

AN OVERVIEW OF THE EU GENDER EQUALITY LAW

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I. INTRODUCTION

The European Union (EU) has yielded commendable regulatory progress in gender equality so far. Every action taken by the EU is founded on treaties that have been approved by all EU member countries. As the primary source of law, the treaty law of the European law lays the foundations for its policy on gender equality. The EU's commitment to gender equality dates back to the Treaty of Rome in 1957.

In the Treaty establishing the European Economic Community (the Treaty of Rome; EEC Treaty) adopted in 1957, Article 119 was the only provision on gender equality as regards equal pay. The original purpose behind this provision on the principle of equal pay between men and women was purely economic. Concern over unfair treatment of women in the labour market was not the primary factor motivating drafters of the Article; it was that France would be placed at a competitive disadvantage in observing the principle of equal pay for equal work more thoroughly than it was observed in other Member States.¹ Upon pressures from France, the then Member States wanted to eliminate distortions in competition that could have arisen from cheaper female labour in different Member States. In practice, Member States were delayed in transposing the equal pay provision into their national laws, and its implementation only became a priority with the agreement of a social programme in 1974 and upon the adoption of the Directive 75/117 on equal pay for men and women. With the entry into force of the Treaty of Amsterdam in 1999, the promotion of equality between men and women throughout the European Community became one of the essential tasks of the Community (former Article 2 EC). Article 119 EEC Treaty became Article 141 EC Treaty (Treaty on European Community - TEC) upon the entry into force of the Treaty of Amsterdam; and presently Article 157 of the Treaty on the Functioning of the European Union (TFEU). These provisions, together with the other provisions in the EU gender equality legislation are now viewed not only as instruments of economic policy but as an important part of EU social policy.²

The aims set out in the EU treaties are achieved by several types of legislative acts, including regulations, directives, recommendations and opinions that are more detailed on the goals that the Member States have agreed on in

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¹ Paul Craig and Grainne de Burca (2008). *EU Law, Texts, Cases, and Materials*, Oxford University Press, p. 879.

² Ibid.

the treaties. A 'directive' is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the member states to decide how.

A series of actors collaborate to deliver the objective of gender equality, including the European Commission, the Council and the European Parliament. The European Commission is the main implementation body within the EU structure, representing the body that proposes new legislation as well as the institution responsible for ensuring that EU law is applied throughout all Member States. The Commission is divided into several departments, known as Directorates-General (DGs). Since 2010, the task area of gender equality has been allocated to Directorate D of the newly created Directorate-General, 'Justice' (JUST). This task area is further divided into four subunits:

1. Gender equality law;
2. Gender equality between women and men;
3. The rights of people with disabilities; and
4. Anti-discriminatory practices and coordination of Roma issues.

The interpretation and the application of EU law and the treaties are ensured by the Court of Justice of the EU (CJEU) which plays a very important role in the field of equal treatment between men and women, in ensuring that individuals can effectively invoke and enforce their right to gender equality.

The term 'EU gender equality law' refers to all the relevant treaty provisions, legislation and the case law of the CJEU in relation to gender equality. The terms 'gender equality' and 'sex equality' are used interchangeably. However, technically speaking, the term 'sex' refers primarily to the biological conditions/differences whereas the term 'gender' is broader as it also comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society. The purpose of the present publication is to provide a general overview of the EU gender equality law by referencing the relevant treaty provisions and directives.

II. TREATY PROVISIONS

The Lisbon Treaty was signed by the Member States in December 2007, the obstacles to its ratification were finally removed in November 2009 and it became effective on 1 December 2009. With the removal of the pillar structure, the European Union is now founded on two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).³ The European Community is replaced and succeeded by the Union.

The Preamble to the TEU proclaims that the member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.' Article 2 of the TEU emphasizes the centrality of these values by stating that they 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' Article 3 of the TEU reiterates aims of the Union and pledges the Union to namely 'combat social exclusion and discrimination' and to 'promote social justice and protection, equality between men and women.' Article 8 of the

³ See for a consolidated version of both treaties: OJ C 83, 30.3.2010.

TFEU states that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women.’ According to Article 10 of the TFEU, ‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’⁴ Article 19 (1) of the TFEU which provides for the adoption of action by the Council to combat discrimination enlarges the role of the European Parliament: The Council is to act ‘unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament.’ ‘In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure’ (TFEU, Article 289[2]).

Characteristics protected by the TFEU

1	Sex
2	Racial or ethnic origin
3	Religion or belief
4	Disability
5	Age
6	Sexual orientation

The former substantive article on sex equality, Article 141 (ex Article 119) of the Treaty on European Community (TEC) incorporated equal treatment of men and women at work going beyond the field of pay and permitting forms of ‘positive action.’ Article 141 TEC has now become Article 157 of the TFEU:

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

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:

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

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

3. The 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.⁵

⁴ Member States may add other grounds of discrimination to these specified in the TFEU. For example, the Equality Act 2010 of Great Britain adds three more characteristics, marriage and civil partnership, pregnancy and maternity and gender reassignment. For details see: Catherine Barnard (2011). The Equality Act 2010, *European Gender Equality Law Review*, No. 1/2011, pp. 13-22.

⁵ Previously, in Article 141 of the TEC, the Council was required to act in accordance with the co-decision procedure set out in Article 251 of the TEC. Now the role of the

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

The Lisbon Treaty inserts a reference to the Charter of Fundamental Rights of the European Union into Article 6 (1) of the TEU, making it legally binding. Article 6 (1) of the TEU provides that 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same value as the Treaties.' The Charter of Fundamental Rights of the European Union has thus achieved the status of primary legislation. This Charter, amongst other things, prohibits discrimination on any ground, including sex (Article 21); it recognizes the right to gender equality in all areas, thus not only in employment, and the necessity of positive action for its promotion (Article 23). Furthermore, the Charter also defines rights related to family protection and gender equality. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the right to paid maternity leave and to parental leave (Article 33). The impact of the Charter on gender equality law is limited. According to the second indent of Article 6 (1) of the TEU, 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.' Article 51 (2) reiterates this principle and Article 52 (2) emphasizes that rights recognised by the Charter for which provision is made in the Treaties must be exercised within the limits set out in the Treaties. The third indent of Article 6 (1) of the TEU requires the Charter to be interpreted in accordance with the provisions of Title VII meaning that the Charter provides an aid to the interpretation of Union legislation and Member States' implementing measures, and may also provide an argument supporting challenge to such acts, but this is the legal extent of its effect.⁶

III. DIRECTIVES

EU Directives are legally binding for Member States and must be incorporated into their national legislation. This allows citizens who feel that they have been discriminated to take their cases to national courts. In the field of gender equality there are six directives in effect. The Recast Directive (Directive 2006/54) is a consolidating Directive replacing the prior directives on equal pay, equal treatment, occupational social security, and the burden of proof. Apart from Directive 2006/54, there is specific gender equality legislation on state social security, on access to and supply of goods and services, on pregnancy and parental leave, and on self-employment.

European Parliament is highlighted by being referred to it before the Council. This does not constitute a substantial change because the 'ordinary legislative procedure' (TFEU, Article 294) is in substance the former co-decision procedure (TEC, Article 251) (Evelyn Ellis (2010). The Impact of the Lisbon Treaty on Gender Equality, *European Gender Equality Law Review*, No. 1/2010, pp. 7-13, p.9).

⁶ Evelyn Ellis, p. 11.

	Date	No.	Directives
1	19.12.1978	79/7/EEC	Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security ⁷
2	19.10.1992	92/85/EEC	Council Directive 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) ⁸
3	13.12.2004	2004/113/EC	Council Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services ⁹
4	5.7.2006	2006/54/EC	Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ¹⁰
5	8.3.2010	2010/18/EU	Council Directive implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC ¹¹
6	7.7.2010	2010/41/EU	Directive of the European Parliament and of the Council 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 ¹²

III. 1. RECAST DIRECTIVE

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 is called the 'Recast Directive.' The objective of the Recast Directive is to combine in a single text the main provisions existing on gender equality as covered by this Directive as well as by relevant case law for reasons of clarity (preamble

⁷ OJ L 6, 10.1.1979, pp. 24–25.

⁸ OJ L 348, 28.11.1992, pp. 1–8.

⁹ OJ L 373, 21.12.2004, pp. 37–43.

¹⁰ OJ L 204, 26.7.2006, pp. 23–36.

¹¹ OJ L 68, 18.3.2010, pp. 13–20.

¹² OJ L 180, 15.7.2010, pp. 1–6.

point 1). The Recast Directive consolidates different bodies of secondary legislation replacing the prior directives on equal pay (75/117/EEC¹³), equal treatment (76/207/EEC;¹⁴ 2002/73EC¹⁵), occupational social security (86/378/EEC;¹⁶ 96/97/EC¹⁷), and the burden of proof (96/34/EC¹⁸).

The Recast Directive had to be transposed in the EU Member States by 15 August 2008 at the latest (Article 33) and the Directives that are recast in this Directive were to be repealed one year later (Article 34). Member States could, if necessary to take account of particular difficulties, have up to one additional year to comply with the Recast Directive (Article 33). Member states had to transpose into national law the provisions of the Recast Directive which represent a substantive change from earlier directives. This is why Annex 2 of the Recast Directive contains a correlation table between the different Articles of the relevant Directives.

The Recast Directive defines 'direct discrimination,' 'indirect discrimination,' 'harassment,' 'sexual harassment,' 'instruction to discriminate,' and 'positive action' (Articles 2, 3). These central concepts of gender equality law are defined thus:

Concepts	Definitions
Direct discrimination	'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'
Indirect discrimination	'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'
Harassment	'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'

¹³ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women OJ L 45, 19.2.1975, pp. 19-20.

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, 14.2.1976, 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, 5.10.2002, 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 L 225, 12.8.1986, pp. 40-42.

¹⁷ Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes OJ L 46, 17.2.1997, pp. 20-24.

¹⁸ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L 145, 19.6.1996, pp. 4-9.

Sexual harassment	‘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’
Positive action	maintenance or adoption of measures by member States within the meaning of Article 157 of the TFEU with a view to ensuring full equality in practice between men and women in working life
Instruction to discriminate	Instruction to discriminate on grounds of a person’s sex is discrimination

III. 2. PREGNANT WORKERS DIRECTIVE

The goal of maternity protection legislation is to enable women to combine their reproductive and productive roles successfully and to promote equal opportunities and treatment in employment and occupation, without prejudice to health or economic security. By safeguarding women’s employment and income security during and after maternity, maternity protection also promotes and achieves effective gender equality at work.¹⁹

The Charter of Fundamental Rights of the European Union, in its Article 33 (2), states that ‘to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.’ This provision guarantees that issues related to pregnancy, maternity and parental leave are to be protected, not only as employment and social issues but also as fundamental human rights.

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) (Pregnant Workers Directive): The Pregnant Workers Directive is aimed at improving health and safety at work of pregnant workers and workers who have recently given birth and who are breastfeeding (Article 1). It provides measures for health and safety; protection against unfavourable treatment; and specific forms of leave for pregnant workers and women who have recently given birth. The Directive addresses not only the health and safety of workers who are pregnant, or have recently given birth or are breastfeeding, but also, issues of equal treatment, such as the right to return to the same or an equivalent working place, the rules on dismissal and employment rights, or on better financial support during the leave.

Article 5 (3) of Directive 92/85/EEC obliges employers to grant a pregnant worker a leave of absence to protect her health and safety if moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds. Leave must also be granted if a pregnant or breastfeeding worker is exposed to prohibited substances or is required to do night work, if moving her to another job or changing to daytime

¹⁹ ILO (2014). *Maternity and paternity at work: Law and practice across the world*, pp.1, 3.

work is not possible. Pregnant and breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, if performing night work would be detrimental to the safety or health of the worker concerned (Article 7). A transfer to daytime work or, if this is not technically and/or objectively feasible, leave from work or the extension of maternity leave should be possible. Article 9 provides that pregnant workers must be entitled, where necessary, to time off work without loss of pay to attend ante-natal examinations. Article 8 provides for a minimum of 14 continuous weeks of maternity leave before and/or after birth, including at least two weeks of compulsory maternity leave. Article 11 is on the issue of rights related to the employment contract and specifically the right to the maintenance of payment and/or the entitlement to an adequate allowance during the period of maternity leave, which should not be set at a lower rate than the level of sickness benefits. Article 10 requires Member States to take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding, during the period from the beginning of their pregnancy to the end of the period of maternity leave. Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings through pregnancy and delivery. Directive 92/85/EC provides for a minimum maternity leave period for employees of 14 weeks and for a minimum payment during this leave at the level of sick pay (Article 11).

Maternity leave and additional maternity leave are limited to women. This reflects the traditional division of responsibility prioritizing the relationship between a woman and her child. In *Hofmann*²⁰ and *Italy*,²¹ the European Court of Justice (ECJ), under the previous Equal Treatment Directive 76/207,²² ruled that national provisions could legitimately confine additional maternity leave and compulsory adoption leave to mothers.

The 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: The Pregnant Workers Directive envisages a maternity leave of at least 14 weeks allocated before and/or after delivery. The maternity leave has to include compulsory maternity leave of at least two weeks allocated before and/or after delivery. The 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 breastfeeding²³ extended the maternity leave from 14 to 18 weeks. This corresponded to 12 non-compulsory weeks that women can choose to take before or after delivery and six compulsory weeks after delivery. If the actual date of delivery differed from the presumed date, the period of leave before the birth

²⁰ Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 (European Commission, Compilation of Case Law on the Equality of Treatment between Women and Men and on Non-Discrimination in the European Union, 3rd publication, Luxembourg 2010, pp. 62-63).

²¹ Case 163/82 *Commission v Italy* [1983] ECR 3273 (*Ibid.*, pp. 53-54).

²² OJ L 39, 14 February 1976, p. 40.

²³ COM (2008) 637 final.

could be extended without having an effect on the post-natal period. Moreover, additional leave might be granted in the event of premature childbirth, children hospitalized at birth, the birth of children with disabilities and multiple births. Also, any period of sick leave, up to four weeks before delivery, in the event of illness or complications during pregnancy or childbirth would not shorten the period of maternity leave in the interest of women's health. Where childbirth occurred after the due date, the prenatal portion of the leave shall be extended to the actual date of birth, without any reduction in the post-natal portion of the leave.

European Parliament legislative resolution of 20 October 2010 on the Proposal: European Parliament legislative resolution of 20 October 2010²⁴ on the Proposal extended the maternity leave to 20 weeks (Article 8). Member States had to take the necessary measures to ensure that workers were entitled to a continuous period of maternity leave of at least 20 weeks allocated before and/or after confinement. With respect to the last four weeks of the period, a scheme of family-related leave available at national level might be considered to be maternity leave for the purposes of this Directive, on condition that it provided overall protection to workers, that is equivalent to the level laid down in this Directive. The remuneration for the last four weeks of maternity leave would be no lower than the allowance referred to in the Directive or, alternatively, it might be the average of the remuneration for the 20 weeks of maternity leave, which would be at least 75% of the last monthly salary or of the average monthly salary as stipulated according to national law, subject to any ceiling laid down under national legislation. The Member States might lay down the periods over which the average monthly salaries were calculated. Where a Member State had made provision for a period of maternity leave of at least 18 weeks, that Member State might decide that the last two weeks were met through paternity leave available at national level, with the same level of pay.

The maternity leave would include compulsory fully paid maternity leave of at least six weeks after childbirth, without prejudice to existing national laws which provide for a period of compulsory maternity leave before childbirth. The six-week period of compulsory maternity leave would apply to all working women regardless of the number of days worked prior to confinement. The Member States would take the necessary measures to ensure that workers are entitled to choose freely the time at which the non-compulsory portion of the maternity leave was taken, before or after childbirth, without prejudice to existing national laws and/or practices, which provide a maximum number of weeks prior to the childbirth. This period might be shared with the father, in accordance with the legislation of the Member State concerned if the couple agrees and so requests. To protect the health of both mother and child, Member States would take the necessary measures to ensure that workers could decide freely and without compulsion whether or not to take the non-compulsory portion of maternity leave before childbirth. The worker had to indicate her chosen period of the non-compulsory portion of the maternity leave no later than one month

²⁴ European Parliament legislative resolution (P7_TA (2010) 0373) on the proposal for a directive of the European Parliament and of the Council 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 are breastfeeding, Date: 20.10.2010, Strasbourg.

before the date of commencement of such leave. For multiple births the compulsory portion of maternity leave would be increased for each additional child in accordance with national legislation. The prenatal portion of maternity leave would be extended by any period elapsing between the presumed date and the actual date of childbirth, without the remaining portion of leave being reduced. Member States would take the necessary measures to ensure that additional leave on full pay is granted in the case of premature childbirth, children hospitalised at birth, children with disabilities, mothers with disabilities, and multiple births. The duration of the additional leave should be proportionate and allow the special needs of the mother and the child/children to be accommodated. The total period of maternity leave would be extended by at least eight weeks after the birth in the case of the birth of a disabled child. Member States would also ensure an additional period of leave of six weeks in the case of a stillbirth. Member States would ensure that any period of sick leave due to illness or complications arising out of pregnancy occurring four weeks or more before confinement does not impact on the duration of maternity leave. Member States were to protect mothers' and fathers' rights by ensuring that there are special working conditions so as to help the parents of children with disabilities. Member States were to take the necessary measures to ensure that the provisions of this Directive concerning maternity and paternity leave also apply in the event of adoption of a child of less than 12 months old (inserted Article 8b).

Member States had to adopt suitable measures for the recognition of postnatal depression as a serious illness, and shall support awareness campaigns aimed at disseminating accurate information on the illness and correcting the prejudices and possible stigmatization which it can still attract.

Recognition of men's right to parenthood, as well as their responsibility to share unpaid care and household work, will help to break down traditional social attitudes, resulting in greater equality for both men and women at work and at home.²⁵ In the resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life, Member States were encouraged to consider whether, under their respective legal systems, working men might be granted a non-transferable individual right to paternity leave, without any loss of employment rights.²⁶ European Parliament legislative resolution of 20 October 2010 on the Proposal called on EU Member States to improve rights for men to paternity leave and to adopt other measures enabling men to support family life, thereby encouraging working men and women to share the care of children and other dependants. Article 8a inserted by the European Parliament was on paternity leave: Member States shall take the necessary measures to ensure that workers whose life partner has recently given birth are entitled to a continuous period of non-transferable paid paternity leave of at least two weeks, granted on an equivalent basis – except with regard to its duration – to maternity leave, to be taken after the confinement of the worker's spouse or partner during the period of the maternity leave. Member States that have not already introduced non-transferable paid paternity leave, granted on an equivalent basis – except with regard to its duration – to

²⁵ ILO, *Maternity and paternity at work: Law and practice across the world*, p. 51.

²⁶ OJ C 218, 31 July 2000, p. 5.

maternity leave to be taken during the period of the maternity leave on a compulsory basis for a continuous period of at least two weeks after the confinement of the worker's spouse or partner, are strongly encouraged to implement it in order to promote equal participation of both parents in balancing family rights and responsibilities. Member States shall take the necessary measures to ensure that workers whose life partner has recently given birth are granted a period of special leave including the unused portion of maternity leave in the case of death or physical incapacity of the mother.

As regards night work and overtime Article 7 of the Resolution stated that Member States had to take the necessary measures to ensure that workers were not obliged to perform night work and were not obliged to work overtime:

- a) during the ten weeks prior to the due date of childbirth;
- b) during the remainder of the pregnancy should it be necessary for the health of the mother or the unborn child;
- c) during the entire period of breastfeeding.

The 'necessary measures' had to entail the possibility of a transfer to compatible daytime work; or leave from work or extension of maternity leave where such a transfer was not technically and/or objectively feasible.

The Council has not responded officially to the legislative resolution of 20 October 2010 on the proposed maternity leave directive adopted by Parliament.²⁷ On 1 July 2015, the Commission reviewed progress on the draft Maternity Leave Directive which has been stuck in the legislative process since 2008 and it decided to withdraw its proposal.²⁸

III. 3. PARENTAL LEAVE DIRECTIVE

Reconciliation between professional and family life is recognised as an important aim of the EU. The Pregnant Workers Directive and the Parental Leave Directive are among the legislative measures designed to promote the reconciliation of professional and family life and to promote a more balanced share of family responsibilities between working parents.

'Gender equality in the workforce: Reconciling work, private and family life in Europe Final Report,' prepared for the European Commission Directorate General for Justice and Fundamental Rights summarises and synthesises the findings of a research project entitled 'Reconciling work, private and family life: production of statistical reports.' The main finding is that despite improvements in gender equality over recent decades, 'women continue to lag behind on labour force participation and earnings, face slower transition to their first job, while contributing more to domestic tasks even if they are breadwinners. These challenges are particularly pronounced in the presence of children. Mothers have lower employment rates, shorter hours and interrupted their careers more due to childcare, compared to women without children and men (with or without children).'²⁹ The findings reveal that 'it seems unrealistic to expect a

²⁷ Motion For A Resolution further to Questions for Oral Answer B8-0000/2015 and B8-0000/2015 pursuant to Rule 128 (5) of the Rules of Procedure on maternity leave (2015/0000 (RSP)), 13.05.2015.

²⁸ http://ec.europa.eu/justice/newsroom/gender-equality/news/150701_en.htm

²⁹ Melinda Mills, Flavia Tsang, Patrick Präg, Kai Ruggeri, Celine Miani and Stijn Hoorens (2014). Gender equality in the workforce: Reconciling work, private and family life in

significant increase in female employment rates or hours worked as long as men's contribution to domestic work continues to be only about half of women's.³⁰

The employment guidelines proposed by the Commission and approved by the Council, present common priorities and targets for the national employment policies. They have been in an integrated package with the Broad Economic Policy Guidelines since 2005. On 26 March 2010, in an informal meeting of EU equality ministers, it was decided that the same target rate for the employment of both men and women (75%) should be set. In line with the Europe 2020 Strategy,³¹ the European Employment Strategy targets at having 75% of people aged 20-64 in work by 2020. Europe's current average employment rate is at 69% for those aged 20-64. Only 63% of women are in work compared to 76% of men.³² To raise to 75% the employment rate for women and men aged 20-64 means giving priority to addressing barriers to women's participation in the labour market when implementing the Strategy.

The importance of childcare is emphasized in Council Recommendation 92/241/EEC of 31 March 1992,³³ the Barcelona European Council conclusions of March 2002, and European Commission: Communication on Early Childhood Education and Care of 17 February 2011.³⁴ The Barcelona European Council agreed that the Member States should remove disincentives to female labour force participation and strive, taking into account the demand for childcare facilities and in line with national patterns of provision, to provide childcare by 2010 to at least 90% of children between 3 years old and the mandatory school age and at least 33% of children under 3 years of age. In most EU Member States, compulsory full-time education starts at the age of five or six. For those children who are too young to attend school, there are wide differences in the availability and provision of pre-school education and care services. In 2009, education ministers agreed on a target that 95% of four year-olds should have access to pre-school education. The current EU average is 92.3%, but there are wide variations in the number of hours per week as well as the quality of services.³⁵

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 (former Parental Leave Directive) had to be transposed into national law by 8 March 2012 by the Member States.

The Parental Leave Directive applies to all workers who have an employment contract, including part-time workers, fixed-term workers and temporary

Europe Final Report RR-462-EC, prepared for the European Commission Directorate General for Justice and Fundamental Rights, pp. v, viii.

³⁰ Ibid., p. xiv.

³¹ Communication from the Commission, EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final, Brussels, 3.3.2010.

³² Ibid., p. 7.

³³ OJ L 123, 8 May 1992, p. 16.

³⁴ Communication from the Commission, Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow, COM (2011) 66 final, Brussels, 17.2.2011.

³⁵ <http://www.euractiv.com/socialeurope/brussels-calls-universal-child-c-news-502271>

agency workers (Clause 1). Member States shall grant all employees a right, in principle non-transferable, to four months' unpaid parental leave which can be used until the child has reached the age of eight, although the precise age is to be determined by the Member States and/or social partners (Clause 2). Men and women workers are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years. The main improvement is that the individual right to parental leave has to be granted for a period of four months, thus one more month more than according to the former Parental Leave Directive. In order to encourage a more equal take-up of leave by both parents, the new Parental Leave Directive emphasizes the non-transferability of at least one of the four months. There is still no obligation to provide totally or partially paid parental leave. The Parental Leave Directive further provides protection from discrimination for workers on the grounds of applying for or taking of parental leave stipulating that parents returning from parental leave may request changes to their working hours/or patterns for a set period of time. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job. Employers have to consider and respond to such requests, taking into account both employers' and workers' needs.

EU Member States are directed to adopt the necessary measures to prohibit dismissal of workers from the beginning of pregnancy to the end of maternity leave, except in cases not connected with their condition and authorized under national legislation or practice (Clause 5). Protecting mothers against employment termination after childbirth by combining leave measures with job protection regulations is fundamental to protect situation of mothers in the labour market.

According to the EU Directive on parental leave, the individual right of men and women workers to parental leave for at least four months should also apply in the case of adoption of a child (Clause 4). Member States and/or social partners should assess the need to adjust the conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness (Clause 3/3).

Modalities of application are flexible in order to take into account the needs of both employers and workers and to meet the operational and organisational requirements of small undertakings (Clause 3): Member States and/or social partners shall establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave. Member States and/or social partners shall have regard to the interests of workers and of employers in specifying the length of such notice periods. The Member States and/or social partners may, in particular, decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system; make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year; define the circumstances in which an employer is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the organisation; and authorise special arrangements for small undertakings.

III. 4. DIRECTIVE 79/7/EEC ON EQUAL TREATMENT IN STATUTORY SOCIAL SECURITY SCHEMES

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 concerns equal treatment in the area of statutory social security. The term 'progressive' expresses the idea that the Directive does not apply to all parts of social security; only statutory schemes are covered. Furthermore, Article 7 of the Directive allows Member States to exclude some areas of statutory social security from the Directive's scope. Also, the period of implementation was six years and this considerably longer period of time to adapt their laws to Directive's requirements expired on 23 December 1984.³⁶

Article 2 draws the personal scope of the Directive: This Directive shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalidated workers and self-employed persons. Article 3 is on the material scope of the Directive stating that the Directive shall apply to: (a) statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment; (b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a). This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in (a). Article 4 (1) on the equal treatment rule reads: The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns the scope of the schemes and the conditions of access thereto; the obligation to contribute and the calculation of contributions; and the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

The five permissible exceptions to the scope of the Directive are set out in Article 7 (1):

1. the determination of pensionable age;
2. advantages granted to retired persons who have brought up children, specifically concerning periods of interruption of employment;
3. old-age or invalidity benefit entitlement connected with the derived entitlements of a spouse;
4. long-term benefits accorded to a spouse connected with the invalidity, old-age, accidents at work or the occupational disease of their spouse;
5. a right of option before the adoption of the Directive, specifically the option not to acquire rights or incur obligations under a statutory scheme.

III. 5. DIRECTIVE 2004/113/EC ON EQUAL TREATMENT IN THE ACCESS TO AND SUPPLY OF GOODS AND SERVICES

³⁶ Frans Pennings (2003). Introduction to European Social Security Law, 4th edition, Intersentia, p. 325.

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 enshrines in EU law the principle of equal treatment between men and women in the access to and supply of goods and services. Member States were required to implement the directive by the end of 2007, except for the clause about costs relating to pregnancy and maternity, Article 5 (3), which had to be implemented by the end of 2009.

The Directive applies to all people and organisations (both public and private sector) that make goods and services available to the public; goods and services offered outside the area of private and family life. The Directive does not apply to the content of media and advertising or to education (Article 3). Differences in treatment may be permitted in the provision of goods and services exclusively or primarily to members of one sex if this is justified by a legitimate aim, and if appropriate and necessary (Article 4/5). A legitimate aim could, for example, as given in the preamble to the Directive, be the protection of victims of gender-related violence (in cases like the provision of single-sex shelters); single-sex voluntary bodies; single-sex private clubs; single-sex sports events; or provision of accommodation by a person in a part of that person's home. There is also a specific exception for insurance and related financial services where gender is used as a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data (Article 5/2). This derogation has recently been declared invalid by the Court of Justice as from 21 December 2012.³⁷ The Court ruled on a challenge by a Belgian consumer group, *Test-Achats*. The court argued that a current exemption for insurers contradicted the wider European principle of gender equality. 'Taking the gender of the insured individual into account as a risk factor in insurance contracts constitutes discrimination,' the ECJ said.

III. 6. DIRECTIVE 2010/41/EU ON EQUAL TREATMENT IN AN ACTIVITY IN A SELF-EMPLOYED CAPACITY

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 enables Member States to adopt positive action measures aimed at ensuring full equality between men and women in working life, for example by promoting business creation by women (Article 5). The Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 August 2012 at the latest. Where justified by particular difficulties, the Member States could, if necessary, have an additional period of two years until 5 August 2014 (Article 16).

This Directive lays down a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such

³⁷ Case 236/09 *Test Achats* of 1 March 2011. The ECJ decision was challenged by insurance companies mainly on the ground that that nobody should be treated unfairly because of their gender, but that financial services providers should be allowed to make sensible decisions based on sound analysis of relevant risk factors.

an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC (Article 1).

Directive 2010/41/EU covers self-employed workers, namely all persons pursuing a gainful activity for their own account, under the conditions laid down by national law. In addition, 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 are covered (Article 2).

Self-employed women, and female spouses or when and in so far as recognised by national law, the life partners of self-employed workers, not being employees or business partners, who contribute to the activity of self-employed workers shall be entitled to maternity allowance for at least 14 weeks. This allowance shall be sufficient to enable them to interrupt their activities if they wish to do so. This allocation shall therefore be equivalent to the average loss of income or profit. This amount may however be subject to a ceiling limit; and/or the allowance provided at national level in the event of an interruption in activities on health grounds; and/or any other family-related allowance provided for and determined by the Member State (Article 8).

IV. CONCLUSIONS

Equality between men and women has been one of the fundamental principles of EU law. The principle of equality between men and women has been part of EU law since the signing of the Treaty of Rome in 1957. For a long time, the sex equality principle remained limited in scope and confined largely to employment-related sex discrimination. In time, a considerable body of legislation has been adopted on matters such as equal pay, equal treatment in employment and occupation, equality in social security schemes, health protection in the context of maternity, parental leave, access to goods and services, or self-employment.

Through equal treatment legislation, judicial action, gender mainstreaming (integration of the gender perspective into all other policies), and specific measures for the advancement of women the EU has made significant progress over the last decades. The principle of gender equality is guaranteed in the TFEU. Article 8 TFEU states: 'In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.' Equality between men and women is also enshrined in Article 23 of the Charter of Fundamental Rights of the European Union and gender mainstreaming is a horizontal policy of the EU. All Member States have established national equality bodies to monitor the application of gender equality laws.

Equal treatment of men and women in the field of employment aims to facilitate the active participation of both men and women in the labour market and to promote opportunities for both men and women to enjoy a better work-life balance. Despite the significant progress achieved over decades, gender gaps remain and in the labour market, women are still over-represented in lower paid sectors and under-represented in decision-making positions. The Maternity Leave Proposal was presented by the Commission in 2008, and the European Parliament issued its first reading position in 2010. The revision of

the Maternity Leave Directive included a longer period of leave and more rights for mothers but the co-legislators have not been able to come to an agreement and adopt the proposed legislation. On 1 July 2015, the Commission after reviewing progress on the draft Maternity Leave Directive decided to withdraw its proposal. The new initiative will be part of the Commission's Work Programme for 2016. Achievement of equality between men and women is an ongoing process.

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