regard to the definition of equal pay and equal work – as well as additional activities by the government, which are reported to support the enforcement of job evaluation / classification.

4.2.1 Germany

In Germany, wage bargaining is centralised on a medium level; thus, bargaining mainly takes place on a sector or industry level (Eurofound, 2014a). Furthermore, union concentration is exceptionally high in Germany (Eurofound, 2014a). Due to the way in which autonomy of collective bargaining (freedom of coalition) is defined in the German

Constitution, the Federal Labour Court decided that the evaluation of work and the establishment of systems of pay are crucial parts of this autonomy, in which the State must not interfere (Burri & Van Eijken, 2014). Thus, most wages and job evaluation / classification systems are set under the Act on Collective Bargaining (Tarifvertragsgesetz), which does not include provisions on equal pay (Burri & Van Eijken, 2015). Furthermore, the General Act on Equal Treatment includes a general prohibition of discrimination, but no definition of equal pay. Neither are concepts of pay and work of equal value defined in statutory legislation. Likewise, the AGG (Allgemeines Gleichbehandlungsgesetz) does not refer to equal pay but includes a general prohibition of discrimination (Burri & Van Eijken, 2014).

In collaboration with the major German employer associations, the German government provides tools for the implementation of gender-neutral pay, which include some of the principles of gender-neutral job evaluation / classification.

4.2.1.1 Logib-D

Logib-D is an analytical tool which supports organisations in detecting gender-disparity in their pay structures⁸. The tool analyses the gender pay gap while controlling for age, tenure, education, and working time. In addition, gender-disparity on ratings of demand level (ranging on a 6-point scale from simple and repetitive tasks to demanding and complex tasks) and job position (ranging on a 6-point scale from no leadership responsibility to top-level leadership responsibility) can be examined. Data is provided for individual employees. Thus, Logib-D is a very useful tool for examining if gender inequalities exist. However, it does not provide support in detecting the root causes of gender-disparities and is not connected with job evaluation / classification.

4.2.1.2 Eg-check.de

Eg-check provides three tools for detecting gender-inequality in pay: 1) structures for aggregating data, 2) questions for detecting discriminating rules, and 3) criteria for the direct comparison of jobs⁹. The last tool applies criteria for job evaluation / classification as pay is examined in relation to criteria such as knowledge and abilities, psychosocial competencies, responsibility and physical demands. However, jobs are evaluated on an individual level comparing a male employee with a female employee – a method which can bias ratings of criteria, criteria are only broadly defined, providing ambiguity that furthers the influence of stereotypes, and the tool is designed to examining discrimination claims; thus, it is reactive rather than designed for supporting the preventive examination of pay schemes.

4.2.1.3 Abakaba

In order to facilitate the application of gender-neutral job evaluation / classification, Abakaba (Analytische Bewertung von Arbeitstätigkeiten nach Katz und Baisch) provides a catalogue of specific criteria which are clustered within an intellectual area, a psychosocial area, a physical area and responsibility (Katz & Baisch, 1996). The criteria include work demands and impairments and are additionally rated with regard to their

⁸ www.logib-d.de/startseite

⁹ www.eg-check.de/html/278.htm

frequency (Katz & Baisch, 1996). Based on Abakaba, the diagnostic tool VIWIV (Verdiene ich, was ich verdiene?) is provided, which aims to support the evaluation of pay discrimination on an individual level (Katz & Baisch, 1996). Thus, VIWIV provides job evaluation / classification for a reactive examination, but does not support the preventive examination of pay schemes.

4.2.2 United Kingdom

In the United Kingdom, wage-bargaining is highly decentralised as it takes place on a local or company level and shows a low level of coordination (Eurofound, 2014a). Legislation is driven by a comparator approach in equal pay cases, specifying that a comparator is a person of the opposite sex who is employed by the same employer in the same establishment, or one for whom broadly similar terms and conditions apply (Burri & Van Eijken, 2015). Thereby, legislation refers to like work (i.e., same or broadly similar work), work of equal value (i.e., different work of equal value in terms of factors such as effort, skill and decision-making), and work rated as equivalent (i.e., different work rated under the same job evaluation scheme) as being work of equal value (Burri & Van Eijken, 2014). Thus, legislation specifically refers to job evaluation and further details that job evaluation must be thorough, analytic, based on jobs (instead of the person who is currently doing the job), and non-discriminatory in criteria and weighting. In line with those specifications, United Kingdom shows a high level of activities for promoting gender-neutral job evaluation / classification to employers.

4.2.2.1 Job evaluation for civil servants

For civil servants, the government published a practical guide including job evaluation and grading support¹⁰ and a specific guide focusing on job evaluation of senior posts¹¹. Both practical guides provide guidance on processes for gender-neutral job evaluation including checklists and templates for job evaluation. The concrete process steps suggested are 1) qualitative interviews with post-holders and managers, 2) scoring of anonymised job profiles by two evaluators, and 3) formal sign off of the resulting job evaluation by a senior manager. The general guide includes the following factors for the job evaluation: Problem solving, decision making, autonomy, management of resources, and impact in addition to asking for required skills and experience and the guide for senior posts specifies managing people, accountability, judgment, influencing and professional competence as factors for job evaluation.

4.2.2.2 Think, act, report¹²

In addition, the United Kingdom has launched a voluntary initiative with the aim to promote transparency on gender equality. This initiative promotes the identification of issues around gender equality by collecting and considering relevant data (*think*), taking steps to address the identified issues (*act*), and creating transparency on the actions which are taken (*report*). Although this framework does not explicitly refer to job evaluation and

¹⁰ <https://www.gov.uk/government/publications/job-evaluation-and-grading-support-jegs-for-civil-servants>

¹¹ <https://www.gov.uk/government/publications/job-evaluation-for-senior-posts-good-practice-guide>

¹² <https://www.gov.uk/government/policies/creating-a-fairer-and-more-equal-society/supporting-pages/think-act-report>

job classification, it recommends narrative descriptions of the organisation's approach and actions to promote gender equality in addition to quantitative workforce and pay measures. With job evaluation and job classification being one of those recommended approaches, the initiative indirectly promotes reporting of job evaluation / classification and therefore increases transparency on its use.

4.2.3 Sweden

Sweden is characterised by highly coordinated bargaining on the sector or industry level. Thus, there is an informal centralisation of bargaining by monopolistic and powerful union confederations with or without government involvement (Eurofound, 2014a). Chapter 3 of the 2008 Discrimination Act defines the concept of equal pay in the following way: "Work is to be considered equal in value to other work if, based on an overall assessment of the nature of the work and the requirements imposed on the worker, it may be deemed to be of similar value. Assessments of work requirements shall take into account criteria such as knowledge and skills, responsibility and effort. When the nature of the work is assessed, particular regard shall be taken of the working conditions" (Burri & Van Eijken, 2014). In addition, Swedish companies are obliged to monitor pay practices in the workplace and to regularly present surveys, analyses and action plans for equal pay (e.g. Burri & Van Eijken, 2015).

In all likelihood facilitated by the high level of centralisation, gender-neutral job evaluations are reported to be often included in the framework of collective agreements based on the following four criteria: Knowledge and experience, degree of effort, responsibility and working conditions. In addition, factors such as physical and mental stress, competence, degree of independence, planning, and decision making can be taken into account¹³.

4.2.4 France

According to Eurofound (2014a), France is characterised by collective bargaining at the sector or industry level, with low levels of coordination. For equal pay for men and women, the Labour Code provides the definition "for the same job or a job of equal value" (Burri & Van Eijken, 2014), whereby pay is defined in line with Article 157 TFEU (Burri & Van Eijken, 2014) 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"¹⁴. The 2006 Act on Equal Pay between Women and Men requires compulsory annual bargaining of wages and other advantages in cash or in kind for organisations with more than 50 employees, which are required to deal with equality. In order to ensure that negotiations cover gender equality, specific and quantitative information on gender equality must be provided covering recruitment, qualifications, work-life balance, training, and pay (Commission Staff Working Document SWD(2013)512). The social partners are also obliged to establish instruments that measure equality in pay; afterwards, they have to report on the progress made on a yearly basis (Burri & Van Eijken, 2015). Furthermore, sanctions are imposed on

¹³ http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/job-evaluation/index_en.htm

¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

organisations which do not conclude agreements on gender equality (Burri & Van Eijken, 2014). Finally, legislation specifies that evaluation criteria must not lead to discrimination and take into account all relevant skills. In case of discrimination identified, the evaluation criteria will be corrected. With regard to additional activities, the government provides a diagnostic framework for detecting gender differences.

4.2.4.1 Diagnostic Égalité Professionnelle¹⁵

The diagnostic framework for detecting gender differences roughly examines the gender pay gap for different employee groups differentiated between workers, employees, supervisors, and technical specialists. Apart from this rough classification, it does not provide additional job evaluation criteria for the examination of the gender pay gap.

4.2.5 Latvia

In Latvia, wage bargaining takes place on the local or company level and is characterised by a low level of coordination (Eurofound, 2014a). Although there are some sectors of industry with generally binding collective agreements such as construction, medicine or the railways, these do not specifically deal with issues concerning gender equality. Employers are generally obliged "to define equal pay for men and women for the same work or work of equal value" (Burri & Van Eijken, 2014). However, there are no legislative acts to define such concepts as "equal work" and "work of equal value" (Burri & Van Eijken, 2015). Deviating from EU law, pay is defined as "regularly paid remuneration for work, which also includes bonuses and other kinds of remuneration in connection with employment as provided by normative acts" (Burri & Van Eijken, 2014). Furthermore, there is no case law dealing with issues such as justifications for differences in pay (Burri & Van Eijken, 2014). Additional activities by the government could not be detected.

4.2.6 Malta

Malta is characterised by wage bargaining on the local or company level and shows a low level of coordination (Eurofound, 2014a). Equal pay is defined in line with Article 157 TFEU and Recast Directive 2006/54/EC (Burri & Van Eijken, 2014). However, neither the Employment and Industrial Relations Act nor the Equality for Men and Women Act define the concept of "work of equal value" (Burri & Van Eijken, 2015). Legislation clearly transfers the obligation to ensure equal treatment in pay for equal work to employers (Burri & Van Eijken, 2014). Further activities by the government could not be detected.

4.2.7 Summary

With the differences in definitions of pay and equal pay across Member States and resulting consequences being discussed in detail elsewhere (Burri & Van Eijken, 2013), the following points focus on the enforcement of job evaluation / classification. First, the general enforcement of job evaluation / classification is so far relatively low; only the United Kingdom could be found to promote job evaluation / classification both

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www.cite.gov.pt/asstscite/downloads/dispsalariats/Exemple_de_tableau_Diagnostic_Egalite_Professionnelle.pdf

internally for public organisations and externally for private organisations. Second, there are preventive instruments which are valuable for detecting the gender pay gap in organisations. Yet, these instruments do not apply principles of job evaluation / classification and do not allow for the analysis of the mechanisms which lead to the gender pay gap. Thus, they are valuable for detecting if there is a gender pay gap, but they are less valuable for identifying measures to reduce it. Third, there are instruments which apply job evaluation / classification themes, but do this in a reactive manner serving primarily as analytical tools for examining discrimination claims. Thus, these instruments are not helpful for examining pay schemes preventively and likewise not valuable for the analysis of the mechanisms which lead to the gender pay gap. However, analysing these would be necessary in order to take corrective measures before litigation.

4.3 Promotion of job evaluation / classification in the social dialogue

As the Directive has outlined the crucial role of social dialogue (employer representations and trade unions) for the implementation of the Directive, we will now analyse the social dialogue about the equality of pay and gender-neutral job evaluation / classification in Europe as well as in the focus countries.

4.3.1 Social dialogue on a European level

4.3.1.1 Employer representations

On a European level, the main employer representations, i.e., *Businesseurope*, *UEPME*, and *CEEP*, prioritise addressing gender roles, promoting women in decision-making, supporting work-life balance and tackling the gender pay gap to promote gender equality. Within tackling the gender pay gap, employer representations commit themselves to ensure that pay systems, including job evaluation, are transparent and gender-neutral (*Framework of actions on gender equality, 2009*). Furthermore, *Businesseurope*, *UEPME*, and *CEEP* have established a toolkit¹⁶ for gender equality in practice including 100 exemplary initiatives for promoting gender equality. Searching this database for job evaluation and job classification provides two results:

- The European Federation of Public Service Unions refers to training courses on equal pay including gender-neutral job evaluation¹⁷
- *Merkur*, a Slovenian retailer, refers to a system of job classification which includes roles, competences and standards of responsibilities¹⁸

Thus, except from these two examples, best practice examples and concrete guidelines on job evaluation / classification are still largely missing on a European employer representation level.

¹⁶ <http://erc-online.eu/gendertoolkit/#/>

¹⁷ http://erc-online.eu/gendertoolkit-etuc/wp-content/uploads/sites/2/2014/05/European-Federation-of-Public-Service-Unions-EPSU_Europe.pdf

¹⁸ http://erc-online.eu/gendertoolkit-etuc/wp-content/uploads/sites/2/2014/08/Merkur_Slovenia.pdf

4.3.1.2 Trade Unions

Compared to employer representations, European level trade unions have focused more specifically on tackling the gender pay gap and in this vein also on gender-neutral job evaluation / classification. The ETUC (Confederation Syndicat European Trade Union) has e.g., published a comprehensive document called “Bargaining for Equality”¹⁹ in five different languages. This document aims at reducing the gender pay gap via collective bargaining and also deals with the topic of gender-neutral job evaluation / classification (Pillinger, 2014). However, it does not give specific guidelines on these topics but rather cites initiatives by national trade unions to implement gender neutral job evaluation / classification. The EPSU (European Federation of Public Service Unions) argues for enhancing the transparency of pay²⁰ and does comprehensive surveys on the gender pay gap and initiatives to reduce it in public services²¹. Within these surveys, it also deals extensively with gender-neutral job evaluation. Additionally, it offers workshops for gender-neutral job evaluation / classification.

4.3.1.3 Summary

Although European-level employer representations are a strong force in promoting social dialogue on gender equality in general, only trade unions have so far engaged in very specific activities focusing on gender-neutral job evaluation / classification systems on a European level. It therefore would be very valuable if European-level employer representations would become more involved as well.

4.3.2 Social dialogue on a national level

On a national level, a recent study on the work of social partners on gender equality in Europe concludes that whereas trade unions often have an equality body and a specific action plan for gender equality, employer representations usually do not (Eurofound, 2014b, p. 2). The study further shows that there are clear differences between countries regarding the priority given to achieving gender equality and the way in which social partners aim at increasing gender equality. In the Eastern European and Baltic states, the social partners are mainly involved through formulating laws, strategies and policies by tripartite dialogue with national governments. In the Nordic and Benelux countries and to some extent also in France, Germany and Italy, collective bargaining is used. Independently from different social dialogue systems, i.e., decentralised collective bargaining systems such as in Cyprus, Malta and the UK, or more centralised ones such as in Denmark, Finland, Norway and Sweden, well-developed gender equality activities are reported among social partners (Eurofound, 2014b, p. 2).

Within the following, the concrete results for the six focus countries are presented including the general pattern of activity and specific activities on gender-neutral job evaluation and job classification.

¹⁹ www.etuc.org/publications/bargaining-equality#.VNyohC5qIQu

²⁰ www.epsu.org/a/7421

²¹ www.epsu.org/r/580

4.3.2.1 Germany

Overall, social partners have relatively well-developed activities on gender equality issues in Germany. All national trade unions and all or some employer representations possess external action plans and strategies, i.e., action plans that aim at promoting gender equality in the labour market and society (Eurofound, 2014b, p. 13). The necessity of a new pay and grading system without discrimination has been recognized due to protests by workers in municipal social and child care services and negotiations on this matter are planned by the respective social partners (Pillinger, 2014).

Unions: The large German trade unions all engage in activities for reducing the gender pay gap. In order to do so, the IG Metall for example promotes transparency of pay and gender-neutral job evaluation²² (but without giving explicit guidelines for implementing these). To reduce discrimination against women, IG Metall has enforced that physical requirements must not be taken into account anymore during job evaluation / classification²³. The dbb, representing Germany's civil servants, is relatively active with regard to gender-neutral job evaluation: In conferences dealing with equal pay, the dbb has repeatedly addressed the topic of gender-neutral job evaluation and possible tools for reaching it²⁴. In addition, the dbb has proposed that female-typed competencies such as interpersonal skills, which are so far not used for civil servants' job evaluation, should be taken into account²⁵ and has published an elaborate brochure on equal pay specifically focusing on gender-neutral job evaluation²⁶. In addition, both trade unions Ver.di and the DGB request equal pay for equal work.

Employer representations: Employer representations are partnering with the German government. In 2001, the German government, the Bundesverband der Arbeitgeber (BDA), the Bundesverband der Deutschen Industrie (BDI), the Deutsche Industrie- und Handelskammer (DIHK) and the Zentralverband des Deutschen Handwerks (ZDH) signed a contract for the promotion of equal opportunities for women and men in the private industry. The contract stipulates that employer representations recommend measures to organisations to promote equal opportunities, work-family balance, increase of women in leadership positions, and the education of young women for future-oriented apprenticeships and studies. By now, the employer representations have published their fifth report on equal opportunities and the progress of activities agreed in this contract, which includes progress in the fields of education, employment, work and family, women in leadership positions and fair pay. Within the field of fair pay, Logib-D is mentioned as well as measures on re-entry in employment and the equal pay day, yet job evaluation and job classification are not explicitly mentioned. The BDA, for example, explicitly negates the existence of gender-based differences in job evaluation and classification²⁷.

²² www.igmetall.de/entgeltgerechtigkeit-fuer-frauen-11302.htm ; www.igmetall.de/equal-pay-day-2014-13372.htm

²³ www.igmetall.de/internet/internationaler-frauentag-interview-helga-schwitzler-3728.htm

²⁴ www.dbb.de/cache/teaserdetail/artikel/fachbroschuere-der-dbb-bundesfrauenvertretung-was-ist-frauen-arbeit-wert/archivliste/2013/Juni.html

²⁵ www.dbb.de/fileadmin/pdfs/2013/130121_leitantrag_gerechte_bezahlung.pdf

²⁶ www.frauen.dbb.de/publikationen/geschlechtergerechte_leistungsbezahlung.pdf

²⁷ www.arbeitgeber.de/www/arbeitgeber.nsf/id/de_mythos-entgeltdiskriminierung

4.3.2.2 United Kingdom

Social partners are classified as having relatively well-developed activities on gender equality issues; all national trade unions and some employers' organisations have external action plans and strategies (Eurofound, 2014b, p. 13). In addition, a coalition between trade unions and employer representations (the National Joint Council for Local Government in England and Wales, NJC) has developed its own, very detailed guidelines on job evaluation and classification²⁸. The social partners in UK's health sector have negotiated the so called 'Agenda for Change', involving a job evaluation of all grades in the health sector²⁹. In this realm, they have developed the extensive 'NHS job evaluation handbook', giving very specific information on developing (gender-neutral) job evaluation systems³⁰.

Unions: Unite has initiated the 'PAY UP!' Equal Pay campaign in order to reduce the gender pay gap. Moreover, it has developed the "Fair Pay and Equality Audit Checklist"³¹ that also gives guidelines on gender-neutral job evaluation / classification. UNISON, the public service union, also strives for defending the 'Agenda for Change'³² and negotiates with employers to create fair and equal pay grading structures for members³³. Similar attempts have been made by GMB (EPSU, 2013).

Employer representations: The Confederation of British Industry (CBI) mainly promotes measures on greater transparency, stronger advocacy and widening the talent pool (CBI, 2015), whereas the British Chamber of Commerce promotes shared parental leave, measures on recruitment, age equality, and the promotion of the "think, act, report" initiative of the British Government in an event series. Job evaluation / classification schemes were not specifically mentioned.

4.3.2.3 Sweden

Social partners have relatively well-developed activities on gender equality issues; all national trade unions and all or some employers' organisations have external action plans and strategies (Eurofound, 2014b, p. 13). According to a Swedish expert, Swedish social partners are generally engaged in the debate about equal pay for work of equal value, yet usually do not deal with gender-neutral job evaluation and classification in specific.

Unions: During the collective bargaining campaign in 2013, the LO worked explicitly to tackle the gender pay gap between sectors dominated by women and men (Eurofound,

²⁸

www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCYQFjAB&url=https%3A%2F%2Fwww.atl.org.uk%2FImages%2FGreen%2520book.pdf&ei=2FoIVY3rI6zX7QaHjYCwDg&usq=AFQjCNGj1n4awjxf3xZvgWUDP0vf7yfQ&sig2=PA9T6xoYHNkBnp3qjSt1zA&bvm=bv.88198703,d.ZGU

²⁹ www.nhscareers.nhs.uk/working-in-the-nhs/pay-and-benefits/agenda-for-change-pay-rates

³⁰

www.nhsemployers.org/~media/Employers/Publications/NHS_Job_Evaluation_Handbook.pdf

³¹ www.unitetheunion.org/unite-at-work/equalities/equalityrepstoolkit

³² www.unison.org.uk/at-work/health-care/key-issues/defending-agenda-for-change/the-facts

³³ www.unison.org.uk/get-help/pay/grading-claims/overview

2014b). Unionen SE and SACO also deal with the equality of pay³⁴. Insular unions seem to have implemented job evaluation based on objective and analytical criteria (Pillinger, 2014).

Employer representations: Despite the positive evaluation by Eurofound (2014b), information on gender equality activities by Svenskt Näringsliv, Svensk Industriförening and Arbetsgivaralliansen was scarce, indicating a focus on internal activities and no information on job evaluation / classification could be found.

4.3.2.4 France

Social partners have relatively well-developed activities on gender equality issues; all national trade unions and all or some employers' organisations have external action plans and strategies (Eurofound, 2014b, p. 13). Activities on job evaluation / classification of social partners are supported by legislation which explicitly refers to job evaluation / classification.

Unions: Trade unions have the goal of increasing the value of female work. In 2004, they developed a job evaluation grid in order to assess the equivalence of male and female work. They have pointed out that typically female competencies must not be undervalued. CFDT has for example suggested that gender-neutral criteria should be used to develop job evaluation / classification systems. Furthermore, CFDT plans to develop a method for detecting the existence of possibly discriminating criteria in job evaluation systems (Pillinger, 2014). CGT Mines Énergie has proposed that the grading of female-dominated occupations should be reviewed, however, this proposal has so far remained without success (EPSU, 2013).

Employer representations: The UNAPL, the Medef and CGPME promote a broad set of measures including work-family balance, tackling stereotypes in education, gender roles, quotas for supervisory boards, promoting women in decision making and tackling the gender pay gap. The Medef particularly highlight the responsibility of management for equal pay and career opportunities; but job evaluation and job classification are not mentioned explicitly.

4.3.2.5 Latvia

According to Eurofound (2014b, p. 13) and a national Eurofound expert for Latvia contacted in the realm of this study, gender equality is not a stated priority of social partners and no specific policy commitments have been developed by social partner organisations. Furthermore, neither trade unions nor employers' organisations have external action plans and strategies (Eurofound, 2014b).

Unions: No information on gender equality-related issues could be found on the websites of Latvian unions (e.g., the Free Trade Union Confederation of Latvia).

Employer representations: No information could be found on gender equality measures on the websites by LTRK, the Association of Mechanical Engineering and Metalworking Industries of Latvia and the Latvian Federation of Food Companies. The Latvian

³⁴ www.unionen.se; www.saco.se/vara-fragor/jamstalldhet/jamstallda-loner-kostar-36-miljarder

Employers' Confederation analyses the general topic of gender equality in working conditions by conducting surveys (Eurofound, 2014b).

4.3.2.6 Malta

Overall, the activities of social partners on gender equality issues are classified as relatively well-developed, but neither trade unions nor employers' organisations have external action plans and strategies (Eurofound, 2014b).

Unions: The Confederation of Malta Trade Unions provides information on the Equal Pay Day, but does not explicitly target job evaluation³⁵. For more information, it links to the homepage of the European Commission.

Employer representations: No information could be found on measures regarding gender equality on websites by the Malta Chamber of Commerce, Enterprise and Industry, the Malta Federation of Industry and the Malta Employers' Association.

4.3.2.7 Summary

The outlined results indicate that across countries, unions are more strongly promoting job evaluation / classification than employer representations. Furthermore, there are strong differences in the degree to which the social partners in the different Member States engage in measures to promote equal pay and gender-neutral job evaluation and classification. Whereas France and the UK are highly involved in this issue and provide some very specific guidelines for implementation, other Member States' actions are not this advanced. Whereas German unions and employer representations deal with the topic of equal pay, specific recommendations for the implementation of job evaluation / classification are largely lacking. Gender-neutral job evaluation and classification do not seem to play a role in the social dialogue in Malta and Latvia.

4.3.3 Promotion of job evaluation / classification by equality bodies

In order to ensure equality and fairness for all groups within a Member State, all EU Member States have established equality bodies. As outlined in the Commission Staff Working Document SWD(2013)512 and the Bauer report, these bodies play a crucial role in promoting and monitoring gender-neutral job evaluation / classification systems. We will now outline which activities the equality bodies in the focus countries have engaged in after the entry into force of the Directive.

4.3.3.1 Germany

In its publication "Wichtige Entwicklungen beim Diskriminierungsschutz im Jahr 2013" the German equality body (Antidiskriminierungsstelle) informs briefly about the Directive 2006/54/EG. In the publication „Gleiche Arbeit, ungleicher Lohn?“ it states that job evaluation / classification should be performed equally for men and women and that biased evaluation systems should be updated. The equality body also offers internet links to tools such as eg-check.de and Logib-D and the homepage of the European Commission. In the publication "Ihre Arbeit ist es wert" it explains the gender pay gap and gives advice to individual women (e.g., "tell your employer about tools such as eg-check.de or Logib-

³⁵ www.cmtu.org.mt/#!equal-pay-day-2014/ceft

D")³⁶. As can be seen from these documents, pay equality is an important topic for the German equality body. However, it seems that the importance of job evaluation / classification for achieving this goal has not been sufficiently recognised. The equality body also states that so far, it has only dealt with very few lawsuits regarding the equality of pay.

4.3.3.2 United Kingdom

Based on the Equal Pay Law, the Equality and Human Rights Commission recommends a five-step equal pay audit model. With the analysis of equal work being a central step of this model, the Commission further provides guidelines on job evaluation within the Equal Pay Resources and Audit Toolkit (Equality Act 2010 Code of Practice). This guide details and defines gender-neutral job evaluations and provides elaborate checklists for the gender-neutral design and implementation of job evaluation schemes (Equality and Human Rights Commission, 2010)³⁷. The United Kingdom's equality body thus provides a wealth of valuable information on gender-neutral job evaluation / classification.

4.3.3.3 Sweden

Sweden's equality body has developed a computer program for assessing the job evaluation processes in companies as well as the existence of pay equality³⁸. In order to determine which jobs are equivalent in wage surveys, a review of job demands is made in a systematic and gender-neutral manner. The program can be used in the evaluation and grouping of similar activities in conjunction with a salary survey. The method is based on the main areas of knowledge and skills, responsibility, effort and working conditions, as recommended in the Commission Staff Working Document SWD(2013)512. The publication "Pay surveys - provisions and outcomes" deals with the topic of work of equal value. In addition, it addresses possible systematic undervaluation of female-typed compared to male-typed skills. Finally, workshops are offered to help employers with implementing gender-neutral job evaluation systems.

4.3.3.4 France

The French equality body has published an extensive guideline on the topic of equal work of equal value that was developed together with the social partners³⁹. This guideline describes job evaluation practices that seem gender-neutral but are not, uses best practice strategies from other countries and outlines how to make job evaluation / classification gender-neutral. In 2013, the Defender of Rights (le Défenseur des droits) has introduced the measures for gender-neutral job evaluation outlined in this publication to a national expert group striving for promoting the principle of equal pay. In addition, in order to encourage a review of classifications, the Defender of Rights has met many different stakeholders (such as trade unions, the National Association of HR managers, companies, etc.) and organized conferences and workshops⁴⁰. Thus, the French equality

³⁶ www.antidiskriminierungsstelle.de/DE/Home/home_node.html

³⁷ www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/managing-workers/equal-pay/equal-pay-audit-toolkit/carrying-out-equal-pay-audit/step-2-additional-information

³⁸ www.do.se/sv/Material/Analys-lonelots/

³⁹ www.aravis.aract.fr/defenseur-des-droits-un-guide-pour-une-evaluation-non-discriminante-des-emplois-a-predominance-feminine/

⁴⁰ www.defenseurdesdroits.fr

body uses a comprehensive and well-designed approach specifically targeting gender-neutral job evaluation / classification.

4.3.3.5 Latvia

As outlined in the Report on the Year 2013 by the Latvian Ombudsman⁴¹, the focus of fair pay seems to lie less on wage differences between men and women, but more on the overall amount of wage (that is usually only little above the legal minimum). In accordance, no information on the gender pay gap and job evaluation / classification could be found on the homepage of the Latvian Ombudsman.

4.3.3.6 Malta

The National Commission for the Promotion of Equality awards the Equality Mark⁴² to companies that have good employment practices, including on equal pay, which go beyond what is determined by law (Directive 2006/54/EC). However, descriptions do not refer specifically to job evaluation / job classification schemes. Malta's equality body links to the Directive on its websites.

4.3.3.7 Summary

As outlined above, the activities on equal pay and gender-neutral job evaluation / classification of equality bodies strongly differ between the Member States. Whereas the United Kingdom, France and Sweden already have very elaborate material and activities for promoting gender-neutral job evaluation / classification, the other Member States scrutinised have more diffuse activities for achieving equal pay.

5. Access to legal recourse and compensation and overview on legal remedies

In general, only few cases are considered with regard to pay discrimination. If so, processes are usually lengthy, which speaks to the inefficiency of processes. In addition, some countries such as the United Kingdom particularly stress the importance of a comparison, i.e., a target person must be compared to another person in a comparable situation (Commission Staff Document, 2013), which impedes case law based on job evaluation / classification. Nevertheless, two cases which explicitly refer to job evaluation / classification could be detected.

5.1 Discrimination by assigning different criteria evaluations within the same job evaluation / classification scheme (case from the United Kingdom)

In 1999 P became regional director on a salary of £40,000 p.a. Three colleagues, R, W and H, were all paid more than her, with R earning the highest salary at £55,000 p.a. All four were graded as Level 6 Range 3 on the pay scale. The organisation had a pay scheme based on job evaluation / classification but rated P differently in several criteria. The tribunal examining the case rejected the reasons for the different ratings and noted "that

⁴¹ www.tiesibsargs.lv/files/content/zinojumi/Tiesibsarga%20gada%20zinojums_2013_ENG.pdf

⁴² https://socialdialogue.gov.mt/en/NCPE/Pages/The_Equality_Mark/The_Equality_Mark.aspx

the employer had introduced a salary scheme, based on experience, skills, knowledge and ability, but after a few years it fell into disuse and salaries were again determined on an ad hoc basis. Individuals would know their classification and their own salary but not where they fell within a salary band. According to the tribunal, the employer only operated an objective pay structure for a few years", then let go of it (Barrow, 2012).

5.2 Discrimination by applying different job evaluation / classification schemes (case from Germany)

In a logistics company in Hamburg, women were employed under a different collective agreement than men despite equal work, which led to wage differences of up to 300€ (women were employed under the Angestellentarifvertrag and men were employed under the Lohntarifvertrag). In this lawsuit, the workers' council achieved (on the basis of § 17(2) of the Allgemeines Gleichbehandlungsgesetz AGG) that the employer agreed to an arrangement after receiving order and subsequently to a bargaining agreement on the abolition of this discriminating practice (ArbG Hamburg, enactment from 24.08.2007- 17 BV 2/07)⁴³.

6. Difficulties encountered by Member States in the implementation of the Directive 2006/54/EC

6.1 Difficulties encountered by organisations

Developing an individualised job evaluation / classification system is a *resource-intensive process* that requires a lot of time and expertise (see also International Labor Office, 2008). Therefore, particularly small- and medium-sized companies may face difficulties in engaging in this process (which is reflected for example in the low usage rates of job evaluation / classification systems in these companies, as described in 4.1.). An additional difficulty encountered by organisations is the fact that the principle of job evaluation only partly matches the logic of their own pay allocation systems: As outlined in 3.2.2, organisations often allocate pay at least partially according to individual employees' performance (i.e., actual outcomes) instead of the requirements of certain positions (i.e., necessary input). Thus, the Directive might seem to organisations as not fitting with their business logic which might further decrease their willingness to engage in this resource-intensive process.

6.2 Difficulties encountered by national governments

First, gender equality is not the most important point on the agenda of some countries, especially of those which were severely hit by the economic crisis (Eurofound, 2014b). Thus, for these countries it might be difficult to take the necessary means such as the introduction of definitions for pay and equal pay in compliance with the EU legislation. Second, organisations are reluctant to adopt measures which dictate the course of action without leaving room for organisation-specific adaptations. The fact that analytical tools

⁴³ www.antidiskriminierungsstelle.de/DE/Home/home_node.html

for examining the gender pay gap are either preventive but not based on job evaluation / classification schemes or based on job evaluation / classification but reactive (as outlined in point 4.2.7) might reflect organisations being only willing to apply the principles when forced to do so (by potential litigation).

6.3 Difficulties encountered by social partners

As outlined in the Eurofound Study on social dialogue (2014b), several difficulties regarding gender-neutral job evaluation / classification have emerged for the social partners. Especially trade unions have criticised a lack of instruments for actually implementing gender-neutral job evaluation / classification and have asked for explicit guidelines on this topic (Pillinger, 2014). Moreover, in order to be able to include wage rates for every job into collective agreements, trade unions have demanded access to information on pay and job descriptions, as this information is currently lacking.

6.4 Difficulties encountered by equality bodies

As outlined in 4.3.3.7, the degree to which equality bodies engage in activities to apply the Directive varies to a great extent. Whereas some equality bodies (in the United Kingdom, France, and Sweden) very specifically target gender-neutral job evaluation / classification, others do not promote this measure at all. Thus, for those countries currently using no or unspecific measures for tackling the gender pay gap, a lack of information seems to represent the main difficulty in the implementation of the Directive. In addition, national experts highlighted the crucial role of the national governments in promoting the use of gender-neutral job evaluation systems.

7. Summary of recommendations

In the following we will outline our scientific recommendations for the enforcement of gender-neutral job evaluation / classification in the Directive as well as for its promotion and monitoring.

7.1 Enforcement of job evaluation and classification in the Directive 2006/54/EC

We will start with those recommendations which target at enhancing gender-neutrality in each step of the job evaluation / classification process.

7.1.1 Measures necessary to ensure gender-neutrality of job evaluation and classification systems

7.1.1.1 Establishment of the evaluation committee

In order to reduce potential stereotypic influences resulting from subjective ratings of the evaluation committee, the evaluation committee should be set up as a *mixed-sex evaluation committee* and provided with training *beforehand*. Furthermore, the role of *devil's advocate*

(see 3.1.2.1) should be explicitly assigned and the evaluation committee should be made *accountable* for the whole job evaluation process.

7.1.1.2 Generation of job descriptions

In order to generate gender-neutral job descriptions, the evaluation committee should use *job-titles*, which should be defined in a *gender- and status-neutral* way, and engage in *structured free recall procedures for generating gender-neutral sub-factors*, which should be *clearly defined* and described by both *male- and female-typed examples*. *Standardized interviews or questionnaires* should be used for job evaluation, which should be translated into point scores by several members of the evaluation committee.

7.1.1.3 Internal and external weighting

In order to control gender-neutrality in internal and external weighting, a *weighting grid* should be developed by ranking both factors and sub-factors according to their importance for the organisation and be subsequently *checked for gender-neutrality* by analysing the mean percentages allocated to both male- and female-typed sub-factors.

7.1.1.4 Assignments of points to jobs and job classification

In order to avoid gender influences on job classification, *point levels should be assigned to job classes before starting the job evaluation / classification process*. After the job classification process it should be *checked* whether female-typed positions tend to end up at *upper interval boundaries* as this might indicate undervaluation due to gender biases.

7.1.2 Measures to translate gender-neutral job evaluation and classification into equal access to employment and working conditions focusing on pay

We will now summarise our recommendations for translating gender-neutral job evaluation / classification into equal access to employment and equal working conditions⁴⁴.

7.1.2.1 Equal access to employment

To ensure gender-neutrality in access to employment, job descriptions from the job evaluation process should be used in personnel selection processes. Therefore, the global job description developed in the job evaluation process ought to be translated into an *objective, behaviourally-based job description* for personnel selection. Based on this job description, *job advertisements* should be formulated using *gender-neutral job titles* and *gender-neutral wording*. Finally, applicants' competence should be measured by making use of *work samples, behaviourally-anchored rating scales* and *highly standardised selection interviews* based on job descriptions derived from the job evaluation process.

⁴⁴ As outlined in 3.2.3, the diverse nature of occupational social security systems and the only indirect link of job evaluation and classification to social security systems make it difficult to give recommendations. Therefore, occupational social security systems are not included in the summary of recommendations.

7.1.2.2 Equal working conditions focusing on pay

As job evaluation / classification does not provide information on how to deal with pay negotiations and performance-based pay, we recommend the following measures in addition to those measures recommended for increasing gender-neutrality in job evaluation / classification (see 7.1.1). For reducing gender-differences in starting pay, *transparency* about average salaries and wage limits should be enhanced for both female applicants and personnel decision makers and the *salience of gender* should be reduced in personnel selection processes, e.g., by making sure that women are not a minority in applicant pools. For performance-based pay, the principles of gender-neutrality outlined for job evaluation / classification should be applied to *reduce ambiguity in performance assessment* and *linking pay to performance*.

As these recommendations show, it might prove valuable to *enhance the notion of "equal pay for work of equal value"* and the recommendations on how to achieve it from the current input-based manner to an outcome-based notion such as *"equal pay for equal performance"*.

7.2 Promotion of job evaluation and classification by national governments, social partners and equality bodies

As outlined in the Directive, in the Commission report on its implementation (COM(2013) 861) together with its accompanying Commission Staff Working Document SWD(2013)512 and in the European Parliament resolution of 10 March 2015, national governments, social partners and equality bodies play a crucial role in promoting gender-neutral job evaluation and classification.

In addition to those measures targeting the identification (without applying job evaluation / classification) and reactive examination of pay discrimination (by applying job evaluation / classification), national governments, social partners, and equality bodies should particularly promote instruments for the *preventive examination* of organisational pay schemes' *gender neutrality*. In addition to *checklists*, these could include analytical tools such as *weighting grids* and *checks for gender-equality in resulting job classes*. Furthermore, in order to facilitate the application of job evaluation / classification systems, *clear and unambiguous guidelines* on the necessary steps to implement job evaluation / classification systems should be provided.

A further step in facilitating the implementation of job evaluation /classification could be to *establish databases* which include factors and factor ratings for specific jobs and occupations. These should be enforced by national governments on national level or – as research shows that job-specific information on work activities and necessary skills is comparable across countries (Taylor, Li, Shi & Borman, 2008) – even European level⁴⁵ by the European Commission.

⁴⁵ The European Commission's efforts to establish European Skills, Competences, Qualifications and Occupations (ESCO) within the scope of the Directive 2005/36/EC could provide a valuable start for establishing such a database.

7.3 Transparency and monitoring of the implementation of the Directive 2006/54/EC

We would advise to broaden the recommendations on strengthening the principle of equal pay between men and women through transparency⁴⁶ from *wage transparency* to *transparency of human resource processes*. Protecting personal and organisation-specific data, a first step could be to encourage organisations to descriptively report those measures which aim to foster gender-neutrality in their human resource processes. For example, governments and social partners could enforce the inclusion of this topic in annual reports.

In addition, some measures could be taken in order to enhance the monitoring of the implementation of the Directive 2006/54/EC. First, a *survey on the application of job evaluation / classification schemes* in organisations across European countries would help in assessing the initial situation and thereby improve recommendations on further necessary actions. The European employer representations and unions could be entrusted with distributing this survey to organisations within countries. Its results should be summarised in a report, highlighting positive, but also negative / insufficient practices in the member states, giving starting points for further improvements. Second, a *systematic and longitudinal examination* would provide intermediate results and could help to identify when additional corrective actions are necessary. The European Parliament resolution of 10 March 2015 on progress on equality between women and men in the European Union asks for a recast and enforcement of Directive 2006/54/EC. In order to systematically assess the success of this recast and enforcement, the above mentioned survey on the application of job evaluation / classification schemes should be carried out *before* the recast of the Directive is published / measures for its enforcement are initiated. The success of this recast / reinforcement could then be evaluated by repeating the survey in discrete time intervals of about 2 years, which would allow assessing whether improvements with regard to job evaluation / classification have been made over time. Finally, *analyses of internal and external weighting of factors and sub-factors on a country-level or European level* would allow for the examination of differences in factor weighting across sectors and thereby increase the *transparency of the pay gap* between (male- and female-typed) sectors. To do so, information on job evaluation and classification should be gathered on the occupational level comparably to the European Skills, Competencies, Qualifications and Occupations database. This database would allow the analysis of weighting factors and calculation of reference values for gender-neutral pay levels. Based on the results of these analyses, a deeper insight particularly on the pay gap across professions and occupations and more fine-grained recommendations for enhancing the gender-neutrality of job evaluation and classification systems could be provided.

⁴⁶ Commission recommendation from 7.3.2014

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9. Annex: Overview on the implementation of Directive 2006/54/EC

9.1 Annex I: Overview on the methodological approach of this research paper

Step 1: Quantitative analysis	
<p>Based on data from Eurostat, we analysed available statistical indicators for women's access to employment, working conditions including pay, and occupational social security systems in the six focus countries and the EU as a whole. We analysed their development over time in order to compare the status quo before the entry into force of the Directive with the current status quo several years after the entry into force of the Directive.</p>	
Step 2: Qualitative analysis	
Evaluation of job evaluation and classification with regard to gender stereotypes	Analysis of homepages and publications of national governments, social partners and equality bodies
<p>Based on scientific theories and empirical evidence with regard to gender stereotypes we analysed the recommendations given in the Directive and in the Commission Staff Working Document SWD(2013)512. Moreover, we developed scientific recommendations for translating gender-neutral job evaluation and classification into equal access to employment, working conditions focusing on pay, and occupational social security systems.</p>	<p>Based on homepages and available publications, we analysed to which degree measures to promote equal pay in general and gender-neutral job evaluation and classification were applied in the six focus countries.</p> <p>For each focus country, we analysed homepages and publications of ministries, three major employer representations and three major trade unions as well as the equality bodies.</p> <p>In addition, we studied scientific publications and reports by official authorities.</p> <p>To validate our results, we contacted several experts on gender equality in the six member states and included the information provided by them⁴⁷.</p>

⁴⁷ In sum, Eurofound experts from 4 member states provided additional information on the topic of gender-neutral job evaluation and classification in the social dialogue. Likewise, a renowned expert from the United Kingdom sent further information on the activities of social partners in several member states. Finally, the answers of two equality bodies could be incorporated.

9.2 Annex II: Summary of measures taken by the national governments, social partners and equality bodies in the six focus countries

	National government	Social partners	Equality Body
Germany	<ul style="list-style-type: none"> • Collective bargaining is centralised on a medium level. • The state does not interfere with social partners' decisions about job evaluation and the equality of pay. • Together with the major employer representations the government provides tools for the implementation of gender-neutral pay such as Logib-D. 	<ul style="list-style-type: none"> • Well-developed activities on gender equality issues. • <u>Unions</u>: Specific initiatives to reduce the gender pay gap and to develop gender-neutral job evaluation systems. • <u>Employer representations</u>: Partner with the government to promote equal opportunities for men and women. 	<ul style="list-style-type: none"> • Pay equality as an important topic. • Publications about the gender pay gap and tools for assessing it. • Little information on gender-neutral job evaluation and classification.
United Kingdom	<ul style="list-style-type: none"> • Collective bargaining is highly decentralised and shows low levels of coordination. • Legislation refers specifically to job-evaluation. • The government provides a wealth of information on gender-neutral job evaluation and classification such as a practice guide and checklists. 	<ul style="list-style-type: none"> • Well-developed activities on gender equality issues. • <u>Unions</u>: Provide specific guidelines on gender-neutral job evaluation and classification. • <u>Employer representations</u>: Advocate for transparency and a greater use of the available talent pool as well as other diversity-related measures. 	<ul style="list-style-type: none"> • Pay equality as an important topic. • Very detailed recommendations on a five-step equal pay audit model. • Detailed information and checklists for gender-neutral job evaluation and classification.
Sweden	<ul style="list-style-type: none"> • Collective bargaining is informally centralised and highly coordinated. • Gender-neutral job evaluation and classification have often been part of collective bargaining. 	<ul style="list-style-type: none"> • Relatively well-developed activities on gender equality issues. • <u>Unions</u>: Focus on tackling the gender pay gap. • <u>Employer representations</u>: Only scarce information available. 	<ul style="list-style-type: none"> • Pay equality as an important topic. • Own tool for assessing potential gender pay gaps. • Detailed information and workshops on gender-neutral job evaluation and classification.

	National government	Social partners	Equality Body
France	<ul style="list-style-type: none"> • Collective bargaining is centralised on a medium level with low levels of coordination • Collective negotiations must include gender equality and thereby also pay equity 	<ul style="list-style-type: none"> • Relatively well-developed activities on gender equality issues. Social partners have influence on gender-neutral job evaluation and classification due to legislation. • <u>Unions</u>: Suggest making use of gender-neutral job evaluation and classification. • <u>Employer representations</u>: Broad set of measures to promote gender equality. 	<ul style="list-style-type: none"> • Pay equality as an important topic. • Very extensive guidelines for gender-neutral job evaluation and classification. • Equality body strongly promotes gender-neutral job evaluation and classification by talking to different stakeholders.
Latvia	<ul style="list-style-type: none"> • Collective bargaining is centralised on a low level and is also little coordinated. • There are no legislative acts defining equal work and work of equal value. 	<ul style="list-style-type: none"> • No specific activities on gender equality issues. • <u>Unions</u>: No information available. • <u>Employer representations</u>: No information available. 	<ul style="list-style-type: none"> • Pay equality not a central topic. • No specific information on gender-neutral job evaluation and classification.
Malta	<ul style="list-style-type: none"> • Collective bargaining is of low centralisation and coordination. • There are no legislative acts defining equal work and work of equal value. 	<ul style="list-style-type: none"> • Relatively well-developed activities on gender equality issues, but no external strategies. • <u>Unions</u>: No information available. • <u>Employer representations</u>: No information available. 	<ul style="list-style-type: none"> • Award for companies that have good employment practices including equal pay. • No specific information on gender-neutral job evaluation and classification.

Gender equality in employment and occupation

European Implementation Assessment

ANNEX IV

Maternity, paternity and parental leave

**Research paper
by Dorota Szelewa**

Abstract

The goal of this study is to critically assess the implementation of Directives 2006/54/EC (the Recast Directive) and 2010/18/EU (Parental Leave Directive) on aspects of maternity, paternity and parental leave and to formulate recommendations based on this analysis. With regards to the Recast Directive the study concentrates on the aspects concerning the protection against unemployment after returning from maternity, paternity or parental leave. An assessment of the transposition of the Parental Leave Directive includes a more comprehensive review of the national parental leave systems.

AUTHORS

This Report has been prepared by Dr. Szelewa PhD, University of Warsaw, at the request of the Ex-post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the European Parliament.

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

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List of abbreviations

CEU	Council of European Union
EC	European Commission
EP	European Parliament
FEMM	The Committee on Women's Rights and Gender Equality
GPG	Gender Pay Gap
ILO	International Labour Organization
MISSOC	Mutual Information System on Social Protection
OECD	Organization of Economic Cooperation and Development
SPC	Social Protection Committee
TRF	Total Fertility Rate

Executive summary

Work and family reconciliation policies supporting female employment are the crucial part of policies enhancing female economic independence and an important pillar of gender equality within the family and society. Research on the effects of reconciliation policies has repeatedly confirmed a positive impact of gender-balanced parental leave schemes on women's wages or, in general – on the conduct of their professional careers. The need to enhance parenthood-related policies has also been recognized at the EU-level as a part of actions in support of women's economic independence.

The EU-level efforts include setting the standards in legally binding documents, such as directives. The goal of this study is to critically assess the implementation of Directives 2006/54/EC (the Recast Directive) and 2010/18/EU (the Parental Leave Directive) on aspects of maternity, paternity and parental leave.

With regards to the **Parental Leave Directive** the main findings of the study suggest that while all of the Member States provide at least four months parental leave, only 19 countries offer at least one month of individual and non-transferable entitlement. Thus, there is a need for a stronger monitoring of the Directive's implementation, including the impact assessment on men's behaviour. Policies in support of the work and family reconciliation, such as various schemes of parental leave have proved to be a positive influence on female professional careers and the work-life balance. The recommendation is that the European Commission should especially address the persistence of the gender pay gap by placing emphasis on the parental leave provisions (also at the EU level). The European legislator should consider the revision of the Directive in order to strengthen the individual entitlements of the fathers and to oblige the Member States to strengthen income replacement policies for the employees using parental leave.

With regards to the **Recast Directive** the study concentrates on the aspects regarding the protection against dismissal after returning from maternity, paternity or parental leave. The main finding of this analysis is that the national legal regulations have a common core, however, they are embedded in different parts of the legal system. Additionally, due to the complexity of the labour markets in the Member States, the possibility of differential treatment arises with respect to the protection of workers against discrimination. Therefore, social awareness, as well as efficiency and transparency of the judiciary play a significant role in safeguarding the use of the regulations. Information on the cases of unlawful dismissals is still scarce, but existing data demonstrate that the employment status of the parents returning to work after using family-related leave is vulnerable. It is strongly recommended that the Member States should carefully monitor the situation of these employees and if necessary take further steps to introduce an efficient system of employment protection for working parents.

Finally, the Council should take the necessary steps to adopt the new Maternity Leave Directive as soon as possible, in order to strengthen the rights of working parents.¹ If this is not possible, a new initiative is necessary to re-open the process of revising the current Maternity Leave Directive.

¹ Cf. European Parliament resolution of 20 May 2015 on maternity leave (2015/2655(RSP)) www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP8-TA-2015-0207%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN

See also 'Maternity leave: MEPs urge Council to restart talks', European Parliament Press release of 20 May 2015. MEPs pressed the European Commission not to withdraw the draft EU directive on maternity leave, despite four years' deadlock over it in the EU Council of Ministers, in a resolution voted on 20 May 2015. They also urged the ministers to resume talks and agree an official position. www.europarl.europa.eu/news/en/news-room/content/20150513IPR55443/html/Maternity-leave-MEPs-urge-Council-to-restart-talks (footnote added on 22 May 2015)

Introduction and methodological note

Despite the long-term commitment of the European Union towards gender equality and the reconciliation of family life and work, the indicators concerning men and women's performance in formal employment or decision-making show gender imbalances on several levels. On the one hand there are persisting gender employment, pay and pension gaps, and on the other – most countries have only experienced modest progress within the framework of the mobilisation of men engaging in care activities and domestic work.

At the same time, the EU employment strategy, Europa 2020, has set the goal with regard to the employment rates of both men and women at the level of 75%. One of the most important factors influencing the female employment rate is their activity related to childbirth and child-rearing. Policies in support of work and family reconciliation, such as various schemes of parental leave and formal care services have proved to positively influence female employment. The need to enhance parenthood-related policies has long been recognized at the EU-level as a part of the actions in support of women's economic independence. Thus, apart from setting the standards in the legal acts (for example, directives related to parenthood), the EU provides strategic goals (such as the Barcelona objectives). Notwithstanding, a variety of solutions in the field of childcare policies which can be observed among the EU Member States, some of them clearly underperforming in the fields of support for female economic independence. Thus, there is a need for assessment and monitoring of the implementation of the EU standards at the national level.

This study evaluates the implementation of Directives 2006/54/EC (the Recast Directive) and 2010/18/EU (Parental Leave Directive) on aspects of maternity, paternity and parental leave. While the first of the two directives provides a broad legal framework for various aspects of gender equality, the Parental Leave Directive is focused on the concrete features of parental leave, such as its duration, the protection against dismissal or equal rights for adopting parents. With regards to the Recast Directive the study concentrates on the aspects concerning the protection against unemployment after returning from maternity, paternity or parental leave. An assessment of the transposition of the Parental Leave Directive would include a more comprehensive review of the national parental leave systems. The following sections explain the organization of the study in more detail.

Presentation of the findings

The material is presented in two basic sections, in which the implementation of the two Directives is analysed separately. Primarily, within each of the sections, the general characterization of the policies under analysis is provided, followed by a brief description of the most crucial provisions of the Directive. Additionally, the legal provisions of each of the Directives are placed in the context of the general European Union policies towards gender equality and the economic independence of women. Secondly, the crucial checkpoints for analysing the implementation for each of the Directives are identified in order to prepare the framework for a systematic analysis of the national implementation of the regulations. Thirdly, the analysis will also skim upon the issue of the societal impact of the regulations (on gender gaps in employment and pay, unequal division of domestic work or the impact of the policy measures on general trends in fertility). Each of

the two chapters close with recommendations for the EU institutions, Member States and social partners with regard to the particular Directive.

A brief methodological note

The starting point for data extraction and interpretation commenced with a review of the existing country reports as prepared by the following databases/periodic reports as provided by the international organizations and networks, such as:

- The International Network of Parental Leave Policy and Research²;
- The Mutual Information System on Social Protection (MISSOC) comparative tables³;
- The Comparative Family Policy Database (Ann Gauthier)⁴;
- The OECD Family Policy Database⁵;
- The Council of Europe Family Policy Database⁶;
- The ILO Working Conditions Laws Database and 2014 ILO report "Maternity and paternity at work"⁷;

Information compiled for Eurofound EurWORK – The European Observatory of Working Life and for the forthcoming Eurofound publication *Promotion of fathers' take up of parental and paternity leave in the European Union* also appeared as a useful reference point for the most recent changes in leave schemes, as well as a recent comprehensive study provided by the FEMM (Schulze and Gergoric 2015).

Finally, the main findings of this study were also compared with the recent report on the implementation of the Parental Leave Directive, as prepared by the European Network of Legal Experts in the Field of Gender Equality.⁸

Multiple other sources, listed in the references, were consulted for the assessment of the implementation of both Directives. The assessment of the Member States' compliance with the Recast Directive 2006/54/EC, in its aspects regarding protection from dismissals for the persons returning from leave taken for family reasons, is mainly based on a comprehensive study issued by the European Commission: *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in practice in 33 European countries* (Burri and van Eijken 2014), as well as on the basis of the cyclical reports from the Directive's transposition.

Moreover, the research reports and studies have been consulted together with experts from the Member States who were available for contact⁹, whenever inconsistencies between the databases appeared. The author has also used a previously developed database for the purpose of the research project comparing family policies in Europe.¹⁰

² www.leavenetwork.org.

³ www.missoc.org

⁴ www.demogr.mpg.de/cgi-bin/databases/FamPolDB/index.plx

⁵ www.oecd.org/social/family/database

⁶ www.coe.int/t/dg3/familypolicy/Database/default_en.asp

⁷ www.redetis.iipe.unesco.org/wp-content/uploads/2014/05/OIT_2014_Maternity-and-Paternity-at-work_full-report.pdf

⁸ http://ec.europa.eu/justice/gender-equality/document/files/parental_leave_report_final_en.pdf

⁹ I would like to address my special thanks to: Mare Ainsaar, Hana Haškova, Daniel Gerbery, Katrin Gasior, and Margarita Jankauskaite.

¹⁰ Database will be available on the website www.familypolicy.eu in October 2015.

Chapter 1: Assessment of the implementation of the Directive 2010/18/EU

Key findings

- The Parental Leave Directive represents a relatively low common denominator with regards to setting the standards for Member States;
- All of the Member States provide at least four months of the leave, however, only in 19 countries the parental leave schemes offer at least one month of individual and non-transferable leave;
- Almost all of the countries offer schemes for adopting parents and family leave on the grounds of the *force majeure*. About one third of the countries do not have legal provisions for taking care of another (other than the child) family member;
- The Directive is implemented in a way that it is unlikely to change men's behaviour. Take-up rates for men depend on the availability of non-transferable entitlements and adequate financial compensation, as attached to the leave;
- There is a need for stronger monitoring of the Directive's implementation, including the impact assessment on men's behaviour (take-up rates);
- Research on the societal impact of parental leave demonstrates a positive effect of non-transferable entitlements on the increase in men's engagement in childcare and domestic duties;
- The issues of gender employment and pay gaps should be addressed, among others, with strengthening the parental leave provisions (also at the EU level).

1.1. Background

The European Union has developed important benchmarks regarding parental leave policies, in relation to gender equality goals and strategies included in the EU legislation. As far as parental leave provisions are concerned, the legislation (meaning, the EU Directives) provides the minimum standards that must be adopted to national systems.

Recognizing the new needs of families, the Commission proposed related actions with regards to the reconciliation of work and family. In 2008, a **work-life balance package** was proposed in order to stimulate the balancing of professional and family life, and to increase the participation in the labour force, especially for women (EC 2008). Among others, the Commission announced that they would work on and improve the strengthening of women's entitlements to leave for family reasons (in effect, extending maternity leave), and to assure the equal treatment of the self-employed and their spouses. In the **Strategy for Equality between Women and Men 2010-2015**, the Commission recommended the "assessment of the remaining gaps in the entitlement to family-related leave, notably paternity leave and carers' leave, and the options for addressing them" (EC 2010).

At the same time the Strategy does not provide specific targets and concrete instruments that would, for example provide more incentives for men to involve themselves in care, including long-term care (IRS 2014). In the resolution of 10 March 2015 on the progress of equality between men and women in the European Union in 2013, the European Parliament called for a renewed effort to strengthen the individual rights of the father to take either paternity leave or a part of the parental leave “to be taken by either the father or mother, but without swapping between them, until their child has reached a given age” (Recital 24).¹¹ Therefore, the issue of individual entitlements for fathers receives special attention in this chapter, and apart from this presents the crucial provisions of the Directive and their transposition to the national legal frameworks.

1.2. Parental leave: basic definitions

In general, family-related leave schemes are quite often difficult to compare, as there are problems with defining particular schemes as exclusively maternity, paternity, parental or childcare leave (see for instance de Rosario Palma Ramalho, Foubert and Burri 2015). Parental leave is perceived both as part of a workers’ rights and entitlements, and as an important element of policies in support of equal opportunities for men and women. **Maternity leave** usually means a pre- and post-natal break from employment for the mother of a newly born child. While maternity leave serves as the basic period for physical recovery after childbirth, **paternity leave** is designed for fathers to step out of work, when their child is born: and also while the mother might need assistance in daily caring activities and domestic duties, paternity leave also serves as an opportunity for the father to develop bonds towards his the newly born child, so that he is able to fulfil his role as an active father.

Parental leave refers to any kind of leave that is available after the first immediate post-natal leave and it is usually available to both parents. It is important to note, that paternity leave is distinct from the **father’s quota of the parental leave**, which marks the part of parental leave that is only reserved for the father, i.e. this is the father’s individual and non-transferable entitlement.

1.3. Directive 2010/18/EU – the most important provisions

The first EU-level legislation with regards to parental leave was adopted in 1996 (the first so-called parental leave directive) on the basis of the 1995 Framework Agreement on Parental Leave.¹² The Directive guaranteed entitlements for both: men and women to at least three months parental leave for children under 8 years of age, as well as protection from dismissal on the grounds of taking a break from employment for family reasons. When the **new social partners’ framework agreement** was agreed, the Directive was amended in 2010¹³, introducing important changes, strengthening the principle of gender

¹¹ European Parliament resolution of 10 March 2015 on progress on equality between men and women in the European Union in 2013 (2014/2217(INI)).

¹² Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICEF, CEEP and the ETUC.

¹³ 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

equality in work and family life. The new framework agreed by the social partners was a part of a wider work on reconciliation and a series of actions that the social partners undertook on a work-life balance (Clauwaert and Sechi 2011).

Directive 2010/18/EU on the basis of the new framework agreement introduced references that included the former Lisbon Strategy and Barcelona target and the Framework of Actions on Gender Equality. Updated recitals adhere strongly to family policies to realise the principle of gender equality. Additionally, the new Directive recognises that “encouraging” fathers to participate in the leave is not sufficient and that, therefore, there is a need to urge the Member States to “**use more effective measures**”¹⁴.

In this sense, the main changes included **extending the obligatory duration** of the leave to four months and an obligation on the side of the Member States to reserve at least one month of the leave to fathers (second parents). Although the Directive recognizes the importance of **income replacement** during parental leave, especially with regard to the leave take-up by men, details in this respect are left for the Member States to decide. Additionally, the Directive’s provisions were extended to cover **different employment contracts** as the basis for entitlement to parental leave (part-time, fixed term and temporary workers). Protection against any discriminatory treatment or dismissal was strengthened to focus on the Member States’ role in securing the sufficient measures (see also the first chapter with regards to the protection against dismissals. Table 1 presents the legislative checkpoints of the Directive.

Table 1: The crucial provisions of the Directive 2010/18/EU.

SUBJECT SCOPE	<p>The Directive applies to all working parents (women and men), including part-time, fixed-term and temporary agency workers;</p> <p>It provides recognition for the diversity” of family structures”;</p> <p>It guarantees the right to parental leave and is applicable to adopting parents</p>
THE BASIC FEATURES OF PARENTAL LEAVE	<p>Character of entitlement: is an individual entitlement given on the grounds of birth or adoption;</p> <p>Duration: the leave’s duration is at least 4 months for each parent;</p> <p>Non-transferability: “in principle”, the entitlements should be non-transferable, while at least one month must be individual and non-transferable;</p> <p>Age limit of the child: the leave should be granted until the child is eight years old;</p>
NON-DISCRIMINATION AND PROTECTION FROM DISMISSAL	<p>The guarantee of maintaining the contract upon return from the leave;</p> <p>Each of the Member States must provide protection against dismissal after the expiry of the parental leave: the right to return to the same,</p>

¹⁴ Ibid., Recital 8.

	<p>equivalent and similar job;</p> <p>Working time arrangement upon return: the worker returning from parental leave should be given the possibility and opportunity to work with flexible working arrangements.</p>
FAMILY LEAVE ON THE GROUNDS OF THE FORCE MAJEURE	Workers should be granted leave for urgent family reasons in the cases of sickness or accident
THE MEMBER STATES MIGHT DECIDE	<p>Mode of granting the leave: whether parental leave is granted part-time, in a fragmented way, in the form of a credit system;</p> <p>Entry requirements/qualifications: about the specific country “work qualification” (duration of work performance in general) and “service” qualification (duration of work with one employer), but the period requirement should not exceed one year;</p> <p>Income replacement: with regards to the entitlements to income replacement cash benefits, however, the MS should consider the importance of income replacement for the take-up of the leave by fathers.</p>

1.4. The implementation of the Parental Leave Directive – an overview

The following sections will briefly analyse the implementation of the Directive according to the broad categories set out above (for information regarding dismissal, see Chapter 2), with a special focus on the basic feature of the parental leave.

1.4.1. The basic feature of the parental leave

As far as the leave’s duration is concerned, the basic criteria for compliance are met by all of the Member States. There are a variety of solutions in this regard: **16 countries offer leave of four months to 12 months:** Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Slovenia and the UK, while **in the remaining twelve Member States the provision of leave is longer than 12 months.** Within this group, three (or more) years of available leave (or available without breaks until the child is three or more years) are offered in countries such as: Austria, Estonia, Germany, Hungary, Lithuania, Poland, Slovakia or Spain.

With regards to the **one month of non-transferable entitlement, the majority of the Member States, comply with the Directive**, i.e. Bulgaria, Croatia, Cyprus, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Sweden and the UK. Parental leave systems are almost compliant with the Directive in countries like Austria or Belgium, where there exists some ambiguity of whether the entitlements might be transferred. A number of the Central-Eastern European countries have only family-based entitlements (Estonia, Hungary, Latvia, Lithuania and Slovakia), even though the possibility to use the leave is open to both parents, the entitlements are transferable. Similarly, in the situation of the

Czech Republic, where in theory the entitlement is individual, however, only one parent is able to receive the benefit, and the entitlements might be transferred.

Although only slightly touched upon by the Directive, the comparison of **income replacement** is also interesting, because it reveals a great variety of solutions among the Member States. Therefore, it is possible to cluster the countries into the following groups (with regards to the scope of cash support provided):

- **countries, where the leave is unpaid:** Bulgaria, Cyprus, Greece (private sector), Ireland, Malta, the Netherlands (but tax cuts), Spain and in the UK;
- **countries with flat-rate payment:** Austria, Belgium, the Czech Republic, France, Luxembourg (though relatively high), Poland (mixed), and in Slovakia;
- **countries providing payment with a relatively small rate of wage replacement:** Italy (30%), Portugal (25%);
- **countries providing payments with a relatively high rate of wage replacement:** Croatia, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Romania, Slovenia, and Sweden.

More detailed information about each of the Member States is presented in the **Annex Table 1**.

1.4.2. Leave on the grounds of the force majeure or to take care of a sick child/family relative.

Almost all of the Member States **provide some form of the leave on the grounds of the force majeure**, though nearly one third of them provides such entitlements only in the case of the urgent need to take care of the child. The legal construction of the entitlement varies from the leave offered “per illness” or “per case” (7-15 days in Slovenia, 2-4 days in Spain, 10 days in Slovakia, or “reasonable time” in the UK) to the number of days as available “per year” and the entitlement might be either individual or family-based. For example, in one year, two days of such a scheme are offered in Luxembourg, similarly, two days (without giving a reason) to take care of a child in Poland, 14 days per employee in Poland, or 25 days per family in Germany.

In the majority of the countries (with the exception of Belgium, or the UK), the leave is paid and often at a high level of wage replacement. Some countries do not have legal provisions for taking care of another (than the child) family member (Estonia, Hungary, Lithuania, Luxembourg). In countries such as Sweden or Cyprus, the leave is granted as a unified scheme of parental leave that may be used also in the force majeure.¹⁵ More detailed information on the leave based on the grounds of the force majeure, as well as the leave to take care of a child and a family member is presented in the **Annex Table 2**.

1.4.3. The leave for adopting parents.

The same provisions as for biological parents (with regards to parental leave) are also available **for adopting parents** in almost all of the countries, but there are small varieties

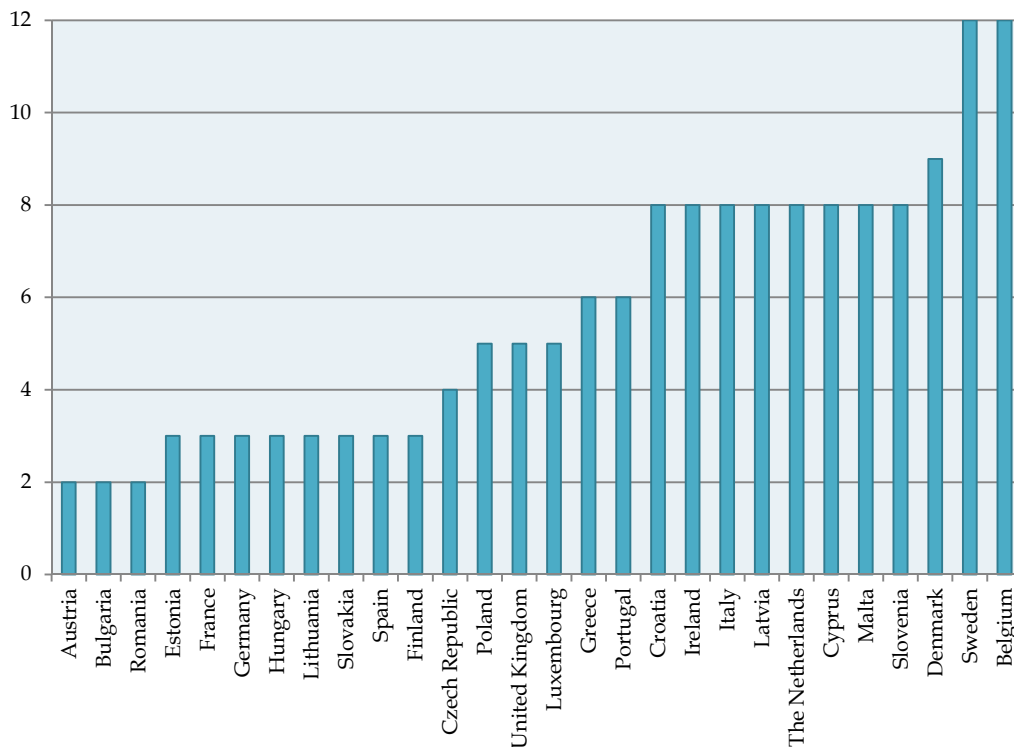
¹⁵ Information given under consultation with the expert.

with regard to, for example, the upper limit of the child's age; some countries extend the period, within which the leave might be taken. Such higher age limit is offered in the case of adopting parents in Croatia, Ireland, Italy and in Portugal. Further information is presented in **Annex Table 3**.

1.4.4. The age limit of the child

The age limit of the child represents an important issue that influences the scheme's flexibility for the use of both parents. Again, the Member States do not provide a uniform solution with respect to this matter. Altogether, 11 Member States set the upper limit of the child's age at the level of eight years (and above). Sweden and Belgium allow the parents to take the leave in parts until the child is 12 years old, while Denmark – up to the child's ninth birthday. Further, eight of the countries allow for the use of the leave until the child is exactly eight years old (Croatia, Cyprus, Ireland, Italy, Malta, Latvia, the Netherlands, and Slovenia). Portugal and Greece set the limit at the age of six, while almost half of the countries place the age limit between the second and the fifth year of the child's life. It seems that there is a need **for the further monitoring of the flexibility of taking the leave in relation to the upper limit of the child's age**, as many countries treat this issue within a fixed manner. Figure 1 presents the comparative data.

Figure 1: The age-limit of a child for using parental leave entitlements in 22 Member States.



Sources: Moss 2014, EC 2012a, MISSOC comparative tables.

1.4.5. The sanctions

Table 2: The sanctions in Member States, provisions concerning parental leave (not exclusively)

COUNTRY	DAMAGE COMPENSATION	REINSTATEMENT/ DISMISSAL COMPENSATION	FINES
Austria	Yes	---	Yes
Belgium	Yes, maximum six months' salary.	---	---
Bulgaria	Yes, only civil courts (tort law).	---	Yes, by Commission for Protection from Discrimination (higher in cases of repetition).
Croatia	Yes	---	Yes
Cyprus	---	Yes	Yes
Czech Republic	Yes	---	Yes
Denmark	Yes	Yes	---
Estonia	Yes	Yes	---
Finland	---	Dismissal compensation, reinstatement not guaranteed	---
France	Yes	If a dismissed employee does not want to continue employment with the employer: minimum 6 months' salary.	Yes
Germany	Yes, but only if infringement.	---	---
Greece	Full pay back plus interest, plus moral costs.	Discriminatory dismissal null/void.	Yes, by Labour Inspectorate.
Hungary	---	Reinstatement	Yes
Ireland	Yes, up to two years' salary. If the case in Circuit Court - unlimited compensation.	Reinstatement/re-engagement, or specific course of action.	---
Italy	Yes	Yes	Yes
Latvia	Yes	Yes	Yes
Lithuania	Yes	Optional, by court ruling.	Yes, by Equal Opportunities Ombudsperson.
Luxembourg	Yes	Reinstatement	---
The Netherlands	Yes	Yes, invalidation of the dismissal in order to claim a salary, reinstatement by a court.	Yes
Poland	Yes	Yes	Yes
Portugal	Yes	Yes	Yes
Romania	Yes	Yes	Yes
Slovakia	---	---	Yes, up to 100 000 euro.
Slovenia	Yes (limited in the public sector)	Yes	Yes
Spain	Yes	Reinstatement	Yes
Sweden	Yes	Reinstatement	Yes
United Kingdom	Yes	Dismissal compensation.	---

Source: Burri and van Eijken 2014 and de Rosario Palma Ramalho, Foubert and Burri 2015.

The Directive 2010/18 provides in Article 2, that "Member States shall determine what penalties are applicable when national provisions enacted pursuant to this Directive are infringed. The **penalties shall be effective, proportionate and dissuasive.**" Most of the sanctions presented below refer to the protection of employment rights and non-discrimination during parental leave, as well as the protection of return to work when it finishes. The issue of low take-up of parenthood-related leaves is sometimes wrongly associated with cultural factors and not with discriminatory practices. Table 2 below lists some of the sanctions in selected Member States. It should also be noted, that the sanctions are not exclusively reserved for parental leave, therefore they also cover Recast Directive's provisions with regard to unlawful dismissals. More information on sanctions with regard to unlawful dismissals are also provided in Chapter 2, section 2.3.

1.5. The process and the state of transposition: summary

This section draws a couple of general conclusions on the state of compliance with the Directive and the process of the Member States' national systems' transposition. Thus, the countries can be placed into the following categories:

1. Countries that have *already* had their system adjusted (in most of the aspects) to the new requirements:

Nordic countries are pioneers in providing comprehensive and generous (in terms of the benefits) regulations with regards to parental leave. In **Sweden**, non-transferable, well-paid period of leave is a central incentive for fathers to care for small children. Sixty days are guaranteed for a father (second partner), combined with an additional ten days when a child is born. A special feature of the Swedish family policy is the so-called gender equality bonus, introduced in 2008, the aim of which is to promote the engagement of fathers in care duties. Parental leave scheme in **Finland** provide parents with family-based entitlement, however, paternity leave of nine weeks is available for the father, which represents an individual and non-transferable entitlement.

Germany introduced a major reform of the parental leave system, when a new parental leave was established in 2007: twelve months of the leave became available to the family, while eight weeks were introduced as individual and non-transferrable entitlement (intended as two months for the father).

Among the East-Central European countries, **Lithuania** and **Slovenia** already have some the solutions in place, such as, for example, special entitlements for the fathers (individual and non-transferable portion of parental leave). Ever since 2006 **Lithuania** has offered one month of the leave for fathers, but the possibility of taking the leave is extremely fixed and the father must use it within the first month of the child's life and its purpose is to assist the mother in caring activities.¹⁶

¹⁶ Information available on the webpage of the Lithuanian State Social Insurance Fund Board of the Republic of Lithuania, available at <http://sena.sodra.lt/index.php?cid=1976>, last time visited 30.03.2015.

Although countries, such as Austria, the Czech Republic, Latvia and Spain considered their national systems in line with the Directive (de Rosario Palma Ramalho, Foubert and Burri 2015), they in fact still do not comply with some of the Directive's important provisions (see below).

2. Countries that explicitly changed their legislation to comply with the requirements:¹⁷

Belgium explicitly reformed its system of parental leave in 2012 in order to comply with the Directive: the main change was the introduction of four months of parental leave (as an individual entitlement). At the same time, though, it is not explicitly stated whether the entitlement is transferrable.

Croatia reformed its system of parental leave in line with the Directive, and thus, the duration of the parental leave was altogether extended to eight months, while two months became an individual and non-transferable right for the father. However, the allowance during the parental leave is at a flat-rate level and diminishes with time, so this does not seem to be a sufficient incentive for the fathers to take the leave. Moreover, the amendments did not cover the rights of employed and self-employed parents.

In **Cyprus** the duration of the leave was changed from 13 to 18 weeks in 2012, in order to comply with the Directive, however, the leave is not accompanied with benefits. At the same time, the right to take leave for family on the grounds of the force majeure was introduced.¹⁸

In **Greece** a new law on parental leave was adopted in 2012, and implemented almost immediately. The new legislation explicitly incorporates the Directive by including the following provisions: entitlements to parental leave for parents adopting or fostering a child (if the child is adopted before his/her 6th birthday), extending the duration of the leave to four months (individual entitlement). Although the leave might be used only until the child is six years old, special circumstances allow the extension of the reference period until the child is eight-years-old.

Changes in the **Irish** system of parental leave took place in 2013. The duration of the leave was extended from 14 to 18 weeks. There are also four weeks of individual and non-transferable leave (unpaid).

In **Luxemburg** the law implementing Directive 2010/18/EU on parental leave was voted for on the first reading. The new Act introduced the right for employees returning from parental leave to request flexible working arrangements and increases the duration of unpaid parental leave from three to four months in order to comply with the Directive. It became effective as of June 2013.¹⁹

¹⁷ Information obtained from the International Network on Parental Leave, reporting years: 2010, 2011, 2012, 2013, 2014., as well as consultation with several of the national experts.

¹⁸ Information available at <http://cyadvocates.com/ptlaw/2012/05/22/employment-law-update-parental-leave-and-leave-on-grounds-of-force-majeure-law/> last time visited 30.03.2015.

¹⁹ European Network of legal experts in the field of labour law - Annual Flash Report 2013

In **Poland**, also to be in accordance with the Directive, the government introduced a new six-months paid leave scheme called “parental leave”, however, as a family-based entitlement. After the expiration of the parental leave, there is still a possibility to use up to 34 months of the childcare leave (that has also been recognised as “further” parental leave), while two other months are reserved separately for each of the parents. Thus, one of the 36 months of the leave is non-transferable, and the leave is unpaid.²⁰ Altogether, the duration of all available leave is now approximately four years, which makes the Polish family leave one of the longest available leave schemes in Europe.

The entitlements for fathers in **Slovenia** had already been introduced even before the country joined the European Union. In 2013 additional adjustments were adopted, when the government approved the draft “Parental Protection and Family Benefit Act”. According to the Act, each parent has the right to parental leave, which lasts for 130 days, while 30 days cannot be transferred. The total length of leave granted for the birth of the child is therefore extended from 12 to 12.5 months. The act regulates the leave of adoptive parents in the same way as the parental leave of biological parents (260 days) when adopting a child under eight.²¹

The case of Great Britain is especially interesting. In 2013 the **United Kingdom** made changes to the Parental Leave regulations within the UK national legislation²². The amendments include an increase from three to four months within the period of parental leave permitted following the birth or adoption of a child. The entitlement is individual and non transferable. Moreover, the right to request flexible working hours was extended to agency workers returning from a period of parental leave. Finally, the UK has interpreted Clause 5(1) (the right to return to the same job at the end of parental leave) in a literal sense (i.e. as it is read) and has provided provisions for individuals who return to work at different times during parental leave.²³

3. Countries that comply partially with the new provisions or do not comply with some of the important provisions.

Austria reformed the country’s system of parental leave in 2010; however, the change was not due to the new Directive. In particular, up until the present day, Austria does not provide an explicitly non-transferable and individual entitlement for one of the parents, although the government increased the possibility of receiving additional income that

²⁰ A special allowance is available to parents that meet income criteria for 24 of 36 months of childcare leave, therefore, in theory there is some possibility to receive payment, but it is very limited.

²¹ Information available on the webpage of the Ministry of Labour, Family, Social Affairs and Equal Opportunities www.mddsz.gov.si/nc/en/newsroom/news/article//7249 last visited on 30.03.2015.

²² Ajibade et al. (2014) “Reconciling Work and Family Life within Labour Law”, UK Report - EWL Seminar 2014, University of Leicester.

²³ From April 2015 changes are introduced so that parents are entitled to shared parental leave and statutory shared parental pay, subject to various qualifying conditions. According to these new regulations, apart from the Ordinary Paternity Leave, fathers would be entitled to Additional Paternity Leave - but only if the mother or co-adopter returns to work. More information is available at <https://www.gov.uk/paternity-pay-leave> last time visited 30.03.2015.

beforehand restricted the possibility of the full use of parental leave, and this new reform (2013) was intended to increase the father's take-up (Rille-Pfeiffer and Dearing 2014). Another problem is that the parental leave must, in principle, be used until the child is two years old.

Parents in **Denmark** have the opportunity to use fully paid 32 weeks of parental leave, although the system leaves it for the parents to decide how to share the leave between the two of them. Therefore, the only individual and non-transferable entitlement for the fathers is two weeks of fully paid paternity leave.

A further group of the East-Central European countries do not provide non-transferable entitlement for the fathers: the Czech Republic, Estonia, Hungary, Latvia and Slovakia are not in accordance with this particular provision of the Directive, and often do not plan to harmonize their systems in accordance with the Directive (within the respect mentioned). Some of these countries provide paternity leave, although this does not comply with the requirements of the Directive. Thus, in **Latvia**, fathers are entitled to 10 working days of paternity leave, in **Hungary** the only individual entitlements for the fathers are five days of absence during the first two months of the child's life. The **Czech Republic** and **Slovakia** are the only two countries in the entire EU where zero individual and non-transferable entitlements exist for the fathers.

Spain has adopted solutions extending paternity leave from 15 days to four weeks for the fathers, however, the full implementation of the law has been postponed several times. Currently, due to budgetary limitations, the full implementation of this provision has been postponed until January 2016.

1.6. Impact of the legal solution on changing gender roles

This section focuses on the role of the Directive as an agenda setter with regards to the increase in gender equality. It provides some data on the take-up rates of the leave by fathers and links it to the shape of entitlements. Arguments in favour of strengthening the provisions for increased fathers' participation in childcare are outlined in the final part of this section, which is also followed by recommendations.

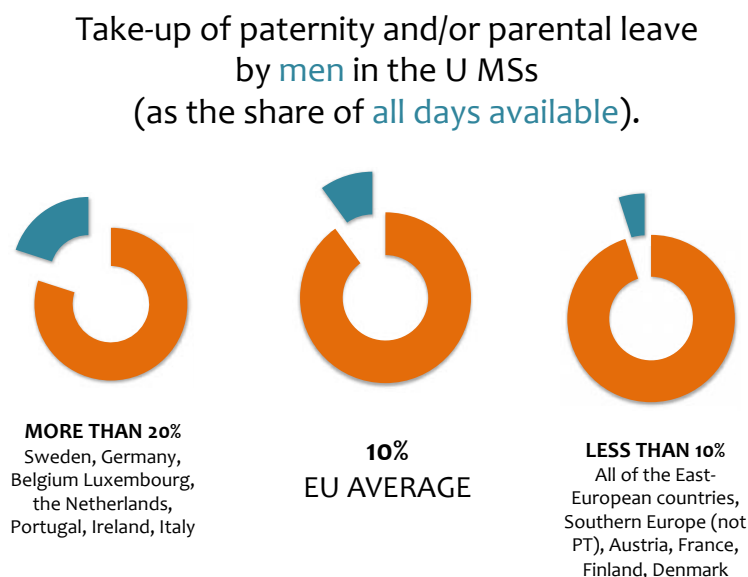
1.6.1. Father's take-up of parental leave and the shape of entitlement.

The fathers' take-up of these schemes is remarkably higher in the countries that reserve part of the leave for the other partner, providing non-transferable, individual entitlements, with generous payments.²⁴ In **Belgium**, between 2002 and 2012 the percentage of fathers on parental leave increased from 8.3 to 25.7 %, mostly in relation to individualised entitlements. The reform of parental leave in **Germany** which reserved two months for one parent in 2007 contributed to an increase of men using the leave from 3.3 % in 2006 to 29.3 % for children born in the second quarter of 2012 (Blum and Erler 2014). For **Portugal**, the increase was also due to the introduction of the obligatory section in 2009 (although excluding "special schemes") from 37% in 2008 to 68% for the compulsory days in 2013 (Wall and Leitão 2004). Although outside of the EU, it is worth

²⁴ This paragraph comes from Szelewa 2014.

noting that the flexibility and earmarking of longer periods of leave only for fathers leads to the increase in the use of the “father-only” quota. In **Norway** while only 0.6% of the fathers took exactly 12 weeks of the leave in 2011 (10 weeks was reserved for them), in 2012, after extending the earmarked period to 12 weeks, the percentage of fathers who decided to take 12 weeks of the leave increased to 21% (Brandth and Kvande 2014). At the same time, almost no fathers used the entitlements in **Greece**, since the leave is unpaid. In **Slovakia**, there is no statutory leave for fathers, and no earmarked portions of parental leave for fathers only, thus, only 1% of the fathers reportedly take the parental leave (also see Figure 2). The lack of obligation for the Member States to provide wage replacement that would effectively encourage fathers to take the leave is a serious weakness in the current EU regulations on parental leave.

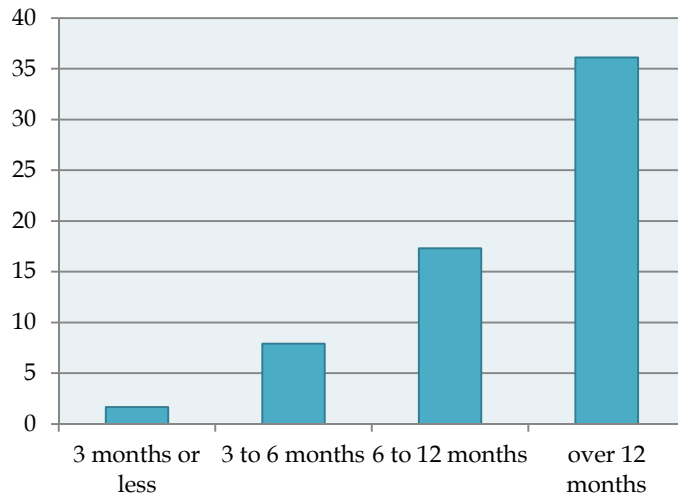
Figure 2: Take-up of paternity and/or parental leave by men in the EU Member States.



Source: on the basis of Schulze and Gergoric (2015), p. 73.

An even more striking picture of gender imbalance appears when absolute numbers of men and women on parental leave are taken into account, and especially with regard to the duration of the leave (see Annex Table 4). While all the Member States are taken together, the female to male ratio is dramatically increasing with the increase in duration of the leave: while there is only 1.6 times more women than men using the leave for less than three months, there are almost 8 times more women using the leave for between three to six months (See Figure 3). The consecutive leave duration clusters give rather shocking results: women using the leave for 6 to 12 months outnumber men in the same category by 17 times, while there are 36 times more women on leave that last for at least 12 months (in absolute numbers, in thousands, women: 3 423. 7, men: 94.8). Importantly, almost half of all women in the EU belong to the latter group, i.e. they use the parental leave for at least 12 months.

Figure 3: Female to male ratio of the persons using parental leave, according to the leave's duration, in the whole European Union, 2010.



Source: Eurostat Labour Force Survey ad hoc module: "Reconciliation between work and family life 2010"

Here, as well, various results could act as notices for different EU Member States. Unsurprisingly, the lowest female to male ratio can be observed in countries such as Sweden or Finland, although Swedish men seem to phase out sooner than the Fins do and the ratio for Sweden is even higher than the average (there are 52 times more women than men on parental leave of over 12 months). Naturally, here the national comparisons show less profound conclusions, as the number of weeks available and the availability of benefit would strongly influence the results.

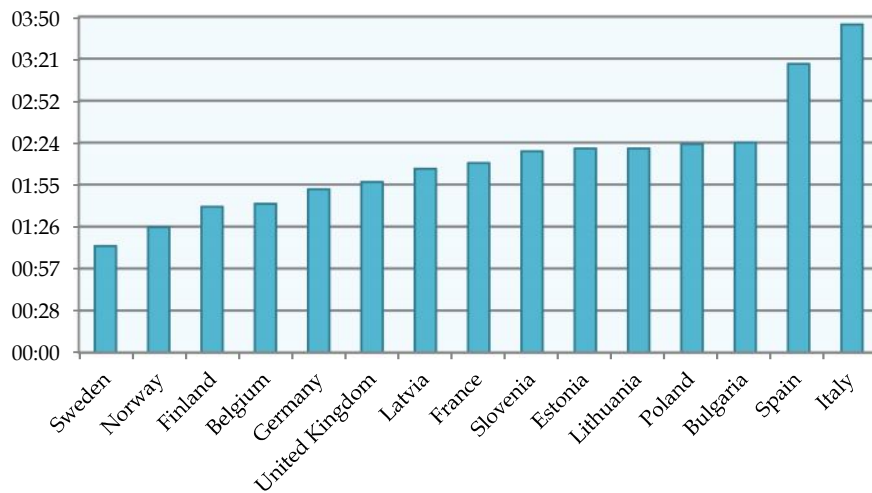
1.6.2. Gender balance in childcare and demography: the importance of fathers' entitlements

As stated in the Preamble of the Directive, one of its most important considerations is that "family policies should contribute to the achievement of gender equality and be looked at in the context of demographic changes" (recital 8). Therefore, achieving the goal of gender equality by providing adequate support via the system of parental leaves is linked directly to the **European trends in demography**. Some studies suggest a link between demography and gender equality. Although research on the links between the father's quota and procreation decisions is quite disperse, based on the existing studies, it is possible to state that the father's quota (individual and non-transferable entitlements) might represent one of the crucial policy instruments when it comes to boosting fertility.

Firstly, the researchers observe an interesting **gender gap with regards to procreation decisions**: the mean personal ideal number of children is a little higher for men than for women in countries like Poland (m:2.41, w:2.05), Portugal (m:2.0, w: 1.71), Cyprus (m:2.87, w:2.65), Germany (m:2.17, w:1.96) (Eurobarometer 2006). Unsurprisingly, these countries are not on the top of the gender equality indexes, but are often classified as "familialistic" or "male-breadwinner" gender regimes (OECD 2011). A figure showing men's engagement in domestic duties might shed a new light on the coincidence of

women being *less* eager than men to have children in countries with a higher degree of gender imbalance concerning domestic work (where men do *less*) (Figure 4).

Figure 4: Gender gap with regard to time devoted to domestic activities

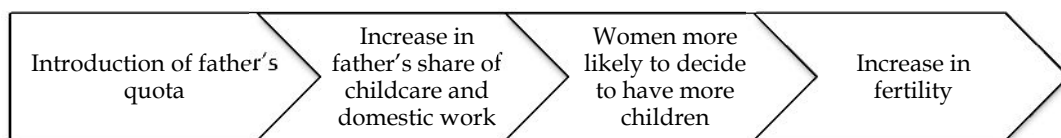


Source: *Harmonised European Time Use Survey, my own calculations (number of hours daily devoted to domestic activities by men as subtracted from the number of hours daily devoted to domestic activities by women).*

Secondly, there is some evidence showing the **link between men’s engagement in childcare and household duties and women’s willingness to have more children** - a study comparing Hungarian and Swedish families concluded that the more equal division of domestic activities within the family, the greater the probability of having a second and even a third child and the relation was true for both Hungary and Sweden, in spite of a totally different cultural contexts (Olah 2003).

Thirdly, the earmarked, **non-transferable entitlement increases men’s involvement** and the duration of the leave also matters. According to Nepomnyaschy and Waldfogel (2007) fathers, who take longer paternity leaves (at least two weeks), are more likely to still perform daily child care tasks, like changing nappies, feeding or bathing nine months later than those who only take a short leave or none at all. A generally positive relation between policies aimed at more gender equality at home and an increase in the father’s involvement was also confirmed by the research results published by Jennifer Hook (2006). This phenomenon of a more intense sharing of domestic work by men after they take paternity leave might be interpreted as a kind of “spill-over” effect from the care work done by men at the time of such leave.

Figure 5: the possible impact of the non-transferable leave on fertility.



Source: *Author’s own compilation on the basis of Olah 2003, Hook 2006 and Nepomnyaschy and Waldfogel 2007*

Taking into account the link between fathers' involvement and women's attitude towards childbearing (especially after the first child) might lead to a conclusion that the **fathers' quota might be associated with an increase in fertility**, although for sure more studies on these relations are needed to confirm the findings. In other words, women are not willing to have children, if men do not participate in the childbearing, and the best way to encourage fathers to change their behaviour at home is to offer them individual and non-transferable entitlements to parental leave, for a considerable amount of time.

1.6.3. Addressing gender employment and pay gaps

Focusing on the importance of men's changing roles, the Commission issued a study on the role of men in gender equality (Scambor, Wojnicka and Bergmann 2012). As stressed by the authors, an increase in the gender balance at home, more equal division of childcare and domestic duties is one of the most important preconditions for reaching employment targets as set, for example, by the Strategy for Europe 2020 and as confirmed in the European Pact for Gender Equality 2011-2020, with two goals that are closely relevant to parental leave: the first one to "close the gender gaps in employment and social protection" and the second goal to "promote a better work-life balance for men and women throughout the life-course".²⁵

Again, wider gender employment and pay gaps coincide with weaker cultural and institutional support for active fatherhood and lower entitlements with regard to parental leave. In terms of the employment gap, it is the highest in Malta (29.6 pp.), Italy and Greece (19.9 pp. and 19.6 pp. respectively). In general, the employment rate of mothers with children under the age of 12, compared to the values of childless women, is also lower (also labelled as "**motherhood penalty**" by Correll, Benard et. al. 2007). The reverse phenomenon can be identified in the case of European men. The employment rate of men is higher when they have a child, which results in an employment rate increase of approximately nine percentage points on average. These two overlapping effects contribute to a **significant gender employment gap in households with small children**.

The EU institutions have addressed the problem of the **gender pay gap** (GPG) many times, beginning with Article 119 of the Treaty of Rome (1957). Nevertheless, the difference between female and male career paths remains to be relatively stable and closing the gap is not proceeding at a satisfactory pace, it is even stagnating, as the current figure equals 16 %.²⁶ More importantly, the nature of GPG is often multifaceted.²⁷ The factors that might critically influence the trends with regards to GPG are connected

²⁵ Council conclusions on the European Pact for gender equality for the period 2011 – 2020, 3073th Employment, Social Policy, Health and Consumer Affairs Council meeting Brussels, 7 March 2011, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/119628.pdf

²⁶ European Parliament, Application of the principle of equal pay for men and women for equal work of equal value. An assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur Edit Bauer, MEP), PE 504.469 EAVA 4/2013. Available at [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/504469/IPOL-JOIN_ET\(2013\)504469_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/504469/IPOL-JOIN_ET(2013)504469_EN.pdf)

²⁷ More comprehensive approaches to measuring the gap, that would include measuring the so-called "adjusted" (also called "unexplained") GPG, i.e. the gendered effect of the cultural and institutional context for the economic independence of women. In other words, the adjusted GPG takes into account individual socio-economic (age, children, education etc.) and workplace (job post, tenure, collective agreements etc.) contexts.

to the institutional context and in particular, to **the shape of the welfare state and the level of state support for female economic autonomy**. Here, the role of parental leave might be very important, especially with regard to how the construction of the leave improves the gender balance in caring activities. In particular, non-transferrable entitlements for the fathers might influence gender balance in childcare and at the same time improve the women's situation on a macro-scale, as employers' bias against hiring women would decrease once the statutory entitlements are more equal.

The **European Parliament** has addressed the lack of progress with GPG in the resolution *Equal pay for male and female workers for equal work or work of equal value*.²⁸ One of the EP's recommendations was that "maternity and parental leave must not give rise to discrimination against women in the labour market". The Commission touched slightly upon the issue of parental leave in the publication *Tackling the gender pay gap* (EC 2014), stating that "[w]omen spend more time than men carrying out domestic and care work, and few men take parental leave" (ibid., p.7). However, at the same time, the Commission's recommendation²⁹ does not mention the issues of maternity or parental leave.

1.7. Recommendations regarding Directive 2010/18/EU

1.7.1. With regards to the *monitoring* of the Directive's implementation:

A closer monitoring of the Directive's transposition to the national legal system is strongly recommended, especially with regards to how the national schemes respect the Directive's provision concerning at least one month of the non-transferable leave entitlement. While monitoring the legal transposition of the Directive is an important issue, the recommendation is also to **focus more on the societal impact of the new provisions**. Statistics on fathers' take-up of the leave show that sometimes differentiated solutions improve the father's use of parental leave. The recommendation is to include the provisions with regards to parental leave and the need for a closer monitoring of the Directive in **other top-level EU documents on the implementation of the principle of equal opportunities**. In sum, while there is a need for closer monitoring of the Directive's transposition, it is also necessary to monitor the social impact of the legislation in order to possibly work on a revised version of the Directive.

Therefore,

the European Commission should:

- ensure the full implementation of the Directive when drafting **the new employment guidelines** and in their Country Specific Recommendations in the framework of the European Semester;

²⁸ European Parliament resolution of 24 May 2012 with recommendations to the Commission on the application of the principle of equal pay for male and female workers for equal work or work of equal value (2011/2285(INI)).

²⁹ Commission Recommendation of 7.3.2014 on strengthening the principle of equal pay between men and women through transparency.

- enhance the dimension of women's economic independence by introducing the gender quality component in the strategies such as in a **revised EU 2020 Strategy, the new strategy for equality between men and women**, as well as other documents and recommendations that relate to the economic independence of women and especially
- include a direct reference to the importance of gender-balanced parental leave in the **Commission's recommendation on strengthening the principle of equal pay** recognizing the significance of maternity, paternity and parental leave provisions for closing the gender pay gap in the European Union;
- place a requirement on the Member States to report the implementation of the Directive together with the results **concerning the take-up rates by both men and women**, or
- commission an **EU-based survey on the reconciliation of work and family** that would be conducted more frequently than the EU-SILC special modules allowing for a more effective monitoring of the social impact of parental leave schemes (currently, the most updated statistics come from 2010);

the European Parliament should:

- consider **taking further steps with regards to the Directive's monitoring and evaluation**, and propose, for example, **targets with regards to the father's take-up** (similar to the Barcelona objectives concerning the enrolment rate of children in early childhood and care institutions). **Achieving at least 25% of fathers' take-up rate** would be an example of such an objective. As it lies on the **Commission's side** to effectuate such targets, the EP might originally put the initiative forward as a novel solution for a more effective implementation of the Directive;

the social partners should:

- place more emphasis on gender balance in the further improvement of the parental leave framework, both at the EU level, as well as when negotiating the conditions of the national schemes;
- pay special attention to the issue of presence and effectiveness of **sanctions** in the case of any breach of any legal provision that have been introduced to comply to the Directive;

the European Institute for Gender Equality should:

- take a closer look at the features of parental leave schemes and provide a more comprehensive and detailed outlook of the Directive's transposition to the national systems. As these schemes are often complicated, they might provide functionally equivalent solutions. That could result from the cooperation with the existing research networks (i.e. International Leave Policies and Research Network), but studying the systems in such a way, that the issue of gender equality is placed at the centre of the analysis.

and the Member States should:

- make every effort to **fully comply with the Directive**, special attention being paid to the provision of one month of parental leave as an individual and non-transferable entitlement;
- review, and if necessary, strengthen the existing **sanctions** so that they are **effective, proportionate and dissuasive**;
- take into account that the Directive provides minimum standards and consider establishing more advanced solutions, such as two or more months of the fathers' quota, with payment at the level that would compensate the loss of income at least at the level of 2/3 of the previous wage (*also: see below*).

1.7.2. With regards to the features of parental leave and possible revisions of the Framework Agreement:

The current standards with regard to parental leave, and especially father-only entitlements need revision in the light of the research results showing a **positive impact of the fathers' engagement in domestic duties and on decisions concerning having more children**. Fathers on parental leave engage more in care and household duties and facilitate women's professional careers and economic independence. This also leads to better results with regards to female wages and pensions. The proposal for the enhancement of the existing standards could consider the construction of the leave that has at least **three basic features at the same time**:

1. **The period of the leave must come as an individual and non-transferable entitlement.** When the family as such is granted the right to take the leave, these are predominantly women, who use them. This is both due to ideas about gender roles with regard to motherhood and care, but also because of purely economic calculation: since most men earn more than their spouses and the benefit attached to the leave almost never fully covers the previous wage, family will lose more if it is the father who takes a break from employment. Finally, with at least two months reserved for the father, the likelihood that the mother takes breaks from employment for taking care of a child diminishes: this creates a signal for the employer and for the father's co-workers that care is not predominantly a woman's task, which might contribute to diminishing the workplace politics that discriminate women.
2. **The leave should be accompanied by a reasonable level of income replacement.** Unpaid leave or some symbolic income replacement will never work for the families for financial reasons, as mentioned above. The higher income loss, the less likely it is that the father takes the leave, even if this is his individual entitlement. Although the Directive leaves it for the Member States to decide whether **financial compensation is attached to the leave** (in the form of cash benefit with a particular income replacement rate or a flat-rate allowance), the document also mentions the importance of income replacement for the father's take-up of the leave (Clause 5§5 and Preamble, quotations 18-20).

3. **The period of the leave should also be considerably long and cover at least one month, or ideally 2-3 months.** Otherwise the effect of the leave on the division of care work within the family might not be that significant. Fathers need to take their time to adjust and take-over the daily routines of childcare and domestic duties, such as, for example, preparing the meals for their children, but also: for their working spouse.

Therefore,

the social partners should:

- consider revising of the Framework Agreement in order to strenghten fathers' entitlement sand, therefore, to effectively contribute to increse in work-life balance for both women and men;

the European Parliament and/or the Commission should

- consider a simoultaneous and supportive actions for a revision of the Framework Agreement and, which follows, revision of the Directive, so that the three abovementioned elements are present;

the Council of Ministers and the Member States should

- immediately agree on the adoption of the **new Maternity Leave Directive**, that, among others, introduces two weeks (10 working days) of paternity leave with full wage compensation, therefore, a post-natal leave only for the fathers. Additionally, the new Directive extends the duration of maternity leave to 18 or even 20 weeks. If the initiative is not successful, the draft proposal of a new Directive including the policy measures should be submitted;^{30, 31}

the European Institute for Gender Equality should:

- place even more emphasis on comparing and analysing work and life reconciliation measures in its research programmes, with a special focus on the **role of fathers in participating in childcare**, especially that the EIGE has already focussed on the role and participation of men in bringing about the policies of gender equality. Research on women's procreation decisions show a positive relation between fathers' engagement and the likelihood of having more children.

³⁰ It is expected that if no agreement is reached between the Parliament and the Council, the draft might be finally out of the agenda between May and July 2015. For now (02.04.2015), the official status of the draft proposal is still marked as „current proposal“. See for example www.euissuetracker.com/en/eu-legislation/3961/pregnant-workers-safety-improvements last visited 10.04.2015.

³¹ See also European Parliament Press release of 20-05-2015. MEPs pressed the European Commission not to withdraw a draft EU directive on maternity leave, despite four years' deadlock over it in the EU Council of Ministers, in a resolution voted on 20 May 2015. They also urged the ministers to resume talks and agree an official position. www.euoparl.europa.eu/news/en/news-room/content/20150513IPR55443/html/Maternity-leave-MEPs-urge-Council-to-restart-talks (footnote added on 22-05-2015)

Chapter 2: Assessment of the implementation of the Recast Directive 2006/54/EC with regard to certain aspects of maternity, parental leave and adoption leave.

Key findings

- The Recast Directive 2006/54 consolidates the issues related to gender equality and indicates minimum standards in this field, also including rulings of the CJEU.
- The transposition of the Recast Directive was a complex process, as its provisions interacted with both previous European regulations, as well as national legal systems.
- As a result, the national legal regulations have a common core, however, they are embedded in different parts of the legal system.
- Due to the complexity of labour markets in the Member States, a possibility of differential treatment arises with respect to the protection of workers against discrimination.
- Social awareness, efficiency and transparency of the judiciary play a major role in safeguarding the use of the regulations. The Member States differ significantly in all three dimensions.

2.1. Background

The adoption of the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) represented a major step on the way to renew the EU's long-term commitment to gender equality. The Directive regulated the implementation of the principle of equal treatment in employment, goods and services. Additionally, 2007 was proclaimed a "Year of Equal Opportunities for All", and the European Institute for Gender Equality was established (Mushaben and Abels 2012).

However, the progress on the way to implementing the principle of gender equality to various fields of public policies could slow down. As some researchers stress, the horizontal commitment to the gender equality policy at the EU level has somehow been weakened recently (Stratigaki 2012). Within the field of employment and work-life balance, one example is a smaller emphasis on the need to reform the work-life balance systems in order to enhance equal opportunities for men and women in the strategy Europe 2020 (Villa and Smith 2014). On the other hand, the recent economic crisis has left many countries with a weakened capacity to provide public policies in support of female economic autonomy: cuts in social spending included limiting the provision of care services or lowering the levels of benefits attached to maternity, paternity and parental leave (Karamessini and Rubery 2014).

The abovementioned developments combined with high levels of unemployment might contribute to the increased vulnerability of women's status on the labour market. Thus, there is a need to take a closer look at the issues of employment protection. This chapter focuses on the provisions of the Recast Directive that deal with the protection against unlawful dismissals. The following sections provide a brief overview of the provisions, also in the context of the related EU legal acts, as well as the assessment of both: legal guarantees against unlawful dismissals and the evaluation of the implementation of the legal provisions, subject to availability.

2.2. Provisions of the Directive (aspects of maternity, paternity and parental leave)

2.2.1. Selected aspects of the Directive

In principle, Directive 2006/54, **consolidates the former EU provisions on gender equality issues**, and also incorporates the European Court of Justice rulings (case law). The purpose of such a consolidation has been the modernisation and expansion of provisions, also in line with the Court of Justice of the European Union rulings. As stipulated, the Recast Directive 2006/54 was supposed to be transposed in the Member States by September 15, 2008. In the cases, where the transposition was particularly difficult, the period was extended by one year, that is until 15 September 2009. Nonetheless, some Member States prolonged this period even more.

The directive takes into account, that **pregnancy discrimination is a form of direct sexual discrimination**. Furthermore, the complications and health conditions that affect the ability to work and which can be used by the employer as grounds for unequal treatment or dismissal, are treated as a direct form of discrimination. Importantly, the Recast Directive states directly that any forms of less favourable treatment of women in relation to pregnancy or maternity leave in relation to Directive 92/85/EEC, is a form of discrimination (Article 2(2)(c)). It should be mentioned that the Directive assumes that specific protection of women against discrimination related to pregnancy and maternity leave does not constitute the discrimination of men, as it refers to the main biological differences between men and women.

The Directive regulates the **issue of returning to work after the maternity leave** (Article 15) as well as the **protection against dismissal due to paternity leave or adoption leave** (Article 16). The main goal of this chapter is to analyse the implementation of these two Articles, as well as a general overview of non-discrimination measures with regards to the unlawful dismissals of persons returning to their jobs after using the leave schemes.

2.2.2. Protection against dismissals in other provisions of the EU legislation

The second essential provision related to the issue of maternity and protection against dismissals is the **Pregnant Workers Directive** (also known as the Maternity Leave Directive) (92/85/EEC).³² The issue of dismissals has been regulated in Article 10, which

³² This provision stipulates the minimum length of the maternity leave – 14 weeks (Article 8), but also indicates that a woman should be eligible for adequate cash benefit (Article 11 (3)). The adequacy of cash benefit has been identified at least at the level equivalent to the benefit in case of illness.

provides, that **Member States should prohibit dismissals of pregnant workers since the beginning of pregnancy until the end of maternity leave.** If, and only if the dismissal is justified, it should take place in writing. Also, the Member States should take proper steps if the dismissal is unlawful. Finally, the **Parental Leave Directive** regulates the protection of parents who use parental leave, as well as those who are returning from a leave to work (against unfavourable treatment).

One should note that before **the Equal Treatment Directive (76/207/EEC)** transposition, discriminatory treatment of pregnant women was widespread in countries such as Denmark. The transposition of the Directive efficiently reduced the scale of discrimination. Such examples are stark proof that the introduction of certain standards to the legal systems in the Member States can efficiently change the perceptions of social and economic phenomena so that equality can be safeguarded.

Importantly, the Recast Directive allows for the **specific protection of women with regards to pregnancy and maternity** (Article 28/1), however, as a result of rulings of the **Court of Justice of the European Union (CJEU)** (Rulings 23-25), several regulations prohibiting women from certain kinds of jobs or work conditions, have been removed in some Member States. Such examples include night work, for example. The line of reasoning of the CJEU was that such protective measures should apply only to the situations directly connected with pregnancy and childbirth and ought not to exclude women on the basis of such protective measures.

A notable CJEU ruling in the field of the Recast Directive and the Pregnant Workers Directive concerns **the period of protection.** In the Paquay case³³, the Court ruled that the protection against dismissal should be extended before the dismissal notification moment and that it should also include the preparatory steps. In other words, workers are protected against the dismissal if the steps leading to the dismissal were already taken in the protection period.

In 2008, the **European Commission published a proposal amending Directive 92/85/EEC**³⁴. The proposal **strengthened the protection of the worker's employment**, and it extends beyond the moment of returning after using the leave. Thus, an amended Directive would oblige the employer to provide justification in writing for the dismissal of a woman within six months after she returns from maternity leave. The **European Parliament (EP)** adopted its first reading in this ordinary legislative procedure on 20 October 2010³⁵. Protection against dismissal would be further strengthened by obligating the Member States to introduce an effective system of **sanctions and compensation** in the case of unlawful dismissal.³⁶

³³ Case C-460/06 *Paquay v Societe d'architectes Hoet and Minne SPRL* [2007] ECR I-8511.

³⁴ Proposal for a Directive of the European Parliament and of the Council of 3 October 2008 amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding [COM(2008) 637 final - Not published in the Official Journal]. The proposal was part of what the Commission called "Work-life balance package, see Commission MEMO 08/603.

³⁵ Formerly: Co-decision procedure (COD).

³⁶ See the remarks on the status of the draft proposal: chapter 1, footnote no 29.

2.3. The implementation of the Recast Directive – an overview

2.3.1. Implementation: general remarks

The transposition of the Recast Directive often has taken a form of **general gender equality acts and amendments of the respective labour laws and/or equivalent legal acts**. Thus, the provisions are embedded either in specific legal acts (such as Maternity Protection Acts), in the labour law, or health and safety regulations. Also, the grounds for discrimination differ between the Member States – in some States, they take a minimalist form, while in others – they are significantly extended.

Articles 15 and 16 stipulate the right to return to work, or if not possible, to a similar job (position). In some Member States, such as Croatia, a person returning from the leave is additionally eligible for additional vocational training. In some countries the abovementioned **guarantee of return to work is not explicitly present in the national legislation** (as is the case in the Netherlands, which faces an infringement procedure), or is regulated indirectly (the cases of Belgium, where a worker can be transferred to a worse job, cannot claim reinstatement, and Germany). In Hungary, the guarantee does not cover executive employees (which is seen as an infringement of the Directive). Furthermore, in some countries, which fulfil all the formal criteria, the practice regarding protection is far from the letter of law.

The abovementioned protection from dismissals provided by the Parental Leave should additionally harmonize the Member States' regulations with regards to the issue of unlawful dismissals. Nonetheless, in some countries, the protection is significantly weaker or regulated indirectly (Belgium, Germany, Lithuania and Slovenia).

Some challenges remain, such as **indirect discrimination**. The examples of such problems include the length of employment, which can serve as a factor affecting the probability of dismissal (such as in Germany, where workers with the shortest tenure are dismissed first).

This section gives an overview of the variety of modes of the Recast Directive's selected provisions' implementation. Several of these issues are stressed by the below analysis. The section finishes with some concluding remarks and data with regards to the legal awareness on the issue of dismissals.

2.3.2. The protection against discrimination in the labour markets in the Member States

This section provides an overview of both: the legal provisions with regards to protection against dismissals, and the implementation problems. Situations in particular countries are based, to a large extent, on the Report *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in practice in 33 European countries* (Burri and van Eijken 2014), as well as on several other documents analysing the transposition of the Recast Directive (consulted together with national sources). In order to stress the most important information, this section stresses the **challenges**, as well as **good practices** (whenever applicable).

The **Austrian** system of protection is characterised by dualism, which reflects a segmentation of the labour market. The regulations in the public sector are more explicit (the issue of pregnancy), but also more generous. For example, fathers who are civil servants are entitled to the parental leave immediately after the birth of a child. In principle, the size of a company does not affect the probability of discrimination on the grounds of pregnancy and parenthood, however, only in companies employing 5 workers or more, a representative can be elected, who can react to notices and dismissals. The gaps identified concern the categories of workers who fall under the social insurance law, but do not fall under the labour law. This means that the protection of maternity does not apply for them to the extent as in the case of the regular workers (covered by the Maternity Protection Act). Also it appears, that some issues (such as the extension of a contract) remain a practical problem in the case of the self-employed.

In **Belgium**, the law protects pregnant workers against dismissal, and the burden of proof is on the employer's side. However, no protection regarding the return to work exists, which would be in accordance with Article 15 of the Recast Directive. A similar problem is noted in the case of adoption leave (also, the damage is smaller). The parental leave provides the protection against dismissal, but again, not the right to return to the same position. The guarantees are more extensive in the public sector; however, the situation of pregnancy and maternity is considered to contribute to legal vulnerability.

Challenge! The lack of protection in the case of the returning worker.

When it comes to the protection of pregnant mothers, a gap in the **Bulgarian** law can be observed: the general Protection against Discrimination Act indicates that pregnancy and motherhood is protected, if the law regulates this issue. However, other legal acts do not regulate this issue explicitly. It is the Labour Code that provides protection for mothers against dismissal during pregnancy and after, reassignment etc. The dismissal of mothers of children under three is possible only in strictly defined cases, after the acceptance of a Labour inspector.

Good practice! In the case of vulnerable workers dismissals, the third party supervises this process.

The **Croatian** Labour Act provides a complete ban on dismissals in situations beyond the standards indicated in the Recast Directive. At the same time, it is argued that some areas remain overprotected, especially in relation to pregnancy or breast-feeding. Such a situation is not in line with the European legal state of the art. The private sector seems more prone to provide less protection. The Labour Act, however, does not protect the termination of a fixed-term contract in the case of pregnancy or maternity leave.

Data: Based on the 2009 survey, as many as 69% of Croatians did not know that gender discrimination is punishable. Only 12% of the respondents knew it is prohibited.

Challenge! The ruling of courts of the first and second instance levels are not published. This hampers the possibility to track cases related to unlawful decisions.

In **Cyprus**, The Maternity Protection Law specifically forbids victimization in relation to pregnancy/maternity until three months after the end of the maternity leave.

The **Czech** law protects pregnant women and women on maternity leave, as well as parents on the parental leave against dismissal. The return to work is guaranteed to maternity leave users, but also parental leave users. The law is binding and unitary for all types of companies as well as the private and public sector. However, the practices of discrimination are more common in smaller companies of the private sector.

Data: According to the 2012 STEM survey, 73% of Czechs consider pregnancy as the most frequent reason for discrimination. This is the second most frequently indicated ground for discrimination.

In **Denmark**, the major provisions concerning the protection during pregnancy, maternity, parental leave, paternity leave and adoption leave are regulated by the Equal Treatment Act and Maternity, Paternity and Parental Leave and Benefit Act. The two acts have been strongly affected by the EU-level regulations. The majority of the legal cases in the field of equal opportunities deal with the issues of pregnancy, maternity and other related provisions.

The problems identified in **Estonia** concern the practice of the termination of contracts of pregnant workers or those workers who are on the leave. Also, members of the management boards are not covered by the anti-dismissal legislation, which seems to be against the European legal regulations.

In **Finland**, the major problem is the practice of the non-extension of fixed-term contracts in the case of pregnancy or using a leave. When it comes to legal action, the issue of costs is often raised. This problem affects not only the low earners (who are entitled to free aid), but to higher income earners, who are not covered by the aid.

Challenge! The costs of litigation can reduce the scale of legal procedures.

In **France**, pregnant women do not need to notify an employer about pregnancy and are protected against dismissal starting from the beginning of the pregnancy until four weeks after they return from a maternity leave. A similar solution is applied in the case of adoption leave. The protection against discrimination is considered better in the public sector.

Data: in 2009 Halde (French Equal Opportunities and Anti-Discrimination Commission) survey, 46% of French respondents indicated that maternity and pregnancy are a problem for women in their career. Also, between 2008 and 2010, the number of cases related to pregnancy increased by 50%. With the establishment of the French Protection of Rights Body (ENA), the number of cases decreased, though their share in total claims remains constant.

Apart from the General Equal Treatment Act, there are no explicit anti-discrimination regulations relating to pregnancy or maternity in **Germany**. The German legal system is fragmented in this respect, with civil servants enjoying higher levels of protection. Among the problems, the right to return to work after the leave has been noted, while the protection of pregnant workers remains strict. Other issues include the burden of proof, the impossibility to prosecute in court by anti-discrimination organisations, as well as the lack of case law available.

The transposition of the Directive 2006/54 was delayed in **Greece**. The current law covers all workers, however in reality, the discrimination on the grounds of pregnancy, maternity or parenthood is widespread. This phenomenon has gained significance in recent years, especially in the private sector. The problems with the legal actions concern the costs and the length of the process.

Challenge! The costs of litigation can reduce the scale of legal procedures

In recent years, the **Hungarian** legal system has reduced the scope of protection against the dismissal of mothers and single fathers of children under three after the period of unpaid leave. It is argued, that such changes reinforce the traditional role of women in Hungary. Also, the damage paid to the unlawfully dismissed worker has been reduced. The protection against the dismissal does not cover executive employees (and recent changes extended the definition of such employees). In general, the number of legal actions against unlawful dismissal is low (although the statistics on this topic are missing).

In principle the legislation in the field of protection against discrimination on the grounds of pregnancy, maternity leave and parental leave are in line with the European provisions in **Ireland**. However, the practice, especially regarding the return to work after the leave, is different. It is a situation where many women are dismissed. One of the main problems identified is the length of the claim procedure.

Challenge! The procedure of the legal claim is lengthy and discouraging.

The **Italian** legal system provides stronger protection in the case of unlawful dismissals, compared to the EU standards. However, the practice of the induced termination of contracts, enforced on employees has been common practice.

Good practice! The governmental reaction has been an attempt to restore the balance by employers and employees by the requirement of the presence of a governmental official during the termination of the contract.

In the case of **Latvia**, the protection of pregnancy and maternity as well as parental and adoption leaves, is regulated in the Labour Code. Since 2010, the definition of direct discrimination directly reflects the EU provision. During the leave, an individual earns rights to annual leave, as well as rights to meanwhile improved work conditions. The dismissal of mothers on the maternity leave is possible only in strictly defined situations. The legal standards go significantly beyond the stipulated minimum, however, the field of social security remains comparatively underdeveloped in this respect, as the definition of direct discrimination is not fully applied there.

When it comes to **Lithuania**, the Labour Code expressly prohibits discrimination based on family and marital status as well as on the employee's intention to have children. Secondly, the Labour Code states that inter alia gender and family and marital status shall not be seen as valid grounds for dismissal. Nevertheless, the dismissals can be divided into two types: dismissal on the initiative of the employer with a notice of termination (ordinary dismissal) and dismissal without notice of termination. These two

types of dismissal differ with regards to the reasons for dismissal, the dismissal period, protection and legal means the employees have against the dismissal.³⁷

Data: There are employers, who are unwilling to employ women due to the uncertainty regarding the length of their ability to work, their flexibility and the high level of maternity protection. Research done by A. Atmanaviciene in 2006 was based on interviews with more than 150 women working in the sectors of healthcare, education, and the textile industry, and has demonstrated that there are widespread discriminatory practices as far as the access of women to employment, career opportunities and remuneration is concerned. Companies often fail to address employees' problems regarding transportation and flexible working time arrangements.

In **Malta**, the Protection of Maternity Regulations delimits unlawful dismissals by making it unlawful for the employer to dismiss a pregnant employee, an employee who has recently given birth or a breastfeeding employee, either from the date she notifies the employer of her pregnancy or from the moment she seeks to exercise her rights. The act provides redress for any unfair dismissal and makes any contravention of the regulations an offence punishable by a fine.³⁸

Data: Only a couple of reported cases concerning discrimination on the grounds of pregnancy, parental leave, parenthood discrimination can be found in Malta. In one recent ruling (2012) an accounts clerk was awarded EUR 12 000 by the Industrial Tribunal by way of damages for unfair dismissal. Her employment was terminated one month after she informed her employer of her pregnancy. Another important case (the Psaila Savona Case) concerns dismissal on grounds of pregnancy by a 'high-flying' lawyer. She claims to have been unfairly dismissed on the grounds of pregnancy. Her employer has argued that she was not an employee but a 'legal consultant' operating as a self-employed person and was not covered by the employment legislation, as well as the fact that she was not dismissed on the grounds of pregnancy. It took four years for the Industrial Tribunal, to rule the case was out of its jurisdiction.

Challenge! The legal procedures are lengthy, and in turn, discouraging.

In several aspects related to the protection of pregnancy, maternity, parental leave and adoption leave, the **Dutch** legislation complies with the Directive's provision. The regulations concerning this field are located in two equal treatment acts. However, a notable exception is the lack of a direct reference to protection of workers to return to the same or a comparable job from maternity or pregnancy leave, which was a reason for infringement procedure.

³⁷ The employee may appeal against the dismissal at court within 1 month after its delivery and claim that the dismissal is not valid. In this case, the employer has to substantiate and prove that he dully observed and fulfilled the order for a particular case of dismissal and obligatory prerequisites (i.e. notification period) as well as the legal and factual grounds for the dismissal. The court has to decide whether the prerequisites for an effective dismissal were fulfilled and the legal and factual grounds for the dismissal are sound.

³⁸ The Maltese Industrial Tribunal enjoys exclusive jurisdiction to consider and decide all cases of alleged unfair dismissals, including those of employees under a fixed-term contract of employment. In the cases where the Industrial Tribunal finds in favour of the dismissed employee it may order reinstatement when it considers that it would be practicable and in accordance with the equity, for the complainant to be reinstated or re-engaged by the employer. In other cases the Tribunal will order compensation only.

Data: The Equal Treatment Commission found that 45 % of the women who had given birth to a child in the previous 4 years (between 2007-2011) had suffered discrimination. The highest risks concern the refusal to conclude a contract (38%), or to renew a temporary contract because of pregnancy (44%). 3% of the women with a permanent contract indicated that they were dismissed (partly) because of their pregnancy. There is some evidence that in small firms there is more pregnancy-related discrimination than in large firms. There is also some evidence that higher-educated women suffer more often with respect to their possibilities for career advancement – after coming back from leave they often experience that their function has changed to their disadvantage. Lower-educated women more often suffer discrimination in the phase of concluding a contract/extension of a temporary contract.

Challenge! A great practical problem is the fact that nowadays young women are very often employed on the basis of temporary contracts, and that they run a high risk that the contract is not renewed as soon as the employer finds out about the pregnancy/wish to have children. Although there is legal protection against such discrimination, this does not suffice to stop this practice.

In the **Polish** context, the protection against discrimination is embedded in the Labour Code, as well as in the Act on implementation of several EU regulations on equal treatment (2010). It is prohibited to employ women in conditions, which are detrimental to their health, as well as to employ women during the night or outdoors. The law fails to provide explicitly that sex-related discrimination includes any less favourable treatment of a woman related to her pregnancy or maternity leave. Nor is there any reference to pregnancy and maternity when the law regulates direct and indirect discrimination and victimization.

Data: In **Poland**, one of the national survey's among working mothers revealed that about 10% of them are almost immediately dismissed from work after they return from maternity or childcare leave (CBOS 2013). Additionally, the Government Plenipotentiary for Equal Opportunities reported receiving about 100 complaints per year from women that were pressured to promise they would not have children before signing employment contracts or that they quit their jobs once they find out they are pregnant (Saxonberg 2014, p. 58). According to the most recent inspection conducted by the Polish National Labour Inspectorate, over 10% of men and over 4% of women were dismissed after returning from paternal and maternity leave, respectively, in 2013, which represents a decrease as compared to 2012, when the figures for men equalled 12.6%, and for women – 5.7%.³⁹

The system of parenthood protection in **Portugal** has been included in the Labour Code. An important regulation that has been included in the Code concerns the principle stating that dismissal of pregnant workers and using maternity leave is unlawful. Such dismissal needs to be approved by a public body. Accordingly, the dissolution of a labour contract by both parties or by the employee's resignation has to be signed before a public authority or, if not, the worker can reverse the resignation in the first seven days after it was signed.

³⁹ Data provided by the Polish National Labour Inspectorate.

Good practice! The presence of a public authority official is an attempt to restore the balance between the two sides of employment, resulting in the reduction of bad practices such as “white resignations”.

In **Romania**, the main provisions regarding protection of parenthood are divided between the legislation regulating the use of leaves, but also the law on equal opportunities of women and men. An important provision concerns the extension of the protection period to six months after the end of parental leave. The only allowed dismissal ground for protected workers is related to closing down employer’s firm.

The major provisions regarding protection of pregnancy, maternity as well as leave schemes are regulated by the Labour Code in the **Slovak Republic**. The Code stipulates that workers are protected against dismissal during the maternity and parental leave, but also during the period of care for a child under the age of three. The workers are entitled to any improvement of the working conditions, which took place during the period of leaves.

Case Law: Case of Supreme Court (No. 2 Cdo 183/2008. The Court decided on the appeal lodged by a claimant, whose employer, having learnt about her pregnancy, removed her from the post of deputy director and decreased her salary. The claimant regarded the unilateral act of the defendant, changing her employment contract and decreasing her salary, as invalid. The Supreme (extraordinary appeal) Court changed the ruling of the regional court in the disputed part, because the Supreme Court considered the decision of the first-instance court as correct.

In **Slovenia**, the main regulations regarding protection of parenthood are included in the Employment Relationship Act. Importantly, the provision does not explicitly guarantee the right to return to the same or similar job after leave. This may contribute to the discrimination of parents using leaves as their work positions can be taken over by co-workers or newly recruited employees.

Challenge! Fixed term contract not renewed after women become pregnant.

In **Spain**, the protection against dismissal comes via Article 35 of the Spanish Constitution and Article 4 of the Workers’ Statute. The dismissal is automatically deemed null and void when there are no reasons unrelated to the employee’s pregnancy to justify the decision.⁴⁰ In the cases of unfair dismissal, the Spanish labour court judge must order that the employee be reinstated. In the event that the employer chooses not to reinstate the employee, the labour court judge must specify the amount of compensation to be paid to the employee

Data: an example of harassment of pregnant women in the workplace is presented in a study entitled ‘mobbing maternal’ (harassment during pregnancy), which analyses 111,000 calls made to a foundation that helps young, destitute pregnant women at risk of social exclusion. According to the report, 90 % of pregnant women suffer harassment in the workplace during pregnancy, and 25% are dismissed. In total, 90% of the cases never come before the courts, either because they involve temporary contracts, or because the pregnant women in question opt for an early exit from the job market.

⁴⁰ Judgment 342/2006 of the Spanish Constitutional Court.

Challenge! The disappearance of the Ministry of Equality in October 2010 worsened this situation, and thus, reduced the visibility of the information regarding gender equality policies in Spain.

In **Swedish** legislation, the protection of parenthood is regulated in the Parental Leave Act. The Act provides against unfair treatment in cases related to pregnancy, maternity, parental and adoption leave, including dismissals. Also (through the interpretation of the CJEU case law), pregnancy and maternity are protected on the grounds of protection against direct discrimination in a more general Discrimination Act. In principle, the protection of pregnant workers or workers on leave is not strict, as dismissals in unrelated cases is possible. However, the notice is effective only after a worker returns from leave to work.

Good practice! Generally speaking, in Sweden it can be expected to have a fairly good awareness of maternity, paternity, and parental leave benefits. When it comes to additional rights regulated by collective agreements, the union is the crucial entity providing information as well as fellow workers. Also in this respect, general awareness can be supposed to be high. Moreover, employers are expected to apply collective agreements automatically.

When it comes to the **United Kingdom** the Employment Rights Act 1996 regulates unfair dismissals stating that employees are entitled to a fair reason before being dismissed, based on their capability to do the job, their conduct, whether their position is economically redundant, on the grounds of a statute, or some other substantial reason. It is automatically unfair for an employer to dismiss an employee, regardless of the length of service, for a reason related to discrimination, becoming pregnant, or having previously asserted certain specified employment rights.⁴¹ The Employment Tribunal will judge the reasonableness of the employer's decision to dismiss on the standard of a "band of reasonable responses" assessing whether the employer's decision was one, which falls outside the range of reasonable responses of reasonable employers.

Data: The research conducted by the Equal Opportunities Commission in 2005 found that 36% of employers in large workplaces and 48% in small workplaces (including 65% of those in those workplaces where there had not been a pregnancy in the last three years) felt that some women abused their rights to maternity leave. Small employers were more likely to believe that maternity rights did not take into account the operational needs of employers.

Annex Table 5 presents information on dismissals in several of the EU Member States.

2.3.3. Implementation of the Directive: some conclusions.

The broad review of national legislation systems in the European context indicates that from the formal side, **most of them comply with the EU regulations**. This means that the EU was able to set a common minimum standard. However, the existence of the minimum standard (and in many instances provisions that exceed it) does not

⁴¹ The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, available at: <http://www.legislation.gov.uk/uksi/2012/989/contents/made> last time visited 30.03.2015.

automatically translate into complete protection for those affected. This **gap between the formal regulation and the practice** is visible with respect to the issues described in this paper. The DG Justice 2012 Report argues that this gap is significant and involves several instances of harassment, discrimination, dismissal, refusal to recruit, and refusal to extend a fixed-term contract.

It should be stated, that while the protection of pregnant worker or a person using maternity leave, parental leave or adoption leave is comprehensive, in all the Member States, when it comes to specificities, **important differences can be observed**. One example is **the moment, when the protection starts** and if an employer is notified. In some countries, such as in Poland, Spain or Italy, the protection against dismissal is in force irrespective of a notification. In Cyprus, the protection runs from the moment of a written notification of an employer, while in Austria and Hungary some form of a notification is required. In some countries the protection is extended beyond the length of a maternity leave. This is the case of Cyprus, and similar provisions regarding extended protection exist in Germany or Italy. Croatia provides significantly extended protection, as it provides a ban on dismissal during pregnancy, maternity leave, parental and adoption leave, as well as part-time work or reduced working hours due to care for a disabled child.

Furthermore, two major rules have been identified in the European review of regulations and practices.

Firstly, it is the **sectoral differentiation: in principle, more protection is granted in the public sector, compared with the private one**.

Secondly, **the size of a company matters**: discriminatory measures decline with the size of a company (the smaller the company, the more discrimination). Of some importance, though only in some countries, is the protection of workers who are employed on the basis of a typical contract. If the protection principles are embedded in the labour law, and this type of regulation does not cover such persons, then the possibility of a loophole arises. A similar phenomenon can be observed in the case of the self-employed, which in some countries constitutes an ambivalent category in the labour market.

An important issue relates to a **widespread practice of termination of fixed-term contracts** in the protection period. The CJEU has maintained that the refusal to extend a fixed-term contract in the case of pregnant worker is an instance of direct discrimination. As the authors state, such practices remain in place in several countries, such as Greece, Luxembourg, the Netherlands, Germany, Austria and Croatia). At the same time, in Italy, the workers tend not to extend their contract. Such practices also occur in the public service sector.

It is remarkable that while the protection is strongly embedded in the national legislation, **the practice of litigation against unlawful dismissals is relatively rare**. While the comprehensive statistics regarding both personal experiences of dismissals, as well as litigation, are missing, one can argue that only in the fraction of unlawful dismissal cases, do they reach the judicial system. It is especially striking, given the fact that the issue of dismissals is the major focus of cases related to maternity and pregnancy.

There are multiple reasons for such limited litigations.

- Firstly, **such cases often lack the supporting evidence**, which makes litigation challenging.
- Secondly, there is a **fear related to victimisation or the stigma of a trouble-maker**, in particular, during the period of crisis. Moreover, individuals are afraid to be exposed, especially in smaller settlements. In some countries, **individuals refrain from taking a case to court as they are aware that the procedure will be difficult and costly**, while it does not guarantee success.
- Thirdly, **the common practice is to induce the voluntary job resignation of a pregnant worker**. This has been the case of Italy, where specific measures (such as a third party – a representative of the Ministry of Labour – presence at the termination of the contract is required) have been established in order to restore the protection of parents of children under three.

To sum up, at least two conditions need to be met in order to safeguard the protection of vulnerable individuals. These conditions are:

1. **An efficient judiciary system** friendly towards the potential claimants;
2. **Widespread social awareness** (understood as the knowledge of rights, but also knowledge of case laws etc.). One can argue, that the higher the awareness, the more litigation and a more efficient judiciary system, a better and real protection for individuals. Unfortunately, both of them remain under-researched, as we are missing the comparative data on the legal awareness of societies, but we also lack the systematic knowledge on the functioning of the legal and judiciary systems.

Finally, some data on the societal perception are presented in order to support the further recommendations, including the recommendation on the increase of legal awareness. The graph below illustrates **the perceived scale of discrimination based on gender**. While the data presented is relatively general, it very clearly shows how diverse the social perception of discrimination is in the Member States.

Figure 6: The social perception of discrimination based on gender in the Member States, 2012

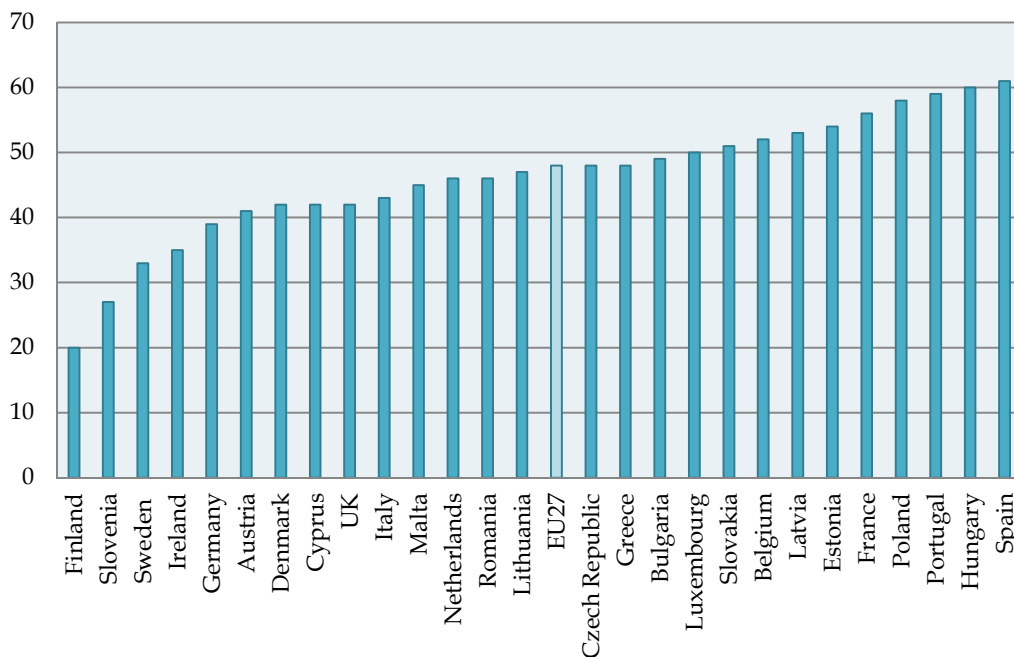


Source: Special Eurobarometer 393, Discrimination in the EU 2012 (combined positive answers: total 'widespread').

As one can observe, on average, **approximately 30% of Europeans notice the gender discrimination as widespread**. Such a perception is the smallest in Bulgaria, where only 14% of respondents see it as widespread, while in France as many as 48% perceive this form of discrimination as widespread. It should be noted, moreover, that we have observed some improvement in this respect.

The same Eurobarometer survey conveys an important message regarding the awareness of rights **in the case of discrimination or harassment**. On average, **half of Europeans would not know their rights** in the case of such a situation and in most of the countries, unknowledgeable respondents dominate.

Figure 7: The percentage of respondents who would not know their rights in case of discrimination or harassment (2012).



Source: Special Eurobarometer 393, *Discrimination in the EU 2012* ("Do you know your rights in the case of discrimination or harassment?", the share of persons, who answered: "no").

The brief data shown above might partially suggest why the actions in the case of the violation of protection related to pregnancy are relatively rare, but they also indicate the possible directions of change in the Member States. Below, a short review of regulations, good and bad practices in the Member States can be found. Whenever possible, the review of a situation is combined with some empirical illustration regarding discrimination or the scale of the litigation.

2.4. Recommendations regarding Directive 2006/54/EC

A stronger monitoring of the Directives' implementation is recommended. It is especially important, that the vast majority of the Member States conform to the Directives' provisions, to observe the less visible aspects, such as litigations, the issuance of fines and other administrative measures. A specific form of monitoring should cover the

functioning of the legal system and its dissuasive effects regarding the different forms of discrimination.

Therefore,

the European Commission should

- ensure that the legal standards in all the Member States are in line with the European provisions;
- closely monitor the cases of discrimination in the field and occupation, with regard to their number, character, and following legal redress. The latter is of special importance, as while the legal framework present in the Member States in the great majority is in line with the Directives' provisions, the sanctions in the case of equal treatment breach significantly differ;
- undertake actions regarding the improvement of the knowledge on the experience of harassment/discrimination among European citizens specifically related to pregnancy, maternity leave, parental leave, paternity leave and adoption leave. A suitable platform for such repeated actions could be the Eurobarometer survey;
- increase its knowledge about the scale of awareness on the rights of pregnant workers, and maternity leave and paternity leave and parental leave takers.

the European Parliament should

- consider further steps regarding the monitoring and evaluation of the Directives' impact on fighting discrimination against pregnant workers, and maternity leave and paternity leave and parental leave takers;
- continue to take initiatives aimed at pointing out the loopholes from the Member States' legal systems, causing differential treatment of certain categories of workers ('atypical' workers, self-employed). This applies especially to workers not covered by labour laws.

the social partners should

- become more active in ensuring the protection of pregnant workers and parents, and actively engage, both in the prevention of discrimination and in the process of legal actions if discrimination occurs.

the European Institute for Gender Equality should:

- pay more attention to the analysis of reasons behind the gender discrimination in the field of maternity, paternity, parental and adoption leave;
- take into account the socio-legal impact of the individual sanctions on the practice of gender discrimination in a wider context;
- create and maintain the database of good practices in this field of combating gender discrimination in the workplace.

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Annex Table 1: Review of parental leave provisions in the Member States, according to their compliance to the Directive.

Country	Duration	Character of entitlements: <i>individual/family-based, special incentives for fathers:</i> <i>yes/no</i>	Whether income attached: <i>paid/unpaid</i> if paid: <i>flat rate/wage replacement</i>	Compliance with the Directive: <i>in compliance/partial compliance with comments</i>
The Directive	At least 4 months	In principle - the entitlement should be non-transferable, At least one month as individual and non-transferable.	it is on the MSs to decide about the provision	
Austria	Options of the leave's duration until the child reaches two	Entitlement is per family , but there is a bonus if the partners share: accordingly, the leave is proportionally shorter if not shared by both spouses (12 m. instead of 14m.).	Flat-rate payment according to the selected duration of the leave	In partial compliance due to family-based entitlement only, though the gender bonus improves father's take up.
Belgium	17 weeks (4 months)	Not explicitly stated whether the entitlement is transferrable. No special incentives for fathers.	Flat-rate payment.	In partial compliance, as there is an ambiguity about non-transferability of entitlements might raise concern.
Bulgaria	6 months per parent	One month of individual non-transferrable entitlement.	Unpaid.	In compliance.
Croatia	8 months	4 months per parent (individual), while 2 months as non-transferable leave.	Wage replacement starting with 100%, the final part of the leave 50% (ceiling 80% budgetary base).	In compliance (explicit reforms to comply with the Directive).
Cyprus	18 weeks	2 weeks can be transferred, 16 weeks as individual and non-transferrable.	Unpaid.	In compliance.
Czech Republic	Options of the leave: shortest: until the child is 24	Individual entitlement (each parent might take the leave).	Flat-rate , same amount of the benefit paid for various durations.	In partial compliance, as the entitlements are transferrable.

Country	Duration	Character of entitlements: <i>individual/family-based, special incentives for fathers: yes/no</i>	Whether income attached: <i>paid/unpaid</i> if paid: <i>flat rate/wage replacement</i>	Compliance with the Directive: <i>in compliance/partial compliance with comments</i>
	months, longest: until the child is 48 months		Benefits might only be paid to one parent.	
Denmark	32 weeks	Individual entitlement (each parent might take the leave).	100% of wage replacement (with ceiling). Benefits might only be paid to one parent.	In partial compliance, as the entitlements are transferrable
Estonia	Until the child is 36 months (minus 70 days of maternity leave).	Family-based.	100% of wage replacement (with diminishing rate towards the end of the period).	In partial compliance, as the entitlements are transferrable, and family-based.
Finland	158 working days	Family-based. But can be shared. <i>However: there a paternity leave of 9 weeks; with the payment at the level of 75% (30 days) and 70% (further) wage replacement.</i>	75% of wage replacement during the first 30 days, then 70%.	In compliance. Although the entitlement for parental leave is family-based, the system is more unified, so in practice, the father's quota is nine weeks and paid, which in fact
France	12 months, 6 months for the first child, 18 months for each subsequent child; for parents with at least 2 children the leave can be renewed until the child is 2.5 (or 3 if the other parent takes the remaining 6 m.)	Individual and non- transferable entitlement for 6 months.	Flat-rate payment.	In compliance.
Germany	Until the child is 156 weeks.	8 weeks of individual and non- transferable entitlement.	67% of wage replacement for 52+8 weeks (min. 300 euro, ceiling 1800 euro).	In compliance. The two additional months of the leave are treated as bonus, but work as a non-transferable entitlement.

Country	Duration	Character of entitlements: <i>individual/family-based, special incentives for fathers: yes/no</i>	Whether income attached: <i>paid/unpaid</i> if paid: <i>flat rate/wage replacement</i>	Compliance with the Directive: <i>in compliance/partial compliance with comments</i>
Greece	4 months minimum; 9 months (public sector).	4 months per child for each parent is an individual and non-transferable entitlement .	Unpaid for private sector. Fully paid in the public sector.	In compliance. Greece introduced reforms explicitly to conform to the Directive.
Hungary	104 weeks with the possibility to extend it by 52 weeks.	Family-based.	For 104 months: 70% of wage replacement , with a ceiling, then – flat rate.	In partial compliance, as there is only family-based entitlement.
Ireland	18 weeks per each parent.	Individual and non-transferable.	Unpaid.	In compliance. Ireland introduced reforms explicitly to conform to the Directive.
Italy	10+1 months.	6 months is an individual entitlement , One bonus month if father takes at least 3 months.	30% of wage replacement.	In compliance.
Latvia	18 months.	Family-based.	60% of wage replacement for 12 months or 43,75% for 18 months.	In partial compliance. The scheme does not provide a non-transferable entitlement.
Lithuania	Until the child is 36 months.	Family-based , but there is one month of paternity leave for each father.	100% of wage replacement for the first year of the child's life, then 70% (or smaller replacement rates for longer period). Ceiling applicable.	In compliance although the possibility to use one month by the father is extremely fixed – until the child reaches one month.
Luxembourg	6 months for each parent.	Individual and non-transferable.	Flat-rate , relatively high level payment (1778 euro per month).	In compliance.

Country	Duration	Character of entitlements: <i>individual/family-based, special incentives for fathers: yes/no</i>	Whether income attached: <i>paid/unpaid if paid: flat rate/wage replacement</i>	Compliance with the Directive: <i>in compliance/partial compliance with comments</i>
Malta	4 months for each parent 12 months for public service employees.	Individual and non-transferable.	Unpaid	In compliance. Malta introduced reforms explicitly to conform to the Directive.
the Netherlands	26 weeks for each parent	26 weeks (38 work hours per week) of individual and non-transferable leave.	Unpaid (but there are tax cuts).	In compliance.
Poland	26 weeks of parental leave and 36 months of the further parental leave	1 month of non-transferable entitlement per each parent.	Unpaid (though income tested flat-rate allowance might be available for 24 months)	In compliance.
Portugal	Initial parental leave (former maternity leave) 120 or 150 calendar days, Additional parental leave: 3 months per parent	3 months of non-transferable leave 1 month bonus if parents share 'initial' leave. <i>Apart from that: 20 days of "initial father-only parental leave", 10 days obligatory after the childbirth, with 100% replacement rate.</i>	25% of wage replacement.	In compliance.
Romania	Options: 12 months or for 24 months.	1 month of non-transferable leave.	85% wage replacement with a ceiling, lower ceiling in case of the longer leave option.	In compliance. Romania introduced reforms explicitly to conform to the Directive.
Slovakia	30 months (until the child reaches 3 years, after using 6 months of maternity leave).	Family-based.	Flat-rate payment.	In partial compliance, as the entitlement is in family-based.

Country	Duration	Character of entitlements: <i>individual/family-based, special incentives for fathers: yes/no</i>	Whether income attached: <i>paid/unpaid</i> if paid: <i>flat rate/wage replacement</i>	Compliance with the Directive: <i>in compliance/partial compliance with comments</i>
Slovenia	37 weeks.	30 days of the leave as individual non-transferable entitlement.	90% of wage replacement rate with a ceiling (100% in case of low income).	In compliance.
Spain	Until the child is three years old.	Individual entitlement, but transferable.	Unpaid.	In partial compliance as the entitlements are transferrable.
Sweden	480 days.	60 days of individual and non-transferable entitlement.	390 days paid at 80% of wage replacement , then - flat-rate. Ceilings applicable.	In compliance.
UK	18 weeks for each parent	Entitlement is individual and non-transferable.	Unpaid.	In compliance.

Sources: See methodological note.

Annex Table 2: Leave on the grounds of force majeure, leave to care for sick children and leave to care for other sick dependents.

Country	Provisions
Austria	For taking care of children up to 24 months: a parent who does not take parental leave is entitled to leave in the event of force majeure. In case of sick relatives, children up to the age of 12. The employee is paid his/her wage by the employer for up to 2 weeks. 3 months for seriously ill child (until the child is 18). 1 week per worker per year, 6 months for terminally ill relative.
Belgium	Force majeure has a very wide definition, wider than merely family reasons, e.g. force majeure leave is also given in the event of natural disasters. Urgent family leave is available in connection with both children and parents. The total maximum duration is 10 days per year.
Bulgaria	Up to 60 days per year, plus taking care of a child under quarantine, plus taking care of a sick child up to 3 years of age who is hospitalised. For an adult relative: 10 days per year per person.
Croatia	60 days per illness for taking care of a child under 7, 40 days in case of children at the age of 7 to 18.
Cyprus	7 days per year.
Czech Republic	9 days per illness in the case of a sick child, and 9 days per illness for taking care of the relative at home.
Denmark	There is no legal definition of force majeure in the law and it depends on local agreements. It is possible to take leave on the grounds of force majeure to take care of a relative in case sickness or accident. Particular details are specified by the collective agreements.
Estonia	The employee can take care of a child for 14 days per illness, 3-6 days per year paid or 10 days unpaid.
Finland	Available for both children and other relatives. A maximum duration of 4 working days at a time for children under 10 years of age.
France	There is no leave on the grounds of force majeure that would be regulated by the French legislation. However, an employee might take 3 days of the leave per year to take care of a sick child, or 310 days over 3 years in case of serious disability or illness, applicable for sick child and for other dependent. Most collective agreements extend the entitlements beyond the minimum.
Germany	Parents have the right to take unpaid leave for a maximum of 10 days per year, and 25 days in the case of several children. Single parents have the right to take leave for a maximum of 20 days per year, in the case of big families - up to 50 days per year. If the child is terminally ill, the then the duration of the leave might be extended to several months.
Greece	Private sector: leave to take care of a sick child: 6-14 days per year per parent, similarly in the case of other dependent. Public sector: leave to take care of a sick child: 22 days for certain medical conditions, similarly in the case of other dependent.

Country	Provisions
Hungary	The leave on the grounds of force majeure is available for the employees that need to justify the reason, although there is no formal limit on the number of days. In case of a sick child, 14 days per family per year.
Ireland	Force majeure leave may consist of one or more days, but not more than 3 days in any period of 12 consecutive months or 5 days in any period of 36 consecutive months. In the case of taking care of other family dependent, the leave's duration might be up to 104 weeks per dependent. Absence for part of a working day is counted as 1 day of force majeure leave. The force majeure leave is paid by the employer.
Italy	Parents are entitled to time off to care for a sick child upon demonstration of a medical certificate. Unlimited during a child's first 3 years and is paid at 30% of the salary. For children 3 to 8, leave is limited to 5 days a year. 3 days in case of death or serious illness of a family member.
Latvia	Force majeure leave is available, though without specific details specified. In order to take care of a sick child under 14, the care leave is paid for 14 days, or for 21 days, when the child is hospitalised.
Lithuania	It is possible to take time-off paid by state social insurance fund. It is regulated similarly to the case of the employee's own illness: 80% of the employee's salary is paid for the first 7 days of the leave. If the child is under 14, the leave is extended to 14 days. If the child under 7 or a very seriously ill child under 14, then the leave is extended to 120 days within the period of 12 months.
Luxembourg	Available to take care of a child of less than 15 years. The maximum duration is 2 days per child and per year. Force majeure is treated in the same way as sickness leave.
Malta	Minimum 15 hours per year, paid.
The Netherlands	The provision with regards to the reads that in special cases wages must be paid when the worker cannot work, among other, in the event of childbirth, the death of the partner or a close relative, etc. The maximum duration should take "a short and reasonable time", the leave is paid. Leave to take care of a sick child: 2 days per child per year or 4 days to 52 weeks if child disabled or seriously ill.

Country	Provisions
Poland	<p>There are two sorts of leaves to take care of a child.</p> <p>First, the leave to care for a child under 14 (without giving a reason): up to 2 days per year (with right to remuneration).</p> <p>Second, the leave to take care for a healthy child up to 8 years of age (14 years if the child is disabled or chronically ill) in the case of an unforeseen closure of a nursery school, kindergarten, or school, and if a child under 14 years old is ill: up to 60 days per year, with payment (care allowance, 80% of wage replacement).</p> <p>The leave is also available on various grounds – childbirth, the wedding, death and funerals, case</p> <p>The duration of the leave varies according to the situation, e.g.</p> <ul style="list-style-type: none"> - wedding or childbirth of the employee: 2 days per case; - death and funeral of the worker's spouse, his/her child, parents, step-parents: 2 days; - wedding of the child of the worker or the funeral of another relative: 1 day. <p>The payment varies according to the reason for the leave, e.g. the leave is paid in full in the case of the death, funeral, wedding and birth of members of the worker's family.</p>
Portugal	<p>Special care leave is available for children, adopted children, children of the other parent (up to the age of 12) and disabled children.</p> <p>The leave can be taken for up to 30 days per year in the event of the illness or accident of the child. If the child is over 12, there is a need to take care of other dependent family members, the leave can be taken for max. 15 days per year. The leave is also available if a child is in a hospital.</p>
Romania	<p>There is no explicit entitlement to take a leave on the grounds of force majeure.</p> <p>It is possible to take leave in case of family issues, however, the specification of the entitlement is delegated to collective agreements.</p>
Slovakia	<p>The right to leave to take care of a sick child up to 10 years of age (or if childcare facility is closed): 10 days per incidence;</p> <p>In the case of bringing the child to a handicapped facility: 10 days.</p> <p>The right to leave to take care of a dependent family member: 10 days for a relative staying at home.</p> <p>The leave is paid.</p>
Slovenia	<p>The working parent is entitled to 7 working days for taking care of children under 7 and 15 working days in case of mentally or physically disabled children. 7 working days of the leave are available for taking care of other immediate family member. There is a possibility of extension up to six months for children and up to 14 days for other family members in special circumstances. The leave is paid at the level of 80% of the previous wage.</p>
Spain	<p>The law allows for 2 days' leave for the birth of a child or in the event of the death, accident, serious illness or hospitalization of family relatives. The maximum period per case is 2 days, 4 days if travel is necessary from another municipality.</p>

Country	Provisions
Sweden	Covers both children (under 12) and other members of the family. The maximum duration per year is 60 days; in special circumstances this can be extended to a maximum of 120 days. 80% of the wage is granted as compensation.
United Kingdom	Includes assistance on an occasion when a dependent falls ill or is injured and making arrangements in the event that the dependents give birth, or in the case of the death of a dependent, the breakdown of childcare services, or sudden problems involving a dependent child during school hours or an a school trip, for the duration of „reasonable time”. No income substitute.

Sources: Moss 2014 (country reports) and de Rosario Palma Ramalho, Foubert and Burri 2015.

Annex Table 3: Parental leave and some other special provisions for adopting parents.

Country	Provisions
Austria	The same regulations as for parental leave for biological parents.
Belgium	Adoption leave: the child is under 3 – 6 weeks of the leave, if older – then four weeks. Furthermore, the same regulations as for parental leave for biological parents.
Bulgaria	There is a new provision (from 2014) giving the right to a paid leave to the adopting parents for 12 months, 6 months might be transferred to the other parent.
Croatia	Employees: 6 months per family for taking care of an adopted child up to the age of 8, paid as maternity benefit. This might be followed by the parental leave on the same grounds as for biological parents. Adopting parents that are not employed or self-employed: one parent has the right to 12 months of the leave. The leave is paid at the level of 50% of the budgetary base rate.
Cyprus	Adoption leave can be given to a female worker for a total period of 16 weeks. This might be followed by parental leave. In the case of adopting a child, the two schemes might be taken until the child reaches 12 years of age.
Czech Republic	The same regulations as for parental leave for biological parents. Additionally, if the child is adopted after his/her 3 rd birthday (but before 7 th birthday), the parents are entitled to 22 weeks of parental leave.
Denmark	Before adopting the child, the prospective adopting parents have the right to one week of the leave (4 weeks in case of the child that comes from abroad). Furthermore, the parents have the right to 14 weeks of the leave. The same regulations apply for parental leave as for biological parents, with the exception that two of the 48 weeks must be taken by both parents together.
Estonia	70 days of adoption leave per child for parents adopting a child under ten years at 100 per cent of average earnings, with no ceiling. Adoptive parents are eligible for parental leave for a child under three years, and qualify for parental benefit and childcare benefit.
Finland	Adoptive parents receive a longer period of parental leave (200 workdays, or approximately 33 weeks), but do not receive maternity or paternity leave. However, they can apply for an adoption grant: A lump sum of between EUR 1,900 and EUR 4,500.

Country	Provisions
France	New adoptive parents receive 10 consecutive weeks of leave, beginning 10 days before the expected adoption date. If the family will have at least three children after the adoption, the adoptive parents receive 18 weeks. In cases of multiple adoptions, the new parents may take 22 weeks. Adoptive leave may be taken by either parent or shared between the two, but French law has an incentive for the parents to share it: if both parents take some of the leave, it is extended by the usual amount of paternity leave (11 or 18 days, depending on the number of children adopted).
Germany	The same regulations as for parental leave for biological parents (payment for 18 months).
Greece	Mothers in the public sector receive three paid months of leave, which they may take in the first six months after the adoption, while receiving her full salary. Fathers, and mothers in the private sector, have no adoption leave protection.
Hungary	The same regulations as for parental leave for biological parents.
Ireland	Adoption leave is nearly identical to maternity leave and benefits. However, instead of 26 weeks of benefit payments, adoptive parents receive only 24 weeks of payments, omitting the two prenatal weeks of maternity leave. If a child was adopted between the age of 6 and 8, leave in respect of that child may be taken up to 2 years after the date of the adoption order. This might be followed by 16 weeks of unpaid parental leave
Italy	Mothers and single fathers may take three months of maternity leave once the child is placed (equivalent to the usual post-natal maternity leave), if the child is not yet six years old. In each of these circumstances, the pay rate is the same as for birth mothers. The same regulations apply for parental leave as for biological parents, only that the upper limit of the child's age is 8 years from the moment of entry to the family.
Latvia	A special adoption leave is available for 10 calendar days if the child is younger than 3 years old. The same regulations apply for parental leave as for biological parents.
Lithuania	If a person adopts or takes foster care of new-born baby, she/he is entitled to maternity leave from the moment of adoption up to the child is seventy days of age. Maternity benefit is paid on the same grounds as to biological mother. Adoptive parents or foster caregivers have the same rights to parental leave and benefit as biological parents.
Luxembourg	Adoptive parents are entitled to 8 weeks leave, extended to 12 weeks for multiple adoptions, paid at 100 per cent of earnings and available to all working persons in Luxembourg who have belonged to a social security scheme at least for the six months preceding the commencement of the leave.

Country	Provisions
Malta	For public sector employees 14 weeks of paid adoption leave is available followed by 4 weeks of unpaid leave. Furthermore, the same regulations apply for parental leave as for biological parents.
the Netherlands	Dutch law allows for four weeks of leave for each new adoptive parent. Each parent may take four continuous weeks of leave, either simultaneously or separately. Then, the same regulations apply for parental leave as for biological parents.
Poland	Adoption leave entitlements are similar to maternity/paternity leave with regard to the period following childbirth (here: adoption). Furthermore, the same regulations apply for parental leave as for biological parents. Parental allowance is paid if the adopted child is seven years old or younger.
Portugal	Granted to both parents on the same conditions as those for initial parental leave (for the period of 120 or 150 days and paid accordingly), provided the adopted child is under the age of 15 and did not live with the adoptive parents prior to adoption; the parents can divide the period of the leave between them.
Romania	The same regulations as for parental leave for biological parents. No additional measures to address the specific needs of adoptive parents.
Slovakia	Max. 28 weeks of paid leave is available for adopting parents ("substitute care"), followed by parental leave granted until the child is three years old.
Slovenia	Since September 2014, all adopting parents have the same entitlements to parental leave as other parents. The start of parental leave must take place within 30 days following the moment of adoption.
Spain	The rights of adopting parents do not differ from the entitlements available for biological parents. Thus, 16 weeks of the leave following adoption is available (same as maternity leave), though the scheme might be used for child younger up to the age of 6. Furthermore, the same regulations apply for parental leave as for biological parents.
Sweden	10 days of temporary leave on the occasion of adoption is available to adopting parents (just as in the case of childbirth), but the leave might be used up until the child is 5 years old. Full access to parental leave is granted for adopting parents as if they were birth parents.
United Kingdom	Adoptive parents are entitled to leave in terms similar to those taking maternity leave. With this, adoptive parents can take 26 weeks ordinary adoption leave. Followed by 26 of "additional" leave.

Sources: Moss 2014 (country reports) and de Rosario Palma Ramalho, Foubert and Burri 2015.

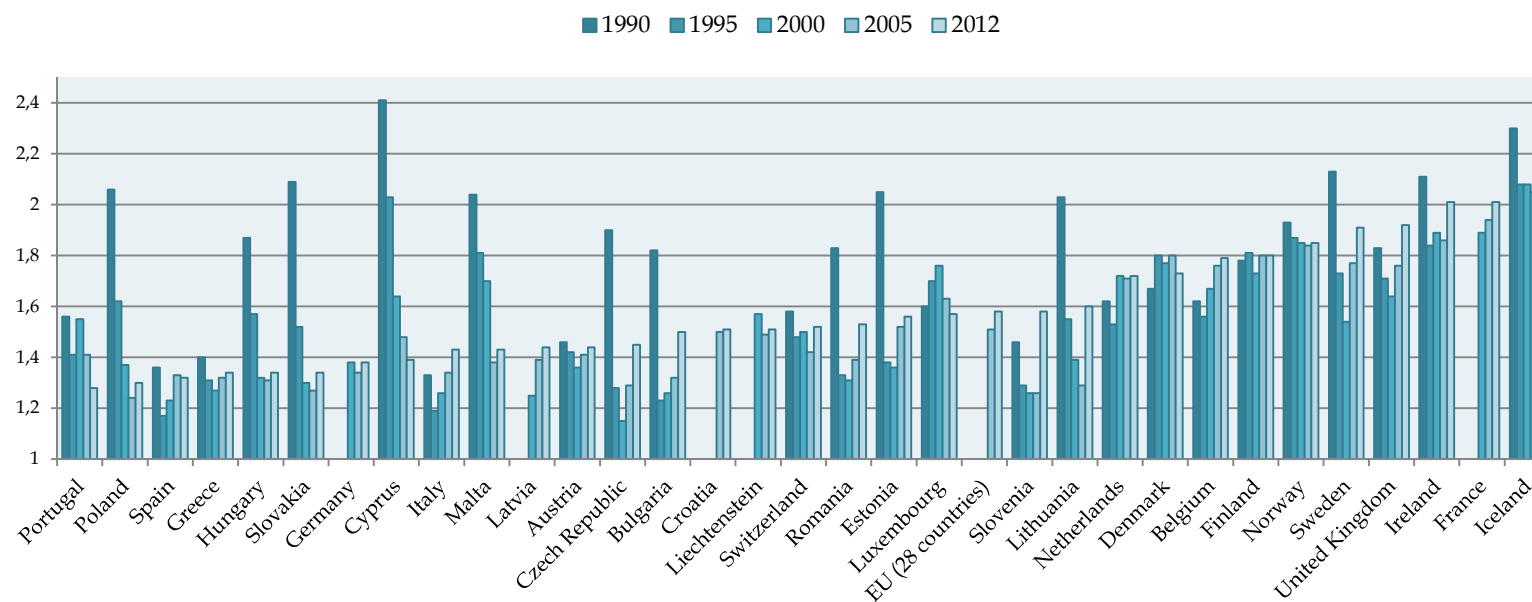
Annex Table 4: The numbers of parental leave used by women and men in the EU, by the duration of the leave, in thousands.

Country	3 months or less		3 to 6 months		6 to 12 months		over 12 months	
	Males	Females	Males	Females	Males	Females	Males	Females
EU 28	699,2	1 170,5	133,2	1 054,8	95,1	1 645,4	94,8	3 423,7
Belgium	15,1	80,1	:	23,9	:	:	:	:
Bulgaria	:	:	:	:	:	15,5	:	13,6
Czech Republic	1,2	1,3	:	3,5	:	7,8	1,8	284,7
Denmark	20,9	10,6	7,2	22,5	:	13,9	:	:
Germany	173,8	170,2	:	96,4	:	407,6	:	680,9
Estonia	:	:	:	:	:	3,9	:	57,9
Ireland	:	:	:	:	:	:	:	:
Greece	:	27,8	:	3,8	:	16,1	:	:
Spain	4,2	47,5	:	46,4	:	78,4	:	44,0
France	:	:	:	65,9	:	67,4	:	451,9
Croatia	4,3	5,1	:	35,2	:	:	:	4,3
Italy	41,1	230,8	:	204,9	:	187,3	:	43,6
Cyprus	:	:	:	:	:	:	:	:
Latvia	:	5,0	:	:	:	28,6	:	70,1
Lithuania	5,4	:	:	:	:	9,3	:	35,9
Luxembourg	:	:	2,1	13,4	:	:	:	:
Hungary	:	12,4	:	3,2	:	14,8	3,0	181,2
Malta	:	:	:	:	:	:	:	2,4
Netherlands	16,9	102,2	2,8	35,2	5,7	13,8	3,7	8,2
Austria	:	:	9,1	5,1	:	22,4	:	192,5
Poland	6,1	124,1	:	131,4	:	136,7	6,2	292,7
Portugal	21,3	41,0	:	102,3	:	:	:	:

	3 months or less		3 to 6 months		6 to 12 months		over 12 months	
	:	:	:	:	:	:	:	:
Romania	:	:	:	:	:	34,0	20,5	429,4
Slovenia	4,6	:	:	1,5	2,3	78,2	:	9,4
Slovakia	:	:	:	:	:	5,2	:	133,3
Finland	18,9	7,6	7,0	21,6	7,8	56,1	12,6	105,2
Sweden	140,1	36,7	65,6	35,3	35,1	139,4	4,0	211,1
United Kingdom	183,5	212,8	:	191,4	:	301,8	:	166,2

Source: Eurostat Labour Force Survey ad hoc module: "Reconciliation between work and family life 2010".

Annex Figure 1: Total fertility rates in the European countries 1990-2012.



Source: Eurostat.

Annex Table 5: Information on unlawful dismissals in several EU Member States (due to availability).

United Kingdom	Figures from 2013 provided by a research company "OnePoll" show 1 in 7 of the women surveyed (1,000) had lost their job while on maternity leave; 40% said their jobs had changed by the time they returned, with half reporting a cut in hours or demotion. More than a 10% had been replaced in their jobs by the person who had covered their maternity leave. ⁴²
Greece	Since 2011, the Greek Ombudsman (GO) has handled a considerable number of complaints related to employers' unilateral decision to place women working in the private sector, returning to work from maternity leave, on job rotation (meaning, depriving them of their right to full weekly employment, and restricting them to working only for few days per week, with the corresponding reduction in earnings). ⁴³
Spain	According to the latest ILO study (2014), only 55% of Spanish women return to their regular working hours after maternity compared to a 100% of Spanish male workers ⁴⁴
Poland	According to one of the national surveys among working mothers revealed that about 10% of them are almost immediately dismissed from work after they come back from maternity or childcare leave (CBOS 2013). Additionally, the Government Plenipotentiary for Equal Opportunities reported receiving about 100 complaints per year from women that were pressured to promise they would not have children before signing employment contracts or that they quit their jobs once they find out they are pregnant (Saxonberg 2014, p. 58). According to the most recent inspection conducted by the Polish National Labour Inspectorate, over 10% of men and over 4% of women were dismissed after returning from paternal and maternity leave, respectively, in 2013, which represents a decrease as compared to 2012, when the figures for men equalled to 12.6%, and for women – 5,7%. ⁴⁵
France	In 2009 Halde (French Equal Opportunities and Anti-Discrimination Commission) survey, 46% of French respondents indicated that maternity and pregnancy are a problem for women in their career.
Netherlands	The Dutch Equal Treatment Commission found that 45 % of the women who had given birth to a child in the previous 4 years (between 2007-2011) had suffered discrimination. The highest risks concern the refusal to conclude a contract (38%), or to renew a temporary contract because of pregnancy (44%). 3% of the women with a permanent contract indicated that they were dismissed (partly) because of their pregnancy. ⁴⁶

⁴² www.theguardian.com/law/2013/mar/09/women-on-maternity-leave-illegal-discrimination

⁴³ www.synigoros.gr/resources/job-rotation-after-maternity-leave-special-report-2012.pdf

⁴⁴ <http://noticias.juridicas.com/actual/3874-slo-el-55-de-las-trabajadoras-espaolas-recupera-a-su-horario-laboral-tras-ser-madre-frente-al-100-de-los-hombres.html>

⁴⁵ CBOS. 2013. Postawy prokreacyjne kobiet [Procreation attitudes of women], BS/29/2013, Warsaw: Public Opinion Research Centre. Saxonberg, Steven. 2014. Gendering Family Policies in Post-Communist Europe. A Historical-Institutional Analysis. Palgrave Macmillan.

⁴⁶ Commissie Gelijke Behandeling: *Hoe is het bevallen? Onderzoek naar discriminatie van zwangere vrouwen Nen moeders van jonge kinderen op het werk* Utrecht March 2012

The principle of equal pay is anchored in the EEC founding Treaty of 1957. Directive 2006/54/EC of the European Parliament and of the Council was a recast of secondary law dating back to 1975, pursuing gender equality in (access to) employment and 'consolidating' case law in this area developed by the European Court of Justice. Did this 'Recast Directive' have the envisaged effects? Or is further legislative action necessary?

This European Implementation Assessment, based on research from four independent groups of experts, analyses different aspects of the application of the Recast Directive, and concludes that there is a very strong case for immediate and vigorous actions at EU level, going beyond voluntary measures, in line with EP resolutions.

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