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Directorate-General for Research

WORKING PAPER

**WOMEN'S RIGHTS
AND THE TREATY OF AMSTERDAM
ON EUROPEAN UNION**

Women's Rights Series

FEMM 104 EN

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5 - 1998

women's rights and the Treaty of Amsterdam on European Union

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	TREATY OF MAASTRICHT ON EUROPEAN UNION	TREATY OF AMSTERDAM (consolidated version of the Treaties)	PROTOCOL AND AGREEMENT ON SOCIAL POLICY (incorporated in the Treaty consolidated by the Amsterdam Treaty)
Fundamental social rights		fourth recital , TEU preamble. Article 136 ECT (former Article 117)	Agreement Article 1
Human Rights		TEU Article 49 (former Article O), respect for principles set out in Article 6(1) (former Article F) of the TEU	
Fundamental right of equality between men and women		ECT Article 2 : promotion of equality between men and women as a task of the Community	
Community activities		ECT Article 3(2) : 'In all the activities referred to in this article, the Community shall aim to eliminate inequalities, and to promote equality between men and women.'	
Non-discrimination measures		ECT Article 13 (former Article 6a) 'to combat discrimination based on sex' (unanimity in the Council, consultation of Parliament)	
Equal pay	Article 119 : equal pay for equal work	ECT Article 141 (former Article 119): equal pay 'for equal work or work of equal value' (codecision and adoption by qualified majority)	Agreement Article 6
Positive measures		ECT Article 141(4) (former Article 119): 'specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity ...'	Agreement Article 6(3) : 'specific advantages in order to make it easier for women to pursue a vocational activity ...'
Social dialogue	Article 118b	ECT Articles 136, 137(4), 138, 139 (former Article 118b) and 130 (under the Title on employment)	Agreement Articles 3 and 4
Employment		ECT new Title VIII (Articles 125 to 130), implemented after the Luxembourg Council of 20 and 21 November 1997 under the guidelines for employment which feature promotion of equality between men and women.	

1. INTRODUCTION

The Treaty of Amsterdam, signed by the 15 Member States of the European Community on 16 and 17 June 1997, is undoubtedly an important step in the process of European integration. Although the Treaty has not yet been fully ratified, this working document aims to attempt an analysis of its implications for and impact on women's rights. These cannot be properly assessed without a certain amount of knowledge of existing law in this area during the period of application of the Maastricht Treaty¹, the Protocol on Article 119 and Protocol 14 on social policy. For this reason, before turning to the Amsterdam Treaty, we shall briefly survey the vast area of Community law on equal treatment for men and women. The picture which emerges will show that achieving equality between men and women is a long and laborious process, which took a step in the right direction with the Maastricht Treaty and will culminate in the Amsterdam Treaty.

2. EXISTING COMMUNITY LAW

2.1. Article 119 of the EC Treaty

2.1.1. Article 119 of the Treaty of Rome

Article 119 of the Treaty of Rome is the basis of Community law on sexual equality:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

- (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*
- (b) that pay for work at time rates shall be the same for the same job.'*

This article was originally put into the Treaty of Rome to avoid France suffering a competitive disadvantage because of its social policy. It was only later that its social impact became clear, under the vigilant eye of the Court of Justice. At present, equality between women and men is not only

¹ A study on 'Women's rights and the Maastricht Treaty on European Union' was published in 1994, Working Paper, DG for Research, Women's Rights Series, W-5.

guaranteed by Article 119 but also by nine directives, a large number of European Parliament recommendations and resolutions, four action programmes and extensive Court of Justice case law.

In its judgment in the *Defrenne II* case², the Court gave direct effect to Article 119: Article 119 could be invoked by individuals against the State (direct vertical effect) as well as against individuals (direct horizontal effect). The Court confirmed this position in several later judgments. It stated that the direct effect of Article 119 applied equally to collective labour agreements. If an individual invokes the direct effect of Article 119, national courts and tribunals, if they consider that the article has indeed been contravened, can declare the discriminatory provision inapplicable, without having to wait for any consultation between the two sides of industry³. Workers may invoke Article 119 against the trustees of a British-type occupational social security scheme (contracted-out scheme)⁴, or the administrators of a continental-type pension fund⁵. The Court in fact considered that *'the effectiveness of Article 119 would be considerably diminished and the legal protection required to ensure real equality would be seriously impaired if an employee ... could rely on that provision only as against the employer, and not against the trustees, who are expressly charged with performing the employer's obligations'*⁶. Similarly, it recognized the right of employees' dependants to invoke the direct effect of Article 119, in their quality as recipients of complementary social security benefits or as dependants or beneficiaries of a deceased worker⁷.

Originally there was a certain amount of confusion as to what was covered by the direct effect of Article 119. In the *Defrenne II* judgment, the Court of Justice decreed that Article 119 applied directly only in the case of 'direct discrimination', i.e. discrimination which could be proved by reference only to the criteria contained in Article 119: equal pay for equal work. Article 119 had no direct effect with regard to more covert forms of discrimination, what the Court called 'indirect discrimination'. In later judgements the Court has seemed to abandon this strict distinction and consider that individuals can invoke the direct effect of Article 119 if an act or circumstance could be classified as 'remuneration' and discrimination has occurred in the same private or public establishment or service⁸.

Thus part-time workers, for example, can invoke Article 119 if the hourly rate they are paid is lower than that paid to full-time workers and if they can prove that this situation amounts to discrimination based on sex (part-time workers are mainly women)⁹.

² Gabrielle Defrenne v Sabena, CJEC 22 April 1976, C 43/75, ECR 1976, p. 455.

³ - Maria Kowalska v Freie und Hansestadt Hamburg, CJEC 17 June 1990, C 33/89, ECR 1990, p. 2591.

- Helga Nimz v Freie und Hansestadt Hamburg, CJEC 7 February 1991, C 184/89, ECR 1991, p. 297.

⁴ Coloroll Pension Trustees Ltd v James Richard Russell, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group Plc, CJEC C-200/91 28 September 1994, ECR 1994, p. 4389.

⁵ -Gertruida Catharina Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel, CJEC C-128/93 28 September 1994, ECR 1994, p. 4541.

-Francina Johanna Maria Dietz v Stichting Thuiszorg Rotterdam, CJEC C- 435/93 24 October 1996, ECR 1996, p. I-5223.

⁶ Coloroll and Fisscher judgments, see Footnotes 4 and 5.

⁷ Coloroll judgment, see Footnote 4.

⁸ Worringham and Humphreys v Lloyds Bank Ltd., CJEC 11 March 1981, C 69/80, ECR 1981, p. 767.

⁹ Jenkins v Kingsgate, CJEC 31 March 1981, C 96/80, ECR 1981, p. 911.

In a few cases the Court of Justice has put a time limit on the direct effect of Article 119 to avoid serious financial consequences for employers or pension funds¹⁰.

2.1.2. The Protocol on Article 119 annexed to the Maastricht Treaty

When drawing up the Maastricht Treaty the Member States decided not to amend Article 119 in the light of the clarification provided by the Court of Justice in the Barber judgment (see below), as the United Kingdom opposed this. The Member States therefore adopted a Protocol on Article 119 (which does not apply to the United Kingdom) stating that complete equality pursuant to Article 119 only applies to benefits attributable to periods of employment after 17 May 1990 (date of the Barber judgment), unless the worker concerned initiated legal proceedings or introduced an equivalent claim before that date.

In other words, from 17 May 1990 an objectively equal pension entitlement and equal cover against the risk of death were guaranteed. With regard to benefits, only benefits attributable to pension contributions paid after 17 May 1990 had to be objectively equal.

The question still arose whether this Protocol could be considered an integral part of the Treaty or whether it should be seen as a non-binding, interpretative agreement. Although at first sight the Protocol seemed to fit what Article 31 of the Vienna Convention (1986) on international treaty law calls 'the interpretative context', the particularities of Community law should be borne in mind. Just as a protocol to the Treaty of Rome has the status of an article of the Treaty (Article 239 of the Treaty of Rome), the protocols to the Maastricht Treaty were also part of the Treaty itself.

The Court of Justice therefore was in principle not competent to contest the validity of the Protocol. If the Court had wished nonetheless to do so, its only option would have been to invoke human rights, which according to the Court's case law, are the summit of Community law's hierarchical pyramid. However, to date the Court has not used the fundamental human rights option except when achievement of one of the European Community's objectives was at issue. Moreover, not one article of the Treaty has yet been attacked on these grounds. In line with expectations, the Court accepted the Protocol, as was shown by the Ten Oever and Moroni judgments.

It could be supposed that the Court had recognized the Protocol's Treaty status and did not intend to go against the will of the Member States on the basis of a still fragile theory of human rights.

Moreover in the context of the Council's proposed directive amending Directive 86/378 on implementing the principle of equal treatment for men and women in occupational social security schemes (see below), the Committee on Women's Rights, in the working document on this proposed directive, raised the issue of the need to simplify social legislation, particularly with regard to equality between men and women¹¹. The Commission expressed the same wish in a 1993

¹⁰ - Defrenne II, CJEC 22 April 1976, op. cit., Footnote 2.
- Douglas Harvey Barber v Guardian Exchange Assurance Group, CJEC 17 May 1990, C 262/88, ECR 1990, p.1889

¹¹ Committee on Women's Rights, Working Document on the proposal for a Council directive amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, 8 February 1996, PE 214.948.

document¹², where it hopes that '*Community social policy action will once again be founded on a single legal basis; a major opportunity to achieve this will be the conference of representatives of Member State governments in 1996*'.

According to the Committee on Women's Rights, Court of Justice case law shows that eliminating discrimination is not a matter of recognition of a fundamental, autonomous right to equality between men and women but depends on the judges' assessment of the conditions in which a right is exercised; women have a claim to equal status as an autonomous, subjective, basic right; this right must be recognized and enshrined in the Treaty if true democracy is to be achieved.

Adoption of the new Amsterdam Treaty will have achieved this aspiration as the Protocol is incorporated in the Treaty.

2.2. Nine directives on equality between women and men

2.2.1. *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*¹³

This first directive on equality between women and men further develops the principle of equal pay enshrined in Article 119. It provides for equal pay not only for the same work but also for work of equal value. In order to determine what should be considered 'work of equal value', the Commission has developed an extensive classification system which is continually revised to take account of technological and social changes in the workplace.

The practical effect of this directive resides principally in the fact that it obliges Member States to introduce legislation to allow any workers who consider they have suffered discrimination to take their complaint to the courts. The Member States must also take steps to protect workers who have initiated court proceedings.

In 1995 the Commission submitted a proposal for a Council decision (which has since been adopted) on the fourth medium-term Community Action Programme on equal opportunities for men and women, in which it stated the reasons for this action programme, pointing out that '*the rate of unemployment amongst women is higher than amongst men, they often have low-skilled, poorly paid and insecure jobs and there are still gaps in pay between men and women in most regions of the Union*'¹⁴.

¹² COM(93)600 p. 13.

¹³ Cf. Annex I: Directive 75/117/EEC (OJ L 45, 19.2.1975)

¹⁴ Proposal for a Council decision on the fourth medium-term Community action programme on equal opportunities for men and women (1996-2000), COM(95)381 final, 19.7.1995, p. 1.
Council Decision 95/593/EEC of 22 December 1995, OJ L 335, 30.12.1995, p. 37.

This programme was adopted in the objective defined by the White Paper on growth, competitiveness and employment¹⁵, in which the Commission undertook to continue implementing the measures described in the Memorandum on equal pay¹⁶, together with the code of conduct on the application of equal pay for women and men for work of equal value¹⁷.

In this context, the Commission undertakes to improve reference data on women and pay, to disseminate research results and relevant case law and to support development of training modules for those responsible for pay negotiations.

Similarly, the Memorandum noted that despite the adoption of laws implementing Directive 75/117/EEC, the gap between minimum wages for men and women was still widening. Parliament then called on the Commission, in its resolution on the Memorandum¹⁸, 'to include in its annual report on equal opportunities for women and men an appropriate chapter on the progress made in the area of equal pay for work of equal value, taking into consideration in particular the proposed strategy of the Memorandum and the code of conduct for achieving real equal pay by improving baseline data on women's pay, dissemination of information, training and, where applicable, legal actions taken'.

In order to better implement the principle of equal pay, the code of conduct aims to give practical advice to employers and those involved in collective bargaining to make up for the shortcomings of equal pay legislation. The code applies in the workplace in both the public and private sectors. It is not binding, but establishes the idea that negotiators on both sides of industry should analyse pay structures, evaluate discrimination based on sex in order to take appropriate action and implement follow-up measures to eliminate such discrimination.

The code also aims to help women and men who consider that their work is undervalued because of discrimination on the grounds of sex to obtain the information needed to resolve their problem through negotiation or, as a last resort, through the national courts. The code of conduct was drawn up with a view to better implementation of Directive 75/117/EEC. As we shall see, the Amsterdam Treaty will have helped to resolve this problem by amending Article 119.

2.2.2. 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 conditions¹⁹

In this directive the principle of equal treatment is not only concerned with removing pay discrimination. The directive prohibits any form of direct or indirect discrimination on grounds of

¹⁵ White Paper on growth, competitiveness and employment, Bulletin of the European Communities, COM(93)700, Bull. 12-1993 supplement 6/93.

¹⁶ Commission memorandum on equal pay for work of equal value, COM(94)0006-C4-0008/94. See also the resolution by the European Parliament on the Memorandum on equal pay for work of equal value, A4-0338/95, OJ C 65, 4.3.96, p. 43.

¹⁷ See the Commission communication, COM(96)0336-C4-0460/96, 17 July 1996. See also Parliament's resolution on the communication, OJ C 200, 30.6.1997, p. 193.

¹⁸ Op. cit., Footnote 16.

¹⁹ Cf. Annex II: Directive 76/207/EEC (OJ L 39, 14.2.1976)

sex, with regard to access to the job market (selection criteria), vocational training, promotion and general working conditions.

Although the concept of indirect discrimination is not entirely clear, it may be supposed that this is a form of discrimination resulting from legislation, laws or agreements which appear to be neutral and egalitarian but have a different effect in practice. If this effect cannot be justified by the requirements of the job, sex is the only basis for discrimination.

By prohibiting direct and indirect discrimination in the whole process of work (from recruitment to termination of the job contract), the directive goes to the heart of the problem of discrimination. Although the proportion of women on the job market has considerably increased, sexual discrimination remains. Thus, choosing to work part-time or taking leave because of pregnancy, for example, are still too often penalized in one way or other²⁰.

The directive authorizes positive discrimination insofar as it contributes to achieving equal treatment for men and women. Following the Kalanke Judgment²¹ which was given on 17 October 1995 on the interpretation of Article 2(4) of the directive, the Court stated that positive measures were likely to encourage access of the under-represented sex to employment, appointment and promotion in particular jobs, particularly by giving priority to the under-represented sex, but such systems must take the particular circumstances of each case into account; this led the Commission to amend the directive to clarify its meaning.

Following this judgment there was a Commission proposal (not yet adopted) to amend the directive, based on Article 235 of the Treaty, which would amend Article 2(4) as follows : *'This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which would affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case'*²². However, in the context of the new provisions of the Amsterdam Treaty, we shall consider the Kalanke judgment and the Marschall case²³ which once again revolutionized Community case law and questioned the need to amend the directive, as the new Amsterdam Treaty has established new powers, particularly with regard to positive measures.

2.2.3. Directive 79/7/EEC, of 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security²⁴

²⁰ Examples of this kind of indirect discrimination:

- Jenkins v Kingsgate, CJEC 31 March 1981, op. cit. Footnote 9

- Dekker v Stichting Vormingscentrum voor Jong Volwassenen, CJEC 8 November 1990, C 177/88, ECR 1990, p. 3941

²¹ Eckhard Kalanke v Freie Hansestadt Bremen, CJEC C-450/93, 17 October 1995 ECR 1995, p. I-3051.

²² Proposal for a Council directive amending 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 C 179, 22.6.96, p. 8.

²³ Hellmut Marschall v Land Nordrhein-Westfalen, CJEC C-409/95, 11 November 1997, not yet published in the ECR.

²⁴ Cf. Annex III : Directive 79/7/EEC (OJ L 6, 10.1.1979)

With this directive, Community law ventures into a sensitive area. Introducing the principle of equal treatment into an area as complex and as strongly influenced by the traditional stereotype of the family as social security is certainly not an easy task. In this area, the traditional image of the man as head of the family and therefore entitled to higher social benefits still often prevails. But this image has been chipped away by many cases. This shows once again that social changes are only later reflected in law, often after a bitter struggle between progressive and conservative factions, a fact which is unanimously recognized by the legal profession.

Similarly, in its communication of 12 March 1997²⁵ the Commission points out once more that the traditional concept of social protection, based on the model of the husband earning the family income while the wife does not have a paid job, is becoming increasingly outdated.

In Directive 79/7 the Member States indicate their readiness to extend equality between men and women to social security.

Directive 79/7 applies to the working population. This includes employed and self-employed workers. It also concerns all workers whose activity is interrupted by illness, accident or involuntary unemployment and to retired or invalid workers. It provides for implementation of the principle of equal treatment with regard to sickness, invalidity, old age, accidents at work and occupational diseases and unemployment.

Survivors' benefits and family benefits are expressly excluded from the field of application of the directive. In addition, the Member States retain full freedom of action with regard to determining the retirement age and provisions relating to the protection of women on the grounds of maternity (cf. point 6).

Today, according to the Commission²⁶, the challenge is not only to strive towards equal treatment for women and men, it is also to achieve individualization of rights, while avoiding the pitfall of penalizing women who have not had a paid job because they were taking care of their family²⁷. The Commission considers that the aim of individualization of rights would be to end the practice of expecting family structures to provide individual social protection. It would help to bring social protection into line with legislation governing work contracts, which treats workers as individuals. The Commission has undertaken to evaluate, in the 1997 annual report, the progress made by the Member States towards individualizing rights without endangering the economic situation of women.

²⁵ COM(97)102 final.

²⁶ Op. cit., Footnote 25.

²⁷ The idea of individualizing social security had already been proposed by the Commission in a draft directive on statutory and occupational social security schemes which included the sectors excluded by the two directives on social security, in the document COM(87)0494 of 23 October 1987. This directive has never been adopted and was discussed most recently by the Council on 12 June 1989, but in the context of the fourth Community action programme (COM(95)0381 of 19 July 1995, p. B. 22) the Commission states that it will *'withdraw its 1987 proposal and will present a new proposal on the completion of equal treatment in social security, in order to take account of developments ... which have occurred in the meantime.'*

2.2.4. 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, modified by Council Directive 96/97/EC of 20 December 1996²⁸

Some years after Directive 79/7, the Council extended the principle of equal treatment to occupational social security schemes. Occupational social security schemes are considered to be those not covered by Directive 79/7 set up through a collective agreement in an undertaking or group of undertakings in a sector or group of sectors intended to supplement or replace the statutory scheme.

The directive stated that the Member States must eliminate any sexually discriminatory provisions of such schemes by 1 January 1993. With regard to retirement age, the Member States could defer application of the principle of equal treatment until such equality was achieved in statutory schemes. The directive also authorized different levels of benefit to be set, on the basis of different actuarial calculations, until 1999. Similarly, with regard to survivors' pensions, application of the principle of equal treatment could be deferred pending adoption of a specific directive.

The situation has changed considerably following the judgments in the Barber, Ten Oever, Moroni, Coloroll, Smith, Van den Akker, Fisscher, Vroege and Beune cases²⁹, as we shall see below.

Directive 86/378 was amended by Council Directive 96/97/EC of 20 December 1996 following these judgments, which made some of its provisions unnecessary³⁰.

The new directive does not apply to individual contracts for self-employed workers, schemes for workers having only one member, insurance contracts to which the employer is not a party, optional provisions of occupational schemes or occupational schemes insofar as benefits are financed by contributions paid by workers on a voluntary basis.

Now the directive allows different levels of benefit to be set in defined-contribution schemes and funded defined-benefit schemes. Examples of the elements which may be unequal are given in the annex, such as conversion into a capital sum of part of the periodic pension, transfer of pension

²⁸ Cf Annex IV: Directive 86/378/EEC (OJ L 225, 12.8.1986) and Council Directive 96/97/EC of 20 December 1996, amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 46, 17.2.1997, p. 20.

²⁹ - Douglas Harvey Barber v Guardian Exchange Assurance Group, op. cit., Footnote 10.
 - Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf, CJEC 6 October 1993, C 109/91, ECR 1993, p. 4939
 - Michael Moroni v Collo GmbH, CJEC 14 December 1993, C 110/91, ECR 1993, p. 6609
 - Coloroll, CJEC 28.9.94, C 200/91, ECR 1994 I p. 4389.
 - Constance Christina Ellen Smith and others v Avdel Systems Ltd, CJEC C-408/92 28 September 1994, ECR 1994, p. I-4435.
 - Maria Nelleke Gerda Van den Akker and others v Stichting Shell Pensioenfonds, CJEC C-28/93 28 September 1994, ECR 1994, p. I-4527.
 - Fisscher, CJEC C-128/93 28 September 1994, ECR 1994, p. I-4541.
 - Anna Adriaandtje Vroege v NCIV Instituut voor Volkshuisvesting BV et Stichting Pensioenfonds NCIV, CJEC C-57/93, 28 September 1994, ECR 1994, p. I-4583.
 - Bestuur van het Algemeen burgerlijk pensioenfonds v G.A. Beune, CJEC C-7/93, 28 September 1994, ECR 1994, p. I-4471

³⁰ Council Directive 96/97/EC of 20 December 1996 op. cit., Footnote 28.

rights, reversionary pension payable to a dependant in return for the surrender of part of a pension and a reduced pension where the worker opts to take early retirement.

Thus, the new directive applies to the dependants of workers who are self-employed, have ceased work because of sickness, maternity, accident or involuntary unemployment, are seeking work, or are retired or invalid.

The directive still clearly states that workers' contributions must be equal for both sexes.

Today, the Member States' obligation to take the necessary steps to revise provisions which contravene the principle of equal treatment applies only to occupational schemes for self-employed workers, and they have the right to defer until 1 January 1999 application of the principle as regards the right to set different levels for workers' contributions and for survivors' pensions, until Community law establishes the principle of equal treatment in statutory social security schemes.

With regard to retirement age, under the new Article 9a a flexible system for men and women is possible.

Above all, Article 2 of the new directive is concerned with the retroactive effect of the Court's case law. The principle is that any measures taken must cover all benefits derived from periods of employment subsequent to 17 May 1990³¹ and apply retroactively to that date. For workers or their dependants who have initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990 with a view to receiving equal treatment, the retroactive effect is limited to 8 April 1976³².

The directive also allows Member States to legislate on time limits applicable to workers or their dependants wishing to claim their right to equal treatment by initiating legal proceedings or raising an equivalent claim under national law, provided that these time limits are not less favourable than for similar actions and that they do not render the exercise of Community law impossible in practice.

Consequently, the directive seems restrictive; the retirement age has in principle become equal for men and women, flexibility in this regard has become the exception.

2.2.5. Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood³³

At first sight this seems to be an important step forward, applying the principle of equal treatment to self-employed workers and their assisting spouses (who are generally female!), but in fact it is not revolutionary.

Although the directive establishes the principle of equal treatment in general terms, it does not make provision for much more than an obligation for the Member States to examine the status of assisting

³¹ Date of the Barber judgment, op. cit., Footnote 29.

³² Date of the Defrenne judgment, op. cit., Footnote 2, concerning the direct applicability of Article 119.

³³ Cf. Annex V: Directive 86/613/EEC (OJ L 359, 19.12.1986).

spouses and the possibilities of pregnancy and/or maternity leave for female self-employed workers or assisting spouses.

The directive should have been reviewed before 1 July 1993 but to date this has not been done. The fourth Community action programme notes that in this respect Council Directive 96/613/EEC of 11 December 1986 does not appear to have had the impact originally hoped for, because of the modest nature of the obligations it imposes. The Commission undertakes to continue to study the progress achieved in relation to the impact of this directive and to propose action to promote its objectives. It also undertakes to propose a revised directive after consultation of all interested partners, to provide a response to the real needs in this area.

A report on the situation of assisting spouses of the self-employed was submitted to the Committee on Women's Rights on 8 January 1997³⁴, resulting in a motion for a resolution by the European Parliament on the situation of assisting spouses of the self-employed which pointed out that the directive had not achieved its objective of giving assisting spouses a clearly defined professional status and establishing their social security entitlements; this failure was in part due to the complexities surrounding their legal status. The resolution³⁵ adopted on 20 February 1997 calls for the amended directive to be more binding on Member States and for it to apply not only to assisting spouses but also to assisting live-in partners in other long-term forms of cohabitation in Member States that recognize contracts of this kind.

The resolution calls on the directive to include compulsory registration of assisting spouses and an obligation on Member States to take the necessary measures to ensure that assisting spouses are able to take out insurance cover for health care, retirement pensions, maternity benefit and replacement services and invalidity benefit, as well as access to vocational training, the right of assisting spouses to represent their company and/or to vote and be elected to the appropriate professional organizations and to establish their legal status as assisting spouses and the right to join social security schemes.

However, taking account of the risks for small family enterprises, the resolution stresses the need for flexibility.

2.2.6. Directive 92/95 /EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding³⁶

With this directive the Council aims to protect pregnant women from the inherent risks of certain jobs. The activities in which female workers are engaged must be evaluated by the employer or by a protective service set up for that purpose. If the assessment reveals a risk to the safety or health of a pregnant worker, the employer must take the necessary measures to move the worker concerned to another job or grant her temporary leave. Certain activities, listed in the annex to the directive, may not be undertaken by pregnant workers, such as work underground (mines) and work which entails or might entail exposing the body to high atmospheric pressure, etc.

³⁴ Report on the situation of assisting spouses of the self-employed, Committee on Women's Rights, A4-0005/97.

³⁵ European Parliament resolution on the situation of assisting spouses of the self-employed, 20 February 1997, OJ C 85, 17.3.1997, p.186

³⁶ Cf. Annex VI: Directive 92/85/EEC (OJ L 348, 28.11.1992)

In addition, women may not be obliged to perform night work during their pregnancy and for a period following childbirth to be determined by the national authorities. In general, pregnant workers are entitled to 14 continuous weeks maternity leave which they may take before and/or after the birth, in accordance with national legislation.

Apart from these provisions on health protection, the directive also provides protection with regard to employment rights. Dismissal on the grounds of pregnancy is strictly prohibited (protection against dismissal runs from the beginning of the pregnancy to the end of maternity leave). Various other rights such as maintenance of remuneration and/or payment of an equivalent allowance are ensured.

The Member States have two years from the date of adopting the directive to make the necessary adjustments to their laws and regulations.

2.2.7. Council directive on parental leave and leave for family reasons³⁷ which became Council directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC³⁸

In the first directive the Commission proposed to grant to one parent (father or mother) the right to stay at home after the birth of a child and the end of maternity leave or after adoption of a child, to look after the child. The right to parental leave would not however automatically entail the right to receive benefit. The Member States would be free to decide whether or not to grant benefit for parental leave.

This directive was adopted on 3 June 1996 on the basis of the Agreement on Social Policy annexed to Protocol 14 on Social Policy annexed to the Treaty establishing the European Community and in particular its Article 4(2), which allows management and labour jointly to request that agreements concluded at Community level be implemented by a Council decision on a proposal by the Commission. This directive was adopted by all the Member States except the United Kingdom.

In fact the Council had not been able to act, as there was no unanimity, on the proposal for a directive on parental leave and family leave, as amended³⁹ on 15 November 1984; the Commission then used Article 3(2) and (3) of the Agreement on Social Policy to consult management and labour on possible options for Community action on combining work and family life, thus approaching the issue in a more general way. The two sides of industry replied favourably to this request in a joint letter of 5 July 1995 and on 14 December 1995 concluded a framework agreement on parental leave which they forwarded to the Commission with a view to it being implemented by a Council decision. The Commission also referred to the Council Recommendation on child care⁴⁰ which recommends increased provision of child care services and aims to encourage greater flexibility in work organization and to encourage men to play a greater part in caring for children.

³⁷ OJ C 333, 9.12.1983 and OJ C 316, 27.11.1984
OJ L 145, 19 June 1996, p. 4
Annex VII.

³⁸ UNICE: Union of industrial and employers confederations of Europe; CEEP: European centre of public enterprises; ETUC: European trade union confederation.

³⁹ OJ C 316, 27.11.1984, p.7.

⁴⁰ Council Recommendation 92/241/EEC on child care, OJ L 123, 8.5.1992 and Bull 3-1992, Point 1.2.1998.

The social partners' intention in the framework agreement was to set out minimum requirements on parental leave and time off from work on grounds of *force majeure* (which is a new approach in line with the policy of combining work and family life) and to leave the Member States and/or management and labour to define the conditions for implementation.

The Commission considered that the most appropriate instrument was a Council directive, as the framework agreement should be applied indirectly through transposition by the Member States and/or management and labour. The Member States were to transpose the directive by 3 June 1998.

The directive as adopted is the first to have Article 4(2) of the Agreement on Social Policy annexed to the Treaty on European Union as its legal basis and to implement an agreement concluded by management and labour at Community level.

The framework agreement establishes an individual right to parental leave on a non-transferable basis for all workers, men and women, on the grounds of the birth or adoption of a child, to enable them to take care of that child for at least three months until a given age up to eight years. The conditions of access and detailed rules for applying parental leave are to be defined by law and/or collective agreements in the Member States, as long as the minimum requirements are respected. The framework agreement also aims to protect workers against the risk of dismissal on the grounds of applying for or taking parental leave and to maintain until the end of the parental leave any rights acquired or in the process of being acquired by the worker on the date on which parental leave starts. The framework agreement also governs the right of workers to time off from work on grounds of *force majeure* for urgent family reasons in the event of sickness or accident making the immediate presence of the worker indispensable.

At the Amsterdam summit the United Kingdom undertook to accept the directives adopted under the Social Agreement, with a view to including the Agreement in the Treaty itself, as well as any directives which might be adopted before the new Treaty of Amsterdam came into force, in particular Council Directive 96/34/EC. At the European Council of 24 July 1997 the Council and Commission agreed to render application of these directives effective by adopting specific directives on the basis of Article 100 of the EC Treaty. A directive of 15 December 1997⁴¹ therefore amended and extended to the United Kingdom Directive 96/34/EC on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC.

2.2.8. Council directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex⁴²

The general principle with regard to the burden of proof '*actori incumbit probatio*' (the burden of proof lies with the plaintiff) normally presents insurmountable problems in discrimination cases. The relevant documents are generally in the possession of the employer, while forms of indirect discrimination are naturally difficult to prove.

⁴¹ Council directive 97/74/EC, OJ L 10, 16.1.1998, p. 24.

⁴² OJ L 14, 20.1.1998, p.6
Annex VIII.

To solve this problem the Commission and Parliament considered in the draft directive⁴³ that the burden of proof should be reversed. Under this proposal the plaintiff only has to establish 'presumed discrimination'. It would then be up to the employer (the defendant) to refute this presumption by proving that he had not violated the principle of equal treatment⁴⁴.

The new directive is based on Article 2(2) of the Agreement on Social Policy annexed to the Treaty on European Union, which explicitly provides for Community legislation on equal treatment. This article was chosen after adoption of the 1988 first draft directive, based on Articles 235 and 100 of the Treaty, was blocked in the Council.

On 5 July 1995 the Commission submitted to the two sides of industry a new text based in particular on Court case law. After consulting management and labour for the second time on 7 February 1996 (pursuant to Article 3 of the Agreement on Social Policy), the Commission clearly decided to present the new directive which aimed to adjust the burden of proof rather than reverse it completely. The directive was adopted on 15 December 1997 by the Council pursuant to the procedure under Article 189c of the Treaty.

Article 4 of the directive obliges Member States to take such measures as are necessary to ensure that when people **consider** themselves wronged because the principle of equal treatment has not been applied to them and establish before a court or other competent authority facts from which it may be **presumed** that there has been direct or indirect discrimination, the respondent must prove that there has been no breach of the principle of equal treatment. This article uses the principle of presumed discrimination as people only have to 'consider' themselves wronged and supply evidence leading to a presumption of direct discrimination or less favourable treatment because of apparent discrimination⁴⁵ for them to be able to go to court and have the burden of proof reversed against the employer, who would have to prove that there had been no discrimination or that discrimination was justified by objective factors which had nothing to do with the person's sex⁴⁶.

Article 4(2) of the directive allows the Member States under the subsidiarity principle to take measures which are more favourable to plaintiffs, as the directive aims to set minimum standards. The Member States may therefore impose total reversal of the burden of proof. Thus, as soon as the plaintiff complained of discrimination or less favourable treatment, it would be up to the defendant to supply positive and objective proof that there had been no discrimination.

The directive also establishes for the first time a clear **definition of indirect discrimination**, based on case law which has emerged from the Court. Article 2 defines indirect discrimination as occurring when an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

⁴³ OJ C 176, 5.7.1988 and OJ C 332, 7.11.1996, p.11, OJ C 185, 18.6.1997, p.21.

⁴⁴ A technical note on the legal situation with regard to the burden of proof in the Member States is available from the Directorate General for Research. It is also annexed to Working Paper W2 entitled 'Measures to combat sexual harassment at the workplace - Action taken in the Member States of the European Community'.

⁴⁵ *Specialarbejderforbundet i Danmark v Dansk Industri*, formerly *Industriens arbejdsgivere*, acting for Royal Copenhagen, CJEC C-400/93, 31 May 1995, ECR1995, p. I-1275 (point 24).

⁴⁶ See *Dr P.M. Enderby, Frenchay Health Authority, Secretary of State for Health*, CJEC 27 October 1993, C-127/92, ECR 1993, p. 5566 (point 19).

As we shall see in the chapter on case law, the problem of defining indirect discrimination has given rise to a large number of judgments, which encouraged the Commission to introduce this directive.

2.2.9. Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC⁴⁷

This directive was adopted on 15 December 1997, transposing the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, pursuant to Article 4(2) of the Agreement on Social Policy (resulting from the implementation for the second time of this procedure under the Protocol on Social Policy). The directive is to be transposed within two years, and an additional year is allowed if transposition is implemented through a collective agreement between management and labour.

The purpose of the agreement is in general to remove discrimination against part-time workers and to promote part-time work on a basis which is acceptable for employers and workers.

As the majority (70 to 90%)⁴⁸ of part-time workers are women, this directive is very much concerned with improving the situation of women on the job market.

Nevertheless, the directive falls short of the initial proposals and Commission initiatives⁴⁹, in particular the initiative of 9 April 1996 in which the Commission indicated to management and labour that in the event of a failure of negotiations it would draw up a new draft directive which would help to protect all forms of atypical work against all forms of discrimination.

Thus Parliament, in its resolution on an initiative aimed at a proposal for a directive on atypical employment contracts and terms of employment⁵⁰, called for all forms of atypical work to be protected against all forms of discrimination. It also called for flexible forms of employment to be promoted, taking account of the requirements of competition and the aspirations of workers, pursuant to the conclusions of the Essen Council with regard to introducing new flexible forms of work organization.

The framework agreement has two objectives:

- to remove discrimination against part-time workers and improve the quality of part-time work;

⁴⁷ OJ L 14, 20.1.98. p.9. Annex IX.

⁴⁸ The state of women's health in the European Community', COM(97)224 final, p. 26.

⁴⁹ Proposal for a Council directive on certain employment relationships with regard to working conditions COM(90)0228, OJ C 224, 8.9.1990, p.3.

Proposal for a Council directive on certain employment relationships with regard to distortions of competition COM(90)0228, OJ No C 224, 8.9.1990, p.5.

Proposal for a Council directive supplementing the measures to encourage improvements in the safety and health at work of temporary workers COM(90)0228 OJ No C 224, 8.9.1990, p.7

Commission initiative of 9 April 1996 in the context of the second consultation phase of management and labour, pursuant to Article 3(3) of the Agreement on Social Policy, on flexibility of working time and job security (forms of work other than full time and fixed contract), communicated to the Committee on Social Affairs and Employment, 22 November 1996.

⁵⁰ Resolution of 10 July 1990, OJ C 231, 17.9.1990, p.32.

- to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers.

This framework agreement is concerned only with part-time work and not with all the forms of atypical work. However, in the preamble to the framework agreement, the parties to the agreement recognize the need to consider similar agreements relating to other forms of flexible work.

The framework agreement **defines a part-time worker** as a person whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker, meaning a full-time worker in the same establishment having the same type of employment contract or relationship, engaged in the same or similar work, due regard being given to other considerations such as seniority and qualifications or skills. Where there is no comparable full-time worker in the same establishment, the comparison is made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law or practice.

Clause 2(2) allows the Member States and/or the social partners to establish a definition of part-time workers who work on a casual basis.

The framework agreement also establishes the **principle of non-discrimination** applicable only to 'employment conditions'. Statutory social security schemes are excluded from this framework agreement as they come within the exclusive competence of the Member States.

The framework agreement does not state what is meant by employment conditions, but in the report by the Committee on Social Affairs and Employment on the Commission proposal for a Council Directive concerning the framework agreement on part-time work⁵¹, the rapporteur proposes that this term should include at least the following:

- the right to paid annual leave, social protection and continued pay in the event of sickness, paid and unpaid paternity and maternity leave, the right to redundancy pay and to bonuses based on length of service,
- the principle of equal pay for equal work and work of equal value,
- statutory and collectively agreed rules regarding dismissal,
- access to vocational training opportunities,
- access to promotion opportunities in the establishment/undertaking,
- use of the establishment's social facilities and privileges regarding the use of public transport,
- inclusion of part-time workers when determining the size of plants for establishment of collective representative bodies, where these are provided for in national legislation.

The framework agreement also provides for the possibility of some differences in treatment if these are justified by '**objective reasons**', but does not say what is meant by objective reasons. The agreement states that treatment may not be less favourable solely on the grounds of part-time work. Therefore derogations from the principle of non-discrimination can be based on time qualifications, i.e. a worker may have to work a minimum average weekly number of hours to qualify for equal treatment.

Clause 3 states that the definition of a part-time worker is calculated on the basis of weekly hours of work or on the average over a period of employment up to one year. The framework agreement

⁵¹ Doc. A4-0352/97, 6 November 1997.

does not state what factors may be grounds for the derogations which are to be defined by the Member States and/or the social partners. Access criteria on the basis of pay conditions can also be used, i.e. on the basis of earnings and seniority in order to totally or partly exclude part-time workers from benefitting from certain conditions of employment which apply to comparable full-time workers.

The only obligation which the framework agreement actually imposes on the Member States and the social partners is regularly to review discriminatory derogations in their legislation and collective agreements. The use of the conditional tense in the rest of the text shows that the framework agreement has a declaratory intent.

The main objective remains, however, to develop part-time work by inviting the Member States and/or management and labour to:

- *'identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;'*
- give consideration to requests by workers to transfer from full-time to part-time work and requests to transfer from part-time to full-time work or to increase their working time,
- provide information on the availability of part-time and full-time positions in the establishment,
- consider measures to facilitate access to part-time work at all levels of the enterprise, including skilled and managerial positions, and
- consider, where appropriate, measures to facilitate access by part-time workers to vocational training.

The Commission is shortly to put forward a directive to extend the framework agreement to the United Kingdom.

2.3. The third medium-term Community action programme (1991-1995)

The Commission and Parliament did not manage to achieve a binding text (directive or regulation) and the Member States were merely invited to undertake various forms of action on a voluntary basis. The Commission action programmes aim to promote equality through measures taken voluntarily.

The third action programme, covering the period 1991-1995, is based on three pillars:

- the implementation and development of existing law,
- better integration of women into the labour market,
- improving the status of women in society.

The Commission has endeavoured to achieve the last objective through an information and awareness-raising campaign.

2.4. The fourth medium-term Community action programme on equal opportunities for women and men (1996-2000)

On 22 December 1995 the Council adopted a Decision⁵² on a medium-term Community action programme on equal opportunities for men and women (1996-2000), with the following objectives:

⁵² OJ L 335, 30.12.1995, p. 37.

- to promote integration of the equal opportunities for men and women dimension in all policies and activities (mainstreaming);
- to mobilize all the actors in economic and social life to achieve equal opportunities for men and women;
- to promote equal opportunities for men and women in a changing economy, especially in the fields of education, vocational training and the labour market;
- to reconcile working and family life for men and women;
- to promote a gender balance in decision-making;
- to make conditions more conducive to exercising equality rights.

Since the Essen European Council in December 1994, promoting equal opportunities for women and men has been a fundamental task of the European Union and the Member States, on a par with combating unemployment. This was to be expressed by implementing this fourth action programme and the policy known as 'mainstreaming'.

The 'mainstreaming' policy is the most ambitious strand of this fourth action programme, as it was followed up in February 1996 by a Commission communication entitled 'Incorporating equal opportunities for women and men into all Community policies and activities'⁵³.

Moreover in its annual report on equal opportunities for women and men in the European Union (announced in the Commission White Paper on European Social Policy - A way forward for the Union⁵⁴, the Commission defines mainstreaming as '*incorporating the equal opportunities dimension (...) the systematic consideration of the respective priorities and needs of women and men in all policies and measures*'⁵⁵. Today, the objective is to establish equal opportunities for men and women horizontally, to be applied by everyone. As we shall see, the Amsterdam Treaty will enshrine this policy by giving the European Union the resources needed to achieve this objective. In addition, on 2 December 1996 the Council adopted a recommendation on the balanced participation of women and men in the decision-making process⁵⁶ to implement the fourth action programme, which comments that '*balanced participation of women and men in the decision-making process is likely to give rise to different ideas, values and behaviour which will result in more justice and equality in the world for both men and women*'. The Council therefore recommends to the Member States that they adopt a comprehensive, integrated strategy to promote balanced participation of women and men in the decision-making process. This once more demonstrates the approach to equality between men and women via the mainstreaming policy.

2.5. Case law of the Court of Justice of the European Communities

Although the Commission and Parliament have the joint task of drawing up regulations, on which the Council has the final word, Court of Justice case law undoubtedly plays an important part in the

⁵³ COM(96)67 final, of 21 February 1996. See also Parliament's resolution in OJ C 304, 6.10.1997, p. 50.

⁵⁴ COM(94)333, of 27 July 1994.

⁵⁵ COM(96)650 final, 12 February 1997, p. 10.

⁵⁶ OJ L 319, 10.12.1996, p.11.

final implementation of Community law in the Member States. Through wide interpretation and constantly evolving case law the Court has been able to give concrete form to the principle of equal treatment. An analysis of all the Court's judgments on this subject lies outside the scope of this document, which intends only to give a brief survey of Community law. We shall therefore confine ourselves to a few 'landmark judgments' in four important and sensitive areas of social legislation: pay, pensions, social security systems and working conditions.

2.5.1. The concept of pay

According to Article 119(2) of the Treaty on European Union, '*pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer*'.

By giving a wide interpretation to this definition of pay, which in itself is vague, the Court of Justice has been able to include various actions and practices within the field of application of this article. This approach by the Court enables individuals effectively to claim recognition of their rights, principally through the direct effect of Article 119.

For example, the Court has declared that contributions to a pension scheme paid by an employer on behalf of his employee over and above gross salary (which in effect increased the gross salary) were within the field of the application of Article 119⁵⁷.

Similarly, with regard to transport privileges granted to retired male workers and their wives and children, such privileges must be considered an extension of the benefits conferred during the employment relationship. If these privileges are not granted to retired female employees, this constitutes discrimination and is prohibited under Article 119⁵⁸.

The supplementary allowance to unemployment pay, which under national legislation is payable by the last employer and must be paid when the employee reaches retirement age, constitutes pay. A system which in practice limits payment of this 'pre-pension' to male workers aged 60 and over, as female workers of this age are not entitled to unemployment benefit, is contrary to the principle of equal pay. As, in the Member State in question, male and female workers may retire between 60 and 65, there is no reason to exclude women aged between 60 and 65 from unemployment benefit and consequently from pre-pension payments⁵⁹. The situation is different in a Member State where there are still different retirement ages for men and women and where the amount of pre-pension allocated to women is reduced when they reach the age of 60, at which age they are entitled to the old age and retirement pensions. In these circumstances the objective situation of men and women is actually different, and it is not a matter of discrimination⁶⁰.

⁵⁷ Worringham & Humphreys v Lloyds Bank Ltd., CJEC 11 March 1981, C 69/80, ECR 1981, op. cit., Footnote 8.

⁵⁸ Garland v British Rail Engineering Ltd., CJEC 9 February 1982, C 12/81, ECR 1982, p. 359.

⁵⁹ Commission of the European Communities v Kingdom of Belgium, CJEC 17 February 1983, C 173/91, ECR 1981, p. 693.

⁶⁰ Birds Eye Walls Limited v Friedel M. Roberts, CJEC 9 November 1993, C 132/92, ECR 1993, p. 5599.

Similarly, the concept of pay under Article 119 covers allowances (in the form of paid leave such as maternity leave⁶¹ or remuneration for overtime or for training courses in the skills needed for works council activities), as long as it is paid by the employer according to the law and in connection with a contract for paid work⁶².

With regard to maternity leave, the Gillespie judgment⁶³ states that the principle of equal pay established by Article 119 of the Treaty and clarified by Directive 75/117 does not impose an obligation to maintain the entire salary of female workers during their maternity leave, nor does it lay down specific criteria to determine the amount of the allowance to be paid to them during this period, as long as this is not set at a level which would endanger the objective of maternity leave, which is to protect female workers before and after confinement.

Briefly, as soon as an employer pays, directly or indirectly, a benefit which has close links with the services provided by the worker, it is counted as pay under the terms of Article 119.

The link between work done and pay is, however, difficult to ? What is the situation of employers' contributions to such schemes? Can these be considered pay or would this overstep the limits of admissible interpretation?

Very early on, the Court drew a clear distinction between statutory social security schemes and contractual schemes. Employers' contributions towards funding a statutory social security scheme and the benefits paid from these schemes, under which there is no agreement between employers and workers, do not constitute pay as defined in Article 119⁶⁴.

However, benefits paid to employees under an occupational pension scheme, according to the Court of Justice, count as considerations under the terms of Article 119. In the *Bilka/Weber* case, the Court commented specifically on the contractual origin of the pension scheme, i.e. an agreement between the employer and a worker's representative body. The pension scheme in question was financed entirely by the employer⁶⁵.

In these judgments, the Court has adopted a clear position with regard to the scope of Article 119. But this attitude did not at first establish the idea that men and women are directly entitled to equal treatment in occupational pension schemes by virtue of Article 119. The delay in this idea becoming widespread can probably be explained by the fact that Directive 86/378 gave the Member States until 1 January 1993 to remove discriminatory provisions from occupational schemes. With regard to retirement age, actuarial calculations and survivors' pensions, the Member States could (again according to the directive) delay application of the principle of equal treatment to a date later than

⁶¹ *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board*, CJEC C-342/93 of 13 February 1996, ECR 1996, p. I-0475.

⁶² *Bötel*, CJEC C-360/90 ECR 1992, p. I-3607
 - *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, CJEC C-457/93, 6 February 1996, ECR 1996, p. I-0243
 - *Edith Freers and Hannelore Speckmann v Deutsche Bundespost*, CJEC C-278/93, 7 March 1996, ECR 1996, p. I-1165.

⁶³ *Gillespie judgment*, op. cit., Footnote 61.

⁶⁴ *Gabrielle Defrenne v Belgian State*, CJEC 25 May 1971, C 90/70, ECR 1971, p.445.

⁶⁵ *Bilka Kaufhaus GmbH v Weber von Hertz*, CJEC 13 May 1986, C 170/81, ECR 1986, p. 1607.

1 January 1993. It is not surprising that the Barber judgment came like a bolt from the blue for employers⁶⁶.

Mr Douglas Barber was employed by the Guardian Royal Exchange Assurance Group. At the age of 52 he was made redundant. He then claimed benefits from the enterprise's pension fund, which was wholly financed by the employer. This was a contracted-out scheme by virtue of the British Social Security Pensions Act. This means that the scheme was a substitute for a large part of the statutory scheme. Under the Guardian pension scheme, men were entitled to a retirement pension at the age of 62 and women at the age of 57. In the event of redundancy, these age limits were reduced to 55 and 50 respectively. Mr Barber, who was made redundant when he was 52, was therefore not entitled to an early retirement pension, although a woman of the same age would have been. Mr Barber considered that he had been discriminated against on grounds of sex.

In reply to a request for a preliminary ruling by the Court of Appeal in London, the Court of Justice ruled, firstly, that benefits paid on redundancy constituted a form of pay. The fact that these benefits were paid after termination of the employment relationship did not prevent them being considered as pay.

The Court then ruled that a retirement pension paid under a contracted-out scheme also constituted pay. The Court referred to the previously established distinction between statutory pension schemes and contractual schemes. As contracted-out schemes result either from an agreement between workers and employers or from a unilateral decision by the employer, and they are financed by the employer alone or by both the employer and the workers, the Court considered that this was a contractual scheme and consequently the benefits constituted remuneration. Furthermore, the Court noted the link between the benefits and the employment relationship between the entitled workers and a particular employer.

Although the Court had in essence only confirmed its previous judgments, this judgment came as a shock to employers' insurance schemes and pension funds. The social and financial implications of this judgment, which are considerable, will be considered below, under the heading 'occupational schemes'. For the moment we shall concentrate on the theory that benefits paid under a contracted-out scheme constitute pay.

The specific situation of the Barber judgment allowed various pension funds to hope that the Court would limit its judgment to contracted-out schemes. However, two judgments indicate that the Court has no intention of accepting this minimalist interpretation. Survivors' pensions paid under a contractual scheme also constitute pay⁶⁷. Recent case law has followed this line by extending the principle to civil servants' pensions on the basis that *'in order to determine whether a pension scheme falls within the scope of Article 119, the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer'*⁶⁸. The fact that the survivor's pension is not paid to the worker himself but to a relation makes no difference⁶⁹.

⁶⁶ Douglas Harvey Barber v Guardian Exchange Assurance Group, CJEC 17 May 1990, op. cit., Footnote 10.

⁶⁷ Ten Oever v Stichting Bedrijfspensioenfonds, CJEC 6 October 1993, op. cit., Footnote 29.

⁶⁸ Bestuur van het Algemeen burgerlijk pensioenfonds v G.A. Beune, CJEC C-7/93, 28 September 1994, ECR 1994, p. I-4471.

⁶⁹ See Coloroll judgment, op. cit., Footnote 29.

In the Moroni judgment⁷⁰, the Court expressly rejected a too restrictive interpretation of the Barber judgment: *'the scope of the principles stated in the Barber judgment cannot be regarded as being limited to contracted out occupational schemes and those principles also apply to supplementary schemes of the type in question in the main proceedings'*. In fact this was a supplementary contractual pension scheme set up by the Collo company. The Court ruled that benefits paid under this kind of contractual pension scheme also constituted pay. The Court seems to go further still in the Beune judgment⁷¹, pointing out that *'application of Article 119 is not conditional upon a pension being supplementary to a benefit provided by a statutory social security scheme. Benefits awarded under an occupational scheme which, partly or entirely, take the place of the benefits paid by a statutory social security scheme may fall within the scope of Article 119'*. With regard to the nature of benefits then, the Court seems to hold to the original distinction between statutory and contractual schemes.

With regard to contributions to pension schemes, in the Neath v Steeper judgment⁷² the Court has drawn a distinction between workers' contributions and employers' contributions. This was concerned with a defined benefits scheme under which workers' contributions were identical for male and female employees. The employers, however, paid higher contributions for women than for men, because of different actuarial calculations. In fact, to guarantee a fixed monthly pension rate for male and female workers, more savings are necessary for women than for men, according to statistical data. Women on average live longer than men. The Court considered that this difference in the level of employers' contributions did not violate Article 119. According to the Court, only workers' contributions constituted 'pay' within the meaning of Article 119. Employers' contributions, on the other hand, were not 'considerations' resulting from the worker's employment but a supplement to workers' contributions to make it possible to reach a fixed sum, determined in advance. These contributions were not related to the work done. Different actuarial calculations, entailing a different level of employers' contributions to a defined benefit scheme, do not come within the scope of Article 119. Moreover, Article 119 does not cover the situation when differences arise in such schemes between workers of one sex and the other if the planned pension is converted into capital or replaced by a widow's pension payable to a dependant in return for renouncing part of the sum due, or is reduced in the event of early retirement, or when pension rights are transferred to another scheme. These differences are only a consequence of the method of financing such schemes, necessarily incorporating actuarial factors⁷³.

Once it has been established that benefits or considerations constitute pay, the principle of 'equal pay for equal work' must be respected. This is equally true for jobs for which the national judge has conceded that they are 'of equal value'. If it is clear that a lower salary is paid for one of these jobs and if the workers employed in this job are mainly women, the employer must prove that this difference in pay is justified by objective criteria. Simply the fact that these two rates are the result of a collective agreement is not sufficient to establish an objective reason for the difference in pay. Economic reasons such as shortage of staff in a particular job, which necessitates offering a higher salary to attract workers, can, however, justify a difference in pay for jobs of equal value. The

⁷⁰ Moroni v Collo GmbH, CJEC 14 December 1993, op. cit., Footnote 29.

⁷¹ Op. cit., Footnote 68.

⁷² David Neath v Hugh Steeper Ltd., CJEC 22 December 1993, C 152/91, ECR 1993, p. 6953.

⁷³ Coloroll judgment, op. cit., Footnote 29.

national judge must determine whether the employer has supplied sufficient proof that pay differentials result from these economic reasons and not from sex discrimination⁷⁴.

In the Royal Copenhagen judgment⁷⁵ the Court cited its case law in its decision that work paid at piece rates was also covered by Article 119, as the remuneration depended entirely or essentially on the individual labour of each worker. Given that it is difficult to establish the factors which were decisive in setting the rates or units of measurement used to calculate the variable part of the remuneration (corresponding to the individual product of each worker), it would be up to the employer to prove that these differences were not due to sex discrimination. The Court, however, would have to determine whether conditions existed for reversing the burden of proof.

2.5.2. Occupational schemes

The Court of Justice has therefore stated as law that benefits paid under contracted-out schemes, contractual survivors' pensions and supplementary pensions are covered by Article 119. This means that application of the principle of equal treatment for men and women is imperative in these areas. This obligation has massive implications for occupational schemes: equal retirement age with regard to old-age pensions (which supplement or replace statutory schemes) and an equal level of contributions with regard to survivors' pensions. However, with regard to statutory schemes, it is still not obligatory to set an equal retirement age for men and women (see Directive 79/7). Moreover, the former directive (Directive 86/378), now modified, on occupational social security schemes implied that States could postpone indefinitely setting an equal retirement age with regard to contractual old-age pensions and the application of the equal treatment principle with regard to survivors' pensions.

The Court was fully aware of this contradiction between Directive 86/378 and Article 19, but it persisted in its case law. As Article 119 has a direct effect in the event of any form of discrimination which can be established on the criteria of work and pay alone, any contradictory provision in a directive is superseded by this article. According to the Court of Justice, this applies in the Barber, Ten Oever and Moroni cases and the more recent Fisscher, Vroege and Coloroll judgments⁷⁶. These judgments, as we shall see below, led the Commission to amend Directive 86/378 by Council Directive 96/97 of 20 December 1996. The Vroege and Fisscher judgments specifically recognized the direct effect of the provision on direct discrimination concerning the right to membership of an occupational pension scheme, with effect from 8 April 1976, the date on which the direct effect of the article came into force. In fact, the Vroege judgment confirmed the fact that the right to membership of an occupational pension scheme came within the scope of Article 119. Similarly, the Fisscher judgment recognized the right to membership of an occupational retirement scheme for part-time workers. The enterprise which employed Mrs Fisscher excluded married women from entitlement to membership of the occupational retirement scheme, and this right of membership was not extended to them until 1 January 1991, which meant that Mrs Fisscher could join only from 1

⁷⁴ Dr P.M. Enderby v Frenchay Health Authority, Secretary of State for Health, CJEC 27 October 1993, C 127/92, ECR 1993, p. 5566.

⁷⁵ Op. cit., Footnote 45.

⁷⁶ -Geertruida Catharina Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel, CJEC C-128/93 of 28 September 1994, ECR 1994, p. I-4583.
 - Anna Adriaantje Vroege v NCIV Instituut for Volkshuisvesting BV and Stichting Pensioenfonds NCIV, CJEC C 57/93 of 28 September 1994, ECR 1994, p. I-4541.
 - Coloroll, op. cit., Footnote 4.

January 1988. Mrs Fisscher obtained a judgment that, pursuant to Article 119 and the Bilka judgment, the effect of which was not limited in time, the principle of equal treatment should be respected with regard to entitlement to membership of an occupational pension scheme from 8 April 1976, date of the Defrenne judgement (which for the first time recognized the direct effect of Article 119). As Article 119 has a direct effect, it can be invoked by individuals before the national courts and cannot be subject to a derogation from the principle of equal treatment. Consequently, following the Court's various judgments interpreting Article 119, certain provisions of the 1986 Directive became null and void.

Article 8 of Directive 86/378 of 24 July 1986 on direct discrimination relating to the right of membership of a workers' occupational social security scheme and also Article 9 concerning the retirement age of employees seemed to be redundant because of the direct effect of Article 119.

Consequently, the Commission had to adopt an amendment to Directive 86/378 (Council Directive 96/97 of 20 December 1996) stating that the general deadline at Article 8 no longer concerned occupational social security schemes for employees but only occupational schemes for self-employed workers; the directive therefore amends Article 8 as follows: *'Member States shall take the necessary steps to ensure that the provisions of occupational schemes for self-employed workers contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest'*. Moreover, the new Article 9 of the directive allows differences in retirement age only for self-employed workers: *'As regards schemes for self-employed workers, Member States may defer compulsory application of the principle of equal treatment with regard to: (a) determination of pensionable age....'*

To soften this severe and certainly unexpected judgment, the Court of Justice decided, in the famous Paragraph 45 of the Barber judgment, to place a time limit on the effect of Article 119: *'the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension with an effect from a date prior to that of this judgment [17 May 1990], except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law'*.

This Court judgment did not, however, set minds at rest. The Court's wording ('entitlement to a pension', 'un droit à pension' 'recht op pensioen' ...) could be interpreted in various ways. 'Entitlement to a pension' could mean that the principle of equality applied:

- to all pensions paid after the date of the Barber judgment,
- only to pensions which became payable after the Barber judgment,
- only to pensions which had to be paid to workers whose contract of employment expired after the date of the Barber judgment,
- to pension rights obtained after the date of the Barber judgment.

The first and strictest interpretation would have had an immediate effect and entailed the highest costs for pension funds. The last interpretation would have limited the direct effect of Article 119 to a large extent. In this case, full equality of treatment would have been achieved only after approximately 40 years (a complete career). This interpretation would therefore have been the most advantageous for pension funds.

The Court therefore needed to clarify the interpretation of the time limit. The Member States, however, had not waited for a new Court of Justice judgment. In the margins of the very full agenda for negotiations on the Maastricht Treaty, the Member States considered the question of how to interpret this Court judgment. At the last minute a protocol on Article 119 was annexed to the Maastricht Treaty, and reads as follows:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if, and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

The Member States therefore were in no doubt that only the last interpretation of the direct effect of Article 119, with the least retroactive effect, could be applicable.

It seems that the Court did not wish to engage in conflict with the Member States. In the 'post-Barber' judgments already mentioned, in the Ten Oever, Moroni, Neath and Coloroll judgments, the Court repeated the interpretation formulated in the protocol on Article 119. With regard to **occupational pension schemes** there was no obligation for equal treatment except for benefits which could be attributed to periods of employment after 17 May 1990, date of the Barber judgment, except for workers who had initiated legal proceedings before that date. The Coloroll judgment states that *'by virtue of the Barber judgment the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of service subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.'*

On the other hand, according to the Vroege and Fisscher judgments, the protocol has no effect on the **right to membership** of an occupational pension scheme, which is still governed by the Bilka judgment of 13 May 1986: *'The right to join an occupational pension scheme falls within the scope of Article 119 of the Treaty and is therefore covered by the prohibition of discrimination laid down by that article. The limitation of the effects in time of the Barber judgment does not apply to the right to join an occupational pension scheme and in this context there is no scope for any analogous limitation'*.

In its judgment in the Neath v Steeper case, the Court extended this time limitation to the transfer of acquired rights and capital. If a beneficiary opts for capital instead of a pension or transfers acquired rights to another pension fund, the value of the capital or the transferred rights does not have to be objectively equal for both sexes except in the case of a pension constituted after 17 May 1990.

2.5.3. Statutory social security schemes

Considerable attention has been paid to the application of Directive 79/7 on statutory social security schemes. This should not however obscure the fact that statutory schemes are themselves not outside the scope of the principle of equal treatment, although its application is more limited.

With regard to the scope of Directive 79/7, case law shows that the allowance to be paid must be directly and actually linked to protection against one of the risks listed at Article 3(1) of the

directive⁷⁷ (sickness, invalidity, old age, accidents at work and occupational diseases and unemployment). However, the directive does not cover a national scheme for reduced price fares on public transport for certain categories of people, particularly the elderly⁷⁸. A benefit consisting of reductions of this kind does not directly and actually protect the recipient against one of the risks listed at Article 3(1) of Directive 79/7, and the circumstance that the recipients are in fact in one of these situations does not suffice to bring this benefit within the field of application of the directive.

It is still not obligatory to set the same retirement age for men and women for the purpose of paying old age and retirement pensions. However, the exception provided at Article 7(1)a of Directive 79/7 must be interpreted strictly. Invalidity benefits or carers' benefit are not obligatorily subject to the age set for old age and retirement pensions. In a Member State which still has different retirement ages for men and women, granting these benefits may not now depend on the retirement age. Discrimination in benefit schemes other than those for old age and retirement pensions (because of a different retirement age for each sex) may not be authorized, according to the Court, unless such discrimination is objectively necessary to preserve the financial balance of the social security scheme or to ensure coherence between the retirement pension scheme and the scheme for other benefits⁷⁹.

The Richardson judgment⁸⁰ concerned the exemption from prescription charges granted to women from the age of 60 and men only from the age of 65; these age limits corresponded to the legal retirement age in the United Kingdom. The Court took the view that this discrimination was not necessarily linked to the difference between the retirement age of men and women and was not therefore covered by the derogation at Article 7(1)a of Directive 79/7.

As a general rule, any discrimination on the grounds of sex is prohibited, as is clearly illustrated by the following examples.

If national laws deprive invalid widows of invalidity benefits in order to grant them widows' pensions (which are lower), this situation constitutes discrimination on the grounds of sex to the extent that this rule is not applied to invalid widowers. This change of benefits is only justified if the widow voluntarily and deliberately chooses the widow's pension⁸¹.

National laws which provide that married women, widows and students whose income as self-employed workers do not exceed a certain level may be exempt from the obligation to pay contributions to the social security fund for self-employed workers, while married men and widowers do not have the same option, is contrary to the principle of equal treatment. In this kind

⁷⁷ - *The Queen v Secretary of State for Social Security, ex parte Florence Rose Smithson*, CJEC C-243/90 of 4 February 1992, ECR 1992, p. I-0467.

- *Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer*, CJEC C-63/91 and C-64/91 of 16 July 1992, ECR 1992, p. I-4737.

⁷⁸ *Stanley Charles Atkins v Wrekin District Council and Department of Transport*, CJEC C-228/94 of 11 July 1996, ECR 1996, p. I-3633.

⁷⁹ *Secretary of State for Social Security v Evelyn Thomas e.a.*, CJEC 30 March 1993, C 328/91, ECR 1993, p. 1267.

Secretary of State Security and Chief Adjudication Officer v Rose Graham, Mary Connell and Margaret Nicholas, CJEC C-92/94 of 11 August 1995, ECR 1995, p. I-2521.

⁸⁰ *The Queen v Secretary of State for Health, ex parte Cyril Richardson*, CJEC C-137/94 of 19 October 1995, ECR 1995, p. I-3407.

⁸¹ *A.M. Van Gemert - Derks v Bestuur van de Nieuwe Industriële Bedrijfsvereniging*, CJEC 27 October 1993, C 337/91, ECR 1993, p. 5464.

of case, the members of the disadvantaged group have the right to be treated in the same way as members of the advantaged group. If the directive is not implemented correctly, the scheme applied to members of the favoured group remains in effect the only valid reference system⁸².

The Court has repeatedly confirmed this position. In a case concerning increases in social security benefits for dependants, the Court for example decreed that pending correct implementation of the directive, the most advantageous system must be applied, even if this entailed 'unjust enrichment' for certain people⁸³. In this way the Court prevented a legal vacuum in the Member States' national laws.

If the opportunity arises the Court does not hesitate to subject the same regulation to new scrutiny. In a case where a Member State had abolished a discriminatory provision, such as a reference to the aptitude of women to carry out domestic tasks, but referred to the previous conditions in the amended legislation, the Court took the view that this was still a matter of sex discrimination⁸⁴.

Thanks to strict monitoring and above all to cooperation by citizens and national courts as well as the Court of Justice, the principle of equal treatment is being applied more and more effectively in the Member States' statutory social security schemes.

This does not mean however that there can no longer be any distinction between different categories of people entitled to social benefits. Even if a particular measure will in fact affect more women than men, it may still be admissible if the distinction it makes is for reasons of social policy rather than considerations based on sex⁸⁵. Thus, for example a Member State may make an increase in benefit dependent on the occupational income of the younger partner of a married couple. Although such a measure results in a larger number of men than women receiving increased benefits, the Court considers that this is not discrimination on the grounds of sex⁸⁶. Moreover, in 1995 the Court delivered two important judgments concerning the exclusion of low paid part-time workers from the German general social security scheme⁸⁷, which constituted indirect discrimination because it affected a larger number of women than men. In fact case law has consistently taken the view that indirect discrimination in violation of the principle of equal treatment occurs when a disadvantageous situation, resulting from the application of criteria not concerned with sex, concerns a considerably higher number of women than men⁸⁸, unless it is proven that this is explained by objectively justified factors which have nothing to do with sex-based discrimination.

⁸² Caisse d'assurances sociales pour travailleurs indépendants 'Integrity' v Nadine Rouvroy, CJEC 20 November 1990, C 373/89, ECR 1990, p. 4243.

⁸³ Cotter, McDermott v Minister for Social Welfare, CJEC 13 March 1991, C377/89, ECR 1991, p. 1155.

⁸⁴ Elsie Rita Johnson v Chief Adjudication Officer, CJEC 11 July 1991, C 31/90, ECR 1991 p. 3723.

⁸⁵ Commission of the European Communities v. Belgium, CEJC 7 May 1991, C 229/89, ECR 1991, p. 2205.

⁸⁶ Jan Melenbroek v Bestuur van de Sociale Verzekeringsbank, CJEC 19 November 1992, C 226/91, ECR 1992, p. 5963.

⁸⁷ Nolte v Landesversicherungsanstalt Hannover, CJEC C-317/93 of 14 December 1995, ECR 1995, p. I4625. -Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz (later Innungskrankenkasse Rheinhessen-Pfalz), CJEC C-444/93 of 14 December 1995, ECR 1995, p. I-4741.

⁸⁸ See for example M A De Weerd, née Roks and others v Bestuur van de Bedrijfsvereniging voor de gezondheid, Geestelijke en Maatschappelijke Belangen and others, CJEC C-343/92 of 24 February 1994, ECR 1994, p. I-0571.

In the Nolte, Megner and Scheffel judgments⁸⁹, the State obtained a judgment that the scheme was justified as there was a demand for this type of 'minor employment' and the supply of such employment could only be fostered by excluding it from compulsory insurance. Including this type of employment in a compulsory scheme risked an increase in unlawful employment and devices for circumventing the law. The Court accepted this argument as it reflected a legitimate social policy aim of the country in question and recognized that the measures were necessary⁹⁰.

The Court also recognized as being in line with the directive a provision in Dutch law which made receipt of an invalidity benefit subject to the condition of having received a certain income from or in connection with work in the year preceding the beginning of the incapacity, even though this condition affects more women than men⁹¹. The Laperre case⁹² was concerned with a social assistance scheme in the Netherlands intended to guarantee beneficiaries an income equivalent to the minimum wage irrespective of any savings they might have but subject to conditions relating to their age and previous employment. The Court took the view that this scheme did not infringe the directive although it had a disproportionate impact on women, as the government had shown that the scheme was necessary to attain a social policy aim unrelated to any discrimination on grounds of sex.

In general, therefore, the Court of Justice leaves the Member States enough leeway to conduct their own social policy.

2.5.4. Working conditions

Directive 76/207 and in particular the Court's interpretation of the concept of 'indirect discrimination' have also brought the principle of equal treatment into the job market as such. In several, already numerous, judgments, the Court has curbed discrimination on recruitment and in connection with in-service training, working conditions as such or termination of an employment contract.

In the context of access to employment covered by Article 3 of Directive 76/207, the Court states that this concept should not be understood as relating solely to the conditions existing before the beginning of an employment relationship⁹³. This case was concerned with the allocation of a benefit entitled 'family credit' which individuals could receive if their income did not exceed a certain amount, if they or their spouse were engaged in a paid occupation and if they or their spouse had a dependent child or family member. The Court took the view that the prospect of receiving a family credit on accepting a low paid job encouraged an employed worker to accept this job and consequently this benefit was connected with considerations of access to employment and constituted a condition of work under the terms of Article 5 of the directive and should therefore respect the fundamental principle of equal treatment.

⁸⁹ Op. cit., Footnote 87.

⁹⁰ The Court in this case was less strict than in the Roks judgment.

⁹¹ Y.M. Posthuma-van Damme v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen and N. Oztürk v Bestuur van de Nieuwe Algemene Bedrijfsvereniging, CJEC C-280/94 of 1 February 1996, ECR 1996, p. I-0179..

⁹² C.B. Laperre v Bestuurcommissie beroepzaken in provincie Zuid-Holland, CJEC C-8/94 of 8 February 1996, ECR 1996, p. I-0273.

⁹³ Jennifer Meyers v Adjudication Officer, CJEC C-116/94 of 13 July 1995, ECR 1995, p. I-2131.

In a recent judgment⁹⁴ the Court, still on the subject of equal access to employment, took the view that some national provisions (this was a German law) were contrary to Community law as they could discriminate against women working part-time in the public finance service if they took up a new profession as tax advisers. According to the Court, in the event of a part-time job involving no less than half of normal working hours, extending the length of professional experience required for exemption from the qualifying examination for the profession of tax adviser by a corresponding period constituted discrimination, as these provisions affected a much larger number of women than men, unless the legislation was justified by objective factors unrelated to any discrimination on grounds of sex.

In the Webb judgment⁹⁵ the Court held that dismissal of a female worker because of pregnancy constituted direct discrimination on grounds of sex and consequently that Directive 76/207 precluded dismissal of an employee who is recruited for an unlimited term, initially to replace another employee during the latter's maternity leave, and who cannot carry out this replacement job because she herself becomes pregnant shortly after her recruitment; the state of pregnancy is not comparable with a pathological condition and even less so with unavailability for work on non-medical grounds.

In the Stoeckel case the Court went as far as to describe the ban on night working for women as discriminatory. The Court held that the principle of equal treatment for men and women required that women should also have the option of working at night, although this should not affect the protection of women during pregnancy or maternity⁹⁶. This judgment is extremely important at a period of economic hardship, when employers are sometimes obliged to introduce continuous shift work. If the principle of equal treatment was not applied in the area of night working, there would perhaps be more dismissals of female workers.

In this initial judgment of 25 July 1991⁹⁷ the Court stated that the French law prohibiting women from working at night was contrary to the Community principle of equality between men and women. The Court had to issue another judgment on 13 March 1997⁹⁸ declaring that by maintaining in force Article L213.1 of the Code du Travail prohibiting women working at night in industry, while this prohibition did not apply to men, France had not fulfilled its obligations under Article 5(1) of Directive 76/207. The Court also commented that while this article was in force, individuals were unsure of their legal situation and exposed to unwarranted criminal proceedings. Consequently the Court ruled that incompatibility of national legislation with Community provisions, even when directly applicable, could be finally remedied only by binding national provisions having the same legal force as those which had to be amended.

⁹⁴ Brigitte Kording v Senator für Finanzen, CJEC C-100/95 of 3 October 1997, not yet published.

⁹⁵ Carole Louise Webb v EMO Air Cargo (UK) Ltd., CJEC C-32/93 of 14 July 1994, ECR 1994, p. I-3567.

⁹⁶ Ministère public v Alfred Stoeckel, CJEC 25 July 1991, C 345/89, ECR 1991, p. 4047.

⁹⁷ Op. cit., Footnote 96.

⁹⁸ Commission v French Republic, CJEC C-197/96 of 13 March 1997, ECR 1997, p. I-1489.

See also, Commission v Italian Republic, CJEC C-207/96 of 4 December 1997, not yet published.

3. THE TREATY OF AMSTERDAM ON EUROPEAN UNION

Signature of the Treaty of Amsterdam has brought about a major change in the condition of women in the European Union. It emphasizes non-discrimination on grounds of sex by raising equality between men and women to the status of a fundamental right under the Treaty by including new Articles 2, 3 and 6a which expressly give the Institutions new powers to combat any discrimination based on sex. These powers are only limited by the need for unanimity in the Council and the fact that Parliament is only consulted. Inclusion in the new Treaty of the Agreement on Social Policy at Articles 117, 118 and 119 shows again that non-discrimination policy and equality between men and women have taken a leap forward; as much in method of implementation - codecision procedure - as in the content itself, as Article 119 clearly admits the possibility of positive discrimination. Above all, social policy in general and equality between men and women in particular will involve all 15 Member States instead of 14, as the United Kingdom will be obliged to respect decisions taken in application of the Treaty.

3.1. Implementation of a general policy on equality between men and women

The Amsterdam Treaty was signed by the Foreign Affairs Ministers of the Fifteen on 2 October 1997 in Amsterdam. The Dutch Prime Minister, Mr Wim Kok, said that this Treaty opened the way for an enlarged and stronger Europe⁹⁹. At all events, despite criticism, it is generally agreed that this Treaty has enabled some progress to be made particularly with regard to employment and sexual equality¹⁰⁰.

3.1.1. Provisions on fundamental rights and non-discrimination

Firstly, the Amsterdam Treaty includes fundamental social rights as defined in the European Social Charter, signed in Turin on 18 October 1961, and in the Community Charter of the Fundamental Social Rights of Workers of 1989, to which the new fourth paragraph of the TEU preamble refers. An addition to Article O and a change to Article F of the Treaty demonstrate a willingness to reaffirm the fundamental principles on which the European Union is founded and to confirm a commitment to defending fundamental rights. This extension consequently has implications for the new chapter on employment and social policy which is considered below.

With regard to non-discrimination, a new Article 6a (Article 13 of the consolidated Amsterdam Treaty) has been inserted into the Treaty establishing the European Community, enabling the Council, acting **unanimously**, on a proposal from the Commission and after **consulting** the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This clause has, however, no direct effect, in contrast to Article 6 on nationality. There is no codecision procedure for legislative measures to implement it (although this procedure is recognized for Article 6 on nationality) and such measures must be adopted unanimously.

⁹⁹ See Agence Europe No 7071, Friday, 3 October 1997, p. 2.

¹⁰⁰ See Agence Europe No 7075, Thursday, 9 October 1997, p. 2.
See also Agence Europe No 7006, Monday/Tuesday 30/06 and 1/07 1997, p. 2.

Parliament, in its resolution on the Commission annual report on equal opportunities for women and men in the European Union - 1996¹⁰¹ was already welcoming *'the new Article 6a in the Amsterdam draft Treaty on combating discrimination based on gender, race or ethnicity; hopes that on this basis measures will be taken to combat racism towards migrant women'*¹⁰².

With regard to equality between men and women, this principle has been added at **Article 2** of the ECT in order to establish equality between men and women as one of the tasks of the Community, on a par with convergence of economic performance and promotion of employment. Parliament had already welcomed, in its resolution of 17 February 1998 on respect for human rights in the EU¹⁰³, the inclusion of anti-discrimination clauses in the Community instruments to prevent all forms of discrimination.

The purpose of including this article was to specify what was meant by a minimum level of fundamental social rights in order to clarify what the European social model should be. This would also facilitate the task of the Court of Justice in monitoring the correct application of fundamental rights.

We can also note this concern in recent case law of 17 February 1998¹⁰⁴, which was not able to recognize discrimination on the grounds of a person's sexual orientation as this is not at present covered by Community law. The plaintiff had invoked the principle of non-discrimination on the grounds of sex on the basis of Article 119 as her employer, a British railway operator, had refused to grant her partner a reduced fare card. Although the Amsterdam Treaty allows the Council the possibility, on a proposal by the Commission and after consulting Parliament, of adopting measures to eliminate various forms of discrimination, in particular those based on sexual orientation, the Court is at present not able to act on a fundamental right which is recognized by the Treaty of Amsterdam, as the Treaty first has to be ratified.

The Treaty also has a new paragraph at **Article 3(2)** which obliges the Community in all the activities it undertakes in fulfilling its tasks to aim to eliminate inequalities and **promote equality between men and women**.

Here we find the idea of 'mainstreaming' which was developed in the Fourth Action Programme for Equal Opportunities between Men and Women, which aims to promote the inclusion of equal opportunities between women and men in the process of preparing, implementing and monitoring all the policies and actions of the European Union and the Member States. In particular, Parliament's resolution of Tuesday, 16 September 1997¹⁰⁵ on the Commission communication¹⁰⁶ *'notes that the incorporation of equal opportunities for men and women into all Community policies and activities should be pursued as a principle which now forms part of the Amsterdam draft Treaty'*. Moreover, the report on the follow-up to the communication was adopted on Wednesday, 4 March 1998 by the

¹⁰¹ Resolution of 16 September 1997 on the annual report from the Commission: Equal opportunities for women and men in the European Union 1996, OJ C 304, 6.10.1997, p. 45.

¹⁰² Paragraph 42 of the above resolution.

¹⁰³ Resolution on respect for human rights in the European Union (1996), minutes of the sitting of 17 February 1998, p. 31, PE 266.805.

¹⁰⁴ Appeal by Lisa Grant v South West Trains, judgment given 17 February 1998, not yet published in the ECR.

¹⁰⁵ OJ C 304, 6.10.1997, p. 50.

¹⁰⁶ Commission communication: incorporating equal opportunities for women and men in all Community policies and activities - 'mainstreaming', COM(96)67 final, 21.2.1996.

Commission¹⁰⁷. This report points out that many efforts have been made over two years, in external relations, employment, the Structural Funds, education, training, youth and the Commission's staff policy. The Commission advocates: (a) an impact study on policies on equality between men and women in the Commission; (b) procedures to monitor the inclusion of the equal opportunities dimension; (c) the development of powers with regard to sexual equality.

In Parliament's opinion of 11 September 1997 (date of draft opinion)¹⁰⁸ it is pointed out that the paragraph added to Article 3 goes *'beyond purely principle of mainstreaming, since it implies a proactive strategy of eliminating inequality as well as promoting equality between women and men'*. The draftsman considers that this would commit the Commission to ensuring that all new legislative proposals complied with this principle. Moreover, this article enables the Member States to take new initiatives under these policies.

3.1.2. A new title on employment in the Treaty taking account of equality between men and women

A new **Title VIII** has been added, which states that the Community and the Member States shall 'work towards' developing a coordinated strategy for employment with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and Article 2 of the Amsterdam Treaty (i.e. respecting equality between men and women).

The Member States will retain their exclusive competence in this area but must ensure that their employment policies are consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2) (former Article 103). They must also regard promoting employment as a **matter of common concern**. But no penalties are envisaged in the event of non-compliance with these provisions.

The Community is to respect the competences of the Member States and encourage cooperation between them, if necessary complementing their action, always with a view to the objective of a high level of employment, in the formulation and implementation of Community policies.

With regard to procedure, the Council is to consider a joint annual report by the Commission and Council on the employment situation in the Community and adopt conclusions thereon. The Council is to act by a qualified majority on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee, the Committee of the Regions and the new Employment Committee, in order each year to draw up guidelines on employment which the Member States are to take into account in their employment policies. The Member States in their turn are to submit an annual report on the principal measures taken. The Council, acting by a qualified majority on a recommendation from the Commission and on the basis of reports and opinions from the Employment Committee, may make recommendations.

This addition to the Treaty has been considered a major success of the IGC. The Luxembourg Extraordinary European Council confirmed this success.

¹⁰⁷ See Agence Europe, Thursday, 5 March 1998, No 7173, p. 14.

¹⁰⁸ Draft opinion by the European Parliament, PE 223.233, 11 September 1997.

After the White Paper on Growth, Competitiveness and Employment¹⁰⁹ and the European Councils of Essen (9 and 10 December 1994) and Madrid (15 and 16 December 1995), which established the framework for a Community employment policy through various areas and structural objectives including in particular equal opportunities in the job market, the Amsterdam Council of 15 and 16 June 1997 decided that the new title on employment should be immediately applicable, without waiting for final ratification of the Treaty.

Coordination of the Member States' employment policies is to be implemented in 1998, on the basis of a joint approach to the broad guidelines on employment. A decision was taken at the Amsterdam European Council to hold an extraordinary European Council on employment; it took place on 20 and 21 November 1997 in Luxembourg, and the Member States agreed on the strict guidelines which will underlie national employment policies.

On 1 October 1997 the Commission adopted the proposal for guidelines for Member States' employment policies 1998¹¹⁰.

These guidelines firstly set specific objectives to be achieved, including equal opportunities. The Commission recognizes that unemployment is higher for women¹¹¹ and that their rate of participation in work is lower. Within work, women are over-represented in some sectors and under-represented in others.

The Commission therefore proposes to attack discrimination between men and women by asking the Member States to translate their commitment to equal opportunities into increased employment rates for women and breaking down gender segregation and to make consistent efforts to reduce the gap in unemployment rates between women and men by actively supporting increased employment of women.

The Commission also calls on the Member States to accelerate implementation of the various directives and social partner agreements on combining work and family life and to monitor them. The Commission also considers that efforts should be made to raise levels of care provision, using the standards of the best performing Member States as a benchmark.

The Commission calls for measures to make it easier for women to return to the paid workforce after an absence. The Member States should address the problem of access to training opportunities if women have not been registered as 'job seekers' and the problem of interaction between taxation and benefit systems which may not necessarily encourage women to return to work. Here, too, the Commission calls on the Member States to take account of the particular labour market situation of women, promote entrepreneurship among women and improve their employability and adaptability.

Implementation of the guidelines must respect the principle of subsidiarity and the competences of the Member States; after their adoption by the Council on the basis of this Commission proposal, they should be included in the Member States' national employment action plans on a multi-annual basis. The guidelines are then to be used by the Member States in analysing their own situations as they themselves will define their policies and attitude towards each of them. The Council can study

¹⁰⁹ Op. cit., Footnote 15.

¹¹⁰ COM(97)497 final, 1.10.1997.

¹¹¹ A public hearing organized on 3 February 1997 by the Committee on Women's' Rights on the impact of employment on women outlined this problem.

the implementation of the guidelines in each Member State's national policies and make the necessary adjustments when setting the guidelines for the following year.

Article 129 provides that the Council may adopt, by the codecision procedure (Article 251, former Article 189b) with Parliament and after consulting the Economic and Social Committee and the Committee of the Regions, incentive measures designed to encourage cooperation between Member States and to support their action in the field of employment. There is, however, no question of harmonizing the laws and regulations of the Member States.

3.2 The implications of including the Protocol and Agreement on Social Policy at Article 141 (former Article 119) of the new Treaty

3.2.1. The Protocol and Agreement on Social Policy

The status of the Protocol on Social Policy and in particular the Agreement arising from it have raised an even greater number of questions.

The Protocol on Social Policy was signed by 11 Member States only (excluding the United Kingdom) which wished to move further along the path mapped out by the 1989 Social Charter. These 11 Member States drew up an agreement between themselves to this end, although this could not however affect the Community 'acquis'. The 11 Member States (subsequently joined by three new States) referred in the first instance to Treaty articles to regulate social policy matters. When the Fifteen could not agree, the 14 Member States who had signed it could refer to the Agreement. In this event, as we shall see below, decisions could be taken unanimously by the 14 Members or even by a qualified majority. The Protocol annexed to the Maastricht Treaty provided that the 11 Member States (extended to 14 in 1993) were authorized to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they were concerned the acts and decisions required for giving effect to the Agreement. In practice the United Kingdom would not take part in Council deliberations on Commission proposals made on the basis of the Agreement. Consequently, Council acts which had to be adopted by a qualified majority were adopted if they had received at least 44 votes. Logically, acts adopted by the Council in this area were not applicable to the United Kingdom.

Undoubtedly the Agreement had major implications for social policy in general and for equal treatment between men and women in particular. In Article 117 of the EEC Treaty, only the Member States aimed to improve living and working conditions. In Article 1 of the Agreement, however, the Community and the Member States undertook to achieve various social policy objectives. These objectives went further than those specified at Articles 2 and 117 of the EEC Treaty. But the Amsterdam Treaty resolved this problem by incorporating the Social Protocol in the Treaty itself.

Today the new Article 136 (former Article 117) sets its sights on new objectives: promoting employment, improving living and working conditions, proper social protection, dialogue between management and labour, developing human resources and combating exclusion. Moreover, *'the Community and the Member States shall implement measures which take account of the diverse forms of national practices ... and the need to maintain the competitiveness of the Community economy'*.

However, it only alludes to the fundamental principles of the Community Charter of Fundamental Social Rights, without explicitly including them. The new Article 136 states: *'The Community and*

the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers ...'

3.2.2. The new Article 141 of the Amsterdam Treaty

With regard to equal pay, the new Article 141 (former Article 119) of the Amsterdam Treaty incorporates Article 6 of the Agreement on Social Policy, extending the principle of equal pay to equal pay for work of equal value, at Paragraph 1 of the article. Paragraph 1 of Article 141 therefore reads: *'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or **work of equal value** is applied'*.

It should be noted that the Commission had already, in the code of conduct concerning the application of equal pay for work of equal value¹¹², introduced this principle by reference to former Article 119 and Directive 75/117/EEC of 1975 on equal pay, which recognized this concept. In addition, the European Parliament resolution on the Memorandum on equal pay for work of equal value¹¹³ advocated extending Article 119(1) of the EEC Treaty to include the concept of equal pay for work of equal value.

Nonetheless, Parliament regretted that the new Article 141 did not go beyond the area of employment to encompass all the aspects of the policy of equality between men and women. The Committee on Women's Rights, in its opinion on the draft Amsterdam Treaty of 11 September 1997¹¹⁴, hoped that *'Article 119, as it is now drafted, can be extended through a broad interpretation of the word "occupation" in paragraph 3, to cover all areas of women's lives including work, politics and the family'*.

3.3. Extension of the codecision procedure to the area of equality between men and women

Article 141(3) of the new Amsterdam Treaty represents a real step forward as it provides a new legal basis for implementing equal opportunities and equal treatment for men and women. This article introduces the codecision procedure (pursuant to the new Article 251 of the Amsterdam Treaty, incorporating Article 189b of the Maastricht Treaty) for adopting measures to implement equality between men and women. This makes equality policy more democratic as Parliament's role becomes more important.

With regard to the codecision procedure, this begins after Parliament has delivered its opinion on a Commission proposal (the Council can only amend it unanimously). Following this opinion, the Council may, by a qualified majority, adopt the proposed act by a simplified proceeding at first reading, if it accepts all Parliament's amendments or if Parliament has not proposed any. Otherwise, the Council adopts its opinion, which is known as a 'common position'. This position is then referred back to Parliament at second reading. Parliament then has three months to choose between four options: (a) not to give an opinion, (b) to adopt the proposal, (c) to reject the proposal, (d) to amend the proposal. In the case of (a) and (b), the Council can then finally adopt the act.

¹¹² Op. cit., Footnote 17.

¹¹³ Op. cit., Footnote 16.

¹¹⁴ Opinion of the Committee on Women's Rights on the draft Treaty of Amsterdam, 11 September 1997, PE 223.233/fin., not yet adopted in the plenary.

If Parliament rejects the proposal and also rejects the common position, by an absolute majority of its members, the proposal is said to be abandoned and not adopted. If Parliament decides to amend the proposal, the amendments are forwarded to the Council after the Commission has given its opinion. If the Council adopts all Parliament's amendments within three months of receiving them, the act is considered as definitively adopted. If not, the procedure states that it must be referred to the Conciliation Committee within six weeks.

This committee is made up of members of the Council (or their representatives) and an equal number of Members of the European Parliament. Its task is to reach an agreement on a joint text after considering the common position and Parliament's amendments. There are then three possibilities: (a) the Conciliation Committee reaches an agreement within six weeks, the joint text must then be adopted by the Council by a qualified majority (except in the areas where unanimity is required), and by Parliament by a simple majority for the act to be considered finally adopted; (b) one of the Institutions does not adopt the joint text: the proposal is deemed not adopted; (c) if the Conciliation Committee does not reach an agreement, the act is considered not adopted.

The periods of three months and six weeks provided by the codecision procedure may be extended by maximum periods of one month and two weeks respectively, on the initiative of Parliament or the Council. Article 141 has therefore become, through the use of the codecision procedure, a legal base for adopting measures aiming to ensure equality between men and women in the workplace.

3.4. Implementation of positive discrimination in favour of women in the Amsterdam Treaty

3.4.1. The foundations of positive discrimination in the Agreement on Social Policy

The principle of equal treatment formed part of Article 6 of the Agreement. This article repeated the text of Article 119 of the EEC Treaty. It stated that:

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

2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

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

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

However, it added a third paragraph, as follows: *'This article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.'* The agreement therefore clearly authorized positive discrimination and set no limits.

Directive 76/207 is concerned with positive discrimination. It deals in particular with measures to protect pregnant women (Article 2(3)) and to promote equal opportunities (Article 2(4)). Positive discrimination was therefore only authorized in areas where it could be clearly established that in reality, unequal treatment was the norm.

As early as 1984 the Council had adopted a recommendation calling on the Member States to adopt positive measures in favour of women¹¹⁵. The Council proposed that Member States should encourage women to apply for responsible positions and, at least in State enterprises, that they should recruit more women. The Member States should also encourage private enterprise to follow their example.

Although the Court of Justice accepted the principle of positive discrimination on the basis of Article 2(4) of the directive on equal treatment, it has scrupulously ensured that the principle remains within the prescribed limits.

In its judgment of 25 October 1988¹¹⁶ *Commission of the European Communities v French Republic*, the Court decreed that Article 2(4) should be interpreted to the effect that it is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality.

With regard in particular to jobs where women are under-represented, positive discrimination should enable jobs to be more evenly allocated between the sexes. Parliament considered that when several candidates were of equal merit and one of the two sexes was under-represented in the job in question, preference should be given to the candidate of the under-represented sex. Parliament therefore proposed to include the concept of 'positive action measures' in its Staff Regulations.

Parliament has long held the opinion that the European Institutions should set an example and take positive action measures. Thus in 1997 it adopted a legislative resolution on the amended proposal for a Council regulation amending the Staff Regulations of officials of the European Communities¹¹⁷:

1. Officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect, to race, political, philosophical or religious beliefs, sex or sexual orientation.

2. Within the powers conferred on them by the Treaty establishing the European Community, the institutions shall determine, after consulting the Staff Regulations Committee and the Equal Opportunities Committee, measures and actions to promote equal opportunities for female and male officials in the areas covered by these Staff Regulations, and shall adopt the appropriate provisions, notably to redress such de facto inequalities as hamper opportunities for women in these areas, in particular through positive action programmes.'

The Court of First Instance has generally taken the same view as the Court of Justice. Thus, the Court of First Instance cancelled the promotion by Parliament of a female candidate, as a male candidate was able to establish that the woman was not suitably qualified for the job. The fact that

¹¹⁵ Recommendation 84/635/EEC, OJ L 331, 19.12.1984, p. 34.

¹¹⁶ *Commission of the European Communities v France*, CJEC 25 October 1988, C 312/86, ECR 1988, p. 6315.

¹¹⁷ Legislative resolution embodying the opinion of the European Parliament on the amended proposal for a Council Regulation (EURATOM, ECSC, EC) amending the Staff Regulations of officials and conditions of employment of other servants of the European Communities in respect of equal treatment of men and women, OJ C 85, 17.3.1997, pp. 128 to 133.

of the 21 posts in that grade, only three were held by women, could not justify the woman's promotion¹¹⁸.

The Court of Justice also took the view that, in the context of improving the status of women, it was no longer prepared to turn a blind eye to national laws which discriminated against men¹¹⁹. Discrimination against men does not in fact contribute to encouraging equal treatment, which remains the ultimate objective.

The Court also took a hostile attitude to regulations which aimed in very general terms to promote women's rights. Thus the Court held that a national law which allowed collective agreements to retain general clauses on specific rights for women overstepped the boundaries of positive discrimination. Although an article of this kind seemed at first sight to apply the principle of positive discrimination, and in certain areas could possibly encourage equal treatment, the Court feared that it would once more open the door to different treatment for men and women¹²⁰.

Positive action measures were therefore authorized under Articles 2(3) and 2(4) of the Directive on equal treatment. This was, however, only a limited application of the principle of positive discrimination. A new legal basis was evidently needed if an effective positive discrimination policy was to be conducted. Article 6 of the Agreement on Social Policy met this need: for the first time, unlimited positive discrimination was authorized.

Parliament had some criticism of the wording of Article 6(3)¹²¹, which was added to the article guaranteeing the principle of equal pay for equal work. It seemed then that, in the context of positive discrimination, women could be paid more than men for the same work. This interpretation was contrary to Article 119 of the Treaty of Rome, which could not be the intention of Article 6(3). Parliament noted, however, that Article 119 had been interpreted more widely and that its field of application went far beyond the simple principle of equal pay. It hoped that, similarly, positive discrimination would also - and above all - have an effect in other areas.

3.4.2. The implications of the Kalanke judgment

The Kalanke judgment in October 1995¹²², however, questioned the lack of legal clarity on issues of equality and equal opportunities.

In this judgment the Court found that the city of Bremen's positive measures with regard to recruitment and promotion contravened Article 2(4) of Directive 76/207/EEC on equal treatment which states that *'This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).'* which are *'access to employment, including*

¹¹⁸ Frederiksen v European Parliament, Court of First Instance, 11 December 1991, T 169/89, ECR 1991, p. T-1403.

¹¹⁹ Caisse d'assurances sociales pour travailleurs indépendants 'Integrity' v Nadine Rouvroy, CJEC 20 November 1990, op. cit., Footnote 82.

¹²⁰ Commission v France, CJEC 25 October 1988, op. cit., Footnote 116.

¹²¹ Opinion of the Committee on Women's Rights on the Intergovernmental Conference in the framework of the European Parliament's strategy for European Union; draftsman: Mrs Domingo Segarra, March 1992, PE 156.165.

¹²² Op. cit., Footnote 21.

promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security.'

This article could therefore be interpreted as authorizing positive action measures. The question in this case was whether this last provision of the directive covered the law of the Land of Bremen on equal treatment of men and women in the public service, which states that in the case of an appointment or promotion, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented, there being under-representation if women do not make up at least half of the staff in the relevant personnel group within a department.

As there were two candidates of different sex with the same qualifications, priority had been given to the female candidate by virtue of the above law. The Court stated that Article 2(4) had to be interpreted strictly: *'National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive'*.

The Court therefore stated that the absolute and unconditional nature of law means that this policy goes beyond promoting equal opportunities.

The Commission then had to consider the appropriate provisions to respect this judgment, while preserving and even improving the possibility of 'positive action' for women in the context of implementing the principle of equal opportunities for men and women¹²³.

It embarked on three initiatives:

(a) It **issued a communication**¹²⁴ which explains the judgment in that it prohibits rigid quotas for women's employment, other positive action measures being not only authorized but encouraged, as they are not considered discriminatory.

(b) It proposed **amending Directive 76/207/EEC**¹²⁵ in order to state clearly that measures envisaged by the provision at Article 2(4) of the directive included action to give priority in recruitment or promotion to the under-represented sex, provided that the employer was still able to assess the particular circumstances of an individual case¹²⁶. Consequently, the proposal for a directive amending Directive 76/207/EEC replaces Article 2(4) of Directive 76/207/EEC by the following: *'This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-*

¹²³ See Agence Europe, 18 October 1996, p. 6.

¹²⁴ COM(96)88 final.

¹²⁵ Proposal for a Council directive amending 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 C 179, 22.6.1996, p.8.

¹²⁶ Commissioner Padraig Flynn said that it was *'crucial to reaffirm the need to use, when appropriate, "positive action" measures to promote equal opportunities for men and women in particular by removing existing factors of inequality which affect the opportunities of the under-represented sex in the employment area'*, see Agence Europe No 6697, Thursday, 28 March 1996, p. 13.

represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case’.

(c) It proposed **an amendment to the Treaty** to include in the section on equal opportunities a reference to the possibility of positive measures. Consequently, the inclusion of Paragraph 4 at Article 141 is important as it refers for the first time to positive measures, although it does not use this precise expression. The new Article 141(4) states: *‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers’*.

This article does not, however, incorporate Article 6(3) of the Agreement on Social Policy which referred to *‘measures providing for specific advantages in order to make it easier for women to pursue a vocational activity’*.

Moreover, this article is accompanied by a declaration to be included in the Final Act stating that the Member States undertake to improve the situation of women in working life¹²⁷.

It is true that this declaration has no legal force, but the positive measures in question aim to resolve the problem of structural discrimination of which women in particular are victims. This declaration also aims to clarify the purpose of the new paragraph 4 of Article 141, to eliminate structural discrimination affecting women and to enable the Court to exercise more effective control in order to authorize the adoption of measures to this end.

Moreover, in its resolution on the first triennial Commission report on economic and social cohesion¹²⁸ Parliament pointed out that *‘effective equality between the sexes is an essential feature of social and economic cohesion; calls, therefore, on the Commission to consider the possibility of drawing up a Community initiative programme which will indicate, promote and test practical arrangements in the planning and management of the Funds so as to bridge this gap’*.

3.4.3. The legal controversy provoked by the recent Marschall judgment

On 11 November 1997 the Court gave its verdict in the Marschall case C-409/95¹²⁹ which under certain conditions authorizes giving priority to women in recruitment to some jobs if the possibility of a different decision is safeguarded. In this judgment the Court refined the Kalanke judgment and clarified its scope.

In the Marschall case, the judges concluded that giving priority to women in recruitment with the intention of restoring the balance between the sexes is in line with Directive 76/207/EEC, on condition that a preference for the male candidate is not excluded a priori. It is therefore essential to assess each applicant objectively. The case was concerned with a German teacher, Mr Hellmut Marschall, who worked in the Land of Nordrhein- Westfalen and applied for promotion to a job in a school in the town of Schwerte. The competent authority did not consider his application as it planned to recruit a woman. The teacher appealed against this decision which had been taken under

¹²⁷ Annex X.

¹²⁸ Minutes of the sitting of 19 November 1997, PE 264.019.

¹²⁹ Hellmut Marschall v Land Nordrhein-Westfalen, CJEC C-409/95, 11 November 1997, not yet published.

a provision of the civil service regulations of the Land which gave priority to women if they were under-represented. This priority for women - if they had equal skills, competence and professional experience - applied unless *'reasons specific to an individual (male) candidate tilt the balance in his favour'*.

The Court pointed out that by providing for this exception to the policy of giving priority to women the civil service rules ensured *'sufficient flexibility'*. This still made it possible to prefer the male candidate on the basis of traditional promotion criteria. When candidates were similarly qualified, there was still a tendency for men to be promoted rather than women. Some prejudices and stereotypes obscured the abilities of women in the world of work.

The Court recognized this problem and authorized positive discrimination policies for women as long as they were not automatic. It was therefore imperative that all applications were assessed objectively and that the criteria which allowed a male applicant to be appointed did not discriminate against women. The judgment is worded as follows: *'A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of 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, provided that:*

- *in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and*
- *such criteria are not such as to discriminate against the female candidates'*.

Following these two judgments the question arose whether there was actually a need to amend Directive 76/207/EEC and if so in what way, as in the meantime the Amsterdam Treaty had been signed by the Member States. The Committee on Women's Rights organized a public hearing on 22 January 1998¹³⁰ on the Marschall judgment in which Mrs Ilse Ridder-Melchers, Minister of Nordrhein-Westfalen for equal rights between men and women, and Mrs Vogel-Polsky, Professor at the Free University of Brussels, took part. The aim of this hearing was to prepare Parliament's response with regard to the proposal to amend Directive 76/207/EEC on equal treatment for men and women.

Mrs Ilse Ridder-Melchers considered that the Marschall judgment represented *'a historic decision for European women'*. She considered that the judgment went further than the provisions in force in Nordrhein-Westfalen. In the face of structural discrimination, measures were needed to restore balance to the situation, including positive actions in favour of women. Directive 76/207/EEC had done much to improve the situation of women. The directive and the Marschall ruling could be the basis for effective instruments to develop equal opportunities. Mrs Ridder-Melchers was opposed to any modification of the directive, especially in the present context of high unemployment, affecting more women than men, which made the quota system all the more justified.

¹³⁰ See Agence Europe No 7147, Wednesday 18 January 1998, p. 12.

Mrs Vogel-Polsky, however, was less optimistic than Mrs Ridder-Melchers as she considered that the Marschall decision was directly in line with the Kalanke judgment. The Marschall judgment had not settled the problem of the contradiction between a fundamental right (equal treatment) and an individual right (positive measures).

Consequently, only the new provisions of the Amsterdam Treaty at Article 141(4) would be able to respond satisfactorily to promoting equal opportunities through introducing positive measures, as this was a 'positive mandate', objectively given to national or Community political institutions to enable them collectively to take positive action to achieve the aim of the fundamental right. In particular, Mrs Vogel-Polsky underlined the importance of the new Articles 2 and 3 in the Amsterdam Treaty which for the first time incorporated in the Community's legal base equality between men and women as a Community objective. In fact, Article 141(4) was only concerned with the area of work while Articles 2 and 3 went further and could be applied more widely, reflecting the concept of 'mainstreaming'. Moreover, Parliament in its resolution on the Commission's annual report on equal opportunities for women and men in the European Union - 1996¹³¹ had used the opportunity to point out the importance of using positive measures to promote women and applying the idea of mainstreaming. It considered that *'mainstreaming gender and equal opportunities should go hand in hand with positive action to promote women where they are particularly disadvantaged'*¹³².

Mrs Vogel-Polsky considered it would be wiser to await ratification of the Amsterdam Treaty as the directive, even if amended, would not be able to meet the requirements for promoting women as it considered positive action as a derogation from equal treatment.

3.5. The social dialogue

The incorporation almost unchanged in the new Amsterdam Treaty of the Protocol on Social Policy will oblige the Commission to consult the two sides of industry before submitting any proposal in the area of social policy. The new Articles 136 to 143, formerly Articles 117 to 120, contain the former Agreement on Social Policy. In particular Article 139, the former Article 118b, aims to promote dialogue between management and labour and to involve them in developing social policy. Management and labour are entitled to be consulted by the Commission, both on the line which Community social policy may take and on the substance of any planned Commission proposal. Dialogue between management and labour may lead, if they wish, to contractual relations, including agreements (Article 139(1)). With regard to the principle of equal treatment for men and women, this means that management and labour may, if they take the initiative, play a part in directing social policy towards greater equality. Nonetheless, the Commission set several conditions in the agreement which management and labour must satisfy if they are to take part in the social dialogue at Community level.

- There must be organizations established on an interprofessional, sectoral or category basis at European level.

¹³¹ Op. cit., Footnote 101.

¹³² Paragraph 7 of the above resolution.

- They must be made up of national organizations which are in turn full social partners in the Member States and empowered to conclude agreements.
- They must have a structure sufficient to enable them to participate effectively in the social dialogue.

Despite these exacting requirements, the Commission had already drawn up a list of organizations which meet these criteria (these include Unice, the Union of Industrial and Employers Confederations of Europe; ETUC, the European Trade Union Confederation; the European Confederation of Public Enterprises and a large number of more specialized organizations).

The two sides of industry hoped that through dialogue, a higher profile would be given to European social policy, and current social problems would eventually be handled at European level.

Article 139 of the Amsterdam Treaty now provides that agreements concluded by the two sides of industry may be implemented according to procedures and practices specific to management and labour and the Member States or, in matters covered by the new Article 137 (former Article 118 and part of 118a), at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

With regard to equality between men and women (Article 137(1)), the Council is to act by a qualified majority (Article 137(2)), in accordance with the procedure referred to in Article 251 (former Article 189b establishing the codecision procedure). Article 138 provides that the Commission shall have the task of promoting the consultation of management and labour at Community level and must consult them before submitting proposals in the social policy field. The duration of the procedure may in principle not exceed nine months, but it can be extended by joint agreement of management and labour and may then evolve into the new procedure under Article 139 (former Article 118b), referred to above.

The new articles on social policy thus give much more power to management and labour, which will henceforward be involved in all social policy matters, with regard to implementation of these policies but also more particularly with regard to equality between men and women. Here, too, Parliament will have a greater role to play through the codecision procedure which is to be used¹³³. Parliament's role, however, is still limited as the Commission will not have the power to change the substance of an agreement concluded by management and labour.

In addition, under the new Title VIII on employment, Article 130 establishes an employment committee with advisory status to promote coordination between Member States on employment and labour market policies. To do this, it will monitor the employment situation and may formulate opinions, at the request of either the Council or the Commission or on its own initiative. Above all, in fulfilling its mandate, it must consult management and labour.

¹³³ According to the opinion of the Economic and Social Committee on the European Council on Employment: *'an important step in this direction has been taken by involving not only the Council, the Parliament and the Commission, but also the social partners, the Economic and Social Committee and the Committee of the Regions, as well as attributing a reinforced status to the Employment and Labour Market committee'*, OJ C 355, 21.11.1997, p. 64.

4. CONCLUSION

As the Amsterdam Treaty has not yet been ratified, it is difficult today to predict the next steps which are likely to be taken with regard to equality between men and women. What is certain however is that women's rights have a higher profile in the Amsterdam Treaty because new, more solid and more extensive legal bases have been established.

The new Treaty takes a more general view of equality between men and women, in line with the idea of mainstreaming. Women are considered to be on an equal footing with men in all areas, particularly with regard to decision-making. The situation of women must also be protected as a gender issue. Consequently, positive discrimination is officially recognized, even though limited to Article 141(4) (former Article 119) (i.e. to the area of working life). Extension of the codecision procedure will also enable Parliament to make itself heard more effectively to uphold equal treatment for men and women. Incorporation of the Protocol and Agreement on Social Policy in the main body of the Treaty will ensure that all measures concerned with equality between men and women will apply fully to all the Member States, including the United Kingdom.

These new provisions of the Amsterdam Treaty will enable women's rights to be treated definitively as a fundamental right, to be generally respected in the same way as race or religion; this could lead, after International Women's Day on 8 March 1998, to a declaration of International Women's Year¹³⁴.

¹³⁴ The years 1997 and 1998 were recognized as anti-racism and xenophobia years and 1999 has been declared the World Year to combat violence against women.

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2. **Gabrielle Defrenne v Sabena**, CJEC 22 April 1976, C 43/75, ECR 1976, p. 455.
3. **Worringham & Humphreys v Lloyds Bank Ltd.**, CJEC 11 March 1981, C 69/80, ECR 1981, p. 767.
4. **Jenkins v Kingsgate**, CJEC 31 March 1981, C 96/80, ECR 1981, p. 911.
5. **Garland v British Rail Engineering Ltd.**, CJEC 9 February 1982, C 12/81, ECR 1982, p. 359.
6. **Bilka Kaufhaus GmbH v Weber von Hertz**, CJEC 13 May 1986, C 170/84, ECR 1986, p. 1607.
7. **Douglas Harvey Barber v Guardian Exchange Assurance Group**, CJEC 17 May 1990, C 262/88, ECR 1990, p. 1889.
8. **Maria Kowalska v Freie und Hansestadt Hamburg**, CJEC 17 June 1990, C 33/89, ECR 1990, p. 2591.
9. **Dekker v Stichting Vormingscentrum voor Jong Volwassenen**, CJEC 8 November 1990, C 177/88, ECR 1990, p. 3941.
10. **Caisse d'assurances sociales pour travailleurs indépendants "Integrity" v Nadine Rouvroy**, CJEC 20 November 1990, C 373/89, ECR 1990, p. 4243.
11. **Helga Nimz v Freie und Hansestadt Hamburg**, CJEC 7 February 1991, C 184/89, ECR 1991, p. 297.
12. **Cotter, Mc Dermott v Minister for Social Welfare**, CJEC 13 March 1991, C 377/89, ECR 1991, p. 1155.
13. **Commission v Belgium**, CJEC 7 May 1991, C 229/89, ECR 1991, p. 2205.
14. **Elsie Rita Johnson v Chief Adjudication Officer**, CJEC 11 July 1991, C 31/90, ECR 1991, p. 3723.
15. **Ministère public v Alfred Stoeckel**, CJEC 25 July 1991, C 345/89, ECR 1991, p. 4047.
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17. **The Queen v Secretary of State for Social Security, ex parte Florence Rose Smithson**, CJEC C-243/90 4 February 1992, ECR 1992, p. I-0467.

18. **Sonia Jackson and Patricia Cresswell v Chief Adjudication Officer**, CJEC C-63/91 and C-64/91 16 July 1992, ECR 1992, p. I-4737.
19. **Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank**, CJEC 19 November 1992, C 226/91, ECR 1992, p. 5963.
20. **Commission v Belgium**, CJEC 17 February 1993, C 173/91, ECR 1993, p. 693.
21. **Secretary of State for Social Security v Evelyn Thomas**, CJEC 30 March 1993, C 328/91, ECR 1993, p. 1267.
22. **Geraldus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf**, CJEC 6 October 1993, C 109/91, ECR 1993, p. 4939.
23. **Dr. P.M. Enderby v Frenchay Health Authority, Secretary of State for Health**, CJEC 27 October 1993, C 127/92, ECR 1993, p. 5566.
24. **A.M. Van Gemert - Derks v Bestuur van de Nieuwe Industriële Bedrijfsvereniging**, CJEC 27 October 1993, C 337/91, ECR 1993, p. 5464.
25. **Birds Eye Walls Ltd. v Friedel M. Roberts**, CJEC 9 November 1993, C 132/92, ECR 1993, p. 5599.
26. **Michael Moroni v Collo GmbH**, CJEC 14 December 1993, C 110/91, ECR 1993, p. 6609.
27. **David Neath v Hugh Steeper Ltd.**, CJEC 22 December 1993, C 152/91, ECR 1993, p. 6953.
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29. **Carole Louise Webb v EMO Air Cargo (UK) Ltd.**, CJEC C-32/93 14 July 1994, ECR 1994, p.I-3567.
30. **Coloroll Pension Trustees Ltd v James Richard Russell, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group Plc**, CJEC C-200/91 28 September 1994, ECR 1994, p. 4389.
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ANNEXES

A.

**DIRECTIVES ON EQUALITY BETWEEN
WOMEN AND MEN**

ANNEX I

**Council Directive 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
(75/117/EEC)**

COUNCIL DIRECTIVE

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**

(75/117/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES -

Having regard to the Treaty establishing the European Economic Community, in particular Article 100 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament¹³⁵;

Having regard to the Opinion of the Economic and Social Committee¹³⁶.

Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market;

Whereas it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions;

Whereas the Council resolution of 21 January 1974¹³⁷ concerning a social action programme, aimed at making it possible to harmonize living and working conditions while the improvement is being maintained and at achieving a balanced social and economic development of the Community, recognized that priority should be given to action taken on behalf of women as regards access to employment and vocational training and advancement, and as regards working conditions, including pay;

Whereas it is desirable to reinforce the basic laws by standards aimed at facilitating the practical application of the principle of equality in such a way that all employees in the Community can be protected in these matters;

Whereas differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of 30 December 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay.

HAS ADOPTED THIS DIRECTIVE:

Article 1

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

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

Article 2

Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 3

Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.

¹³⁵OJ No C 55, 13.5.1974, p.43.

¹³⁶OJ No C 88, 26.7.1974, p. 7.

¹³⁷OJ No C 13, 12.2.1974, p. 1.

Article 4

Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.

Article 5

Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.

Article 6

Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.

Article 7

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.

Article 8

1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within one year of its notification and shall immediately inform the Commission thereof.
2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 9

Within two years of the expiry of the one-year period referred to in Article 8, Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 10

This Directive is addressed to the Member States.

Done at Brussels, 10 February 1975.

*For the Council
The President*

G. FITZGERALD

ANNEX II

**Council Directive 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
(76/207/EEC)**

COUNCIL DIRECTIVE

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

(76/207/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament¹³⁸,

Having regard to the opinion of the Economic and Social Committee¹³⁹,

Whereas the Council,

in its resolution of 21 January 1974 concerning a social action programme¹⁴⁰, included among the priorities action for the purpose of achieving equality between men and women as regards access to employment and vocational training and promotion and as regards working conditions, including pay;

Whereas, with regard to pay, the Council adopted on 10 February 1975 Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women¹⁴¹;

Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions also appears to be necessary; whereas, equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered; whereas the Treaty does not confer the necessary specific powers for this purpose;

Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments,

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."
2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

¹³⁸OJ No C 111, 20.5.1975, p. 14.

¹³⁹OJ No C 286, 15.12.1975, p. 8.

¹⁴⁰OJ No 13, 12.2.1974, p. 1.

¹⁴¹OJ No L 45, 19.2.1975, p. 19.

2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.
3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.
4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).

Article 3

1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.
2. To this end, Member States shall take the measures necessary to ensure that:
 - (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
 - (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
 - (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.

Article 4

Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
- (c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.

Article 5

1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
2. To this end, Member States shall take the measures necessary to ensure that:
 - (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
 - (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;
 - (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.

Article 6

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.

Article 7

Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 8

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.

Article 9

1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof.

However, as regards the first part of Article 3 (2) (c) and the first part of Article 5 (2) (c), Member States shall carry out a first examination and if necessary a first revision of the laws, regulations and administrative provisions referred to therein within four years of notification of this Directive.

2. Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.
3. Member States shall also communicate to the Commission the texts of laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 10

Within two years following expiry of the 30-month period laid down in the first subparagraph of Article 9 (1), Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 9 February 1976.

For the Council

The President

G. THORN

ANNEX III

**Council Directive of 19 December 1978 on the
progressive implementation of the principle of equal
treatment for men and women in matters of social security
(79/7/EEC)**

COUNCIL DIRECTIVE

of 19 December 1978

**on the progressive implementation of the principle of equal treatment for men
and women in matters of social security**

(79/7/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES -

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission¹⁴²,

Having regard to the opinion of the European Parliament¹⁴³,

Having regard to the opinion of the Economic and Social Committee¹⁴⁴,

Whereas Article 1(2) of 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 conditions¹⁴⁵ provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application; whereas the Treaty does not confer the specific powers required for this purpose;

Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes;

Whereas the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity; whereas, in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as 'the principle of equal treatment'.

Article 2

This Directive shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons.

Article 3

1. This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

- sickness,
- invalidity,
- old age,

¹⁴²OJ No C 34, 11.2.1997, p. 3.

¹⁴³OJ No C 299, 12.12.1977, p. 3.

¹⁴⁴OJ No C 180, 28.7.1977, p. 36.

¹⁴⁵OJ No L 39, 14.2.1976, p. 40.

- accidents at work and occupational diseases,
 - unemployment;
- (b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).
2. This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a).
3. With a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 4

1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:
- the scope of the schemes and the conditions of access thereto,
 - the obligation to contribute and the calculation of contributions,
 - the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.
2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.

Article 5

Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

Article 6

Member States shall introduce into their legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Article 7

1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:
- (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
 - (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
 - (c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
 - (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependant wife;
 - (e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.
2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof.

2. Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7(2).

They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.

Article 9

Within seven years of notification of this Directive, Member States shall forward all information necessary to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council and to propose such further measures as may be required for the implementation of the principle of equal treatment.

Article 10

This Directive is addressed to the Member States.

Done at Brussels, 19 December 1978.

For the Council

The President

H.-D. GENSCHER

ANNEX IV

**Council Directive of 24 July 1986 on the
implementation of the principle of equal treatment
for men and women in occupational social security schemes
(86/378/EEC)**

**amended by the Directive of 20 December 1996
(96/97/EC)**

COUNCIL DIRECTIVE

of 24 July 1986

**on the implementation of the principle of equal treatment for men and women
in occupational social security schemes**

(86/378/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 100 and 235 thereof,

Having regard to the proposal from the Commission¹⁴⁶,

Having regard to the opinion of the European Parliament¹⁴⁷,

Having regard to the opinion of the Economic and Social Committee¹⁴⁸,

Whereas the Treaty provides that each Member State shall ensure the application of the principle that men and women should receive equal pay for equal work; whereas 'pay' should be taken to mean the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer in respect of his employment;

Whereas, although the principle of equal pay does indeed apply directly in cases where discrimination can be determined solely on the basis of the criteria of equal treatment and equal pay, there are also situations in which implementation of this principle implies the adoption of additional measures which more clearly define its scope;

Whereas Article 1 (2) of 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 conditions¹⁴⁹ provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application; whereas the Council adopted to this end Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁵⁰;

Whereas Article 3 (3) of Directive 79/7/EEC provides that, with a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application;

Whereas the principle of equal treatment should be implemented in occupational social security schemes which provide protection against the risks specified in Article 3 (1) of Directive 79/7/EEC as well as those which provide employees with any other consideration in cash or in kind within the meaning of the Treaty;

Whereas implementation of the principle of equal treatment does not prejudice the provisions relating to the protection of women by reason of maternity,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The object of this Directive is to implement, in occupational social security schemes, the principle of equal treatment for men and women, hereinafter referred to as 'the principle of equal treatment'.

¹⁴⁶OJ No C 134, 21.5.1983, p.7.

¹⁴⁷OJ No C 117, 30.4.1984, p. 169.

¹⁴⁸OJ No C 35, 9.2.1984, p.7.

¹⁴⁹OJ No L 39, 14.2.1976, p.40.

¹⁵⁰OJ No L 6, 10.1.1979, p. 24.

Article 2

1. 'Occupational social security schemes' means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.
2. This Directive does not apply to:
 - (a) individual contracts,
 - (b) schemes having only one member,
 - (c) in the case of salaried workers, insurance schemes offered to participants individually to guarantee them:
 - either additional benefits, or
 - a choice of date on which the normal benefits will start, or a choice between several benefits.

Article 3

This Directive shall apply to members of the working population including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, and to retired and disabled workers.

Article 4

This Directive shall apply to:

- (a) occupational schemes which provide protection against the following risks:
 - sickness,
 - invalidity,
 - old age, including early retirement,
 - industrial accidents and occupational diseases,
 - unemployment;
- (b) occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits are accorded to employed persons and thus constitute a consideration paid by the employer to the worker by reason of the latter's employment.

Article 5

1. Under the conditions laid down in the following provisions, the principle of equal treatment implies that there shall be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status, especially as regards:
 - the scope of the schemes and the conditions of access to them; - the obligation to contribute and the calculation of contributions; - the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.
2. The principle of equal treatment shall not prejudice the provisions relating to the protection of women by reason of maternity.

Article 6

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family for:
 - (a) determining the persons who may participate in an occupational scheme;
 - (b) fixing the compulsory or optional nature of participation in an occupational scheme;

- (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
 - (d) laying down different rules, except as provided for in subparagraphs (h) and (i), for the reimbursement of contributions where a worker leaves a scheme without having fulfilled the conditions guaranteeing him a deferred right to long-term benefits;
 - (e) setting different conditions for the granting of benefits of restricting such benefits to workers of one or other of the sexes;
 - (f) fixing different retirement ages;
 - (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
 - (h) setting different levels of benefit, except insofar as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of benefits designated as contribution-defined;
 - (i) setting different levels of worker contribution;
setting different levels of employer contribution in the case of benefits designated as contribution-defined, except with a view to making the amount of those benefits more nearly equal;
 - (j) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in subparagraphs (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.
2. Where the granting of benefits within the scope of this Directive is left to the discretion of the scheme's management bodies, the latter must take account of the principle of equal treatment.

Article 7

Member States shall take all necessary steps to ensure that:

- (a) provisions contrary to the principle of equal treatment in legally compulsory collective agreements, staff rules of undertakings or any other arrangements relating to occupational schemes are null and void, or may be declared null and void or amended;
- (b) schemes containing such provisions may not be approved or extended by administrative measures.

Article 8

- 1. Member States shall take all necessary steps to ensure that the provisions of occupational schemes contrary to the principle of equal treatment are revised by 1 January 1993.
- 2. This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 9

Member States may defer compulsory application of the principle of equal treatment with regard to:

- (a) determination of pensionable age for the purposes of granting old-age or retirement pensions, and the possible implications for other benefits:
 - either until the date on which such equality is achieved in statutory schemes,
 - or, at the latest, until such equality is required by a directive.
- (b) survivors' pensions until a directive requires the principle of equal treatment in statutory social security schemes in that regard;
- (c) the application of the first subparagraph of Article 6 (1) (i) to take account of the different actuarial calculation factors, at the latest until the expiry of a thirteen-year period as from the notification of this Directive.

Article 10

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves injured by failure to apply the principle of equal treatment to pursue their claims before the courts, possibly after bringing the matters before other competent authorities.

Article 11

Member States shall take all the necessary steps to protect worker against dismissal where this constitutes a response on the part of the employer to a complaint made at undertaking level or to the institution of legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

1. Member States shall bring into force such laws, regulations and administrative provisions as are necessary in order to comply with this Directive at the latest three years after notification thereof¹⁵¹. They shall immediately inform the Commission thereof.
2. Member States shall communicate to the Commission at the latest five years after notification of this Directive all information necessary to enable the Commission to draw up a report on the application of this Directive for submission to the Council.

Article 13

This Directive is addressed to the Member States.

Done at Brussels, 24 July 1986.

For the Council

The President

A. CLARK

¹⁵¹This Directive was notified to the Member States on 30 July 1986.

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**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission¹⁵²,

Having regard to the opinion of the European Parliament¹⁵³,

Having regard to the opinion of the Economic and Social Committee¹⁵⁴,

Whereas Article 119 of the Treaty provides that each Member State shall ensure the application of the principle that men and women should receive equal pay for equal work; whereas 'pay' should be taken to mean the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer in respect of his employment; Whereas, in its judgement of 17 May 1990, in Case 262/88: Barber v. Guardian Royal Exchange Assurance Group¹⁵⁵, the Court of Justice of the European Communities acknowledges that all forms of occupational pension constitute an element of pay within the meaning of Article 119 of the Treaty;

Whereas, in the abovementioned judgment, as clarified by the judgment of 14 December 1993 (Case C-110/91: Moroni v. Collo GmbH)¹⁵⁶, the Court interprets Article 119 of the Treaty in such a way that discrimination between men and women in occupational social security schemes is prohibited in general and not only in respect of establishing the age of entitlement to a pension or when an occupational pension is offered by way of compensation for compulsory retirement on economic grounds;

Whereas, in accordance with Protocol 2 concerning Article 119 of the Treaty annexed to the Treaty establishing the European Community, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its judgments of 28 September 1994¹⁵⁷ (Case C-57/93: Vroege v. NCIV Instituut voor Volkshuisvesting BV and Case C-128/93: Fisscher v. Voorhuis Hengelo BV), the Court ruled that the abovementioned Protocol did not affect the right to join an occupational pension scheme, which continues to be governed by the judgment of 13 May 1986 in Case 170/84: Bilka-Kaufhaus GmbH v. Hartz¹⁵⁸, and that the limitation of the effects in time of the judgment of 17 May 1990 in Case C-262/88: Barber v. Guardian Royal Exchange Assurance Group does not apply to the right to join an occupational pension scheme; whereas the Court also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice; whereas the Court has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned;

Whereas the exclusion of workers on the grounds of the nature of their work contracts from access to a company or sectorial social security scheme may constitute indirect discrimination against women;

Whereas, in its judgment of 9 November 1993 (Case C-132/92: Birds Eye Walls Ltd v. Friedel M. Roberts)¹⁵⁹, the Court has also specified that it is not contrary to Article 119 of the Treaty, when calculating the amount of a bridging pension which is

¹⁵² OJ No C 218, 23.8.1995, p. 5.

¹⁵³ Opinion delivered on 12 November 1996 (OJ No C 362, 2.12.1996).

¹⁵⁴ OJ No C 18, 22.1.1996, p. 132.

¹⁵⁵ [1990] ECR I-1889.

¹⁵⁶ [1993] ECR I-6591.

¹⁵⁷ [1994] ECR I-4541 and [1994] I-4583, respectively.

¹⁵⁸ [1986] ECR I-1607.

¹⁵⁹ [1993] ECR I-5579.

paid by an employer to male and female employees who have taken early retirement on grounds of ill health and which is intended to compensate, in particular, for loss of income resulting from the fact that they have not yet reached the age required for payment of the State pension which they will subsequently receive and to reduce the amount of the bridging pension accordingly, even though, in the case of men and women aged between 60 and 65, the result is that a female ex-employee receives a smaller bridging pension than that paid to her male counterpart, the difference being equal to the amount of the State pension to which she is entitled as from the age of 60 in respect of the periods of service completed with that employer;

Whereas, in its judgment of 6 October 1993 (Case C-109/91: *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*¹⁶⁰) and in its judgments of 14 December 1993 (Case C-110/91: *Moroni v. Collo GmbH*), 22 December 1993 (Case C-152/91: *Neath v. Hugh Steeper Ltd*)¹⁶¹ and 28 September 1994 (Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*)¹⁶², the Court confirms that, by virtue of the judgment of 17 May 1990 (Case C-262/88: *Barber v. Guardian Royal Exchange Assurance Group*), the direct effect of Article 119 of the Treaty may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law;

Whereas, in its abovementioned judgments (Case C-109/91: *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* and Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*), the Court confirms that the limitation of the effects in time of the Barber judgment applies to survivors' pensions and, consequently, equal treatment in this matter may be claimed only in relation to periods of service subsequent to 17 May 1990, except in the case of those who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law; Whereas, moreover, in its judgments in Case C-152/91 and Case C-200/91, the Court specifies that the contributions of male and female workers to a defined-benefit pension scheme must be the same, since they are covered by Article 119 of the Treaty, whereas inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not to be assessed in the light of that same provision;

Whereas, in its judgments of 28 September 1994¹⁶³ (Case C-408/92: *Smith v. Advel Systems* and Case C-28/93: *Van den Akker v. Stichting Shell Pensioenfonds*), the Court points out that Article 119 of the Treaty precludes an employer who adopts measures necessary to comply with the Barber judgment of 17 May 1990 (C-262/88) from raising the retirement age for women to that which exists for men in relation to periods of service completed between 17 May 1990 and the date on which those measures come into force; on the other hand, as regards periods of service completed after the latter date, Article 119 does not prevent an employer from taking that step; as regards periods of service prior to 17 May 1990, Community law imposed no obligation which would justify retroactive reduction of the advantages which women enjoyed;

Whereas, in its abovementioned judgment in Case C-200/91: *Coloroll Pension Trustees Limited v. Russell and Others*), the Court ruled that additional benefits stemming from contributions paid by employees on a purely voluntary basis are not covered by Article 119 of the Treaty;

Whereas, among the measures included in its third medium-term action programme on equal opportunities for women and men (1991 to 1995)¹⁶⁴, the Commission emphasizes once more the adoption of suitable measures to take account of the consequences of the judgment of 17 May 1990 in Case 262/88 (*Barber v. Guardian Royal Exchange Assurance Group*);

Whereas that judgment automatically invalidates certain provisions of 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 schemes¹⁶⁵ in respect of paid workers;

Whereas Article 119 of the Treaty is directly applicable and can be invoked before the national courts against any employer, whether a private person or a legal person, and whereas it is for these courts to safeguard the rights which that provision confers on individuals;

Whereas, on grounds of legal certainty, it is necessary to amend Directive 86/378/EEC in order to adapt the provisions which are affected by the Barber case-law,

HAS ADOPTED THIS DIRECTIVE:

¹⁶⁰[1993] ECI I-4879.

¹⁶¹[1993] ECR I-6953.

¹⁶²[1994] ECR I-4389.

¹⁶³[1994] ECR I-4435 and [1994] ECR I-4527, respectively.

¹⁶⁴OJ No C 142, 31.5.1991, p.1.

¹⁶⁵OJ No L 225, 12.8.1986, p. 40.

Directive 86/378/EEG shall be amended as follows:

1. Article 2 shall be replaced by the following:

'Article 2

1. "Occupational social security schemes" means schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.
2. This Directive does not apply to:
 - (a) individual contracts for self-employed workers;
 - (b) schemes for self-employed workers having only one member;
 - (c) insurance contracts to which the employer is not a party, in the case of salaried workers;
 - (d) optional provisions of occupational schemes offered to participants individually to guarantee them:
 - either additional benefits, or
 - a choice of date on which the normal benefits for self-employed workers will start, or a choice between several benefits;
 - (e) occupational schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.
3. This Directive does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.'

2. Article 3 shall be replaced by the following:

'Article 3

This Directive shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, to retired and disabled workers and to those claiming under them, in accordance with national law and/or practice.'

3. Article 6 shall be replaced by the following:

'Article 6

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:
 - (a) determining the persons who may participate in an occupational scheme;
 - (b) fixing the compulsory or optional nature of participation in an occupational scheme;
 - (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
 - (d) laying down different rules, except as provided for in points (h) and (i), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
 - (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

- (f) fixing different retirement ages;
- (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes. In the case of funded defined-benefit schemes, certain elements (examples of which are annexed) may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;
- (i) setting different levels for workers' contributions;
 - setting different levels for employers' contributions, except: - in the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes,
 - in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined,
- (j) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (i), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Directive is left to the discretion of the scheme's management bodies, the latter must comply with the principle of equal treatment.'

4. Article 8 shall be replaced by the following:

'Article 8

- 1. Member States shall take the necessary steps to ensure that the provisions of occupational schemes for self-employed workers contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest.
- 2. This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme for self-employed workers prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.'

5. Article 9 shall be replaced by the following:

'Article 9

As regards schemes for self-employed workers, Member States may defer compulsory application of the principle of equal treatment with regard to:

- (a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits: -
 - either until the date on which such equality is achieved in statutory schemes,
 - or, at the latest, until such equality is prescribed by a directive;
- (b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;
- (c) the application of the first subparagraph of point (i) of Article 6 (1) to take account of the different actuarial calculation factors, at the latest until 1 January 1999.'

6. The following Article shall be inserted:

'Article 9a

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Directive.'

7. The following Annex shall be added:

'ANNEX

Examples of elements which may be unequal, in respect of funded defined-benefit schemes, as referred to in Article 6 (h):

- conversion into a capital sum of part of a periodic pension, - transfer of pension rights,
- a reversionary pension payable to a dependant in return for the surrender of part of a pension,
- a reduced pension where the worker opts to take early retirement.'

Article 2

1. Any measure implementing this Directive, as regards paid workers, must cover all benefits derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures must apply retroactively to 8 April 1976 and must cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, that date shall be replaced by the date on which Article 119 of the Treaty became applicable on their territory.
2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raise an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of Community law impossible in practice.
3. For Member States whose accession took place after 17 May 1990 and who were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in paragraph 1 and 2 of this Directive is replaced by 1 January 1994.

Article 3

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 July 1997. They shall forthwith inform the Commission thereof. When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
2. Member States shall communicate to the Commission, at the latest two years after the entry into force of this Directive, all information necessary to enable the Commission to draw up a report on the application of this Directive.

Article 4

This Directive shall enter into force on the 20 day following that of its publication in the Official Journal of the European Communities.

Article 5

This Directive is addressed to the Member States.

Done at Brussels, 20 December 1996.

For the Council

The President

S. BARRETT

ANNEX V

**Council Directive of 11 December 1986 on the
application of the principle of equal treatment between
men and women engaged in an activity, including agriculture,
in a self-employed capacity and on the protection of self-employed
women during pregnancy and motherhood
(86/613/EEC)**

COUNCIL DIRECTIVE

of 11 December 1986

on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood

(86/613/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 100 and 235 thereof,

Having regard to the proposal from the Commission¹⁶⁶,

Having regard to the opinion of the European Parliament¹⁶⁷,

Having regard to the opinion of the Economic and Social Committee¹⁶⁸,

Whereas, in its resolution of 12 July 1982 on the promotion of equal opportunities for women¹⁶⁹, the Council approved the general objectives of the Commission communication concerning a new Community action programme on the promotion of equal opportunities for women (1982 to 1985) and expressed the will to implement appropriate measures to achieve them;

Whereas action 5 of the programme referred to above concerns the application of the principle of equal treatment to self-employed women and to women in agriculture;

Whereas the implementation of the principle of equal pay for men and women workers, as laid down in Article 119 of the Treaty, forms an integral part of the establishment and functioning of the common market;

Whereas on 10 February 1975 the Council adopted Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women¹⁷⁰;

Whereas, as regards other aspects of equality of treatment between men and women, on 9 February 1976 the Council adopted 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 conditions¹⁷¹ and on 19 December 1978 Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁷²;

Whereas, as regards persons engaged in a self-employed capacity, in an activity in which their spouses are also engaged, the implementation of the principle of equal treatment should be pursued through the adoption of detailed provisions designed to cover the specific situation of these persons;

Whereas differences persist between the Member States in this field, whereas, therefore it is necessary to approximate national provisions with regard to the application of the principle of equal treatment; Whereas in certain respects the Treaty does not confer the powers necessary for the specific actions required;

Whereas the implementation of the principle of equal treatment is without prejudice to measures concerning the protection of women during pregnancy and motherhood,

HAS ADOPTED THIS DIRECTIVE:

SECTION I

Aims and scope

¹⁶⁶OJ No C 113, 27.4.1984, p. 4.

¹⁶⁷OJ No C 172, 2.7.1984, p. 90.

¹⁶⁸OJ No C 343, 24.12.1984, p.1.

¹⁶⁹OJ No C 186, 21.7.1982, p. 3.

¹⁷⁰OJ No L 45, 19.2.1975, p. 19.

¹⁷¹OJ No L 39, 14.2.1975, p. 40.

¹⁷²OJ No L 6, 10.1.1979, p. 24.

Article 1

The purpose of this Directive is to ensure, in accordance with the following provisions, application in the Member States of the principle of equal treatment as between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 76/207/EEC and 79/7/EEC.

Article 2

This Directive covers:

- (a) self-employed workers, i.e. all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions; (b) their spouses, not being employees or partners, where they habitually, under the conditions laid down by national law, participate in the activities of the self-employed worker and perform the same tasks or ancillary tasks.

Article 3

For the purposes of this Directive the principle of equal treatment implies the absence of all discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status.

SECTION II

Equal treatment between self-employed male and female workers - position of the spouses without professional status of self-employed workers - protection of self-employed workers or wives of self-employed workers during pregnancy and motherhood

Article 4

As regards self-employed persons, Member States shall take the measures necessary to ensure the elimination of all provisions which are contrary to the principle of equal treatment as defined in Directive 76/207/EEC, especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial facilities.

Article 5

Without prejudice to the specific conditions for access to certain activities which apply equally to both sexes, Member States shall take the measures necessary to ensure that the conditions for the formation of a company between spouses are not more restrictive than the conditions for the formation of a company between unmarried persons.

Article 6

Where a contributory social security system for selfemployed workers exists in a Member State, that Member State shall take the necessary measures to enable the spouses referred to in Article 2 (b) who are not protected under the self-employed worker's social security scheme to join a contributory social security scheme voluntarily.

Article 7

Member States shall undertake to examine under what conditions recognition of the work of the spouses referred to in Article 2 (b) may be encouraged and, in the light of such examination, consider any appropriate steps for encouraging such recognition.

Article 8

Member States shall undertake to examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may, during interruptions in their occupational activity owing to pregnancy or motherhood,

- have access to services supplying temporary replacements or existing national social services, or
- be entitled to cash benefits under a social security scheme or under any other public social protection system.

SECTION III

General and final provisions

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment in self-employed activities to pursue their claims by judicial process, possibly after recourse to other competent authorities.

Article 10

Member States shall ensure that the measures adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of bodies representing self-employed workers and vocational training centres.

Article 11

The Council shall review this Directive, on a proposal from the Commission, before 1 July 1993.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 30 June 1989.

However, if a Member State which, in order to comply with Article 5 of this Directive, has to amend its legislation on matrimonial rights and obligations, the date on which such Member State must comply with Article 5 shall be 30 June 1991. 2. Member States shall immediately inform the Commission of the measures taken to comply with this Directive.

Article 13

Member States shall forward to the Commission, not later than 30 June 1991, all the information necessary to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 14

This Directive is addressed to the Member States.

Done at Brussels, 11 December 1986.

For the Council

The President

A. CLARKE

ANNEX VI

**Council Directive of 19 October 1992 on the
introduction of measures to encourage improvements
in the safety and health at work of pregnant workers and
workers who have recently given birth or are breastfeeding
(tenth individual directive within the meaning of Article 16(1)
of Directive 81/391/EEC)
(92/85/EEC)**

COUNCIL DIRECTIVE 92/85/EEC

of 19 October 1992

on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 118a thereof,

Having regard to the proposal from the Commission, drawn up after consultation with the Advisory Committee on Safety, Hygiene and Health Protection at work¹⁷³,

In cooperation with the European Parliament¹⁷⁴,

Having regard to the opinion of the Economic and Social Committee¹⁷⁵,

Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member States being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonizing conditions while maintaining the improvements made;

Whereas, under the terms of Article 118a of the Treaty, the said directives are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings;

Whereas, pursuant to Decision 74/325/EEC¹⁷⁶, as last amended by the 1985 Act of Accession, the Advisory Committee on Safety, Hygiene and Health protection at Work is consulted by the Commission on the drafting of proposals in this field;

Whereas the Community Charter of the fundamental social rights of workers, adopted at the Strasbourg European Council on 9 December 1989 by the Heads of State or Government of 11 Member States, lays down, in paragraph 19 in particular, that:

'Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made';

Whereas the Commission, in its action programme for the implementation of the Community Charter of the fundamental social rights of workers, has included among its aims the adoption by the Council of a Directive on the protection of pregnant women at work;

Whereas Article 15 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work¹⁷⁷ provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

¹⁷³ OJ No C 281, 9.11.190, p. 3; and
OJ No C 25, 1.2.1991, p.9.

¹⁷⁴ OJ No C 19, 28.1.1991, p. 177; and
OJ No C 150, 15.6.1992, p. 99.

¹⁷⁵ OJ No C 41, 18.2.1991, p. 29.

¹⁷⁶ OJ No L 185, 9.7.1974, p. 15.

¹⁷⁷ OJ No L 183, 29.6.1989, p.1.

Whereas some types of activities may pose a specific risk, for pregnant workers, workers who have recently given birth or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions; whereas such risks must therefore be assessed and the result of such assessment communicated to female workers and/or their representatives;

Whereas, further, should the result of this assessment reveal the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected;

Whereas pregnant workers and workers who are breastfeeding must not engage in activities which have been assessed as revealing a risk of exposure, jeopardizing safety and health, to certain particularly dangerous agents or working conditions;

Whereas provision should be made for pregnant workers, workers who have recently given birth or workers who are breastfeeding not to be required to work at night where such provision is necessary from the point of view of their safety and health;

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited;

Whereas measures for the organization of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance;

Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance;

Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness,

HAS ADOPTED THIS DIRECTIVE

SECTION I

PURPOSE AND DEFINITIONS

Article 1

Purpose

1. The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.
2. The provisions of Directive 89/391/EEC, except for Article 2 (2) thereof, shall apply in full to the whole area covered by paragraph 1, without prejudice to any more stringent and/or specific provisions contained in this Directive.
3. This Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding as compared with the situation which exists in each Member State on the date on which this Directive is adopted.

Article 2

Definitions

For the purposes of this Directive:

- (a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

- (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
- (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

SECTION II

GENERAL PROVISIONS

Article 3

Guidelines

1. In consultation with the Member States and assisted by the Advisory Committee on Safety, Hygiene and Health Protection at Work, the Commission shall draw up guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of workers within the meaning of Article 2.

The guidelines referred to in the first subparagraph shall also cover movements and postures, mental and physical fatigue and other types of physical and mental stress connected with the work done by workers within the meaning of Article 2.

2. The purpose of the guidelines referred to in paragraph 1 is to serve as a basis for the assessment referred to in Article 4 (1).

To this end, Member States shall bring these guidelines to the attention of all employers and all female workers and/or their representatives in the respective Member State.

Article 4

Assessment and information

1. For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of Directive 89/391/EEC, in order to:
 - assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,
 - decide what measures should be taken.
2. Without prejudice to Article 10 of Directive 89/391/EEC, workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.

Article 5

Action further to the results of the assessment

1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4 (1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.
2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.
3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.

4. The provisions of this Article shall apply mutatis mutandis to the case where a worker pursuing an activity which is forbidden pursuant to Article 6 becomes pregnant or starts breastfeeding and informs her employer thereof.

Cases in which exposure is prohibited

In addition to the general provisions concerning the protection of workers, in particular those relating to the limit values for occupational exposure:

1. pregnant workers within the meaning of Article 2 (a) may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardize safety or health, to the agents and working conditions listed in Annex II, Section A;
2. workers who are breastfeeding, within the meaning of Article 2 (c), may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardize safety or health, to the agents and working conditions listed in Annex II, Section B.

Article 7

Night work

1. Member States shall take the necessary measures to ensure that workers referred to in Article 2 are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned.
2. The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of:
 - (a) transfer to daytime work; or
 - (b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

Article 8

Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.
2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

Article 9

Time off for ante-natal examinations

Member States shall take the necessary measures to ensure that pregnant workers within the meaning of Article 2 (a) are entitled to, in accordance with national legislation and/or practice, time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours.

Article 10

Prohibition of dismissal

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.

Article 11

Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized in this Article, it shall be provided that:

1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;
2. in the case referred to in Article 8, the following must be ensured:
 - (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;
 - (b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;
3. the allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;
4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2 (b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.

Article 12

Defence of rights

Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who should themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.

Article 13

Amendments to the Annexes

1. Strictly technical adjustments to Annex I as a result of technical progress, changes in international regulations or specifications and new findings in the area covered by this Directive shall be adopted in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC.
2. Annex II may be amended only in accordance with the procedure laid down in Article 118a of the Treaty.

Article 14

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after the adoption thereof or ensure, at the latest two years after adoption of this Directive, that the two sides of industry introduce the requisite provisions by means of collective agreements, with Member States being required to make all the necessary provisions to enable them at all times to guarantee the results laid down by this Directive. They shall forthwith inform the Commission thereof.
2. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference of this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

3. Member States shall communicate to the Commission the texts of the essential provisions of national law which they have already adopted or adopt in the field governed by this Directive.
4. Member States shall report to the Commission every five years on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry.

However, Member States shall report for the first time to the Commission on the practical implementation of the provisions of this Directive, indicating the points of view of the two sides of industry, four years after its adoption. The Commission shall inform the European Parliament, the Council, the Economic and Social Committee and the Advisory Committee on Safety, Hygiene and Health Protection at Work.

5. The Commission shall periodically submit to the European Parliament, the Council and the Economic and Social Committee a report on the implementation of this Directive, taking into account paragraphs 1, 2 and 3.
6. The Council will re-examine this Directive, on the basis of an assessment carried out on the basis of the reports referred to in the second subparagraph of paragraph 4 and, should the need arise, of a proposal, to be submitted by the Commission at the latest five years after adoption of the Directive.

Article 15

This Directive is addressed to the Member States.

Done at Luxembourg, 19 October 1992.

For the Council

The President

D. CURRY

NON-EXHAUSTIVE LIST OF AGENTS, PROCESSES AND WORKING CONDITIONS

referred to in Article 4 (1)

A. Agents

1. Physical agents where these are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment, and in particular:
 - (a) shocks, vibration or movement;
 - (b) handling of loads entailing risks, particularly of a dorsolumbar nature;
 - (c) noise;
 - (d) ionizing radiation ⁽¹⁷⁸⁾;
 - (e) non-ionizing radiation;
 - (f) extremes of cold or heat;
 - (g) movements and postures, travelling - either inside or outside the establishment - mental and physical fatigue and other physical burdens connected with the activity of the worker within the meaning of Article 2 of the Directive.
2. Biological agents

Biological agents of risk groups 2, 3 and 3 within the meaning of Article 2 (d) numbers 2, 3 and 4 of Directive 90/679/EEC¹⁷⁹, in so far as it is known that these agents or the therapeutic measures necessitated by such agents endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II.
3. Chemical agents

The following chemical agents in so far as it is known that they endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II:

 - (a) substances labelled R 40, R 45, R 46, and R 47 under Directive 67/548/EE¹⁸⁰ in so far as they do not yet appear in Annex II;
 - (b) chemical agents in Annex I to Directive 90/394/EEC¹⁸¹
 - (c) mercury and mercury derivatives;
 - (d) antimetabolic drugs;
 - (e) carbon monoxide;
 - (f) chemical agents of known and dangerous percutaneous absorption.

B. Processes

Industrial processes listed in Annex I to Directive 90/394/EEC.

C. Working conditions

¹⁷⁸See Directive 80/836/Euratom (OJ No L 246, 17.9.1980, p.1.)

¹⁷⁹OJ No L 374, 31.12.1990, p.1.

¹⁸⁰OJ No L 196, 16.8.1967, p.1. Directive as last amended by Directive 90/517/EEC (OJ No L 287, 19.10.1990, p. 37).

¹⁸¹OJ No L 196, 26.7.1990, p.1.

Underground mining work.

ANNEX II

NON-EXHAUSTIVE LIST OF AGENTS AND WORKING CONDITIONS

referred to in Article 6

A. Pregnant workers within the meaning of Article 2(a)

1. *Agents*

(a) Physical agents

Work in hyperbaric atmosphere, e.g. pressurised enclosures and underwater diving.

(b) Biological agents

The following biological agents:

- toxoplasma,

- rubella virus,

unless the pregnant workers are proved to be adequate protected against such agents by immunisation.

(c) Chemical agents

Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. *Working conditions*

Underground mining work.

B. Workers who are breastfeeding within the meaning of Article 2(c)

1. *Agents*

(a) Chemical agents

Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. *Working conditions*

Underground mining work.

ANNEX VII

**Council Directive of 3 June 1996 on the
framework agreement on parental leave
concluded by UNICE, CEEP and the ETUC
(96/34/EC)**

and

**Council Directive of 15 December 1997
amending and extending to the United Kingdom of Great Britain
and Northern Ireland Directive 96/34/EEC on the framework
agreement on parental leave concluded by UNICE, CEEP and the ETUC
(97/75/EC)**

COUNCIL DIRECTIVE 96/34/EC

of 3 June 1996

on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Agreement on social policy, annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 4 (2) thereof,

Having regard to the proposal from the Commission,

- (1) Whereas on the basis of the Protocol on social policy, the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland, (hereinafter referred to as 'the Member States'), wishing to pursue the course mapped out by the 1989 Social Charter have concluded an Agreement on social policy amongst themselves;
- (2) Whereas management and labour may, in accordance with Article 4 (2) of the Agreement on social policy, request jointly that agreements at Community level be implemented by a Council decision on a proposal from the Commission;
- (3) Whereas paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on equal treatment for men and women provides, *inter alia*, that 'measures should also be developed enabling men and women to reconcile their occupational and family obligations';
- (4) Whereas the Council, despite the existence of a broad consensus, has not been able to act on the proposal for a Directive on parental leave for family reasons¹⁸², as amended¹⁸³ on 15 November 1984;
- (5) Whereas the Commission, in accordance with Article 3 (2) of the Agreement on social policy, consulted management and labour on the possible direction of Community action with regard to reconciling working and family life;
- (6) Whereas the Commission, considering after such consultation that Community action was desirable, once again consulted management and labour on the substance of the envisaged proposal in accordance with Article 3 (3) of the said Agreement;
- (7) Whereas the general cross-industry organizations (Unice, CEEP and the ETUC) informed the Commission in their joint letter of 5 July 1995 of their desire to initiate the procedure provided for by Article 4 of the said Agreement;
- (8) Whereas the said cross-industry organizations concluded, on 14 December 1995, a framework agreement on parental leave; whereas they have forwarded to the Commission their joint request to implement this framework agreement by a Council Decision on a proposal from the Commission in accordance with Article 4 (2) of the said Agreement;
- (9) Whereas the Council, in its Resolution of 6 December 1994 on certain aspects for a European Union social policy; a contribution to economic and social convergence in the Union¹⁸⁴, asked the two sides of industry to make use of the possibilities for concluding agreements, since they are as a rule closer to social reality and to social problems; whereas in Madrid, the members of the European Council from those States which have signed the Agreement on social policy welcomed the conclusion of this framework agreement;
- (10) Whereas the signatory parties wanted to conclude a framework agreement setting out minimum requirements on parental leave and time off from work on grounds of force majeure and referring back to the Member States and/or management and labour for the definition of the conditions under which parental leave would be implemented, in order to take account of the situation, including the situation with regard to family policy, existing in each Member State, particularly as regards the conditions for granting parental leave and exercise of the right to parental leave;
- (11) Whereas the proper instrument for implementing this framework agreement is a Directive within the meaning of Article 189 of the Treaty; whereas it is therefore binding on the Member States as to the result to be achieved, but leaves them the choice of form and methods;

¹⁸²OJ No C 333, 9.12.1983, p.6.

¹⁸³OJ No C 316, 27.11.1984, p.7.

¹⁸⁴OJ No C 368, 23.12.1994, p.6.

- (12) Whereas, in keeping with the principle of subsidiarity and the principle of proportionality as set out in Article 3b of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive is confined to the minimum required to achieve these objectives and does not go beyond what is necessary to achieve that purpose;
- (13) Whereas the Commission has drafted its proposal for a Directive, taking into account the representative status of the signatory parties, their mandate and the legality of the clauses of the framework agreement and compliance with the relevant provisions concerning small and medium-sized undertakings;
- (14) Whereas the Commission, in accordance with its Communication of 14 December 1993 concerning the implementation of the Protocol on social policy, informed the European Parliament by sending it the text of the framework agreement, accompanied by its proposal for a Directive and the explanatory memorandum;
- (15) Whereas the Commission also informed the Economic and Social Committee by sending it the text of the framework agreement, accompanied by its proposal for a Directive and the explanatory memorandum;
- (16) Whereas clause 4 point 2 of the framework agreement states that the implementation of the provisions of this agreement does not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States and/or management and labour to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances (including the introduction of non-transferability), as long as the minimum requirements provided for in the present agreement are complied with;
- (17) Whereas the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinions and creeds;
- (18) Whereas Article F (2) of the Treaty on European Union provides that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law';
- (19) Whereas the Member States can entrust management and labour, at their joint request, with the implementation of this Directive, as long as they take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive;
- (20) Whereas the implementation of the framework agreement contributes to achieving the objectives under Article 1 of the Agreement on social policy,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Implementation of the framework agreement

The purpose of this Directive is to put into effect the annexed framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organizations (Unice, CEEP and the ETUC).

Article 2

Final provisions

- 1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 June 1998 at the latest or shall ensure by that date at the latest that management and labour have introduced the necessary measures by agreement, the Member States being required to take any necessary measure enabling them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.
- 2. The Member States may have a maximum additional period of one year, if this is necessary to take account of special difficulties or implementation by a collective agreement.

They must forthwith inform the Commission of such circumstances.
- 3. When Member States adopt the measures referred to in paragraph 1, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

This Directive is addressed to the Member States.

Done at Luxembourg, 3 June 1996.

For the Council

The President

T. TREU

FRAMEWORK AGREEMENT ON PARENTAL LEAVE**PREAMBLE**

The enclosed framework agreement represents an undertaking by Unice, CEEP and the ETUC to set out minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.

ETUC, Unice and CEEP request the Commission to submit this framework agreement to the Council for a Council Decision making these minimum requirements binding in the Member States of the European Community, with the exception of the United Kingdom of Great Britain and Northern Ireland.

I. GENERAL CONSIDERATIONS

1. Having regard to the Agreement on social policy annexed to the Protocol on social policy, annexed to the Treaty establishing the European Community, and in particular Articles 3 (4) and 4 (2) thereof;
2. Whereas Article 4 (2) of the Agreement on social policy provides that agreements concluded at Community level shall be implemented, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission;
3. Whereas the Commission has announced its intention to propose a Community measure on the reconciliation of work and family life;
4. Whereas the Community Charter of Fundamental Social Rights stipulates at point 16 dealing with equal treatment that measures should be developed to enable men and women to reconcile their occupational and family obligations;
5. Whereas the Council Resolution of 6 December 1994 recognizes that an effective policy of equal opportunities presupposes an integrated overall strategy allowing for better organization of working hours and greater flexibility, and for an easier return to working life, and notes the important role of the two sides of industry in this area and in offering both men and women an opportunity to reconcile their work responsibilities with family obligations;
6. Whereas measures to reconcile work and family life should encourage the introduction of new flexible ways of organizing work and time which are better suited to the changing needs of society and which should take the needs of both undertakings and workers into account;
7. Whereas family policy should be looked at in the context of demographic changes, the effects of the ageing population, closing the generation gap and promoting women's participation in the labour force;
8. Whereas men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by means such as awareness programmes;
9. Whereas the present agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time off from work on grounds of force majeure, and refers back to Member States and social partners for the establishment of the conditions of access and detailed rules of application in order to take account of the situation in each Member State;
10. Whereas Member States should provide for the maintenance of entitlements to benefits in kind under sickness insurance during the minimum period of parental leave;
11. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave;
12. Whereas this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would impede the creation and development of small and medium-sized undertakings;

13. Whereas management and labour are best placed to find solutions that correspond to the needs of both employers and workers and must therefore have conferred on them a special role in the implementation and application of the present agreement,

THE SIGNATORY PARTIES HAVE AGREED THE FOLLOWING:

II. CONTENT

Clause 1: Purpose and scope

1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.
2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.

Clause 2: Parental leave

1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.
2. To promote equal opportunities and equal treatment between men and women, the parties to this agreement consider that the right to parental leave provided for under clause 2.1 should, in principle, be granted on a non-transferable basis.
3. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or management and labour may, in particular:
 - (a) decide whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system;
 - (b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year;
 - (c) adjust conditions of access and detailed rules for applying parental leave to the special circumstances of adoption;
 - (d) establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave;
 - (e) define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and practices, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the undertaking (e.g. where work is of a seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time, where a specific function is of strategic importance). Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and practices;
 - (f) in addition to (e), authorize special arrangements to meet the operational and organizational requirements of small undertakings.
4. In order to ensure that workers can exercise their right to parental leave, Member States and/or management and labour shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or practices.
5. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.
6. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.

7. Member States and/or management and labour shall define the status of the employment contract or employment relationship for the period of parental leave.
8. All matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

Clause 3: Time off from work on grounds of force majeure

1. Member States and/or management and labour shall take the necessary measures to entitle workers to time off from work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.
2. Member States and/or management and labour may specify the conditions of access and detailed rules for applying clause 3.1 and limit this entitlement to a certain amount of time per year and/or per case.

Clause 4: Final provisions

1. Member States may apply or introduce more favourable provisions than those set out in this agreement.
2. Implementation of the provisions of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field covered by this agreement. This shall not prejudice the right of Member States and/or management and labour to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances (including the introduction of non-transferability), as long as the minimum requirements provided for in the present agreement are complied with.
3. The present agreement shall not prejudice the right of management and labour to conclude, at the appropriate level including European level, agreements adapting and/or complementing the provisions of this agreement in order to take into account particular circumstances.
4. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with the Council decision within a period of two years from its adoption or shall ensure that management and labour¹⁸⁵ introduce the necessary measures by way of agreement by the end of this period. Member States may, if necessary to take account of particular difficulties or implementation by collective agreement, have up to a maximum of one additional year to comply with this decision.
5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practices.
6. Without prejudice to the respective role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who will give an opinion.
7. The signatory parties shall review the application of this agreement five years after the date of the Council decision if requested by one of the parties to this agreement.

Done at Brussels, 14 December 1995.

Fritz VERZETNITSCH,
President of the ETUC

Antonio Castellano AUYANET,
President of the CEEP

François PERIGOT,
President of the UNICE

Emilio GABAGLIO,
Secretary-General

Roger GOURVÈS,
Secretary-General

Zygmunt
TYSKIEWICZ,
Secretary-General

ETUC
Bld Emile Jacqmain 155
B-1210 Brussels

CEEP
Rue de la Charité 15
B-1040 Brussels

UNICE
Rue Joseph II 40
B-1040 Brussels

¹⁸⁵ Within the meaning of Article 2(4) of the Agreement on social policy.

Women's Rights and the Treaty of Amsterdam on European Union
COUNCIL DIRECTIVE 97/75/EC

of 15 December 1997

**amending and extending, to the United Kingdom of Great Britain and Northern
Ireland, Directive 96/34/EC on the framework agreement on parental leave
concluded by UNICE, CEEP and the ETUC**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas the Council, acting in accordance with the Agreement on social policy annexed to Protocol 14 to the Treaty, and in particular Article 4(2) thereof, adopted Directive 96/34/EC (4); whereas, as a result, the said Directive does not apply to the United Kingdom of Great Britain and Northern Ireland;

Whereas the Amsterdam European Council, held on 16 and 17 June 1997, noted with approval the agreement of the Intergovernmental Conference to incorporate the Agreement on social policy in the Treaty and also noted that a means had to be found to give legal effect to the wish of the United Kingdom of Great Britain and Northern Ireland to accept the Directives already adopted on the basis of that Agreement before the signature of the Amsterdam Treaty; whereas this Directive seeks to achieve this aim by extending Directive 96/34/EC to the United Kingdom;

Whereas the fact that Directive 96/34/EC is not applicable in the United Kingdom directly affects the functioning of the internal market; whereas implementation of the framework agreement annexed to the said Directive and, in particular, the principle of reconciliation of parental and professional responsibilities for working parents, in all the Member States will improve the functioning of the internal market;

Whereas implementation of the framework agreement aims, in particular, at achieving the objective of equal treatment between men and women with regard to labour opportunities and treatment at work, and the reconciliation of working and family life;

Whereas the adoption of this Directive will make Directive 96/34/EC applicable in the United Kingdom; whereas, from the date on which this Directive enters into force, the term 'Member States' in Directive 96/34/EC should be construed as including the United Kingdom,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Without prejudice to Article 2, Directive 96/34/EC shall apply to the United Kingdom of Great Britain and Northern Ireland.

Article 2

The following paragraph shall be inserted in Article 2 of Directive 96/34/EC:

'1a. As regards the United Kingdom of Great Britain and Northern Ireland, the date of 3 June 1998 in paragraph 1 shall be replaced by 15 December 1999.'

Article 3

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1997.

For the Council

The President

J.-C. JUNCKER

(1) OJ C 335, 6. 11. 1997.

(2) OJ C 371, 8. 12. 1997.

(3) OJ C 355, 21. 11. 1997.

(4) OJ L 145, 19. 6. 1996, p. 4.

ANNEX VIII

**Council Directive of 15 December 1997
on the burden of proof in cases of discrimination
based on sex
(97/80/EC)**

COUNCIL DIRECTIVE 97/80/EC

of 15 December 1997

on the burden of proof in cases of discrimination based on sex

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Agreement on social policy annexed to the Protocol (No 14) on social policy annexed to the Treaty establishing the European Community, and in particular Article 2(2) thereof,

Having regard to the proposal from the Commission¹⁸⁶,

Having regard to the opinion of the Economic and Social Committee¹⁸⁷,

Acting, in accordance with the procedure laid down in Article 189c of the Treaty, in cooperation with the European Parliament¹⁸⁸,

- (1) Whereas, on the basis of the Protocol on social policy annexed to the Treaty, the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter called 'the Member States'), wishing to implement the 1989 Social Charter, have concluded an Agreement on social policy;
- (2) Whereas the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of combating every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs;
- (3) Whereas paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on equal treatment for men and women, provides, inter alia, that 'action should be intensified to ensure the implementation of the principle of equality for men and women as regards, in particular, access to employment, remuneration, working conditions, social protection, education, vocational training and career development';
- (4) Whereas, in accordance with Article 3(2) of the Agreement on social policy, the Commission has consulted management and labour at Community level on the possible direction of Community action on the burden of proof in cases of discrimination based on sex;
- (5) Whereas the Commission, considering Community action advisable after such consultation, once again consulted management and labour on the content of the proposal contemplated in accordance with Article 3(3) of the same Agreement; whereas the latter have sent their opinions to the Commission;
- (6) Whereas, after the second round of consultation, neither management nor labour have informed the Commission of their wish to initiate the process - possibly leading to an agreement - provided for in Article 4 of the same Agreement;
- (7) Whereas, in accordance with Article 1 of the Agreement, the Community and the Member States have set themselves the objective, inter alia, of improving living and working conditions; whereas effective implementation of the principle of equal treatment for men and women would contribute to the achievement of that aim;
- (8) Whereas the principle of equal treatment was stated in Article 119 of the Treaty, in 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 women¹⁸⁹ and in 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 conditions¹⁹⁰;
- (9) Whereas Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are

¹⁸⁶OJ C 332, 7.11.1996, p. 11 and OJ C 185, 18.6.1997, p. 21.

¹⁸⁷OJ C 133, 28.4.1997, p.34.

¹⁸⁸Opinion of the European Parliament of 10 April 1997 (OJ C 132, 28.4.1997, p. 215), Common Position of the Council of 24 July 1997 (OJ C 307, 8.10.1997, p.6.) and Decision of the European Parliament of 6 November 1997 (OJ C 358, 24.11.1997).

¹⁸⁹OJ L 45, 19.2.1975, p.19.

¹⁹⁰OJ L 39, 14.2.1976, p.40.

- breastfeeding¹⁹¹ also contributes to the effective implementation of the principle of equal treatment for men and women; whereas that Directive should not work to the detriment of the aforementioned Directives on equal treatment; whereas, therefore, female workers covered by that Directive should likewise benefit from the adaptation of the rules on the burden of proof;
- (10) Whereas Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC¹⁹², is also based on the principle of equal treatment for men and women;
- (11) Whereas the references to 'judicial process' and 'court' cover mechanisms by means of which disputes may be submitted for examination and decision to independent bodies which may hand down decisions that are binding on the parties to those disputes;
- (12) Whereas the expression 'out-of-court procedures' means in particular procedures such as conciliation and mediation;
- (13) Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice;
- (14) Whereas it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs;
- (15) Whereas it is necessary to take account of the specific features of certain Member States' legal systems, inter alia where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other competent authority that there has been no breach of the principle of equal treatment;
- (16) Whereas Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case; whereas the procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate;
- (17) Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;
- (18) Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought;
- (19) Whereas it is all the more difficult to prove discrimination when it is indirect; whereas it is therefore important to define indirect discrimination;
- (20) Whereas the aim of adequately adapting the rules on the burden of proof has not been achieved satisfactorily in all Member States and, in accordance with the principle of subsidiarity stated in Article 3b of the Treaty and with that of proportionality, that aim must be attained at Community level; whereas this Directive confines itself to the minimum action required and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Aim

The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

¹⁹¹OJ L 348, 28.11.1992, p.1.

¹⁹²OJ L 145, 19.6.1996, p.4.

Article 2

Definitions

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.
2. For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Article 3

Scope

1. This Directive shall apply to:
 - (a) the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC;
 - (b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.
2. This Directive shall not apply to criminal procedures, unless otherwise provided by the Member States.

Article 4

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 5

Information

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

Article 6

Non-regression

Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the general level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the minimum requirements of this Directive are complied with.

Article 7

Implementation

The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 1 January 2001. They shall immediately inform the Commission thereof.

When the Member States adopt those measures they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by the Member States.

The Member States shall communicate to the Commission, within two years of the entry into force of this Directive, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

Article 8

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1997.

For the Council

The President

J.-C. JUNCKER

ANNEX IX

**Council Directive of 15 December 1997
concerning the framework agreement on part-time work
concluded by UNICE, CEEP and the ETUC
(97/81/EC)**

COUNCIL DIRECTIVE 97/81/EC

of 15 December 1997

**concerning the Framework Agreement on part-time work concluded by UNICE,
CEEP and the ETUC THE COUNCIL OF THE EUROPEAN UNION,**

Having regard to the Agreement on social policy annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 4(2) thereof,

Having regard to the proposal from the Commission,

- (1) Whereas on the basis of the Protocol on social policy annexed to the Treaty establishing the European Community, the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as 'the Member States'), wishing to continue along the path laid down in the 1989 Social Charter, have concluded an agreement on social policy;
- (2) Whereas management and labour (the social partners) may, in accordance with Article 4(2) of the Agreement on social policy, request jointly that agreements at Community level be implemented by a Council decision on a proposal from the Commission;
- (3) Whereas point 7 of the Community Charter of the Fundamental Social Rights of Workers provides, inter alia, that 'the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular (. . .) forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work';
- (4) Whereas the Council has not reached a decision on the proposal for a Directive on certain employment relationships with regard to distortions of competition¹⁹³, as amended¹⁹⁴, nor on the proposal for a Directive on certain employment relationships with regard to working conditions¹⁹⁵;
- (5) Whereas the conclusions of the Essen European Council stressed the need to take measures to promote employment and equal opportunities for women and men, and called for measures with a view to increasing the employment-intensiveness of growth, in particular by a more flexible organization of work in a way which fulfils both the wishes of employees and the requirements of competition;
- (6) Whereas the Commission, in accordance with Article 3(2) of the Agreement on social policy, has consulted management and labour on the possible direction of Community action with regard to flexible working time and job security;
- (7) Whereas the Commission, considering after such consultation that Community action was desirable, once again consulted management and labour at Community level on the substance of the envisaged proposal in accordance with Article 3(3) of the said Agreement;
- (8) Whereas the general cross-industry organizations, the Union of Industrial and Employer's Confederations of Europe (UNICE), the European Centre of Enterprises with Public Participation (CEEP) and the European Trade Union Confederation (ETUC) informed the Commission in their joint letter of 19 June 1996 of their desire to initiate the procedure provided for in Article 4 of the Agreement on social policy; whereas they asked the Commission, in a joint letter dated 12 March 1997, for a further three months; whereas the Commission complied with this request;
- (9) Whereas the said cross-industry organizations concluded, on 6 June 1997, a Framework Agreement on part-time work; whereas they forwarded to the Commission their joint request to implement this Framework Agreement by a Council decision on a proposal from the Commission, in accordance with Article 4(2) of the said Agreement;
- (10) Whereas the Council, in its Resolution of 6 December 1994 on prospects for a European Union social policy: contribution to economic and social convergence in the Union¹⁹⁶, asked management and labour to make use of the opportunities for concluding agreements, since they are as a rule closer to social reality and to social problems;

¹⁹³OJ C 224, 8.9.1990, p. 6.

¹⁹⁴OJ C 305, 5.12.1990, p. 8.

¹⁹⁵OJ C 224, 8.9.1990, p. 4.

¹⁹⁶OJ C 368, 23.12.1994, p.6.

- (11) Whereas the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working; whereas they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike;
- (12) Whereas the social partners wished to give particular attention to part-time work, while at the same time indicating that it was their intention to consider the need for similar agreements for other flexible forms of work;
- (13) Whereas, in the conclusions of the Amsterdam European Council, the Heads of State and Government of the European Union strongly welcomed the agreement concluded by the social partners on part-time work;
- (14) Whereas the proper instrument for implementing the Framework Agreement is a Directive within the meaning of Article 189 of the Treaty; whereas it therefore binds the Member States as to the result to be achieved, whilst leaving national authorities the choice of form and methods;
- (15) Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3(b) of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas this Directive does not go beyond what is necessary for the attainment of those objectives;
- (16) Whereas, with regard to terms used in the Framework Agreement which are not specifically defined therein, this Directive leaves Member States free to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions respect the content of the Framework Agreement;
- (17) Whereas the Commission has drafted its proposal for a Directive, in accordance with its Communication of 14 December 1993 concerning the application of the Protocol (No 14) on social policy and its Communication of 18 September 1996 concerning the development of the social dialogue at Community level, taking into account the representative status of the signatory parties and the legality of each clause of the Framework Agreement;
- (18) Whereas the Commission has drafted its proposal for a Directive in compliance with Article 2(2) of the Agreement on social policy which provides that Directives in the social policy domain 'shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings';
- (19) Whereas the Commission, in accordance with its Communication of 14 December 1993 concerning the application of the Protocol (No 14) on social policy, informed the European Parliament by sending it the text of its proposal for a Directive containing the Framework Agreement;
- (20) Whereas the Commission also informed the Economic and Social Committee;
- (21) Whereas Clause 6.1 of the Framework Agreement provides that Member States and/or the social partners may maintain or introduce more favourable provisions;
- (22) Whereas Clause 6.2 of the Framework Agreement provides that implementation of this Directive may not serve to justify any regression in relation to the situation which already exists in each Member State;
- (23) Whereas the Community Charter of the Fundamental Social Rights of Workers recognizes the importance of the fight against all forms of discrimination, especially based on sex, colour, race, opinion and creed;
- (24) Whereas Article F(2) of the Treaty on European Union states that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law;
- (25) Whereas the Member States may entrust the social partners, at their joint request, with the implementation of this Directive, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive;
- (26) Whereas the implementation of the Framework Agreement contributes to achieving the objectives under Article 1 of the Agreement on social policy,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The purpose of this Directive is to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organizations (UNICE, CEEP and the ETUC) annexed hereto.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 20 January 2000, or shall ensure that, by that date at the latest, the social partners have introduced the necessary measures by agreement, the Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

Member States may have a maximum of one more year, if necessary, to take account of special difficulties or implementation by a collective agreement.

They shall inform the Commission forthwith in such circumstances. When Member States adopt the measures referred to in the first subparagraph, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the main provisions of domestic law which they have adopted or which they adopt in the field governed by this Directive.

Article 3

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1997.

For the Council

The President

J.-C. JUNCKER

B

**THE DECLARATION ON EQUALITY BETWEEN
WOMEN AND MEN**

ANNEX X

**Declaration on Article 119(4) of the Treaty
establishing the European Community**

28. Declaration on Article 119(4) of the Treaty establishing the European Community

When adopting measures referred to in Article 119(4) of the Treaty establishing the European Community, Member States should, in the first instance, aim at improving the situation of women in working life.