

The Transposition of Recast Directive 2006/54/EC



The Transposition of Recast Directive 2006/54/EC

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

Susanne Burri and Sacha Prechal

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Production:

Susanne Burri

Frans van Eck

Titia Hijmans van den Bergh

Titia Kloos

Simone van der Post

Sacha Prechal

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List of Abbreviations

AT	Republic of Austria
BE	Kingdom of Belgium
BG	Republic of Bulgaria
CY	Republic of Cyprus
CZ	Czech Republic
DE	Federal Republic of Germany
DK	Kingdom of Denmark
EE	Republic of Estonia
EL	Hellenic Republic
ES	Kingdom of Spain
FI	Republic of Finland
FR	French Republic
HU	Republic of Hungary
IC	Republic of Iceland
IE	Ireland
IT	Italian Republic
LI	Principality of Liechtenstein
LT	Republic of Lithuania
LU	Grand Duchy of Luxembourg
LV	Republic of Latvia
MT	Republic of Malta
NO	Kingdom of Norway
NL	Kingdom of the Netherlands
PL	Republic of Poland
PT	Portuguese Republic
RO	Romania
SE	Kingdom of Sweden
SI	Republic of Slovenia
SK	Slovak Republic
UK	United Kingdom of Great Britain and Northern Ireland

Members of the European Network of Legal Experts in the Field of Gender Equality

Co-ordinator:

Susanne Burri, Utrecht University, the Netherlands

Assistant co-ordinator:

Hanneke van Eijken, Utrecht University, the Netherlands

Executive Committee:

Sacha Prechal, Utrecht University, the Netherlands

Christopher McCrudden, Oxford University, the United Kingdom

Hélène Masse-Dessen, Barrister at the Conseil d'Etat and Cour de Cassation, France

Susanne Burri, Utrecht University, the Netherlands

National experts:

Anna Sporrer (Austria), Attorney at law

Jean Jacqmain (Belgium), Free University of Brussels, Faculty of Law

Genoveva Tisheva (Bulgaria), Bulgarian Gender Research Foundation

Evangelia Lia Eftstratiou-Georgiades (Cyprus), Advocate

Kristina Koldinská (Czech Republic), Charles University, Faculty of Law

Ruth Nielsen (Denmark), Copenhagen Business School, Law Department

Anneli Albi (Estonia), University of Kent, Kent Law School

Kevät Nousiainen (Finland) Helsinki University, Faculty of Law

Sylvaine Laulom (France), University Jean Monnet, Saint-Etienne, Faculty of Law

Beate Rudolf (Germany), Free University of Berlin, Department of Law

Sophia Koukoulis-Spiliotopoulos (Greece), Attorney at law

Csilla Kollonay Lehoczky (Hungary), Central European University, Department of Legal

Studies, Eötvös Loránd University, Department of Labour and Social Law

Herdís Thorgeirsdóttir (Iceland), Bifrost University, Faculty of Law

Frances Meenan (Ireland), Barrister, Four Courts, Law Library, Dublin

Simonetta Renga (Italy), Ferrara University, Faculty of Economics

Kristīne Dupate (Latvia), Practising lawyer

Nicole Mathé (Liechtenstein), University of Vienna

Tomas Davulis (Lithuania), Vilnius University, Faculty of Law

Anik Raskin (Luxembourg), National Women's Council of Luxembourg

Peter G. Xuereb (Malta), University of Malta, Faculty of Law

Rikki Holtmaat (the Netherlands), University of Leiden, Faculty of Law

Helga Aune (Norway), University of Oslo, Faculty of Law

Eleonora Zielinska (Poland), University of Warsaw, Faculty of Law and Administration

Maria Do Rosário Palma Ramalho (Portugal), University of Lisbon, Faculty of Law

Roxana Teșiu (Romania), Independent legal advisor

Zuzana Magurová (Slovakia), Slovak Academy of Sciences, Institute of State and Law

Tanja Koderman Sever (Slovenia), Independent legal advisor

Berta Valdes (Spain) University Castilla-La Mancha, Faculty of Law

Ann Numhauser-Henning (Sweden), Lund University, Faculty of Law

Aileen McColgan (the United Kingdom), King's College London

Ad hoc experts:

Dagmar Schiek, University of Leeds, the United Kingdom

Christa Tobler, University of Leiden, the Netherlands and University of Basel, Switzerland

Part I

The Transposition of the Recast Directive

1. Introduction

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women (recast) consolidates the existing directives on gender equality.¹ 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 (preamble point 1). Such a text should increase clarity and should modernize and simplify the provisions of some Directives on equal treatment and pay between men and women, in order to make gender equality law more accessible for a broader public.² The Directives that form part of this recasting exercise are Directive 76/207/EEC³ as amended by Directive 2002/73/EC⁴ on equal treatment for men and women in the access to employment, vocational training and promotion and working conditions, Directive 86/378/EEC,⁵ as amended by Directive 96/97/EC⁶ on equal treatment for men and women in occupational social security schemes, Directive 75/117/EEC⁷ on equal pay between men and women and Directive 97/80/EC⁸ on the burden of proof.

The Recast Directive should have been transposed in the EU Member States by 15 August 2008 at the latest (Article 33) and the Directives that are consolidated in this Directive will be repealed one year later (Article 34). Member States may, if necessary to take account of particular difficulties, have up to one additional year to com-

¹ 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.

² See for a recent overview: S. Burri & S. Prechal, *EU Gender Equality Law*, European Commission, Luxembourg: Office for Official Publication of the European Communities, KE-80-08-432-EN-C, 2008 (available in English, French and German); see for an electronic version: http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.htm or <http://ec.europa.eu/social/home.jsp?langId=en> (accessed 1 December 2008).

³ 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.

⁴ 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.

⁵ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ L* 225, 12 August 1986, pp. 40–42.

⁶ Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ L* 46, 17 February 1997, pp. 20–24.

⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *OJ L* 45, 19 February 1975, pp. 19–20.

⁸ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *OJ L* 14, 20 January 1998, pp. 6–8.

ply with the Recast Directive (Article 33). The Recast Directive will be incorporated in the EEA agreement and therefore also apply to Iceland, Liechtenstein and Norway.⁹

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

According to the preamble of the Recast Directive, the obligation to transpose its provisions into national law should be confined to those provisions which represent a substantive change compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged already existed under the earlier Directives (Recital 39 and Article 33). Because the obligation to transpose the Recast Directive only applies to provisions which represent a substantive change as compared to the earlier Directives, the implementation may turn out to be complicated in the sense that the substantive changes should first be identified. This is the reason why Annex 2 of the Recast Directive contains a correlation table between the different Articles of the relevant Directives. This correlation table shows that only Article 7(2), on the application of the provisions on pension schemes to civil servants, has no corollary article in one or more of the above-mentioned Directives. However, a closer look at the different provisions of the Recast Directive reveals more ‘novelties’ or ‘clarifications’ compared to the provisions of the earlier Directives. These mainly concern the following issues:

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

⁹ See decision no. 33/2008 of the EEA Committee of 14 March 2008.

- 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).

The purpose of this report is to provide an overview of the measures that the EU Member States, Iceland, Norway and Liechtenstein have taken in order to comply with their obligations to transpose into national law the provisions of the Recast Directive which represent a substantive change from earlier directives and to analyse whether they have fulfilled their obligations or not. This first part provides a short summary of findings, with an overview of the countries that have transposed the provisions of the Recast Directive explicitly, not at all or partially. Specific attention is paid to the transposition of the above-mentioned ‘novelties’ or ‘clarifications’ of the Recast Directive. The second part includes the thirty national reports by the independent experts of the European Commission’s European Network of Legal Experts in the field of Gender Equality. In these national contributions, some problematic issues arising from the incomplete and/or incorrect implementation of the directives which are part of the recasting exercise are highlighted within the specific national (legal) context.

2. Summary of findings

The national reports of the experts, written based on a questionnaire of the European Commission (see Annex I), illustrate how complicated the transposition process of various anti-discrimination directives is at the national level due to the different legal and/or political contexts. This being said, as regards the transposition of the Recast Directive, three categories of countries can be distinguished: countries that have transposed the Recast Directive; countries where no specific transposition process has taken place yet and countries where some specific provisions of the Recast Directive have been transposed. However, it should be noted that some countries are convinced that due to the fact that the Directives which are part of the recasting exercise have been implemented correctly, no further transposition is necessary. Generally speaking, only little attention has been paid to the ‘clarifications’ and/or ‘novelties’ of the Recast Directive as listed above. No EU list of ‘clarifications’ or ‘novelties’ has been published to attract the explicit attention of implementing authorities in the Member States and EEA countries. Therefore, the division of the different countries into these three categories is somewhat arbitrary, since the correct transposition of the Recast Directive partly depends on the earlier implementation of the directives that are part of the recasting exercise (see, for example, the national contribution on France).

2.1. Transposition of the Directive

In the following Member States steps have been taken in order to transpose the Recast Directive: Cyprus, Estonia, Hungary, Ireland, Liechtenstein, Lithuania, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. In most of these countries the transposition process was still ongoing after 15 August 2008 (Cyprus, Estonia, Ireland, Liechtenstein, Poland, Portugal and Sweden). In some Member States, the transposition was purely *pro forma*, in the sense that no existing legislation was amended or new provisions were adopted. In Hungary, it was restricted to a check of existing of existing legislation and ascertaining that in was in compliance with the provisions of the Re-

cast Directive. Similarly, the Slovakian government stated that due to the correct transposition of the directives which are part of the recasting exercise, the Recast Directive was transposed as well. In the same way, the Spanish government considered that with the transposition of Directive 2002/73/EC¹⁰ the Recast Directive has also been transposed.

In some of these countries (Estonia, Poland, Slovenia, Spain), the transposition of the Recast Directive is closely related to the implementation of other gender equality directives, in particular Directives 2002/73/EC on equal treatment for men and women in the access to employment, vocational training and promotion and working conditions and/or Directive 2004/113/EC¹¹ on equal treatment of men and women in the access to and the supply of goods and services, or it is part of the adoption of new non-discrimination legislation.

2.2. No specific transposition of the Directive

In some Member States, no specific transposition of the Recast Directive has taken place yet (Austria, Belgium, Finland, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Norway, Romania and the United Kingdom). In most of these countries, their governments consider it unnecessary to explicitly and formally transpose the Recast Directive due to the fact that the obligations arising out of the directives which are part of the recasting exercise, in particular Directive 76/207/EEC, as amended by Directive 2002/73/EC, have already been met or are going to be met in the near future. *Mutatis mutandis* the same reasoning was applied to the Recast Directive (e.g. Austria, Finland, Germany, Latvia, Malta, the Netherlands, Norway and the United Kingdom). The main reason put forward by the national experts explaining the lack of specific transposition of the Recast Directive was that the Member States were not aware of any novelties that should be specifically transposed into national law. This impression might have been confirmed by the rather scarce academic literature on the potential impact of the Recast Directive (see Annex II) and the above-mentioned correlation table. It is certainly true that the Recast Directive brings only modest changes and clarifications to the Directives which are included in the recasting exercise. The impact of the Recast Directive on the national law of the Member States therefore remains highly limited.

Some experts refer to political debates and/or specific legal contexts to explain why no specific transposition has taken place yet. This is the case for Belgium, the Czech Republic, Germany, Greece, Italy, Latvia and the United Kingdom. In Belgium, the transposition of the Recast Directive will only be complete when the federal authorities adopt their own provisions. In the Czech Republic and the United Kingdom, the process of drafting and/or adopting a single piece of equality legislation is still ongoing and no specific procedure is taking place in view of the transposition of the Recast Directive. In Romania, no information regarding the transposition of the Recast Directive is available to the public.

¹⁰ 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.

¹¹ 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.

2.3. Transposition of specific provisions

In some Member States, a number of specific provisions have been adopted in order to transpose the Recast Directive (Bulgaria, Denmark and France). In some Member States, this transposition was combined with the implementation of other equality directives (e.g. France). The incomplete transposition of the Recast Directive in Bulgaria, for example, is partially due to the fact that occupational pension schemes as described in the Recast Directive (in Title III, Chapter 2) do not seem to exist.

2.4. Transposition of ‘novelties’ or ‘clarifications’ in the Recast Directive

In most of the countries that have transposed the Recast Directive, only a few provisions have been transposed, mainly because Member States believed that some ‘clarifications’ or ‘novelties’ did not need any specific transposition. In some countries, this is true, for example for the prohibition of discrimination on the grounds of gender reassignment. Some experts mention that according to case law – in particular of the European Court of Justice – such prohibition is part of the ban on sex discrimination and that therefore no legislative provisions have been adopted regarding gender reassignment (e.g. Austria, Denmark, Finland, France, Germany, Hungary, Ireland, Portugal and Spain). Sometimes public information regarding the transposition is lacking (Greece and Romania).

In the following subsections, some problematic issues in the transposition process concerning ‘novelties’ or ‘clarifications’ are highlighted. The national contributions provide more detailed overviews of specific problematic matters in the relevant national context. Sometimes problems are caused by incorrect or incomplete transposition of some existing provisions of the ‘older’ directives that are part of the recasting exercise. In such cases, those particular directives have not been fully transposed.

2.4.1. Equal treatment and equal opportunities

In many countries, this concept has not been explicitly transposed, in the sense that there should be a precise reference to equal opportunities in legislation (Czech Republic, Denmark, France, Germany, Iceland, Ireland, Latvia, Liechtenstein, Luxembourg, Malta, the Netherlands and Slovakia). However, even if there is an explicit reference to the concept of equal opportunities in legislation, this does not in itself guarantee a more substantive approach to equality (e.g. Lithuania). Some Member States did not consider the transposition of this concept necessary (e.g. Hungary). The lack of clarity and consensus on what this concept exactly entails compared to the principle of equal treatment might be one of the reasons of a specific lack of transposition (e.g. Belgium).

2.4.2. Gender reassignment

In most countries, no explicit reference is made to gender reassignment in existing legislation or in currently pending legislative proposals (Austria, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia and Spain). As stated above, this does not necessarily mean that there are no means to combat discrimination on the grounds of gender reassignment.

2.4.3. Indirect discrimination

It seems that only in a few countries the concept of indirect discrimination has not been transposed correctly in all areas covered by the Recast Directive (Estonia, Malta

and the United Kingdom). In Estonia, however, the current definition is sufficiently clear to be interpreted in conformity with Article 2(1)(b) of the Recast Directive.

2.4.4. Positive action

In many countries, the concept of positive action has been transposed and also applies to occupational pension schemes. However, in Belgium, the lawfulness of positive actions remains uncertain. In France, there is no reference to positive action in the Anti-Discrimination Act. In Latvian law, there is no provision on positive action at all. Furthermore, the description of the concept of positive action is problematic in Poland and in Slovakia. In the United Kingdom, positive action is only allowed in a very limited number of cases. In some countries, the concept of positive action is part of national law, but no specific steps have been taken to implement the concept of positive action in occupational pension schemes (Denmark, Germany, Hungary, Iceland, Ireland, Lithuania, and Portugal).

2.4.5. Horizontal provisions applicable to occupational social security schemes

In some countries (e.g. Bulgaria, Finland, Latvia, Romania, Slovakia, Sweden) the characteristics of the national social security system do not correspond with a concept such as ‘occupational pension schemes’, causing their governments to believe that it was not necessary to transpose the provisions on occupational social security schemes of the Recast Directive into national law. The concept of occupational pension schemes is also virtually unknown in Greece and it is unclear which Greek social security schemes fall under this concept and which do not. In a number of countries no specific steps have been taken regarding the application of the horizontal provisions to occupational social security schemes (Czech Republic, Denmark, Hungary, Luxembourg, Slovenia and the United Kingdom). This is not always problematic, however, due to the interpretation of national law by the courts in conformity with the relevant case law of the ECJ (United Kingdom). In Germany, a number of horizontal provisions of the Recast Directive do not apply to occupational social security schemes. The material scope of the relevant legislation in Poland is more limited than in the Recast Directive.

2.4.6. Reconciliation

Some countries have included references to aspects related to the reconciliation in anti-discrimination legislation. In many countries such references are lacking (e.g. in Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Ireland, Poland and Romania). However, even if anti-discrimination legislation does not explicitly refer to the issue of the reconciliation of work, private and family life, this does not mean that in practice no attention is paid to the issue (e.g. Finland). The issue of the reconciliation of work, private and family life is often covered by many provisions outside sex discrimination legislation, such as labour law or in specific legal instruments.¹²

¹² Also see: European Network of Legal Experts in the fields of Employment, Social Affairs and Equality between Men and Women, *Report on Pregnancy, Maternity, Parental and Paternity Rights*, March 2007, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, available at: http://ec.europa.eu/employment_social/gender_equality/legislation/report_pregnancy.pdf, accessed 22 January 2009, and European Network of Legal Experts in the field of Gender Equality, *Legal Approaches to Aspects of the Reconciliation of Work, Family Life in Thirty European Countries*, August 2008, European Commission, Directorate-General for Employment, Social Affairs and

2.4.7. Assessment and report on the exclusions

Often no explicit reference exists in national legislation with regard to this state obligation, which derives directly from Article 31(3) of the Recast Directive.

2.4.8. Enforcement

Most countries believe that there is no need to transpose Article 17(1) in the light of existing national legislation. In some countries, problems are caused by the incomplete transposition of earlier directives or lower standards than those required by EU law (e.g. Malta and Ireland). Some experts highlight more general limits of enforcement which have not been addressed during the transposition process of the Recast Directive (e.g. Austria, Belgium and Latvia).

3. Some conclusions

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

This report not only provides an overview of the transposition process of the Recast Directive, but also highlights some flaws in national gender equality legislation in the light of Community requirements (e.g. Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Poland, Romania, Slovakia, Sweden and the United Kingdom). A recent publication of the European Network of Legal Experts in the field of Gender Equality, *The Implementation of EU Gender Equality Law in 30 Countries*, provides a more extensive overview of the relevant legislation and case law for each individual country.¹³ Read in conjunction, the two reports reflect the recent developments and not only highlight the difficulties, but also the achievements in the field of gender equality law at the national level.¹⁴

Equal Opportunities, Unit G/2, available at: http://ec.europa.eu/employment_social/gender_equality/docs/reconciliation_final_28_august_en.pdf, accessed 22 January 2009.

¹³ September 2008, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.2. This report will be available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html and <http://ec.europa.eu/social/home.jsp?langId=en>.

¹⁴ For regular up-to-date information about the developments both at EU level and in the Member States, see also the European Gender Equality Law Review, available at http://ec.europa.eu/employment_social/gender_equality/legislation/bulletin_en.htm (accessed 1 December 2008).

Part II

Reports from the Experts of the Member States and EEA Countries

AUSTRIA – *Anna Sporrer*

1. Transposition of the Recast Directive into national law

As the legal standards of gender equality law in Austria are generally in conformity with EC law, no separate transposition of the recast directive has been launched. Therefore the Recast Directive was already transposed before 15 August 2008.¹

2. Possible reasons for a lack of transposition

As the legal standards of gender equality law in Austria are generally in conformity with EC law, no separate transposition of the Recast Directive was considered to be required.

3. Overview of the transposed provisions and amendments

As there was no separate transposition, no overview can be given..

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

As Paragraph 2 of the Austrian Equal Treatment Act explicitly states that the provisions on gender equality are aimed at ‘de facto equality’ (*Gleichstellung*) between women and men, which entails the principle of equal opportunities, this requirement has already been fulfilled by the amendment of the equal treatment act OJ I 66/2004, which was dedicated to the implementation of Directive 2002/73/EC.

Gender reassignment

The prohibition of discrimination on grounds of gender reassignment has not explicitly been transposed, but will be covered by interpretation in conformity with EC law.

Indirect discrimination

The concept of indirect discrimination has already been fully implemented by an exact word-by-word transposition of the Directive into the law.

Positive action

Based on Paragraph 8 of the Austrian Equal Treatment Act, the concept of positive action has applied to all areas of the labour market since 2004.

¹ This analysis refers only to legislation on a federal level applicable to the private sector and to the federal public sector and in particular does not include the regional public sector.

Horizontal provisions applicable to occupational social security schemes

These requirements have also been implemented, as the Business Pensions Act (*‘Betriebspensionsgesetz’*) provides for a horizontal general principle of equality and occupational social security will also be covered by the principle of equal pay, which is stated in the Equal Treatment Act.

Reconciliation

The prohibition of discrimination on grounds of sex as provided by the Austrian Equal Treatment Act also refers to marriage and family status. Moreover, discrimination on grounds of maternity protection or parental leave – at least when in conformity with EC law – will constitute a case of sex discrimination.

Based on the Act on Constitution of Work (*‘Arbeitsverfassungsgesetz’*), work councils may establish committees on equal opportunities, which may consider measures for equal opportunities, including better reconciliation of work and family life, and which may conclude collective agreements on company level concerning these issues with the employer.

Assessment and report on the exclusions

The obligation to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements has not been enshrined in the Equal Treatment Act but as – in my opinion – this provision is applicable between the state and the EU only and it does not constitute an individual right of a person, there is no legal necessity to transpose this into law.

Enforcement

Article 17(1) has been implemented into Austrian law by providing for the access to civil courts, the Equal Treatment Commission and the Equal Treatment Ombudspersons.

5. Obligations of the Member States/EEA countries

In general: I believe that Austria has fulfilled its obligations under the Recast Directive.

The Equal Treatment Act applicable to the private sector fulfils the basic requirements and standards of the Directive. In particular, the definitions of direct and indirect discrimination are exactly consistent with Directive 76/207, as amended by Directive 2002/73. Furthermore, legislation complies with the EU standards regarding sanctions in cases of discrimination and the definitions of sexual harassment and harassment are in conformity with Directive 76/207, as amended by Directive 2002/73. The Equal Treatment Act for the private sector focuses on the equality rights of individuals only, but does not include provisions on preventative measures or on systematic equality plans. In general the obligatory elements of the Directives have been properly implemented, whereas the provisions of Directive 2002/73, which are not binding, have not been explicitly transposed.

Regarding enforcement and compliance aspects the Austrian legal system provides for high standards as far as the enforcement of individual rights are concerned, whereas collective means of enforcement are still not as well developed as the severity and dimension of sex-related discrimination would require. Furthermore, the obstacles which hinder the implementation of *de facto* equality between women and men

in society and the economy require a more systematic and comprehensive policy conducted by and including all actors like the judiciary, politicians, the unions, employers, governmental and non-governmental organisations and civil society.

The Equal Treatment Acts applicable to the public sector go beyond EU law requirements, in particular concerning the legally binding provisions on affirmative action in favour of women.

6. Any simplification/reduction in administrative burden?

There has been no simplification or reduction of the administrative burden.

7. Overall assessment

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

BELGIUM – Jean Jacqmain

1. Transposition of the Recast Directive into national law

Formally, the answer is negative as there is not one single bit of legislation in Belgium which refers to Directive 2006/54 as required by its Article 33. This seems unbelievable as an entirely new ‘Gender Act’ was adopted on 10 May 2007 with the explicit purpose of transposing the whole set of EC Directives concerning gender equality, within the federal parliament’s jurisdiction; more recently, the Flemish Community and Region and the Brussels-Capital Region passed new instruments, obviously inspired by the federal Act, while the other federate authorities are still processing their own drafts of new legislation.

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

Substantively, quite a good deal of attention was paid at federal level to the transposition of Directive 2002/73 and to the case law of the ECJ. Consequently, with the qualifications described below under 3 and 4 and in the light of the conceptual complexity of the new federal legislation (especially the parallel use of the notions ‘distinction’ and ‘discrimination’),² one may consider that the Recast Directive has been transposed by the federal parliament. As to the federate authorities, the reference to EC law is more dutiful than enthusiastic, and copying the federal legislation was evidently regarded as a safe way to perform the duty.

² See European Network of Legal Experts in the field of Gender Equality, *The implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html

2. Possible reasons for a lack of transposition

See above, under 1, as the lack of transposition is formal rather than substantive, at least at the federal level.

3. Overview of transposed provisions and amendments

In the publication *The implementation of EU Gender Equality Law in 30 Countries* the conformity of the federal legislation with EC law up to Directive 2002/73 has been discussed.³ However, the following information can be given regarding the *de facto* transposition of Directive 2006/54.

Object and scope

The Act of 10 May 2007 (Articles 5 and 6) applies, among many other subjects, to working conditions, including pay, and to occupational social security schemes, and to any persons concerned. It deals with certain aspects of access to employment (e.g. in the federal public services, or concerning the uniform conditions of access to the professions), but other aspects fall within the jurisdiction of the federate authorities (e.g. in their own public services, or concerning the management of the labour market); and vocational training is almost entirely a Community matter. Consequently, as long as federate authorities have not all adopted their own provisions, the directive is not fully transposed.

Definitions

All definitions are implemented adequately (Article 5 of the Act), including the provision on maternity (Article 2(2)(c) of the Directive; Article 4(1) of the Act).

Positive measures

The Act provides (Article 16) for possible positive measures, without requiring that any such step be taken. No positive action may be undertaken until authorized by an ancillary Royal Decree, which is still lacking, more than one year after the Act came into force. Thus, the lawfulness of positive actions initiated under the previous gender equality legislation is uncertain.

Equal pay

The Act (Article 6(2)) transposes the Directive adequately, except for the mention of work of the same value, which has been forgotten. Given the extremely desiccated style of the Act, it is fortunate that the social partners decided to update their Collective Agreement n°25 (1975) on equal pay for male and female workers by way of Collective Agreement n°25ter of 9 July 2008. Although it is only applicable in the private sector, the new Collective Agreement can serve as a handbook for equal pay, including work of the same value.

Occupational social security schemes

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

³ European Network of Legal Experts in the field of Gender Equality, *The implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html

The Act of 10 May 2007 was amended on 8 June 2008 (Article 12(2)) to include occupational schemes for the self-employed; again, the wording of the Directive was copied literally. The possibility offered by Article 11 of the Directive was not used.

On the other hand, both Acts of 2003 and 2007 use the possibility of the exceptions provided in Article 9(1) h) and j) of the Directive, concerning a limited use of gender-related actuarial factors.

Equal treatment in access to employment and working conditions

Within the jurisdiction of the federal parliament (see above), the Directive is transposed adequately (Article 6(1) of the Act). However, see below under 4 concerning the novelties.

It must be mentioned that no steps have been taken, or are even envisaged, to implement Article 14(1) d) of the Directive, concerning membership of a trade union or employers' organisation. Quite plainly, such an intervention of the authorities would be unthinkable in Belgium; moreover, no complaints concerning such discrimination have ever been heard. In contrast, the three trade union confederations adhere to the 'Charter for gender mainstreaming' which was promoted by the minister of Employment in 2004, thus undertaking to improve the representation of women in executive positions within their organisations.

Article 15 (no adverse effects of maternity leave) and Article 16 (as far as paternity leave is concerned) of the Directive have not been transposed, for extremely insignificant reasons which arose during the preparation of the Act. In the first case, the ministers of Employment and of Equal Opportunities could not agree on how (that is, in what statute) the preservation of rights should be organised; and in the second one, the minister of Employment argued that it would be too complicated to create protection against dismissal for such a brief and unusual leave (ten days to be used in bulk or singly during the month following the child's birth).

Enforcement and compliance

All provisions of the Directive which come under this heading are transposed correctly (Articles 20 through 25 of the Act). However, it is doubtful that the minimum amount of fixed damages (equalling six months' pay) which may be allowed in cases of either discrimination or victimisation is an effective deterrent. On the other hand, the possibility to limit the compensation in a case such as the ECJ's *Draehmpaehl* C-180/95, [1997] has been used.

Another moot point concerns the scope of the courts' power to order perpetrators to put an end to a discrimination consisting in the dismissal of the victim. So far, the Court of Cassation's inflexible case law decrees that no court may order an employer to reinstate an employee. However, if consequently the power of injunction may not be used to remedy a discrimination (while it is the victim's wish), is Belgium transposing Article 17(1) of the Directive effectively?

Article 29 of the Directive is not implemented by the Act of 10 May 2007, but (at federal level) by the Gender Mainstreaming Act of 12 January 2007. Replacing a previous Act of 6 March 1996, the latter is aimed primarily at following up on the resolutions of the Beijing Conference (1995), but it refers to Directive 2002/73. The Flemish *decreet* of 10 July 2008 also aims at promoting gender mainstreaming and refers both to the Beijing Conference and to Directive 2002/73.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The differences between the two notions are far from clear. As to the transposition, the whole set of legislation of 10 May 2007 is aimed at ‘combating discrimination’; unlike the previous Acts aimed at implementing EC gender legislation (Acts of 4 August 1978 and 7 May 1999) and in Collective Agreement n°25 the word ‘equality’ is hardly used at all, except in the references to the Directives. On the other hand, the Mainstreaming Act of 12 January 2007 mentions ‘the promotion of equality between men and women’.

Gender reassignment

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

Indirect discrimination

The definition was taken from Directive 2002/73.

Positive action

The related provision is horizontal in the Act of 10 May 2007 and thus applicable to any matter included in its substantive scope. However, given that no positive action may be undertaken in any matter not included in the list to be provided by an ancillary Royal Decree (see above under 3.), any clash with EC law should be avoided in the future (e.g. no positive action is permissible in statutory social security schemes, which are included in the scope of the Act; see ECJ *Integrity* C-373/89 [1990], a Belgian case).

Horizontal provisions applicable to occupational social security schemes

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

Occupational social security schemes

Here is an obvious formal contradiction between Article 7(2) of the Directive and the Act of 10 May 2007, although this probably endues no practical effect. There is unanimity in Belgian legal opinion to regard the statutory pension schemes for tenured staff members of the public services, all of which are based on the ‘Civilian and Ecclesiastical Pension Act’ of 21 July 1844 (this is no typographical error) as statutory social security. Such an analysis has been adopted in the Act of 10 May 2007 (Article 5, 14°) quite deliberately, as the ECJ’s contrary case law (in *Beune* C-7/93 [1994] etc.) was well known. However, given that all the general provisions of the Act are horizontal (see above), no negative effect on the defence of a claimant’s rights (including dependant’s rights such as a survivor’s pension) is possible.

Reconciliation

Paternity leave and non-transferable adoption leave were introduced in 2001 (although the latter already existed in the public services).

Concerning Article 9(1)(g) of the Recast Directive, which is a copy of Article 6(1)(g) of Directive 86/378/EEC amended by Directive 96/97/EC, the transposition is not adequate. Indeed, Article 6(3) of the Act of 10 May 2007 simply provides that the Act (i.e. the prohibition of discrimination: Article 12(1)) applies to ‘the conservation

or acquisition of rights during the periods of suspension of employment contracts'. This might be construed as allowing for a negative impact of such periods of suspension (including when they are related with reconciliation), provided this entails no direct or indirect discriminations, while the Directive excludes any negative impact.

Concerning Article 21(2) of the Recast Directive, there have hardly been any efforts from the public authorities to encourage the social partners in the matter of reconciliation since 2001, when the federal Government supported the introduction of the time credit (see the Reconciliation Report).

Assessment and report on the exclusions

Since no ancillary Royal Decree has been adopted yet to provide a list of exclusions, while the present validity of the previous Royal Decree of 8 February 1979 is doubtful, no consideration seems to have been given to Article 31(3) of the Directive.

Enforcement

The consequences of ECJ's decision in *Coote* C-185-97 [1998] have been included in Article 22(2) of the Act of 10 May 2007.

5. Obligations of the Member States/EEA countries

As mentioned under Section 1, formally the Directive has not been transposed at all; substantively, the transposition is fairly adequate, at least at the federal level and with certain federate authorities.

Apart from the obvious gaps described above (see Sections 3 and 4), in the expert's view the main weaknesses of the transposition are the following:

- the pointless complication of the concepts used in the legislation of 10 May 2007⁴ and
- the doubtful effectiveness of the remedies available to victims.

Moreover, no attention has been paid to the impact of the ECJ's decision in *Lindorfer* C-227/04P [2007], but obviously the same applies to the Directive itself.

Concerning the 'Equality Body' (Article 20(2) of the Directive), the Belgian federal legislation indeed goes beyond what is required, since under its institution Act, of 16 December 2002, the Institute for Equality of Women and Men is authorised to initiate litigation in order to enforce the principle of gender equality.

6. Any simplification/reduction in administrative burden?

This is more a question for the member states than for the experts. However, the answer lies in the future as (see above) no authority seems to have paid attention to the Recast Directive itself.

7. Overall assessment

This question is impossible to answer, as it deals with the purposes of the Directive rather than with its substance.

⁴ European Network of Legal Experts in the field of Gender Equality, *The implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html

Sources

- Act of 16 December 2002 creating the Institute for Equality of Women and Men
- Occupational Pension Schemes (Employees) Act of 28 April 2003
- Gender Mainstreaming Act of 10 May 2007, www.juridat.be
- Collective Agreement n°25 on Equal Pay for Male and Female Workers, as amended by Collective Agreement n°25ter, www.cnt-nar.be.

BULGARIA – *Genoveva Tisheva*

1. Transposition of the Recast Directive into national law

According to expert opinion,⁵ the Recast Directive was not fully transposed in Bulgaria before 15 August 2008.

According to the statement of the Bulgarian Government, the Recast Directive has been fully transposed into Bulgarian law, with the exception of Article 15 ‘Return from maternity leave’. Due to this positive self-assessment, no real measures for further transposition were taken, except for this particular provision. The transposition will be ensured through amendments of the Labour Code and of the Law on Protection from Discrimination.

Tables illustrating the correlation between this Directive and the transposition measures were drawn up within the Ministry of Labour and Social Policy as a result of the work of a special working group. The final assessment contained in the tables does not reflect the discussions and main outcomes of the work within the working group. The tables have not been made public yet, although they can be made available to experts interested in the issue.

2. Possible reasons for a lack of transposition

Other than the transposition of Article 15, no transposition efforts have been planned by the Bulgarian Government. The main reasons for this, which correspond to the main areas of non-compliance with the Recast Directive, are as follows:

- The occupational social security schemes envisaged in the Recast Directive have no parallels in the Bulgarian social security system, which makes a large part of the Directive inapplicable;
- The provisions of Title III Chapter 2 ‘Promotion of equal treatment - dialogue’ have not been transposed into Bulgarian legislation but this challenge has been systematically avoided by the Bulgarian Government. It is related to the Bulgarian Government’s reluctance to adopt a special law on gender equality.

3. Overview of transposed provisions and amendments

No specific provisions were adopted in order to achieve compliance with the Recast Directive.

⁵ Experts from the Centre for Women’s Studies and Policies, from the Bulgarian Gender Research Foundation, etc.

In order to show that harmonization with Article 20 was achieved prior to 15 August 2008, only the Regulation for the structure of the Ministry of Labour and Social Policy was amended. Article 32 related to the structure and competences of the Directorate of 'Demographic and family policy and equal opportunities' was amended, increasing competences of this unit in the area of '(...) analysis, monitoring and support of equal treatment of women and men.'⁶

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The notion of 'equal opportunities', along with 'equal treatment' already exists in the Law on Protection from Discrimination (in force since January 2004) and its adoption is not related to the transposition of the Recast Directive.

Gender reassignment

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

Indirect discrimination

Such a definition already exists in the Law on Protection from Discrimination.

Positive action

The concept of positive action in view of the promotion of equality of women and men in working life existed in Bulgarian legislation before the Recast Directive was adopted. As mentioned before, the occupational pension schemes as defined in the recast Directive do not exist in the Bulgarian social security system.

Horizontal provisions applicable to occupational social security schemes

This is not applicable to Bulgarian legislation.

Occupational social security schemes

Not applicable.

Reconciliation

This issue has not been explicitly regulated in Bulgarian legislation yet. The structure of the anti-discrimination legislation so far does not allow that. The general anti-discrimination law has no focus on reconciliation issues. This would be a field for regulation by a special law on gender equality, the concept for which is still pending in the national Assembly.

Assessment and report on the exclusions

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

Enforcement

Such procedures were available even before the Recast Directive.

⁶ Article 32 p. 3 b, in force since 13 June 2008, SG 54/ 2008.

5. Obligations of the Member States/EEA countries

We believe that in spite of the considerable level of compliance achieved through the adoption of the Law on Protection from Discrimination, full compliance cannot be claimed.

The main gaps are related to the following areas:

- Non-applicability of Title II Chapter 2 (Equal treatment in occupational social security schemes), due to the different social security system in Bulgaria;
- Non-compliance with Article 15 (Return from maternity leave);
- Lack of compliance with Article 18 (Compensation or reparation); and
- Non-compliance with Title III Chapter 2 (Promotion of Equal treatment - dialogue).

6. Any simplification/reduction in administrative burden?

We do not have such information.

7. Overall assessment

For the moment, the Directive has not influenced significantly the Bulgarian legislation. The main expectations were for the Directive to promote the adoption of a separate gender equality law, but this has not happened yet.⁷ We believe that the main weakness of the Directive is the unclear formulation of the standards of Title III Chapter 2 of the Recast Directive: Promotion of Equal treatment - dialogue. The approach adopted in these provisions – ‘(...) in accordance with national practice (...) [shall] take adequate measures (...)’ – encourages the formal attitude of the Government.

CYPRUS – *Evangelia Lia Efstratiou-Georgiades*

1. Transposition of the Recast Directive into national law

The Directive is in the final stages of transposition. Three relevant bills and draft resolutions⁸ are now before the House of Representatives and are expected to be voted into law soon, after being discussed in the Parliamentary Committees of Labour and Gender Equality.

⁷ Please mind that by the moment of releasing the report, a Draft Law on Gender Equality was introduced in the National Assembly/ on 21 November 2008/- see last Flash report from November

⁸ a. The bill entitled The Equal Treatment for Men and Women as regards Access to Employment and Vocational Training (Amendment) Law of 2008 amends Law No 205(I)/2002, as amended by laws No. 191(I)/2004, No. 40(I)/2006, No. 176(I)/2007 (Directives 76/207/EEC, 97/80/EC, 2002/73/EC);

b. The bill entitled The Equal Pay between Men and Women for the Same Work or for Work to which Equal Value is attributed (Amendment) Law of 2008 amends Law No. 177(I)/2002, as amended by laws No. 42(I)/2004, No. 193(I)/2004 (Directives 75/117/EEC, 97/80/EC);

c. The bill entitled The Equal Treatment for Men and Women in Occupational Social Insurance Schemes (Amendment) Law of 2008 amends Law No. 133(I)/2002, (Directive 86/378/EEC).

d. Draft Regulations for the Provision of Independent Assistance to Victims of Discrimination of 2008.

Cyprus has drawn up and published tables illustrating the correlation between this Directive and the transposition measures.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of transposed provisions and amendments

The laws which are in force have transposed the provisions of earlier Directives 76/207/EEC, 86/378/EEC, 75/117/EOK 2002/73/EC and 97/80/EC. The aforesaid bills and draft regulations which are now before the House of Representatives amend the previous laws and include the provisions of Articles 2, 14(b) and (d), 15, 17, 19(1), 20, 21, 23, 24 and 31(3), of Recast Directive 2006/54/EC.

New provisions added relate to equal treatment for membership or involvement in an organization of workers or employers, or any other organization as specified in Article 14(d) of the Directive.

Furthermore, the amendments relate to the prohibition of discrimination in pay between the two sexes due to maternity leave or parental leave, to the encouragement of employers to give information to employees or their representatives as regards remuneration at different levels of the organization, the dialogue with social partners and NGOs, as well as the granting of independent assistance to victims of discrimination by the Committee of Equality of Sexes in Employment and Occupational Training.

In particular, the aforesaid bills and draft regulations are the following a) The Equal Treatment between Men and Women as regards Access to Employment and Vocational Training (Amending) Law 2008 which, (i) clarifies the definitions of ‘direct discrimination’ ‘indirect discrimination’ and ‘discrimination on ground of sex’, (ii) ensures the principle of equal treatment of men and women in the participation in workers’ and employers’ organizations and in the benefits provided by such organizations, (iii) clarifies the provisions relating to the judicial and/or administrative protection and the reversal of the burden of proof, (iv) provides that all the above provisions apply even in cases where the employment relation has ended, (v) improves the composition of the Gender Equality Committee in Employment and Vocational Training and makes it more independent so as to enable it to provide independent assistance to victims of discrimination.

b) The Equal Pay between Men and Women for the same work or for work to which equal value is attributed (Amendment) Law of 2008 which (i) replaces/amends the definitions of ‘direct’ and ‘indirect’ discrimination, of ‘discrimination on ground of sex’, of ‘pay’ and of ‘group of companies’, (ii) prohibits discrimination in pay between the two sexes, (iii) extends the comparison of pay between workers in companies of the same group if there is no comparable worker in the same company, (iv) encourages the giving of information by the employers to the employees or their representatives regarding salaries and differences in salaries in the various levels of the company, (v) provides independent assistance to the victims of discrimination.

c) The Equal Treatment between Men and Women in Occupational Social Insurance Schemes (Amendment) Law of 2008 which (i) replaces/amends the definitions mentioned in a) above, (ii) replaces the definition of ‘Occupational Social Insurance Scheme’ by new definition which means a scheme which provides for benefits to em-

employees and self-employed persons in the same company or group of companies which supplement or replace the benefits under the Social Insurance System.

d) Draft Regulations for the provision of Independent Assistance to victims of discrimination. The purpose of these Regulations is to establish the nature, the kind, the content and the procedure for the provision of independent assistance to victims of discrimination by the Gender Equality Committee, including advice on matters of discrimination and legal aid and representation of the victims before the Court or administrative body.

Amendments were drafted such, as mentioned above, that the wording of national legislation fully corresponds to the respective wording of the Directive.

4. Transposition of the novelties or clarifications

The bills and the regulations mentioned above in Section 3 implement not only the principle of equal treatment but also the principle of equal opportunity. There is no special provision on gender reassignment. The bills have a uniform definition of terms of 'direct', 'indirect' etc discrimination and the reversal of the burden of proof remains.

The provisions of Article 7(2) of the Recast Directive are included in the bill mentioned in Section 3 c) above.

The remaining issues as set out in Question 4 are included in the above-mentioned bills as well as in other laws relating to the Protection of Maternity.

The bills are being debated in the Parliamentary Committees on Labour and Equal Opportunities and we do not know whether there will be any alterations or changes and what will be finally laid down by law. It is evident from the text of the bills that the new provisions and amendments which are expected to be made in the laws aim at transposing all the provisions of the Directive into national legislation. All issues set out in Section 4 have been included in the bills.

5. Obligations of the Member States/EEA countries

The process is developing as described in Section 4 above.

6. Any simplification/reduction in administrative burden?

No, not yet.

7. Overall assessment

If and when the bills are approved without changes, national legislation is expected to have a positive impact on the above matters.

CZECH REPUBLIC – *Kristina Koldinská*

1. Transposition of the Recast Directive into national law

The Recast Directive has not been entirely transposed in the Czech Republic. Transposition should be completed when the antidiscrimination bill is adopted. There is,

however, a general conviction that the Recast Directive has already been transposed through the transposition of previous directives.

No tables have been published to illustrate the correlation between this Directive and transposition measures and they probably have not been drawn up (at least, the competent institution – the Government Council for equal opportunities for women and men (Ministry for Human Rights) – has not provided the national expert with any such table).

2. Possible reasons for lack of transposition

The main reason for the ‘cooling’ of the whole transposition process in the whole area of equal opportunities is the long expected and still not realised adoption of the anti-discrimination bill, which should transpose all equality directives. Interestingly enough, however, the Recast Directive is mentioned only once in the whole antidiscrimination bill – in Section 1, in the list of directives that are transposed through the antidiscrimination act. Other directives and their respective articles are also mentioned in the text of the bill, in footnotes to some sections.

3. Overview of transposed provisions and amendments

There is no relevant transposition to be mentioned.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

Even in the antidiscrimination bill, no change has been implemented concerning the principle of equal opportunities. The future antidiscrimination act shall be entitled ‘The Act on Equal Treatment and Legal Instruments of Protection against Discrimination’ and in its Section 1 only the right to equal treatment and the ban on discrimination are mentioned as the purpose of the act.

Gender reassignment

Nothing is mentioned in the legislation in force, nor in the antidiscrimination bill.

Indirect discrimination

The definition of the concept of indirect discrimination according to Article 2(1)(b) of the Recast Directive has been transposed into Section 3, Paragraph 1 of the antidiscrimination bill.

Positive action

Section 7 Paragraph 2 of the antidiscrimination bill provides that measures designed to compensate disadvantages resulting from one of the discrimination grounds listed in Section 2 Paragraph 3 (race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion or world opinion) and which thus guarantee equal treatment and equal opportunities, should not be understood to be discriminatory. A similar provision can be found in Section 4 Paragraph 4 of the Employment Act (No. 435/2004 Coll.).

Horizontal provisions applicable to occupational social security schemes

Nothing is mentioned in the legislation in force, nor in the antidiscrimination bill.

Occupational social security schemes

Nothing to report in this regard.

Reconciliation

Nothing is mentioned in the legislation in force, nor in the antidiscrimination bill.

Assessment and report on the exclusions

The above-mentioned obligation is not mentioned in national legislation. Possible exclusions from the application of the principle of equal treatment are defined in Section 6 Paragraph 3 of the antidiscrimination bill and Section 4 Paragraph 3 of the Employment Act (No. 435/2004 Coll.)

Enforcement

There has been no important change as regards procedures. The only change is a more detailed definition of burden of proof as contained in Section 133a of the Act on Civil Procedural Order (Act No. 99/1963 Coll.), as should be amended by the antidiscrimination act.

5. Obligations of the Member States/EEA countries

I do not really consider that the Czech Republic has fulfilled its obligations. The competent institutions most likely believe that mention of the Recast Directive in the anti-discrimination bill is sufficient. To the question regarding transposition of the Directive addressed to the Government Council for Equal Opportunities for Men and Women, the only answer is that adoption of the antidiscrimination act is expected. The main reason for this seems to be a lack of information about the ‘novelty’ of the Recast Directive.

6. Any simplification/reduction in administrative burden?

No, proper legislation on equal treatment is only currently being adopted in the Czech Republic, therefore no significant simplification could take place.

7. Overall assessment

The above-mentioned purpose of the Recast Directive has not been achieved by the Czech legislator. The current antidiscrimination bill is quite chaotic and not very easy to understand, on the one hand, and it makes use of all possible exceptions from the equal treatment principle and does not provide enough competences to the equality body, on the other hand. Therefore it could be concluded that the Recast Directive and its main objectives have not been transposed properly into Czech legislation and that its impact has not been as strong as it should have been.

DENMARK – Ruth Nielsen

1. Transposition of the Recast Directive into national law

The Danish Equal Pay Act was amended in 2008 in order to implement the Recast Directive (2006/54) in matters of equal pay. In the preparatory work for the proposal

amending the Equal Pay Act, the Minister for Employment stated that the provisions in the Recast Directive on other matters than pay were to be implemented in the Equal Treatment Act (consolidated act no. 734 of 28 June 2006) and in the Act on equal treatment of men and women in occupational social security schemes (consolidated act no. 775 of 29 August 2001). The latter Act was amended by Act no. 517 of 17 June 2008 whereby the definitions in the Recast Directive, a provision on compensation and on mainstreaming were inserted into the Act on equal treatment of men and women in occupational social security schemes. In the Government's work programme for 2008-2009 no further amendments of these acts are mentioned.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of transposed provisions and amendments

In Denmark, Directive 2002/73 was mainly implemented by Act no. 1385 of 21 December 2005 amending the Equal Treatment Act.

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

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

The definition in Article 2 of the Recast Directive was inserted almost verbatim in a new Section 1 a in the Danish Equal Pay Act.

Article 29 of the Recast Directive was implemented by a new Section 1 b in the Danish Act.

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

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

A new Section 4 a in the Danish Equal Pay Act provides for damages or compensation in cases of unequal pay.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

Not mentioned in Danish law in connection with the transposition of Directive 2006/54.

Gender reassignment

Not explicitly mentioned, but Danish equal treatment law has always been interpreted in case law as also covering gender reassignment.

Indirect discrimination

Yes, see above on the new Section 1 a in the Equal Pay Act. It was also inserted in the Equal Treatment Act when Directive 2002/73 was implemented.

Positive action

Positive action is not mentioned in the (amended) Equal Pay Act. No steps have been published to implement the Recast Directive in matters of occupational social security.

Occupational social security schemes

The Act on equal treatment of men and women in occupational social security schemes (consolidated act no. 775 of 29 August 2001) was amended by Act no. 517 of 17 June 2008 whereby a provision on compensation and on mainstreaming were inserted into the Act. There is no mention in Danish legislation on social security schemes of the other horizontal provisions in the Recast Directive.

Reconciliation

The issue of reconciliation of work, private and family life is explicitly mentioned in the recast Directive; see in particular Recitals 11, 26, 27 and Article 9(1) (g) and Article 21(2). It is not explicitly mentioned in Danish legislation.

Assessment and report on the exclusions

Not mentioned in connection with the amendment of the Equal Treatment Act in 2005 or the Equal Pay Act in 2008.

Enforcement

In the preparatory work for the amendment of the Equal Pay Act it is stated that Article 17 of the Recast Directive can be regarded as already having been implemented by Danish procedural law.

5. Obligations of the Member States/EEA countries

Denmark has not fulfilled its obligations. The most important gap is that the requirement of establishing one or more equality bodies in Article 20 of the Recast Directive (2006/54) and the similar requirements for gender equality bodies in the Equal Treatment Directive (2002/73/EC) and the Supply of Goods and Services Directive (2004/113/EC) have not been transposed into Danish law.

According to Article 20 of the Recast Directive, Member States shall designate a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. Member States shall ensure that the competences of these bodies include: (a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; and (c) publishing independent reports and making recommendations on any issue relating to such discrimination. Denmark has no gender equality bodies with all competences outlined in the Directive, only a Gender Equality Complaints Board (*Ligestillingsnævnet*) with the competence required under (a) above. In connection with the implementation of the Equal Treatment Directive (2002/73/EC) a number of organisations, including the Danish Confederation of Trade Unions (LO), have criticised this point. The Government's response was that there are many institutions in Denmark which might analyse gender equality, for example the universities. In the view of the Government, there is no need for a special body with regard to gender equality apart from the Gender Equality Complaints Board which only deals with individual complaints over alleged discrimination at the request of individual complainants and has no competence to

conduct independent surveys concerning discrimination, to publish independent reports or to start cases at its own initiative.

6. Any simplification/reduction in administrative burden?

No.

7. Overall assessment

Denmark is still treating pay, other aspects of equal treatment and occupational social security as separate legal issues. Danish law in these areas has not become more modern or simple as a result of the Recast Directive.

ESTONIA – Anneli Albi

1. Transposition of the Recast Directive into national law

The transposition of the Recast Directive is still ongoing in Estonia. On 10 September 2008, the Government submitted to Parliament a Draft Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act (317 SE I, hereinafter the Draft Act).⁹ The main purpose of the Draft Act is to transpose the requirements of three directives concerning gender equality, Directives 2002/73/EC, 2004/113/EC and 2006/54/EC.¹⁰

The table, illustrating the correlation between the respective Directives, including Directive 2006/54, has been annexed to the Draft Act.¹¹

2. Possible reasons for a lack of transposition

The Government submitted the Draft Act to Parliament in September 2008. In addition to Directive 2006/54, the Draft Act also aims to transpose Directives 2002/73 and 2004/113. However, the Ministry of Social Affairs submitted the first draft of the Act to amend Gender Equality Act and Civil Service Act to the consultations with other ministries, bodies and interest groups only in late 2007. The Draft Act also includes other amendments to the respective legal acts apart from the requirements of the Directives. Some of the bodies who were consulted submitted their comments and objec-

⁹ The text of the Draft Act with explanatory memorandum is available on the Parliament webpage www.riigikogu.ee (in Estonian).

¹⁰ The amendments have the following aims: 1) to bring the definitions in the Gender Equality Act in line with the definitions used in EU Directives as regards the concepts of direct and indirect discrimination, harassment and harassment on the grounds of sex; 2) to improve the protection against gender discrimination with regard to access to goods and services and to guarantee the victims of discrimination the right to request compensation; 3) to bring the burden of proof provisions in line with the requirements of Directives 97/80/EC, 2004/113/EC and 2006/54/EC; 4) to introduce into the Gender Equality Act the provisions to guarantee protection against victimisation; 5) to introduce the obligation to involve non-governmental organizations in the promotion of gender equality; 6) to establish the Office for the Gender Equality Commissioner; 7) to repeal Article 35 of the Labour Contracts Act, which prohibits employment of women for heavy work, work which poses a health hazard or underground work.

¹¹ Annex 1 to the Draft Act to amend Gender Equality Act, Civil Service Act and Labour Contracts Act, available on: www.riigikogu.ee (in Estonian).

tions to certain amendments. The Draft Act was therefore amended and sent to consultations several times. It seems that the main reason for the delay of the transposition process is the insufficient administrative capacity of the Ministry of Social Affairs.

3. Overview of transposed provisions and amendments

As pointed out above, the Draft Act aims to transpose both Directive 2002/73/EC and 2006/54/EC.

As concerns the main ‘novelties’, the Gender Equality Act (GEA) of 2004 already includes some provisions of the Recast Directive, such as the principle of equal opportunities (Article 1(1) of the GEA, Chapter 3 of the GEA), the principle of equal treatment with regard to the occupational pension schemes (Articles 2(1) and 6(2)(3) of the GEA; Article 10(2) of the Labour Contracts Act (LCA)).

As pointed out, the transposition of the Recast Directive is still ongoing at the moment. Therefore no amendments or new provisions can be described.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

Article 1 of the GEA stipulates that the purpose of the Act is to ensure the principle of equal treatment arising from the Estonian Constitution, and to promote the equality of men and women as a fundamental human right as well as for the public good in all areas of social life. Thus the principle of equal opportunities was established in the GEA, adopted in 2004. To this end, the GEA establishes the tasks of the state and local government agencies, of educational and research institutions and of employers in the promotion of gender equality (Articles 9, 10 and 11 of the GEA).

Gender reassignment

It is not explicitly provided in the text of the GEA or in the Labour Contract Act that the provisions concerning gender discrimination would also apply to gender reassignment. Neither is this aspect stipulated in the Draft Act.

Indirect discrimination

The concept of indirect discrimination is mainly in line with the definition in Article 2(1)(b) of the Recast Directive. Article 3(1)(4) of the GEA provides that ‘indirect discrimination based on sex’ occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared to 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.¹² However, the fragment in the text of the law in Estonian could also be translated as ‘provision, criterion or activity’¹³. Therefore, the Draft Act aims to amend the text of Article 3(1)(4) of the GEA by adding to the respective fragment ‘provision, criterion, custom or practice’.¹⁴ It is clarified in the explanatory memorandum of the Draft Act that the definition of indirect discrimination as set forth in the present text of the GEA does not guarantee sufficient protection when discrimination occurs by

¹² The concept of indirect discrimination in Article 10²(3) of the LCA is set forth in the same terms as in the GEA.

¹³ Estonian text: ‘... säte, kriteerium või tegevus...’.

¹⁴ Estonian text: ‘... säte, kriteerium, *tava* või tegevus...’.

virtue of a custom. The concept of ‘practice’ (could also be translated as ‘activity’) does not apply to discriminatory treatment based on ‘custom’, because custom can also mean a lack of activity (e.g. a situation where an enterprise uses certain forms of recruitment and as a result mainly employs persons of one sex).

In the interest of legal certainty it may be advisable for the legislative text to be as specific as possible; nevertheless, the text of the concept of indirect discrimination as set forth in the GEA presently is sufficiently clear to be interpreted in conformity with Article 2(1)(b) of the Recast Directive.

Positive action

Article 5(2)(5) of the GEA provides that the application of special measures which promote gender equality and grant advantages to the less-represented gender or reduce gender inequality are not deemed to be direct or indirect discrimination based on sex. According to Article 2(1) of the GEA, the requirements of the GEA apply to all areas of social life.¹⁵ Thus the scope of the GEA is wider than the scope of the gender equality directives of the EU. The application of the concept of positive action is not confined to working life; it also applies to the other areas where the GEA is applicable.¹⁶ Thus, the concept of positive action also applies to the occupational pension schemes. However, the Draft Act specifies that the positive measures have to be applied temporarily.

Horizontal provisions applicable to occupational social security schemes

According to Article 6(2)(3) of the GEA, the activities of the employer are deemed to be discriminating if the employer establishes conditions for remuneration or other conditions which are less favourable regarding an employee or employees of one sex compared to an employee or employees of the other sex doing the same or equivalent job. Therefore, the requirements of the GEA also apply to occupational social security schemes. Nevertheless, the Draft Act amends the text of Article 6(2)(3) by specifying that the activities of the employer are deemed to be discriminating if the employer establishes conditions for remuneration or conditions for granting and receipt of benefits related to the employment which are less favourable regarding an employee or employees of one sex compared with an employee or employees of the other sex doing the same or equivalent job.

Occupational social security schemes

Article 13(1) of the GEA provides that upon violation of a prohibition to discriminate as provided for in Articles 6 and 8 of the GEA (discrimination in employment relationships), the party who suffered harm may demand compensation for damage and termination of the harmful activity. This also applies to the occupational social security schemes, as these are covered by Article 6(2)(3) of the GEA. Article 13(2) stipulates that an injured party may also request a reasonable amount of money as a compensation for non-patrimonial damage caused by the breach. Article 13(3) provides that when determining the amount of compensation, the court shall take into account, *inter alia*, the scope, duration and the nature of the discrimination. The court shall also take into account whether the offender has eliminated the discriminating circumstances or not.

¹⁵ The law stipulates two exceptions: professing and practising faith or working as a minister of a religion in a registered religious association, and relations in family and private life.

¹⁶ See also Section 4(e) of the report.

The Draft Act amends Article 13(1) of the GEA by removing the restriction that the claim for compensation can be submitted only with regard to discrimination in employment relationships. Article 13(3) of the GEA is amended to extend the obligations under this subsection to labour dispute commissions.

Further, the second sentence of Article 13(3) is annulled. The explanatory memorandum of the Draft Act points out that as the compensation has to be determined taking into account the circumstances of the breach, it cannot depend on whether the discriminatory circumstances have been removed.

According to Article 4(1) of the GEA the principle of shared burden of proof applies only to employment-related situations (as specified in Articles 6 and 8 of the GEA). According to its current wording, if a person discovers that he or she has been discriminated against and submits an application to a competent body describing the facts relating to such discrimination on the basis of which it can be presumed that direct or indirect discrimination based on sex has occurred, the person against whom the application is submitted shall, at the request of the competent body, explain the reasons and motives of his or her behaviour or decision. If this person fails to do so or refuses to give an explanation, such behaviour shall be deemed to be equal to acknowledgement of discrimination by this person. It appears from this provision that the principle of shared burden of proof does not correspond to the requirements of the directives.

The Draft Act amends Article 4(1) of the GEA by bringing the principle of shared burden of proof in line with the Directives. The amended provision will provide that if the person who considers himself or herself to be discriminated against submits to the competent body a complaint concerning factual circumstances from which it can be presumed that direct or indirect discrimination has occurred, the respondent has to prove at the request of the competent body that there has been no breach of the principle of equal treatment. If the respondent fails or refuses to do so, such behaviour shall be deemed to be equal to acknowledgement of discrimination by this respondent. It is also worthy to note that by this amendment the principle of shared burden of proof will be extended from employment-related discrimination to other situations covered by the GEA.

Reconciliation

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

Assessment and report on the exclusions

Article 5(2)(4) stipulates that as regards access to employment, it is not deemed to be direct or indirect discrimination based on sex if a difference of treatment is based on a characteristic related to sex, where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Thus no additional criteria are added in the GEA in comparison with the text of the Directive. This provision is yet to be applied in court practice to assess the scope of the exception. Accordingly the state has to assess whether it may be necessary to amend this provision by

providing a list of activities that fall under this exception. The Draft Act does not specify this issue.

Enforcement

Article 12 of the GEA stipulates that disputes concerning discrimination are resolved in court and pursuant to the procedure provided for in the Chancellor of Justice Act. The Chancellor of Justice has the power to carry out conciliation proceedings in discrimination disputes between private parties.¹⁷ He can also investigate complaints that concern discrimination that has occurred in the public sector.

Other novelties

The Draft Act amends Article 6 of the GEA by adding Subsection 3 to transpose Article 14(1)(d) of the Recast Directive.

Article 5(1) of the GEA is amended by adding that an instruction to discriminate against persons on grounds of sex constitutes discrimination. This principle is currently established by Article 10²(5) of the LCA.¹⁸

5. Obligation of the Member States/EEA countries

At present Estonian law is not fully in line with the requirements of the Recast Directive. As pointed out above, a Draft Act, which aims to transpose Directives 2002/73/EC, 2004/113/EC and 2006/54/EC is pending in Parliament.

Under the existing regulation one of the main shortcomings lies in the insufficient wording of the principle of shared burden of proof, which merely places upon the respondent the obligation to give an explanation rather than the obligation to prove that discrimination has not occurred, once a *prima facie* case has been established by the applicant. The Draft Act aims to bring this provision in line with the requirements of the respective Directives.

Further, the concept of ‘harassment’ does not fully correspond to the definition as used in the Recast Directive. According to the second sentence of Article 10²(4) of the LCA, harassment shall be taken to occur where unwanted conduct or act, either verbal, non-verbal or physical, takes place against a person in a relationship of subordination or dependency with the purpose or effect of violating the dignity of the person and of creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment, and the person rejects such conduct or tolerates it for a reason that it affects his or her access to office or employment or in order to maintain the employment relationship or have access to other advantages or benefits. Thus the concept of harassment is more restrictive under Estonian law. The concept of ‘sexual harassment’ is defined by the same components (Article 3(1)(5) of the GEA). The Draft Act aims to bring the concept of ‘harassment’ and ‘sexual harassment’ in compliance with the requirements of the Directives and introduces in the text of the GEA a concept called ‘harassment due to gender’.

¹⁷ The Chancellor of Justice Act provides three exemptions. According to Article 35⁵(2) of the Chancellor of Justice Act, petitions concerning the activities of natural persons or legal persons in private law do not fall within the competence of the Chancellor of Justice if they concern: 1) professing and practising of faith or working as a minister of a religion in religious associations with registered articles of association; 2) relations in family or private life; 3) performance of the right to succession.

¹⁸ A new draft of the LCA is currently pending in Parliament. The Draft Act fully revises the current LCA; the provisions concerning equal treatment are left out of the LCA.

The law does not explicitly address the transgender aspect, neither is this question clarified in the Draft Act.

Currently the protection against victimisation applies only to the person who has relied on his or her rights as stipulated in the GEA (Article 6(2)(6) of the GEA); the Draft Act extends the scope of protection to include persons who have supported another person in defence of their rights.

As concerns more far-reaching provisions to encourage social dialogue and dialogue with non-governmental organisations with a view to promoting the principle of equal treatment and gender equality, the Draft Act provides a duty for the state and local government agencies to consult, when necessary, with relevant interest groups and non-governmental organisations who have a legitimate interest in contributing to the fight against discrimination on the grounds of sex when planning, assessing or carrying out national, regional or institutional strategies, policies and plans of actions.

Further, the Draft Act amends Article 11(1)(1) of the GEA by stipulating that in the promotion of equal treatment for men and women, an employer shall act so that his or her activities would support that both women and men would apply for vacant positions and that persons of both sexes would be employed to fill vacant positions. According to the explanatory memorandum, this amendment is necessary to urge employers not to use only usual means of recruitment, but to take into account that both women and men could be informed about a vacant position. According to a survey among employers in the private sector carried out by the Ministry of Social Affairs, Estonian employers more often seek new employees amongst their circle of acquaintances than through public competitions. Such practice leads to the result that mainly persons of the same sex as the employees already working in the organisation are hired.

Further, the Draft Act amends Article 6 of the GEA by stipulating that employers and recruitment organisations are not allowed to request information concerning pregnancy, parenthood, family obligations or other gender-related aspects from the job applicant.

6. Any simplification/reduction in administrative burden?

No information available on this aspect yet.

7. Overall assessment

Many ‘novelties’ of the Recast Directive, such as the principle of equal opportunities, were already included in the GEA during its adoption in 2004. At the same time there are several provisions which are not fully in line with the requirements of the Recast Directive (and also Directives 2002/73 and 2004/113). As pointed out, a Draft Act to transpose the requirements of the respective Directives is pending in Parliament. The text of the GEA has not been amended since its adoption in 2004. Therefore the current Draft Act aims, on the one hand, to transpose the requirements of the respective European Directives, while, on the other hand, also clarifying the text of the law, taking into account the problems that have appeared in practice. Thus, the Recast Directive has only partially influenced the amendments to the gender equality law currently in process. Nevertheless, the requirements of the European Directives play a significant role in making the law more effective. Codification of the rules of gender equality law in the Recast Directive both simplifies and makes the gender equality law more accessible. However, as the Directives have to be transposed into national law,

the real positive impact for individuals is achieved only when the requirements of the Directives are effectively implemented in national law.

FINLAND – Kevät Nousiainen

1. Transposition of the Recast Directive into national law

The authorities responsible for preparing the transposition assume that the Recast Directive has not created a need for legislative amendments. Two ministries, the Ministry for Social Affairs and Health (responsible for equality legislation and social insurance) and the Ministry of Employment and the Economy (responsible for labour legislation) have been parties to the assessment of the measures needed for transposition.

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

2. Possible reasons for a lack of transposition

The opinion that no measures are needed is based on the assumption that the Recast Directive contains no novelties. There has also been a delay in the implementation of Directive 2004/113/EC. The Government Bill containing the amendments of the Act on Equality between Women and Men needed for the transposition of Directive 2004/113 was only presented to Parliament in September this year. A review of equality legislation has been underway since 2006. The review is primarily motivated by the need to harmonise legislation and possible unification of equality bodies. The focus of the review is on prohibited grounds of discrimination other than sex, but still the horizon of a major reform has overshadowed the more detailed amendments. Until the main principles of the general review have been decided, it seems that implementation of EC law is to be kept to a minimum.

3. Overview of transposed provisions and amendments

No provisions have been transposed.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

Of the novelties that the Recast Directive contains, the ones related to a broader scope for positive action are not problematic, because the positive action provisions under the Act on Equality between Women and Men contain broad public and private duties to take positive action.

Gender reassignment

No legislative amendment has been made in order to bring gender reassignment explicitly under the Act on Equality. However, the Equality Ombudsman has interpreted the Act on Equality to cover also discrimination arising from gender reassignment, in line with the case law of the European Court of Justice. It is possible that an explicit provision will be adopted in the context of the review of the equality law.

Indirect discrimination

Under Section 7 of the Act on Equality, both direct and indirect discrimination are prohibited. Indirect discrimination is defined similarly to the Directive, except that it is sufficient that an apparently neutral provision or measure ‘may de facto land a person in a less advantageous position’. In this respect, the provision is more favourable for the alleged victim of discrimination than the Directive. Further, also differential treatment on the grounds of parenthood and family responsibilities is considered as indirect discrimination on the grounds of sex.

Positive action

The Act on Equality between Women and Men 1986/609 contains several provisions on positive action. Section 5 of the Act provides for a duty to promote gender equality in all educational institutions, consisting of a duty to ensure that women and men have equal opportunities for education and professional education, and that the teaching materials in use support this aim. Section 6 contains a positive duty of all employers to promote gender equality. The duty consists of a consistent duty to promote equality, which is understood to mean that employers are obligated to promote equality planning. The duty is further specified to include a duty to encourage that both women and men apply for jobs, that both sexes have equal opportunities for promotion, that they have equal employment conditions, especially as to pay, that attention is paid to reconciling work and family life, especially concerning working time, and that discrimination is prevented beforehand. Section 6a contains a positive duty for employers of 30 or more employees, for whom the duty to promote equality planning is more extensive than for smaller businesses. Under the provision, the employer has a duty, together with representatives of the employees, to prepare an equality plan which maps gender equality at the workplace as to the different positions of women and men, especially as to pay, and as to the measures needed to achieve equality and equal pay. The plan is to be reviewed annually, or if so agreed between the employer and the employees’ representatives, once every three years. Section 6a was enacted in 2005, together with Section 6b, which contains more specific provisions on equality planning in educational institutions. Attention is to be paid to student elections, assessments and teaching arrangements, and the institutions are to prevent sexual harassment as well as harassment on the grounds of sex. Also under this provision, the plans are to be reviewed annually. The provision does not apply to basic education.

Horizontal provisions applicable to occupational social security schemes

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

Voluntary additional pension schemes paid ‘by reason of the employment relationship’ (in Finnish terms ‘voluntary additional pension arrangements’) fall under the prohibition of discrimination in employment, Section 8 of the Act on Equality for which remedies and compensation is provided (Act on Equality as to Voluntary Additional Pension Arrangements 1997/1038, Section 1). Such arrangements are not very frequent, as the main pension system is based on statutory pension schemes.

Occupational social security schemes

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

Reconciliation

Reconciliation of work, private and family life is already on the agenda of the social partners’ dialogue. In fact it would be practically impossible to bypass the social partners in this area.

Assessment and report on the exclusions

Under Section 8(1), (1) allows for genuine occupational requirements to be taken into account when employing people, provided there is a ‘weighty and acceptable reason related to the quality of the job or tasks’.

Enforcement

A judicial procedure is available for the victims of discrimination, with the exception of the pension schemes mentioned above. However, associations and organisations with an interest in gender equality have no specific role in the procedure, excepting the role that the labour market organisations play in the Equality Board. The Equality Board is a body that may prohibit continuation of a discriminatory behaviour or measure. The Board is nominated in a tripartite manner (representing the state and labour market organisations; Section 10, Act on Equality Ombudsman and the Equality Board, 1986/610), and the labour market central organisations or the Equality Ombudsman may bring cases to the Board (Section 20, Act on Equality between Women and Men, 1986/609). Organisations for gender equality or women’s organisations play no specific role here. Such organisations may offer help to a victim of discrimination, but have no locus standi or independent role in the legal procedure. The Equality Board has no competence to conciliate the parties. The Equality Ombudsman may in practice attempt to conciliate the parties in an alleged discrimination case, but s/he has no competence to confirm conciliations.

5. Obligations of the Member States/EEA countries

It seems to me that no profound analysis has been undertaken to assess what implementation of the Recast Directive requires. The question of what competences the equality bodies should have is bound to come up in the context of the review of equality law. Smaller adjustments may be needed, especially concerning the scope of provisions on remedies, compensation and burden of proof to certain pension schemes. So far, these have not come up in the legislative review.

6. Any simplification/reduction in administrative burden?

The authorities do not seem to find their administrative burden alleviated by the Recast Directive – not surprisingly, because no specific measures to transpose the Directive have been undertaken.

7. Overall assessment

It is my impression that the implementation of the Recast Directive has been eclipsed by the aspirations and disagreements about the reform of equality legislation aiming at some extent of harmonisation of equality law concerning all prohibited grounds of discrimination under Article 13 EC. The overall structure of the Finnish Act on Equality between Women and Men and the Act on Equality Ombudsman and Equality Board is old, formulated in a manner that differs from the Directive, and is rather complicated due to amendments that have been made since 1986, when they were enacted. Therefore, the simplification that the Recast Directive aims at can hardly be achieved without an overall review of the Finnish Acts.

FRANCE – *Sylvaine Laulom*

1. Transposition of the Recast Directive into national law

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

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

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of transposed provisions and amendments

As the Act concerns the implementation of various directives including Directive 2002/73/EC, it is not easy to determine which provisions of the Recast Directive have been transposed. However, it is possible to say that the Act deals with Articles 2, 5 and 23, 14.

The general scope of the anti-discrimination provisions is extended by the 2008 Act. The new Act applies to the private sector but also to the public sector and to independent work. Until this Act, there were no legal definitions of the notions of direct

and indirect discrimination. The definition of harassment was also different from the European one. Thus the new Act defines direct and indirect discrimination partially in accordance with the European definitions. The law also redefines the notion of harassment. Another innovation is that it includes 'the instruction to discriminate' in the prohibition of discrimination. Since 2006, pregnancy was explicitly considered as a prohibited discrimination, but the 2008 Act specifies that direct and indirect discrimination based on pregnancy, maternity and maternity leave is prohibited. The Act generalises the burden of proof of discrimination. The Act also deals with the equal treatment principle in occupational social security schemes. It adds a new article to the social security code stating that there shall be no difference based on sex in the obligations to contribute and in the calculation of contributions.

4. Transposition of the novelties or classifications

Equal treatment and equal opportunities

There is no specific provision in the Act to deal with the principle of equal opportunities. This does not mean that there are no provisions in general on this issue. For example, under French law there is an obligation to negotiate on the pay gap. But the 2008 Act just intends to respond to some observations of the European commission, it intends to be pragmatic and it does not aim at carrying out a general reform of discrimination law.

Gender reassignment

There is no specific provision on gender reassignment in French law. However, in a decision concerning gender reassignment discrimination (a worker was dismissed just after he told his employer of his intention to undergo gender reassignment surgery), the HALDE (High Authority for combating discrimination and for equality), referring to Directive 2006/54 and to its Recital 3, stated that discrimination based on gender reassignment is discrimination on the ground of sex and should be prohibited.¹⁹

Indirect discrimination

The uniform definition of the concept of indirect discrimination has been implemented. Indirect discrimination is defined as a provision, criterion or practice apparently neutral but that could lead to a particular disadvantage for persons compared with others unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. A similar provision in Article 19 on the burden of proof was also adopted.

Positive action

The Labour Code recognizes the possibility to carry out positive action through temporary measures laid down by collective agreements at sectoral levels or at enterprises. The revision of the Constitution adopted in July 2008 could also favour positive actions. But there are no references to any positive action in the 2008 Act.

Horizontal provisions applicable to occupational social security schemes

No specific changes were made as far as the horizontal provisions of the directive are concerned. However, as the general scope of the Anti-discrimination provisions has been extended by the 2008 act, the scope of the French provisions concerning the bur-

¹⁹ Deliberation No. 2008-29 of 18 February 2008.

den of proof, remedies, the competencies of the Equality Body have also been extended.

Occupational social security schemes

Concerning occupational social security schemes, the 2008 Act contains a very general provision according to which there shall be no difference based on sex in the obligations to contribute and in the calculation of contributions.

Reconciliation

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

Assessment and report on the exclusions

The 2008 Act states that the prohibition of discrimination does not apply when the sex of the worker constitutes a determining factor in employment and that the objective sought is proportionate and the exception proportionate. This exception to the equal treatment principle now applies to all public and private persons including self-employed workers. However, the Act did not modify the decree which defines in the private sectors the jobs concerned: only actors and top models are concerned. In the public sector some other jobs are concerned, like posts on submarines or in some specific police force. For the moment, there is no official information on an assessment of the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements.

Enforcement

Here again there is no specific provision in the 2008 Act on the availability of judicial procedures for the enforcement of obligations imposed by the Directive, probably because this availability has already been recognised.

5. Obligations of the Member States/EEA countries

Generally, French law seems to conform to the Recast Directive. However, there are still some gaps between French gender equality law and the Recast Directive. For example, the French definition of direct discrimination is slightly different from the European one. According to the new definition, there is direct discrimination where one person is treated less favourably on grounds of sex than another is, has been or will be. This is an important difference with the definition given by the Directive, as the conditional tense has not been used to define discrimination. As a consequence, the French definition does not seem to allow comparing the situation of a worker with the situation of a hypothetical one. However, judges may interpret the French definition in compliance with the European one, but it is too early to know what will be the judges' interpretation. The right of associations to initiate a case on behalf of an employee for all judicial actions is also limited, as under French law associations must be established for at least five years. For the Government, this condition strengthens the protection of the victims of discrimination, because only associations with broad experience can initiate a case on behalf of a victim. However, it is obvious that new associations are hindered by this condition.

If France has adopted provisions which go further than the provisions of the Recast Directive, for example concerning the obligation to negotiate on the pay gap, it is not the result of the transposition of this Directive.

6. Any simplification/reduction in administrative burden?

The implementation of the Recast Directive has not led to any significant reduction in administrative burden.

7. Overall assessment

Until now the impact of the Recast Directive in France has been very low. For example, the most important part of the 2008 Act has not been codified. Obviously this does not fulfil the Directive's objectives of simplification and making gender equality law more accessible. More generally, the general aim of the Act was not to modernize, simplify and make gender equality more accessible but just to complete the implementation of the various Directives on equality to avoid an infringement procedure. The Act is not a general text on discrimination. The Recast Directive has only been partially implemented and there have been no debates on the implementation of the Recast Directive itself and the objectives of this Directive. In some aspects the Act could lead to a new complexity of gender equality law. For example, the new Act redefines the notion of harassment but it has not repealed the existing definition. This could create some problems of coordination, as two different definitions of harassment could now apply at the same time.

GERMANY – Beate Rudolf

1. Transposition of the Recast Directive into national law

The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, AGG*, of 2006) covers numerous issues contained in the Recast Directive, but was not intended as a transposition of that Directive. No transposition act was enacted afterwards, and presently no legislative activities for transposition are discernible.

No table illustrating the correlation between this Directive and the transposition measures has been published by the German Government.

2. Possible reasons for a lack of transposition

There seem to be three reasons: The first reason is a widespread belief that the AGG transposes Directive 2006/54, even if that was not its express intention. The second reason is that the issue of anti-discrimination law in general remains highly disputed (cf. the German Government's opposition to the Commission proposal on a new anti-discrimination directive). In particular, the two parties of the ruling grand coalition are deeply divided, with the Social Democrats (SPD) generally being in favour of anti-discrimination law and the Christian Democrats (CDU/CSU) generally being opposed to it. Thus, the transposition of the Recast Directive would open a new field of conflict, which would be exploited by two of the smaller opposition parties (*Bündnis 90/Die Grünen* and *Die Linke*). They have already used parliamentary hearings on

proposals to further expand the anti-discrimination law for this purpose. The third reason is that although the existence of a large gender pay gap in Germany is a well-known fact, most political parties and social partners are reluctant to accept the structural reasons for that gap. There is a preference to believe that there are individual reasons for women's lower pay, such as their choice for specific sectors, part-time work, a higher interest in 'good work' than in good pay, and a less assertive position when negotiating the pay for a job.

3. Overview of transposed provisions and amendments

Recast Directive	German law ²⁰
Article 1	Articles 1 and 2 AGG (excluding occupational pension schemes)
Article 2	Article 3 AGG
Article 3	Article 5 AGG
Article 4	---
Articles 5-13	--- (only case law available)
Article 14	Article 2 AGG
Article 15	Article 315 Civil Code (<i>Bürgerliches Gesetzbuch, BGB</i>)
Article 16	Article 18(1) Law on Parental Leave (<i>Bundeselterngeld- und Elternzeitgesetz, BEEG</i>)
Article 17	Article 2 Law on Labour Courts (<i>Arbeitsgerichtsgesetz, ArbGG</i>), Article 126 Framework Law on Civil Servants (<i>Beamtenrechtsrahmengesetz, BRRG</i>)
Article 18	Article 15, no specific provision for public service
Article 19	Article 22 AGG
Article 20	Article 25 AGG
Article 21	---
Article 22	Article 29 AGG (for Federal Equality Body only)
Article 23	Article 7(2) AGG for individual and collective agreements; for all other: Article 3(2) of the Constitution (<i>Grundgesetz, GG</i>) Article 10a(2a) of the Law on Control over Insurances (<i>Versicherungsaufsichtsgesetz, VAG</i>) for certain occupational pension schemes

²⁰ NB: In German law, provisions are usually named 'Paragraph' (§); in the following text, the term 'Article' is used instead.

Recast Directive	German law ²⁰
Article 24	Article 16 AGG (via Article 24 for public servants)
Article 25	Article 15 AGG (no criminal sanctions)
Article 26	Article 17 AGG

According to Article 1 AGG, the purpose of the law is to prevent or abolish discrimination based on sex (and the other grounds listed in Article 13 EC). Article 2 AGG extends the scope of application of the law to (1) employment and promotion, (2) working conditions and pay, (3) vocational training, (4) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, but excludes occupational pension schemes (Article 2(2) AGG).

Article 3 AGG defines discrimination, including direct and indirect discrimination, harassment and sexual harassment, and instruction to discriminate.

Article 5 AGG permits positive measures that are based on sex (and the other grounds of discrimination).

There is no specific provision on a right to return to the former or an equivalent place of work after maternity leave or after (paid) parental leave. The right derives from the individual employment contract, which obliges the employer to employ the employee in the place of work agreed upon. A unilateral change by the employer is only permitted, pursuant to Article 315 of the Civil Code (*Bürgerliches Gesetzbuch, BGB*), if it is equitable; therefore the employee is only obliged to change to an equivalent post under the same working conditions as before.

Article 18(1) of the Law on Parental Leave (*Bundeselterngeld- und Elternzeitgesetz, BEEG*) prohibits dismissal after an employee's request for parental leave and during parental leave.

Article 2 of the Law on Labour Courts (*Arbeitsgerichtsgesetz, ArbGG*), declares the labour courts competent for disputes concerning labour relations, including occupational pension schemes. Pursuant to Article 126 Framework Law on Civil Servants (*Beamtenrechtsrahmengesetz, BRRG*) the administrative courts are competent in disputes brought by civil servants concerning their employment.

A right to compensation (for immaterial damage) and reparation (for material damage) caused by sex discrimination is provided for by Article 15(1) and (2) AGG. However, there is no right to reparation (for material damage) and compensation (for immaterial damage) if the employer can prove that he/she acted without fault. If the only damage suffered is the refusal to take an applicant's job application into consideration, the maximum compensation is the amount of three months' wages. If the discrimination is caused by the application of a collective agreement, the employer is liable only in case of gross negligence or intent. For public servants, it is unclear whether a right to compensation and reparation is granted by Article 15 in conjunction with Article 24 AGG²¹ or whether the general claim for state liability applies (Article 34 Constitution (Grundgesetz, GG) in conjunction with Article 839 Civil Code (*Bürgerliches Gesetzbuch, BGB*). At any rate, both provisions require fault on the part of the employer.

²¹ If so, it would only apply to civil servants on the federal level because the federal legislator has no power to enact laws on the civil service of the states (*Länder*). None of them have introduced a provision comparable to Article 15 AGG; therefore, the general state liability claim applies.

Article 22 AGG provides for a shift in the burden of proof: The alleged victim has to prove indicia of sex discrimination. If successful, the defendant has to prove that there was no sex discrimination.

Article 25 AGG creates the federal anti-discrimination body, the *Antidiskriminierungsstelle des Bundes*. It is competent to deal with all grounds of discrimination. Its task is to support victims of discrimination in an independent manner, inform them of their rights and of possible support by other bodies, and to facilitate an amicable settlement, to inform the public in general, to conduct research, publish reports, and make recommendations, and to exchange information with European institutions, including the European Gender Institute.

According to Article 7(2) AGG, individual and collective agreements that discriminate on the grounds of sex are null and void. For all other discriminatory provisions (by bodies under public law), the prohibition of sex discrimination pursuant to Article 3(2) of the Constitution applies. Occupational pension schemes in Germany need not be approved, unless they are organised in the form of insurance. In that case, Articles 10a(2a) of the Law on Control over Insurances (*Gesetz über die Beaufsichtigung der Versicherungsunternehmen - Versicherungsaufsichtsgesetz, VAG*) permits the use of sex as a factor in determining contributions and payments.

Article 16 AGG contains a provision on victimisation. It prohibits dismissal or other adverse treatment against the victim of discrimination, witnesses, and persons that support the victim. The provision on the shift of the burden of proof is applicable in these cases. The prohibition of victimisation also applies to civil servants on the federal level (via Article 24), but not on the state level.

Article 17(1) AGG calls upon the social partners, as well as individual employers and employees and works councils to contribute to realising the prevention and eradication of sex discrimination (and discrimination based on any other ground contained in Article 13 EC). It does not, however, expressly encourage them to promote equality between men and women and flexible working agreements.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The AGG makes no reference to the principle of equal opportunities.

Gender reassignment

Gender reassignment is not specifically mentioned in the AGG. According to German constitutional doctrine, a discrimination of a person because of his/her gender reassignment can be considered sex discrimination; as of today, there are no court decisions supporting this view. The obligation to interpret the AGG in a community law-friendly way supports the doctrinal position.

Indirect discrimination

The concept of indirect discrimination was transposed through Article 3(2) of the AGG, which almost literally repeats the text of Article 2(1)(b) of the Recast Directive.²²

²² The slight difference in wording stems from the fact that the AGG covers all grounds of discrimination listed in Article 13(1) EC.

Positive action

The concept of positive action is recognized in Article 5 AGG. It applies to almost all areas of the Recast Directive, *viz.* access to employment, promotion, vocational training, working conditions and pay. It does not, however, apply to occupational pension schemes, because they are excluded from the scope of application of the AGG. The applicable law (*Betriebsrentengesetz*, BetrAVG) does not contain a provision on positive action.

Horizontal provisions applicable to occupational social security schemes

With respect to remedies, no new provisions have been introduced. Already before the Recast Directive, the labour courts were competent to decide disputes concerning occupational pension schemes. Applying Article 141 EC directly, the Federal Labour Court held in the above-mentioned decisions that sex discrimination with respect to occupational pension schemes creates a right to the advantages granted to the other sex. Thus, full reparation is granted for a violation of the prohibition of sex discrimination.

What is lacking, however, are provisions on the engagement of associations on behalf or in support of complainants in procedures concerning occupational pension schemes (Article 17).

In addition, the burden of proof rules (Article 19) have not been transposed so as to apply to occupational pension schemes.

The Equality Body created by the AGG (*Antidiskriminierungsstelle des Bundes*, ADS) is not competent in the areas outside the AGG and thus not for discrimination in occupational pension schemes.

Occupational social security schemes

For occupational pension schemes the applicable law is the Law on Occupational Pension Schemes (*Betriebsrentengesetz*, BetrAVG). It applies to benefits for retirement, invalidity, or for surviving family members, and to schemes based on pension funds and insurances. The law does not contain a prohibition of gender discrimination. It only adapts earlier rules concerning different retirement ages for women and men to the requirements of the ECJ's *Barber* judgment. In its present form, it does not permit different retirement ages for women and men. Following the case law of the ECJ, the Federal Labour Court developed effective protection against gender discrimination, and especially indirect discrimination of (mostly female) part-time workers. In particular, it held that the employer may not set up waiting periods that cannot be met by part-time workers, and it required the employer to conclude pension agreements that provide for different classes of workers according to their working hours.²³ The Court also considered provisions discriminatory that granted men a survivor's pension only if the deceased wife had been the main provider of the family income.²⁴

For sickness and unemployment, there are no occupational social security schemes; they are covered by statutory social security schemes. Hence, there is no need to transpose Article 7(2) of the Recast Directive in this regard.

²³ BAG, judgments of 4 March 1989, 3 AZR 490/87, *Neue Zeitschrift für Arbeitsrecht* (NZA) 1990, 25; of 23 January 1990, 3 AZR 58/88, NZA 1990, 778; of 20 November 1990, 3 AZR 613/89, *Entscheidungssammlung zum Arbeitsrecht* (EzA) § 1 BetrAVG Gleichberechtigung No. 8; and of 5 October 1993, 3 AZR 695/92, NZA 1994, 315.

²⁴ BAG, judgment of 19 November 2002, NZA 2003, 380.

Reconciliation

This issue is not mentioned in the AGG.

Assessment and report on the exclusions

No specific provision has been enacted charging a particular body with the fulfilment of this duty.

Enforcement

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

Other novelties

The Recast Directive in Article 4(1) repeats the principle of equal pay for the same work or work of equal value. Article 4(2) reaffirms that job classification systems must not be discriminatory. Both provisions are not contained in the law as it stands today in Germany. With respect to Article 4(1) of the Recast Directive, it must be emphasised that the lack of an equivalent national provision also constitutes a violation of Article 27(2) of the Recast Directive (prohibition of reducing the level of protection) because before the AGG entered into force, Article 612a(3) of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) expressly prohibited sex discrimination through payment of a lower wage for the same work or work of an equal value. The AGG, however, does not contain a provision that clarifies that wage discrimination also extends to work of an equal value.

5. Obligations of the Member States/EEA countries

I do not believe that Germany has fulfilled its obligations.

The requirement of fault for a claim for compensation or reparation due to sex discrimination is inconsistent with the case law of the ECJ.²⁵ Moreover, it constitutes a reduction of the level of protection granted before its entry into force, and hence violates Article 27(2) of the Recast Directive. Before the AGG entered into force, Article 611a of the Civil Code (*Bürgerliches Gesetzbuch, BGB*) provided for a right to reparation and compensation irrespective of fault.

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

There is no provision specifying the term 'pay' and emphasising the principle of equal pay for equal work and work of equal value. There is no provision prohibiting sex discriminatory criteria in job classification systems.

There is no provision calling upon the social partners to promote sex equality and equality of opportunities, as well as measures for the better reconciliation of work and family/private life.

For civil servants on the state (*Länder*) level, provisions on victimisation are lacking.

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

Provisions that go further than the Directive

Article 14 AGG confers on employees the right to refuse to work if the employer does not take any (or only manifestly useless) measures to combat harassment or sexual harassment. The employee retains the right to be paid.

6. Any simplification/reduction in administrative burden?

No.

7. Overall assessment

Germany has not used the Recast Directive as an opportunity to modernize and simplify the provisions on equal treatment and equal pay. Pertinent laws remain separate. While the AGG covers the scope of application of the Recast Directive to a large extent, it leaves out provisions on the abolition of discriminatory job qualification systems, on the right to return to the same or an equivalent post after maternity leave, and on occupational pension schemes. Thus, certain coherence is reached with respect to the other grounds of discrimination, but at the cost of a coherent law on all aspects of gender equality in matters of employment and occupation.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

1. Transposition of the Recast Directive into national law

The Recast Directive has not yet been transposed in Greece. The transposition is still going on.

No tables illustrating the correlation between this Directive and the transposition measures have been published in accordance with Recital 41 of the Directive.

2. Possible reasons for a lack of transposition

The main cause of the lack of transposition seems to be that the members of the committee which is elaborating the bill transposing the Directive (representatives of the Greek Ombudsman, the General Secretariat for Gender Equality, the social partners and the Ministry of Employment) cannot agree on the transposition of Chapter 2 of the Directive (equal treatment in occupational social security schemes). This issue is very controversial and politically hot in Greece. There are still differences in pension ages and other conditions for entitlement to old age pension between women and men both in occupational and in statutory schemes. For many years, all Greek governments, in agreement with the opposition, have been trying to avoid the elimination of these differences, arguing that there are no occupational pension schemes (or a very small number of such schemes) in Greece. This argument has been put forward unsuccessfully by the Greek Government in two Greek cases before the ECJ: Case C-147/95 *DEI v Evrenopoulos* [1997] ECR I-2057 and Case C-457/98 *Commission v Greece* [2000] ECR I-11481.

Following the second case, where the ECJ found Greece in breach of Directive 96/97/EC²⁶ for not having transposed it within the time limits provided, this Directive was transposed by Decree No. 87/2002.²⁷ However, this transposition was very inadequate, as it did not create the transparency and legal certainty required by the ECJ. Decree No. 87/2002 merely copied the provisions of Directives 86/378 and 96/97, including the definition of an ‘occupational social security scheme’, without clarifying which Greek social security schemes are occupational and which are statutory or even providing criteria by which occupational schemes could be identified, with the result that the concept of ‘occupational scheme’ is virtually unknown in Greece. Thus, Decree No. 87/2002 did not eliminate gender discrimination in several occupational schemes, including those covering employees of the State.

Consequently, the Commission, considering that ‘by maintaining in force provisions concerning different retirement ages and different minimum-service requirements for men and women under the Greek Civil and Military Pensions Code, the Hellenic Republic has failed to fulfil its obligations under Article 141 of the EC Treaty’, lodged a new recourse against Greece before the ECJ, which has not yet been heard.²⁸ The challenged provisions provide for a lower pension age for female civil servants in general than for men and an even lower pension age for female civil servants who have children under age, handicapped children or a handicapped husband.²⁹ Female military officers are entitled to an old-age pension with fewer years of service than men, if they are married or are widows, divorced or unmarried and have unmarried children (irrespective of the children’s age).³⁰

There are still strong reactions against raising women’s pension ages from trade unions, political parties (including the governing party) and some women’s NGOs; other women’s NGOs are in favour of raising women’s pension ages provided that, at the same time, effective measures regarding maternity protection and the reconciliation of family and professional life are taken. It should, however, be noted, that the reactions concern all social security schemes, as there is no awareness of the distinction between occupational and statutory schemes and there is the impression that the equalization of pension ages and other conditions for entitlement to an old age pension is required by Community law for all social security schemes.

It seems that this controversy was reflected in the work of the Committee which is elaborating the bill transposing the Recast Directive and that it was, consequently, agreed that the bill would transpose part of the Directive, i.e. that, for the time being, and probably until the ECJ’s judgment on the recourse of the Commission against Greece is published, Chapter 2 regarding occupational schemes would not be implemented. No text of the bill is yet available.

3. Overview of transposed provisions and amendments

No information available.

²⁶ Directive 96/97/EC amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 46, 17 February 1997 p. 20.

²⁷ Decree No. 87/2002 ‘for the application of the principle of equal treatment of men and women in the occupational social security schemes in compliance with Directives 96/97/EC and 86/378/EEC, OJ A 66/4 April 2002’.

²⁸ Case C-559/07, OJ C 37/21, 9 February 2008.

²⁹ Article 56 of the Civil and Military Pensions Code.

³⁰ Article 26 of the Civil and Military Pensions Code.

4. Transposition of the novelties or clarifications

No information available.

5. Obligations of the Member States/EEA countries

No information available.

6. Any simplification/reduction in administrative burden?

No information available.

7. Overall assessment

No information available.

HUNGARY – Csilla Kollonay Lehoczky

1. Transposition of the Recast Directive into national law

If ‘transposition’ means actual legislative or administrative action, no such action has been taken. If ‘transposition’ means a check of existing legislation and ascertaining that it is in compliance with the provisions of the Recast Directive, this seems to have been made.

A correlation table has been drawn up, but it has not been made publicly available yet.

2. Possible reasons for a lack of transposition

The opinion seems to be that there is no need for a new transposition process.

3. Overview of transposed provisions and amendments

No provisions have been adopted after the transposition of Directive 2002/73/EC or, after the ‘implementation’ of Directive 2003/114 (which only introduced, as a novelty, the permission to use sex-related actuarial calculation).

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

It is considered that the definition of the purpose of the Directive does not need transposition.

Gender reassignment

No provision has been adopted regarding gender reassignment.

Indirect discrimination

No provision has been adopted. Existing older provisions declaring that sex is a prohibited ground of discrimination, the exceptions from the prohibition, as well as the

earlier provisions on indirect discrimination are identified as transposing the Recast Directive. These provisions correspond, with slight differences, to the new provisions.

Positive action

Reference is made to existing provisions permitting positive action on certain conditions defined in Sections 11 and 23 of the Equality Act. No broadening has taken place.

Horizontal provisions applicable to occupational social security schemes

No provisions address this extension (besides those adopted as an implementation of Directive 2004/114/EC).

Occupational social security schemes

The definition of the material scope is not considered to need implementation. The very concept of ‘occupational pension scheme’ is relatively new in Hungary (provisions came into force only in late 2007 and have been applied – if at all – from January 2008).

Reconciliation

Retention or acquisition of most rights during maternity leave or other leave for family reasons is guaranteed (albeit in part by different provisions than indicated in the summary Correlation Table).

Assessment and report on the exclusions

Nothing has happened in this respect. The Equal Treatment Authority contributes to the preparation of reports to the Commission on the harmonization of equal treatment rules – this is featured in the Correlation Table.

Enforcement

No provisions on facilitating enforcement have been adopted.

5. Obligations of the Member States/EEA countries

The broad concept of exceptions and the restricted concept of positive action might have changed, but Hungary has not fulfilled its obligations.

6. Any simplification/reduction in administrative burden?

At this point of time this cannot be assessed, especially from outside governmental offices.

7. Overall assessment

In view of the lack of any specific provisions implementing the provisions of the Recast Directive, no modernization or simplification can be reported.

1. Transposition of the Recast Directive into national law

The EEA Joint Committee has decided that 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) will be incorporated into the EEA Agreement. This decision was made on 14 March 2008 and assigned the number 33/2008. The Directive has not yet entered into force in the EEA states, as Lichtenstein made a constitutional reservation. According to information from the Ministry of Foreign Affairs³¹, Lichtenstein has indicated that the reservation will come to an end by the end of this month (November) or in the beginning of next year.

The EFTA Surveillance Authority (ESA) does not object to incorporations with constitutional reservations into the EEA Treaty, at least not in the same way as with directives which must be incorporated in due time.

2. Possible reasons for a lack of transposition

See under 1. The Recast Directive merges seven existing Directives on equal treatment in the field of employment into one single coherent instrument.

3. Overview of transposed provisions and amendments

An amended Gender Equality Act no. 10/2008 was adopted in April 2008. This Act was not made on the basis of the Recast Directive. The main novelties of that Act were:

- The authority of the Centre for Gender Equality to monitor the implementation of the Act is strengthened and more explicit, enabling the Centre to impose a daily fine in certain instances to enforce the law.
- The substantiated opinions issued by the Complaints Committee on Gender Equality will be legally binding for the parties. New rules concerning the Complaints Committee proceedings have been adopted.
- Consistent with government policy, individuals now have the right to disclose their salaries if they so wish.
- The proportion of each sex may not be less than 40 % in public committees, boards and councils if more than three are appointed.
- A plan shall be attached to the mandatory programme, stating that companies and institutions employing more than 25 people must prepare on matters of equality, listing the manner in which employees will be guaranteed the rights provided for in the Gender Equality Act.
- The equal status consultants within the government ministries will be trained to become experts on equal rights.
- The Equal Status Council shall be appointed by the Minister of Social Affairs, who appoints the chairperson without nomination; labour organizations jointly appoint two representatives; employers' associations jointly appoint two representatives; women's associations jointly appoint two representatives; the shelter for

³¹ Received 12 November 2008

- battered women and the centre for victims of sexual abuse jointly appoint one representative; the centre for gender studies appoints one representative; the society for parental equality appoints one and the Association of Local Authorities in Iceland appoints one. The substitute members will be appointed in the same manner.
- The Minister of Social Affairs shall summon a congress on gender equality within a year from parliamentary elections, and again after two years, with the purpose of encouraging a general debate on gender equality issues among the public in various spheres of society.
 - The Minister of Social Affairs shall present to the Althing, within one year from parliamentary elections, a motion for a parliamentary resolution on a four-year programme on matters of equality, the first one to take effect in the autumn of 2008 and to be valid until 2012.
 - The Minister of Social Affairs shall be in charge of developing a special verification system for the implementation of equal pay and the implementation of equality in employment and dismissals in cooperation with parties on the labour market.

4. Transposition of the novelties or clarifications

No novelties have been transposed into national law apart from the ones in the Directives already transposed and with the amended Gender Equality Act no. 10/2008 (see under Section 3 above).

5. Obligations of the Member States/EEA countries

No information available.

6. Any simplification/reduction in administrative burden?

No information available.

7. Overall assessment

No information available.

IRELAND – *Frances Meenan*

1. Transposition of the Recast Directive into national law

The website of the Department of Justice, Equality and Law Reform states that transposition is in progress and that some minor legislative changes may be required in transposing the Directive, to take account of the case law.³²

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

³² See http://www.justice.ie/en/JELR/Pages/EU_directives; accessed 20 October 2008.

2. Possible reasons for a lack of transposition

There is a considerable volume of legislation going through the Houses of Parliament, but in addition there would be a belief (in Ireland) that Ireland is complying with the EU Equality Directives. In addition there is (quite rightly) a view that there is a considerable and sufficient volume of employment legislation.

3. Overview of the transposed provisions and amendments

The transposition of Equality Directives spans different pieces of legislation³³ as follows:

1. Employment Equality Acts 1998³⁴ – 2008 transposes Directive 75/117/EEC (equal pay), Directive 76/207/EEC (equal treatment), Directive 2002/73/EC (amending 76/207/EEC equal treatment), Directive 97/80/EC (burden of proof) ('the Employment Equality Acts' or the '1998 Act');
2. Pension Act 1990 – 2004 transposes Directive 86/378/EEC (occupational schemes but excluding statutory schemes), Directive 96/97/EC (amending Directive) ('the Pensions Act' or the '1990 Act'). The Pensions Act 1990 was amended *inter alia* by the Social Welfare (Miscellaneous Provisions) Act 2004; References to pensions below refer to the Pensions Act 1990 as amended.
3. Maternity Protection Acts 1994 and 2004 ('the Maternity Acts');
4. Adoptive Leave Acts 1995 and 2005 ('the Adoptive Leave Acts');
5. Parental Leave Acts 1998 and 2006 ('the Parental Leave Acts').

Each Article shall be considered sequentially:

Article 1 – Purpose – generally transposed in Irish legislation as set out above.

Article 2 – Definitions – includes definitions of 'direct discrimination' (Section 6 and 19 of the 1998 Act), 'indirect discrimination' (Section 19 of the 1998 Act and Section 68 of the 1990 Act), 'harassment' and 'sexual harassment' (Section 14A of the 1998 Act), 'pay', defined as remuneration in the 1998 Act and virtually the same as Article 141(1) and the Directive, and 'occupational social security schemes', defined in Section 65 of Pensions Act 1990 – this definition is not identical to the Directive but complies with Directive.

Article 2(2) – (a) Section 14A of the 1998 Act; (b) Section 8(4) of the 1998 Act; Section 6(2)(A) of the 1998 Act and also generally the Maternity Acts.

Article 3 – Positive action – Section 24 of the 1998 Act provides for positive action and repeats the wording in Article 141(4).

Article 4 – 'Like work' is defined in Section 7 of the 1998 Act (same work, work of a similar nature and work of equal value). Section 19 provides for an entitlement to equal remuneration on the gender ground (both direct and indirect). Section provides that an employer cannot discriminate against an employee or a prospective employee in relation to classification of posts. The sections relating to equal pay do not specifically refer to a job classification system in respect of determining pay. However, one would advise that the provisions of 'like work' would overcome such lacuna.

³³ All Acts are available at www.oireachtas.ie.

³⁴ As amended by the Equal Status Act 2000, the Equality Act 2004, the Intoxicating Liquor Act 2003, the Civil Law (Miscellaneous Provisions) Act 2008.

Article 5 – Sections 66 and 68 prohibit both direct and indirect discrimination in respect of occupational social security schemes (occupation benefit schemes), Section 69 is a general obligation that every scheme shall comply with the principle of equal pension treatment and Section 70 provides that there shall be no discrimination in respect of the rules of the scheme, the principle of equal pension treatment shall apply to members' dependants as it applies to members. The wording in the Irish legislation is different to the wording in Article 5 but the general provision for equality is considered to cover Article 5.

Article 6 – The definition of 'employee' is included in Section 66, self-employed persons may be members of schemes (see commentary on Article 7(2) below), there are specific provisions for providing special treatment for women in connection with childbirth and pregnancy and also in respect of periods of family leave (Sections 81 A and 81 B). It should be noted that the family leave provisions are broad and relate to all employees and the self-employed.

Article 7(1) – The term 'occupational benefits' is defined in Section 66 and includes all benefits in the form of pension, payable in cash or in kind in respect of termination of service, retirement, old age or death, interruption of service due to sickness or invalidity, accidents, illnesses during the course of employment, unemployment or expenses incurred in connection with children or other dependants. It should be noted that this provision also relates to various other statutory employment-related benefits.

Article 7(2) – Part VII of the Pensions Act 1990 was inserted by the Social Welfare (Miscellaneous Provisions) Act 2004 in respect of equal treatment in occupational benefit schemes. There is a general definition of 'employee' which implies that a person holding office under or in the service of the State is excluded from the equality provisions. The wider definition of 'employee', namely including civil servants, is provided for in the main provisions of the Act. Accordingly, it is submitted that there would have to be an amendment to that definition in the equal treatment section in order to comply with case law as in Recital 14.

Article 8(1) – Covered under the definition of 'occupational benefit scheme' in Section 66 of the 1990 Act.

Article 8(2) – No such provision. It should be noted that in Ireland there has never been a different retiring age for men and women.

Article 9 – This Article is not recited in Irish legislation. The general provisions in respect of direct and indirect discrimination shall apply (Sections 66-70). The savings in respect of the gender ground are in Section 71.

Article 9(2) – As under Article 9(1).

Article 10(1) and (2) – Section 80(b)(ii) and (4) of the Pensions Act 1990.

Article 11 – Section 71 provides that account shall not be taken of any difference in treatment for self-employed persons in relation to any optional provisions available. It should be noted that in Ireland men and women have always had the same retirement age in both occupational schemes and in statutory social security.

Article 12(1) and (2) – Article 80(b) applies.

Article 12(3) – Not applicable.

Article 12(4) – Not applicable.

Article 13 – Section 71(1)(f).

Article 14(1) – (a) Section 8 (discrimination by employers), Section 11 (employment agencies), Section 13 (membership of professional bodies), Section 13A (application to partnerships, e.g. professional firms) of the 1998 Act as amended. The definition of 'employee', however, in relation to access to employment excludes a person

employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons; (b) as in (a) and Section 12 (vocational training); (c) Section 8 and Section 19 (pay); (d) as in (b) and (c).

Article 14(2) – Section 25.

Article 15 – Sections 26 and 27 of the Maternity Protection Acts.

Article 16 – The Adoptive Leave Act 1995 mirrors as closely as possible the Maternity Protection Act 1994 and provides similar rights under Sections 18 and 19 of the 1995 Act. In the event of a dismissal, a claim may be brought under the Unfair Dismissals Acts 1977 – 2007 or under the Employment Equality Acts. There is no general provision for paternity leave save that in the event of the death of the mother whilst on maternity/adoptive leave the father can take up the balance of the leave and he retains the right of return.

Article 17(1) – Claims may be referred to the Equality Tribunal or the Circuit Court (Section 77 *et seq.*). Section 78 provides for a mediation process. In addition, there are other forms of redress under the Unfair Dismissals Acts in the event that the dismissal arises from a pregnancy, maternity, adoptive leave and parental leave. Section 81H provides for redress in respect of pensions.

Article 17(2) – The Equality Authority may provide assistance to claimants (Section 67 of the 1998 Act).

Article 18 – There is an upper limit of two years' compensation if the claimant brings a claim to the Equality Tribunal for two years' remuneration. However, if they elect to go to the Circuit Court (where there is a significant cost risk) there is no upper limit, save that compensation shall be in respect of the six-year period of employment prior to the referral. However, there is a breach if there is a reference under one or more of the discriminatory grounds (gender, marital status, family status, race, religion, age disability, sexual orientation and the Traveller ground); then, the two-year compensation limit applies. Also there is only a maximum award of EUR 12 697.38 if the claimant is not an employee, e.g. discrimination at a job interview. It is submitted that such a limit prevents real and effective compensation. In the event that an employee is not permitted to return to work following maternity leave, the Maternity Protection Act provides that such a claim should be brought under the Unfair Dismissals Acts, and then there is a limit of 104 weeks remuneration. It is submitted that the maximum limit should be removed. Of course technically the claimant is not prevented from bringing a claim under the employment equality legislation.

Article 19 – Section 85A of the Employment Equality Act 1998 and Section 76 of the Pensions Act 1990.

Article 20(1) – Part V of the 1998 Act establishes the Equality Authority³⁵ and sets out its duties and functions.

Article 20(2) – Section 67 provides for assistance to claimants; Sections 57 and 58 provide for the undertaking of research and inquiries. There is a provision for the publication of such research. There is no provision for the exchange of information with European bodies and the European Institute for Gender Equality.

Article 21(1) – There are ongoing social partnership talks, and various partnership agreements provide for equality plans, e.g. *Towards 2016*. Such negotiations are between the Government, the social partners and various other stakeholders. This is not laid down by law.

³⁵ See www.equality.ie

Article 21(2) – As above and in addition the Equality Authority promotes a good work-life balance.

Article 21(3) – As above.

Article 21(4) – The provision of such information is a matter between the relevant parties. Pay matters are generally treated as confidential if persons are on individual rates as opposed to scales of pay in an organisation.

Article 22 – As Article 21 above.

Article 23 – Section 39 provides that the function of the Equality Authority works towards the elimination of discrimination.

Article 24 – Section 74 of the 1998 Act provides for this provision and similar provisions in Section 74 of the Pensions Act 1990.

Article 25 – See Article 18 above. Also, Section 100 of the 1998 Act sets out maximum fines and terms of imprisonment for those found guilty of an offence.

Article 26 – See Article 23 above.

Article 27 – Not technically referred to.

Article 28 – Section 6(2) A of the 1998 Act is applicable.

Article 29 – Not technically referred to, except for the functions of the Equality Authority referred to above.

Article 30 – The Equality Authority has the function of promoting equality of opportunity generally.

Articles 33 – There have been no amending provisions.

As stated above, Ireland has not specifically amended the above legislation in order to transpose Directive 2006/54/EC.

4. Transposition of the novelties and clarifications

Equal treatment and equal opportunities

The long title to the Equality Act 2004 amending the 1998 Act in order to implement Directive 2002/73/EC only recites the long title to that amending Directive.

Gender reassignment

There is no reference in Irish legislation to gender reassignment. The Equality Authority noted in its Annual Report of 2007 that in 2004 it had stated that it was clear from the developing case law of the Court of Justice that it was obliged to introduce legislation to give legal recognition to the position of transsexuals and that discrimination of persons with a gender identity disorder and/or transsexual people constitutes discrimination on the gender ground. In 2007 there were two settlements relating to transgender/gender identity disorder: one in employment and one concerned the reissuing of the Leaving Certificate (final school examination) to reflect the presenting gender. In the case of *Foy v An T- Ard Chlaraitheoir, Ireland* [Registrar General of Births, Marriages and Death] and the *Attorney General et al.*³⁶, the High Court noted the difficulty in Ireland in respect of registering under a different gender and that it was a matter for Parliament to change the law as was done in the United Kingdom.

Indirect discrimination

This has been applied.

³⁶ [2002] IEHC 116 and [2007] IEHC 470.

Positive action

Whilst as stated above there is a provision in the 1998 Act for positive action, there is no equivalent provision in the Pensions Act 1990.

Horizontal provisions applicable to occupational social security schemes

The Pensions Act 1990 mirrors the provisions of the 1998 Act in respect of defence of rights, compensation, procedures, burden of proof and generally.

Reconciliation

There is no recital of Article 9 (occupational pension schemes). The Parental Leave Acts 1998 and 2006 transpose Directive 96/34/EC. There is a code of practice only, which was agreed in respect of the Protection of Employees (Part-Time Work Act 2001 in respect of part-time work. It is entitled the Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) (Declaration) Order 2006.³⁷ It refers to the work-life balance in its Preamble.

Assessment and report on exclusions

This has not been transposed into Irish law.

Enforcement

There are enforcement procedures which fulfil the requirements of the Directive. However, as stated above, it is questionable whether Irish legislation includes strong enough 'real and effective compensation'. The awards are higher, but there are limits in the legislation. There is a provision for conciliation procedures in that there is a statutory provision for mediation.

Other novelties

It is my professional view that protection on return from maternity/ adoptive/parental leave is still not strong enough. Frequently in practical terms, if an employee goes on maternity leave, she is made redundant on her return as there has been a reorganisation in the workplace during her six-month absence. Of course this has to be balanced against the needs of businesses.

5. Obligations of the Member States/EEA countries

I do not believe that Ireland has fulfilled its obligations.

The main gaps are the avoidance of the term 'principle of equality', i.e. a higher aspiration than just avoidance of discrimination between men and women. Moreover, the matter of compensation is not 'real and effective' and has maximum limits. The protection following maternity leave is not sufficiently 'strong'.

Provisions that go further than the Directive

Ireland has not transposed the Directive. However, there are arguably a number of good points in the Irish legislation in that there is 'composite' legislation, in that there are nine grounds of discrimination – gender, marital status, family status, age, sexual orientation, race, religion disability and being a member of the Traveller community. Hence, one could bring a claim based on age and gender and more than likely be successful on one of the grounds. The downside is the limits on compensation.

³⁷ SI No. 8 of 2006.

6. Any simplification/reduction in administrative burden?

Ireland has not transposed the Directive. The answer to the question is ‘no’.

7. Overall assessment

The Recast Directive has had no impact at all in Ireland. As stated above, Irish legislation is composite in that it covers nine grounds of discrimination and therefore it is complicated both substantively and procedurally. Whilst there is a provision for positive action, it has not reached the higher principle in the reference to the ‘principle’ of gender equality as opposed to comparison between men and women. Due to recent public spending restrictions because of the economic recession, the funding of the Equality Authority has been reduced by 43 per cent. The Chief Executive resigned in December 2008 and since then six members of the Board have also resigned on grounds that the Authority cannot carry out its statutory functions.³⁸

ITALY – *Simonetta Renga*

1. Transposition of the recast Directive into national law

The Recast Directive has not been transposed in our country yet and no tables illustrating the correlation between this Directive and the transposition measures have been published.

The Act of 6 June 2008 no. 101 has only repealed the Code of equal opportunities between men and women issued by Decree no. 198 of 11 April 2006 and Decree no. 151/2001 on the Sustenance of Motherhood and Fatherhood in order to comply with infringement procedure no. 2006/2535, started for non-compliance with Directive 2002/73 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.

2. Possible reasons for a lack of transposition

The former centre-left Government passed, as one of its last actions, a bill on the implementation of Recast Directive 2006/54/EC. The Bill needed to be examined by the relevant parliamentary commissions and then be approved by the Government in order to become a law in the form of a legislative decree. However, the centre-left Government was no longer in power after the political elections of last Spring and the Bill remained a dead letter. No other initiatives have been undertaken except for the approval of Decree no. 101/08 mentioned above.

The present Minister of Equal Opportunities, when presenting the programmatic guidelines of the Department to the Parliament at the end of July,³⁹ promised the transposition of Recast Directive (2006/54/EC) into national law.

We must also note that several legislative interventions issued in the last twenty years have brought about, on the whole, a good level of implementation of earlier

³⁸ www.equality.ie

³⁹ Department of Equal Opportunities, <http://www.pariopportunita.gov.it/>, last accessed 29 September 2008.

EU directives in our country and sometimes domestic legislation has gone even further than EU law. Especially as regards occupational pensions legislation, although the directives have never been specifically implemented, domestic legislation is, on the whole, closely in line with EU law. This circumstance does not justify in the least the lack of transposition neither makes it useless, but it could explain that it is considered to be less urgent at the political level.

3. Overview of transposed provisions and amendments

The only recent provisions which can be considered a step forward in the implementation of the Recast Directive were actually issued to comply with infringement procedure no. 2006/2535, regarding Directive 2002/73/EC.

Act no. 101/08 modified some articles of the Code of equal opportunities between men and women and Decree no. 151/2001 on the Sustenance of Motherhood and Fatherhood. A first change to the Code concerned the notion of direct discrimination, where instruction to discriminate is now included: indeed, instruction to discriminate was not expressly ruled out by the repealed legislation as a hypothesis of discrimination, although it could be deemed to be included by interpretation.

Then, the Code was repealed as regards access to courts for anti-gender discrimination interest groups: in fact, associations and organizations promoting the respect of equal treatment between male and female workers are now entitled to act on the worker's behalf. Before this intervention, only Equality Advisers and trade unions were empowered to act on behalf of the victims of discrimination.

Finally, Act no. 101/2008 stated the right of a woman on maternity leave to benefit at the end of this period from any improvement in working conditions to which she would have been entitled during her absence. The new provision completed, as required by Directive 2002/73, the protection granted by Decree no. 151/2001 for workers on maternity/paternity leave, which also ensures the right of the worker who has taken this leave to return to his or her job or to an equivalent post and stipulates that compulsory maternity leave is to be counted as actual work as regards seniority, annual vacation and thirteenth month and that, for the purposes of promotion, maternity leave is to be regarded as a period of employment, unless special requirements have been made for that purpose by collective agreements.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The Code of Equal Opportunities was already expressly aimed at combining all provisions on equal opportunities between men and women and not only equal treatment in matters of employment and occupation. Actually, the Code is divided into four parts. The first part regards the promotion of Equal Opportunities in general and the bodies set up for this aim, such as the Commission for Equal Opportunities, the Committee for Equal Opportunities and the Equality Advisers; the second part concerns the field of ethic and social relationships; the third part regards Equal Opportunities in economic relationships, that is employment, occupation, self-employment and entrepreneurship; while the final part regards civil and political relationships but only includes the rule on political elections for the European Parliament.

Gender reassignment

Similarly to EC law, Italian legislation on equal opportunities never expressly refers to gender reassignment, although the latter can probably be included in a wide concept of sex discrimination as referred to by Recital 3.

Decree no. 216/2003 implementing Directive 78/2000/EC expressly included sexual orientation, but not gender reassignment, among the grounds of discrimination. Nevertheless, the Decree has not been transposed in the Code of Equal Opportunities of 2006. Actually, the Code was issued in quite a hurry, at the very end of the legislature's last period of office: this probably explains, at least in part, the choice to limit it to gender discrimination, leaving out all other grounds of discrimination.

Indirect discrimination

Italian law provides a notion of indirect discrimination which is even more rigorous than EC law where it concerns justification. In fact, neutral criteria which involve a disparate impact are legitimate only if they are essential requirements for the job. So there is no need to issue new provisions as regards the definition of the concept of indirect discrimination.

Positive action

Positive actions are not merely permitted but also promoted and sustained by the allocation of a specific fund, both in the private and in the public sector. Further funds have been allocated for the promotion of self-employed women and entrepreneurship by women and for the reconciliation of working life with family/private life. Positive actions, in the form of a plan set out to remove discrimination, are also the possible consequence of both an attempt of conciliation promoted by the Equality Advisor and of ordinary proceedings for collective discrimination, where the court can order the adoption of the positive action plan in its decision ascertaining a collective discrimination. The Civil Service plays a leading role in the enhancement of positive actions, as in this sector three-year positive action plans shall be drawn up in jobs and at levels where women are under-represented. Infringement of this provision prevents Civil Service to recruit new personnel. Therefore, as regards positive actions, Italian legislation already fulfils the requirements of the Recast Directive.

Horizontal provisions applicable to occupational social security schemes

This is not relevant in Italy, as in relation to horizontal provisions there is no separation between occupational social security legislation and labour law; as regards judicial remedies, there are slight differences between the two areas of legislation and these do not include discriminatory features

Occupational social security schemes

The Directives on occupational pensions schemes have never been specifically implemented. Despite this, domestic legislation is, on the whole, closely in line with EU law, and this is true also with respect to occupational funds of public employees.

Reconciliation

Legislation ensures a good level of conciliation of private and family life with working life insofar as it provides specific and express rights, such as short-term and long-term care. Obviously, the types of leave have more impact where they are paid and count for the purpose of seniority and pensions rights. On the whole, we have a rather good system of paid care leave. Act no. 101/2008 also states the right of a woman on

maternity leave to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Act no. 53/2000 on Sustenance of Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordination of Hours in the Town's Public Services is the only text which explicitly refers to reconciliation. In particular, Article 9 of Act no. 53/2000 provides for an important measure for the promotion of reconciliation: that is the allocation of a part of the Fund for Family Policies to undertakings that enforce collective agreements on positive actions aimed at allowing parents to adopt a flexible working time schedule, through part-time, telework, home-work, flexitime and other measures. Recently, this fund has been used also for: positive actions in the area of vocational training for workers re-entering the labour market after a leave; positive actions aimed at supporting the substitution, the re-entering in the labour market, the flexible working time schedule and the vocational training of workers taking care of minors, disabled sons/daughters, or non self-sufficient elders. Funds are accessible for private employers and some public subjects, such as Local Health Units and Hospitals.

Unfortunately, the interesting and ambitious model of Act no. 53/2000 was not reflected in actual legislation, which, in general, is not 'reconciliation sensitive', and this is particularly true for the general rules on working hours.

Assessment and report on the exclusions

As regards exclusions and exceptions to the principle of equal treatment, Italian law is very rigorous. It does not allow any general *a priori* exclusion of women from any occupation. It only allows two exceptions: gender requirement in hiring people for artistic and fashion activities and in public performance, when such a requirement is essential to the nature of the work/job; specific exceptions, provided by collective agreements, to the ban on discrimination in access to work for women exist for cases of particularly heavy jobs. Some specific exceptions can be found in certain fields: such as for instance for the penitentiary police, where relevant legislation provides for records separated according to sex, due to the fact that, according to the same legislation, the penitentiary police has to be of the same sex as the convicted because the prisoners' necessities vary according to their sex.

No specific provision has been issued to assess the occupational activities referred to in Article 14(2), in order to decide whether there is justification for maintaining the exclusions concerned.

Enforcement

National provisions have already fully implemented EC law in this area. In particular, Act no. 101/08 recently allowed, in addition to Equality Advisers and Trade Unions, associations and organizations promoting the respect for equal treatment between workers to act on their behalf in case of gender discrimination. This change is very important as it strengthens the remedies system.

5. Obligations of the Member States/EEA countries

As we said, the Recast Directive has not been implemented yet. On the whole, we have a good level of implementation of EU Directives on gender discrimination.

However, there still are some gaps. In the first place, the concept of discrimination needs a wider definition: gender reassignment should be included among the grounds of discrimination; less favourable treatment related to pregnancy, mother-

hood or fatherhood as well as the infringement of maternity rights and dismissals during pregnancy/maternity should be declared expressly equal to discriminatory treatments on the grounds of sex. Secondly, the prohibition of discrimination with respect to working conditions should be extended to dismissals and work suspensions. Finally, a new prohibition should be provided as regards occupational pension schemes. The prohibition concerning equal pay should also be technically improved by an express reference to all aspects and conditions of remuneration.

The provision on victimisation should also expressly refer to all kinds of discrimination.

Gender mainstreaming should be introduced.

Article 21 and 22 on social dialogue and dialogue with non-governmental organisations should be implemented as well as the provision on the exchange of data, which at present is only provided for undertakings employing more than one hundred workers. In any case, the tasks entrusted to the National Committee established at the Ministry of Labour to promote equality and equal opportunities between men and women in the labour market and in the employment relationship should be better specified, namely in relation to equal pay, professional training and occupational pension schemes, in order to comply with Article 26; its powers could be increased so as to include, for example, conducting independent surveys, publishing independent reports, making recommendations on the implementation of gender equality, as well as ensuring the dissemination of information on the Directive and on equality law, in order to ensure full implementation of Articles 20 and 30. Last but not least, another gap as regards the functions of bodies charged with the promotion of the respect for the principle of equal treatment may be detected in relation to their level of independence.

6. Any simplification/reduction in administrative burden?

The Recast Directive has not yet been implemented. Actually, in 2006, with the issue of the Code of Equal Opportunities, which combined all provisions about gender discrimination and equal opportunities in all civil, political, social and economic fields, we missed a good opportunity of rationalising our legislation.

7. Overall assessment

As the Directive has not yet been transposed, we cannot assess the impact of it on our system.

However, in order to foresee what impact the Directive could have, we can look at the modifications needed by the 2006 Code of Equal Opportunities, which was designed as a consolidation act, that is, as a clear and coherent framework of the rules on equal opportunities. Indeed, despite the aims, the Code did not succeed in making the system coherent or in simplifying it. For example, as a consolidation act, the Code should have included at least Decree no. 216/2003 on equal treatment in employment and occupation, implementing EU Directive 2000/78, and this is particularly true also in relation to the institutional bodies in charge of the promotion of equal opportunities and their competences. Moreover, the Code should be amended so as to fill the gaps on gender discrimination legislation already mentioned above, this with the aim of modernizing the system; while in order to make equality law more accessible, the functions of the equality bodies should be extended so as to also include the dissemination of information.

We can, also – by way of ‘lab simulation’ – look at what would have been the impact of the bill passed by the former centre-left Government on the implementation of the Recast Directive. The draft decree, which was never converted into legislation, provided important modifications to key laws on the matter of gender equality in the labour market. The Decree was intended to amend the Code of equal opportunities, the Code on maternity and the Act on the reconciliation of work, private and family life. In particular, the major amendments to the Equal Opportunities Code concerned the notions of direct and indirect discrimination and the prohibition of discrimination, the National Committee on Gender Equality and Equal Opportunities at Work, the judicial remedies and mainstreaming. So the bill was geared, to a certain extent, to modernizing the gender discrimination provisions and to make equality law more accessible by extending the functions of the National Committee. Certainly it did not provide for a simplification of legislation.

More generally, we must be wary of a bad practice which has lately developed in Italy: the tendency of national legislation implementing EU law to merely transpose it by a word for word repetition of the EU Directives. This is a practice that certainly fails to ensure the necessary coordination with other existing provisions. We hope that the present Government will not adopt this practice to implement the Recast Directive, which requires patient comparison with the implementation of earlier directives.

LATVIA – *Kristīne Dupate*

1. Transposition of the Recast Directive into national law

The institution responsible for the transposition of the Recast Directive is the Ministry of Welfare. This institution currently has no plans for the implementation of the Recast Directive, because after the assessment of the requirements of this legal document, the conclusion was drawn that the Recast Directive does not provide any new provisions.

Tables illustrating the correlation between this Directive and the transposition measures have not been published.

2. Possible reasons for a lack of transposition

First, as described above, the Ministry of Welfare has not detected any new provisions in the Recast Directive.

Second, Latvia joined the EU four years ago. EU non-discrimination law is still new for the Member States. There are still gaps regarding formal implementation of the earlier Directives and considerable gaps regarding effective enforcement

3. Overview of transposed provisions and amendments

None of the provisions of the Recast Directive have been transposed yet.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The term ‘equal opportunities’ does not appear in any legal act of Latvia.

Gender reassignment

No provision has been adopted regarding gender reassignment.

Indirect discrimination

Definition of indirect discrimination has been implemented by Labour law on 2001 in the course of implementation of Directive 2002/73.

Positive action

Latvian law does not provide for any positive action measures.

Occupational social security schemes

Almost all equal treatment provisions regarding occupational social security schemes are not applicable because private pension funds in Latvia operate as ‘saving banks’. They just collect contributions which, after attainment of the retirement age (since 2008 equal for both sexes), makes the savings available to the retired worker. The savings are paid out once by the request of the respective person. In other words, private pension funds do not provide pay out of the monthly private pensions.

Horizontal provisions applicable to occupational social security schemes

The concept of victimisation has been implemented by Directive 2002/73. Penalties on the breach of principle of non-discrimination are provided by Administrative violations code and Criminal law. Latvian law does not provide for special requirements on the prevention of discrimination, except with regard to the vocational training. The State Employment agency provides special training programmes for unemployed women after child-care leave.

Requirement on gender mainstreaming has been implemented partially. Internal legal act – Instruction of Cabinet of ministers regulating drafting of normative acts requires assessment of the normative act on gender equality. However, in practice this requirement does not seem to be applied effectively, because drafters of normative acts frequently lack skills and understanding of the possible gender impact. Normative acts regulating adoption of laws by Parliament do not contain obligation on gender mainstreaming.

Reconciliation

Latvian law provides for the right to paid child-care leave for 1,5 years. Latvia has also introduced in 2007 the right to paid paternal leave of 10 days.

Assessment and report on exclusions

Latvian Labour law provides that there is no discrimination if the sex of an employee is a determining and objective factor. Latvian law does not contain any concrete provision on the professions and occupations where sex would be a determining and objective factor. It is left for each employer to determine whether the sex of an employee is a determining factor for the performance of the work.

Enforcement

Formally Latvian law contains all requirement required by the Directive 2006/54 on enforcement. Interests of the persons before national courts may be represented by non-governmental organizations and by the Ombudsman (also representing functions of National Equality body). Labour law also explicitly provides for the reversed burden of proof and right to compensation for moral damage. However, in practice, not

many cases have been brought before national courts. It may be explained by the lack of knowledge of non-discrimination and high litigation expenses. Application of the principle of reversed burden of proof also turns out as being problematic, because national courts follow Civil procedure law requirements, which provides for the procedure on the competition between parties.

5. Obligations of the Member States/EEA countries

My opinion is that Latvia has not fulfilled its obligations.

Earlier directives

There are still many gaps regarding implementation and proper enforcement of the earlier directives.

There are no criteria provided for the assessment of work of equal value. Moreover, existing legal regulations providing for detailed criteria on salaries in the public sector obviously fail to take into account the principle of equal pay for work of equal value and the manifest horizontal segregation of the Latvian labour market.

Besides the problems regarding formal implementation of the requirement of the earlier directives, there are other obvious problems with regard to the effective enforcement of the equal treatment provisions. It especially concerns defence of rights.

Although labour law provides for the reversed burden of proof, proceedings in civil courts are still conducted according to the procedures provided by Civil Procedure law. The provided procedure is appropriate for the principle of the competition of the parties. Consequently these procedures are not always appropriate for the proceeding where the principle of burden of proof is applicable because that may not be effective.

There are no effective mechanisms for the protection against victimisation, because of the difficulties concerning general access to effective court proceedings.

Recast Directive

With regard to the Recast Directive, the most important new provisions which have been not implemented into Latvian law concern extension of the principle of equal treatment with regard to transsexual persons and to long-term pensions provided by the state to judges, prosecutors and persons working within the structure of the Ministry of Interior. Although respective laws do not expressly contain directly discriminatory provisions, they may still turn out as indirectly discriminatory. In order to avoid discrimination in the field of long-service pensions, the principle of non-discrimination must be included.

As described above, it is also crucial to provide more effective procedures for the defence of non-discrimination rights, including the principle of equal opportunities, taking into account existing social barriers.

6. Any simplification/reduction in administrative burden?

Nothing to report.

7. Overall assessment

At the moment, no impact can be detected. However, the Recast Directive provides a legal basis to require substantial implementation and enforcement of the principle of

equal treatment. Besides, the Recast Directive indeed ensures more effective accessibility to existing EU gender equality law.

LIECHTENSTEIN – *Nicole Mathé*

1. Transposition of the Recast Directive into national law

The transposition is still in progress after the Directive was adopted by Liechtenstein as a member of the EEA. According to information from the Equality Office, a law proposal is planned for the near future.

To my knowledge there are no tables illustrating the correlation between this Directive and the transposition measures.

2. Possible reasons for a lack of transposition

Probable reasons could be that gender equality is no first priority in politics and in the legislative process. Additionally, one can imagine that the transposition takes more time as the Recast Directive is rather detailed.

3. Overview of transposed provisions and amendments

Not applicable.

4. Transposition of the novelties or clarifications

No novelties have been transposed.

5. Obligations of the Member States/EEA countries

Not applicable.

6. Any simplification/reduction in administrative burden?

Not applicable.

7. Overall assessment

Not applicable.

LITHUANIA – *Tomas Davulis*

1. Transposition of the Recast Directive into national law

For the transposition of the Recast Directive, major amendments were introduced to the Equal Opportunities Act for Women and Men (hereinafter – EOAWM):⁴⁰

⁴⁰ State Gazette, 1998, no. 112-3100.

- Law of 18 December 2007⁴¹ on the Amendment of Articles 2, 3, 4, 5, 6, 7, 9, 12, 24 and 27 of the Equal Opportunities Act for Women and Men;
- Law of 19 June 2008 (in force since 3 July 2008)⁴² on the Amendment of Articles 3, 12, 13, 25 and Supplement with new Articles 5-3, 7-3 of the Equal Opportunities Act for Women and Men.

Lithuanian authorities have not drawn up and published tables illustrating the correlation between the Recast Directive and national legislation.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of transposed provisions and amendments

The main amendments and new provisions are as follows:

- 1) New definition of direct discrimination. Direct discrimination is now defined as the treatment where one person is treated less favourably on grounds of gender than another is, has been or would be treated in a comparable situation (Article 2(4) EOAWM);
- 2) Elaboration of the work-related exception to the principle of equal treatment. For a certain job that can be performed only by a person of a particular sex, where, due to the nature of a specific professional activity or the conditions of its fulfilment, the sex is an essential (unavoidable) and determinant professional requirement, this treatment is legitimate and the requirement is appropriate (proportionate) (Article 2(4) p. 5 EOAWM);
- 3) Re-formulated definition of indirect discrimination. Indirect discrimination shall mean an act or omission, legal provision, assessment criterion or practice that formally are the same for women and men, but their implementation or application would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless such act or omission, legal provision, assessment criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Article 2(5) EOAWM);
- 4) Extended obligations of the employer not to discriminate employees in the area of promotion (Article 5 p. 1 EOAWM) and the payment of all supplements and all additional payments (Article 5 p. 3 EOAWM);
- 5) New prohibition of discrimination based on sex with regard to membership of, and involvement in, an organization of workers or employers, or any organization whose members carry out a particular profession, including the benefits provided for by such organizations (Articles 5-2 and 7 EOAWM);
- 6) Newly introduced right for organizations of workers and employers and for other legal persons having a legitimate interest, if they obtain written consent from the victim, to defend the rights of the victims of discrimination in administrative and court proceedings (Article 9(2) EOAWM);
- 7) Explicit inclusion of social security systems in the scope of application of the principle of equal treatment. The EOAWM now explicitly prohibits discrimina-

⁴¹ State Gazette, 2007, no. 140-5755.

⁴² State Gazette, 2008, no. 75-2923.

tion on the grounds of sex when establishing and applying social security schemes, including those that amend or supplement the state social insurance system (Article 5-3 EOAWM). The new Article 7-3 EOAWM lists prohibited actions of discrimination such as the establishment of compulsory or non-compulsory participation or different rules concerning the minimum period of participation, different conditions for awarding benefits and restrictions concerning their receipt, preservation of deferred payments, establishment of different amounts of benefits or contributions etc;

- 8) The EOAWM has extended the competence of the Ombudsman of Equal Opportunities giving him/her the right to provide victims of discrimination with objective and impartial advice (Article 12(1) EOAWM).

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

Upon its adoption in 1998, the Lithuanian law on equal treatment was named the Act on Equal Opportunities of Men and Women, but the approach of 'equal opportunities' played and still plays a very formal and nominal role. Equal opportunities for women and men are perceived as the implementation of human equality rights (Article 2(1) EOAWM) and the purpose of the Act remains to ensure the implementation of equal rights for women and men guaranteed by the Constitution of the Republic of Lithuania, and to prohibit any type of discrimination on grounds of sex, by reference in particular to marital or family status (Article 1(1) EOAWM). No particular additional emphasis on equal opportunities was placed on the 'principle of equal opportunities' in the course of transposition of the Recast Directive.

Gender reassignment

The transposition law does not mention gender reassignment. The question of gender reassignment still sparks intensive debates in Lithuania. The Civil Code of 2000 for the first time introduced a right to gender reassignment surgery but the corresponding special law was not adopted. The legal situation was condemned by the ECHR⁴³ because of the claim by a transsexual who was prevented from completing his gender transition. After the judgment, Lithuania decided to pay damages instead of implementing the new legislation on gender reassignment within three months, as ruled by ECHR. The recently elected conservative-liberal coalition is not likely to be in any hurry to adopt the required legislation.

Indirect discrimination

The Amendments of 18 December 2007 brought the definition of indirect discrimination in line with the Directive providing that indirect discrimination means an act or omission, legal provision, assessment criterion or practice that formally are the same for women and men, but whose implementation or application would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless such act or omission, legal provision, assessment criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Article 2(5) EOAWM).

⁴³ ECHR Judgment of 11 September 2007, *L. v Lithuania*, Application no. 27527/03.

Positive action

No changes. Affirmative action is perceived as an accepted exception from the principle of equal treatment but requires formal introduction in the special law (Article 2(4) p. 6 EOAWM) that was never adopted or proposed.

Horizontal provisions applicable to occupational social security schemes

No specific changes were made as far as horizontal provisions are concerned. Generally, Articles 5-3 and 7-3 are incorporated in EOAWM in such a way that they do not need supplementing specific horizontal provisions in EOAWM. The special laws on state pensions and public servants state pensions were not changed accordingly.

Occupational social security schemes

The Amendments of 19 June 2008 for the first time prohibited discrimination on the grounds of sex when establishing and applying social security provisions including those that amend or supplement the state social insurance system (Article 5-3 EOAWM). The special laws on state pensions and public servants state pensions were not changed accordingly.

Reconciliation

No specific changes were made. As a matter of national social policy, the right to paid paternity leave was introduced on 8 June 2006 and the period of paid parental leave was extended from one to two years on 4 December 2007.

Assessment and report on the exclusions

The exception related to the genuine and determining occupational requirements was improved in the EOAWM Amendments of 17 December 2007, although it contains no obligation for state authorities to assess or report on justifications in certain occupational activities. The courts and the Office of Equal Opportunities will have to assess the legality of practices while examining individual cases or investigating complaints. There are no noted cases of application of this exception so far.

Enforcement

The legal landscape concerning protection and defence of rights was improved by giving the right of representation of the victim in administrative and court proceedings to organizations of workers and employers and to other legal persons having a legitimate interest, if they obtain written consent from the victim (Article 9(2) EOAWM). The trade unions were already allowed to represent their members but the 'other legal persons having a legitimate interest' is a novelty in the Lithuanian legal system. However, the practical realization of this right will depend on interpretation of the said provision by the courts. Since Article 56 of the Code of Civil Procedure, which defines the institutions eligible to represent other persons in civil proceedings, has not been changed accordingly, the courts may refuse the representation on the ground of supremacy of the Code of Civil Procedure. Furthermore, the EOAWM Amendments extended the competence of the Ombudsman of Equal Opportunities giving him/her the right to provide victims of discrimination with objective and impartial advice. In the process of drafting the Amendments of the EOAWM, the Legal Department of the Parliament noted that Article 9(1) EOAWM gives the victim the right to appeal to the Equal Opportunities Ombudsman but does not contain its obligation to investigate. However, the duty to investigate all the complaints received is consolidated in Articles 18 and 21 of the EOAWM.

Other novelties

The big novelty of the EOAWM Amendments of 19 June 2009 concerns inclusion of self-employed persons and public servants within the scope of application of certain provisions. The reader will recall that the EOAWM was initially targeting the employment relationship in the meaning of the labour law. The explicit reference to employed persons including self-employed persons allows including the self-employed and the public servants and other categories of state employees who are covered by State pensions system (officers, soldiers, scientists and judges) and to this extent they do fall under the principle of non-discrimination.

5. Obligation of the Member States/EEA countries

The main remaining problem concerns the scope of application of the EOAWM: neither public services nor self-employed persons are explicitly addressed in the Act, and only the newly introduced Article 7-2 of the Act refers to ‘public and private sectors’ where discrimination with regard to membership of an organization of workers or employers is prohibited. The new Article 5-2 EOAWM (prohibition of discrimination in the sphere of social security schemes) would also be applicable to self-employed and public servants. The important implementation gap lies in the fact that there is no clear provision prohibiting the discrimination in relation to access to self-employment or occupation, vocational training and working conditions, the protection of self-employed women during pregnancy and maternity.

There is still no explicit provision that the worker shall benefit from any improvement in working conditions to which she would have been entitled during her absence because of maternity leave (Article 15 of the Recast Directive) and only the general principle of non-discrimination (Article 2(1) p. 4 Labour Code) may be applicable.

Provisions that go further than the Directive

The amendments of 19 June 2008 of EOAWM broadened the scope of application of the equal treatment principle significantly. Now, Section 5-3 EOAWM reads that the prohibition based on sex shall be prohibited in establishing and applying the provisions on social security, including those which aim to replace or supplement the state social security system. In other words, state social security schemes now fall under the EOAWM, with a different pensionable age as the only exception.

6. Any simplification/reduction in administrative burden?

No changes.

7. Overall assessment

The implementation of the Recast Directive has had a reverse effect – it seems that the Recast Directive has become more transparent than domestic transposition law. The structure of the EOAMW and the language of its provisions have become more difficult to follow. On 17 June 2008, the new version of another legal instrument – the Equal Opportunities Act – was adopted and it contains a set of rules aiming at prohibition of discrimination on the grounds of *inter alia* sex. Therefore, the relationship between EOAMW and Equal Opportunities Act has become totally unclear.

1. Transposition of the Recast Directive into national law

Directive 2006/54/EC has not been transposed yet (October 2008). The Ministry of employment and labour affairs is in charge of the file. It seems that a first analysis has been made to identify the requested measures.

No national correlation tables between the Directive and the planned transposition measures have been published.

2. Possible reasons for a lack of transposition

At present, it is difficult to identify the precise reasons why the Directive has not been transposed yet in Luxembourg. It could be that the difficulties in identifying the measures required to amend the present legislation have been underestimated.

Until now, Luxembourg has had only few complaints based on gender equality law. Once the transposition is finalized, it will probably be easier, for individuals as well as for social partners and legal professionals, to refer to national legislation in the field of equality between women and men.

3. Overview of transposed provisions and amendments

No information available.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The concept of equal opportunities is not mentioned in national law, which always refers to equal treatment between women and men. Nevertheless, the term ‘equal opportunity’ is usually used in political discourse and the Ministry in charge of gender equality is the *Ministère de l'égalité des chances* (Ministry in charge of equal opportunities).

Gender reassignment

Gender reassignment is not mentioned in Luxembourg legislation. Protection of transsexuals may be deduced by referring to the comments attached to the draft of the law implementing Directive 2004/113/EC.

Indirect discrimination

Indirect discrimination is literally reproduced in labour law which refers to gender equality in Title IV of the Labour Code. This title includes transposition of Directive 2002/73/EC and of Directive 97/80/EC.

Positive action

Positive action is regulated by labour law (Title IV, Chapter III). Consequently, positive action does not apply to social security schemes.

Occupational social security schemes

The legal framework for occupational pension schemes is provided by the law of 8 June 1999. Self-employed workers are not covered by this law. No legislative framework exists for this category, although it is included in the Directive.

Occupational pension schemes which contain regulations contrary to the principle of equal treatment for women and men are declared null. Article 16 of this law fully reproduces Article 6 of the Directive 96/97 EC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

Reconciliation

Maternity leave or leave for family reasons is granted on the basis of a medical certificate and treated as a period of sick leave. The sickness leave allowance is 100 % of the insured's average daily insurable income.

Regarding collective agreements, social partners have to refer to the results of negotiations on the implementation of the gender equal treatment principle. As there is no obligation to actually agree on any measures, social partners usually just note that negotiations have included the subject.

Assessment and report on exclusions

In general, Luxembourg's legislation to transpose EU directives does not mention obligations which fall on the State and not on individuals.

Enforcement

Regarding labour law, Luxembourg has complied with Directive 2006/54/EC since the implementation of Directive 2002/73/EC. Non-profit associations and trade unions are allowed, on certain conditions, to engage in proceedings on behalf or in support of a victim. The conditions to get the obligatory ministerial approval have not yet been fixed. Furthermore, the national equality body, the *Centre pour l'égalité de traitement* (Centre for Equal Treatment) can provide support and advice in the field of gender discrimination.

5. Obligations of the Member States/EEA countries

Main gaps

The concept of equal opportunity does not appear in national gender equality law.

The implementing law of Directive 2002/73/EC, with its implementation in the Luxembourg Labour Code, generally complies with the EU Directives. Even if gender reassignment is not explicitly mentioned, the reference to EU case law should guarantee implicit protection.

The principle of equal treatment between women and men in matters of social security was introduced by the law of 15 December 1986. Thus, it also applies to occupational social security schemes. However, the law from 1986 only concerns the general principle of equal treatment between women and men. Central gender equality concepts are not included in national social security law.

6. Simplification/reduction in administrative burden

Not applicable.

7. Overall assessment

The implementation of the Recast Directive could be an opportunity to review equality legislation, in particular in the field of social security law.

MALTA – *Peter G. Xuereb*

1. Transposition of the Recast Directive into national law

In Malta, no new legislation has been adopted with the specific aim of implementing Directive 2006/54.

It is true that Legal Notice 137 of 2008 amended the Equal Treatment in Employment Regulations of 2004 (Legal Notice 461 of 2004, henceforth referred to as the ETE Regulations), which had been made under the Employment and Industrial Relations Act of 2002 to give effect to the relevant provisions of Council Directives 2000/78 and 2000/43. The result is that by Regulation 1(2) of the 2004 Regulations, as now amended, it is provided that the 2004 ETE Regulations ‘give effect to *the relevant provisions of Council Directives 76/207/EEC, 2000/78, 2000/43/EC, 2002/73 and 2006/54/EC* and apply to all persons as regards both the public and the private sectors and including service with the Government in accordance with the Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations of 2007’. This may have been intended to bring the definitions of direct and indirect discrimination, pay and equal pay, harassment, and sexual harassment into line across the grounds of discrimination. However, the mere technique of referring to the range of Directives by a single amendment of the 2004 regulations (applicable to all non-sex grounds) has not been accompanied by textual amendment in the rest of the regulations. In particular, regulation 1(3) of the 2004 Regulations is not amended, so that the scope of the regulations remains limited to the non-sex grounds (sexual orientation is included).

This means that as far as grounds of sex are concerned, no amendment to the primary law has been made. We still need to refer to the Employment and Industrial Relations Act (Chapter 452, Laws of Malta; henceforth referred to as EIRA) and the Equality for Men and Women Act of 2003 (Chapter 456, Laws of Malta; henceforth referred to as EMWA). Therefore, the question remains whether these Laws, and any other laws made under them, properly and fully implement the relevant Directives and, for this current exercise, the new provisions in the recast Directive. For example, the Access to Goods and Services and Their Supply (Equal Treatment) Regulations (Legal Notice 181 of 2008) have been made under EMWA in order to give effect to Directive 2004/113 (the Access to Goods and Services Directive) and these regulations are in harmony with the Recast Directive’s provisions, in particular the definitions. Yet, there has been no accompanying amendment of the EMWA itself.

The Extension of Applicability to Service with Government (ETE) Regulations of 2007 had long been awaited, but contain some debatable exceptions regarding which the Commission has considered commencing infringement proceedings.

No table of correlations as envisaged by Recital 41 has been produced.

2. Possible reasons for a lack of transposition

The ‘main causes’ are not clear. It may be that the Government assumes or thinks that Maltese law is perfectly in line with Community law. Alternatively, priorities may have delayed a full review of the legislation.

3. Overview of transposed provisions and amendments

Much of the substance of the Recast Directive that was to be found in the Directives to be replaced by it has already been transposed. However, while a number of provisions to be found in the Recast Directive are actually ‘repeated’ in delegated legislation, they have not been relied on as a basis for the amendment of all primary law wherever this was needed.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

There is no elaboration in the primary law (EMWA) as to the concept of equal opportunities.

Gender reassignment

No specific provision has been introduced as regards gender re-assignment. Indeed, the current position at law in general is rather lacking, with a recent case being decided against a person who wished to remarry after gender re-assignment. This person was denied the issue of banns by the relevant authority and the Court of Appeal has upheld that decision. The case continues before the civil court in its constitutional jurisdiction.

Indirect discrimination

The uniform definition of the concept of indirect discrimination was brought in under the amendment made in 2007 to the 2004 ETE Regulations. However, the scope of those regulations as set out in Regulation 1(3) of same has remained the same (grounds other than sex). The same applies, *mutatis mutandis*, to the regulations brought in to give effect to Directive 2004/113 (the Access to Goods and Services etc. Regulations of 2008). However, according to the parent Act, i.e. the main Maltese law on equality for men and women as it stands [EMWA, Section 2(3)], there is ‘discrimination based on sex’ (there is no definition of indirect discrimination in the Act) where a provision, criterion or practice disadvantages ‘a substantially higher proportion of members of one sex’. Therefore, there is no definition of indirect discrimination in the EMWA, so that the Maltese primary law is not in line with the Directive on this score.

Positive action

The broadening of the field of application of the concept of positive action to include, for example, occupational pension schemes is arguably covered by the rather broad wording of Section 2(4)(b) of the EMWA, in my view.

Horizontal provisions applicable to occupational social security schemes

The extension of the material scope to occupational social security schemes is, it is thought, reflected in Maltese law. However, there are some discrepancies in the word-

ing of the applicable legislation, namely the Equal Treatment in Occupational Security Schemes Regulations (Legal Notice 317 of 2005), especially Regulation 4 thereof.

Occupational social security schemes

Article 7(2) of the Recast Directive is, according to the interpretation given to me by the Department of Social Welfare Standards, reflected in Maltese law. It seems to me that the general principle of equality would indeed apply here.

Reconciliation

The issue of reconciliation of work, private and family life is also frequently mentioned in political speeches, and certain measures have been taken to improve the situation. It is a matter of national debate as to whether enough is being done. Women's organizations say not enough is being done, for example in relation to child-care provision at affordable cost or teleworking and other flexible work arrangements. Little progress appears to have been registered, except in the area of parental leave, for the matters raised by Recital 11 of the Directive. Paternity leave provision has improved in the public sector but remains scarce or poor in the private sector (Recital 26 refers). Adoption gives rise to parental rights equivalent to those that arise on childbirth, but Maltese law does not go beyond that. It follows the requirements regarding the retention or acquisition of rights during maternity leave or leave for family reasons (Article 9(g) of the Directive), but the National Council of Women have recently pointed out that the law does not appear to protect women from dismissal during the probationary period, contrary to what was required by Directive 92/85, in that it does not require the giving of reasons for dismissal during this period.

Article 14(2) is not fully transposed into Maltese law, in my opinion. The relevant provision in EMWA is Section 2(5), which omits the phrase 'including the training leading thereto'; it also omits the words 'and determining'; further, it concludes with the wording 'and where such treatment remains within the limits of what is appropriate and necessary in the circumstances' - which does not exactly reflect the wording of Article 14(2), namely 'provided that its objective is legitimate and the requirement is proportionate'.

Assessment and report on the exclusions

There is no express provision in Maltese law obliging the Government to assess and report upon the exclusions from the application of equal treatment as regards genuine and determining occupational requirements (Article 31(3) of the Directive). On the other hand, this would fall under the statutory obligations of the Equality Body in virtue of the Equality for Men and Women Act of 2003.

Enforcement

Conciliation procedures are made available through the Equality Body, the National Commission for the Promotion of Equality (NCPE), in accordance with EMWA, while as a matter of statutory provision judicial procedures are available both under EMWA and under the EIRA, as well as under the delegated legislation. However, Section 18 of EMWA provides that the Minister may make regulations governing investigations, and that such regulations may provide the arrangements whereby the Commission may itself refer (the matter) to the competent civil court or to the industrial tribunal for redress. Comprehensive general regulations were therefore expected to be made, but to date have not been made. Otherwise Section 19 of EMWA saves the relevant provisions of the EIRA and also further provides for the right of access to

the competent court for an injunction and, where applicable, for compensation for damage suffered. The Access to Goods and Services etc. Regulations of 2008 are somewhat clearer and fuller on the question of remedies, but their material scope is, of course, narrower.

As to burden of proof, Maltese primary law continues to address this issue in terms different from those used in the Directive and, in my view, in such a way as to not accurately render the Directive (Article 19). Thus, Section 19(2) of EMWA provides that ‘it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities’, with the defendant then having to prove that such less favourable treatment was justified in accordance with the provisions of this Act. In my opinion, this appears to put a higher onus on the plaintiff than is permitted by Community law, by appearing to eliminate the space within which the presumption as set out in Article 19(1) can come into play. Different wording, more in line with Community law, is used in the Access to Goods and Services etc. Regulations.

5. Obligations of Member States/EEA countries

In my view the position is as follows. Gaps remain both in terms of the need: (a) for amendment of the primary law, especially the EMWA, (b) for further implementing legislation and (c) for flanking policy and implementation.

As to (a), delegated legislation seems to be outstripping the primary law. There is a need to update the primary law, and especially EMWA. I have pointed out in previous paragraphs of this report what I regard as the main gaps in the implementation of the Recast Directive. In my view, the burden of proof provisions in the primary law (EMWA) call for revision. The concepts and definitions of indirect discrimination and positive action need looking at. In this connection also, a reference to equal opportunities in the legislation in Malta would serve a useful purpose in providing more clearly for Ministerial power to adopt measures aimed more broadly at achieving this end.

As to (b), the Equality Body itself (NCPE) has repeatedly pointed out that further delegated legislation under the EMWA is needed in order to bring that Act fully into play and to allow it to work in practice as intended, especially for the regulation of proceedings before the Equality Body and as relates to the power of that Body to act on behalf of claimants.

As to (c), the same Equality Body and various NGOs keep pressing for the actualisation of Government promises such as creating sufficient and affordable childcare facilities for the public and private sectors for. This is the only way, it is argued, to ensure equal opportunities as well as non-discrimination.

Maltese legislation has not gone further than the provisions of the Recast Directive as a result of any exercise related to the transposition of this Directive.

6. Any simplification/reduction in administrative burden?

It is not clear that the transposition of the Directive, as far as it has been transposed, has led to any significant reduction in the administrative burden, while some would say that the relevant authorities need to work harder at carrying that burden in some areas.

7. Overall assessment

In my view, Malta has not yet fully taken the opportunity presented by the Recast Directive to revisit its main equality legislation (which is now five years old) and, while fully updating the law, to take the opportunity to drive forward societal change.

Gaps remain in relation to implementation of the Directive, but also in terms of access to law and to justice. These mainly relate to the fact that all these provisions (pre-recast and recast) are relatively new and that society takes its time to absorb the culture on which they are premised, as well as to the need to develop the role of the Equality Body in such a way as to make it more clearly available and effective.

Where the Government (Member State) is exhorted to ‘encourage’, sometimes by working with the other social partners, the results are not that obvious. For example, there has been progress in terms of alternative work systems such as teleworking in the public sector, but relatively little in the private sector, and there would appear to have been little or no serious consideration of policy measures that would change the ‘opportunity environment’ such as any new thinking on school term dates (the summer holiday period, especially, is very long) and school hours (somewhat short).

Moreover, the penalties imposed on, for example, employers as sanctions for non-compliance are generally perceived to be weak, so that the legislation risks failing the acid test of effectiveness in terms of remedies and of deterrence.

Finally, for those who hope that Law will change culture, the evidence that this is happening in this case is not strong. Many women still do not work in demanding careers or in full-time employment, and while the participation rate of the younger single female age cohort has risen, it falls back as women come to marriage and child-bearing age. Women who take career breaks can find that they are then entirely outside the social security system in terms of pension provision in particular. Improvements there have been. However, the underlying social dynamics, based on a particular bias towards a particular brand of family life, would appear not to have altered much. Some would say that this was all to the good, preserving traditional family values. Others would wish to see better enforcement of the law and the freer exercise of rights. Still others would wish to see better efforts by Government and the social partners to address the root causes of low female participation in the work-place and in self-employment. Almost all would agree that the Directives, and this will include the Recast Directive, have improved the situation for women. Many, but not all, would like to see women’s opportunities and participation rates further facilitated through the Government and social partners doing more to bring about the changes that may be required. This leaves us in need of the fullest transposition and then implementation of the Recast Directive.

Websites

- Equality Body (NCPE): www.equality.gov.mt
- National Council of Women Malta: www.ncwmalta.com
- Laws of Malta can be accessed on <http://www2.justice.gov.mt/lom>
- Legal Notices can be accessed on www.doi.gov.mt

1. Transposition of the Recast Directive into national law

The Dutch Government's view is that transposition of Directive 2006/54/EC is not necessary, as the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, hereinafter 'GETA'), the Equal Treatment Act Men and Women in Employment (*Wet Gelijke Behandeling mannen en vrouwen*, hereinafter 'ETA') and Book 7 of the Civil Code (*Burgerlijk Wetboek Boek 7*) already cover the provisions of the Recast Directive in substantive law.⁴⁴ According to the Government, all necessary transposition measures have already been taken, either voluntarily or as part of the implementation of previous Directives. We have some doubts about this. In the publication *The implementation of EU Gender Equality Law in 30 Countries*⁴⁵ we mentioned that there are some discrepancies between the Sex Equality Directives and Dutch equal treatment legislation. This concerns the definitions of direct and indirect discrimination and harassment and the restricted interpretation of the instruction to discriminate. Also, we have some doubts concerning the statements by the Government while implementing the Amended Equal Treatment Directive (2002/73/EC), maintaining that Dutch law includes the right to return after maternity leave (Article 7 of the Amended Equal Treatment Directive), that under equal treatment legislation effective damages can be claimed (Articles 6(2)) and that the system of sanctions (Article 8d) complies with the requirements set by this Directive.⁴⁶

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

2. Possible reasons for a lack of transposition

Not applicable; see Section 1.

3. Overview of the transposed provisions and amendments

None of the provisions have been transposed; see Section 1.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The principle of equal opportunities is not mentioned explicitly in Dutch equal treatment law. However, in Dutch law, the principle of equal treatment should be considered as an instrument to establish equal opportunities. The principle of equal opportunities is regularly used by the Equal Treatment Commission to implement the principle of equal treatment.

⁴⁴ *Kamerstukken II* (Parliamentary Papers), 21 109, no. 179, p. 56 and *Staatscourant* (Government Gazette), 20 May 2008, no. 94 / p. 25.

⁴⁵ See European Network of Legal Experts in the field of Gender Equality, *The implementation of EU Gender Equality Law in 30 Countries*, September 2008, European Commission, available at: http://ec.europa.eu/employment_social/gender_equality/index_en.html.

⁴⁶ Law of 5 October 2006, *Staatsblad* (Bulletin of Acts and Decrees) 2006, 469. See also *Kamerstukken II*, 30 237, no. 3, pp. 7-9.

Gender reassignment

The prohibition of discrimination based on gender reassignment is implicitly covered in Dutch equal treatment law and included in the grounds of sex.⁴⁷

Indirect discrimination

As far as terminology is concerned, one should be aware that the word ‘distinction’ is used in the GETA and the ETA, instead of ‘discrimination’. However, the use of this terminology is *de facto* (i.e. in the way they are applied) similar to the EU concepts, as arising from the Directive(s).⁴⁸

The Directive’s wording ‘apparently neutral provision, criterion or practice’, is (problematically) reduced in the Dutch definition (Article 1(1)(c) GETA, Article 1 ETA) to ‘other [i.e., other than sex] characteristics or conduct that result in discrimination [on the grounds of sex]’. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *certain distinction* based on a characteristic or conduct, under the Directive indirect discrimination might also arise out of a general (non-distinguishing) provision or practice. This appears to be falling short of the Directive’s requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics* or *conduct*, whereas the Directive uses ‘apparently neutral provision, criterion or practice’.

The law makes it explicitly clear that a distinction on the grounds of pregnancy, childbirth and maternity constitutes *direct* discrimination on the grounds of sex.

Positive action

The GETA (and the ETA) explicitly permit positive action under certain conditions; this permission is formulated as an exception to the prohibition to distinguish on the grounds of sex. This implies that the Dutch provision of positive action already covers the requirements in Article 3 of the Directive. The conditions imply that:

- a) a positive measure must be aimed at diminishing or cancelling disadvantages of women;
- b) the disadvantages must be connected to the grounds of sex;
- c) the measure must be proportionate to the aim.

Please note: Dutch law includes no obligation or requirement to introduce or effectuate positive action programmes.

Horizontal provisions applicable to occupational social security schemes

As a consequence of the Barber judgment and Directive 96/97, the ETA was amended in 1998. Several new provisions concerning occupational pension schemes were included (Articles 12a /12e ETA). Under Dutch equal treatment law, occupational social security schemes are usually seen as terms of employment (to which the prohibition of discrimination applies). In addition, Article 12b also prohibits discrimination on grounds of sex in occupational social security schemes by all parties other than the employer. This construction therefore meets the requirements of the broadened scope as formulated in Article 7(2) of the Recast Directive. The exceptions in this legislation also comply with the Directives.

⁴⁷ See Equal Treatment Commission, Opinions of 9 March 2006 (2006-33) and 17 November 2003 (2003-139).

⁴⁸ See for a more detailed and critical description the General Report of the Netherlands 2008, p. 1. A revision of the Dutch terminology by the Government will soon be completed (probably this year), but this goes beyond the scope of this questionnaire.

Reconciliation

As mentioned above, distinction on the grounds of pregnancy, childbirth and maternity constitutes *direct* distinction on the grounds of sex. This is significant, as under Dutch equal treatment law direct distinction can only be justified if one of the explicit legal exceptions applies (a so-called *closed system* of justifications). This provision stipulates that benefits deriving from pension schemes must not be affected negatively by pregnancy and maternity leaves.

Social partners play an important role, although this has not been regulated in the equal treatment laws. In the field of gender discrimination, the trade unions play an especially active role in the field of equal pay. Also, they encourage the debate on positive action (e.g. by means of quota).

Assessment and report on the exclusions

The obligation under Article 31(3) of the Recast Directive to report to the Commission has not been transposed into Dutch equal treatment law. This is not surprising, as Article 31(3) does not grant any rights directly to individuals.

Enforcement

Access to the courts is guaranteed for victims of discrimination. Also, interest groups whose aim it is to help victims of discrimination or to combat discrimination, have access to courts. Before bringing a case before the Court, victims (and interest groups) can bring a case before the Equal Treatment Commission (ETC), the national equality body. The ETC can give an Opinion, but its recommendations are not binding. Access to the ETC is free of charge.

5. Obligations of the Member States/EEA countries

See above, under 1a, where we had some doubts about the statement of the Dutch Government that transposition or implementation of the Recast Directive is not necessary.

Provisions that go further than the Directive

The Recast Directive has not been transposed into Dutch law. However, Dutch law already included provisions that go further than this Directive. This matter, however, falls outside the scope of this questionnaire.

6. Any simplification/reduction in administrative burden?

Since the Recast Directive has not been transposed into Dutch law, no simplification or reduction in administrative burden can be measured.

7. Overall assessment

As long as the Recast Directive has not been transposed into Dutch law, no impact of this Directive can be expected.

NORWAY – Helga Aune

1. Transposition of the Recast Directive into national law

The EEA Committee made Directive 2006/54/EC part of the EEA Agreement by its decision of 14 March 2008.

The Norwegian Ministry of Children and Equality has evaluated and concluded that Norwegian legislation is already in line with the requirements of the Recast Directive.

No documents/tables illustrating the correlation between this Directive and the transposition measures have been published.

2. Possible reasons for a lack of transposition

The view is that the requirements following the Recast Directive have already been transposed into legislation through the Gender Equality Act of 1978 (GEA), as this act covers all fields of society, not limited to the employment market. However, the broad cover provided by the GEA and the other anti-discrimination acts do not provide examples as listed in the Directive. One way of achieving the dissemination of information could have been to publish the text of the Directive on the website of the Gender Equality and Discrimination Ombudsman.

3. Overview of transposed provisions and amendments

See the answer to Section 2 above.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The principle of equal opportunities is stated as part of the aim of the GEA, see Section 1.

Gender reassignment

This is covered by the wording of the GEA as well as by Chapter 13 of the Working Environment Act (2005).

Indirect discrimination

This definition is in the GEA Section 3.

Positive action

The GEA covers all fields of society, see Sections 1 and 3.

Horizontal provisions applicable to occupational social security schemes

The GEA covers all fields of society, see Sections 1 and 3.

Occupational social security schemes

The GEA covers all fields of society, see Sections 1 and 3.

Reconciliation

The GEA covers all fields of society, see Sections 1 and 3. In addition, the sections of the Working Environment Act of 2005 apply regarding an inclusive working environment, see Chapter 12 offering various rights to leave as well as to reduced working hours. The right to pay while on leave is regulated in the National Insurance Act of 1997 (*Folketrygdloven*). However, the right to paid leave is indirect for the child's father as the father's right to paid leave is conditioned on that the mother worked at least 6 months during the last ten months before the birth.

Assessment and report on the exclusions

To my knowledge, no such requirements exist in Norwegian law.

Enforcement

This requirement is fulfilled by the free complaint system at the Gender Equality and Discrimination Ombudsman, which to some extent offers mediation processes and the possibility to file a case before the ordinary courts as well as before the Labour Court.

5. Obligations of the Member States/EEA countries

I believe that Norway has fulfilled most of its obligations.

However, I believe the lack of effective publication of the content of the Directive, Recital 41 is a flaw.

There are no provisions that go further than the Directive, but the GEA has a broad coverage.

6. Any simplification/reduction in administrative burden?

I do not think this will be the case, as the Ombudsman will continue its work as before.

7. Overall assessment

The Recast Directive is a modernized directive which provides a single source to look at for legislation. The impact is not tremendous as national legislation already appears to be in line with the requirements of the Directive. I think it is time to stress the importance of making the wording of the Directive more easily accessible to people, for instance at the Ombudsman's website.

POLAND – Eleonora Zielińska

1. Transposition of the Recast Directive into national law

In Poland, the transposition of the Recast Directive (2006/54/EC) and the Service Directive (2004/113/EC), as well as the 2002/73 EC Directive *is still going on*. The Act of 21 November 2008 which entered into force on 19 January 2009⁴⁹ has amended

⁴⁹ Dz.U.(Journal of Laws of Republic of Poland) 2008 No 223 item 1460, <http://isip.sejm.gov.pl/prawo/index.html>, accessed 26 January 2009.

mainly those regulations of Labour Code,⁵⁰ transposition of which had been criticised by the European Commission⁵¹. In addition, on 20 October 2008, the next version of the Draft Law on equal treatment, prepared by the Ministry of Labour and Social Policy, was published on the Ministry's website.⁵² This draft law in further amended version of 22 December 2008 declares to transpose the following Directives: 76/207/EEC, 86/613/EEC, 2000/43/EC, 2000/ 78/EC, 2002/73/EC, 2004/113/EC and 2006/54/EC.⁵³

The existence of two different drafts, which partially regulate the same issues, had surely have detrimental impact on legislative proceedings. However, to a certain extent, this may be explained by the fact that the draft, which already became the law in force is limited to amendments of equality provisions in the field of employment, contained in the Labour Code, whereas the draft law of 22 December 2008 should have broader application in other fields than employment. The drafters' idea is that the Draft of 22 December 2008 would also have a complementary (supplementary) character, as an accessory to other existing equality regulations, such as those contained in the Labour Code.⁵⁴ Such regulation has the advantage that in situations where e.g. the Labour Code fails to regulate certain problems, the provisions of the Draft Law of 22 December 2008 will automatically apply. At the same time, its disadvantage may be that in certain situations the provisions of this Code continue to be binding and the application of Draft law of 22 December 2008 would be excluded in all cases where the Labour Code regulates a certain issue, even when it constitutes improper transposition of EU equality provisions.

In the following I shall refer to these regulations, but only as far as they transpose the Recast Directive and the 2002/73 /EC Directive.

Legislation of such complex issues may be facilitated by tables illustrating the correlation between the Recast Directive and the transposition measures. Such tables have not been published. However, according to the information received from the Department for Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy, they have been elaborated for internal use, with reference to the previous version of the Draft Law on Equal Treatment. However, they have not been updated..

2. Possible reasons for a lack of transposition

The reasons for the postponed launching of the transposition process are a number of factors of various nature, including political ones. The transposition process of the Service Directive, already delayed, was interrupted in 2007, due to the change of Government resulting from the electoral victory of the Citizens Platform party in earlier, parliamentary elections. The present Government, however, has proved to be just as reluctant to promote gender equality as the previous Government and, since the

⁵⁰ Labour Code (Law of 26 June 1974 (LC)(consolidated text : Dz.U. 1998 No 21 item 94 with further amendments

⁵¹ As pointed out in the introduction to the Draft Law; see <http://kprm.gov.pl/bip/080219u3uz.pdf> accessed 17 October 2008, accessed 15 October 2008.

⁵² See http://www.mps.gov.pl/bip/download/rownosc_25wrz.pdf, accessed 20 October 2008'.

⁵³ The draft has a title 'The Act on the implementation of selected provisions of European Union in the field of equal treatment'.8..

⁵⁴ This is explicitly expressed in Article 2 of the Draft law of 22 December 2008, which states: the provisions of this Act do not interfere with the regulations dealing with equal treatment provided for in other laws. However, in matters not regulated in those regulations the provisions of this law shall apply.

transposition of equality directives has little priority in its current legislative policies, the progress of works on the transposition is rather slow. It does not seem to have accelerated, although some NGOs and members of opposition leftist party have exercised pressure on the Government.⁵⁵ A political factor is that the status and competences of two bodies responsible for combating gender discrimination are very unclear (the Department of Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy⁵⁶ and the Plenipotentiary for Equal Treatment⁵⁷). This uncertainty has a significant influence on the dynamics of work on the draft law; not only slowing down the process of elaboration of drafts, but also the open hearings and consultations in this matter. The process of transposition is also rather ineffective due to difficulties and burdens of a legislative nature caused by the assumption that the transposition should cover not only the provisions of gender equality directives, but other anti-discriminatory directives as well. The lack of clear indications in European Law as to the relations between sex/gender discrimination and other grounds of discrimination as well as regarding multiple discrimination has aggravated those handicaps even more. The fact that anti-discriminatory provisions of Labour and Social Security Laws cover all kinds of discrimination have contributed to improper transposition of equality directives as well (e.g. in relation to admissible exceptions to the principle of equal treatment). Other more general factors influencing the slow progress and improper transposition of gender equality directives may be the existing legal tradition of using general clauses, terms and formulations which are supposed to favour creative interpretation of law, rather than very casuistic provisions. Such provisions, although far from the requirement of legal clarity, sometimes allow avoiding frequent changes of the law in force, to which many agents in legislative proceedings show considerable reluctance. However, the main cause of the slow progress and improper transposition of equality directives is connected with insufficient level of knowledge, understanding and awareness of the legal aspects of equal treatment and discrimination among many decision makers participating in the legislative processes, coupled with their traditional and stereotyped thinking about social roles of women and men.

3. Overview of transposed provisions and amendments

The Act of 21 November 2008 provides several amendments to the Labour Code already modified in this respect in 2002 in connection with other equality directives⁵⁸ aimed at transposition of the 2002/73/EC Directive and proper modification of the definitions of indirect discrimination, of harassment and of sexual harassment.⁵⁹

⁵⁵ See e.g. the concern with slow progress on the proper transposition of Equality Directives 2000/43/WE and 2000/78/WE in interpellation No. 834 of the deputies of the socialist party. See <http://orka.sejm.gov.pl/proc6.nsf/0/19AA64173F4F313DC125743400389>, accessed 15 October 2008.

⁵⁶ Of the Ministry of Labour and Social Policy, which in 2005 substituted the Government Plenipotentiary for Equal Status of Women and Men.

⁵⁷ The Plenipotentiary, provided as a 'gift' to Polish women by Prime Minister on Women's Day 2008, who frankly confesses that gender discrimination is not her priority and declares that she would rather restrain her activities to the coordination of policies aimed at combating discrimination based on different grounds, conducted by several governmental agencies. The mandate of the Government Plenipotentiary for Equal Treatment was established by the Ordinance of 22nd April 2008 (*Dz.U.* 2008 No. 75 item 450).

⁵⁸ *Dz.U.* No. 213, item 2081.

⁵⁹ It also provides for the extension of the scope of protection against worse treatment in case of filing the discrimination claim, which also applies to supporting and assisting persons, a more precise definition of exceptions of the principle of equal treatment in cases related to the character of work

The Law also modifies the definition of sexual harassment,⁶⁰ making reference to the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In addition, it also modifies the definition of harassment by adding a reference to grounds of such behaviour similar to the grounds of discrimination. It modifies the definition of 'instruction' to discriminate. It expresses the principle that discrimination includes any less favourable treatment based on a person's rejection of, or submission to, such conduct and considers as discrimination any less favourable treatment of women related to pregnancy or maternity leave (extending the protection concerning paternity leave and parental leave). It also relates the principle of equal treatment to the access to professional training, additional vocational training and other areas not covered by the Recast Directive.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The Law of 22 December 2008 refers to the need to ensure equal opportunities for all only once ('thereby to extend participation of different subjects in social, economic and culture life').

Gender reassignment

The Law does not explicitly refer to gender reassignment.

Indirect discrimination

The legal concept of indirect discrimination has been defined in Labour Code since 2002, however in unsatisfactory way. The Act of 22 December 2008 transposed properly the Directive and it includes now the reference not only to existing, but also to the hypothetical situation and contains reference not only to unfavourable disproportions but also to particular disadvantaged situation. It makes reference to 'legitimate aim' and as regards the means to achieve this aim, mentions the principle of proportionality (means should be appropriate and necessary).

Positive action

The concept of positive action as described in the Draft Law of 22 December 2008 is extremely unclear and significantly different from that provided for in the Labour Code and in EU law (not only in Article 141(4) of the EC Treaty, but also in Article 6 of the Service Directive and Recast Directive). However, the scope of application of positive action is much broader in the Draft Law than in the Service Directive since it also includes education and most healthcare services.⁶¹

Horizontal provisions applicable to occupational social security schemes

The Polish Law on Occupational Pension Schemes of 20 April 2004⁶² has more narrow material scope of application than provided in Article 7 of the Directives (it pro-

(however, still not satisfactory with regard to other exceptions), the explicit guarantee for women after maternity, the return to the previous position (or, if impossible, to an equivalent position, corresponding with her qualification) with remuneration equal to that received by other employees working in the same position, who did not profit from maternity benefits.

⁶⁰ Including reference the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is similar to the definition provided for in the Draft of 29 February 2008.

⁶¹ Without many limitations which have been provided for in the earlier versions of the draft.

⁶² Dz.U. No 116, item 1207.

fects only against old age and earlier retirement). It seems that it may be applied also to particular category of workers such as public servant since the definition of employee covers among others the persons employed on the basis of appointment, election and nomination. The Law establishes also the rights of the eligible person in the case of the member's death. It does not contain the specific anti-discriminatory provisions and special horizontal regulations. However according to the predominant opinions such provisions provided for statutory retirement system should be applied also to occupational pensions schemes. The draft law does not provide new regulations in this respect.

Reconciliation

The issue of reconciliation of work, private and family life is not explicitly mentioned in the Law of 21 November 2008.

Assessment and report on the exclusions

The obligation to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements has not been enshrined into Polish law.

Enforcement

The Draft Law of 22 December 2009 ensures that the conciliation and court procedure, reverse burden of proof and financial compensation and protection against secondary victimisation will be available to every person who considers her/himself wronged by a failure to apply the principle of equal treatment. In addition, it covers contraventions (punished by fine) and infringements of the principle of equal treatment.

The Draft Law does not contain the provisions referring to Article 31 of the Recast Directive. The Draft Law envisages the establishment of the Plenipotentiary for matters of Equal Treatment, part of the office of the Minister responsible for the matters of equal treatment and appointed by The Prime Minister, entitled to monitoring the observation of the principle of equal treatment. According to the Draft Law the Plenipotentiary has an obligation to undertake appropriate actions in reaction to the violations of principle of equal treatment 'in particular in relation to legal persons and other entities not equipped with legal personality' (Article 9 point 7). This provision is confusing since the duty providing independent assistance to individual victims of discrimination, when filing their complaints about discrimination, has been left to the Commissioner for Civil Rights Protection as part of the general principles governing its activities.⁶³

5. Obligations of the Member States/EEA countries

The assessment of whether Poland has fulfilled its obligation under Recast Directive can only be made after the Draft Law is passed.

⁶³ The Draft contains appropriate amendments of the Law on the Commissioner of 15 July 1987, Dz. U. 2001 No. 14, item 147, consolidated text with further amendments.

6. Any simplification/reduction in administrative burden?

Any assessment as to the reduction of reporting requirements can only be made after the Draft Law enters into force.

7. Overall assessment

Any assessments based on the Draft Law, including modernization of the provisions of some equality directives, should be considered premature, as long as the law has not been passed. However, the transposition of the Recast Directive as proposed in Poland has already raised many doubts as to the possibility of making gender equality law more accessible.

PORTUGAL – *Maria do Rosário Palma Ramalho*

1. Transposition of the Recast Directive into national law

The Recast Directive has not yet been transposed in Portugal.

However, a major review is taking place of the Labour Code (which entered into force in 2003) and of its complementary legislation (the Labour Regulation, from 2004), which will eventually give rise to the publication of a new Labour Code, presumably at the beginning of 2009. In the Proposal for this new Labour Code, which is now being discussed in Parliament, Directive 2006/54/EC and other directives are mentioned in the rule regarding the transposition of Community Directives into national law (Article 2 Paragraph o) of the Proposal of Law no. 216/X).

Although the final outcome and the deadline of this reform are still uncertain, we can assume that the transposition of this Directive will accompany that process. We have no knowledge regarding any tables illustrating the correlation between this Directive and the transposition measures in Portugal.

2. Possible reasons for a lack of transposition

This question does not apply to Portugal.

3 Overview of transposed provisions and amendments

In Portugal, the provisions of Directive 2002/73, included in the Recast Directive, have been transposed by the Labour Code and by the Labour Regulation Act (in 2003 and 2004, respectively). These provisions mainly relate to harassment in relation to gender equality. Other provisions related to gender equality had already been transposed into national law prior to the Labour Code, but the subject of gender equality and non-discrimination in general, regarding access to employment and equal treatment at the workplace, is now dealt with in the Labour Code and in the Labour Regulation Act.

Under these circumstances, it is not yet possible to describe new national provisions related to Directive 2006/54/EC, since the reform of the Labour Code has not been completed yet.

4. Transposition of the novelties or clarifications

To provide a clearer answer to the various questions asked, we will consider the issues related to equal opportunities and equal treatment in the field of employment and the questions related to professional social security schemes separately.

a. Regarding the ‘new’ provisions of the Recast Directive in the area of employment, the Portuguese situation is the following:

Equal treatment and equal opportunities

Under Portuguese legislation (Article 22 No. 1 of the Labour Code), the scope of equality rules already covers both equal opportunities and equal treatment. Therefore, this part of the Directive will not need to be transposed.

Gender reassignment

This specific field is not explicitly considered in national legislation as a source of sex-discriminatory practices (these sources are indicated in Article 23, No. 1 of the Labour Code). However, since Community Law considers these practises as gender discrimination, we think that this particular source of discrimination falls under the scope of the national rule regarding sex-discriminatory practices. In this context, transposition of this particular rule may be considered unnecessary.

Indirect discrimination

The concept of indirect discrimination in national legislation (Article 32 No. 2 b) of the Labour Regulation Act) already complies with the concept of the Recast Directive. Therefore we do not anticipate a need for further changes in the national provisions in this area.

Positive Action

The national definition of positive action (Article 25 of the Labour Code) already complies with the Recast Directive. Therefore we do not anticipate the need of further changes in this area.

Reconciliation

As to the issue of reconciliation of work, private and family life as explicitly mentioned in the Directive: concerning Article 9(1)(g), Portuguese legislation already complies with this obligation of the Directive, since the period of these leaves is taken into account for all purposes (Article 50 No. 1. and No. 3 of the Labour Code), so we do not anticipate any need for further changes in national provisions in this area; in what concerns Article 21(2), further measures are required since the issue of reconciliation is not among the issues that must be considered in collective agreements.

Enforcement

Finally, concerning the availability of judicial procedures for the enforcement of obligations imposed by the Directive and, where appropriate, conciliation procedures (Article 17(1)), these measures are already part of national legislation, so we foresee no need of a formal transposition of this rule.

b. In what regards the ‘new’ provisions of the Recast Directive in the area of professional social security schemes, the Portuguese situation is different, since Community

Law regarding gender equality in this area has not been transposed or addressed in a systematic way, but has only led to minor changes in the national rules regarding social security. In this context, concepts like positive action (as described in Article 3 of the Recast Directive to include occupational pension schemes) are absent in this area, as well as a broad scope of the Directive for the purposes of Article 7.

5. Obligations of the Member States/EEA countries

Given the fact that Portuguese legislation generally covers the rules of this Directive, we think that the main obligations of the State regarding this Directive are fulfilled. Of course, there still are some problems related to Directive 2002/73 (e.g. the independence of the equality agencies) and some points that should be further developed (e.g. the need to promote equality issues in collective bargaining) but, on the whole, the Portuguese legal system is consistent with the Recast Directive.

The only exception to this is the issue of professional social security schemes, which should be dealt with in a systematic way. In our view, this area represents the main gap of Portuguese legislation concerning the Recast Directive.

6. Any simplification/reduction in administrative burden?

We have no information to answer to this question.

7. Overall assessment

In our view, the simplification of, easy access to and knowledge of the rules regarding gender equality in the access to employment and at the workplace is already covered in Portugal by the fact that these rules (including maternity and paternity provisions) are all integrated in two major laws: the Labour Code and the Labour Regulation Act. If the new Code is approved, the system will get even simpler, since the Regulation Act is bound to disappear and its rules concerning gender equality, maternity and paternity will be integrated in the Labour Code.

For professional social security schemes, the situation is different and we hope that the Recast Directive will be an opportunity to clarify the Portuguese system in this area, from a gender equality perspective.

ROMANIA – Roxana Teşiu

1. Transposition of the Recast Directive into national law

The vast majority of legal provisions contained in the Recast Directive were already transposed in Romania before 15 August 2008 through the legal provisions of the republished Act No. 202 of 2002 on equal opportunities and equal treatment between women and men⁶⁴. For the few novelties introduced by the Recast Directive, no public

⁶⁴ Act No. 202 of 19 April 2002 on equal opportunities between women and men republished, Official Gazette No. 150 of 1 March 2007. Law No. 202 of 19 April 2002 was republished based on Article III of the Emergency Ordinance No. 56 of 2006 on the completion and modification of Law No. 202 of 19 April 2002, published in Official Gazette No. 768 of 8 September 2006. Upon republication, the texts were given new numbering. The Emergency Ordinance No. 56 of 2006 was ap-

information is available with regard to their transposition. In that regard, extensive search of the websites of the main governmental institutions in charge of the implementation of the legislation on the equal opportunities and treatment between women and men in Romania has not revealed any public information that would highlight transposition activities. These governmental institutions include the National Agency for Equal Opportunities between Women and Men, a specialised body of the central public administration, part of the Ministry of Labour, Family and Equal Opportunities. For the purpose of the current report, based on the fact that there is no public evidence of full transposition of the Recast Directive into the national legal framework, it may be stated that full transposition is pending.

No public information is available with regard to tables illustrating the correlation between the Recast Directive and the transposition measures. In that regard, extensive search of the websites of the main governmental institutions in charge of the implementation of the legislation on equal opportunities and treatment between women and men in Romania has not revealed any public information aimed at marking the correlation.

2. Possible reasons for a lack of transposition

The vast majority of legal provisions contained in the Recast Directive were already transposed in Romania before 15 August 2008. For the novelties and clarifications introduced by the Recast Directive, it is impossible to answer the question of transposition going on. Although public information is not available in that regard, transposition may still be underway. On the other hand, it should be mentioned that according to the information available on the website of the Ministry of Labour, Family and Equal Opportunities with regard to the legal proposals initiated by the Ministry starting with 1 January 2008, no legal initiative has targeted the transposition aspects.

The aspects due to which the Recast Directive has not, to this date, been fully transposed into national legislation are based on the fact that the republished Act No. 202 of 2002 on equal opportunities and equal treatment between women and men already covered the vast majority of legal provisions of the Recast Directive. Another cause for the lack of transposition may be that elections are to be held in Romania on 31 November and that there is strong public debate on uninominal voting, which has moved the attention of the political class and governmental institutions to a different area than the legislative one.

3. Overview of transposed provisions and amendments

Most of the provisions of the Recast Directive were already transposed or present in Romanian legislation through republished Act No. 202 of 2002 on equal opportunities and equal treatment between women and men. In that regard, it should be highlighted that while Act No. 202 of 2002 on equal opportunities was adopted in 2002, several legal initiatives for modifications and completions were adopted in the following years. These legal initiatives were aimed to continuously complete and bring into line Act No. 202 of 2002 on equal opportunities with the provisions of Directives 2002/73/EC.

proved with modifications and completions by Law No. 507 of 2006, published in Official Gazette No. 10 of 8 January 2007.

4. Transposition of the novelties or clarifications

Some of the ‘novelties’ or ‘clarifications’ introduced by the Recast Directive were already present in Romanian legislation.

Equal treatment and equal opportunities

In this regard, in relation to the more complex purpose of the Recast Directive and according to the legal provisions of Article 1(1) of Act No. 202 of 2002 on equal opportunities, the purpose of Romanian law is ‘to regulate the measures for promoting equal opportunities and equal treatment between women and men with the aim of eliminating all forms of discrimination based on sex in all public spheres in Romania’. Therefore, it may be stated that the legislation already in place in Romania was aimed to implement not only the principle of equal treatment of women and men in matters of employment and occupation, but also to address the principle of equal opportunities. In addition to this, it is not just the field of labour that is covered by the law, but also all fields of public life, such as access to education, health, culture, information and decision making.

Even if some of the new elements introduced by the Recast Directive were already present into the Romanian legislation, other important novelties have not been transposed.

Gender reassignment

The principle of equal opportunities and equal treatment of men and women in matters of employment and occupation as transposed the Romanian legislation does not refer specifically to gender reassignment as specified in Recital 3 of the Recast Directive.

Indirect discrimination

The definition of the concept of indirect discrimination has been transposed into Romanian legislation in accordance with Article 2(1)(b) of the Recast Directive.

Positive action

The concept of ‘positive discrimination’ is defined in Romanian legislation. According to the legal provisions of Article 4(e) of Act No. 202 of 2002 on equal opportunities, ‘positive discrimination’ should be understood as those special measures adopted for a temporary period of time in order to accelerate *de facto* achievement of equal opportunities between women and men and which are not considered discriminatory actions. However, it should be highlighted that throughout the further provisions of the Act on equal opportunities, this concept is mentioned only in the context of equal opportunities between women and men as regards participation in the decision-making process. However, it is to be assumed that in implementation the substantive field of application of this concept would cover the matters addressed by the Act, namely promoting equal opportunities for women and men in all fields of Romania’s public life, including employment and occupation.

Horizontal provisions of the Directive

These provisions are not applicable to Romanian legislation.

Occupational social security schemes

These provisions are not applicable to Romanian legislation.

Reconciliation

The issue of reconciliation of work, private and family life is not explicitly mentioned in Act No. 202 of 2002 on equal opportunities.

Assessment and report on the exclusions

The obligation of Romania to report on the results of assessing the occupational activities referred to in Article 14(2) of the Recast Directive is not explicitly provided for in the current Romanian legal framework.

Enforcement

With regard to the availability of judicial procedures for the enforcement of obligations imposed by Article 17(1) of the Recast Directive, and conciliation procedures where appropriate, these measures are already provided for by national legislation, so we foresee no need for formal transposition of this rule.

5. Obligations of the Member States/EEA countries

One of the main gaps with regard to transposing the Recast Directive is related to the defence of rights and compensation or reparation. With regard to defence of rights, protection for victims is not specifically provided for after the end of employment relationship. Similarly, specific legal provisions for the absence of an upper limit for compensation granted to any damage resulting from discrimination are not provided for in the law.

6. Any simplification/reduction in administrative burden?

No information available.

7. Overall assessment

It may be stated that the major objectives of modernization, simplification and improvement of the provisions contained in various Directives, some dating from a long time ago, have been met through the Recast Directive. However, for the time being, it is too early to assess the impact of the Recast Directive in Romania, as it is not fully transposed yet. One area of concern for implementation at the national level is the absence of case law based on the provisions of the Recast Directive that had already been transposed into national legislation. Another area of concern is that, while the European provisions are now comprised in one compact Directive, the relevant standards are still included in distinct legal acts in Romanian legislation and that does not make them very clear or effective for Romanian citizens.

SLOVAKIA – Zuzana Magurová

1. Transposition of the Recast Directive into national law

The Recast Directive has been transposed, but the Government proceeded with the transposition of the formal aspect only. On the basis of its resolution, the Ministry of Labour has become the central coordinating body responsible for the transposition of

this Directive. It was obliged to fulfil this task by 15 May 2008 in cooperation with the Ministry of Defence (responsible for the Act on Civil Service of Customs Officers), the Minister of Justice and the Deputy Prime Minister for knowledge society, European affairs, human rights and minorities (responsible for the Antidiscrimination Act). The Ministry of Labour is responsible for the amendments to the Labour Code.

According to the preambles to these bills, the Recast Directive fully covers the legal regulations falling within competence of the Ministry of Labour, that are identical with legal regulations transposing Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC, which will be cancelled by this Directive with effect from 15 August 2009.

The compliance tables illustrating the correlation between this Directive and the transposition measures have always formed a part of the quoted Acts in the form of an annex. Moreover, the coordinating ministries have automatically changed the text of the original Directive in the initial compliance tables and replaced it with the text taken from the recast version.

The now cancelled directives have been gradually transposed into several laws such as the Labour Code, Civil Service Act, Act on Performance of Work in Public Interest, whereby the most important law is the Antidiscrimination Act. This was amended following two formal notices of the Commission, pointing out the incomplete or incorrect transposition of Directives 2002/73/EC and 2000/78/EC, and in view of the transposition of Council Directive 2004/113/EC.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of the transposed provisions and amendments

The second fundamental amendment to the Antidiscrimination Act⁶⁵ that entered into force on 1 April 2008 also increased the protection of persons against harassment, by the introduction of the explicit prohibition of sexual harassment that was not included elsewhere in our national legislation. The definition of direct and indirect discrimination has been amended. According to Article 2a of the Antidiscrimination Act

– harassment means a conduct that leads or might lead to the creation of an intimidating, hostile, mortifying, humiliating, degrading, dishonouring or offensive environment and the purpose or consequence of which is or might be the infringement of freedom or human dignity;

– sexual harassment means a verbal, nonverbal or physical conduct of sexual nature, the purpose or consequence of which is or might be the infringement of human dignity and that creates an intimidating, humiliating, dishonouring, hostile or offensive environment.

⁶⁵ [Zákon 85/2008 ktorým sa mení a dopĺňa zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov \(antidiskriminačný zákon\) v znení neskorších predpisov a o zmene a doplnení zákona Národnej rady Slovenskej republiky č. 308/1993 Z. z. o zriadení Slovenského národného strediska pre ľudské práva v znení neskorších predpisov](#) (Act no. 85/2008 Coll. amending Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws).

The situation has improved in the definition of wages in the amendment of the Labour Code⁶⁶ that entered into force on 1 September 2007, in Article 119a Wage for equal work and for work of equal value:

- 1) Wage conditions must be agreed without any gender discrimination. The provision of the first sentence applies to each payment for work as well as to payments that are or will be provided in connection with employment under other provisions of this Act or under special regulations;
- 2) Women and men are entitled to equal wages for equal work or for work of equal value. The equal work or work of equal value phrase means work of equal or comparable complexity, responsibility and laboriousness, which is carried out under equal or comparable working conditions and is aimed at equal or comparable performance and results of work carried out under an employment contract at the same employer;
- 3) If the employer applies the system of job evaluation, the evaluation must be based on equal criteria for men and women without any gender discrimination. When assessing the value of work of a woman and a man, in addition to the criteria set out under 2, the employer may apply other objectively measurable criteria applicable to all employees irrespective of gender;
- 4) The points under 1 to 3 above also apply to employees of the same gender, if they carry out equal work or work of equal value.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The principle of equal opportunities has not been regulated yet. The Act on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Antidiscrimination Act) provides for the application of the principle of equal treatment and lays down the means of legal protection in case of violation of this principle.

Gender reassignment

The prohibition of discrimination arising from gender reassignment was transposed into Article 2a(11) of the Antidiscrimination Act: ‘Discrimination based on sex also means discrimination related to pregnancy or maternity, as well as discrimination on the grounds of sexual or gender identification’.

Indirect discrimination

The definition is in Article 2a(3) of the Antidiscrimination Act: ‘Indirect discrimination is outwardly neutral regulation, decision, order or practice that discriminates one person against other person; if such regulation, decision, order or practice are objectively justified by enforcement of a legitimate interest and are adequate to and required for the achievement of such interest, they do not constitute indirect discrimination.’

Positive action

The amendment to the Antidiscrimination Act has repeatedly introduced positive action – literary ‘balancing measure’ – for disadvantaged groups. During the adoption

⁶⁶ [Zákon 348/2007 ktorým sa mení a dopĺňa zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony](#) (Act no. 85/2008 Coll. amending Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination Amending and Supplementing Certain Other Laws).

process, Parliament refused to adopt balancing measures on the grounds of sex and ethnic or racial origin. Instead it replaced these grounds by ‘social and economic disadvantage’.

Horizontal provisions applicable to occupational social security schemes

The Slovak social security system does not contain a specific statutory regulation for occupational pension schemes. Some provisions of the Act on Additional Savings⁶⁷ however, could be considered as laying down conditions for such schemes. Its Article 7 prohibits discrimination when performing additional pension savings referring to the Antidiscrimination Act. It also states that provisions of the collective agreement connected with additional pension savings, employer's agreement, participant's agreement, plan of endowments/ payments, bylaws of the additional pension fund that are not in full compliance with the principle of equal treatment are invalid. Pursuant to Article 34 of this Act, the additional pension savings company is obliged, *inter alia*, to apply the principle of equal treatment to all savers.

Reconciliation

The Government has made several reports and strategies in which it addresses the issue of reconciliation of work, private and family life. The measures in these reports and strategies are described in general outlines and are not always supported by appropriate analyses that would support feasibility of these measures. Furthermore, the documents fail to include gender aspects. Some measures even increase the existing gap between paid work and family, with adverse effects on women and gender equality. The Government has shifted a substantial portion of responsibility for implementation of this issue onto the social partners, and rather scarcely outlines tasks in its strategic documents that should be carried out by the Government itself or by its institutions. For example, the National Labour Inspectorate has powers to cover certain areas of this agenda, yet it has no funds or capacities for regular monitoring.

The Labour Code contains several provisions that have the potential to contribute to the harmonisation of employees' professional and family life. Many of these provisions are related to time management and/or division of working time. The flexible forms of the working time available on our labour market, provided for by legislation, include overtime work, shift work, flexible working time, part-time work, home work and telework. Only a small percentage of employees use these possibilities. In case of part-time work, there are significant differences in its use by men and women, whereby women prevail. The primary cause of the lack of interest from workers in part-time work is financial: most families need to secure two full incomes for their budget. Telework was introduced into the Labour Code only on 1 September 2007⁶⁸ but is not common yet and is limited to certain economic sectors and occupations. In the framework of the harmonisation of the family and professional life certain other amendments were made to the Labour Code, e.g. those relating to parental leave.

When employees return to work following maternity or parental leave (a period of 28 weeks or of 37 weeks in case of multiple births or single mothers), they are entitled to return to their original work and working position. If this is not possible because as such work is no longer performed or the workplace has been cancelled, the employer

⁶⁷ [Zákon 650/2004 o doplnkovom dôchodkovom sporení a o zmene a doplnení niektorých zákonov](#) (Act no. 650/2004 Coll. on Additional Pension Savings).

⁶⁸ When the amendment to the Labour Code by Act No. 348/2007 Coll. entered into force, [Zákon 348/2007 ktorým sa mení a dopĺňa zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony](#).

must transfer them to other work that corresponds with the employment contract. When an employee returns from parental leave, unlike employees returning from maternity leave (for a period up to the age of 3 or up to the age of 6 if the child is chronically and seriously disabled), the employer is not obliged to offer the original job.

Legislation still needs to include an individual and non-transferable right to paternity leave. There are no provisions in the Labour Code about the support for child-care facilities. There is a lack of accessible and affordable child-care facilities and care for dependent persons.

Assessment and report on the exclusions

The possibility of such exclusions is regulated in the Antidiscrimination Act. The differences of treatment must be objectively justified by the nature of occupational activities or the circumstances under which such activities are carried out, provided that the extent or form of such differences of treatment are legitimate and justified in view of these activities or circumstances under which they are carried out. This issue has not been assessed yet.

Enforcement

According to the Antidiscrimination Act, every person who considers him/herself wronged in their rights because the principle of equal treatment has not been applied may pursue their claims by judicial process.

5. Obligation of the Member States/EEA countries

Although the amendments of the quoted Acts have largely harmonised legislation with the Directive and Slovakia has fulfilled the obligation of its transposition, the following weaknesses persist:

The definitions of harassment and sexual harassment contained in the Antidiscrimination Act are not fully identical with those contained in the Directive, because they do not include the characteristics of the conduct as ‘unwanted’ one. In view of the short period of validity of the Act no case of sexual harassment has been decided by court yet. It is very difficult to say whether a regulation not containing the attribute ‘unwanted’ will be more advantageous for the proponents than a formulation identical with the wording of the definition contained in the Directive.

The Antidiscrimination Act does not provide for the possibility of taking positive measures based on sex. We have not regulated paternity leave.

The shifted burden of proof is applied in proceedings concerning the violation of the principle of equal treatment based on the Antidiscrimination Act. Such regulation is not contained in the Code of Civil Procedure. Therefore, the courts can only follow procedural regulations and avoid applying the provision embodied in the Antidiscrimination Act. The obstacles in the access to justice continue due to the high legal fees.

6. Any simplification/reduction in administrative burden?

No information available.

7. Overall assessment

Although the Directive has largely been transposed into our legislation, gender equality law is still not accessible enough and there are still barriers regarding the protection of the right to equal treatment and protection from discrimination.

SLOVENIA – *Tanja Koderman Sever*

1. Transposition of the Recast Directive into national law

The Recast Directive has been transposed. Slovenia has not drawn up and published tables illustrating the correlation between the Recast Directive and the transposition measures.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of the transposed provisions and amendments

In Slovenia, the following provisions of the Recast Directive have been transposed:

- Article 1 with a simple and exact indication of the areas of social life where the principle of equal treatment for women and men is guaranteed;
- Article 2 with an amended definition of indirect discrimination;
- Article 3 with simple and exact regulation of positive action measures;
- Article 5 and 7 providing equal treatment in occupational social security schemes;
- Article 14 allowing exact exclusions from the application of the principle of equal treatment;
- Article 20 with a new description of duties, responsibilities, status and termination of the mandate of the Advocate for the Principle of Equality (hereinafter the Advocate);
- Article 24 with a wider definition of victimisation.

I must mention that the majority of provisions from Directive 2006/54/EC and Directive 2002/73/EC were transposed at the same time and in the same law.

The Recast Directive was transposed by the following provisions of the Act amending the Act Implementing the Principle of Equal Treatment⁶⁹ (hereinafter the AIPET-A):

- Article 3 precisely defines the areas of social life where the principle of equal treatment is guaranteed. It is guaranteed in relation to: access to employment and occupation, including promotion, and to vocational training; working conditions and salary; social protection, social security and health protection etc.;
- Article 4 allows different treatment which is based on a characteristic related to sex, as regards access to employment including training, where by reason of nature of the particular occupational activities concerned or of the context in which they are carried out, such characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate;

⁶⁹ Act amending the Act Implementing the Principle of Equal Treatment, Official Gazette RS, No. 61/2007.

- Article 6 defines indirect discrimination according to the new definition in Directive 2002/73/EC and the Recast Directive;
- Articles 7 and 9 define special measures and their adoption. Special measures are, according to a new provision of the AIPET-A, positive measures and encouraging measures and can be adopted by state authorities, employers, political parties, civil society organizations etc.;
- Articles 10 to 18 include a new description of a working post of the Advocate and the procedure of hearing a case of alleged unequal treatment of women and men before the Advocate, her or his independent status, her or his duties and responsibilities and termination of her or his employment contract before the expiration date.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

In Slovenia we have two laws dealing with equality between women and men. The first one, the Act on Equal Opportunities for Women and Men⁷⁰ (hereinafter the AEOWM) was adopted in 2002 and deals with equal opportunities for women and men. It was not changed when implementing the Recast Directive. And the second one, the Act Implementing the Principle of Equal Treatment⁷¹ (hereinafter AIPET-A), only deals with equal treatment of all persons in all fields of social life and was changed recently with the AIPET-A in order to implement Directive 2002/73/EC and the Recast Directive.

Gender reassignment

Gender reassignment is not explicitly mentioned in the AIPET-A.

Indirect discrimination

The new definition of indirect discrimination is in accordance with the uniform definition of the concept of indirect discrimination in the Recast Directive. It is almost identical to the definition in the Recast Directive, but a bit wider since it was implemented by the AIPET-A, which is a fundamental and general law (*lex generalis*) on the ban on discrimination in Slovenia. Namely, the new definition of indirect discrimination contains discrimination on grounds of various personal circumstances and not only on grounds of gender.

Positive action

With the AIPET-A, the regulation of positive action has changed substantially. It can be adopted in various fields of social life in accordance with the Recast Directive, by state authorities, employers, political parties, civil society organizations and other subjects with regard to their nature of activity and area of work.

Horizontal provisions applicable to occupational social security schemes

There are no new provisions regarding Article 7(2) of the Recast Directive on the material scope of the provisions and consequently regarding the extension of the scope of the horizontal provisions in the Pension and Invalidity Insurance Act.⁷²

⁷⁰ Act on Equal Opportunities for Women and Men, Official Gazette RS, No. 59/02.

⁷¹ Act Implementing the Principle of Equal Treatment, Official Gazette RS, No. 50/04.

⁷² Pension and Invalidity Insurance Act, Official Gazette RS, No. 109.

Reconciliation

According to the new Employment Relationship Act⁷³ (hereinafter the ERA-A) and its recent changes from 2007, reconciliation of work, private and family life is explicitly addressed in Article 187/3 which imposes a general obligation on employers to enable workers easy reconciliation of their work and family life and in some other articles concerning flexible working arrangements. Unfortunately there is no provision on encouraging the social partners to promote equality between women and flexible working arrangements in collective agreements, which is the aim of Article 21 of the Recast Directive.

Assessment and report on the exclusions

There are no provisions on the obligation to assess and 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 in Slovene legislation.

Enforcement

Furthermore, there are no novelties in Slovene legislation as regards judicial procedures for the enforcement of obligations imposed by Article 17 of the Recast Directive.

5. Obligations of the Member States/EEA countries

On the whole, Slovenia has fulfilled its obligations, but there are still some gaps. The main gap, in my opinion, is in the transposition of Articles 15, 17, 21(2) and 31 of the Recast Directive.

Although there are provisions in the ERA-A from which we can deduce that a woman is entitled to return to her job after maternity leave, I believe that a concrete and exact provision on a woman's right to return to her job or to an equivalent post is needed, especially because this right is very often violated by employers. Unfortunately there is no relevant case-law since women rarely request judicial protection before the competent labour court regarding this issue.

Regulation of judicial procedures for the enforcement of obligations imposed by the Recast Directive is lacking for occupational social security schemes.

There are some provisions dealing with reconciliation of work and family life and provisions on the cooperation of the Government with social partners, but again there is no specific provision which would impose an obligation on social partners to promote equality between women and men and to conclude agreements laying down antidiscrimination rules according to the Recast Directive.

There are no provisions on the obligation to assess and 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 in Slovene legislation.

Though Article 1 of the Recast Directive is implemented by ERA-A, I would like to point out that Article 3 of the AIPET-A guarantees equal treatment in relation to salaries and not pay, which makes a huge difference. Since this provision is very new there is still no case-law regarding this issue. Moreover, under the same article, equal treatment is guaranteed in relation to social protection, including social security, part

⁷³ Employment Relationship Act (ERA-A), Official Gazette RS, Nos 42/02, 103/07.

of which are occupational social security schemes. But since the latter are explicitly mentioned by the Recast Directive, I would expect their mentioning in Article 3 of the AIPET-A as well.

There are no provisions which go further than the provisions of the Recast Directive.

6. Any simplification/reduction in administrative burden?

No simplification in administrative burden has been seen yet.

7. Overall assessment

As far as modernization, simplification and easier accessibility of the gender equality laws are concerned, I have to mention that Slovene gender equality legislation is quite new and has been rather modern, simple and easily accessible from its adoption in 2002 and 2004 on. However, the adoption of the AIPET-A and ERA-A are a step forward. Still, we cannot overlook the fact that only the AIPET and ERA have been changed in order to comply with relevant Directives. For this reason, the AEOWM seems a bit obsolete and should be amended as well or it should be reconsidered whether we need both laws at all, this because the amended AIPET, among other grounds, covers gender discrimination as well.

SPAIN – Berta Valdés

1. Transposition of the Recast Directive into national law

The fourth and final provision of Law 3/2007, of 22 March 2007, for the effective equality of women and men establishes that Directive 2002/73 and Directive 97/80/EC are incorporated into Spanish Law. Although Law 3/2007 does not make direct reference to Directive 2006/54/EC, the Spanish Government considers that with Law 3/2007 for equality, the Recast Directive has already been transposed in Spain. Nevertheless, this law does not include tables illustrating the relation between the Recast Directive and the transposition measures.

2. Possible reasons for a lack of transposition

Not applicable.

3. Overview of transposed provisions and amendments

The answer is under Sections 1 and 4.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The aim of Article (1) of the Law is to implement the principle of equal opportunities between women and men in matters of employment and occupation. Article (5) indicates that this principle of equal opportunities will be guaranteed in the access to employment in the private sector, to employment in the public sector and also in self-

employment, in vocational training, in professional promotion and in the conditions of work.

Gender reassignment

The law that regulates the equality between women and men does not include any reference to the change of sex as discrimination, though case law interprets it in this respect.

Indirect discrimination

The definition of the concept of indirect discrimination in Article 2(1)(b) of the Recast Directive replaces the definition of the burden of proof. The Directive has been incorporated in the same terms in Law 3/2007 on Equality.

Positive action

Law 3/2007 establishes a general frame for the adoption of measures of positive action, including any action that aims to correct situations of inequality of women with respect to men. Positive actions may be taken by the Public Authorities, but also by individual persons, and moreover it is specifically allowed to introduce measures of positive action by means of collective labour agreements to facilitate the effective implementation of the principle of equality of treatment and not discrimination in working conditions between women and men. In Spain the occupational pension schemes are usually established through a collective labour agreement and from this point of view it could also be possible to take positive action in this field.

Horizontal provisions applicable to occupational social security schemes

The extension of the scope of the horizontal provisions to the occupational social security schemes is possible as these schemes are in general the result of a collective agreement.

Occupational social security schemes

The Spanish law of equality includes the possibility to deviate from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, but there is no explicit mention of the obligation to assess and to report to the Commission on the exclusions.

Reconciliation

The issue of reconciliation of work, private and family life also has some novelties introduced by Law 3/2007, such as the right to paternity leave or a new suspension of the contract for risk while breastfeeding. Also some aspects of the regulation of maternity leave, of the leave for the care of relatives and of the reduction or adjustment of working hours have been extended and improved.

Assessment and report on the exclusions.

The Spanish law of equality states the possibility to exclude from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, but there is no explicit mention to the obligation to assess and to report to the Commission on the exclusions.

Enforcement

The judicial procedures for the implementation of the principle of equal treatment are also available for situations in which the relationship where the discrimination is alleged to have occurred has already ended

5. Obligations of the Member States/EEA countries

See Section 7.

6. Any simplification/reduction in administrative burden?

See Section 7.

7. Overall assessment

Law 3/2007 on equality is the last legal norm in this field whose aim is the transposition of European Directives. It is explicitly stated that Law 3 / 2007 incorporates Directive 2002/73 and Directive 97/80/EC, but in reality this law also addresses the main aspects of Directive 75/117/EEC. Regarding Directive 86/378/CEE, regulation in Spain has not changed with Law 3/2007 of equality, except the matter related to collective insurance that is one of the instruments that can be used to guarantee the managerial obligations as for pensions. On this point, the Government is allowed to elaborate a Royal Decree in order to introduce some proportionate differences using the possibility of Article 5(2) of Directive 2004/113/EC.

Law 3/2007 does not directly transpose the recast Directive, but only considers the transposition of the said Directives, and in this sense it is not very clear if this will lead to any significant simplification/reduction in administrative burden. This although Law 3/2007 regulates many other aspects which are not in the Recast Directive and in this sense includes a more complete and modern treatment of the principle of equality and non-discrimination in all fields.

SWEDEN – *Ann Numhauser-Henning*

1. Transposition of the Recast Directive into national law

The Recast Directive is in the main being transposed by the new (2008:567) Discrimination Act (DA) entering into force on 1 January 2009 – compare note 2 of the Act. Before that, no specific transposition measures were undertaken to meet the deadline of implementation 15 August 2008. Current Swedish legislation such as the (1991:433) Equal Opportunities Act (EOA), the (1995:584) Parental Leave Act (PLA) and the (2003:307) Prohibition of Discrimination Act (PDA) has been regarded to meet the requirements of the Recast Directive already before August 2008. The 1991 EOA and the 2003 PDA will cease to exist once the DA enters into force, whereas the PLA will continue to apply besides the DA.

There is no table illustrating the correlation between this Directive and the transposition measures in place, to my knowledge.

2. Possible reasons for a lack of transposition

See the answer to question 1.

3. Overview of transposed provisions and amendments

The 2008 DA – together with the PLA – is considered to fully implement the Recast Directive and thus all provisions. This does not mean that every provision is covered explicitly. A number of provisions are tacitly included or implied by national provisions. For example, there is no definition of wages/pay (Article 2.1.e) nor of occupational social security schemes (Article 2.1.f). Article 2.2.c on discrimination on the grounds of pregnancy etc. is not explicitly implemented but tacitly covered by the general ban on (sex) discrimination. Article 1 is also not implemented explicitly but implied to be covered by the general ban on discrimination (on all grounds) in employment, education/vocational training, etc.

To give a description of the new provisions and amendments is quite hard to do since the 2008 DA is a new ‘horizontal’ non-discrimination act covering all grounds (sex, transsexual identity/expression, ethnicity, religion and other belief, sexual orientation, disability and age) and divided in chapters on definitions (Chapter 1), prohibitions of discrimination area by area (Chapter 2), active measures (Chapter 3) and so on. That is, all provisions in the DA are ‘new’ and – at least formally - implement Community Law provisions in a new way, as compared to before. Despite this, no major substantial changes have been made – or are meant to take place - as compared to former non-discrimination legislation.

4. Transposition of the novelties or clarifications

Equal treatment and equal opportunities

The general clause in Chapter 1 Section 1 of the 2008 DA covers – as indicated above – all grounds and areas of society and thus addresses a lot of issues outside the Recast Directive. It does mention as its purpose to ‘counteract discrimination and in other ways support equal rights and opportunities’.

Gender reassignment

The 2008 DA, as indicated above, covers not only sex but also transsexual identity or expression and a number of other grounds. However, in accordance with case law of the ECJ, it is expressly stated in Chapter 1 Section 5 Paragraph 2 that a person who is about to reassign or has reassigned his/her sex is covered by the provisions on sex discrimination.

Indirect discrimination

The 2008 DA contains a provision that almost literally follows Article 2.1.b of the Recast Directive covering all grounds covered by the Act (compare above).

Positive action

The 2008 DA does not contain a provision simply implementing Article 3 of the Recast Directive but a complex structure of different provisions for positive action by area (and for different grounds). As regards 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.

Horizontal provisions applicable to occupational social security schemes

See the answer to the question below.

Occupational social security schemes

There are no such systems as indicated in Article 7.2. Chapter 2 Section 14 of the DA bans discrimination in (all) public social security schemes with an exceptional rule regarding widows' pensions. However, private occupational schemes are only implicitly covered by the (also implicit) ban on wage/pay-discrimination.

Reconciliation

Only discrimination on the grounds of pregnancy and maternity leave are covered by the 2008 DA and then implicitly by the ban on discrimination on the grounds of sex (compare the case law of the ECJ). This far from transparent way to implement the Recast Directive deserves to be criticised. On the other hand, the rights to paternity leave and parental leave, so essential for the reconciliation of family life and work, are regulated by the 1995 PLA in combination with the public parental leave benefit scheme regulated in Chapter 4 of the (1962:381) Public Insurance Act. Those provisions, to my opinion, effectively meet the ambitions and requirements of the Recast Directive.

Assessment and report on the exclusions

Chapter 2 Section 2.1 of the 2008 DA includes an express exception from the ban on discrimination in employment when genuine and determining occupational requirements apply. To my knowledge, the application of this rule has not yet been reported upon. There is little to report on its application since there is, so far, no case law!

Enforcement

According to the 2008 DA, as of 1 January 2009 there will be a single Discrimination Ombudsman (DO) for all grounds, replacing among others the former Equal Opportunities Ombudsman (EOO, *JämO*), competent to represent victims in any alleged case of discrimination. In the field of work, the trade unions have the right to represent their members in cases of discrimination. There is always the possibility for the individual to take a claim to court should their trade union/DO not take an interest in representing them. A novelty in the 2008 DA is the new rules on the right for NGOs to take a case of alleged discrimination to court: Chapter 6 Section 2.

5. Obligations of the Member States/EEA countries

As indicated above, a number of provisions is tacitly included or implied by the national provisions. Thus, the ban on discrimination in employment (Chapter 2 Section 1) is phrased very generally and implicitly covers all employer decisions without any explicit reference to Article 1 of the Recast Directive. Article 2.2.c on discrimination on the grounds of pregnancy etc. is not explicitly implemented but tacitly covered by the general ban on (sex) discrimination. Nor is there a definition of wages/pay (Article 2.1.e) or of occupational social security schemes (Article 2.1.f) –these forms of dis-

crimination are also tacitly covered by the ban in Chapter 2 Section 1. This far from transparent way to implement the Recast Directive deserves to be criticised, in my opinion, and this is especially true with regard to discrimination on the grounds of pregnancy and maternity leave.

6. Any simplification/reduction in administrative burden?

As indicated, the 2008 DA has merged four different ombudsmen, covering different grounds of discrimination, into one Single Body, the DO. This may turn out to simplify things for employers when monitoring the implementation of the Act. This cannot be regarded as a consequence of the Recast Directive, though.

7. Overall assessment

It is really impossible to assess. Any such effects were ‘consumed’ by the bigger project to merge previous discrimination legislation into one single act, the 2008 DA. This initiative was taken before the introduction of the Recast Directive.

UNITED KINGDOM – Aileen McColgan

1. Transposition of the recast Directive into national law

The UK has taken no explicit steps to implement the Recast Directive. The Government Equalities Office website (<http://www.equalities.gov.uk>), which deals with gender and other equality, contains no reference to the Recast Directive.

I have been able to find no trace of any table illustrating the correlation between this Directive and the transposition measures in the UK.

2. Possible reasons for a lack of transposition

In my view there are perhaps two main reasons. In the first place, it seems to me that the assumption is that the Recast Directive is merely a consolidating piece of legislation which does not impose any new obligations on member states. Secondly, the UK Government is in the process of drafting a single piece of equality legislation intended to replace all or most of the current domestic equality legislation and so is not inclined to spend time on what would be regarded as, at best, relatively trivial matters which might arise under the Recast Directive.

3. Overview of transposed provisions and amendments

For the avoidance of doubt, the UK has taken steps to transpose Directive 2002/73/EC.

4. Transpositions of the novelties or clarifications

Equal treatment and equal opportunities

As above, nothing has been done as such in order to transpose. It is worth noting, however, that public authorities have since 2007 been under an obligation to pay due

regard not only to the need to eliminate unlawful sex discrimination and harassment, but also to the need to promote equality of opportunity between men and women.

Gender reassignment

The Sex Discrimination Act prohibits direct discrimination on grounds of gender reassignment as well as sex. The proposed single Equality Act will extend the prohibition to cover indirect as well as direct discrimination and will impose proactive obligations on public authorities in respect of gender reassignment as well as sex.

Indirect discrimination

In the case of all sex discrimination falling within EC law the Sex Discrimination Act 1975 defines indirect discrimination as occurring where (Section 1(2)(b)) the discriminator

applies to [a person] a provision, criterion or practice which he applies or would apply equally to a [person of the opposite sex], but—

- (i) which puts or would put [persons of the same sex as the claimant] at a particular disadvantage when compared with men,
- (ii) which puts [the claimant] at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

It is widely thought that the definition of justification at Section 1(2)(b)(iii) is inconsistent with EC law in imposing a lower threshold.

Positive action

Positive action is generally unlawful under the Sex Discrimination Act 1975 except in very limited cases concerned with training and encouragement of persons of an under-represented sex to apply for work. The Government has suggested that ‘tie-break’ positive discrimination will become lawful under the proposed single Equality Act.

Horizontal provisions applicable to occupational social security schemes

I am not sure what this means. The position is that discrimination in occupational pension schemes will breach the Pensions Act 1995, and that discrimination in relation to occupational ‘social security’ other than pensions will breach either the Sex Discrimination Act 1975 (if non-contractual) or the Equal Pay Act 1970 (if contractual). The Acts are to be interpreted in line with the relevant ECJ case law but for the most part have not been explicitly amended to give effect to it.

Occupational social security schemes

The Pensions Act 1995 prohibits discrimination in relation to occupational pension schemes in line with Article 141 and must be interpreted in line with the relevant case law.

Reconciliation

As above, no explicit implementation of this or any other features of the Recast Directive have occurred though a number of steps have been taken to promote reconciliation (see the earlier report on this subject).

Assessment and report on the exclusions

I am not aware of any steps having been taken in this regard. The current ‘genuine occupational qualifications’ applicable to sex are set to be revised in the forthcoming single Equality Act however.

Enforcement

Judicial procedures are already available though there is no provision for litigation *on behalf of* those affected by discrimination, though the Equality and Human Rights Commission (and others) are able to support sex discrimination claimants.

It is however worth noting that, although the Sex Discrimination Act 1975 prohibits the issue of ‘instructions to discriminate’ this is narrowly defined, not defined as a form of discrimination as such, and only the Equality and Human Rights Commission has the power to enforce it (Section 39):

39 Instructions to discriminate

(1) It is unlawful for a person—

(a) who has authority over another person, or

(b) in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful [under the Act], or procure or attempt to procure the doing by him of any such act.

(2) Proceedings in respect of a contravention of subsection (1) may be brought only—

(a) by the Commission (...).

Other novelty or clarification

It seems to me that the inclusion of ‘pay’ within ‘working conditions’ in Directive 2004/113 and again in the Recast Directive suggests that a direct discrimination claim ought to be available ‘where one person is treated less favourably on grounds of sex [in respect of pay] than another is, has been *or would have been* in a comparable situation’, that is, that a discrimination claim relating to be ought to be available by reference to a hypothetical comparator. This is not available in the UK, the Equal Pay Act 1970 (under which all contractual sex discrimination claims must be brought) requiring as a condition of a claim that the claimant compare herself to an actual man who is engaged in comparable work (narrowly defined). The inclusion of pay within working conditions is not novel to the Recast Directive but this is in my view one of the interesting gaps between EU and UK law. It is perhaps of particular interest given the recognition in the Recast Directive of the *Allonby* litigation (Recital 10).

5. Obligations of the Member States/EEA countries

See answer immediately above on pay. Our GOQ defences are in my view incompatible at present, the Sex Discrimination Act permitting discrimination against women where (Section 7):

(a) the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman; or

(b) the job needs to be held by a man to preserve decency or privacy because—

(i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or

(ii) the holder of the job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities; or

(ba) the job is likely to involve the holder of the job doing his work, or living, in a private home and needs to be held by a man because objection might reasonably be taken to allowing to a woman—

(i) the degree of physical or social contact with a person living in the home, or

(ii) the knowledge of intimate details of such a person's life, which is likely, because of the nature or circumstances of the job or of the home, to be allowed to, or available to, the holder of the job; or

(c) the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and—

(i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with separate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and

(ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women; or

(d) the nature of the establishment, or of the part of it within which the work is done, requires the job to be held by a man because—

(i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and

(ii) those persons are all men (disregarding any woman whose presence is exceptional), and

(iii) it is reasonable, having regard to the essential character of the establishment or that part, that the job should not be held by a woman; or

(e) the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man, or ...

(g) the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman, or

(h) the job is one of two to be held—

(i) by a married couple,

(ii) by a couple who are civil partners of each other, or

(iii) by a married couple or a couple who are civil partners of each other.

(3) Subsection (2) applies where some only of the duties of the job fall within paragraphs (a) to (g) as well as where all of them do.

(4) Paragraph (a), (b), (c), (d), (e) . . . or (g) of subsection (2) does not apply in relation to the filling of a vacancy at a time when the employer already has male employees—

(a) who are capable of carrying out the duties falling within that paragraph, and

(b) whom it would be reasonable to employ on those duties and

(c) whose numbers are sufficient to meet the employer's likely requirements in respect of those duties without undue inconvenience.

Note that these exceptions apply equally to discrimination against men (in which case they are amended appropriately). Some at least in my view are wider than the GOR

defence either because they are simply indefensible (in the case of (h)), or because no proportionality requirement applies.

Another shortcoming relates to the personal scope of the Directive. Domestic legislation protects from employment-related discrimination only those workers employed ‘under a contract of service or of apprenticeship or a contract personally to execute any work or labour’ and not to the ‘genuinely’ self-employed, even those who are economically dependent (e.g. disadvantaged workers whose contracts contain a power of substitution).

6. Any simplification/reduction in administrative burden?

No.

7. Overall assessment

See above; no action has been taken to implement the Directive.

Annex I

Report on the Transposition of the Recast Directive (2006/54/EC)

European Network of Legal Experts in the field of Gender Equality

Questionnaire for the national experts

The Recast Directive has to be implemented 15 August 2008 at the latest. According to the preamble of this Directive the obligation to transpose the Directive into national law should be confined to those provisions which represent a substantive change compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives (Recital 39 and Article 33).

Because the obligation to transpose the Recast Directive only applies to provisions which represent a substantive change as compared to the earlier Directives, the implementation may turn out to be complicated. This is the reason why the Annex 2 of the Recast Directive contains a correlation table between the different Articles of the relevant Directives.

Furthermore, Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with the Directive (Article 33). The purpose of this report is to provide an overview of the measures the Member States, Iceland, Norway and Liechtenstein have taken in order to comply with the provisions of the Directive and an analysis whether they have fulfilled or not their obligations. The main aim of the report is therefore to gather information on the transposition of the Directive in the Member States.

The report will consist of two parts. Part 1 will include a short introduction with a summary of findings. Part 2 will consist of thirty national reports. No page limit will apply to the national reports, assuming that little relevant information will be available for some countries, while other countries will provide more extensive information.

Questionnaire:

- 1.a. Has the Recast Directive been transposed in your Member State/country before 15 August 2008 or is such transposition still going on?
- b. Has your Member State/country drawn up and published tables which illustrate the correlation between this Directive and the transposition measures (see Recital 41).
2. In case the Member State/country has not yet launched the transposition process of the Recast Directive, what are in your opinion the main causes of such lack of transposition?
- 3.a. If some provisions of the Recast Directive have been transposed in your country, which provisions have been transposed? Please take into account that many provisions of the Recast Directive were included in Directive 2002/73/EC and should already be transposed.

- b. Please describe the main amendments and/or new provisions in national law resulting from this transposition.
4. Have any of the following ‘novelties’ or ‘clarifications’ in the Recast Directive compared to the provisions of the earlier Directives which were part of the recast exercise been transposed into national law?
- The purpose of the Directive is not only to implement the principle of equal treatment of men and women in matters of employment and occupation, but also the principle of equal opportunities, see the title of the Directive and Article 1.
 - The Directive also applies to gender reassignment, see Recital 3.
 - The uniform definition of the concept of indirect discrimination in Article 2(1)(b) of the Recast Directive, which 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 for example occupational pension schemes (see also Recitals 21 and 22).
 - Article 7(2) of the Recast Directive on the material scope of the provisions on equal treatment in occupational social security schemes is new (the text incorporates some well-established case-law of the European Court of Justice).
 - The extension of the scope 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 and Article 9(1) (g) and Article 21(2).
 - The obligation for Member States to assess and to report to the Commission on the exclusions from the application of the principle of equal treatment between men and women as regards genuine and determining occupational requirements, 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)
 - Any other ‘novelty’ or ‘clarification’ in the Recast Directive that you would like to point out.
5. Do you consider that the Member State/country has fulfilled its obligations under the Recast Directive?
If not, what are the main gaps in your opinion?
Has the Member State/country adopted provisions which even go further than the provisions of the Recast Directive as a result of the transposition of this Directive?
6. Has the Recast Directive, as implemented in your Member State, led to any significant simplification/reduction in administrative burden (for instance, the reduction of the reporting requirements as contained in the earlier Directives)?
7. Please provide an assessment on the impact of the Recast Directive in your Member State/country in the light of the main objectives of the Recast Directive: to modernize, simplify the provisions of some Directives on equal treatment and pay between men and women and, to make gender equality law more accessible.

Annex II

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Articles

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