



**UNIVERSITY OF LATVIA
FACULTY OF LAW**

**PROMOTION THESIS
EC sex equality law in Latvia.
Rights of persons with regard to
child-birth**

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Table of content

Part I.	Introduction	
	Importance of issue and aims of the study	1
	Scope of the study	6
	Method	8
	Structure	10
	Terminology	10
Part II	Main concepts of EC equality law and their implementation into Latvian legal system	
Chapter 1	Equality and non-discrimination	
	Content of equality and non-discrimination law	12
	Formal equality approach	13
	Substantive equality approach	14
	Differential equality approach	15
	Meaning of the concepts of equality and non-discrimination	16
	Sex equality and non-discrimination under EC law	19
Chapter 2	Direct discrimination	
	EC law	
	Establishing direct discrimination	21
	Comparator	22
	Possibility to justify direct discrimination	24
	Exemptions	27
	<i>Sex or the worker as determining factor</i>	27
	<i>Special protection during pregnancy and maternity</i>	31
	<i>Positive measures</i>	33
	Positive measures and equal pay	39
	Latvian law	41
	Sex of worker as determining factor in Latvian law	41
Chapter 3	Indirect discrimination	
	EC law	43
	“provision, criterion, or practice”	44
	“persons”	44
	“would be put at a particular disadvantage”	44
	“compared to persons of the other sex”	46
	“provision, criterion, or practice can be objectively justified”	46
	“objectively justified by a legitimate aim, and the means of achieving that aim is appropriate and necessary	48
	“objective factors unrelated to sex”	50
	Indirect discrimination in equal pay matters	50
	Indirect discrimination in state social security matters	51
	Concept of indirect discrimination and substantive equality	52
	Latvian law	53
Chapter 4	Equal pay	
	EC law	54
	Definition of pay	55
	Elements of pay	55

	<i>Occupational social security schemes</i>	56
	Distinction between state social security schemes and occupational social security schemes	58
	Sources of discriminatory pay	59
	<i>Same work and work of equal value, preconditions for comparison</i>	60
	<i>Criteria for same work and work of equal value</i>	63
	Pay system	
	<i>Measurement and comparison of pay</i>	63
	<i>Criteria</i>	64
	Justifications for unequal pay	65
	Equal pay during and after pregnancy, maternity and child-care leave	
	<i>Pay during pregnancy</i>	66
	<i>Pay during maternity leave</i>	66
	<i>Pay after maternity leave</i>	67
	<i>Equal pay and child-care leave</i>	68
	Distinction between pay and treatment	68
	Latvian law	70
	Labour law	70
	Occupational social security schemes	71
	<i>Private pension funds</i>	72
	<i>Health insurance</i>	73
	<i>Special service pension schemes</i>	74
Chapter 5	Equal treatment	
	EC law	
	Equal treatment as a fundamental principle of EC law	75
	Directive 76/207. Scope	75
	Access	76
	Classification of professions	76
	Vocational training	78
	Promotion	79
	Harassment and sexual harassment	79
	Instruction to discriminate	83
	Prohibition of adverse treatment	83
	Participation and treatment within organizations	83
	Other working conditions	83
	Treatment of part-time workers	84
	Dismissal	85
	Latvian law	
	Labour law	86
	<i>Access</i>	86
	<i>Working conditions</i>	89
	<i>Dismissal</i>	89
	Part-time workers in Latvia	90
	Equal treatment within the civil service	90
Chapter 6	Social security	92

	EC law	
	Directive 79/7	92
	Ratione materiae	92
	<i>Article 3</i>	92
	<i>Exceptions form principle of equal treatment</i>	93
	Ratione personae	96
	Ratione temporis	98
	Equal treatment under Article 4	99
	Latvian law	
	Social security system	101
	State social insurance system	101
	<i>State social insurance subjects</i>	102
	<i>Rates of state social insurance</i>	103
	Calculation of allowances	
	<i>Unemployment allowance</i>	104
	<i>Sickness allowance</i>	105
	<i>Maternity allowance</i>	106
	<i>Paternity allowance</i>	106
	<i>Accidents at work and occupational disease allowance</i>	107
	<i>Pensions</i>	108
	Social allowance for families with children	109
	Social assistance	109
	General assessment of Latvian social security system	109
Chapter 7	Self-employed persons and equality	
	EC law	
	Concept of self-employed	111
	Scope of Directive 86/613	112
	Equality in social security matters	114
	Latvian law	
	Concept of self-employed under Latvian law	114
	Non-discrimination as regards service provision	116
	Social security	118
Chapter 8	Enforcement and remedies	
	EC law	119
	Direct effect	119
	<i>Treaty provisions</i>	119
	<i>Directives</i>	120
	Indirect effect	123
	Principle of supremacy	126
	Remedies	127
	Principle of effectiveness	128
	Principle of equivalence	129
	Compensation	129
	Time limits	131
	Burden proof	134
	Legal standing	136
	Particular remedies in discrimination cases	136
	<i>Pay</i>	136

	<i>Occupational social security schemes</i>	137
	<i>Treatment</i>	137
	<i>State social insurance</i>	138
	Remedies in multiple discrimination case	139
	State liability	139
	Latvian law	
	Establishing discrimination	142
	Compensation	143
	Principle of effectiveness	148
	Time limits and principle of effectiveness	148
	Time limits and the principle of equivalence	150
	Rights of ex-employees	152
	Burden of proof	152
	State liability under Latvian law	154
Chapter 9	Recast Directive 2006/54	156
Part III	Rights of persons with regard to child-birth	
Chapter 10	Rights during pregnancy	159
	International law	159
	EC law	160
	EC legislative documents	160
	Pay and allowances	162
	Equal treatment	167
	<i>Access</i>	167
	<i>Working conditions</i>	169
	<i>Dismissal</i>	172
	Self-employed	181
	Social security	182
	Latvian law	
	Labour law	182
	<i>Access</i>	182
	<i>Working conditions</i>	184
	<i>Dismissal</i>	187
	<i>Pay during pregnancy</i>	193
	Social security law	195
	Employed pregnant persons	195
	Self-employed pregnant persons	196
	Unemployed pregnant persons	197
Chapter 11	Rights during maternity leave and after it	
	International law	198
	EC law	
	EC legislative documents	199
	Rights during maternity leave	
	Purpose of maternity leave	199
	Length of maternity leave	200
	Financial means during maternity leave	203
	<i>Maternity pay</i>	204
	<i>Maternity allowance</i>	208
	<i>Conditions of calculation of allowance</i>	209

	Treatment during maternity leave	
	<i>Access and working conditions</i>	210
	<i>Dismissal</i>	211
	Rights after maternity leave	
	Employment rights after maternity leave	212
	<i>Breastfeeding</i>	212
	<i>Promotion</i>	212
	<i>Working conditions</i>	214
	<i>Dismissal</i>	216
	<i>Pay</i>	216
	Social rights	218
	Self-employed	218
	Unemployed	218
	Latvian law	
	Labour law	
	<i>Length of maternity leave</i>	219
	<i>Working conditions during maternity leave</i>	219
	<i>Pay during maternity leave</i>	219
	<i>Working conditions after maternity leave</i>	220
	<i>Breastfeeding</i>	220
	<i>Feeding</i>	220
	<i>Dismissal</i>	221
	<i>Pay</i>	221
	Social law	
	Employed persons	222
	Maternity allowance	222
	Acquisition of state social insurance rights during maternity leave	222
	<i>State social insurance rights after maternity leave</i>	223
	<i>Calculation of sickness allowance</i>	223
	<i>Calculations of accidents at work and occupational diseases allowances</i>	224
	<i>Entitlement to and calculation of disability pensions</i>	224
	Self-employed persons	225
	Unemployed persons	226
Chapter 12	Rights during paternity leave and after it	
	EC Law	228
	Latvian law	230
	Labour law	230
	Social law	230
	<i>Acquisition of social rights during paternity leave</i>	231
	<i>Social rights after paternity leave</i>	231
	Social dimension	233
Chapter 13	Rights during child-care leave and after it	

	International law	234
	EC law	235
	Legislation	
	<i>Directive 96/34</i>	235
	<i>Directive 79/7</i>	236
	Case-law of the ECJ	
	<i>Child-care issues under Directive 76/207</i>	237
	<i>Child-care issues under Directive 79/7</i>	238
	<i>Child-care issues under Directive 96/34</i>	238
	<i>Child-care issues under Article 141 of EC Treaty and Directive 75/117</i>	238
	Latvian law	
	Labour law	240
	Social law	240
	<i>Social rights during child-care leave</i>	240
	<i>Social rights after child-care leave</i>	243
	Self-employed	245
	Unemployed	245
	Social dimension	245
Part IV	Conclusions and proposals	248
Chapter 14	Conclusions	
	Problems of EC sex equality law concepts and of implementation of EC sex equality law into the Latvian legal system	
	Equality and non-discrimination	248
	Direct discrimination	249
	<i>EC law</i>	249
	<i>Latvian law</i>	250
	Indirect discrimination	251
	<i>EC law</i>	251
	<i>Latvian law</i>	251
	Equal pay	251
	<i>EC law</i>	251
	<i>Latvian law</i>	252
	Equal treatment	252
	<i>EC law</i>	252
	<i>Latvian law</i>	253
	Social security	253
	<i>EC law</i>	253
	<i>Latvian law</i>	254
	Self-employed persons	255
	<i>EC law</i>	255
	<i>Latvian law</i>	255
	Enforcement and remedies	255
	<i>EC law</i>	255
	<i>Latvian law</i>	256

	Recast Directive 2006/54	257
	Legal regulation of pregnancy and maternity under EC and Latvian law	257
	EC law	257
	Role of Directive 92/85 in discrimination against workers during pregnancy and maternity	258
	Role of EC sex equality legislation in discriminatory treatment during pregnancy and maternity	262
	Role of the ECJ in discriminatory treatment of workers during pregnancy and maternity	264
	Reasons for discriminatory treatment of persons during pregnancy and maternity leave under EC law	
	<i>EC legislation</i>	268
	<i>The ECJ</i>	269
	Latvian law	272
	Labour law	272
	Social security law	273
	Legal regulation of paternity under EC and Latvian law	
	EC law	273
	Latvian law	274
	Legal regulation of paternity under EC and Latvian law	
	EC law	275
	Latvian law	275
Chapter 15	Proposals	278
	EC law	278
	Proposals for legal technique for accommodation of pregnancy and maternity under substantive equality	
	<i>Whether comparator is necessary</i>	278
	<i>Who is the right comparator?</i>	279
	<i>Are situations comparable?</i>	279
	<i>Direct or indirect discrimination?</i>	280
	Thoroughness of review as legal technique and how to promote substantive equality	282
	Proposal for maternity and paternity leave cost-bearing	283
	Proposals for the future	284
	Latvian law	
	Proposals for amendments to Latvian Labour law	285
	Proposals for amendments to Latvian statutory social security law	286
	<i>Maternity leave</i>	286
	<i>Paternity leave</i>	287
	<i>Child-care leave</i>	287
	Proposals for amendments to other laws	288
	Thesis for defence	289
	EC law	289
	Latvian law	290
Appendix	Bibliography	I

Part I.

Introduction

Importance of the issue and aims of the study

The idea of the topic of this thesis arose for several interconnected reasons. The first reason was the accession of Latvia to the European Union, which brought about changes in the Latvian legal system by introducing EU law. The second reason was the introduction of explicit sex equality norms into Latvian legislation because of obligations under the EC Treaty. The third was lack of awareness of society in Latvia about the presence of discrimination on grounds of sex, and the disadvantageous position of women in the labour market and as regards financial resources and about the urgency and significance of this topic not only in the context of human rights, but also of economic interests.

Although formally women and men have the same rights, nevertheless frequently men and women are in different positions and possesses different resources for exercising those formally equal rights¹, which leads to inequality, largely defined by stereotypes governing in society and creating hidden social obstacles. Several statistical data testify to the presence of discrimination based on sex in the labour market and demonstrate the disadvantages which the average Latvian woman faces. Although on average women in Latvia have a better education², nevertheless they are paid on average 16% less than men³. The employment rate of men is 7% higher⁴. On average, women occupy lower posts⁵ and perform work in occupations which are lower paid⁶. Women in Latvia spend twice as long as men every week on unpaid home, family, and child-rearing duties⁷. Summing up, work and family duties show that women on average work longer hours, but earn less. Data on other EU Member States varies⁸, but none of them has attained equality of the sexes in the employment market.

The principle of equal treatment as regards human rights is important to Latvia in as much as it testifies to the level of democracy of

¹ Lynn M. Rosebery, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at page 354.

² Results of the 2000 population and housing census in Latvia, Central Statistical Bureau in Latvia, Riga, 2002.

³ Equality between women and men in the European Union, European Commission, Luxembourg: Office for Official Publication of the European Communities, 2005.

⁴ *Ibid.*

⁵ Profesiju apsekojuma rezultāti Latvijā 2004.gada oktobrī, Republikas Centrālā statistikas pārvalde, Rīga, Jūlijs 2005.

⁶ Darbaspēka apsekojuma galvenie rādītāji 2004.gadā, Latvijas Republikas Centrālā statistikas pārvalde, Rīga, Maijs 2005.

⁷ Latvijas iedzīvotāju laika izlietojums 2005, Republikas Centrālā statistikas pārvalde, Rīga, 2005.

⁸ Equality between women and men in the European Union, European Commission, Luxembourg: Office for Official Publication of the European Communities, 2005.

the country and consequently raises the authority of Latvia as a country which respects common values of humanity. This is because it allows any person residing in or visiting there to feel respected and protected from unjust treatment. Just treatment makes people feel safe and comfortable. People who feel comfortable act more productively and enjoy a better state of health.

However, human rights are not the only dimension of the principle of equal treatment. A more significant dimension is the economic one. Since the whole of Europe suffers from ageing, the need exists for a workforce. Increasing women's employment rate is one way to overcome this problem. This is one of the major goals of the Lisbon strategy⁹. But there is also a need for an increase of the birth-rate, in order to provide a workforce in the future. Factors that impede birth-giving are many. But the most important concerns the division of roles between the sexes. The traditional patriarchal division of roles where man is the bread-winner but woman is the home and child-carer does not fit within today's reality. It contradicts the goal of the Lisbon strategy and the needs of today's woman. Since women are more educated, they see that they are able to contribute to society through work outside the home. This is also important from the perspective of financial independence, taking into account the proportion of single mothers¹⁰ and serial monogamy as dominating family structure, when women themselves to a great extent must provide their children with financial means¹¹. So women want a career and financial stability in order to give birth.

⁹ See homepage of European Commission, at http://ec.europa.eu/employment_social/employment_strategy/index_en.htm

¹⁰ Results of the population census in Latvia in 2000, 1/3 of children in Latvia were growing up in single-parent families the absolute majority of which are mothers. Results of the 2000 population and housing census in Latvia, Central Statistical Bureau in Latvia, Riga, 2002.

¹¹ For example, the State Fund of Alimony provides more than 16 500 children with alimony, because one of their parents is not able or most frequently is not willing to provide the child with financial means. The majority of claimants are mothers who are raising children alone. Only 256 are fathers. See in this regard Bargāk vērsiesies pret aliment nemaksātājiem, portāls www.delfi.lv, 04.08.2006, available at <http://www.delfi.lv/archive/print.php?id=15160713&categoryID=193>.

Recent research on the possibility to obtain sufficient alimony via the court process is problematic, since national courts fail to estimate the real financial situation of defendant parents, which are usually fathers. This leads to the situation that women after divorce frequently have to maintain children by themselves. See research "Sieviešu un bērnu tiesību īstenošana laulības šķiršanas gadījumos Latvijas tiesu praksē", portal www.politika.lv, at <http://www.politika.lv/index.php?id=9912>
Common social inclusion memorandum, portal of Ministry of Welfare www.lm.gov.lv, at http://www.lm.gov.lv/doc_upl/LMMemorandsLV_230104.doc, provides that in Latvia a group which is especially endangered by the risk of poverty is families where women alone raise children.
Rūta Kesnere, „Visiem jābūt vienādām iespējām” (All have to have equal opportunities), newspaper „Latvijas Vēstnesis”, 19.05.2004., p.B4, state official Sanita Zaksa of Ministry of Welfare recognizes that

“In society, there is strong concept that man has to earn more because he has to maintain his family. Statistics show that in Latvia there is a large number of divorced families where exactly the women maintain children. Besides frequently they do not receive any financial support from the man – “breadwinner of the family””.

Besides, more and more young fathers are starting to reconsider their bread-winner role and instead they want to participate in equally shared child-rearing. Those needs of society may be accommodated only via respective social protection during special protection periods, a stable employment relationship and the possibility to effectively reconcile work and family life. In order to provide this, stereotypes and discrimination in labour market must be eliminated.

Notwithstanding that, an important role here is played by the aspect of fair competition within the common market, which forms the basis for the whole idea of the EC and subsequent EU. This was actually the main reason why equality provisions appeared in the EC Treaty in 1958. That was due to the French fear that since they have an obligation to pay to their employees equal pay for the same work irrespective of the sex of the worker, they could suffer a competitive disadvantage, because other signatory states may legitimately pay women less than men for the same work¹². Since that time, the principle of equal treatment between men and women has been recognized as a fundamental principle of the EC¹³ and provided as an aim and horizontal priority by the EC Treaty¹⁴.

Taking into account all the reasons mentioned, the **first aim** of this thesis is to research whether EC sex equality law and related law as regards labour and social rights are implemented into the Latvian legal system properly. In order to do so, the thesis describes and analyses the main EC sex equality law concepts such as direct and indirect discrimination, concepts of equal pay, equal treatment and social security as well as the concept of self-employed person under EC sex equality law. One section is dedicated to the most important issue of any law system, which is enforcement and remedies under EC law. Research and analysis on EC sex equality law and related law as provided by EC legislative acts and case-law of the ECJ serves as the basis for analysis of Latvian labour and social security law in order to verify whether Latvia has fully, properly and precisely fulfilled obligations arising out of the EC Treaty as regards implementation of EC sex equality law and related EC law as regards employment and social rights. The section on concepts of equality and non-discrimination analyses the construction of equality law from the perspective of legal theory in international, EC and Latvian legal systems. This is of great importance as regards the second aim of this study, since the legal theory of each legal system forms a basis for further construction of concepts of equality and non-discrimination and in

¹² Paul Craig/Grainne De Burca, *EU Law*, (2003), 3rd edition, Oxford University Press, at page 846.

¹³ Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1978 Page 01365, para. 27. *See also* Principles of European Constitutional Law, edited by Armin von Bogdandy and Jurgen Bast, Oxford and Portland, Oregon 2006 at pages 130-132.

¹⁴ Articles 2 and 3(2) EC Treaty.

particular provides for a legal basis, under what conditions and norms a legal system accommodates biological differences between both sexes and to what extent it is able to catch socially-construed differences and thus exhaust inequality. Since EC sex equality law provides for minimum requirements, the aim of this study is not only to analyse the aptitude of Latvian law to EC sex equality law, but also to find ways to improve the Latvian legal system in order to promote sex equality.

Birth of a child and the consequences arising is considered a key aspect of sex inequality¹⁵. This is recognized by a number of EC policy¹⁶ and legislative documents¹⁷. Those documents show that the problem of low birth-rate is also seen in the light of sex equality. In particular, today's labour market necessitates an equal parenting approach, by involving fathers in child-care and allowing workers of either sex to effectively combine work and family life.

Rights connected with child-birth in Latvia is a hot topic presently but only because of the low birth rate and consequent negative effect on the economics of Latvia, taking into account the fact that Latvia has the fastest growing economy in the EU¹⁸ and that a considerable part of the workforce flows to work in old Member States, while at home there is a shortage of workers. The first step taken towards increase of the birth-rate was a considerable increase of child-birth and child-care allowances. Reform of allowances did not result in a considerable birth rate, because child-birth allowance is extraordinary, but child-care allowance provides

¹⁵ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 2, paragraph 2, argues:

"The primary causes for a woman's career-interruption and reduced professional availability include: childbirth, breastfeeding and childrearing. Childbirth and breastfeeding are biologically imposed on the mother and temporarily prevent her from contributing to the world of paid labour. On top of that, female workers still tend to take leaves of absence (or quit jobs) more often than men do to raise children. As a consequence, the expected return to the company from the average woman seems lower than that of the average man. Even women who do not actually plan to have a family may suffer from employers' stereotypic belief that women interrupt their careers to have and raise children. This is called statistical discrimination."

¹⁶ See for example Resolution of the Council and of the Ministers for employment and social policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life (2000/C 218/02), OJ C 218/5, 31.07.2000. or A Road Map for Equality between Women and Men 2006-2010, European Commission, Luxembourg: Office for Official Publications of the European Communities, 2006.

¹⁷ See for example, 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, vocation training and promotion, and working conditions, OJ L 269, 05.10.2002. p. 15-20 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006. p. 23 – 36.

¹⁸ LETA ziņu dienests, PB prognozes par Latvijas ekonomikas attīstību eksperti vērtē kā pārāk optimistiskas, 26.07.2006., portālā www.delfi.lv, <http://www.delfi.lv/archive/print.php?id=11803199&categoryID=159>

financial means at the proper level only until the child-reaches one year. This reform did not provide any long-term family policy. So it has resulted in several cases before the Constitutional Court of Latvia, in one of which prohibition of combining paid child-care leave and part-time work was successfully contested, and recognition by the Government¹⁹ of the fact of a total shortage of kindergartens resulting in compelled unemployment of parents which would otherwise help to resolve the problem of shortage of workforce.

The author argues that the current problem of policy on raising the birth-rate is lack of respect to the present needs of today's women and the economic situation of the majority of families in Latvia. In particular, it fails to take into account the different effect of child-birth on men's and women's life, to provide measures offsetting that difference and the possibility of effective reconciliation of work and family life. In other words, it fails to see the low birth-rate problem from the perspective of sex equality. While this remains so, no policy on increase of birth-rate will be successful. It will remain low, the majority of children will be born in families with low income,²⁰ and the unemployment rate among women after child-care leave will be as high as it stands now²¹. Besides, discrimination against women within the labour market in general will remain present.

Thus the **second aim** of this thesis is to research how the birth of a child affects employment and social rights of their parents, because the birth of a child is the key aspect of sex inequality in the labour market and as regards social security rights. Almost all inequalities between the sexes arise due to birth of a child, because of the distinct ways it affects the mother's and father's life due to biological and socially construed differences between the sexes. This thesis will analyse to what extent the present law is able to accommodate biological differences between the sexes and at the same time guarantee equality of outcome as regards economic and social rights.

In this regard, it is also important to recognize the provisions of law reflecting mere socially construed differences between the sexes having a distinct effect on lives of men and women. Recognition of problems in this field will serve as a basis for respective proposals on how to improve the law in order to eliminate social stereotypes from the law as such and in order to help overcome stereotypes prevailing in

¹⁹ Ministru prezidenta 2006.gada 3.augusta rīkojums Nr.391 „Par darba grupu pasākuma plāna izstrādei jaunu bērnudārzu būvniecībai”//Latvijas Vēstnesis 125, 08.08.2006. Since in Latvia more than 15 000 children are waiting in line for a kindergarten, the President of Ministers ordered a common action plan to be elaborated for building new kindergartens.

²⁰ Sanita Jemberga, Brīvpusdienas – lūdzu, dzīvokli – nē//Diena, Nr.186(4626), 12.08.2006.

²¹ On May 2006 12.3% of unemployed persons comprise women after child-care leave. Komersanta Vēstnesis, 2006/52(31), Latvijas Vēstnesis, 16.lpp.

society. Elimination of stereotypes in the field of rights connected with birth of a child would help to offset the difference of treatment between the sexes in the labour market and the consequent effect on social rights. It would allow men to participate in child-rearing and thus strengthen the family, while women will be more confident about their position in the labour market and financial stability, which will logically result in an increase of birth-rate.

Finally, taking into account the first and second reasons for choosing this topic, the **sub-aim** of this thesis is - after translation into Latvian - to provide lawyers in Latvia with information on EC sex equality law, the interpretation given by the ECJ and correct application of Latvian law.

Scope of the study

Ratione personae of the thesis cover rights to equal treatment of workers, self-employed and unemployed persons as regards employment and social rights. *Ratione materiae* include analysis of EC sex equality law in the field of labour and social law as provided by Article 141 of the EC Treaty, Directives 75/117²², 76/207²³, 79/7²⁴, 86/378²⁵, 86/613²⁶ and 97/80²⁷ and respective case-law of the ECJ giving interpretation of those legislative provisions as well as defining general principles of EC law, such as in the field of enforcement and remedies of EC law state liability or indirect effect.

²² Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 045, 19.02.1975, p.0019-0020.

²³ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.02.1976 P.0040-0042 and Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 05.10.2002, p. 15-20.

²⁴ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 006, 10.01.1979 P.0024-0025.

²⁵ Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupation social security schemes, OJ L 225, 12.08.1986. P.0040-0042 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 046, 17.02.1997. P.0020-0024.

²⁶ Council 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 protection of self-employed women during pregnancy and motherhood, OJ L 359, 19.12.1986 P.0056-0058.

²⁷ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 014, 20.01.01998. P.0006-0008.

However, EC sex equality law formally does not comprise Directives 92/85²⁸ and 96/34,²⁹ which nevertheless directly affect sex equality. This thesis will put special stress on analysis of those documents and their place and effect on EC sex equality law and sex equality in real life. Recently, Recast Directive 2006/54/EC³⁰ has had the effect of unifying Directives 75/117, 76/207, 86/378 and 97/80 and codifying case-law of the ECJ as well as having several new features in the field of sex equality. Changes in the field of EC sex equality law provided by Recast Directive 2006/54/EC will be briefly analysed in a separate section. Directive 2004/113³¹ will be analysed only as far as it reinforces and supplements Directive 86/613.

Latvian law will be analysed as far as it is covered by EC sex equality law already mentioned from the perspective of proper implementation and Latvian national law regulates special protection during pregnancy, maternity, paternity and child-care leave and after it going beyond the scope of EC law from the perspective of sex equality. Rights of unemployed persons under Latvian law will be discussed as far as they are covered under Directive 79/7. Although Directive 86/378 also covers unemployed persons and persons seeking employment, nevertheless there are no such occupational social security schemes in Latvia which would be applicable to them. Latvian law analysed comprises not only legislative documents, but also cases decided by Latvian national courts and writings of Latvian lawyers and scholars. As regards EC law, not only legislative documents and case-law of the ECJ but also a variety of writings of scholars will be used.

In order to give a full picture on existing sex equality law and existing obligations of the Member States of the EU, according to their international obligations, which falls outside the scope of EC law, the thesis will recall respective international law documents providing for equality. However, the thesis will not give a thorough analysis of international sex equality law because of limited space. The aim of recalling international sex equality law is to compare in general its provisions with EC sex equality and demonstrate the far-reaching effect of EC sex equality law in comparison to international sex equality law.

²⁸ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28.11.1992 P.0001-0008.

²⁹ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the EUTC, OJ L 145, 19.06.1996 P.0004-0009.

³⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006. p. 23 – 36.

³¹ Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21.12.2004.

As regards analysis of the key aspect of EC sex equality law - rights of the sexes affected by birth of a child - this will comprise the period of the whole pregnancy, maternity, paternity and child-care leave, the period of breastfeeding and a short period after child-care leave, in which a person may suffer disadvantages as regards non-acquired social security rights during that leave. Because of limited space, the thesis will not specially analyse such important aspect of sex equality as the effect on rights of both sexes of the socially-construed stereotype of the child-raising obligation put on women throughout their lives.

Materials used for this study comprise law documents and publications in Latvian and English. Law documents cover international, EC and Latvian legal instruments – legislative acts, case-law of the ECJ and Latvian national courts, one case on sex equality matters delivered by the European Court of Human Rights, explanatory or soft law documents, such as recommendations under international and EC law. Since some part of policy documents sooner or later becomes law, EC and Latvian policy documents are used to illustrate EC and Latvian policy in the field of sex equality.

There is a significant amount of writing on EC sex equality policy and sex equality and related law, especially on case-law of the ECJ. The author of this thesis will use a selection of those writings, mainly concerning analysis of the case-law of the ECJ published in the form of articles by the biggest European law journals, and books published by the biggest European publishers. As regards Latvian legal writings, there is not a significant amount of these as regards labour law and no writings on Latvian sex equality law, except those published by the author of this thesis. In order to acquaint the reader with the state of sex equality issues in everyday life, sources providing for statistics and different kinds of research are used. Analysis reflects the state of normative acts and literature published up to August 2006, when the main research was completed.

Method

Since one of the aims of this thesis is to research proper implementation of EC sex equality law and related law within the Latvian legal system, an appropriate method must be used. The comparative method in its traditional sense compares two independent legal systems³². Although the EC and Latvian legal systems are subordinated, nevertheless in order to recognize whether EC law is properly implemented into the Latvian legal system no other method than the comparative may be used.

³² Konrad Zweigert, Hein Kotz, *Introduction to Comparative Law*, Clarendon Press, Oxford, 3rd edition, 1998.

However, for this special purpose some elements of methodology depart from the traditional notion of the comparative method, but it still contains common elements. There is almost no problem to find two objects³³ each coming from superior and subordinated legal systems sharing common features, because of references in national law on what EC law document is intended to introduce by that national provision. This work is also reduced by the fact that the EC Treaty and EC directives presently give quite exhaustive definitions of main sex equality law concepts and the fact that Latvian law presents a continental law system which provides legislative norms by statutes.

So in general, in order to implement EC law within the Latvian legal system, definitions given by EC law must be transformed almost unchanged into national law. Problems arise where the ECJ has elaborated in course of interpretation of concepts provided by EC legislative acts and regarding enforcement and remedy measures which is left for the competence of each Member State. However, it is true that mere grammatical comparison does not give an answer on the subject of proper implementation. In order to ensure proper implementation, the practical effect and application of implemented provisions must be detected. Only such analysis may guarantee thoroughness of research on implementation. Further analysis on gaps in the Latvian legal system as regards failure to implement EC law properly will be analysed from a critical point of view.

The second aim of the thesis is to recognize deficiencies of EC and Latvian national sex equality law and related law as regards their ability to exhaust *de facto* discrimination. For this purpose, the critical method will be used. Critical methods represent several movements. Critical legal studies emerged at the end of the 1980's in the United States and represent the view that existing legal doctrine and practices of legal institutions represents application of law which is "biased in favour of economically and socially privileged elites, but ignore relations in the reality of life. Feminist critiques deal with understanding the concept of equality and whether it provides adequate means for elimination of inequality. In order to catch discriminatory practices existing in real life its task is to elaborate equality law concepts which would allow claiming equal treatment of the sexes not only where they are in similar situations, but also in different situations such as pregnancy³⁴. The author of the thesis will mainly criticize law from the feminist perspective. Besides, the author uses analytical, inductive and deductive methods.

³³ Lynn M. Rosebery, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at page 7.

³⁴ Lynn M. Rosebery, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at pages 352-364.

Structure

The structure of the thesis is built in order to provide reader friendly material taking into account that not all lawyers are familiar with issues of sex equality and especially with EC sex equality law consisting also of a considerable number of judgments delivered by the ECJ. The present Chapter or Chapter I introduces the reader to the importance of the topic analysed, defines the aim and scope of the study, as well as providing the methodology and terminology used in the course of the thesis.

Chapter II first defines, describes and analyses EC law including case-law of the ECJ as regards main sex equality law concepts. Second, it describes and analyses their implementation into the Latvian legal system. In order to give a complete picture of sex equality concepts, fragmentary reference to international law is provided.

Chapter III deals with a key aspect of sex equality law – rights of persons with regard to child-birth. Here both EC and Latvian law on this matter are described and analysed from the perspective of proper implementation and sex equality.

Chapter IV provides final conclusions discovering deficiencies of EC sex equality and related law itself, problematic areas of Latvian law as regards implementation of EC law and the impact of Latvian national law falling outside the scope of EC law on sex equality. The author also gives proposals for elimination of deficiencies, adverse impact of legislative provisions on sex equality and its promotion towards substantive equality.

Terminology

For more precision, the author uses the term ‘EC law’ not ‘EU law’ since sex equality law falls within the First Pillar governed by the EC Treaty. ‘EC Treaty’ of course means consolidated versions of the Treaty Establishing the European Community. The thesis provides for new numbering of the EC Treaty, e.g., after amendments by the Amsterdam Treaty. Directives will not be named otherwise but used according to their numbering.

Speaking about Directive 76/207 both numberings before and after amendments by Directive 2002/73 will be used. When referring to old numbering of articles directives will be called ‘Directive 76/207’, but new numbering when the directive will be called ‘amended Directive 76/207’.

All EU Member States will be called ‘the Member State’. ‘Old Member States’ means the EU-15 or the Member States which acceded before 1 May 2004, while ‘new Member States’ means those that acceded after that date.

The European Court of Justice will have two designations: the abbreviations 'the ECJ' and 'the Court' used alternately.

Part II.

Main concepts of EC equality law and their implementation into the Latvian legal system

Chapter 1.

Equality and non-discrimination

Content of equality and non-discrimination law

The law on equality and non-discrimination is built upon the notion that it is just to treat similar situations similarly, but different ones differently. It is built upon Aristotle's paradigm that like cases should be treated alike and unlike cases unlike, in proportion to their unlikeness¹. This paradigm "per se is indeterminate as a legal prescription"² or it lacks any content. In other words:

The weakness of Aristotle's concept is that it neither specifies the circumstances which make individuals different nor gives an indication as to how one might find an adequate comparator³.

So it must be filled with the traits providing for who are equals and who are not, and then which cases that the trait regards.

Each society alone according to its state of development defines which cases are equal and which unequal⁴, particular circumstances and the trait according to which cases must be judged as equal or unequal. Consequently, which situations are similar differs from society to society⁵. One trait could be relevant in one case and absolutely irrelevant in another.

¹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 16, paragraph 30; Eugenia Caracciolo di Torella and Annick Masselot, *Pregnancy, maternity and the organisation of family life: an attempt to clarify the case law of the Court of Justice*, European Law Review (2001) 26, Sweet & Maxwell and Contributors, at page 251 describes the Aristotelian paradigm in different words: "things that are alike must be treated alike, while things that are unlike should be treated in proportion to their unlikeness".

See also Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 8.

² Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 9.

³ Eugenia Caracciolo di Torella and Annick Masselot, *Pregnancy, maternity and the organisation of family life: an attempt to clarify the case law of the Court of Justice*, European Law Review (2001) 26, Sweet & Maxwell and Contributors, at page 241.

⁴ *See in this regard*, Egils Levits, *Par tiesiskās vienlīdzības principu*//Latvijas Vēstnesis, 08.05.2003., Nr.68(2833), Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 19, paragraph 39.

⁵ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 21, paragraph 44.

However, most important for the purposes of equality and non-discrimination is the manner in which circumstances and traits of equal and unequal situations are defined. The manner in which circumstances and traits characterising equal and unequal situations are defined and settled distinguishes between different doctrines or approaches to equality. Two general doctrines present formal and substantive equality approaches, of which each has many more sub and mixed approaches elaborated by scholars or developed by legal systems of different states⁶. The author of this thesis will describe three – formal, substantial and a hybrid of both – the differential approach, because it is the closest to the present legal systems of the EU Member States and the legal system of the EU itself.

Formal equality approach

The formal equality approach usually reflects the first Aristotelian paradigm, that likes should be treated alike⁷. A strictly formal approach presumes that all are alike, but circumstances and traits defining equal situations usually represent norms governing in society or norms represented by a privileged group⁸.

The formal approach has its roots in the liberal market economy, and is based on “market freedom, individualism, and formal justice”⁹ where the norm is male, who is white and healthy¹⁰. It does not provide for different treatment according to difference. No issues of equality can be addressed without a comparator¹¹, thus formal equality leaves out those who do not fit the norm. For example, this concerns pregnancy. Since a male cannot be pregnant, formal equality does not accommodate needs of pregnant workers, because there is no comparator which could

⁶ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at pages 29-30.

⁷ *Ibid*, at pages 21-22.

Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 21, paragraph 42.

⁸ So far no legal system has managed to escape the norm of the privileged group. *See* in this regard, Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003 and Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at pages 19-20, paragraphs 39-40.

⁹ Helen Fenwick, “From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law, European Public Law, Volume 4, Issue 4, 1998, Kluwer Law International.

¹⁰ Sandra Friedman, *Discrimination Law*, Oxford University Press, 2002, at page 9.

¹¹ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 23, Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 19, paragraph 39.

be only male¹². Under the doctrine of formal equality, the disadvantage of a pregnant worker would be seen not as a disadvantage of women as a group but a result of individual choice.

Thus equal treatment leads to unequal results. In other words, the formal equality approach has been criticised for guaranteeing consistency of treatment but making no demand on the content of that treatment¹³. It accommodates the needs of the prevailing group.

The substantive equality approach

Substantive equality is aimed at equal results¹⁴ or fairer redistribution of benefits¹⁵. Some scholars argue that the substantive equality approach “is the translation of the second part of the Aristotelian equality paradigm, according to which unlike cases should be treated unlike in proportion to their unlikeness”¹⁶. Fredman argues that the substantive equality approach could also be oriented to equal opportunities¹⁷. Since it focuses on accommodating disadvantaged groups in society, the substantive equality model is more group-oriented¹⁸. The substantive equality approach requires eradication of practices that lead to increase of disadvantage¹⁹. According to Fredman, one stage of equality of opportunity is achieved when structural barriers are eliminated or individuals are treated on the basis of their individual qualities without regard to sex or race. The second stage of equality of opportunity or substantive equality of opportunity requires that such measures be taken as ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good²⁰.

¹² Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 23.

¹³ *Ibid*, at page 22.

¹⁴ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 23, paragraph 47, Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 27.

¹⁵ Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, at page 11.

¹⁶ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 23, paragraph 49.

¹⁷ Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, at pages 11-15.

¹⁸ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 23, paragraph 47.

¹⁹ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 27.

²⁰ Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, at pages 11-15.

Substantive equality allows moving beyond comparison²¹ or to move away from the focus on sameness but rather to concentrate on the structural consequences of a disadvantaged group²². One need not prove discrimination. The simple fact that an individual or group is at a disadvantage is enough to take action aimed at achieving an equal outcome. Under this concept can be placed preferential treatment, or positive discrimination.²³

The concept of preferential treatment of a disadvantaged group, or positive discrimination, fits perfectly within the substantive equality approach²⁴. Nevertheless, Mjoll points out weaknesses to this approach. First of all it is normative indeterminacy that does not identify disadvantaged groups which would be entitled to preferential treatment. On the other hand, dividing groups by disadvantages leads to their being categorised as different groups, deviating from the prevailing norm. Second, this concept is almost unrecognisable as equality, because it lacks its doctrinal basis²⁵.

Foubert, however, tries to establish a doctrinal basis for the substantive equality approach. She argues that the second part of the Aristotelian paradigm, upon which is based the notion of substantive equality, concerns two situations. The first is where persons are in the same legal but different factual situations. This inequality could be corrected by use of affirmative action. The second situation occurs when persons are in unequal legal and factual situations. According to the Aristotelian paradigm, the different treatment which they deserve must be proportionate according to their difference²⁶. However, the author of this thesis would argue - like Mjoll - that proportionality of difference in treatment according to difference of situation suffers from normative indeterminacy.

The differential equality approach

The differential equality approach presents a mix of both the formal and substantive equality concepts. This model is built upon both parts of the

²¹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 23, paragraph 47.

²² Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 27.

²³ Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, at pages 11-15.

²⁴ *Ibid.*

²⁵ Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 29.

²⁶ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at pages 23-30, paragraphs 49-61.

Aristotelian paradigm and although based on the formal equality approach is oriented to accommodation of differences. Differences which this model tries to accommodate are those that are “immutable and unchangeable”²⁷. These include, for example, social protection measures, such as special protection during pregnancy or social protection of disabled people, protection of indigenous people²⁸ as well as minority languages²⁹, and finally, it accommodates or prohibits discrimination based on certain traits, such as sex, nationality, race, or age³⁰.

However, it is arguable on which part of the Aristotelian paradigm the last example is based - the first or the second. As far as concerns biological abilities of the traits mentioned as prohibited for categorisation, there is no necessity to consider them as unfit for the first part of the Aristotelian paradigm. However, since socially construed preconceptions affect the factual situation of persons possessing traits prohibited for categorisation, only the second part of the Aristotelian paradigm may accommodate them as fitting within the first part of the paradigm.

The differential equality approach also accepts affirmative action or positive discrimination, since the purpose of anti-discrimination law is emancipation and social integration of groups defined as disadvantaged³¹. Mjoll identifies as the strength of the approach the fact that this model does not require a comparator³². However, lack of a comparator does not guarantee substantive equal treatment where a different situation is accommodated, such as special treatment during maternity. Mjoll agrees that the weakness of this approach again entails normative indeterminacy as to “which differences should justify or require special treatment” and lack of content of treatment of different situations. Besides, under the differential equality approach the privileged group of society remains as the standard or measure of things³³.

Meaning of the concepts of equality and non-discrimination

Normative acts frequently use two concepts - equality and non-discrimination - to describe prohibition of disadvantageous treatment³⁴.

²⁷ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 24.

²⁸ Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003., Nr.68(2833).

²⁹ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 24.

³⁰ Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003.

³¹ Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003., Nr.68(2833), Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 25.

³² Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 25.

³³ *Ibid*, at page 26.

³⁴ Article 1 CEDAW provides:

Consequently the question arises whether the meaning and content of “equality” and “non-discrimination” is similar or different.

“Discrimination” in English has two linguistic meanings: to make a distinction and to discriminate against or to make unfair distinction. In other languages and with regard to law³⁵ the second meaning alone is used³⁶. It follows that non-discrimination in law prohibits making unfair distinctions. It is important to note that discrimination is not implicit in all differential treatment but only treatment that is unfair or that lacks reasonable justification³⁷.

What constitutes reasonable justification depends on the legal system³⁸. However, this is not the only criterion for discrimination. Discrimination occurs where similar cases are treated differently or two different cases are treated similarly. Under the differential equality approach, a person in the latter case can claim similar treatment, while in the former case one can claim different treatment only if similar treatment is arbitrary³⁹.

“Equality” means the quality or state of being equal⁴⁰. In law, “equality” means equality before the law and guarantees fair treatment

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field...”

Article 14 ECHR provides:

“The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Article 26 ICCPR provides:

“All persons are equal before the law and are entitled without any discrimination to equal protection. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Articles 2 and 3(2) of the EC Treaty provide for equality between men and women, while Article 13 provides for combating discrimination based on sex.

³⁵ Black’s Law Dictionary, 8th edition, Bryan A. Garner Editor in Chief, Thomas West, 2004, at page 500, explains that “discrimination” means:

“The effect of law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap”.

See also L.B. Curzon, Dictionary of Law, Financial Times, Pitman Publishing, 1998, William C. Burton, Burton’s Legal Thesaurus, 3rd edition, Macmillan Library Reference USA, New York.

³⁶ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 30, paragraph 62.

³⁷ In this regard, Black’s Law Dictionary, 8th edition, Bryan A. Garner Editor in Chief, Thomas West, 2004, at page 500, gives a second explanation of the word “discrimination” in law. It also means:

“differential treatment – failure to treat all reasonably equally when no reasonable distinction can be found between those favoured and those not favoured”.

³⁸ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 31, paragraph 63.

³⁹ Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003., Nr.68 (2833).

⁴⁰ Black’s Law Dictionary, 8th edition, Bryan A. Garner Editor in Chief, Thomas West, 2004, at page 576.

according to regularly established norms of justice⁴¹. Equality before the law is undoubtedly narrower than the concept of equality, because law does not always reflect a full understanding of equality governing in society. Besides, the formal equality approach recognizes only legal equality, not factual equality. Levits argues that today's legal systems within Europe⁴² require assessment not only of the legal situation but also of the factual situation in order to establish whether persons are in a similar situation⁴³.

Some authors argue that equality comprises prohibition of discrimination or non-discrimination⁴⁴. They present different arguments for such assertion. Levits contends that the principle of general equality consists of two sub-principles – prohibition of unfair differentiation and prohibition of discrimination. The first sub-principle allows an assessment of whether differentiation based on any trait in any circumstances is unfair or justifiable. The second sub-principle – the principle of non-discrimination - is strictly defined by traits and circumstances which do not allow for differentiation and leaves very small space for justification. Since non-discrimination constitutes only one part of the principle of equality, it follows that equality and non-discrimination are not synonyms, but the latter comprises the former. Another assertion presents itself, namely that eradication of discrimination does not necessarily guarantee equality because of the existence of socially-construed obstacles which non-discrimination law is not able to catch. This possibly follows from the linguistic meaning of discrimination which means that non-discrimination is able to catch only unfair distinctions and nothing more.

However, Mjoll argues that “equality and non-discrimination are generally taken to be the positive and negative statements of the same principle”⁴⁵. She says so with regard to the content of Article 14 and Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Although both norms refer only to non-

⁴¹ *Ibid*, at page 577.

⁴² The differential equality approach.

⁴³ Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003., Nr.68 (2833).

⁴⁴ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 30, paragraph 63, Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 08.05.2003., Nr.68 (2833). Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at page 543. *See also* Elisa Holmes, Anti-Discrimination Rights without Equality, *The Modern Law Review*, March 2005, Vol 68, No. 2. She contends that anti-discrimination rights are not equal treatment norms, they do not require that all people (perhaps in a certain category) are treated the same.

⁴⁵ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 7, *see also* in this regard Gerald Stourzh, “...égaux en droits”: The Place of Non-discrimination in the History of Human Rights, *Human Rights Law Journal*, 29th October 2004, Vol. 25, No.1-4.

discrimination, nevertheless the Explanatory report to Protocol 12 of the Convention provides for the principle of equality and for positive measures; thus the content of the norms in question is filled with content of what equality requires. In such circumstances, one could indeed argue that equality and non-discrimination form opposite sides of the same coin⁴⁶.

Sex equality and non-discrimination under EC law

The EC treaty and EC secondary legislation refer to both concepts. For example, Articles 2 and 3(2) of the EC Treaty provide for equality between men and women, while Article 13 provides for combating discrimination based on sex. Article 141(4) allows Member States to adopt measures providing for special advantages for the disadvantaged sex. Titles of equality law directives refer to equality; only content provides for prohibition of discrimination as well as for positive measures.

However, the provisions of EC legislation form only one part of EC sex equality. In order to assess the equality approach presented by the EC it is of great importance to examine the interpretation and application of that law. Here, the ECJ is the main actor⁴⁷.

The ECJ has held that:

discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations⁴⁸.

This non-discrimination formula has been criticised by scholars as having been limited to situations having a comparator only⁴⁹, because it sifts out different cases that require different treatment but that lack a comparator. However, this argument cannot be accepted. The case-law of the ECJ is not limited to this formula. The ECJ has accepted discrimination without an appropriate comparator in pregnancy cases⁵⁰. This testifies to the

⁴⁶ Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at pages 8-9.

⁴⁷ Article 220 EC Treaty.

⁴⁸ Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker*, European Court Reports 1995 Page I-00225, paragraph 30.

⁴⁹ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at page 543.

⁵⁰ See for example cases C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf.e.V.*, European Court Reports 1994 Page I-01657, C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567, C-109/00, *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993.

accommodation of persons who are in a different situation and does not present a privileged group. Besides, the Court has accepted positive measures in a line of judgments⁵¹, thus allowing advantageous treatment for disadvantaged groups.

Although many rulings of the ECJ in the field of sex equality and non-discrimination deserve considerable criticism⁵², nevertheless the approach taken by the Court regarding enforcement of EC sex equality and non-discrimination law demonstrates the so-called differential equality approach which, although based on formal equality, presents certain elements of the substantive equality approach.

⁵¹ See in this regard cases C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, European Court Reports 1997 Page I-06363, Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, European Court Reports 2000 Page I-01875 and section on direct discrimination.

⁵² To be analysed further in this thesis.

Chapter 2.

Direct discrimination

EC law

Establishing direct discrimination

A definition of direct discrimination in EC legislation was given only in 2002 by Directive 2002/73 amending Directive 76/207. Article 2(2) provides:

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

This means that direct discrimination occurs where a person is treated less favourably on grounds of sex. This formulation seems simple, but sometimes it is not easy to distinguish between direct and indirect discrimination.

Indirect discrimination occurs where a person is treated less favourably on another ground than sex, but the effect is such that it puts the person at a particular disadvantage compared with a person of the other sex. However, there could be situations where a provision or criterion formulated neutrally is applied to one sex only. For example, the case of *Nikoloudi*¹ formed a quite complicated situation. Under the Staff Regulations of the employer, part-time workers under indefinite time contracts did not have the right to become established members of the staff. Thus, periods worked part-time were not taken into account when calculating length of service and consequently it negatively affected pay increase. Those provisions were formulated sex neutrally. However, the possibility to work under indefinite term contract part-time work was provided to women only. That provision was introduced as a positive measure allowing women to reconcile work and family life by reserving part-time posts exclusively to them. The ECJ recognized this situation as directly discriminating against women. It held that the Staff Regulation under which only women can be employed under a contract of indefinite period for part-time work does not constitute direct discrimination. However:

the subsequent exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex within the meaning of Directive 76/207².

¹ Case C-196/02, *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*, OJ C 106, 30.04.2005., p.1

² *Ibid.*, para. 40.

It follows that a sex-neutral provision, criterion or practice could be directly discriminating if it concerns persons of one sex only by putting them into a less favourable situation.

Comparator

The definition of direct discrimination provides that direct discrimination occurs where a person **is, has been or would be** treated less favourably in a comparable situation on the grounds of sex. It follows that since 2002 the legislator allows hypothetical comparison. However, comparison to a hypothetical comparator is still limited to a certain category of cases.

In the equal pay case *Defrenne II*,³ the ECJ set clear criteria for comparison – it must be a colleague of the opposite sex working or having worked⁴ in the same establishment or service. The Court still strongly follows this formula⁵. Even recently, it refused to extend the comparison holding that:

So far, a hypothetical comparison is accepted by the ECJ in pregnancy cases only Article 141(1) EC must be interpreted as meaning that a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is not entitled to rely, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer⁶.

In *Dekker*⁷ the Court held that refusal to hire on the grounds of pregnancy, first, is direct discrimination based on the sex of the candidate, and, second, the absence of a male candidate does not make this situation different. The Court had the same opinion regarding dismissal⁸.

However the question arises as to what are comparable situations and what are not. If we follow the reasoning given by the ECJ in *Dekker*, then direct discrimination against women arises in every situation in

³ Case 43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455.

⁴ Case 129/79, *Macarthys Ltd v Wendy Smith*, European Court Reports 1980 Page 01275.

⁵ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, European Court Reports 2002 Page I-07325.

⁶ Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873.

⁷ Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

⁸ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, case C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf.e.V.*, European Court Reports 1994 Page I-01657, case 109/00, *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993.

which men never could find themselves. The ECJ took this approach in *Hertz*⁹ and the outcome was not favourable to pregnant workers. Here, the ECJ compared situations of sick men with that of sick women and found that Directive 76/207 does not preclude dismissal of a female worker on account of repeated periods of sick leave which are attributable to pregnancy or confinement, because men would be dismissed in that situation too. However, the ECJ did not take into account an important aspect of that situation. Namely, that the illness arose due to pregnancy, so that the situation of sick men is not comparable to the situation of women who are sick due to pregnancy disorders.

The ECJ took this fact into account later in *Brown*¹⁰. The Court held that disorders and complications which may arise during pregnancy and cause incapacity for work, “form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition”¹¹. However, the *Hertz* judgment and its simple comparisons of situations is still enforceable with regard to complications and disorders manifesting after maternity leave, because “there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness”¹².

The ECJ followed the *Brown* approach with regard to comparable and non-comparable situations in *Gillespie*¹³. It held that the situation of women during maternity leave is not comparable with that of a man or woman actually working. The consequence of this reasoning is such that EC law does not require a woman to be provided with full pay during maternity leave even if a maternity allowance is paid by the employer¹⁴.

“Although pregnancy is not in any way comparable to a pathological condition”¹⁵, nevertheless with regard to the amount of maternity

⁹ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

¹⁰ C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

¹¹ *Ibid.*, paragraph 22.

¹² Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, paragraph 16, see also case C-400/95, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 page I-02757.

¹³ C-342/93 *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*, European Court Reports 1996 Page I-00475.

¹⁴ C-342/93 *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*, European Court Reports 1996 Page I-00475, C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243. This was recently reaffirmed in case C-147/02, *Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security*, ECR 2004 Page 0000, paragraph 46.

¹⁵ C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, paragraph 22, see also case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567, paragraph 25.

allowance which Member States are obliged to provide under Directive 92/85¹⁶ women on maternity leave are still compared to sick workers, because they are entitled to receive maternity allowance which is not lower than sickness allowance. Thus with regard to protection of pregnant workers, workers on maternity leave and after it (illness attributable to pregnancy continuing after maternity leave) there is no clear and consequent approach on which situations are comparable and which are not¹⁷.

However, some writers suggest that the Court has strongly followed the construction of the concept of discrimination. They say that the *Hertz/Larsson*¹⁸ “comparative approach” - women absent on account of illness attributable to pregnancy continuing after maternity leave must be treated in the same way as men absent from work for any reason not only by reason of sickness – “is the preferable one since it is consistent with the structural requirements of discrimination law”¹⁹. The same could be suggested about allowance or pay during maternity leave. Namely, the Court followed the structural requirements of discrimination law by saying that discrimination is “the application of different rules to comparable situations or the application of the same rule to different situations”. Women on maternity leave are in a special position which requires special protection. That special position and protection is not comparable with that of a man or woman actually at work²⁰.

Here, the question remains open – whether the situation of women in three periods – pregnancy at work, maternity leave, and after maternity leave - is comparable to that of her colleagues or not.

Possibility to justify direct discrimination

So far, the ECJ has strongly followed the position that direct discrimination cannot be justified. In *Dekker* the Court rejected the argument of financial loss of the employer which he would suffer by

¹⁶ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28/11/1992 P.0001-0008.

¹⁷ Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002, at page 101, *see also* Evelyn Ellis, *Recent Developments in European Community Sex Equality Law*, *Common Market Law Review*, 35, 1998, pages 379-408, at page 393.

¹⁸ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, case C-400/95, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757.

¹⁹ Evelyn Ellis, *Recent Developments in European Community Sex Equality Law*, *Common Market Law Review*, 35, 1998, pages 379-408, at page 395.

²⁰ C-342/93 *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*, European Court Reports 1996 Page I-00475, C-333/97.

employing a pregnant worker for the maternity leave period²¹. Likewise, in *Webb* the Court did not accept the argument of improper functioning of the enterprise due to the maternity leave of a worker²².

The possibility to justify direct discrimination is not provided in the definition of Directive 2002/73 either. In contrast, the definition of indirect discrimination expressly provides the possibility for justification. However, a different opinion in that regard is shared by scholars, the Commission and Advocate General Van Gerven. The question whether direct discrimination can be justified particularly arose in the case of *Birds Eye Walls*²³. Advocate General Van Gerven was of the opinion that since sometimes it is difficult to distinguish between direct and indirect discrimination, the possibility of justifying direct discrimination cannot be ruled out.

The facts of the case of *Birds Eye Walls* are as follows. The legislation of the United Kingdom provides for different statutory retirement ages, 60 for women and 65 for men. Under an occupational pension scheme, workers had rights to early retirement. Until age 60 both sexes received a full bridging pension under the occupational pension scheme, but after reaching the age of 60 women's bridging pensions reduced, because they started to receive their statutory pension. That means that between the age of 60 and 65 men received a higher bridging pension than women, although the total amount of pension received by men and women between ages 60 and 65 was equal, because women's bridging pensions during that time were reduced proportionately to the statutory pension they received from the state.

According to the facts, the Commission contended that there was direct discrimination, because women received a reduced bridging pension from the age of 60 while men from 65 only; however, this direct discrimination must be justified taking into account the substantive equality which such regulation achieved. The Advocate General argued that there was indirect discrimination, because calculation of the bridging pensions was the same. It could merely be temporarily reduced on the grounds that a person receives a pension from the state. However, the Advocate General's view appears to be incorrect, because indirect discrimination occurs where persons belonging to one sex are treated less favourably on another ground than sex. Here "less" favourable treatment is based exclusively on sex, so that one cannot say that this situation is indirectly discriminatory.

²¹ Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 12.

²² Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567, paragraph 26.

²³ Case C-132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts*, European Court Reports 1993 Page I-05579.

Also doubtful is the argumentation of the Commission on direct discrimination. When defining whether there is discrimination, one must assess whether situations are similar or comparable. The difficulty in a particular situation is such that, unlike usual equal treatment and pay cases, it consists of more than one element. Namely, it consists of an element of equal pay and statutory provision of retirement ages which falls outside the competence of EC law. However, in deciding whether situations are comparable both elements must be taken into account. Thus, the Court was right in holding that the situations of men and women between age 60 and 65 are not similar and therefore not comparable. The Court reaffirmed this approach in *Hlozek*²⁴.

Regarding the following case-law, legal writers indicate that in *Smith v. Advel Systems*²⁵ the ECJ entertained the possibility to justify direct discrimination²⁶. This case was about an occupational pension scheme which tried to comply with the *Barber* judgment²⁷ by setting an equal retirement age for both sexes. The owner of Advel Systems occupational pension scheme claimed that setting less favourable and even discriminatory treatment for women could be justified by the financial difficulties faced by that occupational pension scheme. But the Court ruled that the financial difficulties of the occupational pension scheme in this case were not comparable to those in the *Barber* judgment, because the period of discrimination which must be eliminated was comparably very short, so that Advel Systems could not justify discrimination against women. The assumption that the Court gave an inclination for justification of direct discrimination comes from the phrase: “even assuming that it would, in this context, be possible to take account of objectively justifiable consideration relating to the needs of the undertaking or of the occupational scheme concerned...”²⁸

Likewise, scholars suggest that the inclination to accept objective justification for direct discrimination was given by the Court in the case of *Webb*²⁹; however, later case-law overthrew that suggestion³⁰.

²⁴ Case C-19/02, *Viktor Hlozek v Roche Austria Gesellschaft mbH.*, European Court Reports 2004 Page I-11491.

²⁵ Case C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd.* European Court Reports 1994 Page I-04435.

²⁶ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, at page 78.

²⁷ C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899.

²⁸ Case C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd.* European Court Reports 1994 Page I-04435, paragraph 30.

²⁹ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, at page 78.

³⁰ In case C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567. The court ruled that employment contract concluded for indefinite cannot be terminated on grounds of a worker's pregnancy. Indeed, formulation of the Court's opinion tends to the conclusion that if it would have been the case on employment contract concluded for a definite period,

Scholars³¹ also stress that a direct discriminatory scheme which does not allow justifications may turn out to be too rigid. In particular, “a number of cases in the field of pregnancy discrimination are on the very edge of what is acceptable, and involve a risk of “*effet pervers*””³². Writers point out that clearly in many cases the ECJ did accept or at least was willing to accept unwritten justification or tried to resolve the problem in terms of non-comparability. The best example for this is the pregnancy cases³³ discussed above, where “the ECJ did not follow the view that pregnancy discrimination is direct sex discrimination, as it has done in other cases, by escaping through a “non-comparability argument””³⁴.

Exemptions

Though direct discrimination can not be justified, there are three instances where different treatment is allowed and can not be considered as discriminatory against either sex. These three exemptions are provided by Directive 76/207 and amended by Directive 2002/73.

Sex of the worker as determining factor

The first instance where different treatment can not be considered as discrimination is where by reason of the nature of occupational activity or training or the context in which they are carried out the sex of the worker constitutes a determining factor³⁵.

The ECJ has held that this particular derogation from the principle of equal treatment must be interpreted strictly³⁶ and any derogation must be proportionate. The principle of proportionality requires assessment of whether derogation is an appropriate and necessary measure to achieve a legitimate aim³⁷. As regards legitimate aim, this could be, for example,

terminating it on the grounds of a worker’s pregnancy would have been justified. However, in case C-109/00, *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993, the ECJ held that dismissal on grounds of pregnancy cannot be justified even if a contract of employment is concluded for a definite term and because of pregnancy the worker will not be able to work during a substantial part of the term of that contract.

³¹ Sacha Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes*, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International.

³² *Ibid.*

³³ See in this regard Cases C-342/93 *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*, European Court Reports 1996 Page I-00475, C-320/01 *Wiebke Busch and Klinikum Neustadt GmbH & Co. Betriebs-KG*, European Court Reports 2003 Page I-02041.

³⁴ Sacha Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes*, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, see footnote at page 545.

³⁵ Article 2(2) of Directive 76/207.

³⁶ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 36.

³⁷ *Ibid.*, para. 38.

public security³⁸ internal and external³⁹. However, considerations of public security as such can not be accepted as justification for derogation from the principle of equal treatment⁴⁰. Women can not be excluded from a certain type of employment on the grounds that public opinion demands that women be given greater protection than men, because almost all risks affect men and women in the same way⁴¹.

The Court has rejected too broad an exclusion of one sex from an entire occupational activity⁴². Derogation must be justified in relation to specific duties and not in relation to an employment consideration in its entirety⁴³. Besides, derogation must be sufficiently transparent⁴⁴. So far, general guidelines given by the Court are more or less clear. However, answers lack two questions of general importance.

The first question is how Member States can guarantee derogation to be applied as derogation from an individual right if derogation is provided by national legislation? The phrase “derogation from an individual right”⁴⁵ can be understood as an obligation to assess each candidate irrespective of sex. However, if derogation is provided by national legislation⁴⁶, then derogation is applied to an abstract circle of persons – one or other sex - and thus making it impossible for a person belonging to the exempted sex to be assessed as a candidate for vacancy on individual grounds.

³⁸ *Ibid.*, para. 36.

³⁹ Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403, paragraph 17.

⁴⁰ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 26, case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403, paragraph 19.

⁴¹ *Ibid.*, para. 44.

⁴² Case 165/82, *Commission of the European Communities v United Kingdom and Northern Ireland* ECR 1983 Page 03431, paragraph 18, Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403, paragraph 24, case C-203/03, *Commission of the European Communities v Republic of Austria*, European Court Reports 2005 Page 00000, paragraph 71, case 318/86, *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 03559, paragraph 25.

⁴³ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 32.

⁴⁴ Case 318/86, *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 03559, paragraph 25.

⁴⁵ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 36, case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403, paragraph 23.

⁴⁶ According to the ECJ, derogations may be made by national legislation. See Case 165/82, *Commission of the European Communities v United Kingdom and Northern Ireland* ECR 1983 page 03431, Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459, Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651. However, according to Article 9(2) of Directive 76/207 the Member States have a duty to assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the directive may still be maintained.

The facts show that approximately 1% of women can perform muscle strength and aerobic fitness equal to average men⁴⁷. The Court admits the fact that some women could be of higher physical strength than some men, so that a situation cannot be accepted where “women [can] be excluded from a certain type of employment solely because they are on average smaller and less strong than average men, while men with similar physical features are accepted for that employment”⁴⁸. On the other hand, the Court in *Sirdar* allowed exclusion of women from service in special combat units in the Royal Marines on the grounds that women would not be able to fight in the first line of attack as commandos and it could affect interoperability⁴⁹ and in *Johnston* accepted that possibly policewomen might create additional risks of being assassinated and thus endanger public safety⁵⁰.

This approach taken by the Court, which demonstrates total exemption of women from certain kinds of activities, contradicts the right to be assessed individually and has been sharply criticised. Scholars have rightly pointed out that the Court failed to show how the presence of women could affect interoperability and failed to take into account that there are women who have the necessary level of physical fitness to be Royal Marines⁵¹. The same concerns the *Johnston* case, where the ECJ accepted the exemption of policewomen instead of providing a test of physical strength which a police officer must pass in order to carry a fire-arm.

The second question concerns the assessment situation where the sex of the worker constitutes a determining factor. What should be the criteria? And can criteria be based on biological differences only or can socially defined differences be used, too? The ECJ has decided no cases on situations where one or other sex is exempted from certain occupational activities due to the nature of that activity, but this is exactly the base for derogations on grounds of biological differences. The Court merely pointed out activities where the sex of the worker obviously constitutes the determining factor because of the nature of the activity.

⁴⁷ Martin Trybus, *Sisters in Arms*, European Community Law and Sex Equality in the Armed Forces, European Law Journal, Vol 9, No.5, December 2003, p.631-658, at footnote page 644 – Women in the Armed forces, Ministry of Defence.

⁴⁸ Case C-203/03, *Commission of the European Communities v Republic of Austria*, European Court Reports 2005 Page 00000, paragraphs 46 and 73.

⁴⁹ Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403, paragraph 30.

⁵⁰ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 36.

⁵¹ Martin Trybus, *Sisters in Arms*, European Community Law and Sex Equality in the Armed Forces, European Law Journal, Vol 9, No.5, December 2003, p.631-658, at page 645.

This concerns singing, acting, dancing, and artistic or fashion modelling⁵².

The rest deals with activities where persons of one sex are exempted on grounds of the context in which activities are carried out and this is the base for derogations on grounds of socially defined differences. This fact testifies itself - the ECJ accepts socially defined differences of sexes, although EC sex equality law is facilitated to fight socially defined differences between the sexes. Every case gives evidence of this. Starting with the midwives case, where the Court accepted that limitation of access to the occupation of midwife to men could be justified by patient sensitivities⁵³ and ending with *Sirdar*, where the strange criterion of interoperability was accepted without any real assessment.

Regarding the base for derogations the Court has merely recognized that:

The Member States maintain a wide variety of other exceptions based on social, moral or in certain cases, religious considerations, that a substantial number of those exceptions are based on considerations relating to the physical and moral protection of women and finally, that certain important exemptions are bound up with the question of military service and the organization of the police and similar bodies. The basis for the exemptions is also variable, inasmuch as some owe their existence to voluntary and unwritten customs, others to provisions laid down by law or regulation, and others still to international conventions⁵⁴.

This means that the ECJ allows the Member States to maintain derogations from the equal treatment principle based on socially defined differences. It is restricted by the principles of proportionality and Article 9(2) of the Directive, which requires periodical assessment of 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 permitted exclusions.

Article 2(6) of Directive 2002/73 amends the definition provided by Article 2(2) of the Directive with the phrase that difference of treatment shall not constitute discrimination where a characteristic related to sex “constitutes a genuine and determining occupational requirement”. However, interpretation of what characteristic “constitutes a genuine and

⁵² Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459, paragraph 34.

⁵³ Case 165/82, *Commission of the European Communities v United Kingdom and Northern Ireland* ECR 1983 Page 03431, paragraph 18.

⁵⁴ Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459, paragraph 34.

determining occupational requirement” still remains within the competence of the Court and leaves space for justifications based on socially defined differences between sexes.

Special protection during pregnancy and maternity

Article 2(3) of Directive 76/207 provides that: “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity”. Historically, the interpretation and application of this exemption has posed considerable uncertainty. Article 2(3) “was designed to prevent any challenge on grounds of equal treatment in EC law to national employment provisions granting leave or other special conditions to women who are pregnant or have given birth, rather than to impose any obligation to adopt such provisions”⁵⁵. Irrespective of the intent of the legislator, the ECJ interpreted Article 2(3) conversely.

In *Hoffman* the Court ruled that Article 2(3) protects woman’s needs in two respects:

First, it is legitimate to ensure the protection of a woman’s biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment⁵⁶.

In *Dekker*⁵⁷, the Court ruled that refusal to employ a pregnant candidate constituted direct discrimination prohibited by Article 2(3). In the subsequent *Hertz*⁵⁸ judgment, the ECJ held that logically dismissal on account of pregnancy also constituted direct discrimination. Further, the Court ruled that an employer is precluded from dismissing a pregnant worker on account of absences due to incapacity for work caused by illness resulting from that pregnancy⁵⁹ and the employer could not refuse to appoint a pregnant worker for a post on the grounds that a statutory prohibition on employment attaching to the condition of pregnancy prevented her from being employed in that post from the outset and for the duration of the pregnancy⁶⁰. The Court based its approach on the non-comparability argument – namely, that men could never suffer from the

⁵⁵ Paul Craig/Grainne De Burca, EU Law, (1998), 2nd edition, Oxford University Press, p.852.

⁵⁶ Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047, paragraph 25.

⁵⁷ Case 177/88, *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

⁵⁸ Case C-179/88, *Handels- og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

⁵⁹ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

⁶⁰ Case C-207/98, *Silke-Karin Mahlburg and Land Meklenburg-Vorpommern*, ECR 2000 I-549.

disadvantage which women face during pregnancy and maternity and thus pregnant women and women after maternity leave must enjoy the same but in some cases preferential treatment.

Interestingly, the Member States tried to use Article 2(3) as justification in many incorrect ways. For example, in case 312/86⁶¹ the French government argued that Article 2(3) allows leave for women only when a child is sick, in *Stoeckel*⁶² - that it allows to put an absolute ban on women's night work. In *Johnston*⁶³ and *Kreil*⁶⁴ the Member States wanted to justify a ban on women being employed for work where carrying and use of fire arms are possible.

Recognizing the sensitivity, importance, and frequency of cases where employer and employees are faced by the dilemma of special pregnancy or maternity protection versus inconvenience for the employer, in 1992 the Council adopted Directive 92/85, which set a minimum requirement for the Member States concerning protection of women during pregnancy and after giving birth. Although formally Article 2(3) of Directive 76/207 simply allowed the Member States to adopt measures protecting women during this period, in reality the ECJ through its case law interpreted Article 2(3) as obliging the Member States to provide pregnant women and women during the maternity period with special protection even before adoption of Directive 92/85. Therefore, part of Directive 92/85 is only a codification of the case-law of the ECJ rather than new requirements. Moreover, some situations affecting pregnant workers and workers after maternity leave are still covered by Directive 76/207. For example, regarding access to work and the obligation of the employer to provide a worker after maternity leave with such terms and conditions of employment as if she had not been on maternity leave.

A new approach to “pregnancy and maternity exemption” was introduced by amendments to Directive 76/207 by extending it. According to Directive 2002/73 amending Directive 76/207 Article 2(7) (ex Article 2(3) also protects persons on parental, paternity, and adoption leave. Thus the EC has recognized special protection of parents irrespective of sex.

⁶¹ Case 312/86, *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 06315.

⁶² Case C-345/89, *Criminal proceedings against Alfred Stoeckel*, European Court Reports 1991 Page I-04047, see also cases C-207/96, *Commission of the European Communities v Italian Republic*, European Court Reports 1997 Page I-06869, C-197/96, *Commission of the European Communities v French Republic*, European Court Reports 1997 Page I-01489 and C-13/93, *Office National de l'Emploi v Madeleine Minne*, European Court reports 1994 Page I-00371.

⁶³ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, European Court Reports 1986 Page 01651, paragraph 36.

⁶⁴ Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, European Court Reports 2000 Page I-00069.

Positive measures

The third instance when Community law allows for an exception with regard to equal treatment is the case of positive measures. Positive measures are allowed according to Article 141(4) of the EC Treaty, which provides:

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.

Positive measures are allowed by Article 2(8) of Directive 76/207 after amendments by Directive 2002/73. Article 2(8) does not specify what “positive measures” means. It simply refers to the provisions of Article 141(4) of the EC Treaty.

The ECJ has so far not given an interpretation on Article 141(4) of the EC Treaty and Article 2(8) of amended Directive 76/207, because Article 141(4) was inserted by the Treaty of Amsterdam and came into force from 1st of May 1999, while the Member State had to implement amendments to Directive 76/207 (Directive 2002/73) only by October 2005. Nevertheless, the ECJ has given an interpretation on Article 2(4) of Directive 76/207 before amendments. From adoption of Directive 76/207 in 1976, Article 2(4) provides: “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)”⁶⁵. All together there are seven cases⁶⁶ - case 312/86⁶⁷, *Kalanke*⁶⁸, *Marschall*⁶⁹, *Badeck*⁷⁰, *Abrahamsson*⁷¹, *Lommers*⁷² and *Briheche*⁷³.

⁶⁵ Article 1(1) of Directive 76/207 provides: “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 to in paragraph 2, social security. This principle is hereinafter referred to as ‘the principle of equal treatment’”.

⁶⁶ Noreen Burrows and Muriel Robinson, *Positive Action for Women in Employment: Time to Align with Europe?*, *Journal of Law and Society*, March 2006, Vol.33, no.1, Blackwell Publishing Ltd., Oxford, Malden, at page 29.

⁶⁷ Case 312/86, *Commission of the European Communities v French Republic*, *European Court Reports* 1988 Page 06315.

⁶⁸ Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, *European Court Reports* 1995 Page I-03051.

⁶⁹ Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, *European Court Reports* 1997 Page I-06363.

⁷⁰ Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, *European Court Reports* 2000 Page I-01875.

⁷¹ Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, *European Court Reports* 2000 Page I-05539.

In case 312/86 the ECJ held:

The exception provided for in Article 2(4) 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 which may exist in the reality of social life.

Although it is clear that frequently women lose in competition for vacancies with equally qualified men, thus women do not always have equal chances to obtain a job or position, nevertheless the ECJ in *Kalanke* ruled that national rules which give priority to women in sectors where they are under-represented automatically, if candidates for promotion are equally qualified, are contrary to Article 2(4) of Directive 76/207 because they involve discrimination on grounds of sex⁷⁴. The Court substantiated this decision by saying that Article 2(4) is simply a derogation from an individual right, therefore must be interpreted strictly⁷⁵. Namely, that an individual right must be given priority over a group right⁷⁶.

The *Kalanke* judgment was sharply criticized. And indeed, various soft-law documents of the Community before this judgment called on the Member State for positive action, which they saw as the only tool to attain *de facto* equality⁷⁷. The Commission immediately issued a Communication⁷⁸ “accompanied by a draft Directive⁷⁹ aiming to modify Article 2(4) of the Directive authorising quota rules provided that the promotion of men would not be *a priori* excluded”⁸⁰. It is argued that the proposal to amend Article 141 with reference to positive measures to the

⁷² Case C-476/99, *H.Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, European Court Reports 2002 Page I-02891.

⁷³ Case C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, European Court Reports 2004 Page I-08807.

⁷⁴ Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, European Court Reports 1995 Page I-03051, paragraph 16.

⁷⁵ Case C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, European Court Reports 1995 Page I-03051, paragraph 21.

⁷⁶ See Anne Peters, *The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – a Conceptual Analysis*, European Law Journal (1996 July) Vol.2 No.2, Blackwell Publishers Ltd., Oxford, Cambridge, at page 192, Noreen Burrows and Muriel Robinson, *Positive Action for Women in Employment: Time to Align with Europe?*, Journal of Law and Society, March 2006, Vol.33, no.1, Blackwell Publishing Ltd., Oxford, Malden, at page 31.

⁷⁷ See in this regard Anne Peters, *The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – a Conceptual Analysis*, European Law Journal (1996 July) Vol.2 No.2, Blackwell Publishers Ltd., Oxford, Cambridge, at pages 182-183.

⁷⁸ March 27, 1996, Com (96) 88 final.

⁷⁹ Proposition of Directive of March 27, 1996, COM (96) 93 final.

⁸⁰ Pedro Cabral, *A Step Closer to Substantive Equality*, E.L.Rev (1998) 23 October Sweet & Maxwell and Contributors, at page 485.

Treaty of Amsterdam was the “Commission’s reaction to the judgment of the ECJ in *Kalanke*”⁸¹.

In the next judgment, *Marschall*, the Court softened its approach to positive action by admitting that a national rule which does not give automatic priority of an equally qualified female candidate but requires objective assessment of specific criteria of each candidate comply with Article 2(4). Moreover, specific criteria can not be such as to discriminate against female candidates. The Court pointed out that:

because of prejudices and stereotypes concerning the role and capacities of women in working life and the gear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding⁸².

However, the Court left “uncertain what criteria can be taken into account at each stage as also what will be deemed sufficient to override the priority”⁸³. It is argued that the Court changed its attitude because of pressure from Community institutions and the Member States which submitted observations supporting the need for quotas⁸⁴.

Scholars gave different assessments on the *Marschall* judgment. Cabral emphasized that the Court in this judgment admitted “measures that go beyond the mere promotion of equality of opportunities and are specially addressed to achieve the result of equal representation”⁸⁵ while Ellis considered that “although the rule appeared to favour women, it only in reality cancelled out for them the discrimination which they would otherwise have experienced”⁸⁶.

In *Badeck*⁸⁷ the Court clarified criteria which could and which could not be taken into account in assessing equally qualified candidates. The ECJ held:

For the purposes of that assessment, certain positive and negative criteria are taken into account. Thus capabilities and experience which have been acquired by carrying out family work are to be taken into account

⁸¹ Christa Tobler, Sex Equality Law under the Treaty of Amsterdam, European Journal of Law Reform, 2000, Vo.2. No.1, Kluwer Law International, at page140.

⁸² Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, European Court Reports 1997 Page I-06363, paragraph 29.

⁸³ Pedro Cabral, A Step Closer to Substantive Equality, E.L.Rev (1998) 23 October Sweet & Maxwell and Contributors, at page 486.

⁸⁴ *Ibid.*, at page 485.

⁸⁵ *Ibid.*, at page 485.

⁸⁶ Evelyn Ellis, Recent Developments in European Community Sex Equality Law, Common Market law Review, 35, 1998, pages 379-408, at page 406.

⁸⁷ Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, European Court Reports 2000 Page I-01875.

in so far as they are of importance for the suitability, performance and capability of candidates, whereas seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance in that respect. Similarly, the family status or income of the partner is immaterial, and part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect⁸⁸.

Some argued that “the court seems to allow some (indirect) discrimination against men in the application of the selection criteria”⁸⁹ while the Court substantiated its ruling saying:

Such criteria, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. They are manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life⁹⁰.

The Court in *Badeck* supported several provisions of national law providing for different kinds of positive action. It accepted that temporary posts in academic service and for academic assistants must be provided for a minimum percentage of women which is at least equal to the percentage of women among graduates, that in trained occupations in which women are under-represented at least half the training places should be allocated to women and that in sectors in which women are under-represented where male and female candidates have equal qualifications all women who satisfy required conditions are called to interview. The Court substantiated this decision by holding that those provisions concern only access to work, namely, it merely promotes equal opportunities for women, but does not give them unconditional priority and does not provide for a rigid quota. However, regarding the provision on temporary academic posts the substantiation is quite weak, because although temporary those posts are actually employment not pure training. Besides, the rule provides for a strict quota although the Court said that it does not⁹¹.

In *Abrahamsson* the Court clarified that Article 2(4) of Directive 76/207 does not preclude measures to promote equal opportunity to

⁸⁸ *Ibid.*, para. 31.

⁸⁹ Catherine Barnard, Bob Hepple, Substantive equality, Cambridge Law Journal, November 2000, 59(3), pages 562-585, at page 578.

⁹⁰ Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, European Court Reports 2000 Page I-01875, paragraph 32.

⁹¹ Case C-158/97, *Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, European Court Reports 2000 Page I-01875, paragraph 342.

women in sectors where they are under-represented if a measure does not give to equally qualified women priority automatically and unconditionally and where the candidatures are subject to objective assessment. Besides, criteria applied for individual assessment are transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates⁹². The Court rejected a national rule providing that for each post a candidate must be chosen which belongs to the under-represented sex and possesses sufficient qualifications in preference to candidates of the opposite sex which would otherwise have been chosen. It added that such a provision would be in breach of EC law even if it concerns selection of candidates for posts of lower level positions⁹³.

Importantly, in *Abrahamsson* the Court for the first time referred to the principle of proportionality. Namely, that a measure of positive action must be proportionate to the aim pursued⁹⁴. This is exactly the point proposed by Advocate General Tesouro⁹⁵ in *Kalanke*.

In *Lommers* the Court continued to analyse positive action measures from the perspective of the principle of proportionality. It stressed that:

...in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued⁹⁶

In this case the ECJ accepted an employer's right to provide a nursery service for female employees only. Although such provision obviously has a tendency to perpetuate and legitimise the traditional division of roles between men and women and possibly it makes the wives of male employees suffer, nevertheless the particular circumstances justified it. First, in the particular establishment women were significantly under-represented. Second, nursery places were of limited number and not accessible to all female employees. Third, fathers were not totally excluded from the possibility to use the nursery. The nursery was available for male employees in emergency situations and for those fathers bringing up their children by themselves. Accordingly, a provision

⁹² Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, European Court Reports 2000 Page I-0553, paragraph 49.

⁹³ *Ibid.*, para 64.

⁹⁴ *Ibid.*, para 55.

⁹⁵ Opinion of Mr. Advocate General Tesouro, case C-450/93, ECR 1995 Page I-3051.

⁹⁶ Case C-476/99, *H.Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, European Court Reports 2002 Page I-02891, paragraph 39.

not guaranteeing equal rights to the nursery for employees of both sexes was proportionate and thus in conformity with Article 2(4) of Directive 76/207.

In *Briche* the Court ruled that Article 2(4) of Directive 76/207 precludes national provisions allowing exemption from age limit for obtaining public-sector employment to widows who have not remarried and who are obliged to work, but excluding widowers who are in the same situation.

All these cases illustrate that the Court gives preference to individual rights rather than group rights. And this is no big surprise, because the Community is based on a liberal market approach which recognizes market freedom and individualism, namely, “that individuals in the employment market act autonomously” and lower low-status employment of women is seen as result of individual choices.⁹⁷

The second problem is that the liberal market approach is based on formal equality and does not allow positive measures as well as group justice⁹⁸, so that the Court has faced difficulties in finding substantiation for positive measures from the point of view of legal theory. Writers characterise this situation as tension between substantive and formal equality. And indeed, on the one hand the Court stresses that it moves towards substantial equality⁹⁹ but on the other hand it insists that positive measures are simply a derogation from equal treatment like the derogations provided in Article 2(2) and 2(3) of Directive 76/207 and thus it must be interpreted strictly and must remain within the limits of the principle of proportionality¹⁰⁰.

Scholars do not support the Court’s approach and point out that:

if substantive equality is the aim of the Directive, and if affirmative action is likely to achieve that aim, it comes to seem more anomalous that such action must be viewed as a derogation from the principle encapsulated under the Directive¹⁰¹

and that

positive action should not be equated as a derogation from equal treatment, but rather as a necessary tool for the concretisation of

⁹⁷ Helen Fenwick, From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex equality Law, *European Public Law*, 1998, Vol.4 Issue 4, Kluwer Law International, at page 508.

⁹⁸ *Ibid.*, at pages 507-509.

⁹⁹ Case C-319/03, *Serge Briheche v Ministre de l’Intérieur, Ministre de l’Éducation nationale and Ministre de la Justice*, *European Court Reports* 2004 Page I-08807, paragraph 25.

¹⁰⁰ *Ibid.*

¹⁰¹ Helen Fenwick, From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex equality Law, *European Public Law*, 1998, Vol.4 Issue 4, Kluwer Law International, at pages 514-515.

substantive equality, a coherent part of the framework and purpose of the Directive¹⁰².

Advocate General Saggio proposed¹⁰³ reconciling the tension between substantive equality and individual rights by the possible development of a proportionality criterion:

Equal treatment, or formal equality, comes into conflict with substantive equality only if the remedial measure, in this case positive action in favour of women, is disproportionate, either it demands excessive sacrifices from those who do not belong to the group, or when the social reality does not justify it¹⁰⁴.

The Court did not accept it in that case, but seems to have started to develop proportionality criteria in *Badeck* and *Lommers*.

It seems that the future will not bring radical changes regarding the Court's approach to positive measures. Writers set hope on Article 141(4) when it comes into force. National courts have several times asked the Court to answer whether Article 141(4) would allowed for more radical positive measures, because formally Article 2(4) allowed equal opportunity measures only while Article 141(4) provides for "full equality in practice". Responses on possible interpretation of Article 141(4) are not very encouraging. In *Abrahamsson* the Court ruled that Article 141(4) is subject to the principle of proportionality¹⁰⁵, thus showing that the provisions of Article 141(4) must be interpreted as derogating from the principle of equality and thus interpreted strictly.

Positive measures and equal pay

Although positive measures usually have been discussed regarding equal treatment matters, nevertheless the Court has given several rulings on positive measures regarding equal pay.

In *Commission v French Republic*¹⁰⁶ the Court did not accept a provision of a collective agreement providing for payment of an allowance to mothers who have to meet the cost of nurseries or childminders. It ruled that this particular provision and several others cannot be considered as positive measures, because those measures are

¹⁰² Pedro Cabral, A Step Closer to Substantive Equality, E.L.Rev (1998) 23 October Sweet & Maxwell and Contributors, at page 486.

¹⁰³ Opinion of Advocate General Saggio case C-407/98, ECR.

¹⁰⁴ Sandra Fredman, Discrimination Law, Oxford University Press, 2002, at page 142.

¹⁰⁵ Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, European Court Reports 2000 Page I-0553, paragraph 55.

¹⁰⁶ Case 312/86, *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 06315.

applied only to women while both sexes belong to the category of workers who are parents.

Similarly, in *Griesmar*¹⁰⁷ the ECJ held that a provision entitling only female civil servants to a higher pension on account of each child she has brought up cannot be considered as a measure eliminating disadvantages which women face in their professional life. This is because, first, exceptional pay for female workers only can be accepted with regard to special protection during the maternity period in accordance with Article 2(3) of Directive 76/207, and second, the responsibility for bringing up children concerns both parents and thus female employees are in a comparable situation with that of male employees.

By contrast, in *Abdoulaye*¹⁰⁸ the Court accepted a lump-sum payment exclusively for female employees who take maternity leave. The Court found this situation incomparable with the situation of male workers, because male workers do not face occupational disadvantages due to maternity leave. Interestingly, it accepted a presumed list of disadvantages which women could face during maternity leave, which include such activities recognized as directly discriminatory against women¹⁰⁹

It is plain why the Court in *Commission v French Republic*¹¹⁰ did not analyse equal pay provisions favouring females only from the point of view of positive measures in equal pay matters. Indeed, at that time positive measures were not allowed in equal pay matters. Since adoption of Article 141(4) it has been argued that it does allow positive measures with regard to equal pay¹¹¹.

However from the *Griesmar* ruling it follows that the Court does not accept positive measures regarding equal pay to compensate disadvantages faced by women workers. This is acceptable only in situations envisaged by Article 2(3) of Directive 76/207. It makes doubtful the argument whether Article 141(4) allows positive measures with regard to pay. Although Article 141(4) allows measures which compensate for disadvantages in professional careers, nevertheless the Court in *Commission v French Republic* and *Griesmar* has rejected

¹⁰⁷ Case C-366/99, *Josep Griesmar v Ministere de l'Economie, des Finance et de l'Industrie et Ministre de la Fonction publique, de la Reforme de l'Etat et de la Decentralisation*, ECR 2001 Page I-09383.

¹⁰⁸ Case C-218/98, *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723.

¹⁰⁹ Clare McGlynn, *Pregnancy, parenthood and the Court of Justice in Abdoulaye*, E.L.Rev. (2000) 25 Dec, Sweet & Maxwell and Contributors, at page 654.

¹¹⁰ Case 312/86, *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 06315.

¹¹¹ Noreen Burrows and Muriel Robison, *Positive Action for Women in Employment: Time to Align with Europe?*, Journal of Law and Society, March 2006, Vol.33, no.1, Blackwell Publishing Ltd., Oxford, Malden, at page 32.

advantages for female workers in respect to pay precisely because the measures were compensatory rather than helping to eliminate existing inequalities structurally. Namely, the Court did not accept compensatory measures which do not solve the problem, but instead pose a risk of discriminating against male workers.

Latvian law

Article 29(5) of the Latvian labour law¹¹² and Article 2¹(3) of the Law on social security¹¹³ precludes direct discrimination in fields of labour and social rights. However, so far in cases decided by national courts, there is no reference as regards what kind of discrimination a claimant has suffered from¹¹⁴. This demonstrates that the national courts do not recognize the existence of direct and indirect discrimination.

Latvian law does not provide for positive measures, but special protection during pregnancy and maternity will be discussed in Chapter II.

Sex of worker as determining factor in Latvian law

Latvian law does not provide exclusions of one or other sex from certain occupational activities. However, the labour market is still strongly segregated in so called “male” and “female” professions. For many employers, it is still not clear whether a situation where the sex of the worker constitutes a determining factor¹¹⁵ can be based on objective factors or could be justified by social stereotypes. Considerable testimony on this theme is available in the shape of advertisements for vacancies calling for workers of a particular sex.

The second problem concerns physically heavy and unhealthy work. Until 1st June 2002, when new the Labour law came into force, Decision No.292 of the Council of Ministers “On heavy and unhealthy work where employing women and persons younger than the age of 18 are prohibited” adopted on 24th of July 1992 was effective. This Decision was inherited from Soviet labour law traditions, where women were excluded from quite a wide range of occupations, mainly in basic and chemical industries. It is needless to add that those exclusions were based

¹¹² Darba likums: LR likums.Latvijas Vēstnesis 105, 2001. 6.jūlijs (Labour Law).

¹¹³ Par sociālo drošību: LR likums. Latvijas Vēstnesis 144, 1995. 21.septembris (Law on Social Security).

¹¹⁴ See for example judgments Cēsu rajona tiesas 2005.gada 3.janvāra spriedums lietā Nr.C11019405, Rīgas pilsētas Ziemeļu rajona tiesas 2005.gada 29.aprīļa spriedums lietā Nr.C32242904047505, C-475/3.

¹¹⁵ Article 2(2) of Directive 76/207 is implemented in Article 29(2) of the Latvian Labour law. It provides: “Differential treatment based on the gender of employees is permitted only in cases where a particular gender is an objective and substantiated precondition for performance of the relevant work or for the relevant employment”.

exclusively on the stereotype that women are the only reproductive elements of society. Although the decision lost force together with the old Labour code¹¹⁶, nevertheless some writers in Latvia think that it is still enforceable¹¹⁷.

Another Council of Ministers Decision inherited from Soviet labour law traditions was No.289 “On maximum weight that women and young persons are allowed to carry and move” adopted on 24th of July 1992. The decision provided that women are allowed to carry no more than 15 kilograms and was obviously based on the general assumption that women are of lesser physical strength. This Decision is no longer in force. Instead, on 6th of August 2002 the Cabinet of Ministers adopted regulation No.344 “On labour protection requirements for carrying of heavy objects”. The regulations implement Directive 90/269¹¹⁸, which requires assessment of the fitness of workers individually in order to avoid back injury.

However, on 28th of May 2002 the Cabinet of Ministers adopted Regulation No.205 “On the order in which licences are issued allowing employment of children in culture, art, sport and advertisement events and on restrictions which must be included in licences”. The regulations set different norms for girls and boys. Boys from 13-15 are allowed to carry objects not heavier than 4 kilograms, while girls only 2 kilograms. Such restrictions obviously diminish equal work opportunities of girls and are contrary to requirements of Directive 76/207, because based on general assumptions not taking into account the fact that the fitness of children of age 13 to 15 differs considerably individually.

¹¹⁶ The Council of Ministers adopted the Decision on the basis of delegation provided by the legislator in the old Labour Code; thus when the Labour Law became invalid, so did all secondary legislative acts, such as the Decision, which was adopted on the basis of the old Labour Code.

¹¹⁷ *Ingus Gailums, Darba likums. Komentāri. Tiesu prakse.*, 2.grāmata C daļa (28.- 99.pants), Gailuma juridiskā biroja izdevniecība, Rīga, 2003.

¹¹⁸ Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *Official Journal L 156*, 21/06/1990 P. 0009 - 0013 (ES, DA, DE, EL, EN, FR, IT, NL, PT.)

Chapter 3.

Indirect discrimination

The concept of indirect discrimination has its origins in case law under Title VII of the US Civil Rights Act 1964 and was subsequently introduced into UK law and into Community law through judicial interpretation of Article 141¹. This was the case of *Jenkins*², referred by the British Employment Appeal Tribunal, in which the ECJ held that a difference in pay between full-time and part-time workers does amount to indirect discrimination if it is a way to reduce the pay of part-time workers which predominantly consist of women. Thereby indirect discrimination was recognized by EC law.

However, application of the concept of indirect discrimination was problematic partially because Community law itself did not provide a definition³. A definition of indirect discrimination first appeared in Directive 97/80. That definition was criticized by scholars⁴, especially regarding the obligation to provide statistical data to prove disparate effect. This requirement made it impossible to prove indirect discrimination in many cases. On the other hand, the definition of indirect discrimination provided by Directive 97/80 made clear the proportionality test for justifications. Before this, the ECJ frequently departed from the three stage proportionality test firstly established in the case of *Bilka-Kaufhaus*⁵.

Currently, the definition of indirect discrimination is provided by Article 2(2) of Directive 76/207 amended by Directive 2002/73. This states:

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

¹ Catherine Barnard, Bob Hepple, Substantive equality, Cambridge Law Journal, November 2000, 59(3), pages 562-585.

² Case 96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*, European Court Reports 1981 Page 00911.

³ Sacha Prechal, Combating Indirect discrimination in Community law context, 1993, Legal Issues of Europe Integration, Vol.19, No.1.

⁴ See Catherine Barnard, Bob Hepple, Indirect Discrimination: Interpreting Seymour-Smith, Cambridge Law Journal, July 1999, 58(2), pages 399-412, Catherine Barnard, Bob Hepple, Substantive equality, Cambridge Law Journal, November 2000, 59(3), pages 562-585, Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at page 542.

⁵ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607. For example departure from proportionality test see cases C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal*, ECR 1993 Page I-06185, C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199.

This definition requires the following elements:

- 1) provision, criterion, or practice;
- 2) persons;
- 3) persons would be put at a particular disadvantage;
- 4) compared to persons of the other sex;
- 5) provision, criterion or practice can be objectively justified;
- 6) objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

“provision, criterion, or practice”

Indirect discrimination can arise not only from a provision or criterion, which are usually fixed in written form. It can arise also from practice. Thus the definition covers official written requirements as well as practice, which is usually unwritten. A provision, criterion, or practice is discriminatory if it has a discriminatory effect irrespective of the employer's intent⁶.

“persons”

Such wording indicates that a negative impact must fall on a group of persons rather than on an individual and that if only one individual suffers indirect discrimination, then he/she has no right to claim. However, the word “persons” must be read together with “would be put at a particular disadvantage”.

“would be put at a particular disadvantage”

This formulation indicates that there is no demand for a group of persons who have already suffered from indirect discrimination. It rather provides that the provision, criterion, or practice is indirectly discriminatory if it could affect persons of one sex and has already affected one person of that group. The ECJ took this approach in the case of *O'Flynn*⁷ regarding indirect discrimination against migrant workers.

Thus the new definition of indirect discrimination differs from the definition provided by Directive 97/90. Under the definition of Directive 97/90, indirect discrimination could be proven only if statistical data can show that a substantially higher proportion of the members of one sex suffer from the disadvantage. The ECJ has given quite unclear guidelines on how this provision must be applied. The European Commission

⁶ Catherine Barnard, Bob Hepple, Substantive equality, Cambridge Law Journal, November 2000, 59(3), pages 562-585. It also follows from the case-law of the ECJ *see for example*, case 96/80, *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*, European Court Reports 1981 Page 00911. or case 177/88 *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

⁷ *John O'Flynn v Adjudication Officer*, European Court Reports 1996 Page I-02617.

proposed a “statistically significant” test, which could show that a difference in impact is not mere chance⁸. However, the ECJ had not defined how much it should be. It is for the national court to determine whether statistics appear to be significant⁹. The Court also permitted use of statistical evidence which reveals lesser but persistent and relatively constant disparity over a long period between men and women¹⁰. In *Danfoss*¹¹ the Court held that the burden of proof must shift to the employer if a pay system lacks transparency and if an employee can establish that among a relatively large number of workers, women workers receive less pay than male colleagues.

The second issue is about groups which must be compared. The ECJ agrees that the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men and women in the workforce able to satisfy the requirements and those unable to do so. “It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State”¹².

The definition in Directive 97/80 was recognized as not effective to catch indirect discrimination:

...use of statistical data in indirect sex discrimination cases gave rise to some rather technical case law and a lot of practical problems¹³.

The requirement to establish statistics on a “substantially higher proportion” or a “statistically significant” or “relatively large number” could be the problem, first, in a small country, where only several employers employ more than 100 employees¹⁴, second, if such statistics are not available or accessible. Besides, “there were also sex discrimination cases in which statistics did not play a role. The very fact that a neutral criterion, such as seniority, could work against women

⁸ Catherine Barnard, Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Cambridge Law Journal, July 1999, 58(2), pages 399-412, Ruth Nielsen, *European Labour Law*, DJOF Publishing, Copenhagen, 2000, at page 218.

⁹ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199, paragraph 62.

¹⁰ *Ibid.*, para. 61.

¹¹ Case C-109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199.

¹² Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199, paragraph 59.

¹³ Sacha Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes*, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at page 542.

¹⁴ Such a situation is in Denmark: Ruth Nielsen, *European Labour Law*, DJOF Publishing, Copenhagen, 2000, at page 219, and it is quite the same in Latvia, too.

seemed sufficient¹⁵”. The new definition of indirect discrimination seems to allow proof of indirect discrimination by statistical evidence as well as “any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned”¹⁶, thus “the standard of proof is considerably lower”¹⁷.

“compared to persons of the other sex”

Unlike migrant workers or workers of different racial or ethnic origin, who must prove disadvantage in comparison to all other workers, persons who suffer from indirect discrimination based on sex must prove disadvantage in comparison to workers of the opposite sex.

In the case of *Defrenne II*¹⁸ it was held that regarding discrimination in equal pay matters, a comparator of the opposite sex must be found in the “same establishment or service, whether private or public” and - once again approved recently in the case of *Lawrence*¹⁹ - that pay conditions must be attributed to the same source. Therefore, the principle of single source is applied in respect of working conditions, too²⁰. However, if indirect discrimination arises due to discriminatory national legislation, a comparator of the opposite sex working in the same establishment or service is not necessary²¹.

A debate arises whether a male colleague who works full-time could be considered as a comparator to a female worker who works part-time. According to the case-law of the ECJ, it depends on the circumstances of each case²². For example part-time and full-time workers are comparable if the issue is about the right to receive wages in

¹⁵ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at page 542, see case 184/89 *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-00297.

¹⁶ Ruth Nielsen, European Labour Law, DJOF Publishing, Copenhagen, 2000, at page 293.

¹⁷ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at page 542.

¹⁸ *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455, paragraph 22.

¹⁹ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, European Court Reports 2002 Page I-07325.

²⁰ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at pages 546-547.

²¹ Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873.

²² Linds A.J.Senden, Article 119, the equal treatment principle and the concepts of direct and indirect discrimination in Community sex equality law, The Finnish Yearbook of international law advisory board, 1997, Kluwer Law International, the Hague, Boston, London, at page 397.

case of illness²³. However, part-time and full-time workers are not comparable if the issue is about the right to receive overtime supplements²⁴.

“provision, criterion, or practice can be objectively justified”

According to the definition and the case-law²⁵ of the ECJ, indirect discrimination can be allowed if it can be objectively justified. As Friedman points out, such a possibility is necessary to find a balance “between equality and other social priorities, particularly the business interests of the employer or state policy”²⁶. However, one should not forget that the “principle of equal treatment is today recognized as an important value or as a fundamental right” and “the courts should not be easily satisfied that the interest of the author of alleged discrimination should have precedence over the principle of equal treatment”²⁷.

Regarding particular justifications, the ECJ has accepted as objective justifications social and employment policy of the state²⁸ and real need of the undertaking²⁹. There are particular justifications regarding criteria of the pay-system which could be accepted if the employer can prove their importance. For example, pay could vary according to an employee’s mobility, training, seniority³⁰, or physical strength³¹. The Court does not accept budgetary considerations of the Member State³², mere generalisations³³, and the fact that indirectly discriminatory provisions were introduced due to collective bargaining³⁴.

²³ Case 171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co.*, European Court Reports 1989 Page 02743.

²⁴ Case C-399/92, *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludwig v Kreis Segeberg*.

²⁵ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

²⁶ Sandra Friedman, *Discrimination Law*, Oxford University press, 2002, at page 112.

²⁴ Sascha Prechal, *Combating Indirect discrimination in Community law context*, 1993, *Legal Issues of Europe Integration*, L 19, #1.

²⁸ Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit*, European Court Reports 2003 Page I-09027.

²⁹ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

³⁰ Case 109/88 *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199.

³¹ Case 237/85 *Gisela Rummler v Dato-Druck GmbH*, European Court Reports 1986 Page 02101.

³² Joined cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main (C-4/02) and Silvia Becker v Land Hessen (C-5/02)*, ECR 2003 Page 00000.

³³ Case C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit*, European Court Reports 2003 Page I-09027 paragraph 64.

³⁴ Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535.

“objectively justified by a legitimate aim, and the means of achieving that aim is appropriate and necessary”

The definition provides for a three-stage proportionality test:

- 1) there must be a legitimate aim;
- 2) the means must be appropriate to achieve the legitimate aim;
- 3) the means must be necessary to achieve the legitimate aim.

“Legitimate aim” means that the aim is generally acceptable and deserving of protection and is sufficiently important to “take priority over the principle of equal treatment”³⁵. In other words:

This test implies in fact that a balancing of interests must be made, namely between the interest of the author of the alleged discrimination on the one hand and the application of the principle of non-discrimination on the other³⁶.

It is also important to recognize that the chosen means are necessary to achieve a legitimate aim or that it is impossible to achieve the legitimate aim in another less discriminatory or non-discriminatory way³⁷.

Before criteria for objective justification of indirect discrimination were introduced in Directive 76/207, the case-law of the ECJ on application of the principle of proportionality was inconsistent. The so-called “three stage” test was firstly applied in *Bilka-Kaufhaus*³⁸. The ECJ held that indirect discrimination can be justified:

...if the national court finds that the measures chosen ... correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective pursued and are necessary to that end³⁹.

The same test was affirmed in *Seymour-Smith*⁴⁰. Provisions of national legislation which have an indirectly discriminatory effect are not in breach of the principle of equal treatment:

...if a Member State is able to show that the measures chosen reflect a necessary aim of its social policy and are suitable and necessary for achieving that aim”.

³⁵ Sascha Prechal, *Combating Indirect discrimination in Community law context*, 1993, *Legal Issues of Europe Integration*, Vol.19, No.1.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, *European Court Reports* 1986 Page 01607.

³⁹ *Ibid.*, para. 36.

⁴⁰ Case C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, *ECR* 1998 Page I-05199.

At first sight, the proportionality tests given in *Bilka-Kaufhaus* and *Seymour-Smith* seem almost identical, but scholars indicate that the proportionality test given in *Seymour-Smith* is weaker than that of *Bilka-Kaufhaus*⁴¹. And indeed, if an employer under the *Bilka-Kaufhaus* test must prove that indirect discrimination is due to real need of the undertaking, then the legislator under the *Seymour-Smith* test does not have to prove that it is necessary to attain a particular social policy aim. It follows that the ECJ distinguished between the proportionality test applied to conduct of the employer and to national legislation⁴².

Indeed, in several following cases the ECJ approved that the national legislator is entitled to a broader discretion when deciding national social policy. In *Kruger*⁴³ the ECJ held:

...social policy is a matter for the Member States. Consequently, it is for the Member States to choose the measures capable of achieving the aims of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion.

However, in the recently decided case of *Steinicke*⁴⁴ on the national legislation of Germany, the Court referred again to the *Seymour-Smith* test and did not mention that Member States have a broad margin of discretion to define and implement their social and employment policy. In the case of *Schonheit*⁴⁵ the ECJ did not mention the proportionality test at all. It elaborated only on permissible justifications.

Some scholars have analyzed whether a difference exists between the proportionality tests applied in equal-pay and equal-treatment cases⁴⁶. For a long period, there was only one case decided by the ECJ on possibly indirectly discriminatory treatment. That was the case of *Sidal*⁴⁷ concerning German legislation exempting small businesses from liability in case of unfair dismissal of employees. Although the ECJ did not find indirect discrimination here, nevertheless it admitted that such legislation would be justified by objective reasons because the legislation:

⁴¹ Catherine Barnard, Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Cambridge Law Journal, July 1999, 58(2), pages 399-412.

⁴² See Catherine Barnard, Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Cambridge Law Journal, July 1999, 58(2), pages 399-412, also Sacha Prechal, *Combating Indirect discrimination in Community law context*, 1993, Legal Issues of Europe Integration, L 19, #1

⁴³ Case C-281/97 *Andrea Krüger v Kreiskrankenhaus Ebersberg*, European Court Reports 1999 Page I-05127.

⁴⁴ Case C-77/02, *Erika Steinicke v Bundesanstalt für Arbeit*, European Court Reports 2003 Page I-09027 paragraph 58, the same approach was approved in case C-285/02 *Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen*, European Court Reports 2004 Page I-05861.

⁴⁵ Joined cases C-4/02 and C-5/02 *Hilde Schönheit v Stadt Frankfurt am Main (C-4/02) and Silvia Becker v Land Hessen (C-5/02)*, ECR 2003 Page 00000.

⁴⁶ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 133.

⁴⁷ C-189/91, *Petra Kirsammer-Hack v Nurhan Sidal*, ECR 1993 Page I-06185.

...forms part of a series of measures intended to alleviate the constraints burdening small business, which play an essential role in economic development and the creation of employment in the Community⁴⁸.

Nevertheless, this concern does not come true, because in recently decided cases on indirectly discriminatory treatment the ECJ applied the full proportionality test⁴⁹.

“objective factors unrelated to sex”

Interestingly, the definition of indirect discrimination given in Directive 2002/73 - unlike the definition in Directive 97/80 - does not require that objective justification must be unrelated to sex. This is of great importance, in assessing proposed justification, whether and how it affects each sex. In *Danfoss* the ECJ held that mobility, training, and seniority criteria affecting a worker's pay put women workers at a disadvantage, since they have household and family duties. Thus the criteria of mobility and training could be justified only if they are of “importance for performance of specific tasks”⁵⁰. The criterion of seniority can be justified only if there is a “relationship between the nature of the work performed and the experience gained”⁵¹.

A pay system which is based upon the criterion of physical strength also put women at a disadvantage, because generally they are of lesser physical strength. Thus each undertaking has an obligation to adopt such job classification system which includes such criteria to which women workers may have a particular aptitude⁵². Although the wording of the definition of indirect discrimination in Directive 2002/73 does not require assessment of the relation of objective factors to sex, nevertheless it is explicitly required case-law of the ECJ. However, precision of definition provided by a legislative act in some cases could play a decisive role, especially in the national courts of new EC Member States which are not familiar with the jurisprudence of the ECJ.

Indirect discrimination in equal pay matters

⁴⁸ *Ibid.*, paragraph 33.

⁴⁹ See cases C-187/00 *Helga Kutz-Bauer v Freie und Hansestadt Hamburg*, European Court reports 2003 Page I-02741 and C-77/02 *Erika Steinicke v Bundesanstalt für Arbeit*, European Court reports 2003 Page I-09027.

⁵⁰ Case 109/88 *Handels-og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court reports 1989 Page 03199.

⁵¹ Case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court reports 1991 Page I-00297, paragraph 14.

⁵² Case 237/85 *Gisela Rummeler v Dato-Druck GmbH.*, European Court reports 1986 Page 02101.

Although the definition of indirect discrimination in Directive 76/207 as amended by Directive 2002/73 seems to be much better for proving indirect discrimination, it concerns only equal treatment matters. Equal pay cases are still covered by the definition of indirect discrimination in Directive 97/80. Therefore it is unclear whether indirect discrimination in pay matters could be proved by other than statistical means. Although regarding some aspects the ECJ in equal pay cases refers to equal treatment cases⁵³ and vice versa, in the case of *Kruger*⁵⁴ the Court strictly separated matters of equal treatment from matters of equal pay.

Indirect discrimination in state social security matters

The same issue concerns indirect discrimination in statutory social security matters as provided by Directive 79/7. Although Article 4(1) of Directive 79/7 prohibits indirect discrimination, it does not provide a definition. Moreover, Directive 97/80 is not applicable to state social security matters. However, from the case-law of the ECJ on state social security matters it follows that almost the same concept of indirect discrimination as in equal treatment and equal pay cases is applied⁵⁵. In case C-229/89 the ECJ held:

It should be recalled at the outset that in accordance with settled case-law, Article 4(1) of Directive 79/7 precludes less favourable treatment from being accorded to a social group when it is shown to be made up of a much greater number of persons of one or the other sex, unless the provision in question is “based on objectively justified factors unrelated to any discriminations on grounds of sex”⁵⁶.

The concept of indirect discrimination applied in state social security matters differs from that applied regarding equal treatment and pay in respect to the proportionality test. Indirect discrimination in state social security matters could be justified by a looser proportionality test⁵⁷. Although cases on state social security matters refer to the three-stage *Bilka* test⁵⁸, nevertheless the Court added:

⁵³ See in this regard application of the proportionality test in indirect discrimination cases.

⁵⁴ Case C-281/97 *Andrea Krüger v Kreiskrankenhaus Ebersberg*, European Court Reports 1999 Page I-05127.

⁵⁵ See C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg*, ECR 1990 Page I-02591.

⁵⁶ Case C-229/89, *Commission of the European Communities v Kingdom of Belgium*, European Court Reports 1991 Page I-02205 paragraph 14.

⁵⁷ Catherine Barnard, Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Cambridge Law Journal, July 1999, 58(2), pages 399-412, at page 411, *see also* Evelyn Ellis, *The Definition of Discrimination in European Community Sex Equality Law*, E.L.Rev (1994) 19 (6), p.563-580.

⁵⁸ See in that respect C-226/91, *Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank*, European Court Reports 1992 Page I-05943 paragraph 13, C-343/92 *M.A. De Weerd, nee Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, European Court Reports 1994 Page I-00571, paragraph 34, C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, European Court Reports 1995 Page I-04625, paragraph 28, C-

The Court observes that, in the current state of Community law, social policy is a matter for the Member States ... Consequently, it is for the Member States to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, the Member States have a broad margin of discretion. It should be noted that the social and employment policy aim relied on by the German Government is objectively unrelated to any discrimination on grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim⁵⁹.

Concept of indirect discrimination and substantive equality

The concept of indirect discrimination could help much to fight discrimination. Even more, from the first sight the concept of indirect discrimination seems to be intended to achieve equality of results, because it is able to catch almost every obstacle disadvantaging one sex. However, this is only partially true, because the concept of indirect discrimination in some cases simply flies in the face of social realities rather than helps to overcome structural inequalities⁶⁰. For example, if women can not on average become physically stronger than men, they can be released from the dual burden of family responsibilities. But instead, the concept of indirect discrimination:

...merely accepts social norms or the stereotype that women are the main child-carer, instead of providing them with respective child care facilities and therefore eliminating the problem in its background”⁶¹.

This problem especially concerns part-time work, as well as problems regarding pay and mobility, training, and seniority of workers.

444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz now Innungskrankenkasse Rheinhessen-Pfalz*, paragraph 24.

⁵⁹ Cases 317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, European Court Reports 1995 Page I-04625, paras. 33 and 34, C-444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz now Innungskrankenkasse Rheinhessen-Pfalz*, European Court Reports 1995 Page I-04741, paragraphs 29 and 30.

⁶⁰ Sandra Friedman, *Discrimination Law*, Oxford University Press, 2002, at page 115, Sacha Prechal, *Combating Indirect discrimination in Community law context*, 1993, *Legal Issues of Europe Integration*, L 19, #1.

The same is pointed out by Evelyn Ellis, *Recent Developments in European Community Sex Equality Law*, *Common Market Law Review*, 35, 1998, pages 379-408, at page 383. She states:

“*Helmig* (Joined Cases C-399, 409 and 425/92 and C-34, 50 and 78/93 (1994) ECR I-5727), however undoubtedly illustrates the limitation inherent in the concept of indirect discrimination itself. Although indirect discrimination aims to tackle the hidden obstacles that stand in the way of women at work, it only discounts those obstacles where they are genuinely irrelevant to the work performed. The Concept does not, furthermore, possess the ability to restructure our society so as to dismantle the obstacles which women continue to face”⁶⁰

⁶¹ Hugh Collins, *Discrimination, Equality and Social Inclusion*, *The Modern Law Review*, Blackwell Publishing, January 2003, Vol.66, No.1, pages 16-42, at page 30.

Latvian law

Article 29(6) of the Latvian labour law⁶² and Article 2¹(4) of the Law on social security⁶³ precludes indirect discrimination in the fields of labour and social rights. So far there is no cases decided by national courts on indirect discrimination:

The situation in Latvia as regards recognition of indirect discrimination fully corresponds to the following situation:

...indirect discrimination is an entirely new concept for most of the accession countries. As a recent report makes clear, specific definition of both indirect and direct discrimination are often lacking in their legislation. And even if these concepts are to be introduced in the near future, the experience within the EU Member States shows that it may take ages before the concept is properly understood and applied. Consequently, there is much progress to be made promotion and implementing the concept⁶⁴

⁶² Darba likums: LR likums.Latvijas Vēstnesis 105, 2001. 6.jūlijs (Labour Law)

⁶³ Par sociālo drošību: LR likums. Latvijas Vēstnesis 144, 1995. 21.septemris (Law on Social Security)

⁶⁴ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, at pages 536-537.

Chapter 4. Equal pay

EC Law

The principle of equal pay means that a worker must receive equal pay for equal work or work of equal value irrespective of sex. Historically, the right to equal pay for equal work was the first provision in the EC providing for equality between men and women. Article 119 (now 141) was inserted in the EC Treaty in 1957 due to French fear of competitive disadvantage “through observing the principle of equal pay for equal work more thoroughly” than other Member states¹. At that time, the provision contained in Article 119 seemed anomalous², so that for a long time it remained unenforced in a number of Member States.

Only in 1975 was the ECJ asked to give a preliminary ruling on Article 119 by the Labour Court of Brussels before which a case was brought by an air hostess who claimed equal pay for equal work with her male colleagues. In this famous case known as *Defrenne II*³, the ECJ said several important things. First, that Article 119 pursues a double aim – not only economic – elimination of competitive disadvantage among undertakings which have introduced the principle of equal pay and those which have not, but also social – improvement of the living and working conditions of peoples⁴. Second, that Article 119 has direct horizontal effect⁵. Although scholars argue that the wording of Article 119 does not fully correspond to the criteria for having direct effect⁶, most probably such decision by the Court was taken to ensure full and immediate observance of the principle of equal pay by the Member States which had failed to do so since 1964.

In 1975 the Council adopted Directive 75/117, which supplemented the concept of equal pay provided by Article 119. Directive 75/117 provided for the right to equal pay for work of equal value and put specific obligations to the Member States to ensure implementation. Amendments on equal pay for work of equal value were made in order to comply with International Labour Organization Convention 100⁷. It has

¹ Paul Craig/Grainne De Burca, *EU Law*, (2003), 3rd edition, Oxford University Press, at page 846. See also Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 168, paragraph 194.

² Paul Craig/Grainne De Burca, *EU Law*, (1998), 2nd edition, Oxford University Press, at page 806.

³ Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455.

⁴ *Ibid.*, paras 8-10.

⁵ *Ibid.*, para. 39.

⁶ Paul Craig/Grainne De Burca, *EU Law*, (1998), 2nd edition, Oxford University Press, at page 172.

⁷ Ruth Nielsen, *European Labour Law*, DJOF Publishing, Copenhagen, 2000, at page 199.

been pointed out that terms as regards pay and the same work used in Article 141 and in Directive 75/117 have the same meaning⁸.

Definition of pay

A definition of pay is provided by Article 141(2) of EC Treaty:

...‘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.

Besides, the ECJ has held that the concept of pay includes any consideration paid immediately or in future under a contract of employment, legislative provisions, on a voluntary basis⁹ or collective agreement¹⁰.

Elements of pay

The concept of pay provided by Article 141 includes such payments as employer’s contributions to private pension funds¹¹, redundancy payments¹², compensation for unfair dismissal¹³, travel concessions¹⁴,

⁸ Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, European Court Reports 2001 Page I-04961, paragraph 29.

⁹ Case C-457/93, *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, European Court Reports 1996 Page I-00243, paragraph 21.

¹⁰ Case C-400/93, *Specialarbejderforbundet I Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, European Court Reports 1995 page I-1275.

The ECJ held: “The principle of equal pay for men and women also applies where the elements of pay are determined by collective bargaining or by negotiation at local level. However, the national court may take that fact into account in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex”.

Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535. The ECJ held:

“22. The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes.”

¹¹ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

¹² Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899.

and bonus payments¹⁵. This list is not exhaustive. Pay also includes payments which a worker receives from an employer even “not performing any work provided for in their contracts of employment”¹⁶. For example, compensation for attending training courses¹⁷, sickness allowance¹⁸, or maternity allowance¹⁹. State social security benefits do not fall within the concept of equal pay²⁰.

Occupational social security schemes

One element of pay - occupational social security - has been discussed in EC law especially frequently. In general, the Western European welfare system is built on the principle that the state provides minimum social protection under the state social security system, while the main part of social security is provided by private social security schemes usually provided by employers.

In *Bilka-Kaufhaus* the ECJ held that benefits paid by an employer under an occupational pension scheme constitute consideration received by the worker from the employer in respect of employment, thus falling within the scope of Article 141²¹. The case-law of the ECJ on equal treatment with regard to occupational pension schemes was codified by the Council adopting Directive 86/378²² and amending Directive 97/96²³. These Directives apply to occupational pension schemes providing for protection against the risks of sickness, invalidity, old age, including early retirement, industrial accidents, occupational diseases, and

¹³ Case C-167/97, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199.

¹⁴ Case 12/81, *Eileen Garland v British Rail Engineering Limited.*, European Court Reports 1982 Page 00359.

¹⁵ Case 58/81, *Commission of the European Communities v Grand Duchy of Luxembourg.*, European Court Reports 1982 Page 02175.

¹⁶ Case C-342/93, *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*, European Court Reports 1996 Page I-00475, paragraph 13.

¹⁷ Case C-360/90, *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötzel*, European Court Reports 1992 Page I-03589, also case C-457/93, *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, European Court Reports 1996 Page I-00243.

¹⁸ Case 171/88, *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co.*, European Court Reports 1989 Page 02743 paragraph 7.

¹⁹ Case 342/93, *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*, European Court Reports 1996 Page I-00475, paragraph 14.

²⁰ Case 80/70.

²¹ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607, paragraph 22.

²² Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, Official Journal L 225, 12/08/1986 P.0040-0042.

²³ 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, Official Journal L 046, 17/02/1997 P.0020-0024.

unemployment and specifies the conditions which are to be considered discriminatory. Several of those conditions regarding occupational pension schemes deserve more thorough discussion.

First, similar retirement age. In *Barber* the ECJ ruled that occupational pension schemes fall within the concept of pay provided by Article 141, so that different pensionable ages for men and women - unlike under the state social insurance system - can not be applicable here²⁴. This decision posed many problems regarding its application and possible consequences with a retroactive character. Regarding this issue, the ECJ held in *Ten Over* that the *Barber* judgment is not applicable before 17th of May 1990 for those workers who did not claim the right to equal pay before national courts. However it does not preclude workers from joining occupational pension funds retroactively²⁵ under condition that they will make all respective contributions²⁶. This decision earned criticism regarding its formal approach and ignorance of social reality. Women excluded from the right to join occupational social security schemes usually do not have enough money to make contributions to schemes retroactively. It was argued that “the ECJ chose to subordinate women’s right to equal pay to the financial interest of employers because rectifying the employers’ past discrimination involves substantial costs”²⁷. And indeed, the Court’s substantiation for limitation to claim benefits was “overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many” pension schemes²⁸.

Second, different pensions according to sex which workers receive from pension schemes. Neither the legislator by adopting Directive 86/378 nor the Court have eliminated the crucial inequality between the sexes which arises from the different average lifespan of the sexes. In particular, insurers - which are usually the owners of private pension schemes - apply different actuarial factors according to a person’s sex,

²⁴ In the recent judgment C-19/02, *Viktor Hlozek v Roche Austria Gesellschaft mbH.*, European Court Reports 2004 Page I-11491, the Court seemed to overrule the similar retirement age principle. It justified different ages for men and women entitling bridging pension under the social plan of an undertaking, because the particular social plan was set for the purposes of a single restructuring operation and according to an agreement between management and employees. The Court found that male and female dismissed employees are not in a similar situation because of different pensionable ages under the statutory pension scheme!

²⁵ Case C-57/93, *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV*, ECR 1994 page I-4541, paragraph 30.

²⁶ Case C-128/93, *Geertruida Catharina Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel.*, European Court Reports 1994 Page I-04583, paragraph 37.

²⁷ Lynn M. Rosebery, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999.

²⁸ Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899, paragraph 44.

which result in different pensions between males and females who have earned equal salary. In *Neath* the Court held that the use of actuarial factors differing according to sex in occupational pension schemes does not fall within the scope of Article 141²⁹ or “in other words, funding arrangements are usually dictated by the insurance companies that administer pension schemes, not by employers”³⁰, so that employers cannot be held responsible for this inequality. The only exception allowed under EC law was different employers’ contributions if the aim is to equalize the amount of final benefits³¹.

Nothing had been done to eliminate inequality until adoption of Directive 2004/113³², which provides for equal treatment in the field of insurance. Article 5 of this directive obliges the Member States to ensure that use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related services of insurers does not result in differences in individuals’ premiums and benefits. Since this provision refers to all kind of insurance, it applies to private pension schemes, too.

Distinction between State social security schemes and occupational social security schemes

The ECJ has set several criteria according to which a distinction must be drawn between the state social security system and occupational social security schemes which constitute pay within the meaning of Article 141. First in *Defrenne I*³³ it held that state social security is:

- 1) directly governed by legislation;
- 2) not subject to agreement between employer and employees within the undertaking or occupational branch;
- 3) obligatorily applicable to the general category of workers.

In contrast to state social security schemes, in *Bilka*³⁴ the Court repeated that occupational social security schemes:

- 1) may be subject to provisions laid down by national legislation; however, they are established only by an agreement concluded between employer and employees
- 2) are supplementary to the statutory social security scheme;

²⁹ Case 152/91, *David Neath v Hugh Steeper Ltd*, ECR 1993 Page I-06935.

³⁰ Lynn M. Rosebery, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at page 382.

³¹ Article 6(1)(i) of Directive 86/378 amended by Directive 96/97.

³² Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

³³ Case C-80/70, *Gabrielle Defrenne v Belgium State*, European Court Reports 1971 Page 00445, *see also* case C-110/91, *Michael Moroni v Collo GmbH*. European Court Reports 1993 Page I-06591, paragraph 14.

³⁴ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607, *see also* case C-110/91, *Michael Moroni v Collo GmbH*. European Court Reports 1993 Page I-06591, paragraph 15.

3) do not receive any public funding.

However, in *Beune*³⁵ the ECJ reconsidered the importance of the criteria mentioned above. *Beune* was a case about a pension scheme for state officials and the question was whether it fell within the concept of a state social security scheme or an occupational social security scheme. The Court found that a civil servant pension scheme does not correspond to all criteria laid down in *Bilka*, but it held that:

...considerations of social policy, of State organization, or of ethics or even budgetary preoccupations which influenced, or may have influenced, the establishment by the national legislature of a scheme such as the scheme at issue cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant's last salary. The pension paid by public employer is therefore entirely comparable to that paid by a private employer to his former employees.³⁶

In *Niemi*³⁷ the Court clarified the conditions set in *Beune* on pension schemes applicable to employees employed by the State and falling within the scope of Article 141. It pointed out that the “decisive criterion is the existence of a link between the employment relationship and the retirement benefit”³⁸. Further, the ECJ reaffirmed three criteria:

- 1) pension concerns only a particular category of workers;
- 2) the amount of pension is directly related to the period of service completed;
- 3) the amount of pension is calculated by reference to a public servant's last salary³⁹.

Sources of discriminatory pay

Sources of discriminatory pay may vary. It could arise from national legislation, collective agreements, or individual employment as well as a discriminatory pay-system in an enterprise. However, this enumeration is not exhaustive. The Court has constantly held that Article 141 and Directive 75/117 preclude unequal pay between workers of opposite sexes “whatever mechanism produces such inequality”⁴⁰.

³⁵ Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, European Court Reports 1994 Page I-04471.

³⁶ Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, European Court Reports 1994 Page I-04471, paragraph 45, *see also* in this regard Paul Craig/Grainne De Burca, *EU Law*, (2003), 3rd edition, Oxford University Press, at page 878.

³⁷ Case C-351/00, *Pirkko Niemi*, European Court Reports 2002 Page I-07007.

³⁸ *Ibid.*, para. 45.

³⁹ *Ibid.*, para. 47.

⁴⁰ Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, European Court Reports 2001 Page I-04961, paragraph 30.

Same work and work of equal value

Preconditions for comparison

The “single source” requirement

It was already mentioned that sources of discriminatory pay may originate from legislative provisions, collective agreements, and individual employment contracts⁴¹ but with the proviso that the source of discrimination is unique. This means that directly discriminatory legislative provisions do not require the existence of a comparator – an employee of the opposite sex earning more for equal work employed by the same employer and at the same establishment⁴². The same principle concerns directly discriminatory provisions of a collective agreement⁴³:

The definition of direct discrimination does not require the existence of an actual comparator; a mere hypothetical comparison is sufficient to meet the legislative standard.

...

On the other hand, we should not exaggerate the revolutionary character of a hypothetical comparator. As a recent judgement⁴⁴ of the ECJ made clear, the alleged discrimination must have its origin in a single source.⁴⁵

This means that discrimination arising from individual employment contracts could be claimed only in accordance with the so-called comparable worth theory⁴⁶. The comparable worth theory provides that an individual can claim equal pay for equal work if there is a comparator – a colleague working at the same establishment⁴⁷ and employed by the

⁴¹ Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455.

⁴² Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873, paragraph 84.

⁴³ Even more in case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535, the ECJ held:

“22. The fact that the rates of pay at issue are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently. If the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could, as the German Government pointed out, easily circumvent the principle of equal pay by using separate bargaining processes.”

⁴⁴ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, European Court Reports 2002 Page I-07325.

⁴⁵ Sacha Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes*, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International.

⁴⁶ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 183.

⁴⁷ Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455, decision.

same employer⁴⁸, or a colleague worked at the same establishment employed by the same employer⁴⁹.

With regard to individual employment agreements, writers had contrary opinions on whether certain paragraphs of *Defrenne II*⁵⁰ and *Macarthys*⁵¹ provide evidence that the ECJ does not exclude the possibility of a broader comparison of pay than only within one service or establishment. Although it has been argued that it is most likely that the ECJ's rulings on the scope of Article 141 limit comparison to one source only, there is no clear answer regarding the scope of Directive 75/117, which seems to be wider⁵².

However, so far the ECJ has not given a broader interpretation of the scope of Directive 75/117. In contrast, recent case-law has underlined the limited scope of Article 141 - that source must be unique. This means that with regard to discriminatory pay arising from individual employment agreements, a comparator is mandatory except in cases of discrimination against a worker arising from pregnancy and maternity, where a comparator is not mandatory⁵³. Moreover, taking account the circumstances of particular cases, where employees performed work for the same establishment but were employed by different employers, the criterion of "single source" was supplemented. If "single source" in *Defrenne II* meant "work carried out in the same establishment"⁵⁴ then in

⁴⁸ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, European Court Reports 2002 Page I-07325, paragraph 17.

⁴⁹ Case 129/79, *Macarthys Ltd v Wendy Smith*, European Court Reports 1980 Page 01275.

⁵⁰ Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455, paragraph 19 :

« It is impossible not to recognize that the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertaking but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level”.

⁵¹ Case 129/79, *Macarthys Ltd v Wendy Smith*, European Court Reports 1980 Page 01275, paragraph 10:

“As the court indicated in the *Defrenne* judgement of 8 April 1976, that provision applies directly, and without the need for more detailed implementing measures on the part of the Community or the Member States, to all forms of direct and overt discrimination which may be identified solely with the aims of the criteria of equal work and equal pay referred to by the Article in question. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service”

⁵² Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, at pages 183-186.

⁵³ Case C-218/98, *Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA*, ECR 1999 Page I-05723.

⁵⁴ Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455, paragraph 22.

Lawrence the criterion “employed by the same employer” was added⁵⁵. The ECJ explains it as follows, that is if:

... the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is nobody which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC⁵⁶.

Thus the statement in the preamble of the Recast Directive could seem misleading for those who are not very familiar with the case-law of the ECJ on this matter:

(10) The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.

It is important to note again that such possibility applies only if direct discrimination arises from provisions of legislature or collective agreements.

The problem of the single source requirement with regard to discrimination arising from individual employment contracts frequently does not allow a challenge to discriminatory pay at large. This is because of horizontal job segregation or the situation where certain sectors of industry still employ male or female workers only. Besides, it is characteristic throughout the EU that traditional “male” professions and jobs are better paid than “female” professions and jobs⁵⁷. It follows that:

These differences in pay between male and female workers require a much broader analysis than merely a legal one. This is what we may call today structural or institutional discrimination, which can only be eliminated by additional instruments adopted at Community and national level or the parties to collective agreements⁵⁸.

Other preconditions

After the single source of discrimination has been established, one should confirm whether men and women to whom the principle of equal pay

⁵⁵ Case C-320/00, *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.*, European Court Reports 2002 Page I-07325, paragraph 17.

⁵⁶ *Ibid.*, para. 18.

⁵⁷ Equality between women and men in the European Union, European Commission, Luxembourg: Office for Official Publication of the European Communities, 2005.

⁵⁸ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at pages 546-547.

must be applied are in identical or comparable situations⁵⁹. For example, the fact that employees are classified in the same job category under a collective agreement does not automatically mean that they perform the same work or work of equal value⁶⁰. Factors such as the nature of the work, training requirements, working conditions⁶¹, and professional qualifications⁶² could help to establish whether persons are in a comparable situation.

Criteria for same work and work of equal value

Duties must be compared irrespective of title or grade⁶³. Indeed quite the opposite, employees formally providing the same services could in fact provide the same services but with different content, thus performing different work. For example, the content of services provided by psychotherapists with the education of psychologists or doctors differs, because their respective expertise is grounded in different education which provides different knowledge and skills⁶⁴.

The ECJ has not set many more criteria except as mentioned for comparison of work. Indeed, this is not surprising since it is not an easy task to determine whether work is the same, or indeed of equal value. Moreover, in general the duty to assess whether work performed is the same or of equal value in general lies with national courts⁶⁵. The Community has provided more detailed guidelines on how to assess the sameness and equal value of work in the form of soft law only⁶⁶.

Pay system

Measurement and comparison of pay

Article 141(2) provides for measurement of pay. It distinguishes two kinds of pay: piece work, and time work.

⁵⁹ Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, European Court Reports 2001 Page I-04961, paragraph 39.

⁶⁰ *Ibid.*, para. 44.

⁶¹ Case C-400/93, *Specialarbejderforbundet I Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, European Court Reports 1995 page I-1275, paragraph 33.

⁶² Case C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse*, European Court Reports 1999 page I-02865, paragraph 18.

⁶³ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 62.

⁶⁴ Case C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse*, European Court Reports 1999 page I-02865, paragraph 20.

⁶⁵ Case C-400/93, *Specialarbejderforbundet I Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, European Court Reports 1995 page I-1275, paragraph 42.

⁶⁶ Communication from the Commission of 17 July 1996 "A code of practice on the implementation of equal pay for equal work of equal value for women and men" COM (96) 336 final.

In *Royal Copenhagen*⁶⁷ the ECJ admitted that pay for piece work is not discriminatory if it depends on individual output. But this is true only if remuneration for piece work among workers performing different piece work is established. A difference in average pay among two groups of workers who perform different piece work does not automatically mean that the pay system is discriminatory as far as it is influenced by individual output.

In *Barber* the ECJ made clear that in order to establish whether the principle of equal pay is observed, each element of pay must be compared⁶⁸. But, for example, an inconvenient-hours supplement can not be taken as the basis for pay comparison⁶⁹, because it is obviously pay for different working conditions, not for the nature of the work.

Interestingly, the ECJ itself has seemingly failed to follow the obligation to compare each element of pay. Roseberry⁷⁰ points out the cases of *Birds Eye Walls*⁷¹, where the Court took into account total pension (occupational and state) income, while in *Barber*⁷² it did not take into account different pension income for male and female workers received from state and occupational pension schemes. These cases show that pay measurement and comparison may involve many criteria and factors, such as different pensionable age, or actuarial factors.

Criteria

To be non-discriminatory, a pay system must be based on gender-neutral and objective criteria. Gender neutral criteria are those which are possible to fulfil for persons of either sex. However, this does not exclude the possibility of indirect as well as direct discrimination.

For example, a pay system which is based only on the physical strength criterion obviously discriminates against women workers, because they are in general of lesser physical strength⁷³. But this does not mean that the pay system can not include any criterion which more favours persons of one sex. They just have to be in balance. Namely, an

⁶⁷ Case C-400/93, *Specialarbejderforbundet I Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, European Court Reports 1995 page I-1275.

⁶⁸ Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899, paragraph 34.

⁶⁹ Case C-236/98, *Jämställdhetsombudsmannen v Örebro läns landsting*, European Court Reports 2000 Page I-02189, paragraph 54.

⁷⁰ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 61.

⁷¹ Case C-132/92, *Birds Eye Walls Ltd. v Friedel M. Roberts*, European Court Reports 1993 Page I-05579.

⁷² Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899.

⁷³ Case 237/85 *Gisela Rummler v Dato-Druck GmbH.*, European Court Reports 1986 Page 02101, paragraph 15.

employer is obliged to base its pay system on conditions which are equally favourable to both sexes⁷⁴.

Such gender neutral criteria as seniority⁷⁵, training, and mobility⁷⁶ could have the same discriminatory effect. Although those criteria - unlike physical strength - are not based on general biological differences between the sexes, they could put at a disadvantage workers of one sex due to socially defined differences. Statistics show that average female workers spend much more time for family duties and child-care, thus they “are not as able as men to organize their working time flexibly”, “they have had less opportunity than men for training or have taken less advantage of such opportunity” and they “more frequently suffer an interruption of their career”⁷⁷.

Objective criteria are those which are of real need to perform work duties. From the case-law of the ECJ it follows that objective criteria are those which are “of importance for the performance of specific tasks entrusted to the employee”⁷⁸. Thus according to the ECJ in order not to be discriminatory each pay system criterion must be assessed from the perspective of biological as well as socially defined differences between the sexes and from the perspective of objectivity – whether the criterion is of importance for performance for the work in question.

It is notable that indirectly discriminatory criteria could be justified by real need on the part of an undertaking. However, this will not be the case where a disadvantaged group of workers would be composed only of persons of one sex⁷⁹.

Justifications for unequal pay

From the discussion above it is clear that direct discrimination is not subject to any justification; however, indirect discrimination can be justified. Regarding justifications for unequal pay, there are two notable cases to mention.

First, although equal pay issues in principle must be distinguished from equal treatment issues, nevertheless in certain circumstances they are closely connected. For example, in *JamO* where working-time of midwives was reduced because they must work on a shift basis. The question was whether reduction of working time could be taken into

⁷⁴ Case 237/85 *Gisela Rummler v Dato-Druck GmbH*, European Court Reports 1986 Page 02101.

⁷⁵ Case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-00297.

⁷⁶ Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199.

⁷⁷ *Ibid.*, paras. 22, 23 and 24.

⁷⁸ Case 109/88, *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199, paragraph 22.

⁷⁹ Case C-196/02, *Vasiliki Nikolouidi v Organismos Tilepikinonion Ellados AE*.

account for comparison of basic salary. The ECJ did not exclude such possibility, if “reduction may constitute an objective reason unrelated to any discrimination on grounds of sex such as to justify a difference in pay”⁸⁰.

Second, an important justification was accepted in *Enderby*. Indirectly discriminatory pay could be justified on economic grounds – namely, by the state of the employment market “which may lead an employer to increase the pay of a particular job in order to attract candidates”⁸¹

Equal pay during and after pregnancy, maternity and child-care leave

Pay during pregnancy

Generally during pregnancy, the pay of a worker must be at the same level as other workers, but only in comparable situations. Directive 92/85 provides for several obligations to provide a pregnant worker with healthy working conditions. However, Directive 92/85 does not explicitly deal with equal pay matters in cases where working time or working conditions have been adjusted to a pregnant worker or it is impossible and pregnant worker must be granted leave or an extension of maternity leave.

How the equal pay principle must be applied to a pregnant worker is quite a controversial issue. The ECJ has held that although pregnancy-related illness or disorders which cause incapacity for work are a specific feature of the condition of pregnancy⁸², nevertheless a woman in such a situation has no right to claim full pay. She has the right to receive pay which is equivalent to the general sick pay applicable to sick workers, but under the condition that sick pay “is not so low as to undermine the objective of protecting pregnant workers”⁸³.

Pay during maternity leave

First, during maternity leave a person is in a special position, “which is not comparable either with that of a man or with that of woman actually at work”⁸⁴, so that women on maternity leave have no right to claim the

⁸⁰ Case C-236/98, *Jämställdhetsombudsmannen v Örebro läns landsting*, European Court Reports 2000 Page I-02189.

⁸¹ Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535, paragraph 26.

⁸² Case C-66/96, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327 paragraph 33.

⁸³ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2.

⁸⁴ Case C-342/93, *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*, European Court Reports 1996 Page I-00475, paragraph 17.

same pay as workers actually working⁸⁵. Nevertheless, maternity allowance paid by the employer constitutes pay within the meaning of Article 141. Second, although she has no right to full pay, this could not “be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth”⁸⁶.

Article 11(3) of Directive 92/85 provides that the minimum amount of maternity leave allowance must be “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” or in simple words – maternity allowance must be at least equivalent to sick pay. Although the wording of Article 11(3) does not explicitly provide that sick pay must be understood as sick leave allowance guaranteed by national social security legislation, the ECJ has ruled so⁸⁷, thus narrowing the wording of Directive 92/85. This means that if the employer provides employees with higher pay than provided by national social security legislation in case of illness, a worker cannot claim higher maternity allowance respectively. But the employer must retain acquisition of rights under any occupational social security scheme⁸⁸. Besides, although a person on maternity leave cannot claim full pay under Article 141, she has the right to claim taking into account in calculating her maternity allowance a back-dated pay rise which is awarded between the beginning of the period covered by reference pay and the end of maternity leave⁸⁹.

Pay after maternity leave

A period of absence due to maternity leave can not be taken into account when paying Christmas bonus where that bonus is awarded retroactively as pay for work performed in the course of that year. However, it could be conditional upon whether the worker is in active employment when the bonus is awarded⁹⁰.

Regarding sick pay, in *Mc Kenna* the ECJ held that a general sick-leave scheme which decreases sick pay after a certain period of absence due to health problems in cases where a person was absent before maternity leave and continues after maternity leave must guarantee to a female worker such sick pay which is not lower than the minimum

⁸⁵ *Ibid.*, para. 20.

⁸⁶ *Ibid.*

⁸⁷ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 36.

⁸⁸ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401., Article 6(1)(g) of Directive 86/378 amended by Directive 97/96, see also case C-356/03.

⁸⁹ Case C-147/02, *Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security*, ECR 2004 Page 0000, paragraph 48.

⁹⁰ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243.

amount she was entitled to during the illness which arose while she was pregnant⁹¹

Equal pay and child-care leave

The ECJ has held that a person on parental leave cannot be compared to a person actually at work, so that a person can not claim equal pay during this period⁹². Even more, a person on parenting leave has no right to claim any financial support under EC law. This has a very interesting effect on the equal pay principle which is applicable when a person returns from parenting leave. In contrast to maternity leave, bonus pay awarded as retroactive pay for work performed in the course of the year could be reduced pro rata, taking into account parenting leave⁹³. It follows that an employer is not under obligation to remedy a decrease in pay due to parenting leave. However, Article 141 precludes depriving a worker after parental leave from the right to receive bonus pay awarded as retroactive pay for work performed in the course of the year because women more frequently take parenting leave than men and thus there could be a risk of indirect discrimination⁹⁴.

Distinction between pay and treatment

The model of EC sex equality law is built so that it distinguishes between equal pay and working conditions, although in general it is obvious that pay constitutes one of the working conditions. Most probably such distinction arose because of the chaotic historical development of EC equality law. Namely, that until 1976 there was only provision on equal pay, but not on equal treatment. This put the ECJ in quite an uneasy situation, which is illustrated in *Defrenne III*⁹⁵. The Court could not deny that respect for fundamental personal rights is one of the general principles of Community law and that there is also no doubt that it includes elimination of discrimination based on sex. It also recognised that equal pay matters are based on the close connection which exists between the nature of services provided and the amount of remuneration. Moreover, Article 141 is based on the presumption that all workers are on an equal footing,

whereas in many respects an assessment of the other conditions of employment and working conditions involves factors connected with the

⁹¹ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2.

⁹² Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243, paras. 37 and 38.

⁹³ *Ibid.*

⁹⁴ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243, paragraphs 35 and 36.

⁹⁵ Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1978 Page 01365.

sex of the workers, taking into account considerations affecting the special position of women in the work process⁹⁶.

In the following cases the ECJ developed clearer criteria for distinction. It held that the:

concept of pay, within the meaning of the second paragraph of Article 119 of the Treaty, comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer”

and the

legal nature of that consideration is not important⁹⁷.

Consequently anything that falls outside the definition of pay constitutes working conditions, so that provisions of equal treatment are applicable.

In some cases it is quiet obvious what constitutes working conditions and what pay. So in *Lommers*⁹⁸, the ECJ repeated that although working conditions may have pecuniary consequences it is not sufficient to bring them within the scope of Article 141⁹⁹, so that nursery places made available for employees by their employer cannot be considered as a matter of equal pay.

However, in a number of cases the ECJ did not follow its strict distinction rules. As Roseberry writes, “the ECJ seemed to reconsider the sharp distinction it had drawn between access and amount of benefit”. In particular in *Bilka-Kaufhaus*¹⁰⁰ and *Nimz*¹⁰¹ it held that access to pay falls within the scope of Article 141.

Also controversial is the question whether compensation for unfair dismissal constitutes pay within the scope of Article 141. As Bernard and Hepple argue, following the finding of the Court in *Gillespie*¹⁰²:

there is a clear distinction between equal pay matters covered by Article 119 and equal treatment in respect to working conditions which is covered

⁹⁶ *Ibid.*, para. 22.

⁹⁷ Case C-281/97, *Andrea Krüger v Kreiskrankenhaus Ebersberg*, European Court Reports 1999 Page I-05127, paragraphs 15 and 16.

⁹⁸ Case C-476/99, *H.Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, European Court Reports 2002 Page I-02891.

⁹⁹ For the first time it was held in Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1978 Page 01365, paragraph 21.

¹⁰⁰ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

¹⁰¹ Case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-00297.

¹⁰² Case C-342/93, *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*, European Court Reports 1996 Page I-00475, paragraph 24.

by the Equal Treatment Directive¹⁰³ ...unfair dismissal compensation cannot be treated as pay because it does not constitute remuneration for work carried out by the employee but is compensation for breach of the employee's working conditions¹⁰⁴.

The ECJ rejected this argument¹⁰⁵.

Interestingly, although in order to compare basic pay for two groups of workers working conditions must be equalized¹⁰⁶, nevertheless different working conditions could serve the objective justification for unequal pay. Thus the Court overruled the principle established in *Defrenne III* that Article 141 "constitutes a special rule, whose application is linked to precise factors" such as that "all workers are ex hypothesi on an equal footing"¹⁰⁷.

Latvian Law

Labour Law

Article 60 of the Labour Law provides for the right to equal pay for the same work or work of equal value. However, since this provision came into force on 1 of June 2002, there have been no cases on equal pay.

Article 2 of Law on Civil Service provides that regarding pay Labour Law is applicable as far as it is not regulated by law in question. Since Law on Civil Service does not regulate equal pay matters they are fully governed by Article 60 of Labour Law. Experts suppose that this is mostly because of lack of information and of a disorganized employment market. Even today, a considerable part of the employment market is formed by illegal employment and where this is not the case, employees are afraid of adverse consequences on the part of the employer and other employers in the future¹⁰⁸. Besides, there is no complete literature in Latvian on the application of Article 60 of the Labour Law, namely an exhaustive description of the ECJ case-law on equal pay matters.

¹⁰³ 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, vocation training and promotion, and working conditions.

¹⁰⁴ Catherine Barnard, Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Cambridge Law Journal, July 1999, 58(2), pages 399-412.

¹⁰⁵ Case C-167/97, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199.

¹⁰⁶ Case C-236/98, *Jämställdhetsombudsmannen v Örebro läns landsting*, European Court Reports 2000 Page I-02189, also case 400/93, *Specialarbejderforbundet I Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S*, European Court Reports 1995 page I-1275, paragraph 33.

¹⁰⁷ Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1978 Page 01365, paragraphs 19 and 22.

¹⁰⁸ Experience of experts of the Human Rights Office, who hold seminars on non-discrimination in regions of Latvia.

However, in 2000 Rēzekne City Court delivered a decision¹⁰⁹ in a case which concerned equal pay. The case concerned the only female employee – Abramova – at a printing works enterprise. Eight months after her reinstatement according to another court decision on unlawful dismissal, the employee was asked to amend her contract of employment regarding pay. In particular, instead of salary depending on individual output and the profit of the enterprise, Abramova was offered a fixed salary each month. She signed the amendments which in reality turned out to be decrease in pay by five times. Generally, the amendments to the employment contract were contested on account of erroneous supposition. Namely, Abramova thought that the provisions of an employment contract regarding supplemental pay depending on the profit of enterprise did not become void. Besides, breach of the principle of equal pay was claimed. In 1999, the old Labour Code was in force. This did not contain any provision for EC directives. However, Article 1 of that code provided the general principle of labour law that every employee is entitled to equal treatment, i.e., irrespective of sex, and Latvia was party to ILO Convention No.100 and CEDAW. Rēzekne City Court decided that the amendments to the employment contract were void and levied from the employer deferred pay in favour of Abramova.

However, the decision of Rēzekne City Court was appealed to Latgale District Court¹¹⁰. Latgale District Court overruled the previous decision on the grounds that there was no erroneous supposition, because the conditions of employment in the amendments were defined clearly, and - by considerably reducing the salary - the duties were also diminished. Besides, the term for bringing an action on amendments of a contract of employment was infringed.

From the perspective of EC law, this case - although *prima facie* an unequal pay case - nevertheless turns out to be an unequal treatment case. Buka points out the important circumstance of the case, that reduction of salary was simultaneous with reduction of duties, so that the element of ‘same work’ was not fulfilled¹¹¹. The unequal treatment aspects of this case will be discussed in the chapter on equal treatment.

Occupational social security schemes

In Latvia, protection exists under occupational social security schemes against two risks – old age, and sickness.

¹⁰⁹ Rēzeknes tiesas 2000.gada 26.janvāra spriedums lietā Nr.2-133/3, Jurista Vārds, 2000.gada 22.jūnijā.

¹¹⁰ Latgales Apgabaltiesas 2000.gada 19.maija spriedums lietā Nr.2-145A, Jurista Vārds, 2000.gada 22.jūnijā.

¹¹¹ Autoru kolektīvs Ivo Alehno zinātniskajā redakcijā, Eiropas Savienības tiesību īstenošana Latvijā, Latvijas Vēstneša Bibliotēka, 2003.

Private pension funds

Private pension funds are regulated by the Law on private pension funds¹¹² and more correspond to the model of supplementary occupational pension schemes¹¹³. Article 11(3) of the respective law provides that all questions regarding participation conditions to a private pension plan must be dealt with alike irrespective of sex, origin, property status, racial or ethnic origin, or religion. This provision means that the principle of gender equality must be applied regarding conditions set both by an employer and by a private pension fund. Namely, that private pension funds have no right to use actuarial factors in defining private pensions¹¹⁴. Recent amendments allow for defined-benefit pension plans¹¹⁵.

However, concerns exist about the provisions of Article 11(3), which provides that an employer when deciding on which group of employees will be entitled to participate in a private pension plan need take account only of such criteria as profession, length of service, and position or other objective criteria. With regard to profession and length of service, there is risk of indirect discrimination. Professions are frequently horizontally segregated between the sexes, so that if an employer decides that only employees of one profession are subject to participation in a private pension plan and employees of that profession consist mainly of one sex, then this could amount to indirect discrimination against another group of employees who perform another profession and consist of persons belonging to the opposite sex.

With regard to length of service, it has been mentioned previously that in *Nimz* the Court held that the criterion of seniority is questionable and can be accepted with regard to higher pay only if “there is relationship between the nature of work performed and the experience gained”¹¹⁶. Thus the criterion of length of service provided by the Law on private pension funds as well as the provisions of Article 6(1)(c) of Directive 86/378 from which it follows that an employer has the right to determine a minimum period of employment to obtain rights to join scheme, most probably are indirectly discriminatory against women employees who interrupt their careers more frequently. Indirectly

¹¹² Par privātajiem pensiju fondiem: LR likums. Latvijas Vēstnesis 1997. 20.jūnijs, Nr.150, ar grozījumiem, kas pieņemti 10.11.2005 un izsludināti Latvijas Vēstnesī 2005. 25.novembris, Nr.189 (Law on private pension funds).

¹¹³ See in that regard case C-110/91, *Michael Moroni v Collo GmbH*. European Court Reports 1993 Page I-06591.

¹¹⁴ According to telephone interview with Parex bank information centre, actuarial factors in Latvia apply only to life insurance.

¹¹⁵ Grozījumi likumā „Par privātajiem pensiju fondiem”: LR likums. Latvijas Vēstnesis, 2005. 25.novembris, Nr.189, 11.panta 1¹.daļa (Amendments to Law on private pension funds).

¹¹⁶ Case 184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-00297, paragraph 14.

discriminatory conditions regarding access to private pension schemes are prohibited under Article 6 of Directive 86/378.

As to the criterion of position, there could be a case of direct discrimination, because formally keeping a higher position does not mean that the keeper of a lower position does not perform identical duties or duties of equal value, thus having rights to equal pay which also includes the right to join an occupational social security scheme¹¹⁷.

Health insurance

According to Article 4(b) of Directive 86/378, occupational social security should be considered to include health insurance certificates which an employer provides for employees. In Latvia almost the only possible way to obtain a health insurance certificate is when it is provided by an employer. It is because individual health insurance certificates can avail themselves only a small percentage of the Latvian population and consequently insurance companies view risks to insure persons individually, since it may not cover expenses based on solidarity principle.

Possession of a health insurance certificate means that an employee has the right to receive certain medical treatment on the account of the insurer. The scope of medical treatment services which an employee has the right to receive on the account of the insurer depends on the health insurance certificate program bought by the employer from the insurance company.

In Latvia there are almost no identical health insurance certificate programmes. The service content of a health insurance certificate depends on agreement between the employer and the insurer which provides the employer with the most acceptable program¹¹⁸. Regarding gender equality, it is recognized by research that women visit doctors more frequently than men¹¹⁹, thus creating more expense for insurers. However, insurance brokers contend that the price of health insurance certificates for employees does not depend on the proportion of male and female workers employed by the respective employer. Another gender equality issue is paid services for birth-giving assistance. This is provided by health insurance certificates only if this service is explicitly

¹¹⁷ Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 62.

¹¹⁸ Aivars Kristapsons (sertificēts apdrošināšanas brokeris), *Darbinieku veselības labad*, *Komersanta Vēstnesis*, 2006/I (7), VSIA „Latvijas Vēstnesis”.

¹¹⁹ Data of Latvia Central Statistical Office from 1997 to 1999 show that women visit doctors twice as often as men, while the same fact is mentioned in the Proposal for a Council Directive implementing the principle of equal treatment between women and men in the Access to and supply of goods and services, COM (2003) 657 final.

included in the particular health insurance certificate program, thus in the rest of cases leaving this burden on account of female employees.

Special service pension schemes

According to Latvian law, persons on military service¹²⁰, a certain category of persons serving at system of Ministry of Interior affairs¹²¹, prosecutors¹²², and artists employed by the state or municipality¹²³ are entitled to a special long service pension. Recently, the Law on long term service pensions for judges was adopted¹²⁴. Although this kind of pension is fully paid by the state budget, nevertheless they correspond to all three criteria established by the ECJ in *Niemi*¹²⁵, thus falling within the scope of Article 141. Usually the persons listed above are entitled to early retirement, thus until they reach statutory pensionable age the special pension acts as a bridging pension. After entitlement to old age pension, the long term service pension is decreased proportionately to the old age pension. Latvia has different pensionable ages under the state statutory pension scheme; however, this situation is not in breach of the equal pay principle according to the *Birds Eye Walls* judgement¹²⁶.

¹²⁰ Militārpersonu izdienas pensiju likums: LR likums. Latvijas Vēstnesis 1998. 1.aprīlis, Nr.86 (1147), 01.04.1998 (Law on pensions for the military).

¹²¹ Par izdienas pensijām Iekšlietu ministrijas sistēmas darbiniekiem ar speciālajām dienesta pakāpēm: LR likums. Latvijas Vēstnesis 1998. 16.aprīlis Nr.100/101 (1161/1162) (Law on pensions for employees of the system of Ministry of Interior Affairs with special ranks).

¹²² Prokuroru izdienas pensiju likums: LR likums. Latvijas Vēstnesis 1999. 3.jūnijs Nr.181(1641), (Law on pensions for prosecutors).

¹²³ Valsts un pašvaldību profesionālo orķestru, koru, koncertorganizāciju, teātru un cirka mākslinieku izdienas pensiju likums: LR likums. Latvijas Vēstnesis 2004. 7.jūlijs Nr.106 (3045) (Law on pension for artists of state and municipal orchestras, choirs, concert organizations, theatres, and circus).

¹²⁴ Tiesnešu izdienas pensiju likums: LR likums. Latvijas Vēstnesis 2006.7.jūlijs Nr.107 (3475) (Law on long term service pensions for judges).

¹²⁵ Case C-351/00, *Pirkko Niemi*, European Court Reports 2002 Page I-07007.

¹²⁶ Case C-132/92, *Birds Eye Walls Ltd. v Friedel M.Roberts*, European Court Reports 1993 Page I-05579.

Chapter 5.

Equal treatment

Equal treatment as a fundamental principle of EC law

The issue of equal treatment was for the first time discussed before the ECJ in *Defrenne III*¹, where a former air hostess claimed discriminatory dismissal because according to the employment contract air hostesses are dismissed at age 40 while male cabin attendants who carry out the same work do not have such a clause in the employment agreement. The Court found that the issue concerns equal treatment while the scope of Article 141 - the only binding non-discrimination provision at that time - no way extends to other issues than equal pay. However, it stressed that elimination of discrimination based on sex forms a part of fundamental rights recognized as one of the fundamental principles of EC law.

Directive 76/207

Directive 76/207 was adopted on 9 February 1976 and the Member States had an obligation to implement it within 30 months. In 2002, Directive 1976 was amended. Most amendments reflected the case-law of the ECJ.

Scope

Directive 76/207 comprises all issues concerning equal treatment in employment and occupation. In particular it refers to access to employment, vocational training, promotion, working conditions, and dismissal as well as referring to Directive 85/92 and 96/34 which deal with reconciliation of work and family life. Regarding the latter, the scope of matters regarding reconciliation of work and family life was extended by amendments to Directive 2002/73 and thus limits to a certain extent the ruling in *Hoffmann*, where the ECJ held that Directive 76/207 “is not designed to settle questions concerned with the organization of family life” and recognizes at least partially the importance of the role of family responsibilities played in equality issues in the employment market.

Directive 76/207 does not distinguish between employers and thus is applicable to all employees working whether in the private or public sector as civil servants². The ECJ has recognized that Directive 76/207 is

¹ Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1978 Page 01365.

² Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459 para 16. See also case C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, European Court Reports 2004 Page I-08807, para 18.

applicable to detrimental treatment in the employment market arising from gender reassignment³.

Although the principle of equal treatment is applicable to professional military service⁴, nevertheless compulsory military service is not subject to Directive 76/207, because unlike professional military service it falls outside the scope of Community law and concerns “the Member States’ choices of military organisation for the defence of their territory or of their essential interests”. Therefore men are not entitled to claim delays in their careers due to mandatory military service⁵.

Directive 76/207 is applicable to workers, the self-employed and also to persons seeking employment or occupation⁶, thus there is no important definition of worker⁷ or self-employed, since it is applicable to all persons seeking or having a connection with the labour market.

Access

Although Directive 76/207 does not explicitly refer to offers of employment, nevertheless the ECJ has recognized that employment advertisements are closely connected with access to employment⁸.

Classification of professions.

Discrimination in matters regarding access to employment may arise in various situations. In *Kording*⁹ the ECJ reviewed a situation where certain groups of professionals willing to become tax advisors were exempted from qualification exams. In order to qualify for that occupation without exams, a person had to have been employed for not less than 15 years as an executive-class officer or employee of the revenue administration. Mrs Kording was refused exemption from the qualification exam, because she had worked on a part-time basis. The majority of respective part-time workers were women, thus the Court found indirect discrimination against female workers, which however

³ Case C-13/94, *P v S and Cornwall County Council*, European Court Reports 1996 Page I-02143.

⁴ Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, European Court Reports 2000 Page I-00069. See in detail section on Direct discrimination.

⁵ Case C-186/01, *Alexander Dory v Bundesrepublik Deutschland*, ECR 2003 page I-02479.

⁶ Article 3(1)(a) of amended Directive 76/207.

⁷ Case C-256/01, *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873, para 63 states:

“In that connection, it must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied (Case C-85/96 *Martinez Sala* (1998) ECR I-2691, paragraph 31)”.

See also Ruth Nielsen, *Gender Equality in European Contract Law*, 2004, Copenhagen, DJOF Publishing, at page 35.

⁸ Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459 paras 42 and 43.

⁹ Case C-100/95, *Brigitte Kording v Senator für Finanzen*, European Court Reports 1997 Page I-05289.

may be justified by objective factors unrelated to any discrimination based on sex. The argument of the defendant, that part-time workers acquire necessary skills more slowly, was overturned by the fact that previously persons were required to show 5 years of respective experience and that the term of employment was extended to 15 years in order to discourage the tendency among officials to enter private practice. This shows that, contrary to the Court's finding in *Nimz*¹⁰ that the requirement of seniority may be applied only where there is a relationship between the nature of the work performed and the experience gained, so that the purpose of 15 years working experience was set due to other reasons than professional skills obtained, thus the legitimacy of treatment between full-time and part-time employees was begun serious doubt.

In *Briheche*¹¹ the Court ruled that exemption from the age limit for access to public sector employment for widows who have not remarried discriminates against widowers who have not remarried, since they are in the same situation. The French Government could not convince the Court that this measure falls under Article 2(4) of the Directive allowing for positive measures, since women take most of the burden of the family, housework, and child rearing and thus they need to be provided with special measures facilitating their integration into the labour market.

The issue of equal opportunities as regards access to work has been addressed with regard to pregnant candidates. The Court in *Dekker* established that refusal to employ a pregnant candidate constitutes direct discrimination based on sex, because only women could be subject to refusal of employment on that ground¹². Consequently there is no obligation for a candidate to inform the employer of the fact of pregnancy¹³. Besides, in order to qualify such refusal as discriminatory no presence of a male candidate is necessary¹⁴.

Contrary to the pregnancy cases described above, the *Cresswell* judgment¹⁵ was subject to considerable criticism¹⁶. In particular it

¹⁰ Case C-184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-0029, para. 14.

¹¹ Case C-319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*, European Court Reports 2004 Page I-08807.

¹² Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, para. 12.

¹³ Case C-109/00, *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993.

¹⁴ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, para. 17.

¹⁵ Joined cases C-63/91 and C-94/01, *Sonia Jackson et Patricia Cresswell v Chief Adjudication Officer.*, European Court Reports 1992 Page I-04737.

¹⁶ Tamara Harvey, Jo Shaw, *Women, work and care: women's dual role and double burden in EC sex equality law*, Journal of European Social Policy, 1998, Vol.8, SAGE, London, Thousand Oaks and New Delhi, at page 53, Siofra O'Leary, *Employment Law at the European Court of Justice. Judicial Structure, Policies and Processes*, Hart Publishing, Oxford – Portland Oregon, 2002, at pages 230-231.

concerned the benefit grant system to persons of working age in order to make sufficient income. In order to define the amount of sufficient income benefit, childminding expenses were deducted only from earnings from employment, but not from allowances paid during vocational training and earnings from part-time work constituting less than 24 hours weekly work. Two single mothers who had taken up vocational training contested those provisions as discriminatory and concerning either equal treatment in social security matters as provided by Directive 79/7 or equal treatment in employment as provided by Directive 76/207. The Court found neither of the directives applicable. In connection with applicability of Directive 76/207, the ECJ merely stated that the benefit system in question concerns income support for persons with insufficient means to meet their needs, not issues concerning access of employment including vocational training. The fact that such benefit system may affect a single mother's ability to take up vocational training is not sufficient to take the supplementary allowance system into the scope of Directive 76/207. So the Court here did not take into account the real effect of the legislation at issue¹⁷.

Vocational training

Article 3(1)(b) of amended Directive 76/207 provides that the right to equal access and treatment as regards vocational training comprises all levels of vocational training, advanced vocational training, as well as retraining and practical work and experience.

So in *Schnorbus*¹⁸ the ECJ admitted that practical training required in order to access employment in the higher civil service falls within the scope of Directive 76/207. The problem was that there were not enough places for all applicants and that several groups of persons had priority to access to that training. One of these priority groups was persons who had completed compulsory military service. Since there were not enough training places, Ms Schnorbus' training was delayed for a maximum of 12 months. The Court first found that there was no direct discrimination on grounds of sex¹⁹, but conditions governing access to training were indirectly discriminatory. And second, that the indirectly discriminatory rule is objectively justified by the counterbalance it seeks to establish

¹⁷ Siofra O'Leary, *Employment Law at the European Court of Justice. Judicial Structure, Policies and Processes*, Hart Publishing, Oxford – Portland Oregon, 2002, at page 230. *See also* Opinion of Mr Advocate General Van Gerven delivered on 15 May 1992 on joined cases C-63/91 and C-64/91., European Court reports 1992 Page I-04737.

¹⁸ Case C-79/99, *Julia Schnorbus v Land Hessen*, European Court Reports 2000 Page I-10997.

¹⁹ It is arguable whether according to recent case C-196/02, *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*, where the Court found that direct discrimination arises where sex-neutral provisions actually concern a group of persons consisting of one sex only. So since according to the facts in *Schnorbus* only men are subject to compulsory military service, then the rule constitutes direct discrimination against females.

with regard to effect of delay constituted by compulsory military service. Besides, it seemed proportionate delay for other applicants in training since it did not exceed 12 months.

Promotion

In *Gester*²⁰ the rule of the civil service providing that part-time civil servants qualify for promotion slower than full-time workers was contested, because the majority of part-time workers were women and the rule in question did not provide for substantiation of the assumption that part-time workers acquire necessary skills for promotion slower than full-time workers. The ECJ, indeed, found here indirect discrimination, which nevertheless may be justified by objective factors unrelated to the sex of the servant.

In *Thibault* the court ruled that absences on grounds of maternity leave must be taken into account for assessment of performance for promotion²¹.

Harassment and sexual harassment

In international and EC law, harassment and sexual harassment are recognized as discrimination on grounds of sex. In EC law, harassment and sexual harassment are prohibited at the workplace and regarding supply of goods and services²².

Article 2(2) of Directive 76/207, amended by Directive 2002/73, gives a definition of both concepts:

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

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

The definitions contain the following elements:

- Unwanted conduct. This is not necessarily be the conduct of the employer himself.
- Related to sex of the person or of a sexual nature.

²⁰ Case C-1/95, *Hellen Gerster v Freistaat Bayern*, European Court Reports 1997 Page I-05253.

²¹ Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

²² Directive 2004/113, but this aspect is not covered by this dissertation, thus not discussed here.

- With the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment²³.

The differences between harassment and sexual harassment are provided by the phrases “related to the sex of a person” and “of a sexual nature” respectively.

The differences between both are illustrated by the following example:

An employer who forces his secretary to “enjoy” his pornography in the office is not necessarily implying he wants a sexual relationship with her. From an evidential point of view, however, the difference between the two situations may be very fine, especially when multi-interpretable innuendo is at play²⁴.

Sexual harassment is also prohibited by Article 11 of the UN Convention of the All Forms of Discrimination against Women (furthermore – CEDAW). Although Article 11 does not explicitly provide for such form of discrimination, the UN Committee on the Elimination of Discrimination against Women (“the Committee”) in its General recommendation No.19²⁵ of 11th session on 1992 gives a new interpretation of Article 11 which comprises sexual harassment at the workplace, too. The Committee gives the following definition:

Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

It is not clear from the CEDAW definition of sexual harassment whether it covers both harassment – unwanted conduct related to the sex of the person, and sexual harassment – unwanted conduct of a sexual nature. This definition does not clearly distinguish harassment from sexual harassment; however, it contains elements of both concepts. Moreover, the aim of the definition given by the Committee is to protect

²³ Mariam Driessen-Reilly and Bart Driessen, Don’t shoot the messenger: a look at Community law relating to harassment in the workplace, (2003) 28 E.L.Rev. Aug., Maxwell and Contributors, at page 496.

²⁴ *Ibid.*

²⁵ <http://www.un.org/womenwatch/daw/cedaw/recomendations/recomm.htm>

women in the workplace²⁶ in all discriminatory situations there are thus no grounds to presume that CEDAW provides only for prohibition of sexual harassment.

The question is whether harassment and sexual harassment can appear in the form of direct and indirect discrimination. The author argues that it is possible. For example, internal regulation staff of an establishment can provide for a dress code, which can directly and indirectly harass one of the sexes. An obligation for men and women to dress similarly or differently in a harassing way can be expressed in a direct and indirect way.

The most problematic, however, is enforcement of provisions precluding harassment and sexual harassment. Until recently the ECJ and CFI had decided only two cases²⁷ on sexual harassment. One of those cases was the following²⁸. Ms Campogrande suffered sexual harassment from her male colleague who was her boss. Her complaint to the employer was conducted but not followed by any express decision, thus Ms Campogrande brought an action before the CFI. The CFI held that the employer – the Commission - was obliged to open an inquiry in order to establish the facts and, if necessary, to determine appropriate compensation. It also held “it to be immaterial that the appellant had not proved that she had suffered material damage as a result of the acts of harassment alleged, that it had not been established that Mr A. had intended to humiliate her and that he had subsequently apologised to her”²⁹. Besides, “the Commission had a duty to examine complaints of sexual harassment speedily”. Further it held “that the fact that Mr A had left the Commission and therefore the alleged harassment had necessarily ceased did not remove the duty to open an inquiry speedily”³⁰. The decision of the CFI was upheld by the ECJ. However this is a so-called staff case which does not give clear guidance on how to investigate and to prove harassment in the workplace other than EU institutions.

There are no cases on harassment related to the sex of a person decided by the CFI or the ECJ so far.

Although in cases of harassment and sexual harassment - like in all other discrimination cases - the burden of proof shifts on to the defendant, nevertheless it is not clear what evidence proves “unwanted conduct”

²⁶ Paragraph 17 of General recommendation No 19 of the UN Committee on the Elimination of Discrimination against Women, <http://www.un.org/womenwatch/daw/cedaw/recomendations/recomm.htm>

²⁷ Case T-549/93 *D v Commission of the European Communities*, not available in English and case C-62/01, *Anna Maria Campogrande v Commission of the European Communities*, European Court Reports 2002 Page I-03793.

²⁸ Case C-62/01 P *Anna Maria Campogrande v Commission of the European Communities*, European Court Reports 2002 Page I-03793.

²⁹ *Ibid.*, para. 8.

³⁰ *Ibid.*, para. 9.

“related to the sex of the person” or “of a sexual nature” and what creates “an intimidating, hostile, degrading, humiliating or offensive environment”³¹

An explanation of the concept of “unwanted conduct” regarding sexual harassment is given in Recommendation 92/113³²:

It is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. Sexual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious.

However, it is much more complicated to define what can constitute “unwanted conduct” regarding harassment related to the sex of the person.

For example, humour can be harassing, but where is the border line between humour and harassment? An American scholar emphasises: “We joke to say who is a member of our group and who is an outsider”³³. Jokes of masculine character can frequently harass women in a male-dominated work collective. “The context, place, and authorship of jokes reveal the distribution and pattern of power as does the ability to trivialize or dismiss something as only a joke”³⁴. Humour can be a very good tool to prevent women from squeezing into traditionally male professions or occupying a higher post.

The facts show that harassment, bullying and mobbing at the workplace affects 8% of the Community’s workforce or 12 million people. It causes three suicides per week in Belgium and European business is losing profits through absenteeism and turnover of staff³⁵. Recommendation 92/113³⁶ also provides that research “in Member States has proven beyond doubt that sexual harassment at work is not an isolated phenomenon” and it affects millions of women in the EC.

It is also unclear who may be sued for harassment or sexual harassment – a colleague harasser or an employer who did not manage to provide workers with appropriate working conditions. The author

³¹ Mariam Driessen-Reilly and Bart Driessen, Don’t shoot the messenger: a look at Community law relating to harassment in the workplace, (2003) 28 E.L.Rev. Aug., Maxwell and Contributors, at page 500.

³² 92/191/EEC: Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, Official Journal L 049, 24/02/1992 P.0001-0008.

³³ Beth A.Quinn, The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World, 2000, 25 Law & Social Inquiry, database: Westlaw.

³⁴ *Ibid.*

³⁵ Mariam Driessen-Reilly and Bart Driessen, Don’t shoot the messenger: a look at Community law relating to harassment in the workplace, (2003) 28 E.L.Rev. Aug., Maxwell and Contributors, at page 493.

³⁶ 92/191/EEC: Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, Official Journal L 049, 24/02/1992 P.0001-0008.

presumes that the actual harasser may be sued, but it does not exclude additional responsibility on the part of the employer who, knowing that harassment or sexual harassment is taking place, fails to prevent it.

Instruction to discriminate

According to Article 2(4) of Directive 76/207 amended by Directive 2002/73, an instruction to discriminate against persons on grounds of sex also constitutes discrimination. There is no case-law so far providing for interpretation of this provision.

Prohibition of adverse treatment

Article 7 of amended Directive 76/207 precludes an employer from dismissing or treating adversely employees or employees' representatives on grounds that they complain within an undertaking or initiate legal proceeding in order to enforce compliance with the principle of equal treatment.

Article 2(3) of Directive 76/207 amended by Directive 2002/73 prohibits victimisation of a harassed or sexually harassed person.

According to the ruling in *Coote*³⁷ Directive 76/207 awards protection of ex-employees. It is also stated in point 17 of the preamble of amending Directive 2002/73 that amended Directive 76/207 must be interpreted in the light of the *Coote* judgment³⁸.

Participation and treatment within organizations

Amended directive 76/207 provides for several rights with regard to organisations. First, Article 3(1)(d) precludes discrimination within organisations of worker or employer or professional organisations. Discrimination is also precluded as regards benefits provided for by such organisations. Second, Articles 8a(2)(a) and 8c promote involvement of organisations in enforcement of the principle of equal treatment.

Other working conditions

Since adoption of Directive 92/85 providing for special protection of women during pregnancy and maternity and Directive 96/34 on parental leave, it was necessary to define the relationship between those directives and the principle of equal treatment. Amending Directive 2002/73 introduced into Directive 76/207 provisions codifying the case-law of the ECJ in pregnancy, maternity³⁹, and parental cases. Article 2(7) of

³⁷ Case C-185/97, *Belinda Jane Coote v Granada Hospitality Ltd.*, European Court Reports 1998 Page I-05199.

³⁸ See for more detailed analysis of the *Coote* judgment section Enforcement and remedies.

³⁹ See for example cases C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011 and C-320/01, *Wiebke*

amended Directive 76/207 provides that persons due to pregnancy and maternity may not be treated less favourably and that after maternity, paternity, adoption, or child-care leave a worker is entitled to the same or an equivalent post and working conditions and shall benefit from any improvement to which he/she would have been entitled during absence.

Working conditions within the meaning of Directive 76/207 also constitute family credit which is an income-related benefit awarded in order to supplement the income of low-paid workers who are responsible for a child⁴⁰. In contrast to the *Cresswell* judgment⁴¹, the Court found that the particular scheme of benefits falls within the scope of Directive 76/207, because it is not a mere supplementary income for persons with insufficient means to meet their needs, but “the aim of the benefit is to ensure that families do not find themselves worse off in work than they would be if they are not working”⁴². The author and writers argue that *Cresswell* differs from *Meyers* only as far as it regards access to vocational training, but in substance it dealt with a similar situation⁴³.

In order to assess whether working conditions are discriminatory, each of the key conditions governing employment or professional activity must be assessed in so far as those key elements themselves constitute specific measures based on their own criteria⁴⁴.

Treatment of part-time workers

A considerable part of judgments in the field of EC sex equality law concerns issues of part-time workers. Less favourable treatment on grounds of part-time employment affects workers not only as regards working conditions, but also as regards pay⁴⁵ conditions and social security matters⁴⁶.

In general, different treatment between part-time and full-time workers is precluded by Directive 97/81. However, it precludes different treatment only from the point of view of general equality which may be subject to justification in all cases, while the principle of equal treatment between the sexes is more limited for justification of discrimination, but this is not the main reason why usually discrimination cases between

Busch and Klinikum Neustadt GmbH & Co. Betriebs-KG, European Court Reports 2003 Page I-02041, para. 38.

⁴⁰ Case C-116/94, *Jennifer Meyers v Adjudication Officer*, European Court Reports 1995 Page I-02131.

⁴¹ Joined cases C-63/91 and C-94/01, *Sonia Jackson et Patricia Cresswell v Chief Adjudication Officer.*, European Court Reports 1992 Page I-04737.

⁴² Case C-116/94, *Jennifer Meyers v Adjudication Officer*, European Court Reports 1995 Page I-02131, para. 20.

⁴³ Siofra O’Leary, *Employment Law at the European Court of Justice. Judicial Structure, Policies and Processes*, Hart Publishing, Oxford – Portland Oregon, 2002, at pages 230.

⁴⁴ Case C-226/98, *Birgitte Jurgensen v Foreningen af Specialleger and Sygesikringens Forhandlingsudvalg*, European Court Reports 2000 Page I-02447, para. 36.

⁴⁵ See for more detail section on Indirect discrimination.

⁴⁶ See for more detail section on Social security.

part-time and full-time workers are judged from the perspective of sex equality law. The main reason lies in the fact that the vast majority of part-time workers are women, thus usually differential treatment between part-time and full-time workers involves discrimination based on sex.

So in *Kachelmann*⁴⁷ the Court decided that it is legitimate for national law to provide that in the event of dismissals on account of economic difficulties of the undertaking, part-time workers may not be considered as being in a comparable situation to full-time workers. Therefore dismissals of part-time workers by not comparing them with full-time workers performing the same work on the basis of social criteria is not precluded by Directive 76/207, although it indirectly discriminates against women.

In *Wippel* the ECJ found that a contract of employment that does not specify hours of work and the organisation of working time which are dependant upon the quantity of available work does not constitute either disadvantageous treatment between part-time and full-time workers according to Directive 97/81, or indirect discrimination on grounds of sex contrary to Directive 76/207, since employment contracts of full-time and part-time workers in the given situation were not comparable, because they comprise different conditions of obligations on the part of employees⁴⁸. In *Gester*⁴⁹ and *Kording*⁵⁰ already described above, part-time workers had less favourable conditions governing access and promotion.

Dismissal

Continuing the theme of discrimination against part-time workers, the ECJ was criticized about the *Sidal* judgment⁵¹, where - without actually applying the test of proportionality - it accepted the legality of a national provision allowing dismissal of workers employed for less than ten hours a week or 45 hours a month without having the right to contest the legality of such dismissal on grounds that it alleviated the constraints weighing on small businesses⁵².

Different pensionable ages allowed in the field of social security have several times been used as grounds for justification of discrimination on grounds of sex. Miss Marshall was dismissed when she

⁴⁷ Case C-322/98, *Bärbel Kachelmann v Bankhaus Hermann Lampe KG.*, European Court Reports 2000 Page I-07505.

⁴⁸ Case C-313/02, *Nicole Wippel v Peek& Cloppenburg & Co.*, European Court Reports 2004 Page I-09483.

⁴⁹ Case C-1/95, *Hellen Gerster v Freistaat Bayern*, European Court Reports 1997 Page I-05253.

⁵⁰ Case C-100/95, *Brigitte Kording v Senator für Finanzen*, European Court Reports 1997 Page I-05289.

⁵¹ Case C-189/91, *Petra Kirsammer-Hack v Nurhan Sidal*, ECR 1993 Page I-06185.

⁵² Lynn M. Roseberry, *The limits of Employment Discrimination Law in the United States and European Community*, (1999), Copenhagen, DJOF Publishing, page 133.

attained the age of 62 on grounds that she had attained retirement age not taking into account her wish to work until age 65. The Court in this regard pointed out that Article 7 of Directive 79/7 allowing the Member States to determine different pensionable ages must be interpreted strictly. Consequently, different pensionable ages defined by a Member State do not form a valid ground for dismissal according to Directive 76/207⁵³. Accordingly, in *Roberts* the ECJ ruled that in case of mass redundancy, a single age for dismissal of men and women involving the grant of an early retirement pension does not constitute discrimination based on sex⁵⁴. It is also discriminatory if as a voluntary redundancy incentive granted in the form of taxation at a rate reduced by half of sums paid on cessation of employment relationship is granted to women who have passed the age of 50, but to men who have passed the age of 55⁵⁵. Dismissal of a pregnant worker constitutes direct discrimination based on sex⁵⁶.

Latvian Law

Labour law

Article 29(1) defines the general obligations of an employer as regards discrimination based on sex. It precludes discrimination as regards establishing an employment relationship and during the whole period of existence of that relationship, but that prohibition especially concerns promotion, defining working conditions, pay or vocational training as well as concerning notice of dismissal.

Access

Article 32(1) provides that a job advertisement must concern both men and women except in cases where the sex of the worker constitutes a determining factor for performance of work. Although it clearly states the obligations of the employer, nevertheless the majority of job offers are formulated in one gender only, in that in which that profession provides in Latvia. In Latvia an absolute majority of occupations are in the masculine gender and only several occupations are traditionally in the feminine gender such as nurse and midwife. Point 13 of Regulations of

⁵³ Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723, paras 34-38.

⁵⁴ Case 151/84, *Joan Roberts v Tate & Lyle Industries Limited*, European Court Reports 1986 Page 00703.

⁵⁵ Case C-207/04, *Paolo Vergani v Agenzia delle Entrate, Ufficio di Arona*, available at

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=&datefs=&datefe=&nomusuel=&domaine=&mots=Directive+79%2F7&resmax=100>

⁵⁶ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

the Cabinet of Ministers No.306 adopted on 18 April 2006⁵⁷ provides that if an occupation is represented by women, the title of the occupation must be used in the feminine gender. However, there is no word on how to use occupations traditionally formulated in the feminine gender. Although the Ministry of Welfare states that a job offer shall provide for the title of occupation in both genders⁵⁸, nevertheless there is no such possibility, because occupations having a title in the feminine gender have no title in the masculine gender. One could say that this is not important, but it is, since in Latvia horizontal segregation of professions is manifest and this concerns to a higher degree those professions which have their title only in the feminine gender. So, all kinds of advertisements starting from education offers and ending with work offers make horizontal segregation deeper and deeper. However, the Ministry of Welfare considers that the Latvian classifier of occupations corresponds to the principle of equality, besides it argues that it is based on the ILO Standard Classification of Occupations⁵⁹ where almost all professions are also defined in the masculine gender.

Further, Article 33 provides for job interviews, where it is prohibited to ask questions which do not relate to work. It especially precludes questions on pregnancy⁶⁰ and marital status. Article 34 allows to challenge refusal of employment on grounds of discrimination.

The Latvian national courts have dealt with one case regarding discriminatory refusal to employ on grounds of sex. This was the *Stūriņas* case⁶¹. She was refused a vacancy as a stoker in autumn 2004, despite the fact that she had previously occupied this post seven times from October 1997 till March 2004 on the basis of defined-term contracts for each heating season and possessed the qualification of stoker. A job offer was published in a local newspaper in November 2004. She applied for the vacancy of stoker. However, later when Stūriņa was called to the responsible person in municipality, she was told that women will not work as stokers any more. The respondent argued that there was no job offer. Publication in the local newspaper was mere publication of a meeting of the municipality where the question of a vacancy for a stoker was discussed and no one in the municipality refused her employment on grounds of sex. The Court found that publication in the local newspaper

⁵⁷ Noteikumi par profesiju klasifikatoru, profesijai atbilstošiem pamatuzdevumiem un kvalifikācijas pamatprasībām un profesiju klasifikatora lietošanas un aktualizēšanas kārtību: MK noteikumi Nr.306. Latvijas Vēstnesis 2006. 8.maijs, Nr.70 (Regulations on classifier of professions according to their basic tasks and qualification requirements and on use and actualization of classifier of professions)

⁵⁸ Letter from Ministry of Welfare 26 May 2006 no.S-01-18/1828.

⁵⁹ ISCO 88, available at <http://www.ilo.org/public/english/bureau/stat/download/res/isco.pdf>

⁶⁰ With one exception which is incompatible with EC law and is discussed in the section on Rights during pregnancy.

⁶¹ Cēsu rajona tiesas 2005.gada 3.janvāra spriedums lietā Nr.C11019405.

must be considered as a job offer and that Stūriņa had suffered discrimination based on sex, because the municipality had failed to prove according to Article 29(3) of the Labour law that discrimination was based on objective factors, or that sex is the determining factor in performance of the work in question. Besides, the fact that none of the applicants had received a protocol of the meeting where assessment of candidates took place also testified to discrimination. The Court failed to distinguish direct from indirect discrimination. Since Stūriņa was refused on grounds that “women will not be employed as stokers any more” this must be considered as direct discrimination which may not be subject to justification. Stūriņa was awarded compensation for financial loss and moral damage⁶².

On more case before *Stūriņas* was delivered by the Supreme Court of Latvia. This was the *Muhinas* case⁶³ where discrimination occurred at a time when the present Labour law containing provisions of prohibition of discrimination was not in force. In particular, in 2000 in one newspaper a job offer for a vacancy as a prison warder was published. It stated that the proper candidate would be male, not older than 35 years of age, and with secondary education. Muhina applied for that vacancy, but was refused by letter in which the head of the prison stated that the administration of the prison objected to accepting women in the prison service. In the next written letter the head of the prison explained the refusal to employ also by heavy working conditions and by specific requirements as regards personnel, because the duties entail guarding male persons. Later, Muhina initiated proceedings before the national court on the basis that she had been discriminated against on grounds of sex contrary to the Constitution of Latvia, ILO Convention No.111 precluding discrimination in occupation, CEDAW, and several more international conventions. All three court instances recognized the fact of discrimination. Before the Supreme Court, the issue regarding award of compensation was contested. However it is worth mentioning some judgments by national courts as regards discrimination. The first is that Muhina had herself intentionally generated discrimination, because she applied for a vacancy which was explicitly offered to men only and second, that since the working conditions in prison are heavy, the refusal to employ was based on so-called ‘positive discrimination’. Thereby the national courts of Latvia demonstrated lack of knowledge first by trying to justify the actions of the employer by legitimising victimisation and second, by misinterpreting the concept of positive discrimination.

⁶² The Stūriņas case as regards remedies is discussed in more detail section on Enforcement and remedies.

⁶³ Augstākās tiesas Senāta 2002.gada 8.maija spriedums lietā Nr.SKC-297.

Working conditions

Continuing the discussion on the *Abramova* case⁶⁴, which started in the section on equal pay, it must be recognized that the case in question concerns not equal pay but equal treatment issues, since indeed according to the decision of the District court⁶⁵ Abramova had no right to claim equal pay, because according to the amended employment agreement she actually performed different work. However, the District court failed to recognize that she was the only women working in the undertaking and the only worker whose working conditions were worse. So, it follows that there was discrimination based on sex as regards equal treatment and in particular working conditions⁶⁶. Besides, it was not discussed in the proceedings, but was mentioned among the facts of the case that shortly before discriminatory amendments to the employment contract, the undertaking's action before the national court on dismissal of Abramova was rejected. It follows that in substance the case concerned prohibition of victimisation.

Dismissal

The main problem of the Labour law regarding discriminatory dismissal is that it precludes only discriminatory notice of dismissal, but does not provide for prohibition of discriminatory dismissal. This may arise, for example, in a situation where a woman informs her employer of her pregnancy only after service of notice of dismissal⁶⁷, or a fixed-term contract is not renewed or extended on grounds of discrimination⁶⁸. The second issue concerns the provisions of Article 47, which allows giving notice of termination during the probation period not providing for reasons for dismissal. Such provision makes it partially impossible to contest such dismissal under Article 48 on grounds of discrimination. Besides, Latvian scholars have debated on whether dismissal the during probation period as such must be based on substantiated grounds or not⁶⁹.

Further, one case on discrimination based on sex was contested before the Constitutional court of Latvia⁷⁰. In particular, it was identical

⁶⁴ Rēzeknes tiesas 2000.gada 26.janvāra spriedums lietā Nr.2-133/3, Jurista Vārds, 2000.gada 22.jūnijā.

⁶⁵ Latgales Apgabaltiesas 2000.gada 19.maija spriedums lietā Nr.2-145A, Jurista Vārds, 2000.gada 22.jūnijā.

⁶⁶ The same opinion is expressed by Arnis Buka in Autoru kolektīvs Ivo Alehno zinātniskajā redakcijā, Eiropas Savienības tiesību īstenošana Latvijā, Latvijas Vēstneša Bibliotēka, 2003.

⁶⁷ This case is discussed in more detail in the chapter on Rights during pregnancy.

⁶⁸ Case C-438/99, *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915.

⁶⁹ See in this regard, Ilze Skultāne, Darba devēja uzteikums pārbaudes laikā//Jurista Vārds 30(335) 10.08.2004.Juris Radzēvičs, Darba likuma nianses//Mans Īpašums, 2002., Nr.11.

⁷⁰ Judgment of the Constitutional Court of Latvia in case No.2003-12-01 "On the Conformity of Section 41 (Item 1, Sub-item "f") of the State Civil Service Law with Articles 91, 101 and 106 of the Satversme (Constitution)", delivered on 18th of December 2003, available at [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/12-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/12-01(03).htm)

to the Marshall case⁷¹. Civil servant Galakrodziniece was dismissed when she attained pensionable age according to the Law on the Civil service providing that a civil servant shall end civil service employment when attaining pensionable age and according to the Law on state pensions. In general, the Law on state pensions provides for equal pensionable ages – 62, while the transitional provisions of the respective law provide that an equal pensionable age will be attained in year 2008. Until that time, it remains different but is subject to a step-by step increase differentiated according to sex. At the time of dismissal of Galakrodziniece, according to the transitional provisions of the Law on state pensions, the pensionable age was different for men and for women. The Constitutional court of Latvia found that there were no incompatibilities of law with the Constitution of Latvia, but a wrong interpretation had led to discrimination based on sex. Although the discriminatory dismissal occurred in 2001, nevertheless the Constitutional Court of Latvia referred to the *Marshall* judgment. The only imprecision of the judgement of the Constitutional Court is that it refers to provisions of Directive 2000/78 when analysing whether the concept of ‘occupation’ comprises civil service not taking into account that this directive does not regulate prohibition of discrimination based on sex. Instead it should refer to the case *Commission v Germany*⁷², where the ECJ explicitly stated that principle of equal treatment between men and women regards public service, too.

Part-time workers in Latvia

According to statistical data, in Latvia part time workers comprise only 10% of all workers, where 39 500 part-time workers are men, but 66 000 part-time workers are women⁷³. The problem however may arise from difficulties in finding part-time work, which possibly frequently precludes women from working at all.

Equal treatment within the civil service

It has already been discussed above that the principle of equal treatment concerns the civil service. However, this is not fully implemented in Latvia. Article 2(4) of the Law on the state civil service⁷⁴ provides that an employment relationship within the civil service is regulated by the

⁷¹ Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723.

⁷² Case 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459 para 16.

⁷³ Darbaspēka apsekojuma galvenie rādītāji 2004.gadā, Latvijas Republikas centrālā statistikas pārvalde, Rīga, 2004

⁷⁴ Valsts civildienesta likums: LR likums. Latvijas Vēstnesis, 2000. 22.septembris, Nr.331/333 (Law on state civil service)

Labour law as regards working time and time-off, pay, material responsibility of the employee, and terms as far as these are not regulated by the present law. It follows that there is no provision as regards the employment relationship within the civil service precluding discrimination based on sex.

A project of amendments to Article 2(4) of the Law on the state civil service providing for the principle of equal treatment and allowing applying of norms of the Labour law to relationships within the civil service was submitted to the Parliament of Latvia by the Secretariat of Integration on June 2005. Since that time no further legislative steps have been taken by the Latvian Parliament towards adoption of those amendments⁷⁵.

⁷⁵ Project of amendments is available in Latvian at www.saeima.lv under No.1292, <http://www.saeima.lv/saeima8/reg.likprj>. It states:

Article 2(4) of Law on state civil service shall provide:

“Within the state civil service relationship, norms regulating the employment relationship shall be applied as regards the principle of equal treatment, prohibition of differential treatment, prohibition of adverse consequences, representation and defence of interests of employees, collective agreements, working time and time-off, civil liability of a servant and terms as well as other question as far as it corresponds to the nature of the legal relationship within the civil service and so far as this law and other normative acts provides for different regulation”

Chapter 6.

Social Security

Directive 79/7

Social security matters in EC sex equality law are regulated by Directive 79/7 on progressive implementation of the principle of equal treatment for men and women in matters of social security¹. This Directive is adopted on the basis of Article 308 (ex Article 235) which allows the Community to take action in a field where it is not provided with the necessary powers, but which is necessary for attainment of operation of the common market and the objectives set forth in the EC Treaty. So Directive 79/7 is not based on the equality provisions of EC Treaty, because at that time only Article 119 (now Article 141) provided for equal pay, but social security matters falls outside that concept².

Scope of Directive 79/7

Ratione materiae

Article 3

Article 3 provides:

1. This Directive shall apply to: (a) statutory schemes which provide protection against the following risks:

- sickness,
- invalidity.
- old age,
- 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 not 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).

In order to fall within the scope of Directive 79/7 a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks specified by Article 3(1)(a) or a form of social assistance having the same objective³. The mode of payment does not play a decisive role as regards identification of a benefit as one which

¹ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, Official Journal L 006, 10.01.1979 P.0024-0025.

² Case 80/70. *Gabrielle Defrenne v Belgium State*, European Court Reports 1971 Page 00445.

³ Case 150/85, *Jacqueline Drake v Chief Adjudication Officer*, European Court Reports 1986 Page 01995, paragraph 21.

falls within the scope of Directive 79/7. However, such benefit must be directly and effectively linked to the protection provided against risks specified in Article 3(1) of the Directive 79/7⁴.

In *Drake* the ECJ found that benefit provided for a person who cares for a disabled person forms part of a statutory scheme providing protection against invalidity and is thus covered by Article 3(1)(a) of Directive 79/7⁵. Further in *Smithson*⁶ and *Atkins*⁷ it ruled that housing benefit and travel concessions do not, because they do not provide for direct and effective protection against risks provided by Article 3(1)(a) of Directive 79/7. In contrast in *Richardson*⁸ the ECJ found that exemption from paying charges for supply of drugs, medicines and appliances falls within the scope of Article 3(1) of Directive 79/7, because the measure affords direct and effective protection against the risk of sickness, while in *Taylor* the Court ruled that winter fuel payment falls within the scope of Directive 79/7, because it is granted in form as protecting against risk of old-age⁹.

Child raising allowance as family benefit does not fall within the scope of Article 3 if it does not provide direct and effective protection against one of the risks listed in Article 3(1)¹⁰.

Exceptions from principle of equal treatment

Article 7 of Directive 79/7 provides for a list of exemptions from the principle of equal treatment in social security matters. It provides that the Member States may determine different pensionable ages for men and women, that persons raising children may not claim equal treatment with regard to old-age pension and other benefits, and a married man may be entitled to special advantages in respect to his dependent wife.

Most of cases decided by the ECJ have arisen due to different pensionable ages for men and women allowed as an exemption from equal treatment under Article 7(1)(a) of Directive 79/7.

⁴ Case C-243/90, *The Queen v Secretary of State for Social Security, ex parte Florence Rose Smithson.*, European Court Reports 1992 Page I-00467, paragraph 14.

⁵ Case 150/85, *Jacqueline Drake v Chief Adjudication Officer*, European Court Reports 1986 Page 01995.

⁶ Case C-243/90, *The Queen v Secretary of State for Social Security, ex parte Florence Rose Smithson.*, European Court Reports 1992 Page I-00467. See also joined cases C-63/91 and C-64/91, *Sonia Jackson et Patricia Cresswell v Chief Adjudication Officer.*, European Court Reports 1992 Page I-04737 and critical opinion of Siofra O'Leary, *Employment Law at the European Court of Justice. Judicial Structures, Policies and processes*, Hart Publishing, 2002, at page 230.

⁷ Case C-228/94, *Stanley Charles Atkins v Wrekin District Council and Department of Transport.*, European Court Reports 1996 Page I-03633.

⁸ Case C-137/94, *The Queen v Secretary of state for Social Security, ex parte Cyril Richardson*, European Court Reports 1995 Page I-03407.

⁹ Case C-382/98, *The Queen v Secretary of State for Social Security, ex parte John Henry Taylor*, European Court Reports 1999 Page I-08955.

¹⁰ Joined cases C-245/94 and C-312/94, *Ingrid Hoever and Iris Zachow v Land Nordrhein-Westfalen*, ECR 1996 Page I-04895, paragraph 42.

The UK¹¹ was aware of whether it is allowed under Directive 79/7 and the derogation provided by Article 7(1)(a) to define different contribution periods for men and women arising from different pensionable ages. The Courts answered that different contribution periods logically follows from different pensionable age¹² and are allowed under Article 7(1)(a) and tried this finding substantiated by following reasoning:

Although the preamble to the Directive does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages include the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a) of the Directive¹³.

However, it is of doubt whether different pensionable age usually works in favour of women. So in the *Thomas* situation where women were precluded from receiving severe disablement and invalid care allowance since they had reached the pensionable age defined for women. The Court in this regard pointed out that discrimination arising from different pensionable age and affecting benefit schemes other than old-age can be justified as being the consequence of determining a different retirement age according to sex, if it is necessary to avoid financial disequilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes¹⁴. The ECJ drew the same conclusion in *Hepple*, where it ruled that it is justified under Article 7(1)(a) to pay an allowance provided as compensation for an impairment of earning capacity due to accident at work or occupational disease, at a reduced rate when the person reaches pensionable age, taking into account that women reach pensionable age

¹¹ Case C-9/91, *The Queen v Secretary of state for Social Security, ex parte Equal Opportunities Commission*, European Court Reports 1992 Page I-04297.

¹² The same applies to different calculation of pensions arising from different pensionable ages, see in this regard case C-154/96, *Louis Wolfs v Office national des pensions (ONP)*, European Court Reports 1998 Page I-0617, however if the Member State defines equal pensionable ages for both sexes the method of calculation of pension must be the same. See cases C-154/92, *Remi van Cant v Rijksdienst voor pensioenen*, European Court Reports 1993 Page I-03811, C-172/02, *Robert Bourgard v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*. European Court Reports 2004 Page I-05823.

¹³ Case C-9/91, *The Queen v Secretary of state for Social Security, ex parte Equal Opportunities Commission*, European Court Reports 1992 Page I-04297, paragraph 15.

¹⁴ Case C-382/91, *Secretary of State for Social Security v Evelyn Thomas and others*, European Court Reports 1993 Page I-0124, paragraph 12.

five years earlier¹⁵. This demonstrates that the derogation allowed under Article 7(1)(a) does not always work to the advantage of women. The case-law discussed above shows that subject to the adverse effect of the “privilege” granted under that provision usually affects the most unprotected groups of women – those who unable to undertake full employment for various reasons.

The finding in *Richardson*¹⁶ where exemption from paying charges for the supply of drugs, medicines and appliances was granted according to pensionable ages different for men and women, the Court substantiated by saying that this sickness scheme does not influence the financial equilibrium of contributory pension schemes, that in certain circumstance the Member State is allowed to withdraw certain social security benefits in order to control social expenditure and that the situation of men and women are comparable situations since women are entitled to continue their occupational activities after reaching pensionable age, but men are entitled to draw a retirement pension before pensionable age. Almost the same substantiation was presented by the Court in the *Taylor* ruling on winter fuel payment¹⁷.

These ruling demonstrates the Court’s neglect of the real situation, where women usually retire earlier and are usually entitled to lower average pension, thus more deserving special charge exemption for medicine than men at the same age, whereas instead the Court offers for the Member State to exempt extra social guarantees totally in case of financial difficulties.

In the recent *Haackert* case, the court clarified that Article 7(1)(a) concerns the right to early retirement, which may be defined differently according to the sex¹⁸.

However the most important finding regarding different retirement ages allowed under Article 7(1)(a) was in *Marschall* where the Court held strictly that different pensionable ages allowed as regards social security schemes is not applicable as regards Directive 76/207 or in other words, women workers may not be legitimately dismissed on account of having reached pensionable age allowing them to receive old-age pension¹⁹.

¹⁵ Case C-196/98, *Regina Virginia Hepple v Adjudication Officer and Adjudication Officer v Anna Stec.*, European Court Reports 2000 Page I-03701.

¹⁶ Case C-137/94, *The Queen v Secretary of state for Social Security, ex parte Cyril Richardson*, European Court Reports 1995 Page I-03407.

¹⁷ Case C-382/98, *The Queen v Secretary of State for Social Security, ex parte John Henry Taylor*, European Court Reports 1999 Page I-08955.

¹⁸ Case C-303/02, *Peter Haackert and Pensionsversicherungsanstalt der Angestellten*, Official Journal C 94, 17.04.2004., p. 8.

¹⁹ Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723, paragraphs 34-36.

Derogations provided under Article 7(1)(d) allow for granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife only. So in *Bramhill* a national provision precluded women from the equal right to obtain long-term increase in old-age pension in respect of dependent spouse. The Court held that such provisions cannot be considered discriminatory since they are allowed under Article 7(1)(d)²⁰.

Ratione personae

Article 2 of Directive 79/7 defines persons to whom it is applicable:

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

From the finding in *Drake* on the scope of Article 3(1) of Directive 79/7 it follows that the working population also comprises persons who have given up employment, because one of the risks materializes in relation to an ascendant.²¹

The Court in *Riele* interpreted Article 2 of Directive 79/7 as applicable to persons working or seeking employment “whose occupation or efforts to find work were interrupted by one of the risks referred to in Article 3 of directive”²².

In *Johnston*²³ the ECJ held that a person who had interrupted her occupational activity due to up-bringing of her child and then was unable to search for work because of health condition does not come within the scope of Article 2 of Directive 79/7. However, the situation is different if sickness occurs when a person after the period of up-bringing of child is seeking employment. In other words, a person seeking employment, without the necessity to make a distinction as to the reason why that person left previous work, comes within the scope of Article 2 of Directive 79/7 and consequently must be protected if one of the risks specified by Article 3 occurs. It is for the national court to determine whether a person must be considered as seeking employment²⁴.

²⁰ Case C-420/92, *Elizabeth Bramhill v Chief Adjudication Officer.*, European Court Reports 1994 Page I-03191.

²¹ Case 150/85, *Jacqueline Drake v Chief Adjudication Officer.*, European Court Reports 1986 Page 01995. See also case C-77/95, *Bruna-Alessandra Zuchner v Handelskrankenkasse (Ersatzkasse) Bremen*, European Court Reports 1996, Page I-05689, paragraph 11.

²² Joined cases 48/88, 106/88, 107/88, *J. E. G. Achterberg-te Riele and others v Sociale Verzekeringsbank.*, European Court Reports 1989 Page 01963, paragraph 13.

²³ Case C-31/90, *Elsie Rita Johnson v Chief Adjudication Officer*, European Court Reports 1991 Page I-03723.

²⁴ *Ibid.*, para. 27.

In *Nolte* and *Megner* the Court ruled that the working population in the meaning of Article 2 comprises part-time employment even if it constitutes less than 15 hours a week²⁵. Further the Court held that the scope *ratione personae* as defined by Article 2 of Directive 79/7 cannot be extended according to the scope *ratione materiae* defined by Article 3, but a person may rely on Directive 79/7 if it bears discriminatory effect as regards his/her spouse, if the spouse comes within the scope of the Directive²⁶.

In *Zuchner*,²⁷ a woman who provided care for her disabled husband contested the legality of a national provision awarding financial assistance only to those persons who have no other person living in the same household who can assist and care for the patient. Mrs Zuchner claimed that she came within the scope of Directive 79/7 as working population since she undertook an activity - care of her handicapped spouse. Besides she had undergone training and if she did not provide care it would have been provided by another person in return for payment or in a hospital. However those arguments were rejected by the Court. The crucial point founded here was that Mrs Zuchner was not engaged in occupational activity and not even seeking work at the time when she started to look after her husband²⁸. The Court stated that:

...the term “activity” referred to in relation to the expression “working population” in Article 2 of the directive can be construed only as referring at the very least to an economic activity, that is to say an activity undertaken in return for remuneration in the broad sense.²⁹

It follows that Directive 79/7 is not applicable to unpaid family and care work usually provided by women to their family members. Writers evaluated this ruling very critically:

This harsh ruling failed to take into account of the real economic value of the services provided by Ms Zuchner, which went beyond the normal calls of married life and for which the State would otherwise have had to pay. Furthermore, it sacrificed the spirit of the Directive to its literal interpretation; it seems more than probable that most of those who are excluded from formal economic work because of caring for an infirm

²⁵ Cases C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, European Court Reports 1995 Page I-04625 and C-444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz now Innungskrankenkasse Rheinhessen-Pfalz*, European Court Reports 1995 Page I-04741.

²⁶ Joined cases C-87/90, C-88/90 and C-89/90, *A. Verholen and others v Sociale Verzekeringsbank Amsterdam.*, European Court Reports 1991 Page I-03757.

²⁷ Case C-77/95, *Bruna-Alessandra Zuchner v Handelskrankenkasse (Ersatzkasse) Bremen*, European Court Reports 1996, Page I-05689.

²⁸ *Ibid.*, para. 12.

²⁹ *Ibid.*, para. 13.

relative are women and this important group left outside the potential help by the Directive³⁰.

Notwithstanding problems related to the *Zuchner* judgment, it is noteworthy to mention that in this case the ECJ clarified the wording of Article 2 of Directive 79/7 in general. It clearly stated that Article 2 is applicable not only to employed persons and persons seeking employment whose activity is interrupted by one of the risks referred to in Article 3(1), but also to persons actually working and persons seeking employment³¹. Although this logically derives from the general idea of Directive 79/7, nevertheless it is of great importance to say it explicitly, since equal treatment first of all depends on an equal amount of contributions made by or in favour of actually employed persons and persons seeking employment, which later, when social risk occurs, will serve as the basis for allowance.

So, prohibition of discrimination based on sex in the field of social security according to Directive 79/7 is limited to scope *ratione personae* as provided by Article 2 and scope *ratione materiae* provided by Article 3 taking into account the exemptions provided by Article 7. In reality it leaves outside a wide range of issues concerning the disadvantageous situation of women performing a traditional role and does not allow to deal with equality issues from the perspective of the substantive approach, because the scope of Directive 79/7 does not allow for thoroughness of review of the real situation governing in society.

Ratione temporis

The date for implementation of Directive 749/7 was 22 December 1984. This means that the Member States were under obligation to provide equal treatment in social security matters not only with regard to rights acquired starting from this date but also “a Member State may not maintain beyond 22 December 1984 any inequalities of treatment which have their origin in the fact that the conditions for entitlement to benefit are those which applied before that date”³². For example, a Member State has no right to provide a transitional provision which requires that a married woman who become unemployed before 23 December 1984 remains subject even after that date to the requirement that she be a “wage-earner”³³ or apply to women conditions which were not previously

³⁰ Evelyn Ellis, Recent Developments in European Community Sex Equality Law, Common Market Law Review, 35, 1998, pages 379-408, at page 397.

³¹ Case C-77/95, *Bruna-Alessandra Zuchner v Handelskrankenkasse (Ersatzkasse) Bremen*, European Court Reports 1996, Page I-05689, paragraph 11.

³² Case 384/85, *Jean Borrie Clarke v Chief Adjudication Officer*, paragraph 9, European Court Reports 1987 Page 2865, paragraph 10.

³³ Case 80/87, *A. Dik, A. Menkutos-Demirci and H. G. W. Laar-Vreeman v College van Burgemeester en Wethouders Arnhem and Winterswijk.*, European Court Reports 1988 Page 01601, in this regard see

applied to men³⁴. To correct that situation the Member State may introduce provisions implementing Directive 79/7 retroactively³⁵. If the Member State introduces transitional social security payments for one sex, then the other sex is entitled to the same right even if it infringes the national rule of unjust enrichment³⁶.

In *Richardson* the national court of the UK asked whether the effect of a judgment where the Court found that the right to exemption from charges for supply of drugs, medicines and appliances must be granted to equal terms to both sexes, should be limited in time so that Directive 79/7 may not be relied on for a claim for damages in respect to periods prior to the date of the judgment by persons who had not brought legal proceedings prior to that date? The Court's answer was that there is no reason for temporal limitation of the *Richardson* judgment even if it causes financial consequences for the Member State³⁷.

Equal treatment under Article 4

Article 4 of Directive 79/7 precludes direct or indirect discrimination on grounds of sex by reference to marital status and concerns the scope and conditions of access to the schemes as well as contributions, calculation and increases in respect to spouse and dependants. However, Directive 79/7 does not provide for definitions of direct and indirect discrimination and will not be covered by Recast Directive 2006/54³⁸.

First of all the Court recognized that Article 4(1) is sufficiently precise to be relied on directly³⁹. Secondly it is true that although Article 4 prohibits discrimination, nevertheless persons and issues which qualify under Articles 2 and 3 may be subject to justified indirect discrimination. So it is allowed to pay increased unemployment benefit for those who have dependants⁴⁰ as well as to grant supplement to old-age pension to a

also joined cases C-87/90, C-88/90 and C-89/90, *A. Verholen and others v Sociale Verzekeringsbank Amsterdam.*, European Court Reports 1991 Page I-03757.

³⁴ Case C-343/92, *M.A. De Weerd, nee Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, European Court Reports 1994 Page I-00571.

³⁵ Case 80/87, *A. Dik, A. Menkutos-Demirci and H. G. W. Laar-Vreeman v College van Burgemeester en Wethouders Arnhem and Winterswijk.*, European Court Reports 1988 Page 01601.

³⁶ Case C-377/89, *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General*, European Court Reports 1991 Page I-01155.

³⁷ Case C-137/94, *The Queen v Secretary of state for Social Security, ex parte Cyril Richardson*, European Court Reports 1995 Page I-03407.

³⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal L 204/23, 26.7.2006.

³⁹ Case 7185, *State of the Netherlands v Federatie Nederlands Vakbeweging*, European Court Reports 1986 Page 0385, paragraph 18.

⁴⁰ Cases 30/85, *J. W. Teuling v Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*, European Court Reports 1987 Page 02497 and C-229/89, *Commission of the European Communities v Kingdom of Belgium*, European Court Reports 1991 Page I-02205.

pensioner whose spouse has not yet reached pensionable age and is exclusively dependent on that pensioner⁴¹, although for those rights far more men qualify than women, nevertheless such indirect discrimination is justified since it ensures minimum subsistence income. The same is true about the rule which - in order to qualify for incapacity for work benefit – requires a person to have had a certain income from work in the year preceding incapacity, since it corresponds to a legitimate aim of social policy. In other words, indirect discrimination may be justified by showing that the provision in question corresponds to the principle of proportionality⁴². Besides, the Member States have to adopt new rules which have the effect of reducing the number of persons eligible for a social security benefit⁴³.

However, important here is the finding of the Court that social policy is a matter for the Member State, which thus enjoys a wide margin of discretion as regards the nature of protective measures and the detailed arrangements for their implementation⁴⁴. It may concern the financial equilibrium of social security systems⁴⁵. On the other hand:

...although budgetary consideration may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes⁴⁶.

In *Nolte* and *Megner* the Court held that in the name of social policy of the Member State it is allowed to exclude from sickness and old-age schemes workers employed for less than 15 hours a week and regularly attracting remuneration of up to one-seventh of the monthly average salary even if such rule is indirectly discriminatory against women⁴⁷. Here the Court accepted indirect discrimination “with little or

⁴¹ Case C-226/91, *Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank*, European Court Reports 1992 Page I-05943.

⁴² Case C-229/89, *Commission of the European Communities v Kingdom of Belgium*, European Court Reports 1991 Page I-02205, paragraph 19.

⁴³ Case C-280/94, *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*., European Court Reports 1996 Page I-00179.

⁴⁴ Case C-229/89, *Commission of the European Communities v Kingdom of Belgium*, European Court Reports 1991 Page I-02205, paragraphs 22 and 23.

⁴⁵ Case C-172/02, *Robert Bourgard v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*. European Court Reports 2004 Page I-05823, paragraph 43.

⁴⁶ Case C-343/92, *M.A. De Weerd, nee Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, European Court Reports 1994 Page I-00571.

⁴⁷ Cases C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, European Court Reports 1995 Page I-04625 and C-444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz now Innungskrankenkasse Rheinhessen-Pfalz*, European Court Reports 1995 Page I-04741.

no investigation of the justification offered⁴⁸ by the Member State. It is argued that in matters of discrimination in the field of social security the ECJ applies a looser proportionality test⁴⁹.

As regards Article 4(2), which provides that the provisions of Directive 79/7 shall be without prejudice to the provisions relating to the protection of women on grounds of maternity, there is no case-law of the ECJ so far. However, parallels could be drawn with interpretation of Article 2(3) of Directive 76/207, which will be discussed in more detail in the following chapter.

Social security in Latvia

Social security system

The social security system is based on various social rights starting from rights for measures for promotion of education and employment and ending with the right to healthcare⁵⁰. Those rights are provided by the Law on social security. Article 2 of Law on social security declares that it is based on such basic principles as equal treatment, solidarity, social insurance and assistance, prophylaxis, autonomy and individual approach. Besides, Article 2.¹ provides for prohibition of differential treatment in the state social security system on grounds of sex, race, colour of skin, age, disability, state of health, religious, political or other belief, ethnic or social origin, financial or family status or other circumstance. It prohibits direct and indirect discrimination and gives definitions of both. Article 2.¹ allows for differential treatment only if differential treatment has a legitimate aim and measures for attainment of that aim are proportionate. The present thesis will discuss only several components of the Latvian social security system – those which concern the subject discussed here. In particular, the state social insurance system, social allowances for families with children and social assistance for persons of low income as far as it affects unemployed persons during the maternity and child-care period.

State social insurance system

Almost the whole social insurance system is built on the state social insurance system. As described in the section on equal pay, private pension funds occupy a very small part of the Latvian social insurance system.

⁴⁸ Evelyn Ellis, Recent Developments in European Community Sex Equality Law, *Common Market Law Review*, 35, 1998, pages 379-408, at page 397.

⁴⁹ See in this regard the section on Indirect discrimination.

⁵⁰ Par sociālo drošību: LR likums. Latvijas Vēstnesis, 1995. 21.septembris, nr.144 (Law on social security), Chapter II.

The Latvian state social insurance system provides for insurance against the following risks:

- 1) old-age pensions;
- 2) unemployment;
- 3) accidents at work and occupational diseases;
- 4) disability;
- 5) maternity and sickness⁵¹.

The state social insurance system is built on four special social insurance budgets. Those are:

- 1) state pension;
- 2) employment;
- 3) accident at work;
- 4) disability, maternity and sickness budgets.⁵²

State social insurance subjects

Employees in general are subject to mandatory insurance against all risks listed above⁵³. Self-employed persons are subject to mandatory insurance against risks of old-age, disability, maternity and sickness⁵⁴ only if their income attains a certain level⁵⁵.

Several more categories of persons are subject to mandatory state social insurance. For example, persons on mandatory military service, spouses of diplomats, unemployed disabled persons, and others are insured against the risk of old age. For the purposes of this thesis, it is important to point out that subject to insurance against risks of old age and unemployment are persons on child-care until the child reaches 1.5 years and persons on maternity and sick leave. Those special groups of persons are socially insured by the state or in other words their social insurance rate is paid by the state from the state budget or one of the four special state social insurance budgets⁵⁶.

⁵¹ Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance) Article 4.

⁵² Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance) Article 7.

⁵³ Exception, Article 6(2) of the Law on state social insurance provides that employees who are at pensionable age are not subject to insurance against risk of disability, professional diseases and unemployment, employees who receive long-term service pension or are disabled persons of III group are not subject to insurance against unemployment and occupational diseases.

⁵⁴ Exception, Article 6(3) Law on state social insurance provides that self-employed persons who are at pensionable age are not subject to insurance against risk of disability.

⁵⁵ Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo un maksimālo apmēru: MK noteikumi Nr.193. Latvijas Vēstnesis, 2000. 6. jūnijs, nr.213/218 (Regulations on maximum and minimum amount of state social insurance object). The minimum amount for self-employed persons is 1320 lats per year.

⁵⁶ Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem: MK noteikumi Nr.230. Latvijas Vēstnesis, 2001. 13.jūnijs, nr.91 (Regulations on state state social insurance payments from state budget and state social insurance special budgets)

Persons who are not subject to mandatory state social insurance can join the state social insurance scheme voluntarily. Persons who do not receive old-age pension can insure themselves against the risk of old-age, but spouses of self-employed persons who are not at pensionable age can voluntarily insure against risks of old-age, disability, maternity and sickness⁵⁷.

Rates of state social insurance

Employees are subject to state social insurance in an amount of 33.09%⁵⁸ of their income, which is only partially paid by employees themselves. Employees from their gross salary pay for social insurance only 9%, while the employer must bear the remaining 24.09%. This means that the employer pays to employee not only gross salary (so called salary on paper) but also an extra 24.09% social insurance payments from the gross salary of the employee.

Self-employed persons who have an income of at least 1320 a year must pay state social insurance⁵⁹. A self-employed person who exceeds the minimum income is free to choose whether to pay state social insurance at the minimum level or more. The amount of minimum insurance is 30.2%⁶⁰ from minimum income.

Spouses of self-employed persons who are not at pensionable age and who have joined the state social insurance system voluntarily must pay 30.98% from a voluntarily defined amount of money⁶¹. Other persons who are not subject to mandatory state social insurance and who are not spouses of self-employed persons must pay 24.79 % for insurance for old-age pension from a freely defined sum of money.

The state pays state social insurance payments from the state budget for persons on child-care leave for insurance for old-age pension

⁵⁷ Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance) Article 5(3)

⁵⁸ Noteikumi par valsts sociālās apdrošināšanas iemaksu likmes sadalījumu pa valsts sociālās apdrošināšanas veidiem 2006.gadā: MK noteikumi Nr.968. Latvijas Vēstnesis, 2005. 23. decembris, nr.206 (Regulations on division of state social insurance rate among modes of state social insurance for year 2006). According to the Regulations, employee payments must be distributed among special social insurance budgets in the following way: 24.79% old-age pension, 1.86% unemployment, 0.25% accidents at work and occupational diseases, 3.03% disability, 3.16% maternity and sickness.

⁵⁹ Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo un maksimālo apmēru: MK noteikumi Nr.193. Latvijas Vēstnesis, 2000. 6.jūnijs, nr.213/218 (Regulations on maximum and minimum amount of state social insurance object).

⁶⁰ Noteikumi par valsts sociālās apdrošināšanas iemaksu likmes sadalījumu pa valsts sociālās apdrošināšanas veidiem 2006.gadā: MK noteikumi Nr.968. Latvijas Vēstnesis, 2005. 23.decembris, nr.206 (Regulations on division of state social insurance rate among modes of state social insurance for year 2006). According to the Regulations payments by the self-employed must be distributed among special social insurance budgets in the following way: 24.79% old-age pension, 3.03% disability, 2.38% maternity and sickness.

⁶¹ *Ibid.*, according to the Regulations as to spouses of self-employed persons, their payments must be distributed among special social insurance budgets in the following way: 24.79% old-age pension, 3.03% disability, 3.16% maternity and sickness.

in an amount of 20% and against risk of unemployment in an amount defined by the Cabinet of Ministers (at the moment 1.86%) from a constant sum of money: 50 lats⁶².

For persons on maternity leave, payments for insurance for old-age pension and against unemployment are made from a special disability, maternity and sickness social insurance budget. The amount of payments for insurance for old-age pension constitutes 20% from the amount of maternity allowance, but against risk of unemployment 1.86% of maternity allowance⁶³.

The Cabinet of Ministers each year defines division of insurance payments among special social insurance budgets.

Calculation of allowances

Unemployment allowance

The right to unemployment allowance is enjoyed by a person who has been socially insured for nine months during one year before obtaining unemployed status and who has at least one year overall length of service or who has been working for at least nine months during the previous 12 months⁶⁴.

The amount of unemployment allowance depends on salary during the period taken into account for calculating that allowance and overall length of service. This means that those persons who worked altogether from one to nine years have the right to unemployment allowance in an amount of 50% of their salary earned during the period taken into account for calculating that allowance, ten to nineteen years – 55%, twenty to twenty-nine years – 60% and more than thirty years of service – 65% of salary is paid during the calculation period⁶⁵.

The calculation period is six months before two months before the month when the status of unemployed person is obtained. For the purposes of calculating unemployment allowance, daily income must be summed up and divided by the number of days when the person has been subject to insurance against the risk of unemployment. This means that for the purposes of calculating unemployment benefit, days during which a person has not been employed at all are not taken into account. The result obtained will form daily unemployment benefit. Notably, during sickness and maternity leave as well as during child-care leave persons

⁶² Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem: MK noteikumi Nr.230. Latvijas Vēstnesis, 2001. 13. jūnijs, nr.91 (Regulations on state state social insurance payments from state budget and state social insurance special budgets), points 3 and 4.

⁶³ *Ibid.*, points 14 and 15.

⁶⁴ Par apdrošināšanu bezdarba gadījumam: LR likums. Latvijas Vēstnesis, 1999. 15. decembris, nr.416/419 (Law on unemployment social insurance), Article 5.

⁶⁵ *Ibid.*, Article 7.

are subject to insurance against risks of unemployment, thus if those periods coincide with the period taken into account for the purposes of calculating unemployment benefit then they are taken into account.

Sickness allowance

Sickness allowance for the first 13 days is paid by the employer. The first day of sickness is unpaid, the second and third day must be paid in an amount of at least 75% of average gross salary, but from the fourth to fourteenth days sickness allowance must be in an amount of at least 80% of average salary⁶⁶.

Starting from the fifteenth day of sickness, allowance is paid by the state social insurance system in an amount of 80% of salary earned during the period taken into account for the purposes of calculating that allowance. Sickness allowance is provided by the state social insurance scheme no longer than 52 weeks if sickness is uninterrupted or 78 weeks within a period of three years⁶⁷.

For the purposes of calculating sickness allowance for employees, income within a period of six months before two months before the month when sickness occurred must be taken into account. Income during this period must be divided by calendar days during this period not taking into account days spent on sick, maternity or child-care leave⁶⁸. The result must be multiplied by 0.8 and the result will form daily sickness benefit. If the employee has not worked during the calculation period, sickness allowance must be calculated in an amount of 40% of average salary in the state. If the employee has not worked during the calculation period because of sickness, maternity or child-care leave, then for the purposes of calculating sickness allowance, the period before the calculation period could take into account up to 32 months before.⁶⁹

For the purposes of calculating sickness allowance for a self-employed person, the sum from which social insurance payments have been made within a period of twelve months before three months before the quarter when sickness occurred must be taken into account. Sums for which social insurance payments have been made during the calculation period must be divided by calendar days not taking into account days spent on sickness, maternity or child-care leave. The result forms daily

⁶⁶ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance), Article 36.

⁶⁷ *Ibid*, Articles 13 and 17.

⁶⁸ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances).

⁶⁹ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23. novembris, nr.182 (Law on maternity and sickness insurance), Article 31.

sickness allowance⁷⁰. If the employee has not worked during the calculation period, sickness allowance must be calculated in an amount of 40% of average salary in the state. If a self-employed person has not worked during the calculation period because of sickness, maternity or child-care leave, then for the purposes of calculating sickness allowance the period up to 39 months before the insured event occurred should be taken into account⁷¹.

Maternity allowance

Under the state social insurance scheme each employed or self-employed woman has the right to 112 days paid maternity leave. If a woman has registered with a doctor by the twelfth week of pregnancy for ante-natal examinations, then she has the right to an extra 14 days of paid maternity leave. An extra 14 days of paid maternity leave applies in case of complications arising from giving birth⁷².

Maternity allowance is in an amount of 100% of the sum from which social insurance payments are paid. This means that maternity allowance for employees constitutes 100% of gross salary received during the period taken into account for the purposes of calculating maternity allowance. Although self-employed persons have the right to choose the amount from which they make payments for social insurance, however maternity allowance for the self-employed cannot be less than the minimum income level which is subject to mandatory state social insurance described above.

Calculation of maternity allowance is subject to the same condition as sickness allowance.

Paternity allowance

Men have rights to ten calendar days paid paternity leave on account of child birth. Paternity allowance constitutes 80% of average salary of the period taken into account for the purposes of calculating paternity allowance⁷³. Calculation of paternity allowance is subject to the same rules as sickness and maternity allowance⁷⁴.

⁷⁰ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances)

⁷¹ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23. novembris, nr.182 (Law on maternity and sickness insurance), Articles 31 and 32.

⁷² *Ibid*, Article 5.

⁷³ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23. novembris, nr.182 (Law on maternity and sickness insurance), Section II A.

⁷⁴ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances).

Accidents at work and occupational disease allowance

In case of accident at work, where an employee has suffered it is for the employer to provide allowance for the first 14 days in an amount of 80% of average wage during the period taken into account for the purposes of calculating accidents at work and occupational disease allowance⁷⁵.

After that period, the Law on mandatory insurance against accidents at work and occupational diseases provides for several kinds of allowances and remuneration – sickness allowance due to accident at work or occupational disease, remuneration for loss of work capacity and lump-sum allowance⁷⁶. The period taken into account for the purposes of calculating average insurance salary is six months before two months before the month when the occasion of insurance occurred⁷⁷. If a person during the calculation period had not been subject to insurance against risk of accident at work or occupational disease, then for the purposes of calculating average insurance salary it must be presumed that the person's average insurance salary had been 40% of the officially declared average wage in Latvia. Average insurance salary is basic value which is then taken into account for calculating sickness allowance due to accident at work or occupational disease, remuneration for loss of work capacity and lump-sum allowance⁷⁸.

Sickness allowance due to accident at work or occupational disease starting from the fifteenth day of sickness is provided by the state social insurance scheme in an amount of 80% of average social insurance salary. It could last for 52 weeks; however, after 16 weeks of sickness a commission of doctors decides whether the person is subject to an award of allowance for loss of work capacity. If the commission finds loss of work capacity of more than 10% then the person has the right to monthly loss of work capacity allowance. If loss of work capacity varies between 10 and 24%, then the responsible institution could decide instead of monthly loss of work capacity allowance to pay a lump-sum allowance

⁷⁵ Par obligāto sociālo apdrošināšanu pret nelaimes gadījumiem darbā un arodslimībām: LR likums. Latvijas Vēstnesis, 1995. 17. novembris, nr.179 (Law on mandatory social insurance against accidents at work and occupational diseases), Article 12.

⁷⁶ Article 14 of the Law on mandatory insurance against accidents at work and occupational diseases provides for several more ways of compensation such as death grant, remuneration for death of bread winner, compensation for medical treatment and rehabilitation etc.

⁷⁷ Par obligāto sociālo apdrošināšanu pret nelaimes gadījumiem darbā un arodslimībām: LR likums. Latvijas Vēstnesis, 1995. 17. novembris, nr.179 (Law on mandatory social insurance against accidents at work and occupational diseases), Article 7(1)(5). Obligātās sociālās apdrošināšanas pret nelaimes gadījumiem darbā un arodslimībām apdrošināšanas atlīdzības piešķiršanas un aprēķināšanas kārtība: MK noteikumi Nr.50. Latvijas Vēstnesis, 1999. 19. februāris, nr.48/49 (On calculation and award of mandatory social insurance remuneration due to accident at work and occupational disease).

⁷⁸ Obligātās sociālās apdrošināšanas pret nelaimes gadījumiem darbā un arodslimībām apdrošināšanas atlīdzības piešķiršanas un aprēķināšanas kārtība: MK noteikumi Nr.50. Latvijas Vēstnesis, 1999. 19. februāris, nr.48/49 (On calculation and award of mandatory social insurance remuneration due to accident at work and occupational disease).

for loss of work capacity in an amount from 3 to 18 average social insurance salaries.

Pensions

The Law on state pensions provide for old-age pensions, disability pensions and pension in case of death of the bread-winner.

Old-age pension

The right to obtain old-age pension accrues to each person who is at least 62 years old and has worked for at least 10 years⁷⁹. At the moment pensionable age between men and women is not equal; according to point 8 of the transitional provisions of the Law on state pensions until year 2008 pensionable age must be equalized by raising women's pensionable age each year for half a year. The amount of pension is dependent upon the insurance sum collected through payments for old-age pension insurance. Pension is calculated in accordance with a special formula provided by Article 12 of the Law on state pensions.

Disability pension

The right to disability pension accrues to a person who has been socially insured at least three years⁸⁰. For the purposes of calculating disability pension the first average social insurance salary is calculated. For those purposes any period of 36 months is taken into during the last five years. Usually for calculating average social insurance salary that 36 month period is taken into account where the person has had higher income and had worked without interruption. If however during the last five years there is no period of uninterrupted work for 36 month, any period of 36 months is taken into account not including those days during which the person had not worked⁸¹. If the person has not been subject to insurance against risk of disability during the last five years then the person has the right to disability pension in an amount of the minimum social security allowance⁸².

Pension in case of death of bread-winner

⁷⁹Par valsts pensijām: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on state pensionēs), Article 11

⁸⁰ *Ibid.*, Article 14.

⁸¹ *Ibid.*, Article 16. Telephone interview with State Social Insurance Agency experts on free of charge consultation line 8001015 on 11th of July 2006.

⁸² Noteikumi par valsts sociālā nodrošinājuma pabalsta un apbedīšanas pabalsta apmēru, tā pārskatīšanas kārtību un pabalstu piešķiršanas un izmaksas kārtību: MK noteikumi Nr.561, Latvijas Vēstnesis, 2005. 29.jūlijs, nr.119 (Regulations on amount of state social security allowance and death grant, and procedure for their award, reassessment and payout). According to the Regulation the minimum social security allowance constitutes 45 lats.

Right to bread-winner pension accrues to family members who were dependent on a dead person. Children of a dead person must be considered as dependants irrespective of whether they have been under actual maintenance of the dead person. Bread-winner pension is calculated on the basis of old-age pension. One child has the right to 50% of possible old-age pension, two children up to 75% of possible old-age pension, but three and more children to 90% of possible old age pension.

Social allowances for families with children

Social allowances are provided by Law on state social allowances⁸³. Their purpose is to support particular categories of persons in situations when they cannot provide themselves with financial means or they are in situations where extra expenses are necessary and the state social insurance system does not cover those situations⁸⁴. For families with children, several kinds of allowances are provided – family, adopted child care, child-care, disabled child-care and childbirth allowance. In this thesis, the provisions of child-birth and child-care will be discussed since they are directly connected with the period analysed in this work and concern the issue of sex-equality. Provisions on child-birth allowance will be discussed in the chapter on rights during maternity leave and after it, but the provisions on child-care leave will be discussed in the chapter on rights during child-care leave and after it.

Social assistance

Measures of social assistance are provided by the Law on Social services and social assistance⁸⁵. Measures of social assistance will be discussed in this thesis only as far as they concern protection of unemployed persons during the maternity and child-care period as far as their income falls below the minimum. In particular, the Law on social services and social assistance guarantees to each person an income not lower than the guaranteed minimum income declared by the state⁸⁶. At the moment in

⁸³ Valsts sociālo pabalstu likums: LR likums. Latvijas Vēstnesis, 2002. 19. novembris, nr.168 (Law on state social allowances).

⁸⁴ *Ibid.*, Article 2.

⁸⁵ Sociālo pakalpojumu un sociālās palīdzības likums: LR likums. Latvijas Vēstnesis, 2002. 19. novembris, nr.168 (Law on social services and assistance).

⁸⁶ Sociālo pakalpojumu un sociālās palīdzības likums: LR likums. Latvijas Vēstnesis, 2002. 19. novembris, nr.168 (Law on social services and assistance), Article 36.

Latvia the guaranteed minimum income constitutes 24 lats a month⁸⁷, but for certain groups of persons in Riga it is 45 lats a month⁸⁸.

General assessment of Latvian social security system

Looking at the Latvian state social security and insurance system from the perspective of gender equality, no explicitly discriminatory norms are there found. However, social insurance legislation bears a considerable risk of being directly discriminatory as regards social insurance rights obtained/lost during the period of maternity leave and negative impact on social insurance protection after maternity leave. This issue will be discussed in the chapter on rights during maternity leave and after it.

As regards social allowances for families with children and social assistance, legislation provides equal rights for both sexes, but only formally. They are frequently subject to less favourable treatment indirectly. That issue will be analysed in the chapters on rights during maternity leave and after it and on rights during child-care leave and after it.

⁸⁷ Grozījums Ministru kabineta 2003.gada 9.decembra noteikumos Nr.693 “Noteikumi par garantēto minimālo ienākumu līmeni un pabalsta apmēru garantētā minimālā ienākuma līmeņa nodrošināšanai”: MK noteikumi Nr.881. Latvijas Vēstnesis 2005. 25. novembris, nr.189 (Amendments to regulations of Cabinet of Ministers adopted on 9th of December 2003 “Regulations on guaranteed minimum income level and amount of allowance for provision of guaranteed minimum income level”).

⁸⁸ Par paaugstināto garantēto minimālo ienākumu līmeni Rīgā: Rīgas domes saistošie noteikumi Nr.84. Latvijas Vēstnesis 2005. 24.februāris, nr.32 (On increased guaranteed minimal income level in Riga).

Chapter 7.

Self-employed persons and equality

EC law

Concept of self-employed

EU law does not give precise definition on who should be regarded as a self-employed person, but the national laws of the Member States differ in this respect. It is clear, however, that regarding application of EC law documents regarding self-employed persons, the national definition is not applicable otherwise it could endanger uniform application of EC law. The only thing which the case-law of the ECJ indicates as regards characteristics of self-employed status is that a self-employed person does not perform duties under subordination of the person who receives services¹.

Another problem is that frequently nowadays it is difficult to distinguish between employed and self-employed persons². As the Court held in *Raulin* that the essential characteristic of an employment relationship is that for a certain period a person performs services for and under direction of another person in return for which he receives remuneration³.

In *Allonby* the Court held that formal classification of a self-employed person under national law does not exclude the possibility that a person may be qualified as a worker within the meaning of Article 141⁴. In order to assess the nature of a person's status, it is necessary to consider "the extent of any limitation of their freedom to choose their timetable, and the place and content of their work" and "the fact that no obligation is imposed on them to accept an assignment is of no consequence in that context"⁵. As Nielsen points out:

It is thus up to neither the parties to the contract, nor the national legal system to decide the status of a person performing a service as either a worker or an independent contractor.⁶

¹ Case C-256/01. *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873. Paragraph 68.

² Ruth Nielsen, *European Labour Law*, DJOF Publishing, 2000, at page 145.

³ Case C357/89. *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen*. European Court Reports 1992 Page I-01027. Paragraph 10.

⁴ Case C-256/01. *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, European Court Reports 2004 Page I-00873. Paragraph 71.

⁵ *Ibid.*, para. 72.

⁶ Ruth Nielsen, *Gender Equality in European Contract Law*, 2004, Copenhagen, DJOF Publishing, at page 35.

It follows that a self-employed person is a person who provides services without a timetable in the meaning of working time, not in subordination of the person who receives the service, but regarding place and content of the work – a self-employed person is responsible for achieving an agreed result only. However, writers stress that there is no need for a sharp distinction between employment contracts and other contracts, since EU discrimination law applies to “matters of employment and occupation”⁷.

Scope of Directive 86/613

The title of Directive 86/613⁸ “on 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” is very promising. Indeed Article 4 provides:

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

From this provision it follows that a pregnant self-employed person has the right not to be discriminated against on grounds of her pregnancy. In addition to situations expressly described in Article 4, the reference made to Directive 76/207 allows the author to conclude that the prohibition to discriminate against a pregnant self-employed person also regards the right to engage for performance of service offered by that person without any discrimination on the part of the service consumer. Besides, the wording of Article 4 provides that discrimination is prohibited “in respect to establishment” from which it follows that self-employed persons may not be discriminated against on grounds of sex on the part of persons providing means directly connected with the possibility to become able to provide a service within the capacity of self-employed which includes such things as rent of premises, supply of office and other equipment.

⁷ Ruth Nielsen, *European Labour Law*, DJOF Publishing, 2000, at page 148. As regards EC sex equality law Directive 76/207 refers to “occupation”, Article 141 of EC Treaty, Directive 79/7 is applicable to the self-employed.

⁸ Council 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 motherhood, OJ L 359, 19.12.1986 P.0056-0058.

However, such an interpretation would lead to such a broad interpretation of Directive 86/613 as would require limitation of freedom of contract law. Recently, Directive 2004/113⁹ on equal treatment between men and women regarding access to and supply of goods and services was adopted. This explicitly prohibits the discrimination described above and stemming from Directive 86/613. Directive 2004/113 clearly provides for limitation of freedom of contract¹⁰ which is quite a dramatic change required to national civil law systems. Lack of case-law on Directive 86/613 does not allow any assessment on how broadly the Member States have interpreted Directive 86/613. However, the implication of Nielsen that implementation of Directive 2004/113 “can be seen as reinforcement and further development of the already existing directive”¹¹ testifies that the exact scope of Article 4 of Directive 86/613 has been far from clear for the Member States.

The only case referred by the ECJ on interpretation of Directive 86/613 is *Jurgensen*.¹² Mrs Jurgensen was a self-practising doctor, who under a reorganisation scheme of medical practices was required to increase annual turn-over in order to remain as a full-time practice. She claimed indirect discrimination against female doctors since they had spent more time for family responsibilities and thus the turnover of their practices is not high enough. From statistical data presented by the parties it did not clearly follow that indirect discrimination had taken place. However more important than the facts, claim and outcome of this case is the interpretation of Directive 86/613 given by the ECJ. This clearly states that rights provided by Article 4 of Directive 86/613 must be interpreted in combination with Directive 76/207¹³. Further the Court affirmed that the principles applicable for identifying facts of discrimination are the same as regards equal pay and equal treatment matters¹⁴. Besides, the principle of reversed burden of proof is applicable to Directive 86/613 as far as self-employed persons are protected under Directive 76/207 via Article 4 of Directive 86/613¹⁵. Although Directive 86/613 in Article 3 prohibits both direct and indirect discrimination, there is no definition provided on both concepts. However, since application of

⁹ Council Directive 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the Access to and supply of goods and services.

¹⁰ Article 3(2) of Directive 2004/113.

¹¹ Ruth Nielsen, *Gender Equality in European Contract Law*, 2004, Copenhagen, DJOF Publishing, at page 36.

¹² Case C-226/98. *Birgitte Jurgensen v Foreningen af Specialleger and Sygesikringens Forhandlingsudvalg*. European Court Reports 2000 Page I-02447.

¹³ *Ibid*, para 26.

¹⁴ *Ibid.*, paras. 27 to 30.

¹⁵ *Ibid*, para. 31.

Directive 86/613 goes hand in hand with Directives 76/207¹⁶ and Directive 2004/113, which provides a definition for direct and indirect discrimination, there is no serious doubt that indirect discrimination precluded by Directive 86/613 may be applied wrongly.

Equality in social security matters

According to Article 2 of Directive 79/7, that directive is applicable to self-employed persons, too. This means that the state is under obligation to treat self-employed persons irrespective of sex. So far the ECJ has delivered only one case on application of Directive 79/7 to self-employed persons. This was *Bourgard*¹⁷ concerning the right of a self-employed man only to obtain early retirement pension on a reduced amount. This judgment shows that Directive 79/7 requires equal treatment between self-employed men and women, but does not require equal treatment in social security matters between workers and self-employed persons.

Latvian law

Concept of self-employed under Latvian law

According to the Law on individual (family) enterprises, agricultural and fishing farms and individual work¹⁸, individual work is entrepreneurship where a natural person who has obtained and/or registered in accordance with normative provisions undertakes individual work without employing other persons. This law defines the concept of individual worker from the aspect of relations between an individual who undertakes individual work and the state, which requires proper registration and if legal norms so require – obtaining of licence, while the provisions of the Civil Law on Contracts for work-performance regulate the relationship between the self-employed and the customer¹⁹. A contract for work-performance has several characteristic features which distinguish it from an employment contract. A contract for work-performance provides for performance of work where a particular result must be achieved and work must be carried out by the tools of the self-employed and under a free working regime, while an employment contract provides for performance of work in

¹⁶ The concept of direct and indirect discrimination is also explicitly provided by Recast Directive 2006/54 which will replace Directive 76/207.

¹⁷ Case C-172/02. *Robert Bourgard v Institut national d'assurances sociales pour travailleurs indépendants (Inasti)*. European Court Reports 2004 Page I-05823.

¹⁸ Par individuālo (ģimenes) uzņēmumu, zemnieka vai zvejnieka saimniecību un individuālo darbu: LR likums. Augstākās Padomes MP, 1992. 31.janvāris, nr.4

¹⁹ A contract for work-performance regulates not only relationships between self-employed and customers, but also relations between either work-performer (also enterprise, undertaking) and customer.

general without the aim of achieving a particular result; besides, working tools and working time must be provided by the employer²⁰.

Nielsen indicates that since the concept of worker under Community law is very broad, most probably many service contracts concluded by small business are governed by EU gender equality rules²¹. This is the exact problem of the Latvian employment market. Since in Latvia the employer must bear the costs of social insurance and entrepreneurship risk duty²² of the employee, in order to avoid this obligation the employer instead of employment contracts concludes contracts for work-performance or service contract. Contracts for work-performance allow the employer to avoid not only social insurance and duty, but also observance of other employment rights, such as complicated dismissal, prescribed by Labour law. As a result, the status of self-employed person is obtained by persons who are quite far from being able to undertake their own business.

In Latvia self-employed persons are frequently poor persons. Consequently, they are almost socially unprotected because their income does not allow for any savings. The Supreme Court of Latvia has delivered two decisions on cases described above. In particular, the plaintiffs were passenger bus drivers employed by a municipal undertaking providing passenger traffic in one of the regions of Latvia. They were employed under employment contracts by the same company from 1968, but in 1999 bus drivers were required to conclude service contracts and become “self-employed”. The Supreme Court distinguished

²⁰ Civillikums: LR likums. Latvijas Vēstnesis, 1994, 30.jūnijs, Nr.75 (Civil Law). Article 2212(1) provides:

“Pursuant to a contract for work-performance, one party undertakes, using the party’s tools and equipment and for a fixed fee, to perform for another party and order, the production of some product or the conducting to its completion of some activity”.

Article 28(2) of the Latvian Labour Law provides:

(2) With an employment contract the employee undertakes to perform specific work, subject to specified working procedures and orders of the employer, while the employer undertakes to pay the agreed work remuneration and to ensure fair and safe working conditions that are not harmful to health.

See unofficial English version of Latvian Civil Law and Labour Law at <http://www.ttc.lv/?id=59>

The distinction between a contract of work-performance and an employment contract is also drawn in several decisions of the Supreme Court of Latvia, in particular, LR Augstākās tiesas Senāta 09.03.2005 spriedums lietā Nr.SKC-176, <http://www.at.gov.lv/fails.php?id=314>, LR Austākās tiesas Senāta spriedums lietā Nr.SKC-60

<http://www.at.gov.lv/fails.php?id=481>

²¹ Ruth Nielsen, Gender Equality in European Contract Law, 2004, Copenhagen, DJOF Publishing, at page 36.

²² Every entrepreneur must pay insurance to a risk fund which provides arrears of pay in case of insolvency of another entrepreneur. Likums “Par darbinieku aizsardzību darba devēja maksātnespējas gadījumā”//Latvijas Vēstnesis, 188, 28.12.2001.Law on protection of employees in case of insolvency of employer. Ministru kabineta 2005.gada 8.novembra noteikumi Nr.850 “Noteikumi par uzņēmējdarbības riska valsts nodevas apmēru un darbinieku prasījumu garantijas fondā ieskaitāmās nodevas daļu 2006.gadā”//Latvijas Vēstnesis 181, 11.11.2005. Regulations of Cabinet of Ministers No.850 of 8th of November 2005 “Regulations on amount of entrepreneurship duty and amount of duty which should be transferred to employees request guarantee fund in year 2006”

the employment relationship from services provided by self-employed persons by stressing that in the cases in question the bus drivers were subject to organization of working time and provided work by tools (buses) belonging to the employer, thus those features testify to employment, not of service provision by the bus drivers²³.

It follows that the concept of self-employed person under Latvian law is to great extent similar to that under EC law.

Non-discrimination as regards service provision

Although Latvian legislation originally does not contain discriminatory provisions as regards self-employed persons and their activities, nevertheless so far there are no provisions protecting self-employed persons from discrimination based on sex when acting in the capacity of self-employed persons from other persons, such as, for example, persons awarding a service contract or persons providing other services access to which is necessary to normally run a self-employed business (e.g., discrimination as regards renting business premises). Failure to provide self-employed persons with a full set of protection against discrimination based on sex is failure to give full effect to Directive 86/613. The term for implementation was 1 May 2004.

A project of amendments to the Civil law which is currently in Parliament accepted for reading by the Legal Commission²⁴ will hopefully correct this situation. It states:

In making a public offer of a good or service or concluding contract which relates to such offer, differential treatment on grounds of sex, age, race, colour of skin, ethnic origin, religious, political opinion or belief and other circumstances is prohibited.

Differential treatment comprises direct and indirect discrimination, harassment or instruction to discriminate. Differential treatment may be justified in case it has legitimate aim and measures chosen for attainment of that aim are proportionate.

It is prohibited to treat directly or indirectly adversely persons who enact defence of their rights concerning prohibition of differential treatment.

²³Decisions of Supreme Court of Latvia, in particular, LR Augstākās tiesas Senāta 09.03.2005 spriedums lietā Nr.SKC-176, <http://www.at.gov.lv/fails.php?id=314>, LR Austākās tiesas Senāta spriedums lietā Nr.SKC-60 <http://www.at.gov.lv/fails.php?id=481>

²⁴ This is the second proposal by the Secretariat of Integration for respective amendments to the Civil law, which was initially intended to implement Directive 2000/43 only. The Legal Commission has once rejected the same project of amendments to the Civil law of almost identical wording on account that it does not fit in the Civil law. Now the Legal Commission accepted the project of amendments for further law-making process not because the members of that commission understand the sense of non-discrimination provisions but because of infringement procedure initiated by the Commission against Latvia (the author was present at the particular meeting of the Legal Commission of Parliament of Latvia on 22.08.2006.)

In case a person establishes facts from which it may be presumed that there has been direct or indirect discrimination, harassment, instruction to discrimination or adverse treatment, it shall be for the respondent to prove that prohibition of differential treatment or adverse treatment has not been violated.²⁵

However, this project of amendments has several imprecise and weak points. First, information reference refers only to Directives 2000/43 and 2004/113, but the project of amendments also concerns provisions of Directives 2000/78 and 86/613, since both latter directives require to provide non-discrimination for self-employed persons. Second, it fails to mention sexual harassment provided by Directive 2004/113 or considers that the concept of harassment comprises sexual harassment too. This point is important with regard to Directive 86/613, because it refers to Directive 76/207 which now also explicitly precludes sexual harassment. Besides, proper implementation of Directive 2004/113 greatly affects enforcement of Directive 86/613 since as writers point out it “can... be seen as a reinforcement and further development of the already existing” Directive 86/613²⁶. Third, it puts into one pot the concepts of direct and indirect discrimination with harassment and instruction to discriminate, not taking into account that the latter concept itself may be directly or indirectly discriminatory²⁷. Fourth, it does not distinguish between concepts of “differential treatment” and “discrimination”, which although not clearly defined under EC law may not correspond precisely to legal theory under Latvian law²⁸. On the other hand, Latvian Civil law is a special law which was adopted in 1937 and formulated in specific language which does not bear reflection of all directives concerned. In particular, all four directives contain a number of exceptions, which is impossible to provide in one article of the Civil law, thus the authors of the amendments proposed to use the term “differential treatment” which itself comprises exceptions to prohibition of discrimination and allows for justification of differential treatment arising in circumstances allowed for exemption under EC equal treatment directives. Fifth, since the wording of the project of amendments reflects only general principles of EC equal treatment directives, the author of this thesis sees many problems in the future regarding correct interpretation and application of that provision.

²⁵ Available at homepage of the Parliament of Latvia (Saeima) www.saeima.lv in Latvian. Translation into English by author.

²⁶ Ruth Nielsen, *Gender Equality in European Contract Law*, 2004, Copenhagen, DJOF Publishing, at page 36.

²⁷ Article 4(4) of Directive 2004/113 prohibits an instruction to direct or indirect discrimination. The same applies to harassment, which may be direct as well as indirect.

²⁸ See in this regard the section on Equality and non-discrimination and Egils Levits, *Par tiesiskās vienlīdzības principu*//*Latvijas Vēstnesis*, 08.05.2003., Nr.68(2833).

Social security

As described in the section on social security, in Latvia each self-employed person whose income attains a certain level²⁹ is subject to mandatory statutory social insurance against risks of old-age, disability, maternity and sickness³⁰. Provisions on social security, allowances and social insurance are sex neutral; however, this is the reason why directly discriminatory treatment is possible as regards maternity and paternity leave and indirectly discriminatory treatment as regards child-care leave. Those issues will be discussed in detail in the sections on the respective matters.

According to Article 6 of Directive 86/613, spouses of self-employed persons who are not at pensionable age can voluntarily insure against risks of old-age, disability, maternity and sickness³¹. Another problem here is the different conditions regarding employed and self-employed persons for calculating social insurance allowances. The period taken into account for the purposes of calculating allowances for the self-employed is much longer than for employees. It constitutes 12 months before three months before the quarter when the socially insured risk occurred. This means that, for example, it exceeds the 12 month period required for employees under Article 11(4) of Directive 92/85. Unfortunately this provision is not applicable to the self-employed. Persons working in professions which according to Latvian legislation could be performed only in the capacity of self-employed³² are concerned about observance of the general principle of equality, since they are not free to choose employment from and consequently be protected against social risks equally to employed persons.

²⁹ Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo un maksimālo apmēru: MK noteikumi Nr.193. Latvijas Vēstnesis, 2000. 6.jūnijs, nr.213/218 (Regulations on maximum and minimum amount of state social insurance object). The minimum amount for self-employed persons is 1320 lats per year.

³⁰ Exception, Article 6(3) of the Law on state social insurance provides that self-employed persons who are at pensionable age are not subject to insurance against risk of disability.

³¹ Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance), Article 5(3).

³² According to Article 1(3) of the Law on state social insurance those professions are advocates, notaries, sworn auditors, individual practice doctor, pharmacists etc.

Chapter 8.

Enforcement and remedies

EC law

Provision of rights in legislative documents is the smallest and easiest part on the way to justice. The most important part is enforcement of rights and remedies. In this particular field, the case-law of the ECJ plays an extremely important role, which is not surprising, because under EC law in principle each Member State is free to choose measures of implementation and remedies for breach of EC law. This fact once again proves that the seemingly free choice given to the Member States in matters of implementation, enforcement, and remedies is to a large extent restricted by the enforcement mechanisms and principles elaborated by the ECJ.

Direct effect

Direct effect is a concept allowing in certain circumstances to base a claim directly on EC law. The concept of direct effect does not cover regulations which are directly applicable¹. It could cover provisions of the EC Treaty and directives. The concept of “direct applicability” must be distinguished from the concept of “direct effect”². First, direct applicability applies to regulations only, while the concept of direct effect to the EC Treaty and directives. Second, regulations are directly applicable irrespective of any other factor, while the concept of direct effect could be applied to provisions of the EC Treaty and directives only if they correspond to certain criteria.

Treaty provisions

The ECJ first faced the question of whether the EC Treaty could be directly effective in 1963 in the case of *Van Gend*³. The ECJ pointed out that the EC Treaty is more than an agreement which merely creates mutual obligations between contracting states; and that the EC Treaty - independently from national law - imposes on individuals not only obligations but also rights:

...rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly

¹ Article 249 EC Treaty.

² The ECJ gave a different explanation of concept of direct applicability in case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. European Court Reports 1978 Page 0062:

“14. Direct applicability ...means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force”.

³ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, European Court Reports, English special edition 1963 Page 00001.

defined way upon individuals as well as upon the Member States and upon the institutions of the Community...⁴

As a result, the Court held that a Treaty provision can be directly effective if it is “clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any implementing measure”⁵.

In the following case *Defrenne II* the Court found that Article 119 (now Article 141) of the EC Treaty providing for the right to equal pay for equal work irrespective of a worker’s sex is directly applicable; moreover, it held that this provision has both vertical and horizontal direct effect⁶. Interestingly, “in contrast to the Treaty provisions in cases like *Van Gend* and *Costa*⁷, Article 191 (now 141) did not appear as a precise and straightforward negative obligation imposed on the Member States”⁸; nevertheless, the Court recognizes its direct applicability.

The Treaty of Amsterdam amended the EC Treaty with several new provisions regarding non-discrimination and sex equality. In particular, Articles 13, 137, and 141 (2)(3)(4) were amended. Neither Article 13⁹, nor Articles 137 and 141(3), correspond to the criteria for direct effect. However, a question remains about Article 141(2) and (4). The ECJ in *Defrenne II* recognized direct effect for Article 141, which now forms only the first part of the whole Article. Most likely Article 141(2) corresponds to the criteria for direct effect; moreover, it supplements and clarifies the first part of the article. However, Article 141(4) contains an optional right for the Member States, thus clearly can not be relied on directly¹⁰.

Directives

In 1974 in the case of *Van Duyn* the ECJ found:

...It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct,

⁴ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, European Court Reports, English special edition 1963 Page 00001.

⁵ Paul Craig/Grainne De Burca, *EU Law*, (1998), 2nd edition, Oxford University Press, p.168.

⁶ Case 45-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455.

⁷ Case 6/64, *Flaminio Costa v E.N.E.L.*, European Court Reports English special edition 1964 Page 00585.

⁸ Paul Craig/Grainne De Burca, *EU Law*, (1998), 2nd edition, Oxford University Press, p.172.

⁹ Christa Tobler, *Sex Equality Law under the Treaty of Amsterdam*, *European Journal of Law Reform*, vol. 2, No.1, at page 142.

¹⁰ *See also* opinion on this matter Christa Tobler, *Sex Equality Law under the Treaty of Amsterdam*, *European Journal of Law Reform*, vol. 2, No.1, at page 142.

the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law¹¹.

In *Ratti*¹² the Court held that rights provided by a directive can not be relied upon by an individual before the date on which the Member State has an obligation to implement it. Only if the state fails to implement a directive on time, may an individual rely directly on the provisions of a directive. Those provisions must be unconditional and sufficiently precise.¹³

In *Francovich*¹⁴ the Court set more precise conditions for direct effect. It held that to determine whether a provision is unconditional and sufficiently precise:

three points to be considered: the identity of the persons entitled to the guarantee provided, the content of the guarantee and the identity of the person liable to provide that guarantee.¹⁵

Regarding the provisions of Directives on gender equality, the Court had already recognized many of them to be directly effective. Those are Articles 5(1)¹⁶ and 6¹⁷ of Directive 7/207, and Article 4(1)¹⁸ of Directive 7/79.

Although it is stated that Article 6 of Directive 76/207 has direct effect, one could argue that it is not so unambiguous. The Court has had quite a controversial view on this question. In *Colson* the Court, referring to Article 5 of Directive 76/207, held:

As regards sanctions for any discrimination which may occur, the Directive does not include any unconditional and sufficiently precise obligation which, in the absence of implementing measures adopted within the prescribed time-limits, may be relied on by an individual in

¹¹ Case 41/74, *Yvonne van Duyn v Home Office*, European Court Reports 1974 Page 01337, paragraph 12.

¹² Case 148/78, *Pubblico Ministero v Tullio Ratti*, European Court Reports 1979, page 1626.

¹³ Case 8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*, European Court Reports 1982 Page 00053.

¹⁴ C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, paragraph 12, European Court Reports 1991 Page I-05357.

¹⁵ C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, paragraph 12, European Court Reports 1991 Page I-05357.

¹⁶ Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, paragraphs 52 and 56, European Court Reports 1986, page 723.

¹⁷ Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, European Court Reports 1993 Page I-04367.

¹⁸ Case 348/85, *Jean Borrie Clarke v Chief Adjudication Officer*, paragraph 9, European Court Reports 1987 Page 2865.

order to obtain specific compensation under the directive, where that is not provided for or permitted under national law.¹⁹

But in *Marshall*²⁰ the ECJ ruled that “a person who has been injured as a result of discriminatory dismissal may rely on the provisions of Article 6 of the Directive as against an authority of the State...”

It follows that, if one could rely on Article 6 of Directive 76/207 before a national court, this provision has direct effect, albeit it was denied by the ECJ previously and albeit the provision itself lacks criteria for having direct effect. Of the same opinion is Lynn M. Rosebery: “The ECJ has held that Article 6 ETD²¹ is sufficiently precise to have vertical direct effect...”²² She also contends that Article 2 of Directive 75/117 most likely would have direct effect because it has almost the same wording²³.

It has been stressed that - unlike Treaty provisions - a directive can have only vertical direct effect. In *Marshall* the Court ruled:

...the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to “each Member State to which it is addressed”. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.²⁴

This means that rights provided by a directive can be pleaded only against the state. But the concept of the state, according to the interpretation of the ECJ, can be broadened. An individual can also claim rights provided by a directive against state institutions²⁵ and municipalities.²⁶ Although the ECJ held that rights provided by a directive can be pleaded only against the state (vertical direct effect), nevertheless the Court has elaborated the so-called “indirect effect”, which could also give the effect of rights provided by directive horizontally.

¹⁹ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 26.

²⁰ C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, European Court Reports 1993 Page I-04367.

²¹ Directive 76/207.

²² Lynn M. Rosebery, “The Limits of Employment Discrimination Law in the United States and European Community”, DJOF Publishing 1999, page 146.

²³ *Ibid.*, page 147.

²⁴ Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723, paragraph 48.

²⁵ *Ibid.*, paras. 49 and 51

²⁶ Case 103/88, *Fratelli Constanzo SpA v Comune di Milano*, paragraphs 30 and 31, European Court Reports 1989, page 1839.

Indirect effect

The ECJ has formulated the concept of indirect effect as follows:

...National courts are required to interpret their national law in the light of the wording and the purpose of the directive...²⁷

Such obligation is binding for national courts in cases concerning issues where the state has failed to implement a directive on time²⁸, where national law was adopted before a directive and was not intended to implement the directive,²⁹ and where the state has implemented a directive incorrectly.³⁰ The requirement to interpret national law in the light of EC law applies in litigation not only between individual and state, but also between two private parties.³¹

Although it is clear that the principle of “indirect effect” is simple “horizontal direct effect”, because it is impossible to interpret provisions of national law in the light of a non-implemented directive by not imposing obligations upon one of private parties, the Court is unwilling to recognize it. Instead, the following explanation has been given:

....That obligation on the part of the national courts to interpret their national law in conformity with a directive, which has been reaffirmed on several occasions, does not mean that a provision in a directive has direct effect in any way as between individuals. On the contrary, it is the national provisions themselves which, interpreted in a manner consistent with the directive, have direct effect.³²

Indeed, indirect effect does not formally directly impose a directive obligation on a private party, but indirectly - via interpretation of national law. An obligation imposed on a private party could be negative³³ or even positive³⁴.

²⁷ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, paragraph 26, European Court Reports 1984 page 01891.

²⁸ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court reports 1984 page 01891.

²⁹ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, paragraph 8, European Court Reports 1992, page I-4135.

³⁰ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court reports 1984 page 01891, see also Paul Craig/Grainne De Burca, *EU Law*, (1998), 2nd edition, Oxford University Press, p.199.

³¹ See also in this respect Lynn M. Rosebery, “The Limits of Employment Discrimination Law in the United States and European Community”, DJOF Publishing 1999, page 142-143.

³² Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, paragraph 7, European Court Reports 1992, page I-4135, paragraph 7.

³³ *Ibid.*

³⁴ See for example cases 185/97, *Belinda Jane Coote v Granada Hospitality Ltd.*, paragraph 28, European Court Reports 1998 Page I-05199 and 32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567.

Creation of a new positive obligation on a private party reflects the *Coote* judgement³⁵. Ms Coote was dismissed on the grounds of pregnancy. She brought an action before the court, but then signed a mutual settlement with her employer, Granada. After that, she left the job. When Ms Coote started to look for new work, she met difficulties, because of lack of references from the previous employer. Meanwhile, Granada, her former employer, consistently refused to give her references. Ms Coote then brought an action before the court, claiming that she had been victimised under Article 7 of Directive 76/207. The national court doubted whether Article 7 was applicable to a detrimental relationship after employment, since the wording of this provision provides only for an actual employment relationship. The ECJ held that even a directive cannot of itself impose an obligation on individuals, but that nevertheless the national courts' obligation is to interpret national law as far as possible in the light of the wording and the purpose of the directive³⁶. Since prohibition of discrimination is recognized as a fundamental right of Community law as well as the right to defend rights before trial, Article 7 in conjunction with Article 6 imposes an obligation to provide persons with rights:

to ensure judicial protection for workers whose employer, after the employment relationship has ended, refuses to provide references as a reaction to legal proceedings brought to enforce compliance with the principle of equal treatment within the meaning of the Directive.³⁷

It is clear in this case that such interpretation put a new positive obligation on a private party (the former employer, Granada), in spite of the assertion by the ECJ that “a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual”³⁸.

The Court gives the following explanation for the obligation of the Court to apply the concept of indirect effect. It contends that Article 10 of the EC Treaty obliges the Member States to take all appropriate measures to fulfil their obligations under the Treaty. That obligation is binding on all authorities of the Member States, including national courts. In turn, national courts are under an obligation to provide the legal protection

³⁵ Case 185/97, *Belinda Jane Coote v Granada Hospitality Ltd.*, European Court Reports 1998 Page I-05199.

³⁶ Case 185/97, *Belinda Jane Coote v Granada Hospitality Ltd.*, paragraph 18, European Court Reports 1998 Page I-05199.

³⁷ *Ibid.*

³⁸ Joined cases C-397/01 and C-403/01, *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, European Court Reports 2004 Page I-08835, paragraph 108.

which individuals derive from Community law and - according to the third paragraph of Article 249 of the EC Treaty - under obligation to interpret “domestic law, and in particular legislative provisions especially adopted for the purpose of implementing the requirements of a directive... in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive”³⁹.

In other words:

The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.⁴⁰

Drake contends that the principle of indirect effect is built upon the rule of law, and also on Article 10 of the EC Treaty and the principle of “*effet utile*”⁴¹. These elements may constitute a general principle of Community law, namely the principle of effective judicial protection⁴².

Although indirect effect is intended to provide effective judicial protection, it is not unrestricted. First, the State may not plead against individual obligations provided by a directive which it has failed to implement⁴³. Second, indirect effect cannot contradict general principles of law or in particular by imposing criminal liability on persons⁴⁴. Third, indirect effect does not oblige interpretation of national law *contra legem*. As Drake points out, from the *Wagner*⁴⁵ judgement it follows that the duty of purposive interpretation imposed on national courts is not absolute and is not designed to give national courts a legislative function so as to allow them to re-write national law⁴⁶. Fourth, in *Schijndel*⁴⁷ the Court declared that the national court is not obliged to abandon its passive

³⁹ *Ibid.*, paras. 108 to 113.

⁴⁰ *Ibid.*, para. 114.

⁴¹ Sara Drake: *Effet utile* is an interpretative principle derived from international law and has in the context of Community law been defined as requiring the Court of Justice to interpret legal rules reasonably, so as not to fail in their aim and objective.

⁴² Sara Drake, Twenty years after Von Colson: the impact of “indirect effect” on the protection of the individual’s Community rights, *European Law Review* (2005) 30 June, Sweet & Maxwell and Contributors, at page 330.

⁴³ C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, *European Court Reports* 1991 Page I-05357.

⁴⁴ See for example, case 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV.*, *European Court Reports* 1987 Page 03969 and joined cases C-74/95 and C-129/95, *Criminal proceedings against X.*, *European Court Reports* 1996 Page I-06609.

⁴⁵ Case C-334/92, *Teodoro Wagner Miret v Fondo de Garantía Salarial.*, *European Court Reports* 1993 Page I-06911.

⁴⁶ Sara Drake, Twenty years after Von Colson: the impact of “indirect effect” on the protection of the individual’s Community rights, *European Law Review* (2005) 30 June, Sweet & Maxwell and Contributors, at page 342.

⁴⁷ Joined cases C-430/93 and 431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, *European Court Reports* 1995 Page I-04705.

role in a civil suit by going beyond the ambit of the dispute defined by the parties themselves and relying on facts other than those on which the party with an interest in application of those provisions bases its claim⁴⁸. However it does not exclude cases where parties have defined the ambit of a civil suit erroneously by reason of misapplication or misinterpretation of EC law. The question arises as to whether the national court is then entitled to abandon its passive role.

In *Schijndel* the Court pointed out public interest as the only reason for the national court to act on its own motion. It is quite unclear what constitutes public interest. Most probably public interest comprises observance of fundamental rights since this is one of the cornerstones of a democratic society. It follows that in discrimination cases the national court must ensure application of a full set of non-discrimination rights. Controversy could arise on the question whether public interest comprises effective observance of EC law and its uniform application throughout the Community. Clearly the Member States would not lose their status of democratic states if they did not ensure the full effectiveness of EC law. On the other hand, public interest may comprise observance of international obligations of the state; moreover, with regard to EC, the public has an interest in sustainable economic development.

Recently the Court has clarified that the national court is required to consider the whole body of rules of national law when applying domestic provisions adopted for the purpose of transposing a directive in the light of that directive⁴⁹. Although fully logical with regard to the principle of indirect effect, such an obligation sometimes could lead to extension of ambit - especially in new Member States, where recognition of the impact of the EC on the national law is far from ideal.

Principle of supremacy

The concept of “indirect effect” to a great extent comes from the principle of supremacy of Community law over national law⁵⁰. It was in *Van Gend* that the ECJ recognized that the “Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights”⁵¹. Consequently, in order to ensure the effectiveness and uniform application of Community law, domestic law

⁴⁸ *Ibid.*

⁴⁹ Joined cases C-397/01 and C-403/01, *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) and *Matthias Döbele* (C-403/01) *v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, European Court Reports 2004 Page I-08835, paragraph 120.

⁵⁰ Case 6/64, *Flaminio Costa v E.N.E.L.*, European Court Reports English special edition 1964 Page 00585.

⁵¹ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, European Court Reports, English special edition 1963 Page 00001.

cannot take precedence over it. Otherwise the whole idea of the EC would be jeopardised⁵².

Thus, it follows that EC law takes precedence over national law. Respectively precedence of EC law means that norms of national law conflicting with EC law are inapplicable, which also precludes “valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions”.⁵³ The principle of supremacy obliges every national court;

in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.⁵⁴

Recently, in *Mangold*,⁵⁵ the Court extended the principle of supremacy of Community law to a period where transposition has not yet expired. It held that a Member State is not allowed to adopt national laws conflicting with Community law which is at the stage of implementation, but that the national court is obliged to set aside any “provision of national law which may conflict with Community law even where the period prescribed for transposition of that directive has not yet expired”⁵⁶.

Remedies

In the absence of respective Community rules, it is for each Member State to lay down detailed procedural rules for safeguarding rights of individuals which derive from EC law⁵⁷. EC sex equality law is governed by directives only, thus leaving the Member States free to design remedies. However, national provisions must comply with certain general principles on EC law remedies and provisions of respective Directives which give general guidelines on what remedies should be. The wording of the respective articles of the greater part of directives⁵⁸ is very general:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves

⁵² Case 6-64, *Flaminio Costa v E.N.E.L.*, European Court Reports English special edition 1964 Page 00585.

⁵³ Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, European Court Reports 1978 Page 00629, paragraph 17.

⁵⁴ Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.*, European Court Reports 1978 Page 00629 paragraph 21.

⁵⁵ Case C-144/04, *Werner Mangold v Rüdiger Helm*, OJ C 36, 11.02.2006. p.10.

⁵⁶ *Ibid.*, paragraph 78.

⁵⁷ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835, paragraph 18.

⁵⁸ Article 6 of Directive 75/117, Article 6 of Directive 79/7, Article 9 of Directive 86/86/613, Article 12 of Directive 92/85, Article 10 of Directive 86/378.

wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process...

But this wording has been interpreted in the line of ECJ judgements and thus is quite detailed. Codification of that case-law is provided in amended Article 6 of Directive 76/207⁵⁹, in particular regarding compensation.

Principle of effectiveness

In *Von Colson* the ECJ held that measures adopted by the Member States must be such as to be effectively relied on before national courts by the persons concerned⁶⁰. It is the principle of effectiveness elaborated by the ECJ with which remedies of the Member States must comply. The principle of effectiveness comprises both procedural and material provisions of national law⁶¹.

One part of the principle of effectiveness requires that procedural rules laid down by the Member States must not be such as to “render virtually impossible or excessively difficult the exercise of rights conferred by Community law”⁶². The principle of effectiveness refers to conditions governing access to the courts, for example such as unreasonable time limits⁶³, as well as proceedings in the national court where procedure could be conducted improperly⁶⁴ or the court could fail to interpret national law in the light of Community law⁶⁵.

However, there is no exhaustive list of cases in which the principle of effectiveness must be called into the question, because:

each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that

⁵⁹ Amended by Directive 2002/73.

⁶⁰ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 18.

⁶¹ Case 68/88, *Commission of the European Communities v Hellenic Republic.*, European Court Reports 1989 Page 02965, paragraph 24.

⁶² Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835, paragraph 18, see also case C-78/98, *Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*, European Court Reports 2000 Page I-03201, paragraph 31.

⁶³ Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, European Court Reports 1976 Page 01989, paragraph 6.

⁶⁴ Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfondsvoor Fysiotherapeuten*, European Court Reports 1995 Page I-04705, paragraph 19.

⁶⁵ Cases C-397/01 and C-403/01, *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.*, European Court Reports 2004 Page I-08835, paragraph 114.

provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.⁶⁶

The second part of the principle of effectiveness requires that penalties for breach of EC law must be effective, proportionate, and dissuasive⁶⁷.

Principle of equivalence

The principle of equivalence requires that procedural rules and substantive rules of national law designed for protection of rights which persons derive from EC law must not be less favourable than those governing similar domestic actions⁶⁸. Put differently, the principle of equivalence requires that rules of national law be applied without distinction “whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar”⁶⁹. However, the principle does not require extending the most favourable rules of national law in a particular field to all actions brought with regard to EC law⁷⁰.

With regard to what constitutes “similar domestic action”, the ECJ has ruled that “the purpose and the essential characteristics of allegedly similar domestic actions”⁷¹ must be taken into account. Furthermore, the national court “must take into account the role played by that provision in the procedure as a whole, as well as the operation and any specific features of that procedure before the different national courts”⁷².

Compensation

Initially, EC law did not provide that in case of discrimination compensation must be available as a mandatory remedy. The ECJ when interpreting Article 6 of Directive 76/207 did not require compensation as mandatory either. However, it is quite difficult to imagine some other

⁶⁶ Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, European Court Reports 1995 Page I-04705, paragraph 19.

⁶⁷ Case 68/88, *Commission of the European Communities v Hellenic Republic.*, European Court Reports 1989 Page 02965, paragraph 24.

⁶⁸ See for example cases 68/88, *Commission of the European Communities v Hellenic Republic.*, European Court Reports 1989 Page 02965, paragraph 24 and C-78/98, *Shirley Preston and Others v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*, European Court Reports 2000 Page I-03201, paragraph 31.

⁶⁹ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835, paragraph 41.

⁷⁰ *Ibid.*, para. 42.

⁷¹ C-78/98, *Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*, European Court Reports 2000 Page I-03201, paragraph 49.

⁷² Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835, paragraph 44.

sanction than compensation which would satisfy all criteria set by the Court, namely, the sanction must:

- 1) guarantee real and effective judicial protection;
- 2) have a deterrent effect on the employer;
- 3) be adequate in relation to the damage sustained.⁷³

Accordingly, in *Colson* the Court held that if a Member State chose a sanction in the form of compensation, then it must correspond to the criteria set out above⁷⁴. It follows that old Article 6 of Directive 76/207 has never required Member States to introduce compensation as a sanction for discrimination. However, amending Directive 2002/73 laid down compensation as a mandatory sanction for all Member States⁷⁵.

Presently, Article 6(2) of amended Directive 76/207 codifies all the main principles with regard to compensation elaborated by the ECJ. It provides, first, that compensation is a mandatory sanction which must be introduced in all Member State, second, compensation must be real and effective, third, if a Member State chooses compensation in the form of reparation for loss and damage sustained, it must be dissuasive and proportionate to the damage suffered, fourth, compensation or reparation may not be restricted by an upper limit, fifth, the amount of compensation or reparation could be restricted in cases where the employer could prove that the only discrimination is refusal to take into account a job application.

According to Finland's Act on equality between women and men⁷⁶ which that Member State has introduced, this particular provision takes the form of compensation, while Germany⁷⁷, Netherlands⁷⁸, and Latvia⁷⁹ have chosen the form of reparation of loss and damage. Importantly, cases where a Member State chooses compensation in the form of reparation of financial loss must be accompanied by moral damage. In *Colson* the Court stressed that pure compensation of loss, "such as, for example, the reimbursement of expenses" incurred by a person in submitting its application does not satisfy the criteria for effective

⁷³ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 23.

⁷⁴ *Ibid.*, para. 23.

⁷⁵ Article 6(2) of Directive 76/207.

⁷⁶ <http://www.tasa-arvo.fi/Resource.phx/tasa-arvo/english/authorities/legislation/actonequality.htx>

⁷⁷ Cases 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court reports 1984 page 01891 and 79/83, *Dirut Harz v Deutsche Tradax GmbH*, European Court Reports 1984.

⁷⁸ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

⁷⁹ Article 29(8) of the Latvian labour law provides:

"(8) If the prohibition against differential treatment and the prohibition against causing adverse consequences is violated, an employee in addition to other rights specified in this Law, has the right to request compensation for losses and compensation for moral harm. In case of dispute, a court at its own discretion shall determine the compensation for moral harm"

sanction and effective transposition of Directive 76/207 respectively⁸⁰. Besides, reparation of loss cannot be conditional upon a requirement of national law to prove fault on the part of an employer⁸¹.

As regards compensation, this can not be limited by national law otherwise the right to adequate reparation for loss and damage would be endangered⁸². Besides, the award of interest is an essential component of compensation, because effective compensation cannot “leave out of account factors, such as effluxion of time, which may in fact reduce its value”⁸³. An upper limit to compensation set by national legislation is acceptable where a discriminated-against candidate would not have obtained the vacant position, because the candidate engaged had superior qualifications. In the particular case of *Draehmpaehl*⁸⁴ the Court accepted a ceiling of three months salary as effective compensation for discrimination suffered in the selection process by way of an employer not taking into account an application for the vacancy.

Time limits

In principle, time limits fall within the competence of the Member States. Nevertheless, time limits set by national legislation must correspond to the principle of effectiveness and equivalence. As Nielsen points out, usually this is a question of where “to strike a balance between conflicting principles of legal certainty and of effectiveness”⁸⁵. In *Rewe*⁸⁶ it was held for the first time that setting reasonable limitation periods for bringing proceedings satisfies the principle of effectiveness, inasmuch as it constitutes an application of the principle of legal certainty. However, time limits must not be such as to make it impossible in practice to exercise rights which a person derives from Community law.

In *Levez* the Court pointed out:

...that it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings. It cannot be said that this makes the exercise of

⁸⁰ Cases 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 23.

⁸¹ Case C-180/95, *Nils Draehmpael v Urania Immobilienservice OHG*, European Court Reports 1997 Page I-02195.

⁸² Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, European Court Reports 1993 Page I-04367, paragraph 30.

⁸³ *Ibid.*, para. 31.

⁸⁴ Case C-180/95, *Nils Draehmpael v Urania Immobilienservice OHG*, European Court Reports 1997 Page I-02195.

⁸⁵ Ruth Nielsen, *European Labour Law*, DJOF Publishing, Copenhagen, 2000, at page 427.

⁸⁶ Case 33-76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.*, European Court Reports 1976 Page 01989, paragraph 5, see also case C-78/98, *Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc.*, European Court Reports 2000 Page I-03201, paragraph 33.

rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation entails by definition the rejection, wholly or in part, the action brought.⁸⁷

Besides the principle of effectiveness, the principle of equivalence must be observed, i.e. time limits for bringing an action regarding EC law must no be less favourable than those governing similar domestic actions⁸⁸.

Concerning implementation of directives and time limits, the Court in *Emmott* ruled that a Member State cannot set time limits for bringing an action until a directive is properly transposed into the domestic legal system⁸⁹. Soon after this, in *Steenhorst-Neerings*⁹⁰ the Court departed from this approach. It started by distinguishing between two types of time-limits, first, those fixing the right to bring an action before the national court, and, second, those fixing the right to claim relevant benefits. In *Steenhorst-Neerings* the Court accepted a provision of national law which set a time limit for which a person can claim benefits retroactively. The ECJ based its decision on the consideration that those are different kind of time limits reviewed in *Emmott* and in *Steenhorst-Neerings*.

The latter situation does not deprive a person of the right to bring an action as such, it merely limits the rights which could be claimed, while the former deprives an individual of judicial protection altogether⁹¹. In this case, the ECJ set criteria as to which the time limits fixing the right to claim benefits retroactively must correspond. First, if there is a possibility to rely on a directly effective provision of a directive, and, second, if the principle of equivalence regarding procedural rights is observed⁹².

Those criteria were affirmed in *Johnson II*⁹³. In *Fantask*, a case which was not about equal treatment, the Court simplified the criteria and required that national provisions for bringing an action must correspond to both principles of effectiveness and equality⁹⁴. It is true that a case about time limits which deprives a person from the right to bring an action at all is much more serious than that limiting rights which an

⁸⁷ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835, paragraph 19.

⁸⁸ Case 33-76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.*, European Court Reports 1976 Page 01989, paragraph 6.

⁸⁹ Case C-208/90, *Theresa Emmott v Minister for Social Welfare and Attorney General*, European Court Reports 1991 Page I-04269.

⁹⁰ Case C-338/91, *H.Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court Reports 1993 Page I-05475.

⁹¹ Case C-338/91, *H.Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court Reports 1993 Page I-05475, paragraph 21.

⁹² *Ibid.*, paras. 14 to 16.

⁹³ Case C-410/92, *Elsie Rita Johnson v Chief Adjudication Officer*, ECR 1994 Page I-05483.

⁹⁴ Case C-188/95, *Fantask A/S e.a. v Industriministerietb (Erhvervministeriet)*, European Court Reports 1997 Page I-06783, paragraphs 47-52.

individual can claim. In *Emmott* the first and most important argument put forward by the Court was the right of individuals for certainty⁹⁵, but in *Steenhorst-Neerings* it overlooked that the right to legal certainty for individuals had been infringed in both cases. In particular, directives are addressed to the Member States, which are fully responsible for implementation. The ruling in *Steenhorst-Neerings* and subsequent judgments in fact oblige persons to be “in the know” about the whole of EC law. General legal certainty has been placed higher than legal certainty of individuals. None of the judgments analyses this subordination, or how general legal certainty would suffer if individual legal certainty were placed above it. Moreover, in *Steenhorst-Neerings* the Court, referring to its ruling in *Emmott*, did not refer to legal certainty of individuals, but put forward the doctrine that time limits set by national legislation cannot prevail over direct effect of provisions in a directive⁹⁶.

The Court also justified its ruling in *Emmott* by the different circumstances of that case⁹⁷. But looking at the facts of the *Emmott* case, there is no fact testifying that she was deprived of any means under national legislation to claim direct effect of Article 4(1) of Directive 79/7 at the time it should have had been transposed on 23 of December 1984. According to the ruling in *Fantask*, no excuses for waiting for other ECJ rulings regarding a particular non-implemented directive would be taken into account for extending time limits set by national legislation, because national measures in general corresponded to the principles of effectiveness and equivalence.

Here, a distinction should be made between issues of pay and of social security benefits. In *Levez*⁹⁸ the Court ruled that setting a time limit of two years for the right to claim pay arrears retroactively does not correspond to Community law. A common feature of *Levez*, *Steenhorst-Neerings* and *Johnson II* is that the persons concerned did not possess full information of the current situation. *Levez* did not know that she had been paid discriminatory small pay, but *Steenhorst-Neerings* and *Johnson* the rights provided by Directive 79/7. The outcome is different and drives the conclusion that individuals must be aware of their rights provided by directives.

⁹⁵ Case C-208/90, *Theresa Emmott v Minister for Social Welfare and Attorney General*, European Court Reports 1991 Page I-04269, paragraphs 21 and 22.

⁹⁶ Case C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court Reports 1993 Page I-05475, paragraph 22.

⁹⁷ Case C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court Reports 1993 Page I-05475, paragraphs 19 and 20.

⁹⁸ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court Reports 1998 Page I-07835.

Burden of proof

Directive 97/80/EC⁹⁹ on the burden of proof in cases of discrimination based on sex provides for exemption of discrimination cases from the traditional civil suit principle – competition between the parties. In particular, individuals who consider themselves to have been wronged by discrimination, establish the facts from which discrimination may be presumed and then it is for the respondent to prove that there has been no discrimination. Directive 97/80 applies to cases covered by Article 141 of EC Treaty, Directives 75/117, 76/207, 92/85¹⁰⁰ and 96/34¹⁰¹. Although not explicitly mentioned in Directive 97/80, it is also applicable to Directive 86/378 since occupational social security schemes fall within the concept of pay provided by Article 141¹⁰². The only equal treatment directive left out of the scope of the principle of reverse burden of proof is 86/613¹⁰³, but the principle of reverse burden of proof may be applicable to self-employed persons via Directive 76/207¹⁰⁴. The wording of Article 3 of Directive 97/80 providing that the burden of proof must shift to the respondent when the claimant establishes before court facts from which discrimination may be presumed, gives room for very broad interpretation and application, because “it is for the national court to determine if the conditions for shifting the burden of proof are satisfied”.¹⁰⁵

There is no extensive case-law of the ECJ on interpretation of this matter; however, the ECJ has given the main guidelines. Regarding facts which the claimant must present, first of all mere facts are required not evidence of discrimination; second, the facts must show only a “*prima facie* case of discrimination”¹⁰⁶. For example, a *prima facie* case of discrimination is where pay for women is significantly lower than pay for male colleagues

⁹⁹ Council Directive 97/80/EC⁹⁹ of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

¹⁰⁰ 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).

¹⁰¹ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICEP, CEEP and the ETUC.

¹⁰² Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

¹⁰³ Council 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 motherhood.

¹⁰⁴ *More* in section on self-employed persons.

¹⁰⁵ E.Szysczak, “Remedies in Sex Discrimination Cases”, J.Lonbay, A.Biondi (eds), Remedies for Breach of EC Law, Chichester, John Wiley & Sons, 1997.

¹⁰⁶ Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535, paragraph 18, *see also* case C-196/02, *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*, paragraph 74.

performing the same work of work of equal value¹⁰⁷. When shifting the burden of proof, the national court must take into account the possibility to obtain facts on discrimination by the person possibly discriminated against. Here first, the national court must ensure that the burden of proof shifts to the employer so as to avoid depriving workers of effective means of enforcing their rights¹⁰⁸; and the court must also ensure transparency of information.

Transparency was mentioned as a precondition for avoiding discrimination in cases regarding equal treatment as regards access to employment, in particular interpretation of Article 2(2) of Directive 76/207/EEC, which allows the Member States to restrict the right of one sex regarding access to certain posts¹⁰⁹. According to this, the Member States before putting a restriction on the right to occupy certain posts must provide the Commission and individuals with transparent information regarding the validity of such restrictions.

The second type of ECJ cases where the principle of transparency was mentioned is regarding equal pay. The Court has held that “where an undertaking applies a system of pay which is totally lacking transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory”¹¹⁰. This is because wages frequently consist of several elements (for example, basic salary plus different kinds of supplement) and those elements are paid taking into account different criteria (for example, mobility, training, seniority¹¹¹), so that the principle of transparency is applicable regarding each element of remuneration. However, where a person can obtain information, for example regarding pay and each element of it, and it is transparent, there is no reason to shift the burden of proof to the employer¹¹².

In order to enforce the reverse burden of proof effectively, the Member State are required to adjust national rules where necessary¹¹³.

¹⁰⁷ See for example case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535, paragraph 17.

¹⁰⁸ Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535, paragraph 14.

¹⁰⁹ Case 248/83 *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459; Case 318/86 *Commission of the European Communities v French Republic*, European Court Reports 1988 Page 03559.

¹¹⁰ Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199, paragraph 11.

¹¹¹ See for example, Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199.

¹¹² Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*, European Court Reports 2001 Page I-04961, paragraph 56.

¹¹³ Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199, paragraph 14.

Directive 97/80 is not applicable where it is for the competent body or court to investigate the facts of the case¹¹⁴.

Legal standing

In *Verholen*, with regard to a person's legal standing in order to claim rights derived under Community law, the ECJ held as follows:

While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection... and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community law.¹¹⁵

In particular, the Court ruled that an individual may rely on Directive 79/7 before a national court if it bears discriminatory effects deriving from a national provision regarding his spouse, who is not a party to the proceedings, providing that the spouse comes within the scope of the directive¹¹⁶.

In *Coloroll*¹¹⁷ the Court held that Article 141 of the EC Treaty may be relied upon by dependants of employees in order to claim a survivor's pension under an occupational pension scheme. Were it otherwise, "this would deprive Article 119 of all its effectiveness as far as survivor's pensions are concerned"¹¹⁸.

Particular remedies in discrimination cases

Pay

In *Defrenne II* the ECJ indicated that Article 119 could be observed in no other way than by raising the lowest salaries¹¹⁹. In following case-law¹²⁰ the Court reaffirmed that the only way to remedy discriminatory pay for disadvantaged workers is to raise it to levels received by other workers. From this case-law it follows that that principle applies to discrimination

¹¹⁴ Article 4(3) of Directive 97/80.

¹¹⁵ Joined cases C-87/90, C-88/90 and C-89/90, *A. Verholen and others v Sociale Verzekeringsbank Amsterdam*, European Court Reports 1991 Page I-03757, paragraph 24.

¹¹⁶ Joined cases C-87/90, C-88/90 and C-89/90, *A. Verholen and others v Sociale Verzekeringsbank Amsterdam*, European Court Reports 1991 Page I-03757.

¹¹⁷ Case C-200/91, *Coloroll Pension Trustees Ltd v James Richard Russel, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group plc.*, European Court Reports 1994 Page I-04389, paragraph 18.

¹¹⁸ *Ibid.*, para. 19.

¹¹⁹ Case 45-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, European Court Reports 1976 Page 00455, paragraph

¹²⁰ See for example, case C-33/89, *Maria Kowalska v Freie und Hansestadt Hamburg*, ECR 1990 Page I-02591, paragraphs 19 and 20, case 184/89, *Helga Nimz v Freie und Hansestadt Hamburg*, European Court Reports 1991 Page I-00297, paragraph 18, case C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd*. European Court Reports 1994 Page I-04435, paragraph 17.

cases, irrespective of whether they originate from individual contracts, collective agreements, or national legislation. Interestingly, under Article 141 a worker performing work of higher value has no right to claim higher pay, but only equal to those performing work of lesser value¹²¹. Such an interpretation of the principle of equal pay testifies a purely formal approach. It does not substantially eradicate discrimination in pay.

Occupational social security schemes

In *Barber* the Court held that occupational pension schemes fall within the concept of equal pay, thus different pensionable ages and contributions must be equal¹²². An obligation to pay non-discriminatory benefits for both sexes arises only in respect of periods of service subsequent to 17 May 1990¹²³. However it does not preclude joining an occupational social security scheme retroactively¹²⁴ under condition that they will make respective contributions¹²⁵.

In *Coloroll* the Court pointed out that Article 119 does not preclude measures to achieve equal treatment by reducing the advantages of previously favoured workers, but this could be done only after entry into force of rules eliminating discrimination¹²⁶. Later, this was affirmed in *Smith*¹²⁷.

Treatment

In *Colson*¹²⁸ the Court held that Article 6 of Directive 76/207 does not put an obligation on an employer to conclude an employment contract with a candidate discriminated against. Roseberry describes it as follows:

The ECJ has specifically held that the ETD does not give a person a right to instatement in a job as a remedy for discriminatory refusal to hire.¹²⁹

¹²¹ Case 157/86, *Mary Murphy and others v An Bord Telecom Eireann.*, European Court Reports 1988 Page 00673.

¹²² Case C-262/88, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, European Court Reports 1990 Page I-018899.

¹²³ *Ibid.*

¹²⁴ Case C-57/93, *Anna Adriaantje Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV*, ECR 1994 page I-4541, paragraph 30.

¹²⁵ Case C-128/93, *Geertruida Catharina Fisscher v Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel.*, European Court Reports 1994 Page I-04583, paragraph 37.

¹²⁶ Case C-200/91, *Coloroll Pension Trustees Ltd v James Richard Russel, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group plc.*, European Court Reports 1994 Page I-04389, paragraph 33.

¹²⁷ Case C-408/92, *Constance Christina Ellen Smith and others v Avdel Systems Ltd.* European Court Reports 1994 Page I-04435, paragraphs 26 and 27.

¹²⁸ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 19.

¹²⁹ Lynn M. Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at page 160.

It is important to note that the Court merely held that Directive 76/207 does not specifically require such a sanction; however, it does not exclude the possibility of rights of reinstatement as one of the possible sanctions in the same line with financial compensation¹³⁰. For example, Italy has the sanction of reinstatement¹³¹. It would appear that in some cases reinstatement could be the only remedy that fulfils the requirement of effectiveness. This could be for example where individuals have obtained very special education or possess very special knowledge, but posts where they could make use of it are of very limited number. It is possible that in such a situation no financial compensation could reimburse the damage and loss sustained.

State social insurance

In *Sutton* the Court held that unlike the case with equal pay in discrimination cases regarding social security benefits, an individual has no right under Directive 79/7 to claim interest on arrears of benefits. The Court substantiated this by saying that the scope of Directive 79/7 is “in the context of the award of social security benefits to establish the unlawfulness of such discrimination and to obtain the benefits to which they would have been entitled in the absence of discrimination”¹³². However it does not exclude the possibility of claiming loss and damage sustained by a discriminated-against individual under the principle of state liability, discussed below.

Nevertheless it raises two questions. First, again a distinction has been drawn between the responsibility of employers with regard to equal pay and the state with regard to social security benefits. Namely, the state seems to be less responsible than the employer for discrimination caused, for example the obligation to justify indirect discrimination, where the margin of discretion left for the Member State is much broader than for employers. Second, the question arises of effectiveness of the remedy, because a claim for social security benefits can be legitimately restricted with regard to the right receive them retroactively¹³³ and a claim for state liability entails an extra obligation to prove mandatory conditions.

In *Cotter* the Court ruled that setting the same conditions for obtaining social security benefits for both sexes cannot be impeded by a

¹³⁰ Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court reports 1984 page 01891, paragraph 18.

¹³¹ Lynn M. Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing 1999, at page 160.

¹³² Case C-66/95, *The Queen v Secretary of state for Social Security, ex parte Eunice Sutton* European Court reports 1997 Page I-02163, paragraph 25.

¹³³ See for example cases C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court reports 1993 Page I-05475 and C-208/90, *Theresa Emmott v Minister for Social Welfare and Attorney General*, European Court reports 1991 Page I-04269.

national law provision prohibiting unjust enrichment even if implementation of Directive 79/7 infringes it¹³⁴.

Remedies in multiple discrimination cases

Together with adoption of two more directives prohibiting discrimination on some other ground than sex, the question of multiple discrimination was raised¹³⁵. So far as it concerns remedies in multiple discrimination cases, the Commission indicates that penalties must be higher than 'single' discrimination¹³⁶.

State liability

The state is liable for loss and damage caused to individuals as a result of breaches of Community law¹³⁷. The principle of state liability was established in the *Francovich*¹³⁸ case, where provisions of a non-implemented directive were found to be incapable of having direct effect. For claiming state liability, certain conditions must be fulfilled. First, the rule of law infringed must be intended to confer rights on individuals¹³⁹; second, the breach is sufficiently serious; and third, there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties¹⁴⁰.

Further in *Factortame III*¹⁴¹ the Court held that a Member State is responsible for breach of Community law, whatever organ of the state is responsible for it. The obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities¹⁴². In *Factortame III* the Member States also wanted to clarify the content of

¹³⁴ Case C-377/89, *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General*, European Court reports 1991 Page I-01155.

¹³⁵ Directive 2000/43, paragraph 14 of preamble.

¹³⁶ European Commission, Remedies and Sanctions in EC non-discrimination law, 2005, http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/05remsan_en.pdf, at page 34.

¹³⁷ Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, European Court reports 1991 Page I-05357, paragraph 35.

¹³⁸ Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, European Court reports 1991 Page I-05357.

¹³⁹ Dorothy Gillies points out one more condition - the content of those rights is identifiable on the basis of the provisions of the directive alone, Dorothy Gillies, *A Guide to EC Environmental Law*, Earthcan Publications Ltd, London, 1999, at page 95.

¹⁴⁰ Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, European Court reports 1991 Page I-05357, paragraph 40, see also case C-66/95, *The Queen v Secretary of state for Social Security, ex parte Eunice Sutton* European Court reports 1997 Page I-02163, paragraph 32.

¹⁴¹ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, European Court reports 1996 Page I-01029.

¹⁴² *Ibid.*, para. 32.

conditions for state liability. In particular, what is to be considered as a sufficiently serious breach of Community law? The Court pointed out the general principle which provides that a breach is sufficiently serious if the Member State has manifestly and gravely disregarded the limits of its discretion¹⁴³. Further it specified that, for example, a breach of Community law is sufficiently serious where the Member State does not take into account a judgment of the Court finding an infringement of Community law, irrespective of whether this is established under the procedure of preliminary ruling or clearly flows from already settled case law¹⁴⁴.

Further rulings of the ECJ highlight factors which could be taken into account when defining a sufficiently serious breach. These include the clarity and precision of the rule breached, the amount of discretion left to national or Community authorities by that rule, whether the infringement and the damage caused was intentional or involuntary, whether any error of law is excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law¹⁴⁵.

Persons can claim reparation for loss and damage under the principle of state liability under the same conditions laid down for reparation of loss and damage for breach of national law. However, those conditions must correspond to the principles of effectiveness and equivalence¹⁴⁶. Reparation of loss and damage sustained as the result of breach of Community law cannot be conditional upon a requirement provided under national law for existence of fault (intentional or

¹⁴³ *Ibid.*, para. 55.

¹⁴⁴ *Ibid.*, para. 57.

¹⁴⁵ Dorothy Gillies, *A Guide to EC Environmental Law*, Earthcan Publications Ltd, London, 1999, at page 97, referring in particular to joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, European Court reports 1991 Page I-05357, joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, European Court reports 1996 Page I-01029, case C-392/93, *The Queen v H. M. Treasury, ex parte British Telecommunications plc.*, European Court reports 1996 Page I-01631, case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, European Court reports 1996 Page I-02553, joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland.*, European Court reports 1996 Page I-04845, case C-66/95, *The Queen v Secretary of State for Social Security, ex parte Eunice Sutton* European Court reports 1997 Page I-02163 and joined cases C-94/95 and C-95/95, *Danila Bonifaci and others (C-94/95) and Wanda Berto and others (C-95/95) v Istituto nazionale della previdenza sociale (INPS).*, European Court reports 1997 Page I-03969.

¹⁴⁶ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, European Court reports 1996 Page I-01029, paragraphs 67-70.

negligent) going beyond that of a sufficiently serious breach of Community law¹⁴⁷.

As regards compensation, this cannot be limited by national law, otherwise it will not ensure effective protection of rights of individuals derived from Community law or guarantee compensation commensurate with the loss and damage sustained. For example, compensation must comprise loss of profit. However, a person must show reasonable diligence in limiting the extent of loss and damage¹⁴⁸.

Recent case law of the ECJ on state liability deals with liability of national courts in correct application of EC law¹⁴⁹. The Court has held that the state is liable for a breach of EC law where the national court has incorrectly interpreted the law or made an improper assessment of facts and evidence. Thus, liability of national courts must be governed by the same conditions as other organs of the state. Manifest infringement of applicable law by the national court must be assessed under criteria set for estimation of sufficiently serious breach of the community law¹⁵⁰.

Some authors discussing the concept of state liability point out that this is less favourable for individual remedy than other concepts, such as direct or indirect effect. They stress:

The Court should pay more regard to the fact that in relation to the protection of the Community rights of individuals, the principle of state liability is not a panacea for remedying the defective behaviour of Member State. This is because an individual litigant would still need to clear a number of hurdles before succeeding with a claim for damages. He (or she) would need to satisfy the Community conditions for liability as well as any applicable national procedural rules. It should also be noted that the action for damages is compensatory in nature and does not guarantee the individual that his or her Community right will be enforced. There is also the drawback that in such circumstances the individual would need to bring two separate actions, which can be costly and time-consuming.¹⁵¹

Nevertheless, the Court in several cases has rejected other EC law enforcement mechanisms, such as the obligation of national law to

¹⁴⁷ *Ibid.*, para. 80.

¹⁴⁸ *Ibid.*, para. 81-90.

¹⁴⁹ See in particular, case C-224/01 *Gerhard Köbler v Republik Österreich.*, European Court reports 2003 Page I-10239 and case C-173/03 *Traghetti del Mediterraneo SpA, in liquidation v Repubblica italiana*,

¹⁵⁰ Case C-173/03 *Traghetti del Mediterraneo SpA, in liquidation v Repubblica italiana*, paragraphs 42 and 43

¹⁵¹ Sara Drake, Twenty years after Von Colson: the impact of “indirect effect” on the protection of the individual’s Community rights, *European Law Review* (2005) 30 June, Sweet & Maxwell and Contributors, at pages 343-344. She refers to Dougan, M., Craig, Costello, C.

interpret national law in compliance with EC law in *Wagner*¹⁵² or effective compensation for discrimination on grounds of sex in the field of social security in *Sutton*¹⁵³, instead advising to bring an action based on State liability.

Latvian law

Establishing discrimination

The greater part of equality directives have been introduced into the Labour Law and different laws on social security. Under these, there are no special requirements for establishing discrimination. However, the Civil law requires proof of fault in order to establish breach of law or agreement.

So far, Latvian Civil law contains no provisions on non-discrimination, but draft amendments to the Civil law provide for the principle of non-discrimination when making goods and services available to the public and making deals¹⁵⁴. In the scope of this thesis, the draft amendments concern non-discrimination of self-employed persons, since the Civil law is the only legislative act governing the operation of self-employed persons, in particular by section on service agreements¹⁵⁵. Therefore the question arises as to how the Civil law must operate in order to comply with EC law.

As mentioned above, under Latvian Civil law establishing existence of fault is necessary for unlawful action¹⁵⁶. According to Article 1640 of the Latvian Civil law, fault can be committed by intent or by negligence - gross or ordinary¹⁵⁷. Thus it follows that traditional application of the requirement of fault under Latvian Civil law makes recognition of discrimination conditional upon ability to prove fault.

However, national law requiring proof of fault on the part of the employer to make him fully liable does not correspond to EC sex equality

¹⁵² Case C-334/92, *Teodoro Wagner Miret v Fondo de Garantía Salarial*, European Court reports 1993 Page I-06911.

¹⁵³ Case C-66/95, *The Queen v Secretary of state for Social Security, ex parte Eunice Sutton* European Court reports 1997 Page I-02163.

¹⁵⁴ Draft amendments registered at Parliament of Latvia (Saeima) No. 1698 http://www.saeima.lv/saeima8/mek_reg.fre At the moment amendments are intended to introduce Directives 2000/43 (equal treatment irrespective of race or ethnic origin) and 2004/113 (equal treatment between men and women in respect to access to goods and supply of services) only, while in reality introducing provisions of Directives 86/613 (equal treatment between self-employed on grounds of sex, as regards establishment and operation of self-employed) and 2000/78 (equal treatment in employment irrespective of age, disability, religion or belief, or sexual orientation, as regards self-employed).

¹⁵⁵ Council 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 motherhood.

¹⁵⁶ Civillikums: LR likums. Latvijas Vēstnesis, 1994, 30.jūnijs, Nr.75 (Civil Law), Article 1635.

¹⁵⁷ *Ibid.*, Article 1644.

law, because such a requirement could result in exemption from full liability. Consequently,

where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person quality of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law”¹⁵⁸.

Latvian lawyers and scholars have recognized that international law may require different interpretation and application of Latvian Civil law. Torgāns has stressed that, since Latvia has joined the EU, lawyers must reread the Civil law and other laws in order to establish whether their interpretation remains the same as until then¹⁵⁹. This especially concerns the element of fault. Kārkliņš points out that Latvian Civil law does not stress the concept of fault as a subjective element, but rather fault as an objective element which characterises the juridical nature of unlawful action (or inaction)¹⁶⁰. It follows that recognition of the fact of discrimination suffices of itself to establish full liability on the part of the employer.

Compensation

As mentioned above, Latvia has chosen compensation in the form of reparation of loss and damage. Article 29(8) of the Latvian Labour Law provides:

(8) If the prohibition against differential treatment and the prohibition against causing adverse consequences is violated, an employee in addition to other rights specified in this Law, has the right to request compensation for losses and compensation for moral harm. In case of dispute, a court at its own discretion shall determine the compensation for moral harm.

This provision concerns Directives 75/117, 76/207 and 86/378. Regarding application of Article 29(8) of the Latvian Labour law, there have been several cases.

The *Sants* case concerned rejection of employment on the grounds of sexual orientation. Plaintiff Sants¹⁶¹ was not engaged as a teacher although he had superior qualifications to the person employed. He claimed lost salary for the following school year. The national court refused compensation for material loss on the ground that it is

¹⁵⁸ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 26.

¹⁵⁹ Torgāns K., Vainas vai attaisnojumu meklējumi civiltiesībās. Jurista Vārds, 2005. 31.maijs, nr.20.

¹⁶⁰ Kārkliņš J., Vainas nozīme, nosakot civiltiesisko atbildību”. Jurista Vārds, 2005. 26.aprīlis, nr.15.

¹⁶¹ Rīgas pilsētas Ziemeļu rajona tiesas 2005.gada 29.aprīļa spriedums lietā Nr.C32242904047505, C-475/3.

unpredictable how long the employment relationship would have lasted if Sants had been engaged for that work. Besides, the national court pointed out that all four elements have to be proved in order to obtain compensation for material loss, including fault on the part of the employer, although it does not correspond to EC law.

Another case was not about discrimination but rather an unlawful differential treatment case. Forest guard Kuzņerevičs¹⁶², employed by the Latvian State Forest agency, claimed unlawful differential treatment. Since Latvian labour law provides for special grounds of discrimination (those provided by EC directives) and does not provide for a general principle of equal treatment, the national court recognized victimisation only, although there was differential treatment, too. Kuzņerevičs, unlike his colleagues performing identical work, did not receive different kinds of premium. He claimed non-received premiums totalling 4084 lats¹⁶³. Riga District court held that there is no ground to consider non-received premiums and supplemental payments as material loss. Instead, the national court decided that the claimant was entitled to compensation for moral damage in the amount of 4084 lats.

Third was the *Stūriņas*¹⁶⁴ case, about discrimination on grounds of sex as regards access to employment¹⁶⁵. The national court here found unlawful discrimination based on sex and awarded her 585.30 lats for material loss, which constituted non-received salary for one heating season and 1000 lats for moral damage.

These cases show that the Latvian national courts have a very heterogeneous approach regarding what constitutes material loss¹⁶⁶. In the *Sants* case, the court did not recognize material loss as lost income in the future, while in the *Stūriņas* case the court took the opposite view. A surprise is the decision in the *Kuzņerevičs* case. It is still unclear why premiums and supplemental payments can not constitute material loss; moreover, in the situation where Kuzņerevičs performed the same work as his colleagues. However, in all three cases it is most likely that the criteria set forth in EC law were fulfilled. Moral compensation for Sants was 2000 lats, Kuzņerevičs – 4084 and Stūriņa in total received 1585 lats. Those sums of money in Latvia could have a dissuasive effect on employers and could give satisfaction to claimants.

¹⁶² Rīgas Apgabaltiesas Civillietu tiesas kolēģijas 2005.gada 21.septembra spriedums lietā Nr.C 27175804 CA-2787/19; 2005.g., Latvijas Republikas Augstākās tiesas Senāta 2006.gada 8.februāra spriedums lietā Nr.SK-54.

¹⁶³ 1 lats = 0,7 euros, 4084 lats are approximately 5800 euros.

¹⁶⁴ Cēsu rajona tiesas 2005.gada 3.janvāra spriedums lietā Nr.C11019405.

¹⁶⁵ The *Stūriņas* case is discussed in more detail in the section on Equal treatment

¹⁶⁶ And this is not surprising, because until now in Latvia there is no uniform data base where one could find all or at least the greater part of judgments delivered by Latvian courts. It is possible that even the author of this thesis does not possess full information on discrimination cases reviewed by Latvian courts.

An interesting point was raised in *Kurzņerevičs* at cassation instance. The employer contended that in *Kurzņerevičs* case Latvian Labour Law on compensation is not applicable because he is a state official. State officials are governed by the Law on the state civil service¹⁶⁷, which provides that the Labour law is applicable to state officials only to a certain extent. The Law on the state civil service does not provide for prohibition of victimisation. It follows that the claim was unfounded.

However, the employer did not claim entire rejection of the claim. It contended that if the court recognized victimisation regarding moral compensation, then the Law on calculation and reimbursement of loss and damages cause by state administration institutions¹⁶⁸ would be applicable by analogy. Article 15(3) of that law allows for moral compensation of no more than 3000 lats, but in cases where damage is not serious instead of compensation the institution could apologise in writing or publicly. Although the cassation court did not follow this line of reasoning and maintained in force the decision of the appeal court, nevertheless it raises the point of incompatibility with EC law of the Law on calculation and reimbursement of loss and damages caused by state administration institutions. This law is indeed applicable in cases where a state official has been discriminated against on grounds of sex. Contrary to the requirement that the upper limit of compensation can not be provided by national legislation, this is a case where it is not implemented.

One more issue on compensation under Latvian law causes reflection. This in particular concerns application of Article 59 of Latvian labour law defining the concept of pay in general. In cases on reinstatement and compensation for enforced idleness¹⁶⁹, the Supreme Court of Latvia recognizes claims for compensation for enforced idleness for the period a person actually did not work. If the person during the period of litigation has found other work, then he/she does not have the right to claim compensation for that period. Moreover, the Supreme Court has found that compensation for enforced idleness does not fall within the concept of pay defined by Article 59 of the Latvian Labour Law¹⁷⁰. Although equal pay is defined by Article 60 of the Labour Law, there is a risk that the principles elaborated by the Supreme Court on the concept

¹⁶⁷Valsts civildienesta likums: LR likums. Latvijas Vēstnesis, 2000. 22.septembris, nr.331/333 (Law on state civil service)

¹⁶⁸ Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums: LR likums. Latvijas Vēstnesis, 2005. 17.jūnijs, nr.96 (3254) (Law on compensation for loss and damage caused by institutions of state administration)

¹⁶⁹ Par likumu piemērošanu, izšķirot tiesās darba strīdus. Latvijas Vēstnesis, Jurista vārds, 2005. 22.februāris, Nr.7 (362), 21.lappuse.

¹⁷⁰ *Ibid.*, 22.lappuse.

and award of compensation in cases of unlawful dismissal, reinstatement, and compensation for enforced idleness could be applied in case of discriminatory dismissal, reinstatement, and compensation - taking into account that the ECJ considers compensation for unlawful dismissal as constituting pay within the meaning of equal pay¹⁷¹.

One more case is noteworthy to mention. This is the *Muhinas* case¹⁷². At the time when discrimination occurred, the only provision allowing claiming compensation was Article 2352a of the Civil law precluding infringement of dignity and honour. Muhina contended that her dignity had been infringed since refusal to employ implies that the worth of women in employment market is of lesser value. The District and Supreme courts of Latvia decided that an apology is proper compensation for moral damage, taking into account the fact that she had herself provoked discrimination by applying for a vacancy addressed to men only and that refusal to employ comprises such considerations as 'positive discrimination against women, since working conditions in prison are heavy'. Although this decision of the Supreme Court may not be taken as a point of departure when defining compensation in discrimination cases arising from an employment relationship because the old Labour code has lost its force, nevertheless it is important to focus the attention of Latvian lawyers to the fact that this decision totally contradicts EC sex equality law.

Directive 86/613 has not yet been fully transposed. Since it is planned to be fully transposed, with respective amendments to the Latvian Civil law, conditions for compensation for discrimination against self-employed persons on grounds of sex will be governed by provisions of Latvian Civil law. Under Latvian Civil law, there are two kinds of reparation. First, reparation for material loss, which comprises decrease of property and lost profit; and second, reparation for moral damage. Reparation for material damage requires proof of four elements – unlawful action, fault, existence and amount of material loss, and causal relationship between unlawful action and material loss. As discussed above, the ECJ in *Dekker*¹⁷³ established that the fact of discrimination cannot be conditional upon the existence of fault required under national law. The same is true about the requirement of the existence of fault in order to claim material loss. Since Latvian Civil law is to a great extent based on German civil law traditions, the situation is identical to that

¹⁷¹ Case C-167/97, *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECR 1998 Page I-05199.

¹⁷² Augstākās tiesas Senāta 2002.gada 8.maija spriedums lietā Nr.SKC-297. See for more detail in section on Equal treatment.

¹⁷³ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 26.

reviewed in *Draehmpaehl*, where under the BGB¹⁷⁴ reparation of loss was conditional on the existence of fault. The Court ruled that:

(the) Directive¹⁷⁵ does not provide for any exemption from liability on which a person guilty of discrimination could rely and does not make reparation of such damage conditional on the existence of fault, no matter how easy it would be to adduce proof of fault.¹⁷⁶

Consequently, in cases of discrimination a person does not have to prove the existence of fault in order to claim material loss.

Although draft amendments to the Civil law provide for prohibition of discrimination, there are no respective amendments implementing effective sanctions, namely the right to moral damage. Recently, Article 1635 of the Civil law was amended¹⁷⁷ and in principle this allows claims for moral damage, but under condition that moral damage is proved by the claimant. This condition does not correspond to the principle of effective remedy, because it makes compensation of moral damages conditional upon ability to prove them. Consequently, if the right to moral damage is conditional, then also conditional is the right to effective, proportionate, and dissuasive compensation¹⁷⁸.

Recently the *Kozlovska* case¹⁷⁹ was decided by Jelgava city court. She was refused employment on grounds of her gipsy nationality. As regards reasoning on the plaintiff's right to compensation, the national court in its judgment refers not only to Article 29(9) of the Labour law, but also to Article 1635 of the Civil law. The court points out that a person has the right to claim moral damage as far as the defendant could be considered liable, thus showing that the judge is not familiar with the *Dekker* judgement¹⁸⁰. One more interesting thing is that when defining the amount of moral compensation the national court among such criteria as effectiveness, deterrent effect and proportionality, declared that the financial situation of the employer must be taken into account. This

¹⁷⁴ Bürgerliches Gesetzbuch (German Civil Code), case C-180/95, *Nils Draehmpael v Urania Immobilienservice OHG*, European Court Reports 1997 Page I-02195, paragraph 7.

¹⁷⁵ 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, vocation training and promotion, and working conditions.

¹⁷⁶ Case C-180/95, *Nils Draehmpael v Urania Immobilienservice OHG*, European Court Reports 1997 Page I-02195, paragraph 21.

¹⁷⁷ Grozījumi Civillikumā: LR likums. Latvijas Vēstnesis, 2006, februāris, Nr.24 (Amendments to Civil Law).

¹⁷⁸ Article 8(2) of Directive 2004/113 explicitly provides for compensation or reparation for loss and damage which must be effective, proportionate, and dissuasive. It is true that such an obligation is not provided by Directive 86/613. However, draft amendments to the Civil law on non-discrimination were intended to introduce Directive 2004/113, which automatically fully introduces Directive 86/613, too.

¹⁷⁹ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr. C 15066406. Decision of Jelgava City court delivered on 25th of May 2006 in case No.C 15066406.

¹⁸⁰ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 26.

finding is logical and follows from the principle of proportionality. Thus the amount of moral compensation must be defined taking into account not only the situation of the claimant but also of the defendant, especially if it is a small enterprise. In particular, the national court instead of the 5000 lats claimed awarded Kozolovska 1000 lats for moral compensation. No compensation for material loss was claimed.

Principle of effectiveness

Here, the author will continue discussion on the right to reinstatement under Community law and effectiveness of remedy. Article 34(2) of the Labour law prohibits a claim to conclude a contract with a candidate discriminated against. This provision excludes the possibility to obtain an effective remedy in cases where financial compensation is not of such great importance as obtaining a particular job. Latvia in the EU and in the world is considered a small state, so that particular posts are of very limited number, while posts where special knowledge is required are even more limited in number, if indeed they exist at all. Here, reinstatement possibly could be the only effective remedy for an individual. Moreover, for reasons of the small population, relationships among employers are very close, while complaining to the court amounts to bad manners. According to the experience of employees of the State Human Rights Office, many persons who seem to be victims of discrimination are afraid to claim their rights before a court because of most probable adverse consequences from all employers, in particular in the business field. Fear of adverse consequences applies not only to persons living in the countryside or small towns but also to workers living in Riga. The only way to avoid such adverse consequences would be the obligation to instate the person discriminated against if he/she is the most appropriate candidate.

Time limits and principle of effectiveness

Latvian labour law in cases of discrimination allows one month for bringing a claim.¹⁸¹ In *Rewe*¹⁸² the ECJ in principle accepted a one-month

¹⁸¹ According to Article 34(1) if there has been a discriminatory refusal to employ during one month after refusal. Article 48 provides for the right to bring an action before the court during one month after possible discrimination: dismissal during the probation period. Article 60 (3) provides one month for bringing a claim regarding discriminatory pay. This one month term starts from the moment when the employee found out or should have found out about discriminatory pay. Article 95(2) provides for a one-month term for bringing an action before the court in case of unequal treatment in particular regarding working conditions, vocational training, or promotion. As under Article 60(3), Article 95(2) provides that the one-month term starts to run from the moment when the employee found out or should have found out about discriminatory treatment. Article 29(1) prohibits discriminatory dismissal and Article 122 provides for one month for bringing an action before the court. The one-month term starts to run from receiving notice of termination.

term for bringing an action as corresponding to EC law and the principle of effectiveness, because it does not render defence of rights impossible or excessively difficult. There is a notion that a one-month term for bringing a claim before the court in all dismissal and discrimination cases was established to satisfy the need for legal certainty of employers.

The decision in the defence-of-rights *Kozlovska* case¹⁸³ includes a very interesting finding with regard to the term for defence of rights determined by Article 34¹⁸⁴. The plaintiff missed the defence of rights one-month term because at first she complained to the State human rights office, which has an obligation to respond in one month, which in turn led to the term for bringing a claim before the court being missed. Nevertheless, the national court held that since under Article 34(2) a person cannot claim engagement, there is no point in depriving a person of the right to claim compensation for unlawful civil action.

Other types of claims under the Labour law according to Article 31(1) must be brought within a time limit of two years. According to this provision, Gailums¹⁸⁵ considers that the right to pay arrears in case of discriminatory pay provided by Article 60(2) is restricted retroactively by the two-year time limit set forth in Article 31(1) as the generally applicable time limit for all types of claims under the Labour law.

Although in several cases the ECJ has allowed time limits for retroactive benefit claim¹⁸⁶, nevertheless it has drawn the line between interpretation of Directive 79/7 and Directive 76/207 and respectively between the remedies available under them. In *Colson* it ruled that compensation must be effective, dissuasive, and proportionate, while in *Marshall* it did not allow an upper limit to be set on compensation. From this point of view, setting a two-year limit on the right to claim pay arrears to some extent sets an upper limit to the right to claim material loss; moreover, it does not allow compensation for material loss to be in

¹⁸² Case 33-76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, European Court reports 1976 Page 01989.

¹⁸³ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr. C 15066406. Decision of Jelgava City court delivered on 25th of May 2006 in case No.C 15066406.

¹⁸⁴ Article 34. Consequences of Violating the Prohibition of Differential Treatment when Establishing Employment Legal Relationships

(1) If when establishing employment legal relationships an employer has violated the prohibition of differential treatment, the applicant may bring an action to court within one month from the date of receipt of refusal by the employer to establish an employment legal relationship with the applicant.

(2) If employment legal relationships have not been established as a result of violation of the prohibition of differential treatment, the applicant does not have the right to request compulsory establishment of such relations.

¹⁸⁵ Ingus Gailums, Darba likums. Komentāri. Tiesu prakse, Rīga, 2003, 108.lpp.

¹⁸⁶ See for example, case C-208/90, *Theresa Emmott v Minister for Social Welfare and Attorney General*, European Court reports 1991 Page I-04269 or case C-338/91, *H.Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court reports 1993 Page I-05475.

an amount that is effective and proportionate and having a deterrent effect on the employer.

In *Levez* the Court ruled that a national rule limiting an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted where the employee was misrepresented on the level of remuneration is in breach of Community law or more particularly the principle of effectiveness¹⁸⁷. It follows that the right to claim arrears of remuneration according to Article 60(2) cannot be restricted to two years prior to the date when the action was brought. Here also is inapplicable the condition that in circumstances where the employee knew about discriminatory pay but brought an action only after some time can be restricted by a two-year limit on arrears¹⁸⁸, because under Article 60(3) the right to claim compensation for unequal pay is restricted to one month from the moment the employee discovered discrimination.

As to the time limit set forth in Article 60(3), this could mislead to some extent. According to findings of the Ministry of Welfare¹⁸⁹, a one-month time limit is provided for the purposes of claiming discrimination in the past; however, it must be interpreted as allowing at any time claiming equal pay presently and for the future, otherwise employees would be deprived of the right to trial.

Time limits and the principle of equivalence

As mentioned above, the one-month time limit is imposed on all discrimination and dismissal cases; other claims under the Labour Law are subject to a two-year time limit. According to the principle of equivalence, similar time limits must be applied in cases where the purpose and cause of action are similar.

As regards claims for discriminatory refusal to employ, discriminatory treatment, or discriminatory dismissal during a probation period - there are no similar claims under national provisions. But unequal pay claims could be compared to other claims arising from remuneration. For example, an employee has a two-year limit to decide whether to claim disbursement of unpaid salary for overtime work. Both claims – for discriminatory pay and unpaid overtime work - are claims attributable to salary and both are the result of manifestly dishonest treatment on the part of the employer; thus according to the principle of

¹⁸⁷ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court reports 1998 Page I-07835, paragraphs 32 and 34.

¹⁸⁸ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court reports 1998 Page I-07835, paragraph 20.

¹⁸⁹ Interview with Māris Badovskis director of EU law department of Ministry of Welfare.

equivalence a claim for equal pay must be extended to a two-year time limit according to Article 31(1).

In case of dismissal under Article 123, a person can claim an extension of one month for bringing a claim for unlawful dismissal. It is for the court to decide whether delay in bringing the claim is justified or not. Such possibility for extension of time limit is not provided for cases of discriminatory refusal to employ, discriminatory dismissal during a probation period, and discriminatory treatment, although in these cases an individual could be subject to justified delay. Although dismissal cases are not similar to discrimination cases, nevertheless it is necessary to take into account the role played by the provisions in the procedure as whole¹⁹⁰. Since a one-month time limit is quite short, clearly the idea of Article 123 is not to deprive a dismissed employee of the right to trial in case of important reasons impeding bringing the claim, such as illness for example. Since the objective of Article 123 is observance of the fundamental right to trial, a one-month time limit in discrimination cases must be subject to prolongation, otherwise it would be in breach of the principle of equivalence.

The problem with regard to observance of the principle of equivalence becomes more serious when analysing the character of time limits provided by the Labour Law from the standpoint of legal theory. Kalniņš¹⁹¹ argues that the one-month time limit set forth in Article 122 is a preclusive term, while the general two-year time limit set forth in Article 31(1) is a negative prescription term. A preclusive term limits the right to a particular already-prescribed period which cannot be stopped or interrupted, while a negative prescription time can be stopped or interrupted; besides, observance of a preclusive term is an obligation of the court by its own motion, while a negative prescription time must be observed only if required by the defendant. He also points out that such claims as claims for payment of salary provided by Article 69 or claims for payment of average wage in case of downtime provided by Article 74(1) are governed by the time limit set forth in Article 31(1) or negative prescription term. This means that, similar to the claims mentioned, an equal pay claim is governed not only by a shorter period for bringing the claim, but the type of term as such is different and less favourable¹⁹².

¹⁹⁰ Case C-326/96, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.*, European Court reports 1998 Page I-07835, paragraph 44.

¹⁹¹ Kalniņš E., Prasība par atjaunošanu darbā. Latvijas Vēstnesis, Jurista Vārds, 2004. 6.aprīlis, nr.13, according to him, preclusive term in German is *Ausschlussfrist*, negative prescription term – *Verjährung*.

¹⁹² Supreme Court of Latvia in decision delivered on 19th of May 2004 in case No.SKC-229 follows the view of Erlens Kalniņš on the character of the one-month term provided by Article 122 of the Labour law governing claims for dismissal as a preclusive term.

Rights of ex-employees

Article 6(1) of Directive 2002/73 requires that a person must have the right to equal treatment even after the relationship in which the discrimination is alleged to have occurred has ended. This provision has its roots in the *Coote*¹⁹³ case, where a worker after an employment relationship had ended was refused references from the previous employer as a reaction to legal proceedings brought to enforce compliance with equal treatment and thus causing adverse consequences. The wording of Article 6(1) of Directive 2002/73 extends the *Coote* judgment by applying the right to sue the previous employer not only to victimisation cases but to all unequal treatment cases. In particular, this means that Article 9 - providing for prohibition of adverse consequences - and Article 95 - providing for equal treatment - must be extended to ex-employees. Presently, both articles refer to actually employed persons only, although proper implementation of Article 6(1) of Directive 2002/73 obviously requires explicit references to ex-employees too.

Burden of proof

The principle of reversed burden of proof under Latvian labour law is applicable in cases of cause of adverse consequences, all discrimination and all dismissal cases. This is provided in Articles 9(2)¹⁹⁴, 29(3) and 125¹⁹⁵ respectively. Article 29(3) provides how the burden of proof must be shifted to the employer:

(3) If in case of a dispute an employee indicates conditions which may serve as a basis for his or her direct or indirect discrimination based on gender, the employer has a duty to prove that the differential treatment is based on objective circumstances not related to the gender of the employee, or also that belonging to a particular gender is an objective and substantiated precondition for performance of the relevant work or the relevant employment.

¹⁹³ Case C-185/97, *Belinda Jane Coote v Granada Hospitality Ltd.*, European Court reports 1998 Page I-05199.

¹⁹⁴ **Article 9. Prohibition on Causing Adverse Consequences**

...

(2) In case of dispute, if the employee can specify circumstances which could give rise to adverse consequences, it is for the employer to prove that sanctions applied to an employee or otherwise directly or indirectly caused adverse consequences on him is not due to exercise of employment rights in a permissible manner

¹⁹⁵ **Article 125. Duty of Burden of Proof**

The employer has a duty to prove that a notice of termination of an employment contract has a legal basis and complies with the specified procedure for termination of an employment contract. In other cases when an employee has brought an action in court for reinstatement at work, the employer has a duty to prove that, when dismissing the employee, he or she has not violated the right of the employee to continue employment legal relationships.

In general, Article 29(3) introduces a requirement of EC law. However, there is some imprecision. First, the wording of Article 29(3) gives the right to an actually employed worker only, while the reversed burden of proof is applicable to a candidate and to an ex-employee. Although the principle of indirect effect requires the Latvian court to interpret Article 29(3) as being applicable to an “unsuccessful” applicant or ex-employer too, nevertheless it could result in more complicated litigation for claimants, because of the strong tradition in Latvia of grammatical interpretation of laws and lack of knowledge of ECJ law. Second, for the purpose of more precise implementation the word “facts” instead of “conditions” should be used. Third, the wording of Article 29(3) could lead to an attempt to justify direct discrimination.

As regards application of the reverse burden of proof in discrimination cases, there is the *Stūriņš*¹⁹⁶ case, where the fact of discrimination on grounds of sex was proved by the testimony of another woman who was orally refused the same vacancy, because “she is a woman”. Thus *Stūriņš*’ allegation of the same orally-expressed discriminatory refusal was accepted by the court. However, the strongest fact in this case was that *Stūriņš* had the best qualifications among all possible candidates including the person actually employed.

In the *Sants*¹⁹⁷ case, regarding discrimination on grounds of sexual orientation, the facts suggesting that there had been discrimination were quite strong. First, *Sants* is among several persons in Latvia who have publicly announced their sexual orientation and this fact was widely discussed and reflected in the mass media in Latvia. Second, his qualifications were superior to those of the person with whom an employment contract was concluded. The court did not accept the claim by the respondent that she did know of *Sants*’ sexual orientation.

From the cases discussed above it follows that no case has come before the Latvian courts based on mere facts, because the facts on discrimination in *Stūriņa* were proved by testimony, but in *Sants* the facts of his orientation were known to almost the entire population, besides his qualifications being superior.

Regarding equal pay, there have been no cases in Latvia. Almost all enterprises, including state and municipal employers, stipulate in their employment contracts that remuneration is confidential, thus it is almost impossible to obtain information regarding pay in an establishment. Under Latvian Labour law, only a representative of workers may access salary data to check the situation regarding equal pay. However, such institutions as worker’s representatives or labour unions operate only in

¹⁹⁶ Cēsu rajona tiesas 2005.gada 3.janvāra spriedums lietā Nr.C11019405.

¹⁹⁷ Rīgas pilsētas Ziemeļu rajona tiesas 2005.gada 29.aprīļa spriedums lietā Nr.C32242904047505, C-475/3.

several enterprises and sectors of industry. The situation is made even worse by so-called “envelope salaries”. This means that a considerable proportion of workers in Latvia officially receive minimum wages and the rest “in an envelope”, because most employers do not want to bear the burden of income taxes and state social insurance¹⁹⁸. Those workers are deprived of any chance to claim equal pay.

It follows that in Latvia it is almost impossible for an employee to establish any statistics regarding salaries in an establishment. The only possible way effectively to enforce the right to equal pay is for the national court to accept rumour and suspicion expressed by the employee as a sufficient fact for shifting the burden of proof to the employer.

It is also difficult to prove discriminatory refusal to employ. The Labour law, in particular Article 34(1), does not explicitly provide that refusal to employ must be in written form or that reasons for refusal must be provided. The recent *Kozlovska*¹⁹⁹ case on refusal to employ on grounds of nationality was successfully challenged only because the employer gave her written notice where the discriminatory reason was explicitly stated²⁰⁰. In particular, the written notice explicitly provided that the reason for rejection was her inability to speak in accent-free Latvian. It is doubtful whether she would otherwise have succeeded. This case was broadly reflected by the mass media, thus almost all employers have learned a good lesson that it is not a good idea to give written notice. This situation demonstrates that the legislator is under obligation to adjust the Labour law in order to provide individuals with effective means for maintaining their rights in case of discriminatory refusal to employ.

According to Article 4(3) of Directive 97/80, discrimination cases adjudicated by the administrative court are not subject to the reverse burden of proof because administrative procedure is based on the objective investigation principle conducted by the administrative court. Administrative courts are the only competent institutions for state officials regarding their employment issues, including possible discrimination. The reverse burden of proof is not applicable in criminal proceedings, which are governed by the presumption of innocence.

State liability under Latvian law

As described above, persons can claim reparation for loss and damage under the principle of state liability under the same conditions laid down

¹⁹⁸ No institution has even provisional data on how much of the employment market consists of workers who receive their real salary “in an envelope”

¹⁹⁹ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr. C 15066406. Decision of Jelgava City court delivered on 25th of May 2006 in case No.C 15066406.

²⁰⁰ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr. C 15066406. Decision of Jelgava City court delivered on 25th of May 2006 in case No.C 15066406.

for reparation of loss and damage for breach of national law, but those conditions must correspond to the principles of effectiveness and equivalence²⁰¹. In Latvia, State liability is provided for by the Law on calculation and reimbursement of loss and damage caused by state administration institutions²⁰². Although under the State liability principle whatever organ of state is liable the Law on calculation and reimbursement of loss and damage caused by state administration institutions regulates reimbursement of loss and damage caused by state administration institutions. No law provides for compensation for loss and damage caused by legislative or judicial power, although the same law could be applied by analogy.

As to specific provisions of the Law on calculation and reimbursement of loss and damage caused by state administration institutions, here issues discussed in *Factortame III* emerge. First, Article 11 of the law obliges a person to show reasonable diligence in limiting the extent of loss and damage; second, Article 8(2) allows for compensation for lost profit; third, since the administrative process provides for the principle of objective investigation carried out by the court, a person is not under obligation to prove fault on the part of the state institution. The only incompatibility with EC law is provided by Article 15(3), which sets an upper limit for compensation for moral damage. Thus in certain cases the Law on calculation and reimbursement of loss and damage caused by state administration institutions does not allow for commensurate compensation and thus does not correspond to the principle of effectiveness.

²⁰¹ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, European Court reports 1996 Page I-01029, paragraphs 67-70.

²⁰² Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums: LR likums. Latvijas Vēstnesis, 2005. 17.jūnijs, nr.96 (3254) (Law on compensation for loss and damage caused by institutions of state administration)

Chapter 9.

Recast Directive 2006/54

Recently, four EC sex equality law directives - 75/117, 76/207, 86/378 and 97/80 - were unified in one recast Directive 2006/54¹. The purpose of the recast is to bring together these directives in a single text as well as to codify developments arising out of the case-law of the ECJ. Importantly, since the Treaty of Amsterdam there is a single legal basis allowing adoption of legislative measures concerning equal treatment and equal pay in employment and occupation as provided by Article 141(3).

From Article 1 it follows that equal pay in the future will constitute a working condition and that the term 'equal treatment' will comprise access to employment, promotion, vocational training, working conditions, including pay and occupational social security schemes. Further, Article 2 defines such concepts as direct and indirect discrimination, harassment, and sexual harassment as well as pay and occupational social security schemes, thus extending and defining concepts not explicitly provided for by Directives 75/117, 86/378 and differently by Directive 97/80².

Articles 5 to 13 of the Recast Directive deal with occupational social security schemes. There are several new provisions. First, part 2 of Article 7, which defines the material scope of equal treatment as regards occupational social security schemes, codifies the cases of *Beune*³ and *Niemi*⁴, where the ECJ held that occupational social security schemes for civil servants fall within the concept of pay if paid by reason of the employment relationship. Article 13 provides for the right for both sexes to claim flexible pensionable age under the same conditions.

Articles 14 to 16 provide for rights to equal treatment as regards access to employment, vocational training, promotion, and working conditions. Articles 15 and 16 require workers after maternity, paternity and adoption leave to be provided with working conditions no less favourable, and to benefit from any improvement in working conditions to which they would have been entitled during their absence. True, those provisions are identical to the provisions contained in Article 2(7) of amended Directive 76/207; however now, according to Articles 1(b) and 14(1)(c), working conditions comprise pay, too. So, the Recast Directive under identical provisions grants entitlement to more rights. This means

¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006. p. 23 – 36.

² Definition of indirect discrimination given in Article 2(2) of Directive 97/80 and not allowing for hypothetical comparison.

³ Case C-7/93, *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*, European Court reports 1994 Page I-04471.

⁴ Case C-351/00, *Pirkko Niemi*, European Court reports 2002 Page I-07007.

that in future the ECJ will not have to rule on the distinction between the concepts of equal treatment and equal pay⁵.

Further follows title III, providing for horizontal provisions, which means that the Member States must implement the obligations envisaged in this title as regards all rights stipulated in previous titles. Article 17 defined obligations on the Member States as regards defence of rights, which are more elaborated than presently provided by Directives 75/117 and 86/378. The same is true of Article 18, which explicitly provides for the right to compensation or reparation in case of unequal pay.

The provisions of burden of proof will be extended explicitly as regards occupational social security schemes. Presently neither Directive 86/378 nor Directive 97/80 provide for reversed burden of proof. However, it is true that that occupational social security schemes are covered by that right via Article 141 as provided by Article 3(1) of Directive 97/80. The right to reversed burden of proof will be limited as regards Directive 92/85. Now according to Article 3(1) of Directive 97/80, all discrimination matters of Directive 92/85 are provided by the right to reversed burden of proof, but after coming into force of the Recast Directive and subsequent repeal of Directive 97/80, the reversed burden of proof will not be applicable as regards discrimination in the field of social security arising from special protection during pregnancy and maternity, since Article 19 of the Recast Directive - unlike Article 3(1) of Directive 97/80 - will not be applicable in statutory social security matters. Provisions of actions of equality bodies as provided by Article 20 will be extended to equal pay and occupational social security matters. This provision also refers to future bodies such as the European Institute for Gender Equality.

A new provision is provided by Article 26, which requires the Member States to take such positive obligations as prevention of discrimination. Importantly, Article 29 requires Member States to apply gender mainstreaming in all legislative documents and policies concerning areas of the Recast Directive. This means that the Member States are obliged to assess the impact on the lives of men and women as regards equal opportunities of all new legislative acts or policies at the stage of their elaboration, adoption, and implementation⁶. The requirement on gender mainstreaming was introduced by Directive 2002/73 and provided by Article 1a of amended Directive 76/207, but it did not embrace equal pay issues. Although the concept of gender mainstreaming was widely used in policy-related areas, it was not defined explicitly by a legislative document until adoption of the Recast Directive.

⁵ See in this regard the section on Equal pay.

⁶ See also Ruth Nielsen, *European Labour Law*, DJOF Publishing, 2000, at page 242

Interestingly, Article 28 stipulates that the provisions of the Recast Directive are without prejudice to national provisions providing for special protection of women during pregnancy and maternity. This means that EC law sets minimum requirements as regards special protection during that period, and as regards the rest, the Member States have a wide margin of discretion on how to protect these rights going beyond minimum rights provided. Recast Directive 2006/54 should be implemented by 15 August 2008, but Directive 75/117, 76/207, 86/378 and 97/80 will be repealed from 15 August 2009.

Part III.

Rights of persons with regard to child-birth

Chapter 10.

Rights during pregnancy

This section deals with International, EC, and Latvian law affecting women during pregnancy. The period of pregnancy which coincides with maternity leave is not included. Rights during this period will be discussed in the next chapter dealing with issues within the period of maternity leave.

International Law

Only two international law documents explicitly provide for special protection of pregnant persons. These are the United Nations Convention on the Elimination of All Forms of Discrimination against Women¹ and International Labour Organization Maternity protection Convention No.183.

Article 11 CEDAW requires State parties to prohibit dismissal on grounds of pregnancy and to provide special protection to women during pregnancy in work which is harmful.

The ILO Maternity protection convention elaborates more on protection of pregnant workers. Article 3 provides that State parties must ensure that a pregnant worker does not carry out work prejudicial to the health of mother and child. However, the convention does not specify what agents could be dangerous to the health of a pregnant worker². Article 8 declares illegal dismissal on grounds of pregnancy. The provisions of Article 9(2) preclude such requirements as an obligation to provide a medical certificate or pregnancy test for a candidate save in exceptional cases where performance of the intended work is precluded by national legislation or could pose a significant risk to health. Article 5 imposes the right for leave if a medical certificate during pregnancy requires it due to risks arising out of pregnancy.

Both international law documents are quite blurred as regards obligations of health and safety requirements for pregnant workers, because neither CEDAW nor the Maternity protection convention specifies particular dangerous agents. What is clear is: prohibition of dismissal on grounds of pregnancy. Although the provisions of Article 9(2) were intended for the purposes of health and safety protection of

¹ Hereinafter CEDAW.

² The matter of working conditions for pregnant workers is little elaborated by Recommendation No.191.

pregnant workers, nevertheless they allow for discrimination, interference in private life and consequent refusal to employ on grounds of pregnancy thus endangering the health of a pregnant candidate. Moreover, Article 9(2)(a) allows State parties legally to define by national legislation instances other than those dangerous for health of a pregnant person when a pregnancy test may be declared. Such a provision contravenes ILO Discrimination convention No.111, which prohibits any discrimination on grounds of sex.

EC law

EC legislative documents

Under EC law there are two legislative documents which explicitly provide for rights of pregnant persons. The EC Treaty itself does not contain any specific provision regarding protection of pregnant persons. However, EU institutions have adopted several secondary legislation documents dealing with this issue.

The title of Directive 92/85 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 testifies to the purpose of the directive. Directive 92/85 is based on Article 138 (previously 118a) and Article 16(1) of Directive 89/391 referring to the necessity to adopt legislative acts in order to protect especially vulnerable groups. More particularly, Directive 92/85 was officially adopted with the purpose of promoting health and safety of workers provided by Article 137.I, as is explicitly stated in Article 1 of the Directive defining the purpose of this act.

However, several facts testify that Directive 92/85 has a double purpose, i.e., not only to protect health and safety of pregnant workers, but also to ensure equal treatment. The ninth recital of the Preamble of Directive 92/85 indicates that protection of the safety and health of pregnant workers, workers who have recently given birth, or workers who are breastfeeding shall not result in less favourable treatment as regards directives on equal treatment between men and women. The problem of official recognition of the double aim of the directive originates from lack of legal basis in the EC Treaty at the time of adoption of Directive 92/85 which would allow adoption of a secondary legislative act for protection of pregnant workers on grounds of equal treatment; thus, reasons of health and safety was used. As to this, a reference appears in the preamble of Directive 92/85 on the purpose of equal treatment and the fact that Article 2(3) of Directive 76/207 is not able to deal with all situations coming before the ECJ.

Indeed, Article 2(3) of Directive 76/207 gives very poor regulation regarding special protection of women during pregnancy and maternity.

This has already been discussed above in the section on direct discrimination, in particular that the legislator had another intention by inserting Article 2(3) into Directive 76/207. However, the ECJ in *Dekker*³ gave an opposite interpretation to that intended. Moreover, because the wording and context of this provision itself is quite unclear, the ECJ in a number of cases had to reject arguments of Member States who tried to justify different discriminatory provisions on grounds of protection of pregnancy and maternity⁴. However, after adoption of Directive 92/85 the ECJ took a new approach as regards protection of pregnant workers and workers on maternity leave and afterwards. In case-law subsequent to adoption of Directive 92/85, the Court seems to feel as having been given the green light for elaborating higher protection for workers during pregnancy and the maternity period and afterwards⁵. On the other hand, the appearance of Directive 92/85 has caused considerable problems on whether pregnancy and maternity protection remain within the equality debate. This will be discussed further below.

Directive 76/207 itself is also based on the provisions of the EC Treaty, which does not say a word about the principle of equal treatment, namely Article 308 (ex-article 235). So initially Directive 76/207 was adopted in the interests of proper operation of the common market. As Bruun argues⁶, Directive 76/207 was adopted in order to improve the situation with shortage of workforce which occurred during the 1970s. However, since the Treaty of Amsterdam has amended the EC Treaty with several provisions on equal treatment between men and women, amendments to Directive 76/207 adopted in 2002 have given another legal basis. Directive 2002/73⁷ was adopted on the basis of Article 141(3), which explicitly empowers EU institutions to adopt secondary legislative acts in order to ensure equal treatment between men and women in matters of employment and occupation⁸. Article 2(7) paragraph 3 of amended Directive 76/207 explicitly provides:

³ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

⁴ See for example cases C-222/84, 312/86.

⁵ For example starting with case C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Oof.e.V.*, European Court Reports 1994 Page I-01657 and going further with case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567 and C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

⁶ Professor Niklas Bruun, at European Workshop "Perspective and Methods in EU Labour Law" in Visby, Sweden, 19-21 June, 2006.

⁷ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269/15, 05.10.2002.

⁸ See also Christa Tobler, Sex Equality Law under the Treaty of Amsterdam, European Journal of Law Reform, Vol.2, No.1.

Less favourable treatment of women related to pregnancy and maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this directive.

Equal pay

Pay matters during pregnancy are governed by Article 141 and Directive 75/117, but some special aspects by Directive 92/85.

Directive 86/613

Directive 86/613⁹ in the period of pregnancy is applicable only so far as its Article 4 refers to equal treatment as defined in Directive 76/207 and so far as Article 8 obliges the Member States to examine conditions regarding possibility of pregnant female self-employed persons and pregnant wives of self-employed persons to have access to services of temporary replacements or national social services and to be entitled to cash benefits under social security schemes.

Directive 79/7

This matter is covered by Directive 79/7¹⁰ on equal treatment between men and women in matters of social security, which is applicable to workers, self-employed as well as persons on involuntary unemployment and persons seeking employment. Directive 79/7 is applicable during pregnancy, too.

Pay and allowances

Article 5 of Directive 92/85 provides that where work is considered dangerous for the health of a pregnant worker, other working conditions or working hours must temporarily be adjusted or the worker must be moved to healthy work, but if this is impossible, the worker must be granted leave for the whole period necessary to protect her safety. The same principle applies to night work. According to Article 7, if a medical certificate states that night work is dangerous for a pregnant worker, then she must be transferred to daytime work or leave work. Article 11(1) provides that while a pregnant worker is moved to other work or leave is granted to her, payment must be maintained in accordance with the employment contract or adequate allowance in accordance with national legislation.

⁹ Council 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 motherhood, OJ L 359, 19.12.1986 P.0056-0058.

¹⁰ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 006, 10.01.1979 P 0024-0025.

Interpretation of those provisions is given in *Padersen*¹¹. One of the questions referred to the ECJ was whether Danish legislation - providing that an employer that considers it impossible to provide work for a pregnant employee can send the employee home and pay her half of her salary - is compatible with EC law. The answer was no. The Court pointed out that such provision is obviously designed to preserve the interests of the employer¹² and that Directives 76/207 and 92/85 require full pay to the pregnant worker if the employer cannot provide her with safe work¹³. It follows that Article 11(1) obliges the employer to pay full salary.

However, no clear answer was given as regards the second part of Article 11(1) providing for “adequate allowance” ensured in accordance with national legislation or practice. Most probably “adequate allowance” provided by national legislation or practice is not in the form of pay but rather in the form of social allowance provided by state or municipal authorities. As to the level of sick pay for absences connected with pregnancy-related illness, the ECJ only pointed out that Directive 92/85 only allows a ceiling on maternity leave allowance¹⁴, but did not deal explicitly with what sum of money - in cases where the employer cannot provide the pregnant worker with safe working conditions – constitutes an “adequate allowance” provided by Article 11(1).

Besides, Article 7(2)(b) explicitly allows granting of extended maternity leave instead of simple paid leave. Although the Court has held that Article 11(1) obliges an employer to grant full pay during that leave, nevertheless the legislator can “rename” compulsory leave as an “extension of maternity leave”. If this is so, then the employer is no under obligation to pay a pregnant worker full pay but instead sick pay only at the level provided for by national social security legislation¹⁵. Consequently, Directive 92/85 leaves space for manoeuvre as regards pay during leave for pregnant employees granted due to inability of the employer to adjust safe working conditions during pregnancy. However, the issue regarding extended maternity leave is not so simple, because no one could compel women to go on maternity leave other than two compulsory weeks¹⁶.

¹¹ Case C-66/96, *Handels – og Kontorfunktionernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327.

¹² *Ibid.*, para. 56.

¹³ *Ibid.*, para. 58.

¹⁴ Case C-66/96, *Handels – og Kontorfunktionernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327, paragraph 39.

¹⁵ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 35.

¹⁶ Article 8(2) of Directive 92/85.

Besides, according to Article 11(4) the Member States can make entitlement to “adequate allowance” subject to the condition of eligibility for such benefits, although those conditions may not provide for periods exceeding 12 months prior to the date of confinement. It follows that adequate allowance provided by national legislation or practice referred to in Article 11(1) shall not be in the amount of full pay. Although Directive 92/85 - unlike regarding maternity allowance - does not put a ceiling on the allowance in question¹⁷, it does not prohibit national law or practice from providing for whatever amount it wishes, presumably on condition that adequate allowance under national provisions may not be so low “as to undermine the objective of protecting pregnant workers”¹⁸.

Another question concerned the distinction made by national legislation between the amount of general sick pay and the amount of sick pay due to absences on account of pregnancy-related illness, which was half of ordinary sick pay. The Court recalled that sick pay provided by the employer falls within the concept of pay under Article 141 and held that less favourable treatment of sick workers on account of pregnancy is based essentially on pregnancy and thus discriminatory¹⁹. The situation would correspond to the principle of equal pay only if “sums received by employees by way of benefits were equal to the amount of their pay”²⁰.

However, this does not necessarily mean that a sick pregnant worker is entitled to full pay or an allowance in the amount of full pay. The particular circumstances of the *Pedersen* case must be taken into account, namely, that a worker had the right to receive full pay in case of sickness, thus full pay here means the same sickness allowance as under the general scheme. As regards a possible distinction between general sick pay and sick allowance provided by national authorities for a worker absent due to pregnancy-related illness, the Court advised the national court to be careful as regards observation of the equal pay principle, even if the amount of both general sick pay and sick allowance for a sick pregnant worker is the same.

Indeed, this issue would require whether to adopt the approach taken by the ECJ in *Birds Eye Walls*²¹, where all circumstances - the equal pay principle and statutory provisions - were taken into account, and departure from strict application of the equal pay principle was

¹⁷ Case C-66/96, *Handels – og Kontorfunktionernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327, paragraph 39.

¹⁸ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2.

¹⁹ Case C-66/96, *Handels – og Kontorfunktionernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327, paragraph 36.

²⁰ *Ibid.*, para. 36.

²¹ Case C-132/92, *Birds Eye Walls Ltd. v Friedel M. Roberts*, European Court Reports 1993 Page I-05579.

justified by equality of outcome, or to decide that a sick pregnant worker is entitled to positive measures, namely, the right to receive sick pay under general terms from her employer plus an allowance from the national authority on account of disadvantages she experienced due to pregnancy-related illness²².

As regards the issue whether a pregnant worker on sick leave due to pregnancy-related illness can claim better pay conditions than other sick workers, the ECJ in *McKenna* held not.²³ The Court first explained why absence due to pregnancy-related illness must be distinguished from absence due to other illness as regards dismissal conditions. It stressed that in order to ensure health and safety requirements during pregnancy, a worker must be protected from dismissal, unlike other sick workers²⁴. However, drawing parallels with maternity pay which does not have to be in the amount of full salary, the Court concluded that pay during pregnancy-related illness does not have to be in full in order to guarantee effective protection of a pregnant worker absent due to pregnancy-related illness, although provided the principle of equal pay is observed and sick pay is the same as under general sick pay conditions²⁵.

In *McKenna*, particular attention was drawn to the issue of reduction in sick pay after particular periods of absence. Namely, the sick pay scheme provided that all employees were entitled to 365 days paid sick leave over any period of four years. Full pay was received for 183 days during a period of 12 months, but if additional sick leave was taken during that period then half pay only was provided up to 365 days within that four-year period. The question was referred whether sick pay could be reduced under this general sick pay scheme in the same way as absence due to pregnancy-related illness as to absence due to other illnesses. The answer given by the Court is unclear. It states that a female worker on sick leave due to pregnancy-related illness and on simple sick leave after maternity leave is entitled to sick pay which is not “below the minimum amount to which she was entitled over the course of the illness which arose during her pregnancy”²⁶. Even more unclear is the obligation set forth in paragraph 68 providing that special provisions must therefore be implemented in order to prevent such an effect. Since the Court by saying this refers to paragraph 62 of the same judgment, this means that the words “below the minimum” means that “payment made is not so low as to undermine the objective of protection of pregnant workers”, but in

²² Drawing parallels with case C-218/98, *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723.

²³ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2, paragraph 62.

²⁴ *Ibid.*, paras. 57 and 58.

²⁵ *Ibid.*, paras. 59 to 62.

²⁶ *Ibid.*, paras 67.

general no other rules than those provided under a general sick pay scheme may be applied, because the only thing which must be ensured is that “she is treated in the same way as a male worker who is absent on grounds of illness”.²⁷ As regards paragraph 68, the only condition here is that half of salary provided under a general sickness scheme is not too low to undermine the objective mentioned in paragraphs 67 and 62 respectively. If this is not the case, then it actually allows the conclusion that EC law does not require that sick pay after maternity leave must be in full, because it does not require it to be so even during sick leave due to pregnancy-related illness before maternity leave. It also follows that the EC does not provide for the right to claim extension of paid sick leave if a worker becomes ill after pregnancy and paid sick leave is exhausted during pregnancy-related illness.

Consequently, pregnancy-related illness is protected only as regards not taking into that absence for purposes of calculating an absence period allowing dismissal. No special sick pay scheme is required for persons absent due to pregnancy-related illness. The general sick pay scheme is applicable. The only condition is that during absence due to pregnancy-related illness, sick pay under a general sick pay scheme cannot be reduced to such a level which would undermine the objective of protecting pregnant workers.

As concerns sick pay due to absence after maternity leave connected with pregnancy and birth-giving, a woman is entitled to sick pay which is not lower than the minimum amount to which she was entitled during illness which arose while she was pregnant. However, the Court did not give clear answers to two questions. First, whether after maternity leave when 183 days fully paid sick leave expires, the employer is allowed to decrease sick pay to half-pay as provided by the general sick-pay scheme. What if 183 days fully paid sick leave has expired before maternity leave? Second, what sick pay the employer must provide to a worker who is sick after maternity leave if the minimum amount of sick pay to which a woman was entitled during pregnancy was so low as to undermine protection of pregnant workers and the employer exceptionally increased that amount? From the wording of the *McKenna* decision it follows that it must be at the previous level. Does this mean that a sick worker after maternity leave is entitled to receive sick pay at a level which does not undermine the objective of protecting pregnant workers? Clearly, that is not what the Court wanted to say. Nevertheless, the last paragraph of the second point of the decision is unclear and does not give answers to the questions asked above. It follows from the first paragraph of the second point of the decision that most probably after

²⁷ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2, paragraph 62.

maternity leave the general sick pay scheme is applicable under general conditions taking into account the whole period of sick leave taken due to pregnancy-related illness that arose before maternity leave.

Consequently, women who were on sick leave due to pregnancy-related illness before maternity leave are in a less favourable situation than other workers, irrespective of the finding of the court that disorders and complications linked to pregnancy and causing incapacity for work form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition.²⁸

Equal treatment

Access

The *Dekker*²⁹ case was not only the first case regarding access to work connected with pregnancy of a candidate, but also the first case regarding pregnancy and equal treatment as such. First, the Court did fundamentally find that “only women can be refused employment on grounds of pregnancy and such refusal therefore constitutes direct discrimination”³⁰, second, that “the absence of a male candidate cannot affect”³¹ the previous finding, thus accepting the hypothetical comparison and third, that discrimination of a pregnant candidate, since it is direct, cannot be justified by the financial burden put on the employer even if it results from national provisions³².

The second case regarding access of a pregnant candidate was dealt with by the Court in *Mahlburg*³³. *Mahlburg* was employed as an operating-theatre nurse under a fixed-term contract, but then an internal offer of two vacancies for operating-theatre nurses under an indefinite term contract was advertised. She applied for those vacancies. At the same time she was pregnant and in order to comply with health and safety requirements under national law, *Mahlburg* was transferred from her operating-theatre nurse post to another internal post which did not involve any risk of infection. After some time she was refused appointment for the post of operating-theatre nurse under an indefinite term contract,

²⁸ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, paragraph 22.

²⁹ *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

³⁰ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 12.

³¹ *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 17.

³² *Elisabeth Johanna Pacifica Dekker v Stichtig Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 13.

³³ Case C-207/98, *Silke-Karin Mahlburg and Land Mecklenburg-Vorpommern*, ECR 2000 I-549

According to the recent ruling in case C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imsalud)*, OJ C 131, 03.06.2006., p.16 *Mahlburg* concerns access to employment rather than promotion. See in this regard the *Herrero* judgment paragraph 28.

because, as the employer contended in written notice, national legislation prohibits employing pregnant workers in posts where they are exposed to harmful effects of dangerous substances. At the beginning of the judgment, the Court makes an interesting distinction. It finds that this is not a case of unequal treatment based directly on pregnancy but on unequal treatment based on statutory prohibition³⁴. Indeed, in the following part there is no word about refusal to accept a pregnant candidate for posts involving risk for pregnant workers being direct discrimination based exclusively on the fact of pregnancy. Instead, the Court elaborated on the principle that special protection during pregnancy provided by EC law cannot result in less favourable treatment³⁵. However, recognition of direct discrimination follows from the Court's assertion that refusal to employ cannot be justified by financial loss which the employer would suffer by appointing a pregnant woman irrespective³⁶ of whether the undertaking is of small or medium size³⁷.

It must be pointed out that the right to access to employment of pregnant persons is governed by Directive 76/207, not by Directive 92/85. Although one could argue that Directive 92/85 is about health and safety, but access to employment is matter of equal treatment or Directive 76/207, nevertheless parallels could be drawn with dismissal cases, where it is recognized that dismissal could negatively affect health of a woman and child or even more, she could decide to terminate her pregnancy³⁸. It appears clear beyond doubt that refusal to employ a pregnant worker could have the same effect on a pregnant woman as dismissal; thus, access issues come within the scope of health and safety issues³⁹. On the other hand, EC law health and safety requirements apply so far to workers only. Moreover, if application of health and safety requirements were extended to pregnant candidates, then how could one distinguish as regards health and safety requirements between the most appropriate pregnant candidates and other less qualified pregnant candidates? Besides, presently according to *Colson*⁴⁰ and *Hartz*⁴¹ a Member State is

³⁴ Case C-207/98, *Silke-Karin Mahlburg and Land Mecklenburg-Vorpommern*, ECR 2000 I-549, paragraph 21.

³⁵ *Ibid.*, para. 26.

³⁶ *Ibid.*, para. 29.

³⁷ *Ibid.*, para. 28.

³⁸ *In this regard see case C-32/93, Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court reports 1994 Page I-03567, paragraph 21.

³⁹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 119, paragraph 248.

⁴⁰ Case C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, European Court Reports 1984 page 01891, paragraph 18.

⁴¹ Case C-79/83, *Dirut Harz v Deutsche Tradax GmbH*, European Court Reports 1984 Page 01921, paragraph 18.

not obliged to provide the sanction of reinstatement of a discriminated candidate, for if health and safety requirements applied to pregnant candidates then their effective protection would be ensured only by way of mandatory reinstatement. It follows that although possible harmful effects to the health of a pregnant candidate as a result of discriminatory refusal to employ is the same as that of a pregnant worker as a result of discriminatory dismissal, nevertheless practical application of extended protection of a health and safety requirement to a discriminated candidate would pose more uncertainty than practical effect. Besides, Directive 76/207 is applicable to both cases and provides both – the candidate and dismissed worker - the right to claim effective compensation.

Working conditions

Exposure to agents

If working duties are liable to involve risks of exposure to the agents specified in Annex I of Directive 92/85 and in guidelines adopted in accordance with Article 3 of the same Directive, an employer is under obligation to assess the nature, degree and duration of exposure to those agents and their risks to safety or health and any possible effect on pregnancy or breastfeeding. The employer is also obliged to provide all protective measures in case of posting of pregnant workers and workers who have given birth⁴²

Annex I gives a non-exhaustive list of agents such as physical, biological and chemical. The guidelines⁴³ specify physical, biological and chemical agents, provide for generic hazards, hazardous working conditions and require adjustments to working conditions in order to comply with specific needs of pregnant workers and workers who are breastfeeding. These include frequent/urgent visits to the toilet, regular nutrition, non exposure to nauseating smells, and others. Although such working conditions during pregnancy could be of great importance for pregnant women, nevertheless the provisions of the Guidelines are not legally binding. On that account, a noteworthy ruling of the Court was made in *Pedersen*, where it was held that pregnancy-related minor complaints or a mere medical recommendation which does not pose any specific risks to pregnancy or an unborn child do not require any special

⁴² Article 3(1)(f) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Official Journal L 018 , 21/01/1997 P. 0001 – 0006.

⁴³ Communication from the Commission on the guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) /* COM/2000/0466 final */

protection⁴⁴. Although the Court appears to be partially correct, on the other hand Foubert also appears to be justified in calling this finding of the Court clumsy, because the intention was to say that:

women who decide to stay at home without there being a medical certificate attesting to their incapacity to work, are not in the same position as sick workers, and therefore, should not be treated as sick workers.⁴⁵

On the other hand, the possibility to work during pregnancy is to a great extent dependent on the simplest working conditions such as access to toilets or nutrition provided by the Guidelines, otherwise the inability of a pregnant worker to overcome minor-complaints due to lack of appropriate working conditions could result in risk for her health and the health of her unborn child.

Several more Directives provide for specific health and safety measures for pregnant workers and workers who are breastfeeding⁴⁶. If assessment reveals risks to the health and safety of a pregnant worker or a worker who is breastfeeding, then the employer must temporarily adjust safe working conditions or working hours. If adjustment of safe working conditions is not possible, then the employer must move the worker to another and safer work position. But if such move is also impossible then the worker must be granted leave. Article 6 of Directive 92/85 prohibits performance of work where a pregnant worker is exposed to agents listed in Annex II, section A and where a worker who is breastfeeding is

⁴⁴ Case C-66/96. *Handels – og Kontorfunktionernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugsforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327. Paragraph 48.

⁴⁵ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 194, paragraph 433.

⁴⁶ See in particular, Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 348, 28.11.1992, p. 9–24.

Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 245, 26.8.1992, p. 6–22.

Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 393, 30.12.1989, p. 1–12.

Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 404, 31.12.1992, p. 10–25.

Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation. OJ L 159, 29.6.1996, p. 1–114.,...

exposed to agents listed in Annex II, section B. This means that those workers must be moved to another job or granted leave.

Writers criticise those provisions for allowing employers far too much manoeuvre⁴⁷. They argue that choices given to employers lack hierarchy and allow employers “to side-track women who they fear will be less productive in the future”. It is suggested that first an employer must ensure that it is impossible to adjust safe working conditions and only then decide on shorter working hours, then the possibility of a move to another job must follow, while granting of leave should be the last option only⁴⁸. The author argues that since Article 2(7) of amended Directive 76/207 explicitly provides that women after maternity leave must be granted an equivalent post on equivalent terms and conditions and according to the principle elaborated by the ECJ that special protection during pregnancy cannot lead to less favourable treatment⁴⁹, which means that equivalent job means that occupied before special protection because of pregnancy was granted, the law does not allow employers to side-track pregnant workers afterwards. The fear is indeed true that granting of additional leave does not work in favour of women’s professional skills, nor does it guarantee full pay.

Other working conditions

Article 7 of the Directive provides that if a medical certificate indicates that night work is prohibited for the health and safety of a pregnant worker or a worker who is breastfeeding, then the worker must be moved to day-time work or granted leave or extended maternity leave. As Foubert points out:

The extra condition regarding the production of a medical certificate is not necessarily at odds with the principle of sex equality in the labour market⁵⁰.

Thus she indicates that the requirement of a medical certificate does not mean the legislator’s intent to provide a pregnant worker or a worker who is breastfeeding with free choice in line with the principle of equal opportunities whether to pursue night work or not.

⁴⁷ Petra Foubert, „The Legal Protection of the Pregnant Worker in the European Community” „Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 113, paragraph 233.

⁴⁸ *Ibid.*

⁴⁹ Case C-136/95. *Caisse nationale d’assurance vieillesse des travailleurs salaries (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011. Paragraph 26.

⁵⁰ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 114, paragraph 236.

Article 9 of Directive 92/85 provides that a pregnant worker has the right to ante-natal examinations during working time if it is necessary, without loss of pay.

Dismissal

Article 10 of Directive 92/85 precludes dismissal of a pregnant worker. This is allowed only in exceptional cases not connected with pregnancy of the worker. Article 10(2) of Directive 92/85 requires that in case of dismissal, substantiation must be provided in written form.

The ECJ has an extended case-law on pregnancy or pregnancy-related dismissals. The first group of cases concerns dismissal on account of absence due to pregnancy-related illness. Altogether there are three cases – *Hertz*⁵¹, *Larsson*⁵² and *Brown*⁵³.

Hertz was dismissed due to absence on account of illness. The illness arose after child-birth and confinement as a consequence of it, and this fact was common ground between *Hertz* and her former employer. The fact that the illness arose after confinement is very important here; nevertheless the national court formulated its question generally, whether Article 5(1) in conjunction with Article 2(3) of Directive 76/207 precludes dismissal on account of absence due to pregnancy- and confinement-related illness. The Court's answer was no, it does not preclude such dismissals. In particular, Directive 76/207 does not provide for special protection of illness attributable to pregnancy. Besides, the Court recognized that there are illnesses typical only for one or other sex; however, men and women are equally exposed to illness and if men and women are dismissed on account of absence due to illness in the same circumstances there is no direct discrimination on grounds of sex⁵⁴.

Ms *Larsson* was dismissed on account of absences due to pregnancy-related illness before and after maternity leave. The national court was not confident about the ruling in *Hertz*, because of the particular circumstances of that judgment. Although in *Hertz* the ECJ ruled that no absence due to pregnancy-related illness is to be treated differently from other illnesses, nevertheless the facts of that case show that this was about illness arising after maternity leave. Thus the Danish court asked whether it is relevant that the illness arose before maternity leave. The Court gave the same answer as in *Hertz* by clarifying that there

⁵¹ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

⁵² Case C-400/95, *Handels- og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757.

⁵³ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

⁵⁴ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, paragraph 17.

is no difference when the illness arises - before, during or after maternity leave, Directive 76/207 does not provide for special protection of illness attributable to pregnancy and confinement. This answer is interesting in light of the fact that the Court referred to Directive 92/85, which was adopted but not transposed during delivery of the judgment. In particular, it stressed that Article 10 of Directive 92/85 prohibits dismissals “during the period from the beginning of their pregnancy and to the end of their maternity leave save in exceptional cases unconnected with their condition”⁵⁵, thus dismissals due to absences on account of pregnancy-related illnesses cannot take place any longer. On the other hand, this finding is not applicable to the situation of Ms Larson because the transposition period of Directive 92/85 had not yet expired.

Only a year later, the Court delivered judgment in *Brown*. Brown was dismissed because she was absent for more than 26 weeks – the period specified as the dismissal period in her employment contract. She was absent due to pregnancy-related illness. The House of Lords before the ruling in *Larsson* referred to the ECJ question whether Directive 76/207 precludes dismissals on account of absence due to pregnancy-related illness arising before maternity leave. Although this question was almost identical to that referred by the Danish court in *Larsson*, nevertheless the result was absolutely opposite. Eventually, the Court recognized that:

disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition⁵⁶.

Then it went further, specifying - unlike in previous cases - that Article 2(3) of Directive 76/207 provides not only for protection against dismissal during maternity leave but the “principle of non-discrimination, for its part, requires similar protection throughout the period of pregnancy”⁵⁷ and although dismissal occurred at a time when Directive 92/85 was not even adopted, nevertheless the purpose of that Directive and more particularly the provisions of Article 10, must be taken into account in the present case⁵⁸. Finally, it is clear that absences due to incapacity for work resulting from pregnancy is a risk inherent to pregnancy and thus must be regarded “as essentially based on the fact of

⁵⁵ Case C-400/95, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757, paragraph 25.

⁵⁶ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, paragraph 22.

⁵⁷ *Ibid.*, para. 24.

⁵⁸ *Ibid.*, paras. 18 and 19.

pregnancy”⁵⁹, thus recognizing - unlike in *Hertz* and *Larsson* - that pregnancy is not a case where men and women are equally exposed to illnesses⁶⁰.

The Court recognized the *Brown* judgment’s inconsistency with its previous rulings in *Hertz* and *Larsson* by saying “contrary to the Court’s ruling in” *Larsson*⁶¹. Such explicit overruling is not a frequent phenomenon in the Court’s practice⁶². The *Brown* ruling recognizes that EC law protects not only women with normal pregnancies but also woman with pathological pregnancies⁶³. However, several authors point out one deficiency in the *Brown* judgment – lack of protection after maternity leave. The question is, why

... illness attributable to pregnancy, a unique status which deserves protection, entails protection only for a certain period of time? ⁶⁴

Why may absence after maternity leave “be taken into account under the same conditions as man’s absence, of the same duration, through incapacity for work”⁶⁵?

One explanation is that the Court chose to apply a substantive equality test as regards pregnancy-related illness before maternity leave and a comparative test to pregnancy-related illness arising after maternity leave⁶⁶, or substantive and formal equality respectively⁶⁷. While Advocate General Colomer distinguished between normal and abnormal pregnancy-related illness, namely, normal – that which arises before

⁵⁹ *Ibid.*, para. 24.

⁶⁰ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, paragraph 17 and case C-400/95, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757, paragraph 23.

⁶¹ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, paragraph 27 and case C-400/95, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757, paragraph 23.

⁶² Christine Boch, Official: During Pregnancy, Females are Pregnant, *European Law Review*, October (1998) 23, Sweet & Maxwell and Contributors, at page 492.

⁶³ *Ibid.*

⁶⁴ Christine Boch, Official: During Pregnancy, Females are Pregnant, *European Law Review*, October (1998) 23, Sweet & Maxwell and Contributors, at page 493, see also Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 156, paragraph 345, at page 190, paragraph 423.

⁶⁵ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, paragraph 27.

⁶⁶ G.F.Mancini and S.O’Lary, The new frontiers of sex equality law in the European Union, (1999) 24 *European Law Review*, August, Sweet & Maxwell and Contributors 1999, at page 339.

⁶⁷ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 190, paragraph 336.

maternity leave and abnormal – arising after maternity leave⁶⁸, because the

...reason for that distinction lies in the fact that, once a woman has given birth and returned from maternity leave, her physiological state is no different from that of male workers and, from that time, it is inappropriate to draw a distinction by reference to the origin of the illness⁶⁹.

Interestingly, Advocate General Colomer in his opinion criticises the position of the United Kingdom, which proposed to distinguish between ordinary or normal risks of pregnancy and abnormal risks of pregnancy which occur in the form of illnesses⁷⁰, therefore in fact himself drawing the same wrong line (only in time) between different risks inherent to pregnancy. Boch to this extent reminds that the ECJ in *Hoffman* has already defined the purpose of Article 2(3) of Directive 76/207, by saying that special protection is intended to protect women until their physiological and mental functions have returned to normal after childbirth⁷¹. Indeed, Advocate General Colomer repeats the same mistake, only in a different aspect. He states:

...it is inappropriate to draw parallels or distinctions between two pregnant women experiencing more or less easy or problematic pregnancies – the point of reference continues to be the male worker.⁷²

It follows that although the *Brown* judgment is a considerable step towards substantive equality through recognition that a pregnant woman is in a different situation than a sick man, nevertheless formal limitation provided by EC law under Directives 76/207 and 92/85 as regards the period of protection - from the start of pregnancy and to the end of maternity leave - does not guarantee full equality.

On the other hand, Roseberry argues that one should not exaggerate the importance of special protection of pregnant workers in case of pregnancy-related illness, because it still occurs in extremely

⁶⁸ *Ibid.*, at page 190, paragraph 423.

⁶⁹ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraph 39.

⁷⁰ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraph 63.

⁷¹ Christine Boch, Official: During Pregnancy, Females are Pregnant, European Law Review, October (1998) 23, Sweet & Maxwell and Contributors, at page 493, case 184/83. *Ulrich Hofmann v Barmer Ersatzkasse*. ECR 1984 Page 03047. Paragraph 25.

⁷² Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraph 63. However, Evelyn Ellis, Recent Development in European Community Sex Equality Law, Common Market Law Review, 1998, 35, Kluwer Law International, at page 395 indicates that the approach taken by the Court in *Hertz* and *Larsson* is preferable, since it is consistent with the structural requirements of discrimination law.

minor cases⁷³. But Foubert contends that the ECJ in *Brown* “increased protection of (pregnant) women beyond what is necessary to safeguard their position in the labour market”⁷⁴. In her opinion, along with Advocates General Colomer and Darmon, excessive protection may lead to increase of discrimination, thus worsening women’s position in the labour market⁷⁵.

The next case to discuss can be put into one line with the *Mahlburg*⁷⁶ case discussed above. Both *Mahlburg* and *Habermann-Beltermann*⁷⁷ concern discrimination having its roots in statutory requirements for health and safety. *Mahlburg* was refused as candidate for an indefinite term post which involved risks for health because she was pregnant at that time. *Habermann-Beltermann* was engaged for an indefinite-term contract for performance of her duties at night time only. When she became pregnant, the employer dismissed her on grounds that national legislation prohibits employment of pregnant workers at night. First, the court recalled that according to *Hertz*, dismissal of a pregnant worker on account of her pregnancy constitutes direct discrimination based on sex. Then it started to resolve the question whether a statutory provision requiring protection of a pregnant worker could operate by way of putting her in a less favourable situation. The Court recognized that prohibition of night work for pregnant workers is fully compatible with Article 2(3) of the Directive. It pointed out that inability to perform night work has a temporal effect, but *Habermann-Beltermann* had an indefinite term contract. Consequently, in those circumstances termination of an indefinite term contract for the reason that the pregnant worker could not perform her duties temporarily would deprive Article 2(3) of Directive 76/207 of its effectiveness.

Mahlburg and *Haberman-Beltermann* caused much uncertainty as regards the term of employment agreements, particularly, whether the outcome of those cases would be different if both workers had had definite term contracts⁷⁸. This is because the ECJ put special emphasis on

⁷³ Lynn M. Rosebery, “The Limits of Employment Discrimination Law in the United States and European Community”, DJOF Publishing 1999, page 308.

⁷⁴ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 190, paragraph 424.

⁷⁵ Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraph 30.

⁷⁶ Case C-207/98, *Silke-Karin Mahlburg and Land Mecklenburg-Vorpommern*, ECR 2000 I-549.

⁷⁷ Case C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Oof.e.V.*, European Court Reports 1994 Page I-01657.

⁷⁸ Paul Craig/Grainne De Burca, EU Law, (1998), 2nd edition, Oxford University Press, at page 861. Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 162, paragraph 362.

the fact of indefinite term contracts and temporal inability to perform duties. The second matter which raised concern was the phrase in the decision “employer and a pregnant employee, both of whom were *unaware* of the pregnancy” when concluding a contract, thus indicating that a candidate who is aware of her pregnancy is under obligation to inform the employer. Answers all to those questions the ECJ gave later in *Tele Danmark*⁷⁹ discussed below.

One more matter which the ECJ failed to do in *Haberman-Beltermann* was to refer to Directive 92/85, which at the time of delivery of the judgment was adopted. This is especially important because Article 7 of Directive 92/85 deals with night work. In particular, from the wording of Article 7(1) read in conjunction with Article 2(a) of the same Directive, it follows that it is up to the pregnant worker to choose whether to work at night or not. Article 2(a) provides that an employer must provide a pregnant worker with safe working conditions only if she informs, but Article 7(1) provides that exemption from night work is conditional upon a medical certificate indicating that night work is indeed risky for the particular worker.

Most probably at the time of delivery of the *Haberman-Beltermann* judgment, none of the judges realised that first, not all pregnancies are exposed to risk due to night work and second, that night work is the subject of free choice of any pregnant women. Therefore, in substance the ECJ by holding that a total prohibition of night work is compatible with Article 2(3), went in contradiction with its previous case-law on prohibition of night work for all women. In *Stoeckel* the court, although recalling that Article 2(3) of Directive 76/207 could allow a ban on night work⁸⁰, nevertheless indicated that prohibition of night work would lead to exclusion of women from undertaking night work, and, moreover, it could be a source of discrimination⁸¹. The equal treatment principle requires that pregnant women must be able to undertake night work, too, consequently diminishing the risk of possible discrimination against all pregnant workers or candidates.

In the following *Webb* judgment, delivered only two months after *Habermann-Beltermann*, the Court for the first time refers to Directive 92/85 or more particularly to Article 10 by saying:

In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that

⁷⁹ Case C-109/00, *Tele Danmark A/S and Handels – og Kontorfunktionaerernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993.

⁸⁰ Case C-345/89. *Criminal proceedings against Alfred Stoeckel*, European Court Reports 1991 Page I-04047. Paragraph 15.

⁸¹ *Ibid.*, para. 19.

pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature subsequently provided, pursuant to Article 10 of 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 (OJ 1992 348, p. 1), for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Furthermore, Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition on the dismissal of pregnant women during that period, save in exceptional cases not connected with their condition⁸².

The Court indicates that the national court when interpreting Directive 76/207 is under obligation to take into account Directive 92/85 although dismissal took place when it was not even adopted. As regards the facts of case, Mrs Webb was employed as a replacement for another worker on maternity leave but on an indefinite term contract. When Webb discovered that she was pregnant and informed her employer, she was dismissed.

The Court once again rejected the argument of proper functioning of the undertaking and based its decision - that such dismissal was discriminatory – on the previously elaborated approach that a contract was concluded for an indefinite term, so that the worker is prevented from performance of her duties only temporarily. It pointed out that the fact that Webb was recruited for the purpose of replacing another pregnant worker does not affect the decision. Such a distinctive approach taken by the Court as regards definite and indefinite term contracts was sharply criticized by Foubert, who argues that:

The Court thereby encourages employers, in an attempt to safeguard their market position, to recruit temporary staff, for temporary workers can easily be dismissed in case of pregnancy. This type of judgment induces employers to statistically discriminate against women when hiring labour force⁸³.

Finally, in *Tele Danmark* - delivered seven years after *Webb* - the Court made it clear that the term of employment contract is irrelevant. Article 10 of Directive 92/85 and Article 5(1) of Directive 76/207 prohibit dismissal of a pregnant worker even if she is engaged for a fixed term and

⁸² Case C-32/93. *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567. Paragraphs 21 and 22.

⁸³ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 168, paragraph 374.

even if due to pregnancy she could not perform a substantial part of her fixed-term employment contract. Tele Danmark is an enterprise which engaged Ms Brandt-Nielsen for a period of six months from 1 July 1995. In August she informed the employer that she was expecting to give birth in early November. Soon after that, she was dismissed on the ground that she would be unable to perform a substantial part of her employment contract and that by conclusion of a fixed-term employment contract had acted in breach of the duty of good faith, because at that time she was aware of her pregnancy. The Court, in answer to this, first recalled that no arguments on financial loss or improper functioning of the undertaking were accepted as justification for dismissal of pregnant workers in previous cases, and, secondly, held that “such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term”⁸⁴, because duration of an employment relationship is an uncertain element – “the relationship may be for a longer or shorter period, and is moreover liable to be renewed or extended”⁸⁵.

Elaboration of uncertainty of the employment relationship presumably has its roots in the theory of economics, which provides that competitive undertakings have a sustainable employment strategy which usually involves a policy of long-term employment. Such an undertaking engages in fixed-term contracts in order to select the best employees. However, notwithstanding that, the ECJ based this decision on the wording of Directive 76/207 and 92/85 by saying that those directives do not distinguish between contracts of definite and indefinite terms. It contended that if the legislator wished to exclude fixed-term contracts, which form a considerable part of employment relationships, it would have done so expressly. Without elaborating on the duty to engage in contracts in good faith, the Court also held clearly that failure to inform an employer of pregnancy cannot be a reason for dismissal. This is logical: since an employer is not allowed to take into account the fact of pregnancy, there is no point in asking about it. Moreover, the issue of pregnancy is a matter of private life and sometimes at the beginning uncertain⁸⁶, thus special protection of a pregnant worker is conditional only upon her wish to inform the employer.

⁸⁴ Case C-109/00. *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993. Paragraph 30.

⁸⁵ Case C-109/00. *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993. Paragraph 32.

⁸⁶ *See in this regard* the practice of EU national courts, Bulletin Legal Issues in Equality No.1/2003, 2/2003, European Commission, at pages 34, 35 and 39 http://www.europa.eu.int/comm/employment_social/equ_opp/documents_en.html and General Report 1997&1998 of the Legal Experts’ Group on Equal Treatment of Men and Women, European Commission, at page 44.

On the same day as *Tele Danmark*, the *Melgar*⁸⁷ judgment was delivered. Melgar was employed by a municipality on the basis of several fixed-term part-time contracts to which she was engaged one after another. After a year of that employment, Melgar informed the municipality of her pregnancy. The municipality subsequently informed her that her present contract would soon cease. The definite-term contract did not specify an expiry date. Melgar was offered another, or fifth, fixed-term contract which provided for an obviously less stable employment relationship than the previous one. She did not sign it but instead brought an action by claiming reinstatement under the previous contract on the ground that she had been discriminated against because of her pregnancy. The national court then referred several questions. The first of these was whether Article 10 of Directive 92/85 is capable of having direct effect. The Court's answer was yes, since Article 10 imposes on employers a precise obligation "which affords them no margin of discretion in their performance"⁸⁸. The second question asked whether Article 10 of Directive 92/85 - providing that dismissal of a pregnant worker is allowed in cases "not connected with their condition which are permitted under national legislation and/or practice" - requires national legislation to draw up a list which specifies reasons not connected with pregnancy and allowing dismissal of pregnant workers. The ECJ pointed out that Directive 92/85 is a minimum requirement directive and does not impose an obligation on Member States to draw up such lists⁸⁹. Article 10 of Directive 92/85 also indicates that dismissal could take place only "where applicable, provided that the competent authority has given its consent". The fourth question was whether it imposes an obligation on the Member State to have such an authority. The response was, no. The words "where applicable" indicates that this requirement is applicable only in the Member States where a system of prior consent is established⁹⁰.

By the third question, the Court was asked whether Article 10 of Directive 92/85 precludes non-renewal of fixed-term contracts. The Court went on to refer to the *Tele Danmark* judgment, where it held that Directives 76/207 and 92/85 obviously do not distinguish between part-time and full-time employment contracts. However, Article 10 of the Directive does not require renewal of a fixed-term contract which has come to an end, and it cannot be regarded as dismissal⁹¹. On the other hand, if the reason for non-renewal or prolongation is pregnancy or

⁸⁷ Case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915.

⁸⁸ Case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915. Paragraph 33.

⁸⁹ *Ibid.*, para. 38.

⁹⁰ *Ibid.*, para. 51.

⁹¹ *Ibid.*, para. 45.

maternity, this constitutes direct discrimination contrary to Articles 2(1) and 3(1) of Directive 76/207⁹².

The most important finding of the Court in *Melgar* is that non-renewal of a fixed-term contract could be contested. Most probably, the greater part of Member States' national laws do not explicitly provide for such a right, because it is unlikely that legislators predicted that such a situation could arise. The second important finding is that Article 10 of Directive 92/85 is capable of having direct effect. Along with other dismissal claims, it allows contest of non-renewal of a fixed-term contract, and although applicable in this case⁹³, direct effect is restricted to vertical relationships only⁹⁴.

Self-employed persons

There is no ECJ case-law on interpretation of Directive 86/613 as regards equal treatment of self-employed persons during pregnancy. However, since Article 4 of Directive 86/613 refers to Directive 76/207, it allows to conclude that parallels may be drawn with respective case law regarding treatment of pregnant workers. It also allows the author to conclude that a person who receives a service is precluded from terminating a service agreement due to the mere fact of pregnancy of the service provider, nor is it allowed to refuse engagement into a service contract due to pregnancy of the service provider.

As regards the promising title of Directive 86/613, specifying that protection of self-employed women during pregnancy and motherhood is provided, there is no ground for optimism. Article 8 just obliges the Member States to examine the conditions under which self-employed women and wives of self-employed persons have access to services supplying temporary replacement or national services and are entitled to cash benefits under a social security system. As Foubert rightly points out, this provision “does not oblige the Member States to take any specific action, or any action at all”⁹⁵.

This means that Directive 86/613 in its substance does not provide for any special right of self-employed women or the wife of a self-employed person except those provided by Directive 76/207. Consequently, in the context of social security, neither Directive 86/613 nor Directive 79/7 requires any special protection during pregnancy.

⁹² *Ibid.*, para. 46.

⁹³ Case 103/88, *Fratelli Constanzo SpA v Comune di Milano*, paragraphs 30 and 31, European Court Reports 1989, page 1839.

⁹⁴ Case 152/84. *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723. Paragraph 48.

⁹⁵ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, footnote no.426 at page 98.

Directive 79/7 only allows the conclusion that if self-employed persons are subject to insurance of risk of sickness, self-employed women are entitled to sickness allowance under a statutory social insurance scheme. The same is true if the wife of a self-employed person under Article 6 of Directive 86/613 has joined a statutory social insurance scheme.

Social security

Article 4(2) of Directive 79/7 provides that the principle of equal treatment shall be without prejudice to the provisions relating to maternity protection. There is no case-law of the ECJ on this matter. However, if drawing parallels with Article 2(3) of Directive 76/207 the wording of both provisions is very similar with the exception of the word “pregnancy”. This suggests that Article 4(2) of Directive is not intended to give any special right to women during pregnancy.

The ECJ has ruled with regard to Article 2(3) of Directive 76/207 that special protection during pregnancy and maternity cannot be subject to less favourable treatment⁹⁶ and such treatment constitutes direct discrimination based on sex. In turn, Article 4(1) of Directive 79/7 prohibits direct and indirect discrimination, so it follows that this provision prohibits less favourable treatment in matters of social security due to pregnancy.

Although the *McKenna*⁹⁷ case concerned equal pay, nevertheless it gives guidance for sickness allowance covered by state social security. Consequently, from the *McKenna* case and Article 4(1) of Directive 79/7, it can be presumed that if a pregnancy-related illness occurs and sickness allowance is provided by state social security, then most probably pregnant workers are subject to the same treatment as other sick workers.

Latvian law

Labour law

Latvian Labour law has many explicit provisions concerning special protection of pregnant workers and several neutral provisions which nevertheless may affect a pregnant worker in a different way than other workers.

Access

Recently Article 33 was amended⁹⁸. Provisions allowing asking a candidate a question on her pregnancy where an employment contract is

⁹⁶ Case C-191/03. *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011. Paragraph 26.

⁹⁷ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2.

⁹⁸ Amendments was adopted on 21st of September, 2006 and on the date of submission of this thesis are not published yet..

intended to be concluded for a fixed term, imply that pregnancy could render impossible performance of a considerable part of that employment. This provision obviously has its roots in the *Habermann-Beltermann* and *Webb* judgments, where the ECJ put stress on the fact that employment contracts are concluded for an indefinite term, thus temporal interruption of their performance cannot serve as a basis for dismissal of a pregnant worker⁹⁹.

As discussed above, the question of fixed-term contracts and pregnancy was unclear until the *Tele Danmark* judgment, where the court ruled that neither Directive 76/207 nor Directive 92/85 makes a distinction between fixed-term and indefinite term contracts¹⁰⁰. Thus, fixed term employment does not serve as a basis for refusal to employ or dismiss a pregnant person. Consequently, the employer does not have any right to ask – but a candidate has a duty to inform - about pregnancy¹⁰¹. Amendments to Article 33(2)(1) were prepared by the Ministry of Welfare due to the author's publication of an article on the compatibility of Latvian labour law with EC law¹⁰².

Article 36 of the Labour law provides that an employer has the right to ask a candidate to undergo medical tests in order to verify whether the state of health of the candidate is appropriate for performance of the work in question. In the medical certificate, the doctor is allowed to show only whether the state of health of a person is appropriate for performance of the job or not, without specification of a reason. There is a risk that in case of pregnancy of a candidate, a doctor could declare in a medical certificate that a candidate is not appropriate for performance of intended work. A doctor could derive such a conclusion not because of the general state of health of the candidate but because of current pregnancy. Since EC law and Latvian labour law preclude refusal to employ a candidate on grounds of pregnancy, it follows that correct application of Article 36 in conjunction with Articles 3(1) of Directive 76/207 and Article 34 of the Latvian Labour law require a doctor in a medical certificate to specify only whether the general state of health of a candidate allows performance of intended work, without taking into account her pregnancy.

⁹⁹ Case C-421/92. *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Oof.e.V.*, European Court Reports 1994 Page I-01657. Paragraph 25. Case C-32/93. *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567. Paragraph 27.

¹⁰⁰ Case C-109/00. *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993. Paragraph 33.

¹⁰¹ *Ibid.*

¹⁰² See Kristīne Dupate, *Vai Darba likums atbilst Eiropas Savienības tiesībām*. Jurista Vārds, 2004. 21.septembris, Nr.36 .

Working conditions

Exposure to agents

According to Article 37(7) of the Labour Law, an employer is precluded from employing a pregnant worker, a worker who has given birth and a year after it or a worker who is breastfeeding in working conditions dangerous for the health of the employee and her child after the worker has notified her condition by medical certificate. Article 99 (1) of the Labour Law obliges an employer after receipt of a medical certificate to prevent any risk which could negatively affect the health and safety of a pregnant worker by providing safe working conditions or by shortening working time so as to allow exclusion of risk. If this is not possible, then the employer must move the pregnant worker to other work or if this is also impossible – grant leave¹⁰³. This special treatment to pregnant workers is granted by temporary amendments to the employment agreement, since Article 99 is provided in the section on amendments to employment contracts.

The Law on health and safety provides that pregnant workers have extra rights regarding conditions to health and safety which are subject to assessment of exposure to agents and/or medical certificate requiring special protection¹⁰⁴. Regulations of the Cabinet of Ministers “On procedure of internal assessment of working environment”¹⁰⁵ provides section IV on assessment of working environment for pregnant workers and workers during the period after birth and women who are breastfeeding. Annexes II and III are analogical to Annexes I and II of Directive 92/85. Guidelines¹⁰⁶ adopted in accordance with Article 3 are not reflected in any Latvian normative act. Most probably, they are not even translated into Latvian¹⁰⁷. As regards non-implementation of guidelines, this is not a breach of EC law because guidelines are not legally binding; however, according to Article 3(2) of Directive 92/85, Member States must bring these guidelines to the attention of all employers and all female workers and their representatives.

As regards other EC directives specifying health and safety requirements¹⁰⁸, these are implemented in respective regulations of

¹⁰³ Article 99(2) of the Labour Law.

¹⁰⁴ Darba aizsardzības likums: LR likums. Latvijas Vēstnesis 2001. 6.jūlijs, nr. 105 (Law on labour health and safety protection), Article 22.

¹⁰⁵ Darba vides iekšējās uzraudzības veikšanas kārtība: MK noteikumi Nr.379. Latvijas Vēstnesis 2001. 29.augusts, nr.123 (On procedure for internal assessment of working environment).

¹⁰⁶ Communication from the Commission on the guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) /* COM/2000/0466 final */

¹⁰⁷ Telephone interview with state official of Unit on Health and safety policies of Work department at Ministry of Welfare on 13 July 2006.

¹⁰⁸ Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through

Cabinet of Ministers which implement the respective directives. However, special treatment of pregnant workers under Latvian legislation is not limited to EC health and safety legislation only. For example, regulations of Cabinet of Ministers “On procedure, on criteria how state of health of a sailor is assessed in order to work on board and criteria for defining compatibility”¹⁰⁹ provides that a person under the age of 18, who has not sailed previously or who has not sailed for five years is not valid for work on board due to pregnancy, while in the rest of cases a person is valid for work on board until the 6th month of pregnancy taking into account the functions she has to perform and the shipping area she has to sail in. It is highly doubtful whether those restrictions are substantiated from the medical point of view. Moreover, there is no difference between the effect of sailing on the normal pregnancy of a pregnant sailor who has sailed before and on the normal pregnancy of a pregnant sailor who has not sailed before.

Other special work conditions

Article 138(6) provides as follows:

(6) It is prohibited to employ at night persons who are under 18 years of age, pregnant women and women for a period following childbirth up to one year, but if a woman is breastfeeding then during the whole period of breastfeeding, if a medical certificate specifies that night work exposes a risk to the health and safety of a woman or her child.

The wording of this provision is unclear, because it does not explicitly provide whether the condition of a medical certificate concerns only the breastfeeding period or also the period of pregnancy and one year after birth-giving. This situation becomes more confusing due to presence of rights on employment of persons under the age of 18. It is clear that the

drilling (eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 348, 28.11.1992, p. 9–24.

Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 245, 26.8.1992, p. 6–22.

Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 393, 30.12.1989, p. 1–12.

Council Directive 92/104/EEC of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground mineral-extracting industries (twelfth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 404, 31.12.1992, p. 10–25.

Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation. OJ L 159, 29.6.1996, p. 1–114.

¹⁰⁹ Kārtība, kādā nosaka jūrnīeku veselības atbalstītu darbam uz kuģa, un atbilstības noteikšanas kritēriji”: MK noteikumi Nr.374. Latvijas Vēstnesis 2003. 16.jūlijs, nr.105. (On procedure and assessment of state of health of sailors for work on board and criteria for defining compatibility).

condition of a medical certificate does not concern their rights. According to Article 7 of Directive 92/85, Article 138(6) must be interpreted so that night work is conditional upon a medical certificate not only for workers who are breastfeeding, but also for those who have recently given birth, and pregnant workers. Indeed, the provision which makes prohibition of night work conditional upon a medical certificate was amended by amendments adopted on 7 May 2004¹¹⁰, soon after accession to the EU; thus the intent of the respective amendments was to comply with Directive 92/85. Consequently, Article 138(6) must be interpreted in the light of Article 7(1) of Directive 92/85, i.e., that night work is conditional upon a medical certificate to pregnant workers, workers who have recently given birth, and workers who are breastfeeding.

Article 136(6) precludes employment of a pregnant worker in overtime work. Article 136(7) envisages the right of a pregnant worker to work overtime if she agrees to it in writing; thus Article 136 will be in conformity with Directive 76/207. This is because the provision of Article 136(6) is a special protection during pregnancy and maternity which goes beyond what is necessary due to biological differences. It reflects the socially-construed protection which negatively affects a woman's right to choose for herself conditions of employment. It is unclear under what conditions the legislator chose excessive protection of pregnant workers. For example, Article 53(2) from the beginning of the adoption of the Labour law¹¹¹ provides that it is allowed to send a pregnant worker on a business trip, if she agrees to it in writing. Article 147(1) implements Article 9 of Directive 92/85 and provides for the right to ante-natal examinations if those examinations are impossible outside working time.

Furthermore, the labour law provides pregnant workers with extra rights, which is not required by Directive 92/85. Article 134(2) gives the right to a pregnant worker to require part-time work. This right should be considered as the voluntary will of a pregnant worker, not as a requirement specified by conditions of health and safety or medical certificate. If part-time work is necessary for the health and safety of a pregnant worker, it is subject to the provisions of Article 99. It is important to distinguish part-time work under Articles 134(2) and 99 for the purposes of pay, which will be discussed below, and rights after the protection period. In particular, if Article 99 interpreted in conjunction with Article 154(5) in the light of Article 2(7) of amended Directive 76/207 requires guarantees of return to an equivalent post after the special protection period, Article 134(2) does not specify the rights of an employee and the obligations of an employer regarding when, how and if

¹¹⁰ Grozījumi Darba likumā: LR likums. Latvijas Vēstnesis 2004. 7. maijs, nr.72.

¹¹¹ The Labour Law was adopted on 20 June 2001 and came into force from 1 July 2002.

return to full-time work must be provided to the employee in question. Nor does EC law give an answer either, because the right provided by Article 134(2) is optional. Moreover, parallels could be drawn with the *Pedersen* case, where the Court ruled that the choice of a pregnant employee not to work which is not connected to a pathological condition or special risks for an unborn child is not intended to be protected by EC legislation¹¹².

According to Article 150(4), a pregnant worker has the right to require annual leave immediately before maternity leave, irrespective of the time she has worked for the respective employer, because usually a worker could only ask for annual leave during the first year of employment with the respective employer after six months of continuous employment by that employer. Article 37(7) of Law on civil service provides that a pregnant civil servant may be transferred to another populated place only with her consent.

Dismissal

Article 109(1) of the Labour Law precludes dismissal of pregnant women except in cases provided by points 1, 2, 3, 4, 5 and 10 of Article 101(1). It states:

(1) An employer has the right to give a written notice of termination of an employment contract only on the basis of circumstances related to the conduct of the employee, his or her abilities, or of economic, organisational, technological measures or measures of a similar nature in the undertaking in the following cases:

1) the employee has without justified cause significantly violated the employment contract or the specified working procedures;

2) the employee, when performing work, has acted illegally and therefore has lost the trust of the employer;

3) the employee, when performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment legal relationships;

4) the employee, when performing work, is under the influence of alcohol, narcotic or toxic substances;

5) the employee has grossly violated labour protection regulations and has jeopardised the safety and health of other persons;

...

10) the employer – legal person or partnership – is being liquidated.

¹¹² Case C-66/96. *Handels – og Kontorfunktionerernes Forbund I Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327. Paragraphs 48/50.

Thus, the requirements of Article 10 of Directive 92/85 are fulfilled. Even more¹¹³, the Labour law provides an exhaustive list of cases when dismissal of a pregnant worker must be considered as exceptional and not connected with her pregnancy. The legislator provides more favourable treatment for pregnant workers regarding dismissal. Generally applicable reasons for dismissal allow dismissal of a worker in several more cases - if the worker lacks professional skills, is not able to perform the duties engaged for, because of state of health testified to by medical certificate, or where a worker who previously had performed the respective duties is reinstated, or due to staff reduction¹¹⁴. However it is arguable whether conditions governing dismissal of pregnant workers are more favourable from the substantive point of view. Instances of dismissal such as lack of professional skills or reduction of staff are very easy to prove by the employer. If those reasons were allowed to apply to pregnant workers, too, then there would be a big risk of abuse of rights by employers. On the other hand, why should an employer bear loss caused by an under-qualified worker only because she is pregnant? And finally, why should such reason for dismissal exist at all, if the Labour law provides for a probation period which is intended for testing professional skills? A possible answer could be that professional skills could be lost during employment if occupation requires perpetual training.

Regarding the prior consent procedure requirement provided for by Article 10 of Directive 92/85, it is applicable to members of trade unions only. Article 110(1) provides that it is precluded to terminate an employment contract with a member of a trade union without the consent of the trade union¹¹⁵. This requirement is not applicable if the contract is terminated on the basis of provisions of points 4, 8 or 10 of Article 101(1). This procedure is applicable with regard to termination notice, but not to termination of the employment contract itself. The Supreme Court of Latvia has held that where an employee joins a trade union after receiving notice of termination, Article 110 is not applicable¹¹⁶.

¹¹³ In case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915. Paragraph 37.

¹¹⁴ Points 6, 7, 8, 9 of Article 101(1) Labour law.

¹¹⁵ The whole consent procedure is provided by Article 110 Labour law.

¹¹⁶ Augstākās tiesas Senāta Civillietu departamenta 2004.gada 6.okotobra spriedums lietā Nr.SK-515//Jurista Vārds 7(362), 22.02.2005. Decision of Supreme Court of Latvia delivered on 6 October 2004 in case No.SK-515.

Furthermore, the issue of correct application of Articles 47¹¹⁷ and 48 in conjunction with Article 109(1) must be discussed, because of one decision of the national court of first instance¹¹⁸. *Ghadijalija* was employed by the joint stock company “Dambis” as a secretary on 12 October 2004 with a probation period of three months. On 30 November 2004 she was notified about her dismissal from 3 December 2004. Ghadijalija contended that the real reason for her dismissal was her pregnancy, because she informed the employer about it verbally. However, officially she informed about the fact of her pregnancy on the day of dismissal, 3 December 2004, by providing a medical certificate. She claimed reinstatement and payment for forced idle-time.

The employer contended that it did not know about Ghadijalija’s pregnancy at the moment of notification of dismissal during the probation period and that she had not submitted any evidence of the fact that she had informed the employer of the fact of pregnancy before notification of termination of the employment contract.

The national court held that Article 46 of the Labour law provides for the purposes of testing an employee’s compatibility for a post, while Article 47 allows dismissal of an employee during the probation period without specifying a reason for dismissal on the part of the employer.

The national court found that notification of termination of employment agreements is not the same as dismissal of an employee and that Article 109(1) concerns notice of termination but not dismissal. During the time when the termination notice was given, Ghadijalija was in the 10th week of her pregnancy, thus the pregnancy was not obvious. Since Ghadijalija had failed to prove that she had informed the employer of the fact of pregnancy prior to notice of termination being given, the national court had no basis to consider that the employer knew about the pregnancy. Consequently, if the employer did not know about her

¹¹⁷ The Labour law provides:

Article 46. Specification of a Probation Period

(1) When entering into an employment contract, a probation period may be specified in order to assess whether an employee is suitable for performance of the work entrusted to him or her. If an employment contract does not specify a probation period, it shall be regarded as entered into without a probation period. A probation period shall not be determined for persons under 18 years of age.

(2) The term of a probation period may not exceed three months. The said term shall not include a period of temporary incapacity and other periods of time when the employee did not perform work for justified cause.

Article 47. Consequences of a Probation Period

(1) During the probation period, the employer and the employee have the right to give a notice of termination of the employment contract in writing three-days prior to termination. An employer, when giving the notice of termination of an employment contract during a probation period, does not have a duty to indicate the cause for such notice.

(2) If the contracted term of a probation period has expired and the employee continues to perform the work, it shall be considered that he or she has passed the probation period.

¹¹⁸ Rīgas pilsētas Centra rajona 2005.gada 26.janvāra spriedums Civillietā Nr.C27176204. Decision of Riga City Central district court delivered on 26 January 2006 in case No.C27176204.

pregnancy, it was not obliged to obey the provision of Article 109(1), but according to Article 47 an employer is not obliged to give reasons for dismissal during the probation period. Besides, first, Ghadialija as a claimant had failed to prove the facts on which she relied in accordance with Article 93 of the Civil procedure law and second, she did not claim the invalidity of the termination notice and reinstatement, but according to Article 192 of the Civil procedure law, the national court had no right to go beyond the ambit of the claim. According to this, national court decided that the claim was unfounded.

This case explicitly demonstrates that the national court is not familiar with EC law at all.

Starting to analyse this case, it is noteworthy that clearly the claim was prepared by Ghadialija herself, not by a lawyer. No legal norms were mentioned on which claim was based. It follows that if the court had accepted such a claim, it was under obligation to apply all provisions of law concerning the case in question. The first mistake is that the national court did not call into question Article 48 precluding termination of an employment contract during the probation period due to discrimination. Obviously, the judge did not know that dismissal due to pregnancy is direct discrimination; thus, the provisions of Article 109(1) must be analysed in conjunction with Article 48.

Furthermore, since pregnancy was the supposed reason for the dismissal, then the issue of reversed burden of proof comes into question. According to Article 29(3), a person should present the facts from which possible discrimination may be presumed. Sufficient facts are *prima facie* discriminatory facts¹¹⁹. Pregnancy of an employee constitutes a *prima facie* fact of discrimination. It follows that the fact of pregnancy of Ghadialija during information on termination of the employment contract suffices for the purposes of shifting the burden of proof to the employer.

Next comes the issue of the right of the employer under Article 47 not to specify the reasons for dismissal during the probation period versus the reversed burden of proof obligation under Article 48 applicable together with Article 29(3). First, there is a big debate on whether dismissal on the grounds of Article 47 is subject to a claim before the court at all. Kalniņš contends that dismissal on grounds of Article 47 cannot be contested¹²⁰, while Skultāne is of the opposite opinion¹²¹. The

¹¹⁹ Case C-127/92. *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535. Paragraph 18. See also case C-196/02. *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*. Paragraph 74

¹²⁰ Erlens Kalniņš, *Prasība par atjaunošanu darbā/Latvijas Vēstnesis*, *Jurista Vārds*, 12 (317), 30.03.2004. He relies on Article 2(2) of ILO Convention No.158 “Termination of Employment Convention” which allows state parties to exclude workers serving a period of probation from application of some provisions of this convention; consequently he concludes that the Latvian legislator has chosen not to apply the provisions of Article 4 of the convention to workers during the probation period.

author agrees with the point of view of Skultāne, basically on the grounds of right to fair trial and that, irrespective of the probation period, an employment contract is a civil law contract and thus subject to challenge. Moreover, Article 48 - although it provides for special cases of dismissal during the probation period - nevertheless indicates that Article 47 is subject to challenge. Regarding the case in question, there is no debate on whether she had the right to contest Article 47, because the matter concerns discrimination, thus Article 48, which explicitly allows bringing a claim before a court, is applicable.

Coming back to the obligation of the employer to provide under Article 48 in conjunction with Article 29(3) reasons for dismissal on grounds of Article 47, there arises the question on what right under Article 47 the employer has. Is it only a right not to provide a reason for dismissal or does it provide the right to dismiss on no ground at all? Writers contend that Article 47 does not provide the employer with the right to dismiss without reason¹²². The author also contends that were it otherwise, no obligation for the employer would arise with regard to Article 48, too. Consequently, proper enforcement of EC sex equality law would be jeopardised. Thus it follows that when the national court has shifted the burden of proof to the employer in accordance with Article 48 in conjunction with Article 48, the employer is under an obligation to specify objective reasons for dismissal not connected with the pregnancy of the worker.

Besides, since it is a case of a pregnant worker, Article 48 must be applied in conjunction with Article 109(1). This means that, if for justification of dismissal under Article 48 any objective reason fits that is not connected with the sex of the employee, in the present case concerning pregnancy reasons for dismissal provided by Article 109(1) is applicable for justification of dismissal only.

As regards justification that the employer was not informed of the pregnancy at the time of giving termination notice, there is no clear answer from the standpoint of EC law. Under Article 2(a) of Directive 92/85, protection of a pregnant worker under this directive is conditional upon information of the employer¹²³. Consequently, if the employee has

¹²¹ Skultāne I., Darba devēja uzteikums pārbaudes laikā. Jurista Vārds, 2004. 10. augusts, nr.30. Ilze Sultāne is a judge of the Supreme Court of Latvia. She contends that the intent of the Latvian legislator when adopting Article 47 was not to deprive a person of the right to a fair trial in breach of Article 92 of the Latvian Constitution, Article 6 of Convention for the protection of human rights and fundamental freedoms, also to German practice.

¹²² See in this regard, Ilze Skultāne, Darba devēja uzteikums pārbaudes laikā. Jurista Vārds, 2004. 10. augusts, nr. 30. Radzēvičs J., Darba likuma nianšes. Mans Īpašums, 2002., Nr.11.

¹²³ Petra Foubert also expresses fear of application of the provisions of Article 2. See Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at pages 109-110, paragraph 226.

failed to inform her employer, Article 10 is not applicable. Here comes into play Directive 76/207, which also precludes dismissal on grounds of pregnancy¹²⁴, but it does not make prohibition of dismissal of a pregnant worker conditional upon information of the employer of the fact of pregnancy. Thus application of Article 109(1) can not be conditional upon the fact of information.

Next comes the issue of appropriate remedies under Article 48. Kalniņš argues that Article 48 does not provide for the right to reinstatement but only for compensation¹²⁵, Skultāne is of the view that Article 47 itself allows claiming reinstatement, if the employer can not prove that the person performed work in an unsatisfactory manner¹²⁶. However this is the case where Article 109(1) is involved. In this respect, Article 109(1) refers to Article 101, but Article 101 is subject to the provisions of Article 122, which provides for the right to claim invalidity of notification of termination of an employment contract, and reinstatement. Were it otherwise and discriminatory termination of an employment contract during the probation period on account of pregnancy would be subject to Article 48 and the national court would reject reinstatement, the author cannot imagine the amount of compensation which would be provided for an unfairly dismissed pregnant person. Such dismissal affects her right to maternity allowance to which she would not be entitled if unemployed and the amount of child-care allowance the amount of which is also directly linked to employment and the amount of salary. Besides, the national court must take into account the reality of life – pregnant persons have considerable difficulties in finding new work.

The next issue is whether a person whose fixed-term contract expires and no new contract is offered by the same employer or renewal of a previous one has the right under the Labour law to claim discrimination on grounds of sex according to the *Melgar* case¹²⁷. Article 122 provides:

An employee may bring an action in court for the invalidation of a notice of termination by an employer within a one-month period from the date of receipt of the notice of termination. In other cases, when the right of an employee to continue employment legal relationships has been violated, he or she may bring an action in court for reinstatement within a one-month period from the date of dismissal.

¹²⁴ Case C-179/88. *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court reports 1990 Page I-03979. Paragraph 13.

¹²⁵ Erlens Kalniņš, Prasība par atjaunošanu darbā//Latvijas Vēstnesis, Jurista Vārds, 12 (317), 30.03.2004.

¹²⁶ Skultāne I., Darba devēja uzteikums pārbaudes laikā. Jurista Vārds, 2004. 10. augusts, nr.30.

¹²⁷ In case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915.

According to Article 122, termination of an employment contract can be contested not only in cases when the procedure requires prior notification of termination but also in other cases¹²⁸. Kalniņš as an example of instances when termination of an employment contract can be contested under Article 122, proposes Article 44(5), 98(1) and 98(4)¹²⁹. However, those articles explicitly refer to the right of challenge under Article 122.

Going back to the *Melgar* case, where the ECJ held that an employee whose fixed-term contract has come to an end and is not renewed due to reasons which are subject to protection under Article 10 of Directive 92/85 constitutes direct discrimination based on sex, it is necessary to explore whether the pregnant worker whose fixed-term contract has expired has the right to contest its non-renewal. Article 113 of the Labour law provides that a fixed-term contract comes to an end when the term specified in the contract expires. Besides, unlike Articles 44(5), 98(1) and 98(4), Article 113 does not explicitly refer to Article 122. Consequently, the legislator has not intended that Article 113 could be contested under Article 122. Article 29(1) provides for prohibition of discrimination when giving notice of termination, thus it is not applicable in cases when a fixed-term contract comes to an end due to expiration of the term. Article 109(1) is also not applicable to this case, because it also provides for a prohibition on giving a termination notice to a pregnant worker. It follows that in principle the Labour law does not allow for protection of rights provided by Article 10 of Directive 92/85 as interpreted by the ECJ in *Melgar*.

In the context of this case it must be noted that the provision of Article 10(2) of Directive 92/85 is not fully implemented, since Article 48 of the Labour law does not provide that for pregnant workers grounds for dismissal during the probation period must be provided and that they must be in written form.

Pay during pregnancy

As already described above, Article 99 provides that in case working conditions may negatively affect the health of a pregnant worker, the employer must adjust safe working conditions and working time, or move her to other work or grant leave. During that period, the pregnant worker is entitled to average pay. The provisions of Article 99 are clear, but the provision of Article 62 is a little confusing. Article 62 in general provides for organization of remuneration, in particular it specifies remuneration of time work and piece work. Among that, Article 62(3) states that in cases

¹²⁸ See also Kalniņš E., Prasība par atjaunošanu darbā. Latvijas Vēstnesis, Jurista Vārds, 2004., 30.marts, nr.12.

¹²⁹ Kalniņš E., Prasība par atjaunošanu darbā. Latvijas Vēstnesis, Jurista Vārds, 2004., 30.marts, nr.12.

where, for the protection of health and safety of a pregnant worker the norms of piece work are diminished, the employer must retain average pay. No word is said in Article 62 on what salary an employer must retain for a pregnant worker who performs time work. It is unclear why the legislator decided to insert Article 62(3) while Article 99 already explicitly regulates this issue. However, taken all together the Labour law provides for better conditions than required by Article 11(1) of Directive 92/85, which also allows for national legislation to provide an adequate allowance.

No other Latvian law than Article 99 of the Labour law provides for pay or allowance for the purposes of special protection of health and safety of a pregnant worker. This means that a pregnant worker is entitled to average pay, which according to the conditions of Article 75 which provides for calculation of average pay, constitutes full pay. Average pay constitutes full pay if a person has worked during the previous 12 months. No periods of sick leave are taken into account for that purpose. However, a period of 12 months constitutes 52 weeks but pregnancy-related illness is a shorter period anyway, thus absences due to pregnancy-related illness do not negatively affect calculation of average pay. Among other provisions, Article 75(6) provides that average pay of hourly work is calculated by dividing the sum of salary during the previous six months by hours worked. No solution is proposed for cases where a pregnant worker has worked less hours a day due to health and safety protection, but under Article 99 was entitled to average pay which constitutes full pay.

Article 147(1) give the right to a pregnant worker to ante-natal examinations during working time, but it is silent about pay, although Article 9 of Directive 92/85 requires that ante-natal examinations during working time must be “without loss of pay”. Article 62 on organization of pay does not provide anything on pay for time spent for ante-natal examinations, either. For matters of pay connected with ante-natal examinations, Article 99 is also not applicable, because application of that provision is conditional upon assessment of health and safety or requirements of a medical certificate, while ante-natal examinations are not conditional upon special medical certificate because they are an integral part of any pregnancy. This Article 9 of Directive 92/85 is not fully implemented in Latvian law.

If a woman decides to work part-time and in accordance with Article 134(2) requires part-time work to be arranged by the employer, she is not entitled to retention of full pay under Article 99. This is a logical conclusion which follows from the different circumstances of application of Articles 99 and 134(2). If the provisions of Article 99 are subject to mandatory health and safety protection, then the provisions of

Article 134(2) if an extra right granted to a pregnant worker which is optional and subject to the free choice of worker, apply.

It is questionable whether matters of sick pay are subject to equal pay issues. Sick pay in Latvia is subject to the state social insurance system; nevertheless, sick allowance for the first 14 days is paid by the employer. The law on maternity and sickness insurance¹³⁰ provides for a minimum amount of sick pay during those first 14 days, but the employer is free to provide higher pay whether under an individual employment contract or under collective agreement. Since sick pay during that period is paid by the employer, it is governed by Article 141 and Directive 75/117, not by Directive 79/7 which comes into play at the 15th day of sickness.

Social security law

Employed pregnant persons

Under the Latvian social insurance system, absences due to pregnancy-related illness are subject to the general sickness allowance system and have no exceptional status. From the case-law of the ECJ, it follows that sick pay and consequently also sickness allowance under the state social insurance system might not be below the minimum, which means that allowance cannot be so low as to undermine the objective of protection of pregnant workers.

Latvian net sickness allowance is higher than net salary. This is because sickness allowance is of the amount of 80% of salary¹³¹ and is free of any taxes while 100% gross salary is subject to income tax and partially to state social insurance payments, thus a worker actually working receives net salary which constitutes 64% of gross salary. Since sickness allowance is provided by the state social insurance scheme for 52 weeks if sickness is uninterrupted or 78 weeks within a period of three years¹³² there is no fear that a person could stay unprotected during pregnancy-related illness occurring before maternity leave.

Another issue is recently proposed amendments to the Regulations of the Cabinet of Ministers providing that in case of illness lasting for more than 6 months, a person must undergo a medical commission in order to establish disability. The Ministry of Welfare in this case departs from the male norm and does not take into consideration that pregnancy-related illness could last for 9 months and such illness is not subject to establishing disability taking into account the Court's assertion in

¹³⁰ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance, Article 36.)

¹³¹ *Ibid.*, Article 17.

¹³² *Ibid.*, Articles 13 and 17.

*Brown*¹³³, that disorders and complications which may cause incapacity for work form inherent risks specific to the condition of pregnancy¹³⁴.

As regards calculation of sick pay, recently Article 32 of the Law on maternity and sickness insurance was amended¹³⁵. Now it provides that in case a person was on sick leave during the period taken into account for the purposes of calculation of sick allowance, the period preceding that period must be taken into account up to 32 months preceding the moment when actual sickness occurred. Such amendments were made due to the efforts of the State Human rights office and the author as representative of the non-governmental organization “Latvian Coalition for gender equality”. The Ministry of Welfare was advised to take into account special protection of pregnant workers who are absent due to pregnancy-related illness. Although the cases of the ECJ referred to concerned prohibition of dismissal, in particular the *Brown* case, does not concern state social insurance, nevertheless it was argued that women cannot be treated less favourably on account of absences due to pregnancy-related illness. That argument was accepted by the Ministry of Welfare and amendments providing for more favourable calculation of sickness allowance than before¹³⁶ is of general application – they do concern all workers.

Self-employed pregnant persons

A self-employed person in case of pregnancy-related illness has the right to sickness allowance starting from the 15th day if illness. The general sickness allowance scheme is applicable to them. As regards calculation of sickness allowance – a longer period must be taken into account than for employed persons¹³⁷.

The provisions of amended Article 32 of the Law on maternity and sickness insurance discussed above also concerns self-employed persons. The period taken into account for the purposes of calculation of sickness allowance could be up to 39 months before the quarter when the socially insured occasion has occurred¹³⁸, instead of the previous 40% of average wage declared by the government.

¹³³ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

¹³⁴ Amendment project adopted by State secretaries on meeting on 10 August 2006 to Regulations of Cabinet of Ministers No 152 “Order of handing out sickness certificates” adopted on 3 March 2001.

¹³⁵ Grozījumi likumā “Par maternitātes un slimības apdrošināšanu”: LR likums. Latvijas Vēstnesis, 2004. 12.decembris.

¹³⁶ Previously, Article 32 of the Law on maternity and sickness insurance provided that if during a period taken into account for the purposes of calculating sickness allowance a person was absent due to sickness, sickness allowance may constitute only 40% of average insurance salary declared by the government.

¹³⁷ See section on social security.

¹³⁸ Article 32(2) of the Law on maternity and sickness insurance.

Unemployed persons

An unemployed person if she is not entitled to unemployed allowance has the right to a guaranteed minimum income declared by the state¹³⁹, which presently comprises 24 lats a month¹⁴⁰, but for certain groups of persons in Riga it is 45 lats a month¹⁴¹. Guaranteed minimum income does not protect the health of the mother and expected child, because real living costs for one person in Latvia monthly amount to 116 lats¹⁴²

¹³⁹ Sociālo pakalpojumu un sociālās palīdzības likums: LR likums. Latvijas Vēstnesis, 2002. 19.novembris, nr.168)(Law on social services and assistance), Article 36.

¹⁴⁰ Grozījums Ministru kabineta 2003.gada 9.decembra noteikumos Nr.693 “Noteikumi par garantēto minimālo ienākumu līmeni un pabalsta apmēru garantētā minimālā ienākuma līmeņa nodrošināšanai”: MK noteikumi Nr.881. Latvijas Vēstnesis 2005. 25.novembris. (Amendments to regulations of Cabinet of Ministers adopted 9th of December 2003 “Regulations on guaranteed minimum income level and amount of allowance for provision of guaranteed minimum income level”).

¹⁴¹ Par paaugstināto garantēto minimālo ienākumu līmeni Rīgā: Rīgas domes saistošie noteikumi Nr.84. Latvijas Vēstnesis 2005. 24.februāris, nr.32 (On increased guaranteed minimal income level in Riga

¹⁴² Data of Latvian State Central Office of Statistics.

Chapter 11.

Rights during and after maternity leave

This section will deal with rights connected with maternity leave, starting from the beginning and till the end of maternity leave, and the effect on subsequent rights of absence on account of maternity leave.

International law

The same as regards rights during pregnancy, rights during and after maternity leave are explicitly provided by only two international law documents - the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹, and the International Labour Organization (ILO) Maternity protection Convention No.183.

Article 11(2) (a) and (b) of CEDAW obliges state parties to ensure prohibition of dismissal on grounds of maternity leave and to introduce maternity leave pay or comparable social benefits without loss of former employment, seniority, and social allowances.

Article 4 of the ILO Maternity protection convention provides for maternity leave of not less than 14 weeks and for compulsory maternity leave of not less than 6 weeks if so agreed by social partners. Article 5 requires grant of leave if necessary due to complications arising from childbirth. Cash benefits according to Article 6 must ensure maintenance of a woman and her child in proper health conditions and suitable standard of living. Maternity benefits cannot be less than two-thirds of a woman's previous earnings or the amount taken into account for the purposes of calculating maternity benefit. State parties must provide such conditions for entitlement to maternity benefits for which the large majority of women are able to qualify. If a woman does not meet the conditions to qualify for maternity benefits, she must be entitled to adequate social assistance. As regards breastfeeding, according to Article 10 every mother must be entitled to at least one daily break for breastfeeding her child. Recommendations No.95 and No.191 call on State parties to provide higher standards of maternity protection, for example by providing women with maternity benefits in the amount of 100% of previous salary and after maternity leave with an equivalent position under the same employment conditions taking into account the period of maternity leave².

¹ Hereinafter CEDAW.

² Nevilles Rubin, Evance Kalula, Bob Hepple, Code of International Labour Law. Volume II Book I Law, Practice and Jurisprudence, Cambridge University Press, 2005, at pages 580-585.

EC law

EC legislative documents

As with pregnancy issues, maternity issues are explicitly regulated by two EC law documents – Directive 76/207 and 92/85. Directive 76/207 after amendments clearly provides for the purpose of *ex* Article 2(3) now Article 2(7). In particular, it states the general principle that less favourable treatment on grounds of maternity leave constitutes discrimination based on sex and provides for the right after maternity leave to return to an equivalent post.

Directive 92/85 provides for the right to maternity leave and its minimum length, as well as setting the minimum requirements on maternity allowance and prohibition of dismissal. Regarding maternity allowance, not only Directive 92/85 but according to the ECJ³ also Article 141 and Directive 75/117 come into play, and consequently Directives 86/613 and 96/97 on occupational social security schemes. Directive 79/7 contains provisions on maternity protection as regards state social security systems, and concerns employed and as well unemployed persons. As regards the latter category provisions of Directive 86/613 provides for some obligations on the part of Member States on maternity protection.

Rights during maternity leave

Purpose of maternity leave

The purpose of maternity leave was defined by the ECJ in *Hofmann*. It held that maternity leave is intended to protect women in two respects:

First, it is legitimate to ensure the protection of woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by multiple burdens which would result from the simultaneous pursuit of employment.⁴

The Court has not changed this definition since then⁵. In *Hofmann*, the Court held that the right to maternity leave falls within the scope of Article 2(3) of Directive 76/207. Presently, the right to maternity

³ Case C-342/93. *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*, European Court Reports 1996 Page I-00475. Paragraph 14.

⁴ Case 184/83. *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047. Paragraph 25.

⁵ See in this regard case C-284/02. *Land Brandenburg v Ursula Sass*, European Court Reports 2004 Page I-11143. Paragraph 32.

leave is provided by Article 8 of Directive 92/85, too. Since the purpose of Directive 92/85 is health and safety protection, the first part of the definition given in *Hofman* perfectly fits it. The second part of the definition of the purpose of maternity leave poses a major problem. Writers⁶ see one of the basic problems of EC equality law here. At the time of adoption of the *Hofmann* judgment, EC law provided no provisions on health and safety. Indeed, the definition given in the *Hofmann* judgment was an interpretation of Article 2(3) of Directive 76/207, whose purpose is to establish equal treatment. In turn, equal treatment means that no distinction between the sexes may be drawn except as regards biological differences, but socially defined differences must be eradicated. The second part of the definition, defining the purpose of maternity leave, directly contradicts the principle of equal treatment, because it provides for socially-defined differences between the sexes – namely that women are considered better child-carers. The Court has not recognized this problem until presently. Even over fourteen years after *Hofmann*, in *Boyle* the Court still elaborated on the second purpose of maternity by saying that:

The ... maternity leave ... is intended in particular to provide the woman with the guarantee that she can look after her new-born baby in the weeks following childbirth⁷.

Length of maternity leave

The problem of the presence of socially-defined differences also concerns the length of maternity leave defined in EC and international law documents. Article 8 of Directive 92/85 provides for at least 14 weeks maternity leave. Article 4 of the ILO Maternity Protection Convention also provides for at least 14 weeks maternity leave. As Foubert argues, medical research shows that the biological needs of women require six to eight weeks for physical recovery from delivery and each extra week of maternity leave indicates care of the new-born baby, thus going beyond biological needs⁸.

⁶ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at pages 100 and 115, paragraphs 206 and 240; Petra Foubert, Does EC pregnancy and maternity legislation create equal opportunities for women in the EC labor market? The European Court of Justice’s interpretation of the EC Pregnancy directive in *Boyle* and *Lewen*, Michigan Journal of Gender and Law, 2002, University of Michigan Law School.

⁷ Case C-411/96. *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401. Paragraph 61.

⁸ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of

However Article 8(2) of Directive 92/85 provides for mandatory maternity leave of two weeks, thus allowing the rest to be conditional upon the free choice of the woman. Foubert points out that:

This creates the possibility for employers to put pressure on women who have just given birth to return to work prematurely. On the other hand, the Council did give the Member States the opportunity to oblige women to take fourteen weeks maternity leave or even more. This is much more than the physically recommended six to eight weeks of rest after childbirth.⁹

It is unclear whether the ILO Maternity Protection Convention obliges women to go on 14 weeks maternity leave¹⁰. Article 4(1) of the Convention provides that in order to obtain rights to maternity leave, women should provide their employer with a medical certificate; thus it could be presumed that not only the length but also maternity leave as such is subject to women's choice. A different interpretation of that provision would contradict Article 8(2) of the Directive. Further, Article 4(4) of the Convention tries to define compulsory maternity leave of six weeks after childbirth, but this is conditional upon the agreement of the parties to social dialog. For EU Member States, this provision cannot be conditional even upon agreement of parties to social dialog, again because of obligations under Article 8(2) of Directive 92/85¹¹.

It is interesting to speculate what the legislator was thinking about when writing Articles 7(2)(b) and Article 8(2) of the Directive. One provision allows grant of extended maternity leave if an employer cannot provide a worker with healthy day time work, while the other mentions only two weeks compulsory maternity leave. This would be understandable if there were no difference between pay, but there is. According to Pedersen¹², if the employer cannot provide a pregnant worker with safe working conditions, then she must be granted leave on full pay, while according to Gillespie¹³, maternity pay does not have to be

America”, Kluwer Law International, The Hague/London/New York, 2002, at pages 115 and 116, paragraphs 240 and 241.

⁹ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 116, paragraph 240.

¹⁰ Maternity Protection Recommendation No.R191, 2000 invites state parties to extend maternity leave up to 18 weeks.

¹¹ Presently ILO Maternity Protection Convention No.183 is ratified by 13 states, of which 7 are EU Member States, see ratifications at web page www.ilo.org

¹² Case C-66/96, *Handels – og Kontorfunktionerernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktioner-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327.

¹³ Case C-342/93. *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*, European Court Reports 1996 Page I-00475.

in the amount of full pay. So it follows that such inconsistency between the two provisions of Directive 92/85 is created by the ECJ.

In the *Boyle* judgment, the ECJ ruled on several aspects of application of Article 8 of Directive 92/85. First, the Court held that although Article 8 of Directive 92/85 provides for a minimum length of mandatory and statutory leave, nevertheless it is for the Member States to determine when maternity leave is to commence¹⁴. Second, it ruled that if a person on sick leave gives birth, then in principle the date on which paid maternity leave commences may be brought forward, but under condition that the worker has expressed her will to go on maternity leave before giving birth. Second, the Court ruled that a woman after giving birth is allowed, instead of maternity leave, to take sick leave and if sick leave ends before the expiry of maternity leave then she has the right to continue to be on maternity leave.

By contrast, an employer may require that a woman is not allowed to take sick leave during a supplementary period of maternity leave provided as an extra right by the employer unless she interrupts supplementary leave and elects to return to work. So, complex problems could arise only because sick pay is higher than maternity pay, as in the present case. However, this issue will be discussed later.

As regards the first finding of the Court, here it is crucial that a woman notify before sickness that she will take maternity leave. Otherwise, her employer could compel her to be on maternity leave for no longer than two weeks. This is also pointed out by the Court¹⁵. Moreover, it recalled the *Hertz* judgment, where the ECJ held that:

...it is for every member State, within the limits laid down in Article 8 of Directive 92/85, to fix periods of maternity leave so as to enable female workers to be absent during the pregnancy period in which the disorders inherent in pregnancy and confinement occur.¹⁶

In the context of the present case, this could mean that it is not upon the employer's choice to determine whether a worker is on sick leave or on maternity leave.

The third finding of the Court raises a line of questions. In particular, why can an employer not require a woman to elect to return to work in order to put herself under a sick leave scheme? As Foubert rightly points out, if the legislator has determined that compulsory leave must be at least two weeks, then it has presumed that two weeks is

¹⁴ Case C-411/96. *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401. Paragraphs 49.

¹⁵ *Ibid.*, paras. 48 and 49.

¹⁶ *Ibid.*, paras 50.

enough to protect women's health and safety¹⁷. Thus the Court's reasoning in Boyle that the employer may not set such conditions because it would comprise the purpose of maternity leave – recovery of woman's biological condition - contradicts what the legislator intended.

Furthermore, the Court held that maternity leave is intended for the purpose that a woman can look after her newborn baby, thus once again and more explicitly than ever before going beyond health and safety purposes and in contrast to the equality principle construing social differences between the sexes of women as better child-carers. Besides, the Advocate General notes that Directive 92/85 provides for continuous maternity leave, which thus cannot be divided into several separate terms¹⁸. As regards supplementary maternity leave and the requirement to return to work in order to be allowed to take sick leave, Foubert notes that this issue was not analysed by the Court from the equality perspective. It is clear that this issue falls outside the scope of Directive 92/85, but does it fall outside Directive 76/207? If supplementary leave is not for the purposes of health and safety protection, then its grant to women workers exclusively amounts to direct discrimination against male workers who are young fathers¹⁹.

Financial means during maternity leave

The Maternity Protection Convention requires cash benefits to be provided in accordance with national laws and regulations. The amount of those benefits must be at a level that ensures maintenance of a woman and her child in proper health condition and sustainable standard of living.

Article 11(2) provides that during maternity leave a woman should be maintained with pay or entitled to an adequate allowance. According to Article 11(3) an allowance should be considered adequate if it is at least equivalent to sick pay. It must be noted that according to Article 11 of Directive 92/85 and the case-law of the ECJ, financial means during maternity leave could be provided as pay, which falls within the scope of Article 141 and Directive 75/117, or as social allowance, which does not fall within the scope of the concept of equal pay. Thus maternity pay and maternity allowance are governed by different conditions under EC law.

¹⁷ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 116, paragraph 240.

¹⁸ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 19 February 1998. European Court Reports 1998 Page I-06401.

¹⁹ Petra Foubert, Does EC pregnancy and maternity legislation create equal opportunities for women in the EC labor market? The European Court of Justice's interpretation of the EC Pregnancy directive in Boyle and Lewen, Michigan Journal of Gender and Law, 2002, University of Michigan Law School.

Maternity pay

In *Gillespie*²⁰ the Court found that if maternity benefit is paid by an employer under legislation or collective agreement and is based on the employment relationship, then this constitutes pay within the meaning of Article 141 and Directive 75/117. However, crucial here was the Court's finding that a woman taking maternity leave is in a special position which requires special protection but is not comparable with a man or woman actually working²¹. Consequently, there is no comparator according to which pay in accordance with the equal pay principle should be determined. Besides, neither Article 119 nor Directive 75/117 requires that women should continue to receive full pay. The only point of departure as regards the amount of maternity pay is that benefit granted must be such as not to undermine the objective of maternity protection²², since Directive 92/85 was not applicable *ratione temporis* to the *Gillespie* case.

In its *Boyle* judgment the Court clarified the issue regarding amount of maternity pay. It held that the provisions of Article 11(3) requiring maternity allowance to be 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" is applicable to maternity benefits "irrespective of whether, in accordance with Article 11(2)(b) of Directive 92/85, it is paid in the form of an allowance, pay or a combination of the two"²³. The Court clearly extended the wording of Article 11(3), which refers to allowance only, not to pay. As justification for this, the Court put forward the argument that pay cannot be lower than required by Article 11(3), but on the other hand this argument was allowed to make the next conclusion, namely that since the provisions of Article 11(3) apply to maternity pay, too, it does not have to be higher than sickness allowance provided by social security legislation²⁴. This means that if an employer provides for higher sickness pay than required by social security legislation, then a woman on maternity leave is not entitled to this increased pay.

Foubert is of the same opinion, namely the Court interpreted Article 11(3) too broadly. She argues:

²⁰ Case C-342/93. *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*, European Court Reports 1996 Page I-00475. Paragraph 14.

²¹ Case C-342/93. *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*, European Court Reports 1996 Page I-00475. Paragraph 17.

²² *Ibid.*, para. 20.

²³ Case C-411/96. *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401. Paragraph 33.

²⁴ *Ibid.*, paras. 34 and 35.

... in Article 11(3) reference is made to the ‘worker concerned’ and not to ‘a worker’ in general. As a consequence, one can perfectly defend the view that a worker who is on maternity leave should be paid at least the amount she would personally receive in case of absence on grounds of illness.²⁵

Following this finding, the Court answered the other preliminary questions referred in the *Boyle* proceedings. It consequently found that it is not discriminatory for the employer to require repayment of the difference between statutory maternity pay and extra maternity pay provided by the employer if the woman fails to return to work one month after the birth of the child.

As regards accrual of pension rights under occupational schemes, the Court held that since this issue does not concern maternity pay or falls outside Article 11(2)(b), it falls within the scope of Article 11(2)(a) so that accrual of pension rights must be considered as other rights connected with an employment contract. Consequently, a woman during maternity leave is entitled to continue to acquire pension rights and this can not be conditional upon whether maternity pay is provided by employment contract or national legislation²⁶.

Notably, the Court in *Boyle* decided it unnecessary to go into the equal pay debate²⁷, which resulted in an inconsistent approach regarding equal pay matters. However, this finding allows the conclusion that maternity pay is just one element of pay during maternity leave. From this standpoint, the finding in the *Gillespie* ruling that although maternity pay comes within the scope of Article 141 and Directive 75/117, but does not have to be in the amount of full pay²⁸, obtains a different meaning.

Recently in *Mayer*²⁹ the Court reaffirmed that a worker on maternity leave is entitled to accrual of pension rights under an occupational pension scheme if according to Article 6(1)(g) of Directive 86/613 such rights are provided by an employment contract or national legislation and maternity benefit is paid by the employer. Those rights cannot be made conditional upon national legislation that requires taxable

²⁵ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 199, paragraph 445.

²⁶ Case C-411/96. *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401. Paragraph 85.

²⁷ *Ibid.*, para 86.

²⁸ Case C-342/93. *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*, European Court Reports 1996 Page I-00475. Paragraphs 14, 17 and 20.

²⁹ Case C-356/03. *Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder*, OJ C 57, 05.03.2005., p.11. Paragraphs 27 and 30.

income which is not maternity pay. As is clear from the *Bilka-Kaufhaus* judgment, contributions to a private pension fund constitute pay within the meaning of Article 141³⁰. It did not examine Directive 92/85, because maternity leave in *Mayer* took place before the period of transposition of that directive; however, the Court did not mention that the same applies to amendments to Directive 86/613, in particular to Article 6(1)(g), which was introduced by amendments adopted in 1996 by Directive 96/97.

Continuing the debate on what elements comprise pay during maternity leave leads to discussion of the *Lewen* case³¹. The question was whether a worker on maternity and child-care leave is entitled to Christmas bonus paid voluntarily by the employer. The Court found that since a Christmas bonus is paid voluntarily, it falls within the concept of equal pay but not within the concept of maternity pay and allowance provided by Article 11(2)(b) of Directive 92/85³². No answer was given whether a Christmas bonus paid voluntarily constitutes a right connected with an employment contract within the meaning of Article 11(2)(a), as was held in *Boyle* regarding accrual of pension rights under an occupational social security scheme. The Court agreed that maternity leave must be taken into account for the purpose of awarding bonus retroactively as pay for work, but no answer was given whether she is entitled to receive it during maternity leave.

Indeed, the *Lewen* judgment makes matters with pay and maternity pay even more complicated than after *Boyle*. The Court's ruling in *Lewen* is inconsistent with the *Boyle* judgment, since it did not rule on interpretation of all EC legislation concerning pay during maternity leave. The ECJ ruled only on application of Article 141, Directive 75/117, and Article 11(2)(b) of Directive 92/85, but not on Article 11(2)(a). Foubert argues that this is because Christmas bonus was paid voluntarily, not according to an employment contract. However, such an interpretation of Article 11(2)(a) appears too narrow, because "rights connected with employment contract" are not mere rights provided by an employment contract. Indeed, rights connected with an employment contract as such are subject to the equal treatment and pay principle. However, that principle also covers voluntary payments³³.

The *Abdolaye*³⁴ case is one more case where the Court recognized benefit paid by an employer to female workers only when they go on

³⁰ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

³¹ Case C-333/97. *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243.

³² Case C-333/97. *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243. Paragraph 23.

³³ Case C-457/93. *Kuratorium für Dialyse und Nierentransplantation e.V. v Johanna Lewark*, European Court Reports 1996 Page I-0024. Paragraph 21.

³⁴ Case C-218/98. *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723.

maternity leave as pay within the meaning of Article 141 and Directive 75/117, which is not discriminatory against male workers, because female workers going on maternity leave are in a different situation. This different situation forms occupational disadvantages which a female worker faces during maternity leave:

First of all, a woman on maternity leave may not be proposed for promotion. On her return, her period of service will be reduced by the length of her absence; second, a pregnant woman may not claim performance-related salary increases; third, a female worker may not take part in training; lastly, since new technology is constantly changing the nature of jobs, the adaptation of a female worker returning from maternity leave becomes complicated.³⁵

This list of occupational disadvantages given by the Court is somewhat strange, because almost all of them are recognized by the Court itself as discriminatory³⁶. In *Thibault*³⁷ the ECJ held that maternity leave must be taken into account for the purposes of assessment of performance. It follows that the same applies to a woman actually on maternity leave – she is entitled to promotion even when absent. Besides, now Article 2(7) of amended Directive 76/207 explicitly provides that a woman after maternity leave shall benefit from any improvement in working conditions to which she would have been entitled during her absence. In *Gillespie*³⁸ and *Alabaster*³⁹ the Court held that a pay rise during maternity leave must be taken into account for calculation of maternity pay, so that a woman on maternity leave is entitled to performance-related salary increases. As regards training and changing technologies “there may be many instances where she does continue some training”⁴⁰ and maternity leave is not so lengthy as to “radically affect a woman’s ability to continue to perform her work”⁴¹. Indeed, technologies are changing fast, but not so fast as to change completely in 14 weeks.

³⁵ Case C-218/98. *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723. Paragraph 19.

³⁶ See also Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 176, paragraph 395.

³⁷ Case C-136/95. *Caisse nationale d’assurance vieillesse des travailleurs salaries (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

³⁸ Case C-342/93. *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*, European Court Reports 1996 Page I-00475.

³⁹ Case C-147/02. *Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security*, ECR 2004 Page 0000.

⁴⁰ Clare McGlynn, *Pregnancy, parenthood and the Court of Justice in Abdoulaye*, E.L.Rev. (2000) 25 Dec, Sweet & Maxwell and Contributors, at page 658.

⁴¹ *Ibid.*

Thus, the reasoning of the Court in *Abdolaye* is incomprehensible, while the argumentation of why only women workers should be entitled to a bonus can not be accepted. McGlynn argues that because of this, the situation cannot be considered as connected with pregnancy and thus requiring a differential. The only acceptable justification would be that benefit is made in order to compensate salary lost during maternity leave. This benefit is, rather, connected with entry of a child into the family. Besides, the disadvantages listed above are faced by a person on child-care leave, not on maternity leave. It is true that those are women who after maternity leave will go on child-care leave and it seems that the Court in *Abdolaye* accepted the reality that “women remain primarily responsible for a child” and

For this reason, women should be granted sufficient rights and entitlements to enable them to fulfil these existing obligations in a way that is least oppressive and rights to which they are already entitled should be defended.⁴²

As McGlynn continues, this is so-called “maternalist” feminism, which seeks to empower women in their traditional nursing role⁴³.

All these cases demonstrate a fragmentary approach by the ECJ as regards pay during maternity leave. Taking together the cases discussed above, the concept of pay during maternity leave is a highly complicated issue. It comprises several elements – first, maternity pay under Article 11(2)(b) of the Directive, which also falls within the scope of Article 141 and Directive 75/117 and according to Article 11(3) must be at least on the level of sick pay provided by social security legislation. Second, it could comprise elements of pay in accordance with Article 11(2)(a) of Directive 92/85⁴⁴, and Article 141 and Directive 75/117⁴⁵ (Article 6(1)(g) of Directive 86/378⁴⁶).

Maternity allowance

Article 11(3) of the Directive explicitly provides for a minimum amount of maternity benefit if it is provided in the form of social security allowance. It must be at least of the level of sickness allowance provided by social security legislation. It is true that maternity allowance does not

⁴² Clare McGlynn, *Pregnancy, parenthood and the Court of Justice in Abdoulaye*, E.L.Rev. (2000) 25 Dec, Sweet & Maxwell and Contributors, at page 661.

⁴³ *Ibid.*

⁴⁴ Case C-411/96. *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401. Paragraph 85.

⁴⁵ Case C-333/97. *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243. Paragraphs 21, 41, 42. Case C-218/98. *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723. Paragraph 14.

⁴⁶ Case C-356/03. *Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder*, OJ C 57, 05.03.2005., p.11.

fall within the scope of Article 141 and Directive 75/117⁴⁷ and thus equal pay cannot be claimed. However, the question is open on whether a woman who receives maternity allowance from the state social security scheme is to be considered as not linked to her employer by a contract of employment relationship according to Article 11(2)(a) of the Directive?

An interesting question here is the issue of whether under Article 11(2)(a) accrual of pension rights must be retained if maternity benefit is provided by the state social security system. Notwithstanding the fact that the *Boyle* case concerned maternity benefit paid in the form of pay, the interpretation of Article 11(2)(a) given in this case does not provide for any argument allowing to distinguish the rights of a worker under Article 11(2)(a) on account of what kind of maternity benefit she receives under Article 11(2)(b) – in the form of pay or social allowance. Moreover, Directive 92/85 exists for the purposes of health and safety protection and it does not clearly distinguish between those two categories of workers on maternity leave.

It is clear that requirements of health and safety protection cannot be conditional upon the source of maternity benefit. Since contributions to an occupational pension scheme have been recognized as a health and safety measure, then they are equally applicable to all workers on maternity leave. Consequently, although the ruling in *Mayer* clearly provides that rights provided by Article 6(1)(g) of Directive 86/613 to retain accrual of pension rights under an occupational scheme during maternity leave are only for those who receive maternity pay from an employer under an employment contract or national legislation, nevertheless, it can be argued that there is such a right under Article 11(2)(a) of Directive 92/85 for every woman, irrespective of source of maternity benefit.

Conditions of calculation of allowance

EC law provides for several requirements as regards calculation of allowance. First, Article 11(4) of Directive 92/85 provides that national legislation may set the conditions for eligibility for maternity benefit, but those conditions cannot provide for more than 12 months prior employment. This requirement may be applied to maternity allowance and to maternity pay.

Second is the finding in *Gillespie* that a worker on maternity leave must receive a pay rise awarded before or during maternity leave⁴⁸. This means that a pay rise during that period must be taken into account for

⁴⁷ Case 80/70. *Gabrielle Defrenne v Belgium State*, European Court Reports 1971 Page 00445.

⁴⁸ Case C-342/93. *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*, European Court Reports 1996 Page I-00475. Paragraph 22.

calculation of maternity pay. This requirement also concerns a back-dated pay rise⁴⁹.

In *Alabaster* the ECJ reaffirmed this finding by holding that even if the period to be taken into account for the purposes of calculating maternity pay is defined by national legislation and that period does not cover maternity leave, then a breach of Article 141 and Directive 75/117 occurs in the case of a pay rise during maternity leave or outside the period taken into account for the purposes of calculating maternity benefit. In other words, for the purposes of calculating maternity pay, the maternity period and the period which is not taken into account for the purposes of calculating maternity pay must also be taken into account if during those periods pay is raised⁵⁰. The Court refused to give guidance on how this requirement should be fulfilled as regards calculation methods. Indeed, if calculation of maternity pay is provided by national legislation, then it is almost impossible to give a uniform formula corresponding to the findings in *Gillespie* and *Alabaster*, except when the period taken into account for the purposes of calculating maternity pay covers the period of maternity leave.

The ILO Maternity protection Convention gives extended minimum requirements on calculation of maternity allowance. Article 6(3) provides that if maternity benefit is based on previous earnings, the amount of benefit shall constitute at least two-thirds of the woman's previous earnings. Article 6(4) requires that a woman shall receive maternity benefit in an amount of at least two-thirds of previous earnings irrespective of other calculation methods provided by national legislation or practice. Differently from the provisions of Article 11(4) of Directive 92/85, Article 6(5) of the Maternity Protection Convention requires that conditions for qualification for cash benefits must be satisfied by a large majority of women. However, it is clear that the requirements of Article 11(4) of Directive are able to satisfy a large majority of employed women.

Treatment during maternity leave

Access and working conditions

Maternity leave is not an obstacle for access to employment, and a person on maternity leave could be subject to working conditions. The recent case of *Herrero*⁵¹ reflects those rights. Ms Herrero applied and during maternity was appointed to the post of administrative assistant. She was

⁴⁹ Case C-147/02. *Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security*, ECR 2004 Page 0000.

⁵⁰ *Ibid*, para 48.

⁵¹ Case C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imsalud)*, OJ C 131, 03.06.2006., p.16.

required to take up the post within one month. Ms Herrero replied that the period for taking up the post must be extended until the end of maternity leave, and that the period during which she was appointed for the post - but could not take it up due to maternity leave - must be taken into account for the purposes of calculating her seniority. The national court was not sure whether Ms Herrero enjoyed the rights claimed according to EC law, and thus referred preliminary questions to the ECJ.

Interestingly, the ECJ considered that the case of Ms Herrero as a question of access to employment rather than promotion, although previously she worked for the same employer as a temporary employee. Consequently, the Court found that Directive 92/85 had no relevance in the case. It recalled the *Thibault*⁵² case, where the Court held that Article 2(3) of Directive 76/207 precluded less favourable treatment as regards access and working conditions, since the aim of the directive is to ensure substantive, not formal, equality. It follows, so the Court held, that an employer cannot refuse to hold open a vacancy for a candidate because she is precluded due to maternity leave from employment from the outset.

As regards calculation of seniority, the Government of the United Kingdom argued that this case must be distinguished from cases where a worker already employed is entitled to any improvements in working conditions during maternity leave, because in the present case taking up of the post was deferred until the end of maternity leave. The Court rejected this argument by citing the Opinion of the Advocate General, who considered that since the aim of Directive 76/207 is not formal, but substantive, equality, it precludes less favourable treatment irrespective of whether it affects an existing employment relationship or a new employment relationship. At the end of the judgment, the Court stressed that the position of a woman on maternity leave is incomparable to that of a man, thus the fact that men would never enjoy such treatment has no bearing⁵³.

Dismissal

Article 10 of Directive 92/85 precludes dismissal of a worker on maternity leave, save in exceptional cases not connected with maternity leave. Presumably, the only case when a person on maternity leave could be dismissed is only due to insolvency of the employer. On the other hand, a worker could be dismissed if the employer discovers an essential breach of working regulations which had taken place before maternity leave. However, those are only suggestions and since according to the

⁵² Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

⁵³ Case C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imsalud)*, OJ C 131, 03.06.2006., p.16, paragraph 46.

Melgar judgment “exceptional cases not connected with their condition” is not even a subject for national legislation to provide an exhaustive list for such instances⁵⁴, interpretation of this provision remains within the competence of the employer and afterwards, consequently, for the national court.

Rights after maternity leave

Employment rights after maternity leave

After maternity leave, only one right is provided by Directive 92/85 concerning health and safety protection. This is the right for workers who are breastfeeding. The remaining issues are covered by Directive 76/207 and Article 141 and Directive 75/117. After amendments to Directive 76/207, Article 2(7) now explicitly provides for the right after maternity leave to return to at least an equivalent job to the previous one plus benefit from any improvement in working conditions to which the employee would be entitled during her absence. Besides, it provides that less favourable treatment of a worker related to maternity leave within the meaning of Directive 92/85 must be considered as discrimination. No such right is provided by EC legislation regarding pay.

Breastfeeding

Working conditions of workers who are breastfeeding are subject to assessment under Article 4. If risk is recognized, then working conditions in accordance with Articles 5 and 6 must be adjusted. Under Article 7, workers who are breastfeeding may not be obliged to perform night work if a medical certificate specifies that it is necessary for the safety or health of the worker. However, one important item is missing – the right to time off for breastfeeding. This is provided only in Guidelines⁵⁵, which are an advisory document only⁵⁶.

Promotion

In the *Thibault* case⁵⁷, due to absences a woman was precluded from assessment of her performance for the purposes of promotion. This was

⁵⁴ Case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915. Paragraph 38.

⁵⁵ Communication from the Commission on the guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) /* COM/2000/0466 final */

⁵⁶ In contrast to what Petra Foubert argues in “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 219, paragraph 493.

⁵⁷ Case C-136/95, *Caisse nationale d’assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

conditional upon presence at work for a particular period during the year taken into account for assessment. The facts of the case show that she was absent on account of sickness several times during pregnancy and afterwards she was on maternity leave. She claimed that the period of maternity leave must be taken into account for the purposes of calculation of work actually performed in order to be assessed for promotion. The Court ruled that not taking into account maternity leave for the purposes of assessing performance constitutes direct discrimination based on grounds of sex. It once again stressed that special protection under Article 2(3) of Directive 76/207 cannot result in less favourable treatment, so that an employer is obliged take into account time spent on maternity leave for the purposes of assessing performance.

This is the first case where the ECJ refers to substantive equality⁵⁸. However, in the point of view of legal writers it is not so clear whether such a situation is directly discriminatory. According to Foubert:

It all depends on the rule that is being tested: the neutral rule of six months' presence at work (which would imply indirect discrimination), or the rule that the period of maternity leave should be added to other period of absence (which would involve direct discrimination)⁵⁹.

The Court reaffirmed the same approach in its *Sass* judgment⁶⁰. This case concerned assessment of performance of civil servants in East Germany. A collective agreement for this group of civil servants provided how length of service should be calculated for the purposes of seniority before the reunification of Germany. It provided that for assessing performance during maternity leave, the legislation of the Federal Republic of Germany must be taken into account, but the length of maternity leave under the legislation of the Democratic Republic of Germany was 20 weeks, while under the legislation of the Federal Republic of Germany only 8 weeks. As a result, the German Civil service refused to take into account the extra 12 weeks which Mrs Sass spent on maternity leave while she was employed under the legislation of the Democratic Republic of Germany. The Court found that Mrs Sass had suffered discrimination based on sex precluded by Article 2(3) of the Directive, because:

⁵⁸ See also Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 179, paragraph 399

⁵⁹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 180, paragraph 402.

⁶⁰ Case C-284/02, *Land Brandenburg v Ursula Sass*, European Court Reports 2004 Page I-11143.

she will not attain the higher salary grade until 12 weeks after a male colleague who started work in the former GDR on the same day as she did.⁶¹

Further, the Court did not uphold the argument that maternity leave which exceeds the mandatory two weeks as referred in Article 8 of Directive 92/85 should be decided as simply a benefit for women. It first of all pointed out that Directive 92/85 is not applicable to the proceedings because the events took a place before the implementation date of that directive and secondly, that Article 8 of the Directive requires at least 14 weeks maternity leave, which does not preclude Member States providing more than 14 weeks maternity leave. If that extended leave is considered for the purposes of Article 8 of Directive 92/85, then it must be considered as statutory leave for protection of a woman who has given birth.

As already discussed above, it is dangerous for the Court to interpret Directive 92/85 in a way that goes far beyond what is necessary taking into account biological differences. Here, a right is given to the Member States to extend statutory maternity leave beyond what is necessary for recovery after birth by giving – 6-8 weeks. Instead, the ECJ again refers to the second aim of maternity leave – protection of the special relationship between mother and child, in contrast to the sole purpose of maternity leave provided by the legislation of the Federal Republic of Germany – protection of a woman who has given birth. However, assessing the outcome of the judgment from the point of view of substantive equality as regards this particular case, it achieves equality of result, but does not promote it for the future.

Working conditions

Two ECJ cases clarify the right to annual leave and the effect of maternity leave on that right. First, in *Boyle* the Court ruled that Directives 92/85 and 76/207 do not preclude a clause in an employment contract which provides that a woman ceases to acquire the right to annual leave during supplementary maternity leave provided by the employer. The right of accrual of annual leave constitutes a right connected with the employment contract of workers for the purposes of Article 11(2)(a) of Directive 92/85; thus, a woman possesses this only while she is on statutory maternity leave.

Debates among legal writers arose on the question claimed by the plaintiff whether such a clause in an employment contract constitutes indirect discrimination against female workers, since a substantially greater proportion of women than men take periods of unpaid leave

⁶¹ *Ibid.*, para 51.

because they take supplementary maternity leave. The Court ruled that since supplementary maternity leave is an extra right granted to women workers, they can not claim discrimination. Foubert rightly argues to the contrary, that the Court again failed to recognize that supplementary maternity leave in fact amounts to child-care leave, because it obviously goes beyond maternity protection, thus discriminating against male workers who are precluded from their child-rearing⁶².

On this issue, Advocate General Colomer has pointed out the following:

Quite apart from the fact that I consider that reserving solely to women the availability of unpaid leave to look after a newborn child does not help promote equality of opportunity between the sexes, since what it does in reality is to perpetuate in society the idea that it is women who as a matter of priority should take care of the children - with all the concomitant adverse effects on their future careers - I do not share the view put forward by the applicants.⁶³

The right to annual leave was also discussed in the *Gomez* case⁶⁴. Here, two issues arose. First, whether a person has the right to annual leave if it coincides with the general period of annual leave fixed in a collective agreement. The Court found that although the right to accrual of annual leave is a right connected with an employment contract and thus falling within the scope of Article 11(2)(a) of Directive 92/85, nevertheless determination of when paid annual leave should take a place falls within the scope of Directive 76/207⁶⁵. Since Article 2(3) of that directive precludes less favourable treatment on grounds of maternity protection, Article 5(1) must be interpreted that a worker must be able to take annual leave in a period other than agreed by collective agreement⁶⁶.

The second question related to the number of days of annual leave to which the worker concerned is entitled. Directive 93/104 provides for minimum days of annual leave which each Member State must introduce. However, it does not preclude provision of more favourable rights, i.e., the right to longer annual leave under national legislation. The question

⁶² Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at pages 203-205, paragraphs 455-457.

⁶³ Case C-411/96. Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 19 February 1998. European Court Reports 1998 Page I-0640, point 60. *See also* Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at pages 203-204, paragraph 455.

⁶⁴ Case C-342/01, *Marka Paz Merino Gomez v Continental Industrias del Caucho SA*, European Court Reports 2004 Page 00000.

⁶⁵ *Ibid.*, paras 34 to 36.

⁶⁶ *Ibid.*, paragraphs. 36 and 37.

was whether Article 11(2)(a) entitled a worker on maternity leave to accrual of minimum-length paid annual leave as provided by Directive 93/104 or for a longer period of paid annual leave as provided by national legislation. The answer given by the Court was logically that a worker on maternity leave must acquire more favourable rights to paid annual leave than provided for all workers under national legislation⁶⁷.

Dismissal

Directive 92/85 does not provide for any special protection for women who return to work after maternity leave. It follows that as regards special protection of workers who are breastfeeding, Directive 76/207⁶⁸ applies. Cases on the effect on rights of a female worker due to pregnancy-related illness were more thoroughly discussed in the chapter on rights during pregnancy. However, the question remains why pregnancy-related illness occurring before maternity leave should be distinguished from pregnancy-related illness occurring or following maternity leave. Notwithstanding previous discussion that possibly protection of pregnancy-related illness goes beyond what is necessary to safeguard the position of a female worker in the labour market⁶⁹, and may lead to increase of discrimination⁷⁰ but that this problem occurs in extremely minor cases⁷¹, nevertheless such distinction lacks substantiated grounds from the point of view of substantive equality. A person who suffers from pregnancy-related illness after maternity leave would not have been sick if she had not decided in favour of pregnancy. This fact makes it different from other kinds of illness and thus for the purposes of attaining substantive equality this interpretation of Directive 76/207 should be overruled⁷².

Pay

There is no case-law of the Court regarding pay after maternity leave. Thus this issue poses many questions. It is clear that pay to a worker after

⁶⁷ *Ibid.*, para 45.

⁶⁸ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 119, paragraph 247.

⁶⁹ *Ibid.*, at page 190, paragraph 424.

⁷⁰ Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraph 30.

⁷¹ Lynn M. Rosebery, "The Limits of Employment Discrimination Law in the United States and European Community", DJOF Publishing 1999, page 308.

⁷² See cases C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979, C-400/95, *Handels- og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757, C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

maternity leave falls within the scope of Article 141 and Directive 75/117. Thus, a woman worker after maternity leave doing the same work or work of equal value in comparison to her male colleagues should be remunerated in the same amount as her male colleagues. This holds true, notwithstanding that usually for the purposes of calculation of pay several criteria are taken into account. However, it is unclear when criteria fall within the scope of Directive 75/117 and when within the scope of Directive 76/207. In *Rummler*⁷³ and *Danfoss*⁷⁴ criteria such as seniority, training, mobility, and physical strength fall within the scope of Directive 75/117, but in *Herrero*⁷⁵ calculation of criteria of seniority falls within the scope of Directive 76/207.

It is unclear whether the *Herrero* judgment refers to seniority taken into account for the purposes of promotion or also for the purposes of pay alone. Looking more closely at those criteria, it is most probable that a woman after maternity leave will not have lost her physical strength, although she could be missing training and mobility⁷⁶ because of breastfeeding and the traditional role of child-carer. Do Article 141 and Directive 75/117 allow those criteria to be taken into account for the purpose of calculating pay for a worker after maternity leave? Directive 75/117 does not refer to maternity protection; thus, it does not give an answer. Possibly, the answer could be found in *Gillespie*⁷⁷ and *Alabaster*⁷⁸, where the Court held that a pay rise during maternity leave must be taken into account for calculation of maternity pay. However, one could distinguish this as concerning maternity pay, not pay after maternity leave.

Even less clarity exists with regard to women workers who have received their maternity benefits in the form of allowances from the state social security system. Only *Lewen* gives a clear answer as regards entitlement to Christmas bonus, i.e., that for the purposes of calculating this bonus the period spent on maternity leave must be taken into account⁷⁹.

⁷³ Case 237/85, *Gisela Rummler v Dato-Druck GmbH*, European Court Reports 1986 Page 02101.

⁷⁴ Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03199.

⁷⁵ Case C-294/04, *Carmen Sarkatzis Herrero v Instituto Madrileño de la Salud (Imosalud)*, OJ C 131, 03.06.2006., p.16.

⁷⁷ Case C-342/93. *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*, European Court Reports 1996 Page I-00475.

⁷⁸ Case C-147/02. *Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security*, ECR 2004 Page 0000.

⁷⁹ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243, paragraphs 41 and 42.

Social rights

Directive 79/7 contains Article 4(2), providing that equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity. There is no case law as regards maternity protection and equal treatment in social security. However, since the provisions of Article 4(2) of Directive 79/7 and Article 2(3) of Directive 76/207 are almost similar by referring to the general principle of sex equality, it could be argued that Article 4(2) of Directive 79/7 must be interpreted as precluding less favourable treatment on grounds of maternity. Thus it follows that women because of maternity leave should not lose any social rights or be precluded from acquiring new ones during maternity leave as if she were working in order to be able to enjoy all social rights after maternity leave.

Directive 79/7 does not provide for maternity protection schemes as such and does not provide for an obligation to equal participation in maternity protection schemes if created by the Member States. It allows the Member States to introduce maternity social insurance schemes to which the only contributors are women, because only they could face the social risk of maternity. An obligation to contribute to a state social insurance scheme for the risk of maternity for women does not contradict the principle of equal pay, but only since social security falls outside the concept of equal pay⁸⁰

Self-employed

No EC legislative document provides for the right to retain service contracts during maternity leave. Moreover, no right to maternity allowance is provided for by EC legislation. Directive 86/613 provides for the right voluntarily to join contributory social security schemes for spouses of self-employed persons. However, it does not guarantee protection during maternity leave, because this provision does not require that state contributory social security schemes cover maternity. Maternity allowance could be provided by other social security means; thus, neither self-employed nor their spouses are granted maternity protection under EC legislation.

Unemployed

International law is silent about social protection of unemployed persons during the maternity period, while Article 2 of Directive 79/7 is applicable to persons affected by involuntary unemployment. Accordingly, interpretation of Article 2 in conjunction with Articles 4(1) and (2) requires special protection of unemployed persons during the

⁸⁰ Case 80/70 *Gabrielle Defrenne v Belgium State*, European Court Reports 1971 Page 00445.

maternity leave period. Suspension of unemployment benefit or not granting another instead would put unemployed women during the protected maternity period in a disadvantageous situation in comparison to unemployed males who are available for work search.

Latvian law

Labour law

Length of maternity leave

Article 154 (1) provides for maternity leave of 56 days before and 56 days after expected birth-giving. Besides, if a woman has attended the doctor and has registered as a person under medical supervision due to pregnancy by the 12th week of pregnancy, then according to Article 154(2) she is entitled to extra leave of 14 days. So, working women in Latvia are usually entitled to 18 weeks maternity leave in all, which considerably exceeds the time necessary due to biological differences. Interestingly, in contrast to Article 8 of Directive 92/85 and the ECJ ruling in *Boyle*⁸¹, Article 37(7) provides for 4 weeks compulsory maternity leave, two weeks before and two weeks after birth-giving. Looking closer at the provisions of Article 8 of Directive 92/85, this could be confusing, because it provides for “at least two weeks before and /or after confinement”. Such a mistake is not surprising, taking into account that Latvian officials are keen on the case-law of the ECJ.

Working conditions during maternity leave

According to Article 152(2), during maternity leave a woman acquires the right to annual leave.

Pay during maternity leave

Latvian legislation does not provide for maternity pay, only for maternity allowance under the state social security system. So an employer is not under obligation to pay any money to women on maternity leave, unless a collective agreement provides for it or the employer pays something voluntarily.

As regards occupational pension schemes, Article 6(1)(g) of Directive 86/378 is not applicable here, because maternity benefit is not paid by the employer, which is one of the preconditions for claiming retention of acquisition of pension rights under occupational social security schemes.

Another issue concerns health insurance provided by the employer. If this does not cover paid birth-giving and ante-natal services, it does

⁸¹ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 49.

not breach Directive 86/378, since that directive does not provide for any positive obligation as regards pay (occupational social security schemes). It requires formal equality only.

Working conditions after maternity leave

Article 154(5) provides for an obligation during maternity leave to retain previous work, but if this is not possible then the employer must provide women with equivalent work with same working and employment conditions. Besides, Article 149(6) obliges provision to women after maternity leave with all improvements as regards employment conditions as if they were not absent on account of maternity leave.

Interestingly, this right is given to women after maternity leave under Article 99. It provides that if a medical certificate so requires, during a period of one year after birth-giving, women must be provided with respective work and health conditions. This provision does not concern breastfeeding workers. Presumably, this provision does not exceed what is necessary due to biological differences, because it could accommodate typical after-birth depression without taking sick-leave.

Article 150(4) provides for the right to claim annual leave after the end of maternity leave. In this regard, Article 149(4) does not allow transfer to the next year of half the annual leave of pregnant workers and workers after maternity leave during one year after birth-giving if this is necessary for the functioning of the enterprise according to Article 149(3). Article 134(2) provides for the right for women to claim part-time work during one year after birth-giving; this also applies to women who are breastfeeding. It is undeniable that the extra right given to a woman only because she has given birth less than a year ago demonstrates that the Latvian legislator considers women as the main child-carers.

Breastfeeding

According to Article 99(3), workers who are breastfeeding cannot be exposed to risk of unhealthy working conditions. Under Article 138(6), women who are breastfeeding could indicate by medical certificate that night work is unhealthy for them. Then the employer must provide day work or extra leave. Article 53(2) allows women who are breastfeeding on a business trip only if they agree to it in written form. Article 136(7) after recent amendments allows women who are breastfeeding to work over-time if they agree to it in written form.

Feeding

Article 146 provides for the right to any worker (male or female) who has a child under one and half years old to have time-off for feeding. The

break should be at least 30 minutes long and not less often than after every three hours. If a worker has more than one child under the age of one and a half, she or he is entitled to at least a one-hour break. Breaks could be added to the general break or transferred to the beginning or to the end of the working day. Breaks for feeding must be paid in full. Piece work must be remunerated according to average earnings.

There is no data available on how workers use rights provided by Article 146. Looking from the practical point of view, this right enables any worker who has a child under one and a half years to have a working day one hour shorter. The rights provided under Article 146 could be useful as they are intended in case more than two children were born and the father of those children works so close to home that he could indeed give assistance to child feeding. It is unlikely that this right is widely used in the private sector.

Dismissal

According to Article 109(1), an employer is precluded from dismissal of women during a period comprising a year after child-birth; this also applies to women who are breastfeeding, save in cases provided by Article 100 (1), (2), (3), (4), (5) and (7).⁸²

Pay

From the provisions of Article 149(6) it follows that a woman after maternity leave is entitled to pay which she would have received if she had not been absent on account of maternity leave.

However, there is one problem regarding equal pay. This concerns calculation of average pay. Article 75 provides that average pay must be calculated on the basis of pay during the previous six months. If a worker has not worked during that time for the purposes of calculation of average pay, then a period of six months prior to those six months must be taken into account. If a worker has not worked during that period too, then for the purposes of calculation of average wage the minimum wage defined by government must be taken as a basis. No exceptions are provided for lack of salary on account of maternity leave. Although maternity leave could last somewhat longer than four months, nevertheless the situation could arise where a woman has been on sick leave for 8 months (on account of pregnancy-related illness, for example) during the previous year and the rest on maternity leave. In such a situation she would be placed in a worse situation than a man who has been on sick leave for 8 months.

⁸² See in this regard the section on Rights during pregnancy.

Social law

Employed

Maternity allowance

As already described in the section on social security, maternity benefit in Latvia is paid in the form of an allowance under the state social security scheme. The amount of maternity allowance exceeds normal salary. It constitutes 100% of gross salary received during the period taken into account for the purposes of calculating maternity allowance. So, it corresponds to the requirements of substantive equality, unless an extra-large bonus is paid by the employer while women are on maternity leave. One element of calculating maternity benefit does not correspond to the ILO Maternity protection convention which Latvia ratified recently⁸³. According to Articles 6(3) and 6(4) of that Convention, maternity benefit shall comprise at least 2/3 of a woman's previous earnings, or maternity benefit calculated according to another method must also be not less than 2/3 of previous earnings. The Law on maternity and sickness insurance provides that if a woman has not been subject to social insurance against risk of maternity, she is entitled to maternity allowance in an amount of 40% of average social insurance salary in Latvia which does not correspond to 2/3 of previous earnings provided by the ILO Maternity protection convention⁸⁴.

Acquisition of state social insurance rights during maternity leave

As described in the section on social security in Latvia, working and self-employed persons acquire state social insurance rights through monthly social insurance contributions. During maternity leave it is the state – not the employer and worker or self-employed themselves - that makes monthly contributions for state social insurance. However, persons on maternity and sick leave are not insured by the state against all risks (old-age pension, unemployment, accidents at work and occupational diseases, disability, maternity, and sickness), but only against old-age pension and unemployment. Thus, persons during maternity and sick leave do not obtain full protection against risks of accidents at work, occupational diseases, disability, maternity, and sickness.

Although persons on maternity leave are insured for old-age pensions, nevertheless the amount of contributions for old-age pension, on which later depends the amount of old age pension, is at a lower rate than if the person were working. The State old-age pension is calculated on the basis of savings formed from state social insurance contributions

⁸³ Latvia has ratified the ILO Maternity protection convention on 23rd of March 2006//Latvijas Vēstnesis 60(3428), 13.04.2006.

⁸⁴ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance), Article 31(6).

made for this purpose⁸⁵. In particular, the amount contributed for old-age pension of a working person constitutes 24.79% of gross salary, while for a person on maternity leave it constitutes only 20% of maternity allowance, which itself is equivalent to gross salary⁸⁶. It follows that persons on maternity leave each month lose their contribution to old-age pension in an amount of 4.79% of their gross salary or its equivalent – maternity allowance. This does not correspond to the requirements of Article 4(1) in conjunction with Article 4(2) of Directive 79/7. It is noteworthy that insurance against the risk of unemployment during maternity leave was introduced only recently. Before, the situation was such as to deny the right of a woman who has not worked for 9 months after maternity leave to unemployment allowance. After respective publications by the author of this thesis on this allegedly discriminatory legislation⁸⁷, respective amendments were prepared by the Ministry of Welfare and adopted by Parliament⁸⁸.

State social insurance rights after maternity leave

Lack of insurance during maternity leave against such risks as accidents at work, occupational diseases, disability, maternity, and sickness could negatively affect women after maternity leave.

Calculation of sickness allowance

As already described in the section on social security, for the purposes of calculating sickness allowance insurance, contributions during a period of six months before the two months before the month when sickness occurred are taken into account⁸⁹. Income during this period must be divided by calendar days during the period not taking into account days spent on sick, maternity, or child-care leave⁹⁰. If the employee has not worked during the calculation period, sickness allowance must be calculated in an amount of 40% of average salary in the state. Such provision clearly operated against persons who due to sickness and

⁸⁵ Par valsts pensijām: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on state pensions), Article 12.

⁸⁶ Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem: MK noteikumi Nr.230. Latvijas Vēstnesis, 2001. 13.jūnijs, nr.91 (Regulations on state state social insurance payments from state budget and state social insurance special budgets), points 14 and 15.

⁸⁷ Kristīne Dupate, Vai darba likums atbilst Eiropas Savienības tiesībām. Jurista Vārds, 2004. 21.septembris, 28.septembris Nr.36(341), 37(342).

⁸⁸ Grozījumi likumā „Par valsts sociālo apdrošināšanu”: LR likums. Latvijas Vēstnesis 2005. 31.marts nr.51 (amendments to Law on state social insurance)

⁸⁹ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances)

⁹⁰ *Ibid.*

maternity leave together were without insurance contributions during the calculation period. For the purposes of eliminating such discriminatory requirements against persons on maternity leave, Article 31 of the Law on maternity and sickness insurance was amended⁹¹. Now it provides that if an employee has not worked during the calculation period because of sickness, maternity, or child-care leave, then - for the purposes of calculating sickness allowance - a period up to 32 months before the calculation period can be taken into account⁹². Although this provision helps to eliminate indirect discrimination against women on child-care leave, nevertheless it does not fully guarantee elimination of discrimination against workers on maternity leave during the calculation period. This is in cases there was pay rise during maternity leave.

Calculation of accidents at work and occupational disease allowances

For the purposes of calculating allowances due to accidents at work and occupational diseases, the method used is almost the same as with sickness allowance. The period for calculating average insurance salary which then serves as a base for calculating allowances for different accidents at work and occupational disease is the six months before two months before the month when the incident occurred. No possibility is provided for lack of insurance contributions against risks of accident at work and occupational disease due to maternity leave in combination with sick leave. Instead, point 32 provides for an insurance salary of 40% of average salary in the state, if the person was not insured during the calculation period against those risks⁹³. Thus the method of calculation of insurance salary taken as a basis for the purposes of calculating allowances due to accidents at work and occupational diseases discriminates against women and is contrary to the obligation provided by Directive 79/7.

Entitlement to and calculation of disability pension

Article 16(3) of the Law on state pensions provides that if a person five years preceding an award of disability pension was not subject to insurance against disability, she is entitled to disability pension in the amount of state social accommodation allowance, which presently

⁹¹ Grozījumi likumā „Par maternitātes un slimības apdrošināšanu”: LR likums. Latvijas Vēstnesis, 2004. 21.decembris, Nr.203 (amendments to Law on maternity and sickness insurance)

⁹² Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance).

⁹³ Obligātās sociālās apdrošināšanas pret nelaimes gadījumiem darbā un arodslimībām apdrošināšanas atlīdzības piešķiršanas un aprēķināšanas kārtība: MK noteikumi Nr.50. Latvijas Vēstnesis, 1999. 19.februāris, nr.48/49 (On calculation and award of mandatory social insurance remuneration due to accidents at work and occupational diseases).

consists of 45 lats a month⁹⁴. Consequently, persons on maternity leave are subject to this provision since they are not insured against risk of disability.

Besides, according to Article 16(1)(1) of the Law on state pensions, for the purposes of calculating disability pension, insurance salary of any 36 consecutive months in a period of five years before the award of disability pension is taken into account. Usually taken into account is that period of 36 months when insurance salary (or income) was highest. However, lack of special provisions about persons on maternity leave precludes those persons from the right to the highest disability pension possible if a pay rise guaranteeing a higher insurance salary was given during maternity leave which is not taken into account for the purposes of calculating disability benefit.

It follows that Latvian social insurance legislation contains many provisions that fail to conform with Directive 79/7 and that discriminate against persons on grounds of sex due to maternity leave.

Self- employed

Self-employed persons are subject to mandatory insurance against risks of old-age, disability, maternity, and sickness⁹⁵ only if their income attains a certain level⁹⁶. So, if the level of income of a self-employed person during a year does not exceed 1320 lats or 110 lats a month, then she is not subject to state social insurance. Self-employed persons on maternity leave are also subject to old-age and disability insurance only. So, after maternity leave they may have less favourable conditions as regards calculation of sickness allowance⁹⁷ and disability pension⁹⁸. Contributions for old-age insurance during maternity leave are also less than during periods actually worked.

In Latvia, self-employed persons are frequently poor. Part of this group is made up of those who are only formally self-employed but who

⁹⁴ Noteikumi par valsts sociālā nodrošinājuma pabalsta un apbedīšanas pabalsta apmēru, tā pārskatīšanas kārtību un pabalstu piešķiršanas un izmaksas kārtību: MK noteikumi Nr.561, Latvijas Vēstnesis, 2005. 29.jūlijs, nr.119 (Regulations on amount of state social security allowance and death grant, and procedure for their award, reassessment and pay-out). According to the Regulations, currently the minimum social security allowance amounts to 45 lats.

⁹⁵ Exception, Article 6(3) of the Law on state social insurance provides that self-employed persons who are of pensionable age are not subject to insurance against risk of disability.

⁹⁶ Noteikumi par valsts sociālās apdrošināšanas obligāto iemaksu objekta minimālo un maksimālo apmēru: MK noteikumi Nr.193. Latvijas Vēstnesis, 2000. 6.jūnijs, nr.213/218 (Regulations on maximum and minimum amount of state social insurance object). According to the Regulations, the minimum amount for self-employed persons is 1320 lats per year.

⁹⁷ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances).

⁹⁸ Par valsts pensijām: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on state pensions)

are *de facto* employees of employers that want to avoid taxes. Another problem here consists of the different conditions regarding employed and self-employed persons for calculation of social insurance allowances. The period taken into account for calculating allowances for the self-employed is much longer than for employees. This constitutes the 12 months before the 3 months before the quarter when the socially insured risk occurred. Consequently, it exceeds the 12-month period required for employees under Article 11(4) of Directive 92/85. Unfortunately, this provision is not applicable to the self-employed. Persons working in professions which according to Latvian legislation could be performed only in a self-employed capacity⁹⁹ are concerned about observance of the general principle of equality, since they are not free to choose the form of employment and, as a corollary, be protected against social risks equally to employed persons.

Unemployed persons

Article 2 of Directive 79/7 provides that it is applicable to all persons who are involuntary unemployed or seeking employment. Article 4(1) precludes direct or indirect discrimination based on sex, while Article 4(2) provides, in line with interpretation of Article 2(3) of Directive 76/207, that women shall not be subject to less favourable treatment on grounds of special maternity protection. It follows that unemployed women who have been involuntary dismissed or are actively seeking work should be granted paid maternity leave. Indeed, due to biological needs, unemployed women, unlike men, are precluded for some period from active work-search. So, under Latvian law unemployed women on maternity leave are precluded even from the right to receive unemployment benefit¹⁰⁰. Pregnant unemployed women are protected only if incapacity for work (illness or the right to maternity leave) arises during one month after dismissal, then she qualifies for sickness allowance without losing the subsequent right to unemployment allowance. Those provisions are of general applicability to all unemployed workers to whom incapacity for work due to sickness occurs during one month after unemployment occurred¹⁰¹. Unemployed women also have the right to receive maternity allowance in case of liquidation of

⁹⁹ Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance). According to Article 1(3) those professions include advocates, notaries, sworn auditors, doctors in sole private practice, pharmacists, and others.

¹⁰⁰ Bezdarbnieku un darba meklētāju atbalsta likums: LR likums. Latvijas Vēstnesis, 2002. 29.maijs, nr.80 (Law on support of unemployed persons and job seekers), Article 14.

¹⁰¹ Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance), Article 15(1).

the employer enterprise, but not later than 210 days after liquidation¹⁰². This means that only those ex-workers who at the date of liquidation were pregnant for more than 2 weeks are entitled to maternity allowance. It is indeed strange to presume that pregnancy lasts only 38 weeks (taking into account the right to maternity leave 8 weeks prior to expected child-birth) while for the medically normally pregnancy lasts 40 weeks. So, current Latvian social insurance law does not provide for protection of all unemployed women as regards maternity leave and allowance, contrary to Directive 79/7.

¹⁰² Par maternitātes un slimības apdrošināšanu: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on maternity and sickness insurance), Article 8.

Chapter 12.

Rights during and after paternity leave

EU law

Article 2(7) of Directive 76/207 provides that rights provided by this directive shall be without prejudice to rights on paternity leave if the Member State decides to provide for such right. Besides, a Member State which provides for paternity leave shall protect a person on paternity leave against dismissal, provide for the right to return to previous work or equivalent work on terms not less favourable, and benefit from any improvements to which he would have been entitled during absence.

This provision was introduced by amendments adopted as Directive 2002/73 on 23 September 2002 and was subject to introduction until 5 October 2005. The preamble (point 13) of Directive 2002/73 refers to the Resolution of the Council on the balanced participation of women and men in family and working life¹, which recognizes in political terms the problem of unequal sharing of family duties, which impedes attainment of equality in the employment market, and the necessity for involvement of fathers in child-care through granting them a non-transferable right to paternity leave. Consequently, this resolution led to provision of paternity leave as an aspect of sex equality, now contained in Article 2(7) of amended Directive 76/207.

There is no case law of the ECJ on interpretation of that provision so far. However, since the optional right (optional for the Member States) to paternity stands beside the right to maternity leave, it could be presumed that rights provided during and after paternity leave are subject to the same interpretation and application as regards rights during and after maternity leave.

The section on maternity leave began discussion on the purpose of maternity leave. It was argued that in order to eliminate statistical discrimination in the labour market and socially construed stereotypes, special maternity protection should reflect only biological differences². It is also once again stressed in the preamble (point 12) of Directive 2002/73 that the purpose of special protection of pregnancy and maternity is due to biological differences. Nevertheless, the ECJ has repeatedly stressed the second purpose of maternity leave defined by itself – the special relationship between mother and child – which goes beyond

¹ Resolution of the Council and of the Ministers for employment and social policy, meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life (2000/C 218/02), OJ C 218/5, 31.07.2000.

² Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts on Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at pages 100 and 107, paragraphs 206 and 217.

biological differences and refers to motherhood rather than maternity³. This was sharply criticised, since it thereby enhances the socially-defined stereotype of woman as main child-carer.

Presently in the Member States where paternity leave is provided, this issue must be analysed from a different angle. The author argues that the purpose of paternity leave is to involve the father in child-care and encourage him to spend more time with the family - thus enhancing fatherhood, which is equal to motherhood - instead of enhancing the bread-winner role by working long hours. It follows that the aim of paternity leave is not to settle biological differences but to shift socially-construed stereotypes from one to another – from the father as bread-winner not involved in child-care to a father who is not the only bread-winner and who shares child care responsibilities.

This revelation changes much of the effect on women's discrimination of the second aim of maternity leave defined by the ECJ. It follows that if a Member State has provided for the right to paternity leave, a period of maternity leave which exceeds the period necessary for physical recovery after child-birth obtains another status in the eyes of equality law – both cover parenthood. Thereby the father and mother obtain equal social roles concerning child-care. Besides, provisions on paternity leave allow revision of the norm of 'normal worker', who was previously seen as a worker without family responsibilities and constantly available for work⁴.

It is noteworthy that issues of the right to paternity leave under EC law arose before adoption of amendments to Directive 76/207. In 1998 the staff case *Burill and Guerra*⁵, both officials of the Commission, contested a provision of Staff Regulations allowing women only to take maternity leave for not less than 16 weeks, thus precluding child-care sharing between them on a part-time basis. The applicants argued that time off provided by maternity leave which is intended to secure the relationship between mother and child and going beyond physical needs for recovery after birth-giving, must be available for both parents under the principle of equal treatment. The Court gave no argument on the issue

³ Tamara Harvey, Jo Shaw, Women, work and care: women's dual role and double burden in EC sex equality law, *Journal of European Social Policy*, 1998, Vol.8, SAGE Publications, at page 51.

⁴ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 352, paragraphs 774 and 775.

⁵ Case T-51/98, *Ann Ruth Burill and Alberto Noriega Guerra v. Commission*, 1999 ECR II-1059. See analysis of this case also in Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at pages 139-142.

of motherhood covered by maternity leave. It merely once again recalled that maternity leave by its second aim covers motherhood and that it is not in breach of the principle of equal treatment. No issue of equality between motherhood and fatherhood was analysed. The Court further ruled that a woman is not compelled to take all maternity leave and that she can start work after child-birth whenever she is able to produce a medical certificate testifying to her recovery.

Looking at this situation from the point of view of Article 2(7) of Directive 76/207, it must be mentioned that both maternity and paternity leave is based on an individual non-transferable right and that recognition of fatherhood as equal to motherhood requires that paternity leave must be as long as the length of maternity leave, which exceeds the 6-8 weeks necessary for physical recovery.

Latvian law

Labour law

Article 155(1) of the Latvian Labour Law provides for the right to 10 calendar days paternity leave for the father of a child. A father could obtain this right immediately after child birth but not later than until the child is two months old. Article 155(6) obliges employers to provide the father with previous or equivalent work, with not less favourable conditions of employment. Article 149(6) entitles the father after paternity leave to benefit from all improvements of employment conditions to which he would have been entitled.

Social law

Section II A of the Law on maternity and sickness insurance provides for the right to paid paternity leave. Paternity allowance is paid from the special disability, maternity, and sickness social insurance budget⁶. The amount of paternity leave is 80% of average insurance contribution salary. Average social contribution salary is calculated in the same way as for the purposes of calculating sickness and maternity allowance and provided by the same Regulations of the Cabinet of Ministers⁷. It provides for taking into account six months income before two months before the month when paternity allowance is claimed. Average daily social contribution salary constitutes the sum of income divided by days actually worked and not taking into account time spent on sickness and

⁶ Par sociālo drošību: LR likums. Latvijas Vēstnesis, 1995. 21.septembris, nr.144 (Law on social security), Article 11.

⁷ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances).

child-care leave. No exception concerns time spent on another paternity leave.

Acquisition of social rights during paternity leave

A person on paternity leave does not acquire any state social insurance rights. This means that regarding all risks socially insured against under state social security, the scheme has a 10-day gap. No social insurance is provided by the state as during maternity leave during which a person is insured against unemployment and old-age pension⁸. This clearly constitutes direct discrimination based on sex, on the basis that maternity leave is also concerned to constitute and protect the special relationship with the child.

If a woman due to biological differences needs 6 to 8 weeks for physical recovery, 10 weeks under Latvian legislation is provided for the purposes of the special relationship between mother and child, while for fathers it is 10 days. So both situations are comparable. Not going here into the debate as to why mothers have a longer time than fathers for creating a relationship with their children, sex equality law would require that a male during 10 days paternity leave acquires at least the same social rights as women on maternity leave. Article 2¹ of the Law on social security, which is an umbrella law, precludes any direct or indirect discrimination based on sex. It follows that lack of a right to acquire social insurance rights during paternity leave is discriminatory. The same is true about the amount of paternity allowance, which constitutes only 80% of social insurance contribution wages, while maternity allowance constitutes 100% of social contribution wages.

Social rights after paternity leave

Since men do not acquire any state social insurance rights during paternity leave, it affects their social rights under the state social insurance system. First, men lack contributions for old age pension. However, the effect is minor, because individual pension savings according to which old-age pension is calculated must consist of at least 10 years' contributions⁹. So, the effect on the sum contributed at least for 10 years is not affected considerably by 10 days when insurance against this risk was interrupted, nevertheless it formally discriminates against men. Besides, a situation could arise where that a person reaches pensionable age but precisely lacks time spent on paternity leave to fulfil the condition of at least 10 years contributions for old-age pension. Such

⁸ Par sociālo drošību: LR likums. Latvijas Vēstnesis, 1995. 21.septembris, nr.144 (Law on social security).

⁹ Par valsts pensijām: LR likums. Latvijas Vēstnesis, 1995. 23.novembris, nr.182 (Law on state pensions), Article 11.

a situation is again discriminatory in comparison to women on maternity leave.

Secondly, as regards disability pension, a person is entitled if socially insured for at least three years before disability occurred. So one could easily be lacking disability pension, because of being on paternity leave during which there is no insurance against any social risk. As regards calculation of disability pension – the formula is such as not negatively to affect the amount of that allowance for persons who were on paternity leave previously, if the condition of a three-year qualifying period for disability pension is met.

Third, when calculating sickness allowance, the formula for calculating average insurance contribution salary does not provide for exemption of periods spent on paternity leave, unlike for persons on maternity leave¹⁰. This means that conditions for calculating sickness allowance are less favourable for those who were on paternity leave. Persons may suffer from this disadvantage 9 months after paternity leave.

Fourth, as regards allowances because of accidents at work and occupational diseases, the formula for calculating remuneration for loss of work capacity and remuneration for loss of bread-winner is less favourable for those who were on paternity leave, because monthly social insurance salaries covering the six month period before two months before the month when the incident occurred must be added up and divided by the months in which social insurance contributions against this risk were made¹¹. The problem is that one of these months could involve a lower social insurance salary due to a gap during paternity leave. However, the same problem could affect a woman on maternity leave. She could be in an even worse position if she returns and starts to work in the last days of the month. This would mean that for the purposes of calculating respective allowances, one day's social insurance salary would be taken into account as a whole month's income.

Fifth, regarding unemployment benefit, a person after paternity leave is not in a less favourable situation with regard to calculation of allowance, since days during which that person has not been insured against the risk of unemployment are not taken into account for the purposes of calculating unemployment benefit¹². Problems could arise

¹⁰ Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība un valsts sociālās apdrošināšana pabalstu piešķiršanas, aprēķināšanas un izmaksas kārtība: MK noteikumi Nr.270. Latvijas Vēstnesis, 1998. 31.jūlijs, nr.223/224 (Regulations on calculation of average insurance salary and calculation, assignation and pay-out of state social insurance allowances)

¹¹ Obligātās sociālās apdrošināšanas pret nelaimes gadījumiem darbā un arodslimībām apdrošināšanas atlīdzības piešķiršanas un aprēķināšanas kārtība: MK noteikumi Nr.50. Latvijas Vēstnesis, 1999. 19.februāris, nr.48/49 (On calculation and award of mandatory social insurance remuneration due to accidents at work and occupational diseases), point 30.

¹² Vidējās apdrošināšanas iemaksu algas aprēķināšanas kārtība bezdarbnieka pabalsta apmēra noteikšanai un bezdarbnieka pabalsta un apbedīšanas pabalsta piešķiršanas, aprēķināšanas un izmaksas

when due to paternity leave a person does not qualify for unemployment benefit as such because he was not socially insured against unemployment risk for at least 9 months during the last 12 months. A month in which a person has been insured against unemployment risk for at least one day is taken as if that person was insured for the whole month.

All these incompatibilities are not precluded by Directive 79/7, since exemption is provided only for maternity periods, although according to the analogical legal method Article 4(2) could be applied to persons on paternity leave, too. As regards Latvian law, it has already been stated above that the Law on social insurance is an umbrella law of the whole social security system in Latvia, thus the principles defined in it apply to state social insurance legislation. Article 2¹ of that law precludes any direct or indirect discrimination based on sex, so the incompatibilities described above amount to breaches of that provision, if drawing parallels with the rights of persons on maternity leave.

Social dimension

The right to paid paternity leave in Latvia was introduced in 2004. Since that time, a small percentage of young fathers have used that right: in 2004 – 4521 (19.5%) fathers, 2005 - 5495 (23.5%) fathers, in comparison to 23 284 women on maternity leave in 2004 and 23 528 in 2005¹³. However, the statistics show a promising future since the data are improving. So, during the first six months of 2006 10 680 children were born and 3107 fathers took paternity leave (29%)¹⁴.

kārtība: MK noteikumi Nr.32. Latvijas Vēstnesis, 2000. 28.janvāris, nr.26/28 (Conditions on calculation of average social insurance contribution salary for the purposes of calculation of unemployment allowance and its award, calculation and pay-out) point 2.2.

¹³ Research “Men in the Latvian Public Environment: Policy, Social and Economic Aspects”, Men Equal Men Different (EC GRANT No VS/2005/0343), Ministry of Children and Family Affairs of Republic of Latvia, 2006.

¹⁴ Sannija Matule, Vecāki stereotipu gūstā”. Latvijas Vēstnesis Plus, 2006. 10.augusts, nr.123 10.08.2006.

Chapter 13.

Rights during and after child-care leave

International Law

The only international law document that attempts to address the reality of the necessity to reconcile work and family life is the ILO Workers with Family Responsibilities Convention No.156¹. The title is promising, while the text fails to hold state parties to any particular obligation other than aiming at a national policy enabling persons with family responsibilities who are engaged or who wish to engage in employment to exercise their right without discrimination. The only concrete obligation put on state parties is to provide that family reasons shall not constitute a valid reason for termination of employment. However, this could be easily evaded by primary reasons of such dismissals, which are usually absence of continuous availability for full-time work.

Interestingly, although the Convention for the Protection of Human Rights and fundamental freedoms² (“the Human Rights Convention”) does not provide for the explicit right not to be discriminated against on grounds of sex in the field of social security, nevertheless there was an attempt to contest the right to parental allowance given to mothers only. This was the *Perovich* case³ where a father who was precluded from the right to parental allowance under Austrian law contested the compatibility of this provision with Articles 8 and 14 of the Human Rights Convention. The European Court of Human Rights first found that parental leave allowance cannot itself amount to failure to respect family life, since Article 8 does not impose any positive obligation on the States parties to the Human Rights Convention. However, the situation is different when Article 14 comes into play, because “the subject matter of disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed”⁴. So it follows that Article 14 taken together with Article 8 is applicable. The main difficulty was that events took place in 1989, but the decision of European Court of Human Rights was delivered in 1998. The European Court of Human Rights recognised this by saying that as regards child-care both parents are similarly placed and that advancement

¹ Available at ILO home page www.ilo.int

² Malcom D.Evans, Blackstone’s International Law Documents 4th edition, Blackstone Press Limited, 1999.

³ Judgment of European Court of Human Rights delivered on 27th March 1998 in case *Petrovich v. Austria* (156/1996/775/976), available at home page of European Court of Human Rights

www.echr.coe.int/echr,
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=156/1996/775/976&sessionid=8329678&skin=hudoc-en>

⁴ *Ibid*, para. 28.

of the equality of the sexes is today's major goal of the Council of Europe.

However, the finding was that both parents must have the same rights to look after their child is quite recent and that still “the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law”⁵. So since at the end of 1980s it was a common standard for Contracting States that parental allowances were not provided for fathers, there is no violation of Article 14 taken together with Article 8 of the Human Rights Convention. The *Petrovich* judgement was supplemented by the concurring opinion of one judge and dissenting opinions of two judges which were absolutely opposite and demonstrating the strength of stereotypes governing among judges. So concurring opinion presented the view that the right to parental allowance granted to mothers only is “indisputably inspired by the biological and psychological bond between mother and child... Certain claims in this sphere sometimes result more from personal convenience than any overriding need”⁶. The European Court of Human Rights decided that granting parental leave allowance to mothers only does not infringe Article 8 providing for the right to respect for family and private life read in conjunction with Article 14 providing for non-discrimination.

EU law

Legislation

Directive 96/34

On 14 December 1995, general cross-industry organizations (UNICE, CEEP, and the EUTC⁷) concluded a framework agreement on parental leave. In order to put it into effect, on 3 June 1996 the Council adopted Directive 96/34⁸.

Directive 96/34 provides for an individual right⁹ of at least three months child-care leave. Particular stress is put on non-transferability of

⁵ *Ibid*, para. 38.

⁶ Concurring opinion of judgment of European Court of Human Rights delivered on 27 March 1998 in case *Petrovich v. Austria* (156/1996/775/976), available at home page of European Court of Human Rights www.echr.coe.int/echr,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=156/1996/775/976&sessionId=8329678&skin=hudoc-en>

⁷ The main organizations representing confederations of European employers' and employees' representatives. See Siofra O'Leary, *Employment Law at the European Court of Justice. Judicial Structures, Policies and processes*, Hart Publishing, 2002, at page 237.

⁸ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the EUTC, Official Journal L 145, 19/06/1996 P.0004-0009, CONSLEG – 96L0034 – 16/01/1998 – 11 P.

⁹ Gwennaële Bruning, Janneke Plantega, *Parental leave and equal opportunities: experiences in eight European countries*, Journal of European Social Policy, SAGE, Thousand Oaks and New Delhi, , London 1999, Vol.9 No.3, at page 196.

that right in order to involve both parents in child-care¹⁰. A person should be entitled to use the right to parental leave until a child reaches 8 years. Conditions of access and other rules on the right to parental leave are left to be defined by each Member State. Those conditions may include, e.g., the right to part-time child-care leave, an obligatory period of not more than one year of service in order to qualify for that right, the right of the employer to delay child-care leave in particular circumstances.

Workers on parental leave must be protected against dismissal, or dismissal is precluded by reason of use of rights of parental leave. After parental leave, a person must have the right to return to the same or equivalent work and benefit from any improvement arising from national law or collective agreement. An important difference between rights after parental leave and after maternity or paternity leave is that the worker is not entitled to benefit from improvements arising from individual employment contracts or working conditions to which she/he would have been entitled during her/his absence¹¹.

Concerning Article 2(7) of Directive 76/207, the purpose of stating that Directive 96/34 is without prejudice to equal treatment between men and women seems unclear, since the provisions of Directive 96/34 apply equally to both men and women. Possibly it implies equality regarding working conditions, which concerns parental leave exceeding the minimum requirement provided by Directive 96/34. In principle, that directive does not preclude the Member States from still granting longer parental leave for the mother than for the father of a child.

As regards social security during and after parental leave, those matters are fully left for the competence of the Member States, although implying the importance of the continuity of entitlements to social security. Implementation deadline for Directive 96/34 was 3 June 1998. However Directive 96/34 does not cover the full spectrum of child-care issues involved, such as equal pay.

Directive 79/7

Article 7(1)(b) explicitly excludes the right to claim equal treatment in the field of social security concerning acquisition of benefit entitlements following periods of interruption of employment due to bringing up children.

¹⁰ Points 7 and 8 of the Preamble of the Framework agreement on parental leave.

¹¹ *See in this regard* Article 2(7) of amended Directive 76/207.

Case-law of the ECJ

Child-care issues under Directive 76/207

Before adoption of Directive 96/34, child-care issues were dealt with from the perspective of Directive 76/207. In *Commission v Italy*¹² the Court decided that it is not discrimination within the meaning of Directive 76/207 if national law provides for initial adoption leave of three months for the mother only, because “by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family during the very delicate initial period”¹³.

In *Hofmann*¹⁴ the Court refused to recognize the equal right of both parents to leave which was provided by national legislation in the form of extended maternity leave. Instead it ruled that any leave called maternity leave and intended to protect motherhood complies with Article 2(3) of the Directive and that that directive is not intended to deal with organization of family life¹⁵. So in principle in *Hofmann* the Court recognized that EC law protects motherhood or the right of the mother to be protected during child-care leave if the Member State so decides, while the father under Directive 76/207 is not entitled to fatherhood or protection during child-care leave. Writers also stress that Hofmann

offers the archetypical statement of the perpetuation of ‘separate spheres’ ideology in EC law, and the acceptance of the private sphere as beyond the reach of (EC) law. Here the use of a model of women as different in fact perpetuated a stereotype of women as care-givers.¹⁶

In *Busch*¹⁷ the Court recognized that returning to work following parental leave constitutes an employment condition within the meaning of Article 5(1) of Directive 76/207. This finding is in particular important as regards application of Directives 92/85 and 96/34 in combination. However, as in pregnancy and maternity cases, the Court did not mention Directive 96/34, which was applicable to particular events of the *Busch* case in both aspects – regarding the time and facts of the case¹⁸ and thus

¹² Case 163/82, *Commission of the European Communities v Italian Republic*, European Court Reports 1983 Page 03273.

¹³ Case 163/82, *Commission of the European Communities v Italian Republic*, European Court Reports 1983 Page 03273, paragraph 16.

¹⁴ Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047.

¹⁵ *Ibid.*, paras. 24 to 28.

¹⁶ Tamara Harvey, Jo Shaw, *Women, work and care: women’s dual role and double burden in EC sex equality law*, Journal of European Social Policy, 1998, Vol.8, SAGE, London, Thousand Oaks and New Delhi, at page50.

¹⁷ Case C-320/01, *Wiebke Busch and Klinikum Neustadt GmbH & Co. Betriebs-KG*, European Court Reports 2003 Page I-02041, paragraph 38.

¹⁸ Point 6 of Clause 2 of Directive 96/34 entitles a worker after child-care leave to return to the same working conditions.

failed to draw a connection between Directive 96/34 and Directive 76/207.

Child –care issues under Directive 79/7

In the eyes of Directive 79/7 child-care benefit could come within its scope only under Article 3(2) as family benefit, the amount of which is affected by increases of social security benefits against risks of disability, old-age, accidents at work, occupational diseases, and unemployment¹⁹. It also follows that Directive 79/7 is not applicable even if child-care becomes one of the risks protected under a statutory scheme²⁰.

Child-care issues under Directive 96/34

Although according to Article 220 of the EC Treaty the ECJ has an exclusive right on interpretation and application of EC law, nevertheless Point 6 of Clause 4 of the Framework agreement on parental leave adopted by Directive 96/34 requires the ECJ to ask for an opinion of signatory parties regarding interpretation of this agreement.

In *Commission v Luxembourg*²¹ the Court declared void provisions of Luxembourg law which provided that in case during parental leave the right to maternity leave arises, parental leave comes to an end. In this regard the ECJ pointed out that Directive 96/34 grants an individual right to parental leave the length of which cannot be affected by any other leave²². So if such a situation occurs, women are entitled to maternity leave but afterwards to the deferred portion of parental leave.

With regard to persons who are entitled to child-care leave under Directive 96/34, the Court clarified that this right cannot depend on the birth of a child and the expiration of the time-limit given for implementation of Directive 96/34. For the purposes of application of rights provided by Directive 96/37, it is important that at the expiration of the time-limit given for implementation of Directive 96/34 the child has not reached the age of eight.

Child-care issues under Article 141 and Directive 75/117

It is clear that Directive 96/34 does not oblige employers or the state to provide workers with either pay or allowances during child-care leave. It is also clear that no obligatory other rights arising from an employment

¹⁹ Joined cases C-245/94 and C-312/94, *Ingrid Hoever and Iris Zachow v Land Nordrhein-Westfalen*, ECR 1996 Page I-04895, paragraphs 41 and 42 and Tamara Hervey, Jo Shaw, Women, work, and care: Women's dual role and double burden in EC sex equality law, *Journal of European Social Policy*, 1998, 8 (1), SAGE, London, Thousand Oaks and New Delhi, at page 53.

²⁰ Article 3(1)(b) of Directive 79/7.

²¹ Case C-519/03, *Commission of the European Communities v Grand Duchy of Luxembourg*, OJ C 143, 11.06.2005. p.11.

²² The ECJ draw parallels with annual leave and case C-342/01, *Marka Paz Merino Gomez v Continental Industrias del Caucho SA*, European Court Reports 2004 Page 00000.

contract need be provided to a worker during that period, unless normative acts provide for special rights in connection with child-care leave.

So in *Lewen*²³ the Court clarified that a person on child-care leave is not entitled to Christmas bonus. But in order to eliminate indirect discrimination against women, according to Article 141 after child-care leave a person must be entitled to a bonus which is awarded retroactively as pay performed in the course of that year. That bonus, however, could be reduced pro rata taking into account time spent on child-care leave.

In *Mau*²⁴ the ECJ decided that under Directive 80/987 a person on child-care leave in case of insolvency of the employer is not entitled to claim non-received salary, since their employment relationship is suspended on account of that leave, and confers no right to remuneration. Misleading in that regard is the term used in *Mau* - “insolvency benefit”²⁵, which more characterises extra benefit to which a person is entitled in case of employer insolvency and respective dismissal provided under national legislation²⁶. This benefit is in particular intended to help overcome difficulties in connection with unemployment, which a person on child-care leave would face sooner or later. So since this issue involves indirect discrimination with regard to pay²⁷, and from the standpoint of substantive equality, a person on child-care leave would have been entitled to this kind of insolvency dismissal benefit.

In *Gewerkschaftsbund*²⁸ the provisions of German law were contested. In particular, it provided that a period of mandatory military service must be taken into account for the purposes of calculating length of service and consequently it must be taken into account for the purposes of calculating termination payment. At the same time, the *Mutterschutzgesetz* provided that parental leave could not be taken into account for the purpose of entitlement of an employee based on length of service. Taking into account that persons on parental leave are close to 100% women, while persons on mandatory military service are close to 100% men, the provisions of German law indirectly discriminate against women. This claim was rejected by the ECJ on the grounds that both

²³ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243. For more detailed discussion see Eugenia Caracciolo di Torella, *Childcare, employment and equality in the European Community: first (false) steps of the Court*, 2000, 25 E.L.Rev. June, Sweet & Maxwell and Contributors.

²⁴ Case C-160/01, *Karen Mau v Bundesanstalt für Arbeit*, (2003) ECR I-04791.

²⁵ *Ibid.*, para. 8.

²⁶ Articles 101(10) and 112 of Latvian labour law.

²⁷ Referring to cases C-333/97, Article 141 precludes indirect discrimination arising from child-care leave, but the finding of the Court that payment of benefits could be conditional upon presence at work is problematic.

²⁸ Case C-220/02, *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich*, ECR 2004 Page 00000.

situations are incomparable – parents take parental leave in the interests of the child and the family, while persons do mandatory military service, although sometimes extended on a voluntary basis, in the collective interests of the nation. Besides, the voluntary nature of parental leave “is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such situation may be”²⁹. This ruling once again illustrates that the equality approach taken by the Court must be evaluated on the grounds of thoroughness of review of *de facto* situations³⁰. The ruling lacks a substantive approach because of the superficial comparison of both situations. If the only reasons which the Court found different were the mandatory and voluntary character and individual and collective interests which distinguishes both situations, then it is not convincing. Lack of child-care facilities and services makes parental leave mandatory, but since Europe faces a lowering of the birth rate and consequent ageing of the population, child-raising is no longer only a matter of family interest³¹.

Latvian law

Labour law

Article 156 of the Labour Law provides for the right to child-care leave. Every worker who has a child has the right to up to one and a half years leave. This may be divided into several parts and used until the child reaches eight years old. Workers must inform their employer in writing about the beginning and length of child-care leave one month beforehand. Time spent on child-care leave is taken into account for the purposes of calculating length of service. After child-care leave, a worker is entitled to return to the previous or equivalent work on the same conditions of employment as before leave. Besides, Article 149(6) provides that a person after child-care leave is entitled to any improvements of employment conditions as if she/he had not been on parental leave, which exceeds minimum requirements of Directive 96/34.

Social law

Social rights during child-care leave

Article 7 of the Law on state social allowances provides for child-care allowances to which are entitled unemployed persons, employed persons on child-care leave, and employed persons actually working. Child-care allowance is provided until a child reaches two years. Child-care allowance is not provided when the mother of the child is on maternity

²⁹ *Ibid.*, para. 60.

³⁰ Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 31.

³¹ Particular stress on those facts is put in point 7 of the Preamble to the Agreement on Parental leave.

leave. Here, the legislator has forgotten about the possibility of the father being on paternity leave, thus allowing fathers to receive paternity and child-childcare allowances simultaneously and discriminating against mothers, or allowing mothers to take child-care leave while the father is already on paternity leave thus institutionalising the mother as child carer. Regulations of the Cabinet of Ministers³² provide detailed rules on child-care allowance. Until a child reaches one year old, one of parents is entitled to child-care allowance of 70% of average social insurances contribution salary. The average social insurance contribution salary is calculated by adding 12 months social insurance salary (gross salary) and dividing by 12. The twelve-month period taken into account for calculating average social insurance contribution salary is the three-month period before the month when the child was born. It is interesting that for calculating child-care allowance, state social insurance contributions are taken into account although this allowance is not subject to the state social insurance system, but is paid by means of the state budget.

Child-care allowance for employed persons who are on child-care leave cannot be less than 56 lats but may not be more than 392 lats a month, while child-care allowance for employed persons who are working constitutes 50% of the child-care allowance which they would receive if they were on child-care leave, but not less than 56 lats. For a child between the ages of one and two, one of the parents receives 30 lats a month.

Presently, the idea of child-care leave and allowance has partially lost its sense, since parents could work full-time with one of them receiving 50% of the child-care allowance, whereas child-care leave was intended to provide the child with parental care in the first years of life. This situation has occurred because of a judgment of the Constitutional Court of Latvia³³ and resulting amendments to Article 7 of the Law on state social allowances in a situation of approaching parliamentary

³² Noteikumi par bērna kopšanas pabalsta un piemaksas pie bērna kopšanas pabalsta par dvīņiem vai vairākiem vienās dzemdībās dzimušiem bērniem apmēru, tā pārskatīšanas kārtību un pabalsta un piemaksas piešķiršanas un izmaksas kārtību: MK noteikumi nr.644, Latvijas Vēstnesis, 2006. 11.augusts, Nr.128 (3496) (Regulations on amount of child care allowance, additional payment of child-care allowance on account of birth of two and more children in one birth, on revision of that allowance and on procedure of award and pay-out of allowance and additional payment).

³³ Latvijas Republikas Satversmes tiesas 2005.gada 4.novembra spriedums lietā Nr.2005-09-01 „Par Valsts sociālo pabalstu likuma 7.panta pirmās daļas 1.punktā ietvertā nosacījuma – „ja šī persona nav nodarbināta (nav uzskatāma par darba ņēmēju vai pašnodarbināto saskaņā ar likumu „Par valsts sociālo apdrošināšanu”_ vai ir nodarbināta un atrodas bērna kopšanas atvaļinājumā” – atbilstību Latvijas Republikas Satversmes 91., 106. un 110.pantam”. Decision of the Constitutional Court of Latvia in case No.2005-09-01 ”On Compliance of the Condition Incorporated in Section 7 (Item 1 of the First Paragraph) of the Law on State Social Allowances – “if this person is not employed (is not considered to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave” with Articles 91, 106 and 110 of the Republic of Latvia Satversme (Constitution), available at <http://www.satv.tiesa.gov.lv/>

elections³⁴. But it all started when in 2004 politicians in Latvia decided that the birth rate in Latvia is catastrophically low and to reform legislation on child-care allowances. At that time, the child-care allowance was 30 lats per month until the child reached two years. At the end of 2004, the Parliament adopted amendments to Article 7 of the Law on state social allowances, providing for a new concept for the amount of child-care allowance during a child's first year of life³⁵. In that regard, the resulting Regulations of the Cabinet of Ministers³⁶ provided for a considerable rise in the amount of child-care allowances. At the same time, amended Article 7 of the Law on state social allowances precluded parent from right to receive at least partial child-care allowance in case he or she works part time.

The Constitutional Court of Latvia in case No.2005-09-01 declared part of the provisions of Article 7 of the Law on state social allowances to be unconstitutional. In particular, Article 7 provided that only those persons who do not work or are employed but are on child-care leave are entitled to child-care allowance. It did not provide for the right to at least partial child-care allowance in cases where a parent tries to reconcile child-care with part-time work. Only those parents who had a child between one and two years old - and thus an allowance of 30 lats a month only - were allowed to work part-time.

The idea of totally precluding parents on child-care leave from working was based on stereotypes that a child receives the best care only if one or both parents look after it 24 hours a day for one year. Although the right to child-care leave was provided for both sexes, this was purely formal. The opinion of the legislator presented by representatives of Parliament and the Ministries of Welfare and Children and Family Affairs fully reflected patriarchal attitudes about women's main responsibility: child-rearing, with adoption of laws that are appropriate only to those parents who live together with their spouse and have only one child.

Although the constitutionality of Article 7 of the law on state social allowances was contested on the grounds of sex equality under Article 91 of the Satversme (Constitution of Latvia), nevertheless the Constitutional Court ruled from the perspective of Article 110 of the Satversme, which provides that the state especially cares and supports families and children. The Constitutional Court found that the part of Article 7 of the law on

³⁴ Grozījumi Valsts sociālo pabalstu likumā: LR likums. Latvijas Vēstnesis 2006. 7.marts, Nr.38 (amendments to the Law on state social allowances).

³⁵ Grozījumi Valsts sociālo pabalstu likumā: LR likums. Latvijas Vēstnesis .2004. 25.novembris, Nr.174 (amendments to Law on state social allowances)

³⁶ Kārtība, kādā piešķir un izmaksā bērna kopšanas pabalstu un piemaksu pie bērna kopšanas pabalsta par diviņiem vai vairākiem vienās dzemdībās dzimušiem bērniem: MK noteikumi Nr.1003. Latvijas Vēstnesis, 2004. 12.decembris Nr.198 (zaudējuši spēku) (On procedure under which award and pay-out of child-care allowances and additional payment of child-care allowance on account of birth of two and more children in one birth)

social allowances which does not allow for reconciliation of work and family life simultaneously by precluding parents from working part-time and from receiving at least partial child-care allowance does not provide for best possible support for families with children. In particular, the measures opted for by the legislator are not proportionate for attaining a legitimate aim – a rise in the birth rate and provision of the best possible care for children. However, the claimants, one of whom was the author of this thesis, put more stress on equal opportunities of the sexes. It was proved during those proceedings that approximately 98% of persons on child-care leave are women. If precluded from part-time work during child-care leave, they are under risk of loss of qualifications and of subsequent unemployment. This is not taking into account other disadvantages in the employment market that arise due to absence on account of child-care leave, such as election to academic posts³⁷, which requires certain pedagogical and scientific work to be done during the previous year.

In accordance with this judgment, Parliament made amendments which now allow working full-time and receiving 50% of the child-care allowance, thus losing the sense of child-care allowance as such and from the legal point of view making it closer to a fertility grant.

Currently, several more cases are pending before the Constitutional Court of Latvia on the constitutionality of the provisions of Article 7 of the Law on social allowances and provisions on rights to child-care allowance. In particular under question are the constitutionality of an upper limit to the child-care allowance and of different treatment between parents who actually work and who are on child-care leave³⁸.

Social rights after child-care leave

Persons on child-care leave are insured under the state social insurance system against risks of unemployment, and for old-age pension. Those rights are provided until a child reaches 1.5 years³⁹. The amount of contributions constitutes 20% from 50 lats for old-age pension and generally applicable percentage from 50 lats⁴⁰ for insurance against risk

³⁷ Particular situation of one of the claimants.

³⁸ Ierosinātas lietas Nr.2006-10-03 un 2006-11-03 Par Ministru kabineta 2004. gada 7. decembra noteikumu Nr. 1003 "Kārtība, kādā piešķir un izmaksā bērna kopšanas pabalstu un piemaksu pie bērna kopšanas pabalsta par dvīņiem vai vairākiem vienās dzemdībās dzimušiem bērniem" 3.1. punktā ietvertu vārdu "ne vairāk kā 392 lati mēnesī" atbilstību Latvijas Republikas Satversmes 91. pantam un Nr.2006-07-01 Par likuma "Grozījumi Valsts sociālo pabalstu likumā" 1. panta daļas, ar kuru Valsts sociālo pabalstu likumā ieviests jauns 7. panta pirmās daļas 3. punkts, un 2. panta atbilstību Latvijas Republikas Satversmes 110. pantam.

³⁹ Par valsts sociālo apdrošināšanu: LR likums. Latvijas Vēstnesis, 1997. 21.oktobris, nr.274/276 (Law on state social insurance), Article 6.

⁴⁰ Noteikumi par valsts sociālās apdrošināšanas obligātajām iemaksām no valsts pamatbudžeta un valsts sociālās apdrošināšanas speciālajiem budžetiem: MK noteikumi Nr.230. Latvijas Vēstnesis,

of unemployment defined by Cabinet of Ministers which presently constitutes 1.86%⁴¹. This means that social insurance during child-care leave provided by the state is of minimum amount and even less than for a person receiving the minimum salary, which is currently 90 lats. Consequently, in case unemployment occurs right after child-care leave, a person is entitled to minimum unemployment allowance, but if unemployment occurs during a period of 9 months after the end of child-care leave, then a person's unemployment allowance would still be partially calculated on the basis of social insurance contributions provided by the state during child-care leave, thus diminishing the respective allowance.

The capital from which old-age pension is calculated also suffers loss during child-care leave because of the very low amount of social insurance contributions provided by the state. The situation is slightly better regarding calculation of maternity and sickness allowance, since Article 32 of the Law on maternity and sickness insurance requires taking into account of social insurance contributions made up to 32 months before the normal calculation period usually taken into account for the purposes of calculating those allowances. However, it does not eliminate differential treatment in comparison to other colleagues who have not been on child-care leave, whose allowances are calculated on the basis of a more recent period, which may reflect a pay rise.

A person after child-care leave risks qualifying for minimum disability pension. Article 16(3) of the Law on state pensions provides that a person who has not been subject to disability insurance during five years before the award of disability pension is entitled to minimum disability pension, which presently amounts to 45 lats a month⁴².

If after child-care an accident at work or occupational disease occurs, then a person up to four months after the end of child-care is entitled to the minimum social allowance or an allowance amounting to 40% of the average insurance contribution salary in the state⁴³.

2001. 13.jūnijs, nr.91 (Regulations on state state social insurance payments from state budget and state social insurance special budgets), points 3 and 4.

⁴¹ Noteikumi par valsts sociālās apdrošināšanas iemaksu likmes sadalījumu pa valsts sociālās apdrošināšanas veidiem 2006.gadā: MK noteikumi Nr.968. Latvijas Vēstnesis, 2005. 23.decembris, nr.206 (Regulations on division of state social insurance rate among modes of state social insurance for year 2006)

⁴² Noteikumi par valsts sociālā nodrošinājuma pabalsta un apbedīšanas pabalsta apmēru, tā pārskatīšanas kārtību un pabalstu piešķiršanas un izmaksas kārtību: MK noteikumi Nr.561, Latvijas Vēstnesis, 2005. 29.jūlijs, nr.119 (Regulations on amount of state social security allowance and death grant, and procedure for their award, reassessment and pay-out).

⁴³ Obligātās sociālās apdrošināšanas pret nelaimes gadījumiem darbā un arodslimībām apdrošināšanas atlīdzības piešķiršanas un aprēķināšanas kārtība: MK noteikumi Nr.50. Latvijas Vēstnesis, 1999. 19.februāris, nr.48/49 (On calculation and award of mandatory social insurance remuneration due to accidents at work and occupational diseases).

The author argues that all instances of less favourable treatment arising from child-care leave in the field of state social security can be contested before the national courts of Latvia as indirect discrimination based on sex. Article 2.¹ of the Law on social security, which is an umbrella law, prohibits indirect discrimination based on sex in the system of social security in Latvia. No other law in the field of social security provides for any exemptions as regards discrimination, so no provision provides for the exemption stipulated in Article 7(1)(b) of Directive 79/7. Since the Member States may not invoke non-implemented provisions of directives against individuals⁴⁴, it follows that indirect discrimination on grounds of sex arising on account of child-care leave is precluded under Latvian legislation.

Self-employed

Self-employed persons have the same right to child-care leave and allowance under the same conditions as employed workers⁴⁵ but because of incomplete and low level social insurance during child-care leave, self-employed persons face almost the same disadvantages as employed workers. The disadvantages are almost the same, because self-employed persons are subject to insurance against the risks of old-age, disability, maternity, and sickness⁴⁶.

Unemployed

Child-care allowance for unemployed persons consists of a flat rate allowance of 50 lats a month, while unemployed persons are socially insured for old-age pension and the risk of unemployment under the same conditions as employed and self-employed persons. So, unemployed persons benefit from child-care leave.

Social dimension

Reform of child-care allowances, which provided one of the parents with an allowance in the amount of previous salary until the child-reaches 1 year, was intended to increase the birth rate in middle-class families.

⁴⁴Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, European Court Reports 1986, page 723.

⁴⁵ Grozījumi Valsts sociālo pabalstu likumā: LR likums, Latvijas Vēstnesis 2006. 7.marts, Nr.38 (amendments to the Law on state social allowances). Noteikumi par bērna kopšanas pabalsta un piemaksas pie bērna kopšanas pabalsta par diviņiem vai vairākiem vienās dzemdībās dzimušiem bērniem apmēru, tā pārskatīšanas kārtību un pabalsta un piemaksas piešķiršanas un izmaksas kārtību: MK noteikumi nr.644, Latvijas Vēstnesis, 2006. 11.augusts, Nr.128 (3496) (Regulations on amount of child care allowance, additional payment of child-care allowance on account of birth of two and more children in one birth, on revision of that allowance and on procedure of award and pay-out of allowance and additional payment).

⁴⁶ Exception, Article 6(3) of Law on state social insurance provides that self-employed persons who are of pensionable age are not subject to insurance against risk of disability.

However, after two and a half years of practice, statistics show that the birth rate is increasing in families with low income. The average child-care allowance in 2006 is only 68 lats⁴⁷, and only 4% of new mothers receive 392 lats. As a result, many families belonging to the category of social risk make babies as a business in order to receive 50 lats a month for one year⁴⁸. This is a considerable income in the countryside, with its high rates of unemployment and alcoholism.

Politicians until now wanted to solve the problems of the birth rate only by increasing extraordinary (child-birth allowance intended to buy necessary things for a new born-baby) or short-term child allowances. The state does not provide a long-term policy for families and children. The state does not discuss problems of lack of child-care facilities when children are between the ages of one and two. During that period, one parent is entitled to 30 lats child-care allowance, which is not enough for survival, while the real survival minimum for one person amounts to around 120 lats. Besides, according to the Labour law, child-care leave is provided for 1.5 years. This means that in combination with maternity leave a mother could stay at home without loss of employment until her child reaches 1 year and 7 months. Social insurance by the state is provided only until a baby reaches 1.5 years.

Kindergartens are available from the age of two. However these are largely lacking. In 2006, around 15 000 children waited in line for kindergarten. Such a situation results in unemployment of their mothers. In May 2006, 12.3% of unemployed persons were women after child-care leave⁴⁹.

The government is currently trying to resolve this situation by making plans on building and opening new kindergartens. Only recently, the prime minister stressed that women face difficulties in returning to the labour market after child-care leave⁵⁰. However this is not due to awareness of gender equality, but because of lack of workforce that has arisen recently in Latvia.

The key problem is still that almost 100% of persons on child-care are women⁵¹ and that the nearest future does not promise considerable changes in this regard. For example, since discussion on reform of child-care allowances started, the term 'child-care' allowance obtained a new name 'mother's salary'. So it is called by everybody – starting with

⁴⁷ Sanita Jemberga, Brīvpusdienas – lūdzu, dzīvokli – nē. Diena, 2006. 12.augusts, Nr.186

⁴⁸ Ibid.

⁴⁹ Vajag darbinieku? Meklē NVA! Komersanta Vēstnesis, Latvijas Vēstnesis, 2006. 28.jūnijs, nr.31, 16.lappuse.

⁵⁰ Vairāk kā 1000 bērniem nav vietu Rīgas bērnudārzos, www.delfi.lv, 16.08.2006.

⁵¹ No institution has precise data, because they identify persons not on grounds of sex but on grounds of personal ID. A letter from the State Social Insurance Agency provided to the Constitutional Court of Latvia in connection with case 2005-09-01 presumes that women comprise 98% of persons on child-care.

politicians and state officials and ending with journalists and the average citizen, who is no longer able to recognize what kind of allowance the term ‘child-care allowance’ covers.

The opinion of the anthropologist authors of the recent research “Men in the Latvian Public Environment: Political, Social and Economic Aspects” is that Latvian legislation is appropriate for equal parenting, but the major obstacle to involvement of fathers in child-care is stereotypes. However, another anthropologist, Putniņa⁵², argues the opposite. She contends that legislation must be such as to stimulate overcoming of stereotypes, but that present legislation stimulates cementing of stereotypes. For example, present legislation does not allow equal parenting or the possibility to share child-care leave between parents on a part-time basis. Instead, it offers full-time work and half child-care allowance for one parent. Taking into account the low average income in Latvia, this results in the traditional division of roles between parents – the mother takes child-care leave on a full-time basis, but the father remains in the role of bread-winner. For most families, this is the only acceptable way from the financial point of view. The reason is that part-time child-care and working for one parent incurs an extra financial burden – during absence on account of part-time work of one parent, a baby sitter must be paid. This leads to the situation where child-care allowance, which forms 50% of the normal child-care allowance, constitutes the pay of the baby sitter, while the family must live on 1.5 the salary of both parents. Instead, if parents decide to divide roles traditionally, then the family income remains at the previous level – the mother receives child-care allowance at the level of previous earnings, the father proceeds with his usual employment, and no need arises for extra baby sitter expenses, because the mother performs child-care.

⁵² Interview on 22nd of August. She is a Ph.D. (Cambridge University).

Part IV.

Conclusions and proposals

Chapter 14.

Conclusions

Problems of EC sex equality law concepts and of implementating EC sex equality law into the Latvian legal system

Equality and non-discrimination

The main problem as regards the differential approach which is applied in the EC and Latvian legal systems is that it does not always guarantee substantive equality. Even less, it is not always able to catch discrimination. In order to improve the situation there is no need for dramatic change as regards legal theory. As Mjoll rightly stresses, strictness of review of the situation defines whether an approach is formal or substantive¹. In turn, the requirement of strict review of legal and factual situations² compels itself to depart from the male as a norm and to take into account hidden social obstacles which women face³. For example, in the widely criticized *Helmig* case⁴ the Court took into account the reality of women's lives – part-time employment in order for the rest of working time to be spent on household and family work - then

¹ Oddny Mjoll Arnardottir, "Equality and Non-Discrimination under the European Convention on Human Rights", Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 31:

The review of discrimination is undertaken though analysis in two principal steps. The first step in analysis must establish the existence and basis of differentiation. Following that the question arises whether the differentiation is justified and the objective and reasonable justification test decides where the line between banned discrimination and permitted or even desirable differentiation lies. Strictness or leniency in the review, placing respectively maximal or only minimal burdens on the establishment of difference of treatment and the justification for differentiation, implies whether the approach is formal or substantive. Thus the strictness of review becomes absolutely instrumental in positioning a case on the sliding scale from formal to substantive equality.

² Levits E., Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 2003. 8.maijs, Nr.68.

³ For example, although Levits (Par tiesiskās vienlīdzības principu. Latvijas Vēstnesis, 2003. 8.maijs, Nr.68) in Latvian legal theory places special protection during pregnancy and maternity under social protection measures thus demonstrating the male norm as the point of departure. EC law by Directive 92/85 and the ECJ by its ruling in *Gillespie* (Case C-342/93, *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*, European Court Reports 1996 Page I-00475) has defined special pregnancy and maternity protection as a *sui generis* situation, thus formally showing that the point of departure is not the male norm. However, both approaches - whatever norm they have as a point of departure - award women the same protection and neither of them guarantees substantive equality.

⁴ Joined cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Detlef Bogdol GmbH and Ursula Ludewig v Kreis Segeberg*, ECR 1994 Page I-05727.

the decision would be favourable to the part-time or simply corresponding idea of substantive equality⁵. The doctrine of strictness of review is not limited to a real comparator: it could as well be hypothetical. For example, it fits for comparison of financial needs of women on maternity leave and the person actually working, taking into account the judgment in *Gillespie*⁶, where the Court said that a woman on maternity leave is not entitled to benefit in the amount of full pay, not taking into account the most probable fact that their financial needs do not diminish on account of maternity leave.

Direct discrimination

EC law

As regards establishing direct discrimination, according to the recent *Nikolaoudi*⁷ judgment a neutral provision may form not only indirect discrimination but also direct discrimination where it affects a group of persons consisting of one sex. Unclear here remains the situation where a neutral provision affects only one person, whether it must be considered as a directly or indirectly discriminatory situation. Moreover, it is very interesting in the present situation where a hypothetical comparison is allowed under both – direct and indirect - discrimination definitions provided by amended Directive 76/207. The case-law of the ECJ has not delivered a case so far on direct discrimination by using a hypothetical

⁵ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 212, paragraph 477 argues:

In my view, the reason the Court preferred not to see discrimination in *Helmig* is connected with the fact that all the involved employees were women who were commonly assumed to work part-time merely in order to have more time to spend with their children in the private sphere of the household and family. The decision that there was no differential treatment between full-time and part-time employees and hence no discrimination, allowed the court to silently endorse the idea that an hour lost for childcare or household activities does not justify any extra financial compensation. In other words: the background idea seems to be that childcare and household activities are economically uninteresting and that, as a consequence, the ability to accomplish those tasks should not be rewarded. By contrast, one hour of free time grabbed from a worker who adapts to the (male) norm of full-time work and no family responsibilities, is worth an overtime bonus. Apparently, the restriction on a full-time employee’s leisure time seems more worthy of financial compensation than the restriction on a part-time employee’s ‘free’ time that is used for activities connected with childcare and household. I cannot discard the impression that the Court would have decided *Helmig* in a different way should the complainants have been male full-time workers with two part-time jobs for different employers. After all, in that case, overtime work imposed by any of the two employers would imply less leisure for the full-time worker, who is generally assumed not to spend his free time on childcare or household activities.

⁶ Case C-342/93, *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*, European Court Reports 1996 Page I-00475.

⁷ Case C-196/02, *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*, OJ C 106, 30.04.2005., p.1.

comparator, except in pregnancy cases⁸. So far the ECJ has demonstrated a strict approach as regards the possibility to justify direct discrimination. However, such a strict approach may lead to compelled departure from legal theory; for example, such a position may lead to an escape from justification of direct discrimination through non-comparability of situations⁹.

As regards exemptions, the ECJ has mandated the Member States to depart from the equal treatment principle when the sex of the worker as a determining factor is defined on the basis of socially construed stereotypes¹⁰. Although special protection during pregnancy and maternity under Article 2(7) of amended Directive (ex Article 2(3)) must be interpreted strictly in the sense that it may not be applied “for special protection measures” to women outside that special period¹¹, nevertheless it still mandates the Member States for quite a wide discretion (*Boyle*) as regards special protection measures during pregnancy and the maternity period which frequently goes beyond biological differences and reflects socially construed stereotypes of woman as the main child-carer¹². Positive measures allowed under Article 141(4) according to the interpretation given by the ECJ present an individual right approach, while the present state of the disadvantageous situation of women in the labour market requires a group approach in order to attain equality.

Latvian law

Provisions of EC law as regards the concept of direct discrimination are properly introduced into the Latvian legal system; however, the case-law of national courts shows that judges do not pay much attention to qualification of direct or indirect discrimination and to the presence or lack of a comparator. In other words, judgments do not reflect reasoning from the perspective of legal theory, which sooner or later may lead to

⁸ See for example, 177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941 and C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

⁹ See in this regard, case C-342/93, *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*, European Court Reports 1996 Page I-00475 and Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International, see footnote at page 545.

¹⁰ See cases, 248/83, *Commission of the European Communities v Federal Republic of Germany*, European Court Reports 1985 Page 01459, paragraph 34 and C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence*, ECR 1999 Page I-07403.

¹¹ See for example cases C-345/89, *Criminal proceedings against Alfred Stoeckel*, European Court Reports 1991 Page I-04047 and C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, European Court Reports 2000 Page I-00069.

¹² See case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paras 49 and 50.

improper legal qualification of discriminatory situations and possible misidentification of indirect discrimination. The second issue is the misleading wording of Article 29(3) of the Labour Law, which indicates that direct discrimination may be justified.

Indirect discrimination

EC law

The definition provided for by amended Directive 76/207 allows for hypothetical comparison. Unlike the definition provided by Directive 97/80, it does not require statistical data showing that a substantially higher proportion of members of one sex suffer from disadvantage. The new definition provides for the obligation to review objective justification under the proportionality test¹³; however, it concerns equal treatment only. The three-stage proportionality test elaborated in *Bilka-Kaufhaus*¹⁴ by the ECJ was not applied always and fully as regards social security matters. Directive 79/7 does not provide for such an obligation either. It seems that the ECJ applies a looser proportionality test as regards social security¹⁵ and social policy matters¹⁶, thus setting different standards for employers and the Member States. Taking into account the scope of competence and amount of financial resources available to the Member States in comparison to employers, such different standards are unacceptable. It is also unacceptable with regard to the principle of equal treatment as a fundamental principle of the EC and equality before the law.

Latvian law

The concept of indirect discrimination is formally introduced in Latvian legislative acts, but since it is a new concept, there is a necessity for information campaigns in order properly to enforce that principle in the whole legal system.

Equal pay

EC law

The major obstacles on the way to substantive equality as regards equal pay matters in the eyes of the present writer are two – a single source requirement or a requirement which limits comparison of pay to a single source – one employer, a collective agreement or legislative provision -

¹³ Unlike the ECJ ruling in case C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal*, ECR 1993 Page I-06185.

¹⁴ ¹⁴ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

¹⁵ See for example, case C-226/91, *Jan Molenbroek v Bestuur van de Sociale Verzekeringsbank*, European Court Reports 1992 Page I-05943 paragraph 13.

¹⁶ See for example, case C-281/97 *Andrea Krüger v Kreiskrankenhaus Ebersberg*, European Court Reports 1999 Page I-05127.

and lack of criteria helping to define work of equal value. If both problems were solved, it would allow elimination of cross-industry discrimination as well as discrimination as regards pay on account of horizontal segregation of the employment market. Presently, EC law distinguishes between the concepts of equal treatment and equal pay, which sometimes may lead to confusion and unpredictable legal consequences, especially in national courts¹⁷. However, this deficiency will be eliminated by Recast Directive 2006/54, which defines the concept of equal pay as a working condition.

Latvian law

Lack of information on provisions prohibiting discriminatory pay and lack of knowledge on interpretation of equal pay provisions provided by Article 60 of the Labour law are seen as a major obstacle to equal pay claims in Latvia. Those claims are also restricted by the practice of private employers to require confidentiality on salaries among employees, and illegal employment relationships comprising lack of employment contract or only partially legitimised wages. Equal pay problems in the field of occupational social security schemes may be only minor, since such system of social security is not widespread in Latvia and with regard to private pension funds differential actuarial factors are prohibited.

Equal treatment

EC law

Equal treatment is limited similarly to the concept of equal pay. Namely, comparison is restricted to the single source, which precludes fighting discrimination in the more general context of the employment market. An important finding of the Court was that refusal to employ and dismissal on grounds of pregnancy constitutes direct discrimination based on sex¹⁸. In this regard it is noteworthy to mention that although Directives 92/85 and 96/34 were adopted as other provisions than sex equality, nevertheless in reality they form an integral part of EC sex equality law. However, incoherency on the legal basis of said directives with EC sex equality law constitutes one of the key problems. It serves to split issues arising in connection with child-birth from sex discrimination arising within the employment market, in spite of the fact that in the majority of cases discrimination within the labour market arises in connection with child-birth.

¹⁷ See in this regard the situation described by Catherine Barnard, Bob Hepple, Indirect Discrimination: Interpreting Seymour-Smith, Cambridge Law Journal, July 1999, 58(2), at pages 404-405.

¹⁸ Cases C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, para. 12 and C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

Amendments to Directive 76/207 finally defined as discrimination harassment and sexual harassment, which according to research are quite widespread phenomena and it is reasonable to consider that it causes financial loss to employers on account of loss of productivity¹⁹. However, the author is anxious about effective enforcement of those concepts, since the burden of proof provisions alone do not resolve fully problems connected with proof of sexual harassment.

Latvian law

Special provisions regarding pregnancy, maternity, paternity, and child-care are seen outside equal treatment matters. It must be provided explicitly that less favourable treatment on grounds of pregnancy, maternity and paternity constitutes direct discrimination based on sex, but less favourable treatment on grounds of child-care constitutes indirect discrimination. Article 29(1) must also provide that discrimination is prohibited not only as regards notice of dismissal but also dismissal and renewal of a fixed term contract. The latter is necessary to comply with the provisions of Article 10 of Directive 92/85 and the ruling in *Hertz*²⁰, but the former in order to comply with the *Melgar* judgment²¹. The wording of Article 32(1) is formulated unclearly, since it is formulated in the negative but provides for a positive obligation. It must be stated clearly that job advertisements must concern both sexes. According to Article 2(4) of the Law on the state civil service, civil servants under national law are not subject to the right to equal treatment²². This is contrary to EC sex equality law. Much more attention must be paid to the enforcement of equal treatment provisions.

Social security

EC Law

Although Directive 79/7 brought many changes favouring women, nevertheless it retains exemptions which, taken together, affects women more negatively than men. In particular, it concerns exemption of the Member States from the obligation to insure persons during and after the child-raising period with social security guarantees. Different pensionable

¹⁹ Evelyn Ellis, *EU Anti-Discrimination Law*, Oxford EC Law Library, Oxford University Press, 2005, at pages 236-240.

²⁰ If Article 10 of Directive 92/85 is applicable only to those workers who have informed their employer of pregnancy, then Article 5(1) of Directive 76/207 precludes dismissal of a pregnant worker (case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979) without precondition of information.

²¹ Case C-438/99, *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915.

²² Valsts civildienesta likums: LR likums. Latvijas Vēstnesis, 2000. 22.septembris, Nr.331/333 (Law on state civil service).

ages allowed under Directive 79/7 does not remedy this substantive inequality, since this “advantage” granted to women is effective only in several Member States²³ and, indeed, it does not always work in favour of women themselves²⁴. Besides, as regards case-law of the ECJ, it has given to the Member States broader competence than to anybody else concerning justification of indirect discrimination by sometimes not requiring proving proportionality of discriminatory measures at all²⁵. The case-law of the ECJ also allows exemption of certain categories of persons from the social security system or certain benefits²⁶. It is obvious that such actions usually work to the disadvantage of part-time workers or workers with low income, of which the majority are women. So Directive 79/7 not only fails to catch inequality arising from unequal division of family and child-care responsibilities between men and women, in particular when women are on child-care leave, but also allows indirect discrimination against women in part-time employment who try in this wise to reconcile work and family life²⁷.

Latvian law

The Latvian social security system at first glimpse does not provide for any directly discriminatory provision distinguishing, for example, between married and single women or widows or widowers, since it is a recent creation – only from the beginning of the 1990s. Besides, it has inherited the traditions of the Soviet social security system which did not explicitly distinguish between rights of men and women. However, major problems arise with regard to social rights after maternity, paternity, and child-care leave. The social security system has failed to accommodate special treatment with regard to maternity and paternity leave in a non-discriminatory way. The child-care social security system discriminates against women indirectly.

²³ Lynn M. Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community*, DJOF Publishing, Copenhagen, 1999, at page 171 the writer states that “only four countries have maintained different pension ages and they disadvantage both men and women in different ways”. The author has no information on new Member States.

²⁴ See in this regard the section on Social security and cases C-382/91, *Secretary of State for Social Security v Evelyn Thomas and others.*, European Court Reports 1993 Page I-0124 and C-196/98, *Regina Virginia Hepple v Adjudication Officer and Adjudication Officer v Anna Stec.*, European Court Reports 2000 Page I-03701.

²⁵ See in this regard cases C-317/93, *Inge Nolte v Landesversicherungsanstalt Hannover*, European Court Reports 1995 Page I-04625 and C-444/93, *Ursula Megner and Hildegard Scheffel v Innungskrankenkasse Vorderpfalz now Innungskrankenkasse Rheinhessen-Pfalz*, European Court Reports 1995 Page I-04741 and the section on Indirect discrimination.

²⁶ Case C-280/94, *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.*, European Court Reports 1996 Page I-00179.

²⁷ See in this regard also Tamara Harvey, Jo Shaw, *Women, work and care: women’s dual role and double burden in EC sex equality law*, Journal of European Social Policy, 1998, Vol.8, SAGE, London, Thousand Oaks and New Delhi.

Self-employed

EC law

EC law provides self-employed persons with the right to equal treatment by three legislative documents – Directives 86/613, 2004/113 and 79/7. However, they comprise more negative obligations than positive. This especially concerns Directive 79/7, which does not oblige the Member States to provide any particular social security protection but just obliges them to obey the prohibition on discrimination. As regards social security during maternity, there is no provision under EC law, including Directive 86/613, obliging Member States to provide self-employed women with special maternity protection.

Latvian law

Self-employed persons are not protected under Latvian law in other fields than social security. Although there is a project of amendments to Latvian Civil law to Article 1403¹, it will take much effort to adopt, taking into account the resistance of deputies and their lack of knowledge in the field of anti-discrimination law. But the most important aspect after adoption of said amendments to the Civil law will be their enforcement and proper interpretation and application. As regards social security under statutory social security schemes, the legislator must reconsider whether different rules on calculation and entitlement to social allowances in comparison to employed persons are legitimate under the general principle of equality, because under Latvian law several occupations persons may perform in the capacity of self-employed only.

Enforcement and remedies

EC law

Although EC law formally leaves enforcement and remedy matters for the choice of the Member States, nevertheless it has elaborated a number of effective enforcement and remedy tools. These include direct and indirect effect, the principles of effectiveness and equivalence, the reversed burden of proof as well as the right to effective, dissuasive and proportionate compensation and state liability.

However, it is unclear why the ECJ distinguishes between enforcement and remedy measures as regards labour and social security rights. In particular, why is a person discriminated against precluded from claiming arrears of benefit²⁸, but the claim for benefits itself may be restricted by a time limit as regards retroactive entitlement to the social

²⁸ Case C-66/95, *The Queen v Secretary of state for Social Security, ex parte Eunice Sutton* European Court Reports 1997 Page I-02163.

benefit in question²⁹? Although arrears of benefits may be claimed through state liability, nevertheless this entails an extra obligation to prove mandatory conditions. EC law does not provide for an exhaustive remedy if the national court has failed to ask for a preliminary ruling and this has led to a wrong case outcome³⁰. Although such failure may be contested under state liability, nevertheless it does not guarantee that the same mistake will not be committed again.

Latvian law

The burden of proof provisions of outcome Labour law must be amended³¹ in order to specify that outcome word 'facts' does not require evidence but indicate that facts must testify to *prima facie* discrimination³².

As regards provision on equal pay provided by Article 60, time limits for bringing a claim for unequal pay must be equalized with other claims concerning pay matters from one month to two years in order to comply with the principle of equivalence. Besides, it must be explained to lawyers that arrears of pay is not restricted to the general time limit of two years governed by the Labour law, otherwise remedies for unequal pay would be precluded from effectiveness.

Article 34(2) - which provides that no instatement may be required by a discriminated person - must be revised, since in a small country in certain circumstances the obligation to conclude an employment contract may be the only effective remedy. While Article 34(2) does not provide for instatement, the one-month term for bringing a claim must be revised, since - as correctly pointed out by the judge in the *Kozłowska* case³³ - such a short (one-month) term may be justified only in cases possibly resulting in a reinstatement obligation for the purposes of legal certainty of the employer.

Case practice of the national courts shows that there is some difficulty in proving financial loss in discrimination cases³⁴. Possibly this

²⁹ See for example cases C-338/91, *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, European Court Reports 1993 Page I-05475 and C-208/90, *Theresa Emmott v Minister for Social Welfare and Attorney General*, European Court Reports 1991 Page I-04269.

³⁰ See in particular, case C-224/01 *Gerhard Köbler v Republik Österreich.*, European Court Reports 2003 Page I-10239 and case C-173/03 *Traghetti del Mediterraneo SpA, in liquidation v Repubblica italiana*,

³¹ Case 109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, European Court Reports 1989 Page 03.

³² Case C-127/92, *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health*, European Court Reports 1993 Page I-05535.

³³ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr.15066406.

³⁴ In this regard see, Sants (Rīgas pilsētas Ziemeļu rajona tiesas 2005.gada 29.aprīļa spriedums lietā Nr.C32242904047505, C-475/3) and Kuzņerēvičs (Rīgas Apgabaltiesas Civillietu tiesas kolēģijas 2005.gada 21.septembra spriedums lietā Nr.C 27175804 CA-2787/19; 2005.g., Latvijas Republikas Augstākās tiesas Senāta 2006.gada 8.februāra spriedums lietā Nr.SKC-54).

is because a very interesting approach is taken as regards compensation for enforced idleness in unfair dismissal cases in general. However, since EC law requires the right to both kinds of compensation - for financial loss and moral damage - national courts must rethink their approach, which presently tends to refuse award of financial loss, instead awarding compensation for moral damage only. Article 1635 of the Civil Law must be amended by provisions not requiring proof of the existence of moral damage, because the right to compensation for moral damage may not be conditional upon requirements of national law which may exempt a person liable for breach of prohibition of discrimination from full liability³⁵. The same is true about requirements of proof of financial loss. Establishing the fact of discrimination is enough to exclude a claimant from the obligation to prove the existence of fault³⁶.

Recast Directive 2006/54

Article 28 of Recast Directive 2006/54 does not pose much optimism as regards elimination of discrimination arising from special protection during pregnancy and maternity. It is true that rights provided for protection during pregnancy and maternity vary considerably from Member State to Member State. This especially concerns the right to extend maternity leave to a period which is several times longer than necessary for physical recovery. Besides, it must be taken into account that excessive protection of women during that special period may increase discrimination against women in general. Such a wide margin of discretion left for the Member States does not help in attaining the goal provided by points 11 and 26 of the Recast Directive, stating that it is necessary to work on further elimination of discrimination, in particular arising from the difficulty of combining family and work commitments and poor involvement of fathers in child-care. Positive features of the Recast Directive include putting the equal pay principle under working conditions, defining direct and indirect discrimination as regards equal pay, and explicitly defining the concept of gender mainstreaming.

Legal regulation of pregnancy and maternity under EC and Latvian law

EC Law

Analysis of rights during pregnancy and maternity under EC law has revealed a line of problems. It is clear that not only Directive 92/85, but

³⁵ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

³⁶ Cases C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941 and C-180/95, *Nils Draehmpael v Urania Immobilienservice OHG*, European Court Reports 1997 page I-02195.

also EC sex equality legislation sometimes lead to discrimination against pregnant persons and persons during maternity leave and after it. Besides, here a major role is played not by the legislator but by the ECJ.

Role of Directive 92/85 in discrimination against workers during pregnancy and maternity

Does Directive 92/85 lift pregnancy and maternity out from the equality debate?

Foubert argues that Directive 92/85 - since it is based on health and safety measures - lifts selected issues of pregnancy and maternity out of the equality debate³⁷. It institutionalises pregnancy as a *sui generis* situation which is incomparable to “any other situation in which a male or female worker may find him or herself”³⁸. The author of the present thesis agrees with this finding, but only partially. The author suggests that it is not Directive 92/85 which allows for discriminatory treatment or lifting out of pregnancy and maternity protection from the equality debate. It is the ECJ that did it by interpreting EC legislation in an inconsistent and discriminatory way. Therefore, the author suggests looking closer at this problem. First of all, the provisions of legislation must be discussed. It is clear that after amendments to Directive 76/207³⁹ the special treatment provided by Directive 92/85 cannot be lifted out of the equality debate. Article 2(7) of amended Directive 76/207 precludes unfavourable treatment related to pregnancy and maternity protection, thus presently this is no longer an issue at all.

The problem of pregnancy and maternity as a *sui generis* situation most of all concerns pay issues. However, one should not exaggerate this problem as regards EC legislation. It is true that EC sex equality legislation contains only one equal pay provision regarding maternity protection. This is Article 6(1)(g) of Directive 86/378, which provides that persons on maternity leave are entitled to retention of accrual of pension rights if it is provided by agreement or national legislation and paid by the employer. General EC legislative acts on equal pay - Article 114 and Directive 75/117 - are silent on this issue. Maternity pay and allowance matters are provided by Article 11 of Directive 92/85, which consists of several parts. Of particular importance with regard to the equal pay debate is the relation between subparts (a) and (b) of part (2). Article 11(2)(b) speaks about adequate maternity pay, while Article 11(2)(a) requires ensuring of rights connected with employment contracts.

³⁷ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at pages 195, 205, paragraphs 438, 471.

³⁸ *Ibid.*, at page 195, paragraph 438.

³⁹ Directive 2002/73.

Consequently, before making a conclusion on whether Directive 92/85 lifts equal pay matters during pregnancy and maternity out of the equality debate, the case-law of the ECJ must be discussed secondly.

As regards the case-law of the ECJ on equal treatment during pregnancy and maternity, there are no issues falling outside the equality debate due to special protection awarded under Directive 92/85. There were only two cases regarding interpretation of Directive 92/85 regarding equal treatment – *Boyle*⁴⁰ and *Gomez*⁴¹. In both, the question of accrual of paid annual leave was discussed. Although that discussion was formally outside the equality debate, because reference was made to Article 11(2)(a) only, nevertheless the outcome was in accordance with the present requirements of Article 2(7) of Directive 76/207.

As regards equal pay, the only matter which is seemingly lifted out of the equality debate is maternity pay. But it is only seemingly. As argued above, maternity benefit provided by Article 11(2)(b) of the Directive is only one element of the whole pay which women on maternity leave may be entitled to. Such judgments as *Boyle*⁴², *Mayer*⁴³, *Lewen*⁴⁴ and *Abdoulaye*⁴⁵ indicate that additional to maternity benefit provided by Article 11(2)(b) of the Directive, women on maternity leave are entitled to accrual of pension rights under occupational social security schemes under Article 11(2)(a) of Directive 92/85 and Article 6(1)(g) of Directive 86/378, accrual of Christmas bonus - where that bonus is awarded retroactively as pay for work performed in the course of that year - and lump-sum payments for persons going on maternity leave under Article 141⁴⁶. Thus Directive 92/85 itself does not say that pay during maternity leave must be at least to the level of sick pay only. The pay level during maternity leave to a great extent depends on interpretation of Article 11(2)(a). The Court, by holding in *Boyle* that accrual of pension rights is guaranteed by Article 11(2)(a), opens the gate

⁴⁰ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401.

⁴¹ Case C-342/01, *Marka Paz Merino Gomez v Continental Industrias del Caucho SA*, European Court Reports 2004 Page 00000.

⁴² Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401.

⁴³ Case C-356/03, *Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder*, OJ C 57, 05.03.2005., p.11.

⁴⁴ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243.

⁴⁵ Case C-218/98, *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723.

⁴⁶ A similar idea to this was suggested by Eugenia Caracciolo di Torella and Annick Masselot, *Pregnancy, maternity and the organization of family life: an attempt to clarify the case law of the Court of Justice*, European Law Review (2001) 26, Sweet & Maxwell and Contributors, at page 251. They suggest that the Court distinguishes between two forms of remuneration – under Article 11(2)(b) of Directive 92/85 and under Article 141, but the author of this thesis suggests that Article 11(2)(a) is also involved and if taken in connection with Article 141 it could bring other elements of equal pay during maternity leave about equality.

to other judgments providing for rights to other elements of pay to which a worker on maternity leave is entitled. This is because accrual of pension rights is one of the elements of equal pay under Article 141⁴⁷ and thus excludes any doubt that rights provided by Article 11(2)(a) concern treatment, not pay. Article 11(2)(a) excludes maternity benefit, which is only one element of equal pay. Besides, the amount of maternity pay itself was restricted by the Court, not by Directive 92/85. It was the Court in *Boyle* which declared that the provisions of Article 11(3) apply not only to maternity allowance but also to maternity pay⁴⁸.

Besides, the Court has only two cases where it has given rulings based purely on Directive 92/85. These are *Boyle*⁴⁹ and *Gomez*⁵⁰ as regards accrual of paid annual leave. The rest of the judgments are based either on equality law or on both equality law and Directive 92/85⁵¹. Thus, the provisions of Directive 92/85 itself are not the real cause for lifting special protection of women during pregnancy and maternity out of the equality debate. However, it is true that Directive 92/85 has encouraged the ECJ to lift certain issues of pregnancy and maternity out of the equality debate and that several provisions could lead to discrimination.

Length of maternity leave

Foubert argues that Directive 92/85:

allows Member States to go further than mere protection of physical differences between men and women. It allows Member States to go so far that they may potentially endanger the general principle of sex equality in the labour market.⁵²

Indeed, the length of maternity leave provided for by Article 8 of Directive 92/85 is longer than would be necessary due to biological

⁴⁷ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court reports 1986 Page 01607.

⁴⁸ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401.

⁴⁹ *Ibid.*

⁵⁰ Case C-342/01, *Marka Paz Merino Gomez v Continental Industrias del Caucho SA*, European Court Reports 2004 Page 00000.

⁵¹ Cases C-66/96, *Handels – og Kontorfunktionærernes Forbund I Danmark, acting on behalf of Berit huj Pedersen v Fellesforeningen for Danmarks Brugforeninger and Dansk Tandlegeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service*, ECR 1998 Page I-07327, C-109/00, *Tele Danmark A/S and Handels – og Kontorfunktionærernes Forbund I Danmark (HK)*, European Court Reports 2001 Page I-6993 and C-320/01, *Wiebke Busch and Klinikum Neustadt GmbH & Co. Betriebs-KG*, European Court Reports 2003 Page I-02041.

⁵² Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 210, paragraph 471.

differences⁵³. And as Foubert rightly points out, the Council by granting maternity leave focused not on the mother's recovery only, but also on care of the baby⁵⁴. However, the Council is not the author of the purposes of maternity leave under EC law. The aims of maternity leave were defined by the ECJ eight years before adoption of Directive 92/85⁵⁵. Besides, Article 8 of Directive 92/85 provides for only two weeks compulsory leave. The rest is optional. As regards the possibility to provide for longer than 14 weeks maternity leave, Directive 92/85 allows that, but the ECJ encourages it⁵⁶. The length of maternity leave is the only matter which Directive 92/85 allows to go beyond what is necessary due to biological differences, but again this provision has its roots in the case-law of the ECJ.

Limited rights during breastfeeding

Directive 92/85 provides for rights of workers who are breastfeeding only so far it concerns exposure to dangerous agents, while it says nothing on breaks necessary for breastfeeding as such. What is the use of protection of breastfeeding workers if they do not have the right to time to breastfeed? It is notorious that the average woman does not have enough milk to express and to leave for the next 8-10 hours for work. Besides, storage of breast milk is complicated. Guidelines advise provision of several special working conditions, but unfortunately they are only soft-law documents, thus advisory. It follows that Directive 92/85, intended to stipulate several real biological differences especially, lacks one of them.

Lack of health and safety protection regarding access to employment

Directive 92/85 does not protect health and safety of candidates for vacancy, nor does it explicitly prohibit rejection of employment on grounds of pregnancy. One could say that this is a discrimination issue, but drawing parallels with prohibition of dismissal stipulated in Article

⁵³ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 115, paragraph 240.

⁵⁴ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 116, paragraph 240.

⁵⁵ See in this regard case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047, paragraph 25.

⁵⁶ In several cases the ECJ has pointed out that Article 8 of Directive 92/85 requires at least 14 weeks of continuous leave. See cases C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraphs 49 and 66 and case C-284/02, *Land Brandenburg v Ursula Sass*, European Court Reports 2004 Page I-11143, paragraph 44. Although the *Sass* judgment establishes substantive equality, nevertheless the ECJ could at least imply that provisions of *Mutterschutzgesetz* is what is deserved for gender equality in contrast to 20 weeks of maternity leave, which obviously goes beyond biological differences.

92/85, rejection of employment does not differently affect a woman's health and safety.

Distinction between pay and allowance

The author of this thesis is also concerned about the provisions of Article 11 of Directive 92/85 which distinguishes between pay and allowances. At the time of adoption of Directive 92/85, the legislator knew that non-discrimination issues regarding pay and allowances are governed by different EC normative acts (equal pay by Article 141 EC Treaty, Directive 75/117, Directive 86/378, but allowances by Directive 79/7) and a different approach elaborated by the ECJ. In particular, those receiving allowance are much more limited regarding the right to claim equality. Besides, issues on the amount of allowances under Article 11 are fully delegated for determination to the Member States, which has the right to ensure them "in accordance with national legislation". Thus Article 11 permits different treatment between persons receiving pay and allowances. This constitutes differential treatment under general principles of equality, which preclude differential treatment of persons in similar situations. However, the problem here is that differential treatment of persons varies from one Member State to another. The only actor which could change this is the EU as legislator.

Role of EC sex equality legislation in discriminatory treatment of persons during pregnancy and maternity

Equal treatment and meaning of the term "without prejudice"

Formulation of Article 2(3) of Directive 76/207 has posed many problems. This provision has been misunderstood by a number of Member States and interpreted by the ECJ opposite to the legislator's original intent⁵⁷. Indeed, the formulation is: "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"⁵⁸.

Presently, this provision as Article 2(7) after amendments to Directive 76/207 has clarified the meaning and scope of protection against discrimination during pregnancy and maternity. It provides for the main principle – that rights awarded under Directive 92/85 cannot serve as a ground for less favourable treatment, and for the right to return to the same or an equivalent job. However, Article 2(7) does not cover all issues regarding treatment of a worker who is pregnant, on maternity leave, or afterwards as a breast-feeding worker. First of all, Directive 76/207 does not clearly preclude refusal to hire on grounds of pregnancy or during maternity leave and secondly, it does not preclude discrimination against

⁵⁷ See sections on direct discrimination and rights during pregnancy.

⁵⁸ Article 2(3) (now 2(7)) of Directive 76/207.

a breastfeeding worker and does not explicitly allow for special protection of breastfeeding workers. Significantly, Article 2(3) (now Article 2(7)) was amended by Directive 2002/73 only so far as it partially codifies the interpretation given by the ECJ on interpretation of old Article 2(3). Article 2(7)⁵⁹ presents no new initiatives by the EU legislator. Articles 2(2)(c) and 15 of the Recast Directive provide for the same rights as present Article 2(7) of amended Directive 76/207.

Equal pay

Article 141 EC Treaty and Directive 75/117 itself do not contain any guidance as regards pay matters during pregnancy and maternity. The only equal pay provision protecting women during maternity leave is provided by Article 6(1)(g) of Directive 86/378. The EU legislator has expressed its attitude to pay issues during pregnancy and maternity through Article 11 of Directive 92/85. Thereby the legislator has failed to draw a strong link between health and safety and equality and has left too much space for the ECJ to lift out pay issues from the equality debate.

The Recast Directive does not promise to bring about changes regarding pay during pregnancy and maternity. It does not provide for the right not to be discriminated against as regards equal pay connected with pregnancy and maternity. Instead, Article 2(2)(c) read in conjunction with Article 4 indicates that while a woman is not at work Directive 92/85 is applicable. The only promising provision is Article 28(1) which concerns the equal pay provision of Article 4, too. Thus, according to the Recast Directive, equal pay matters similarly as equal treatment matters should now be “without prejudice” to the protection of women during pregnancy and maternity.

Maternity protection under Directive 79/7

Although Directive 79/7 contains an almost identical provision to old Article 2(3) of Directive 76/207, nevertheless it is not clear what level of protection Article 4(2) of Directive 79/7 provides for. Presumably, Article 4(2) of Directive 79/7 should be interpreted in line with Article 2(3) of the Directive, that less favourable treatment due to special protection during pregnancy is not allowed. Those matters urge to be clarified on the part of the legislator.

Lack of self-employed persons’ protection during pregnancy and maternity

EC law does not require protection of self-employed persons during pregnancy and maternity. The title of Directive 86/613 is promising; however, the content of that directive does not provide for any substantial

⁵⁹ Except paragraph 4 of Article 2(7) of Directive 76/207.

right during that period. Thus the EU legislator draws a very sharp distinction between rights of workers and self-employed persons, although frequently they are in quite similar situations. Neither Directive 86/613 nor Directive 79/7 oblige Member States to provide the self-employed with a statutory sickness scheme; thus, if pregnancy-related illness occurs, self-employed women stay unprotected.

Role of the ECJ in discriminatory treatment of workers during pregnancy and maternity

Inconsistent application of EC sex equality law and Directive 92/85

The author of this thesis suggests that the reason for discriminatory treatment and pay during pregnancy and maternity leave is not EC legislation – EC sex equality legislation and EC legislation on health and safety measures - but the case-law of the ECJ, which is inconsistent and incoherent in itself. Although the ECJ is under different constraints, nevertheless

there remains a sufficient degree of inconsistency in the interpretation which the Court of Justice has given over the years to suggest that there remains an important interpretive space which the Court can justly be encouraged to exploit to its maximum degree.⁶⁰

First of all, this concerns pay during maternity. Altogether, four provisions of EC law are involved – Articles 11(2)(a) and 11(2)(b) of Directive 92/85, Article 141 EC Treaty, and Article 6(1)(g) of Directive 86/378. As argued above, maternity benefit is only one element of equal pay during maternity leave, which according to *Gillespie*⁶¹ and *Boyle*⁶² is subject to two EC law provisions: Article 141 and Article 11(2)(b) of Directive 92/85. Then follows one more element of the concept of equal pay – accrual of pension rights under occupational social security schemes. This element, according to *Boyle*⁶³ and *Meyer*⁶⁴, is governed by three EC law provisions – Article 11(2)(a) of Directive 92/85 and Article 6(1)(g) of Directive 86/378, but according to *Bilka - Kaufhaus*⁶⁵ matters

⁶⁰ Tamara Harvey, Jo Shaw, Women, work and care: women's dual role and double burden in EC sex equality law, *Journal of European Social Policy*, 1998, Vol.8, SAGE Publications, at page 47.

⁶¹ Case C-342/93, *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*, European Court Reports 1996 Page I-00475.

⁶² Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401.

⁶³ *Ibid.*

⁶⁴ Case C-356/03, *Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder*, OJ C 57, 05.03.2005., p.11.

⁶⁵ Case 170/84, *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, European Court Reports 1986 Page 01607.

referred by Directive 86/378 are subject to Article 141 EC Treaty. In this regard it is not clear why the Court in *Boyle* did not refer to Directive 86/378. Almost the same is so about *Meyer*, in that although Directive 92/85 was not applicable to the current facts⁶⁶ the Court should at least have referred to Article 11(2)(a) of Directive 92/85 and *Boyle* for the purposes of coherency.

Incoherency is also a feature of those rulings on equal pay elements which fall under Article 11(2)(a) and under Article 141 EC Treaty. For example, in *Lewen*⁶⁷ the Court analysed rights to Christmas bonus during maternity leave only from the perspective of Article 141. The ECJ did the same in *Abdoulaye*⁶⁸ regarding lump-sum payment for workers going on maternity leave. In both cases, no references were made to the role of Article 11(2)(a) of Directive 92/85.

The second set of cases is on equal treatment. Here are fewer inconsistencies; however, the Court also refers to Directive 92/85 chaotically. Formally, Directive 92/85 was not applicable in *Habermann-Beltermann*⁶⁹, *Webb*⁷⁰, *Thibault*⁷¹, *Larsson*⁷², *Brown*⁷³ and *Sass*⁷⁴. Nevertheless, the Court did refer to Directive 92/85 in *Larsson*⁷⁵, *Sass* and *Brown*⁷⁶. In *Sass* it simply established that the events took place before the adoption of Directive 92/85, while in *Brown* it advised the national court to take into account the general context of Directive 92/85 when applying Directive 76/207.

The author argues that for the purposes of coherency, the Court should have referred in all cases mentioned to Directive 92/85, firstly in order to show the conjunction between Directives 76/207 and Directive 92/85, and secondly in order to ensure proper application of those directives by national courts.

⁶⁶ The events in *Meyer* took place in 1992 and 1993.

⁶⁷ Case C-333/97, *Susanne Lewen v Lothar Denda*, European Court Reports 1999 Page I-07243.

⁶⁸ Case C-218/98, *Oumar Dabo Abdoulaye and Others v Regie nationale des usines Renault SA*, ECR 1999 Page I-05723.

⁶⁹ Case C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf.e.V.*, European Court Reports 1994 Page I-01657.

⁷⁰ Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd.*, European Court Reports 1994 Page I-03567.

⁷¹ Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salaries (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

⁷² Case C-400/95, *Handels – og Kontorfunktionerernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757.

⁷³ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

⁷⁴ Case C-284/02, *Land Brandenburg v Ursula Sass.*, European Court Reports 2004 Page I-11143.

⁷⁵ Case C-400/95, *Handels – og Kontorfunktionerernes Forbund I Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Futex Supermarked A/S*, European Court Reports 1997 Page I-02757.

In *Mahlburg*⁷⁷ the ECJ also did not refer to Directive 92/85 although the events took place in 1995, when Directive 92/85 had to be implemented. One could argue that *Mahlburg* concerned access to employment which is not covered by Directive 92/85, but the author argues that this case concerns working conditions during pregnancy, which is the exact issue of Directive 92/85. Therefore, the Court failed to refer to all EC legislative acts governing the particular case. The same problem occurred in *Herrero*, which also concerned not only access to employment but also accrual of seniority - rights connected with an employment contract as provided by Article 11(2)(a) of Directive 92/85. Nevertheless, the Court did not take it into account⁷⁸ and ruled that accrual of seniority during maternity leave when a successful candidate cannot take up a new post due to maternity leave falls within the scope of Directive 76/207 only. It failed to recognize that Article 11(2)(a) of Directive 92/85 is also applicable here, but substantive equality requires that lack of a formally written employment contract does not render that provision inapplicable.

It follows that the case-law of the ECJ demonstrates considerable inconsistency and incoherence as regards application of rights provided by EC legislation during pregnancy and maternity leave. Legislation of the EC itself allows interpretation so as to ensure substantive equal treatment and equal pay.

Discriminatory interpretation of EC sex equality law

Purpose of maternity leave

The second purpose of maternity leave declared by the ECJ, namely, that maternity leave protects the special relationship between mother and child⁷⁹, is a key aspect in discriminatory interpretation of EC legislation by the ECJ. Thereby the Court cultivates a socially-construed stereotype of woman as the better child-carer, which is one of the main causes of discrimination and fewer opportunities for women in the labour market. Besides, the Court judges related cases in the light of the second aim of maternity leave. So, starting with *Hofmann*, where it decided not to intervene in issues on additional maternity leave which in reality was child-care leave, the Court then went on, ending with additional unpaid maternity leave as a special advantage granted to women only in *Boyle*⁸⁰. If such an approach to the differences between men and women was

⁷⁷ Case C-207/98, *Silke-Karin Mahlburg and Land Mecklenburg-Vorpommern*, ECR 2000 I-549.

⁷⁸ In paragraph 32 it ruled the opposite, that Directive 92/85 has no relevance in answering the questions referred.

⁷⁹ Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047, paragraph 25.

⁸⁰ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 79.

understandable during adoption of the *Hofman* judgment in 1984, then it is unacceptable nowadays⁸¹.

Length of maternity leave

Excessive length of maternity leave which exceeds the necessary term for physical recovery after birth is closely connected with the previous problem. Indeed, in order to fulfil the second aim of maternity leave the mother should be granted additional weeks of maternity leave to be able to look after her baby full-time without interruptions due to difficulties of physical recovery after birth-giving.

Although the cause of excessive length of maternity leave is Directive 92/85, nevertheless the Court has authority at least to indicate to the Member States that excessive length of maternity leave impedes attainment of substantive equality. So the *Sass* case was surely appropriate to raise a discussion for the future on the purpose of maternity leave. However, the Court did not highlight the approach taken by the Federal Republic of Germany, which accepts only the first aim of maternity leave – protection of a woman who has given birth⁸².

Maternity pay

The Court deserves considerable criticism for its finding in *Gillespie* that neither Article 141 nor Directive 75/117 requires that women continue to receive full pay during maternity leave⁸³. Nothing precluded the Court from finding that the principle of equal pay requires an award of full pay to women during maternity leave. However, it depends how literally Article 11(3) is read, because it does not explicitly require that maternity benefit in the form of pay must be at the level of sick pay, but it concerns maternity benefit in the form of an allowance⁸⁴.

However, the Court did not stop at this finding. In *Boyle* the Court reaffirmed its judgment in *Gillespie* by extending the provisions of

⁸¹ The second aim of maternity leave was mentioned recently in the *Sass* judgment, case C-284/02, *Land Brandenburg v Ursula Sass*, European Court Reports 2004 Page I-11143, paragraph 32. In the *Boyle* judgment, case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 50.

⁸² Case C-284/02, *Land Brandenburg v Ursula Sass*, European Court Reports 2004 Page I-11143, paragraph 32.

⁸³ Case C-342/93, *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*, European Court Reports 1996 Page I-00475, paragraph 20.

⁸⁴ Writers argue that it was clear that Directive 92/85 clearly defined that pay during maternity leave should not be in full:

“The decision in *Gillespie* was clearly dictated by policy. By opting for the guarantee of merely an adequate allowance for female workers on maternity leave, the Court endorsed the solution already negotiated at political level between the Member States in the form of Directive 92/85”.

Siofra O’Leary, *Employment Law at the European Court of Justice. Judicial Structure, Policies and Processes*, Hart Publishing, Oxford – Portland Oregon, 2002, at page 199.

Article 11(3) of Directive 92/85 to maternity benefit in the form of pay⁸⁵. Besides, it ruled that Article 11(3) does not refer to sick pay provided by the employer but requires maternity benefit to be at least in the amount of sick pay provided by national legislation, thus diminishing maternity benefit to the least amount possible under Directive 92/85. Considerable doubt exists whether such was the intent of the legislator⁸⁶, otherwise it would have so provided expressly.

Distinction between pregnancy-related illness before and after maternity leave

The Court, by accepting the distinction between pregnancy related illness before and after maternity leave in *Brown*⁸⁷, has made an arbitrary distinction. Such finding has no legal grounds. If illness is found to be pregnancy-related, then there is no difference when it occurs or how long it lasts⁸⁸. As regards arguments that sex equality law deserves only protection of normal illnesses⁸⁹ and the issue of pregnancy-related illness occurs in extremely minor cases⁹⁰, the author argues that nevertheless it is a problem which could affect women only, thus from the perspective of substantive equality, pregnancy-related illness should be awarded protection irrespective of when it takes place.

Reasons for discriminatory treatment of persons during pregnancy and maternity under EC law

EC legislation

The author of this thesis is not familiar with the particular legislative process and ambitions of the Member States during adoption of Directive 92/85 and EC sex equality legislation, thus she could only guess as to the possible reasons why the EC legislator adopted provisions discriminating against persons during pregnancy and maternity leave.

⁸⁵ Case C-411/96, *Margaret Boyle and Others v Equal Opportunities Commission*, ECR 1998 Page I-06401, paragraph 34.

⁸⁶ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 199, paragraph 445.

⁸⁷ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

⁸⁸ The same opinion is posed by Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 190, paragraph 423.

⁸⁹ *Ibid.*, at page 218, para. 492.

⁹⁰ Lynn M. Roseberry, "The Limits of Employment Discrimination Law in the United States and European Community", DJOF Publishing 1999, page 308.

Directive 92/85

The author could explain over-lengthy maternity leave only by stereotypes of women's role which governs the legislator in the same way as the majority of society⁹¹. While space left to the Member States by Article 8 of Directive 92/85 for variation of the length of maternity leave as well as the obligation for only two weeks compulsory maternity leave testifies to the necessity to accommodate divergent national practices⁹².

Interestingly, the legislator still makes a distinction between maternity pay and allowance. It is true that EC sex equality legislation also regulates issues on equal pay and equality in matters of social security distinctly, but why is this principle binding on health and safety legislation? Why does the legislator not hesitate to put a heavier burden on employers rather than on the state social security system?

EC sex equality law

Lack of regulation on pay during pregnancy and maternity regarding equal pay matters can be explained only by lack of political will. Article 8 of Directive 92/85 does not solve pay issues in terms of equality. Article 28(1) of the Recast Directive, which introduces the "without prejudice" principle, also as regards equal pay, does not promise many changes in that respect. It does not provide for an obligation to ensure full pay during pregnancy and maternity.

The ECJ

Lack of consistent legal technique (method) as regards cases on discrimination due to pregnancy and maternity

The case law of the ECJ testifies to a differential approach. This approach as described before is based on the formal equality doctrine, but has accommodated certain elements of substantive equality. In *Thibault* the ECJ explicitly recognized the presence of substantive equality in EC law⁹³. So as regards sex equality, the ECJ has accommodated such element of substantive equality as positive measures⁹⁴ and certain rights of persons during pregnancy and maternity. The difference between positive measures and special needs during pregnancy and maternity exists as regards the approach taken under substantive equality. If the former is provided in order to eliminate socially-construed obstacles, then

⁹¹ The same was suggested by Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 116, paragraph 241.

⁹² *Ibid.*, at page 115, para. 239.

⁹³ Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011, paragraph 26.

⁹⁴ See for example case Case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, European Court Reports 1997 Page I-06363.

the latter requires grant of rights guaranteeing equality of result or outcome, because they arise due to biological differences.

As to rights during pregnancy and maternity, the ECJ so far has applied substantive equality as equality of results concerning equal treatment. In particular, it has elaborated the principle that special protection of women workers during pregnancy and maternity cannot be subject of less favourable treatment⁹⁵. Other biological differences, which need to be accommodated during pregnancy and maternity, lack substantive equality protection. Such an approach - when the ECJ applies partially substantive and partially formal equality without any system - creates chaotic legal regulation of rights during this period. Besides, the chaos increases when the Court tries to escape by partially accommodating biological differences.

So the brightest example is accommodation of pregnancy-related illness. As regards treatment, the period before maternity leave is protected (substantive equality), but after maternity leave a sick male is the comparator (formal equality), as regards pay⁹⁶, before maternity leave a pregnant worker is entitled to sick pay under a general scheme on condition that it does not undermine the objective of protecting pregnant workers (partial accommodation – neither formal nor substantive equality), but after maternity leave she is subject to the general sick pay scheme (formal equality)⁹⁷. This, then, demonstrates that the equality approach applied could vary within the scope of one situation and be different with regard to treatment and pay.

As regards partial accommodation, the brightest example is maternity benefit. The rulings in *Gillespie* and *Boyle* on maternity pay cannot be considered either as a formal or as a substantive equality approach. On the one hand, the ECJ recognizes the necessity to protect the biological differences of women during maternity leave, contrary to the formal approach, by recalling substantive equality and the *sui generis* situation of women during that period, but on the other hand it fails to accommodate it under the substantive equality approach by recalling equal pay provisions which so far have been subject to the formal equality approach only.

Although ruling on equal pay matters during maternity leave is restricted to a certain extent by the provisions of Directive 92/85, nevertheless the ECJ has failed to keep pregnancy and maternity discrimination as direct discrimination, thus it would be better to allow justification of direct discrimination in very limited instances. Thereby

⁹⁵ Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

⁹⁶ Case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185.

⁹⁷ Case C-191/03, *North Western Health Board v Margaret McKenna*, OJ C 281, 22/11/2005, p.2.

the ECJ has created a legal trap in the form of lack of any legal technique (method) which compels changing or hiding comparators and escaping recognition of direct discrimination through the non-comparability argument⁹⁸.

Why not substantive equality immediately or social, economic, and political obstacles of the ECJ

First of all, judges are members of society and they to a great extent reflect almost the same understanding of sex equality as does society. A second and very important obstacle is the composition of the Court. Only recently were women appointed as judges of the ECJ⁹⁹. Thirdly, an excessive financial burden would be put on the shoulders of employers if the Court decided to award women full pay during pregnancy and maternity. As pointed out by employers in a number of cases already judged, the special protection during pregnancy and maternity as it stands now already imposes a considerable financial burden¹⁰⁰. This on the other hand could indeed lead to an increase of overall discrimination against women in the labour market¹⁰¹. A fourth reason, which is political, is respect of sovereignty of the member states. This is the main reason which compels the Court to divide unequally the burden of benefits connected with pregnancy and maternity between employer and state social security systems, by setting different rules for both of those actors. Besides, that is the main reason which does not allow alternative action – in order to avoid increase of sex discrimination in general - to put the financial burden mainly on the state social security system.

⁹⁸ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at page 545.

⁹⁹ Eugenia Caracciolo di Torella and Annick Masselot, Pregnancy, maternity and the organisation of family life: an attempt to clarify the case law of the Court of Justice, *European Law Review* (2001) 26, Sweet & Maxwell and Contributors, at page 257.

¹⁰⁰ See for example cases C-177/88, Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, C-421/92, *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf.e.V.*, European Court Reports 1994 Page I-01657, C-207/98, *Silke-Karin Mahlburg and Land Mecklenburg-Vorpommern*, ECR 2000 I-549, see also Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 165, paragraph 366, Christine Boch, Official: During Pregnancy, Females are Pregnant, *ELRev.*, October 1998, 23, Sweet and Maxwell and Contributors, at page 493.

¹⁰¹ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 216, paragraph 485, Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 5 February 1998. *Mary Brown v Rentokil Ltd.* Case C-394/96. European Court Reports 1998 Page I-04185, paragraphs 30 and 33.

Latvian Law

Labour Law

Article 37(7) of the Labour Law provides for 4 weeks compulsory maternity leave while EC law requires only two weeks compulsory leave. The right provided by Article 134(2) allowing to require a woman worker only for part-time work for one year after birth-giving even if she does not breastfeed, discriminates against male workers and cements women in their traditional care-giver roles.

The decision of the Latvian national court in *Ghadijalija*¹⁰² shows that rights provided for special protection of women workers during pregnancy, maternity, and breastfeeding are seen as falling outside or not concerning prohibition of discrimination based on sex. Article 47 does not provide that in case of dismissing a pregnant worker during the probation period, she must be given a written dismissal notice with reasons provided for that dismissal according to the requirements of Article 10 of Directive 92/85. The Latvian legislator must provide an explicit right to contest non-renewal of a fixed-term contract on grounds of discrimination based on sex according to the ECJ's ruling in *Melgar*¹⁰³.

Article 75 providing for calculation of average wage does not envisage a different situation for a pregnant worker, a worker after maternity leave, and a worker on breastfeeding. First, it does not provide that calculation of average salary cannot be less favourable on grounds of previous absence on account of maternity leave and second, it does not provide that calculation of average salary cannot be less favourable on grounds that the worker has been awarded special protection rights on account of pregnancy, maternity, or breastfeeding.

The Ministry of Welfare, which is the responsible institution for implementation of EC sex equality law, contrary to Article 3 of Directive 92/85 has not translated or informed employers of Guidelines on assessment of working conditions of pregnant workers, workers who have recently given birth, or who are breastfeeding¹⁰⁴.

Article 36 of the Latvian labour law may be applied in a discriminatory way, if a doctor issuing a medical certificate on the suitability of a candidate's state of health is not informed that pregnancy of a candidate can not be taken into account. The same is true about Article 138(6), because the wording is unclear. This could be read in two

¹⁰² Rīgas pilsētas Centra rajona 2005.gada 26.janvāra spriedums Civillietā Nr.C27176204. Decision of Riga City Central district court delivered on 26 January 2006 in case No.C27176204.

¹⁰³ Case C-438/99. *Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios*, European Court Reports 2001 Page I-06915.

¹⁰⁴ Communication from the Commission on the guidelines on the assessment of the chemical, physical and biological agents and industrial processes considered hazardous for the safety or health of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) /* COM/2000/0466 final */

ways: as precluding night work for pregnant workers, women during the period following childbirth up to one year, either altogether, or as being conditional upon a medical certificate specifying that night work is dangerous during those periods.

Some provisions of the Latvian labour law obviously exceed needs arising from the biological differences between the sexes. First of all comes length of maternity leave constituting 18 weeks instead of the biologically necessary 6 to 8 weeks after birth, and second, provisions of Articles 53(2), 134(2), 136(7) and 138(6) providing for special rights to women during a one-year period following child-birth, which perpetuates the image of women in their traditional role of main child-carer.

Contrary to the requirements of Directive 86/613, pregnant self-employed persons and self-employed persons during maternity are not protected by any piece of Latvian legislation against discriminatory treatment. There are amendments to the Latvian Civil law in Parliament on prohibition of discrimination also as regards service contracts; however, those amendments do not explicitly refer to introducing obligations provided by Directive 86/613.

Social security Law

Although employed women in Latvia have a right during maternity leave to a high maternity allowance comprising 100% of gross salary without tax reduction, this is not so as regards accrual of other social insurance rights during maternity leave, which results in possibly less favourable social insurance rights after maternity leave. In particular, since during maternity leave a woman is insured only against risks of old-age and unemployment, after maternity leave she may be subject to less favourable conditions of calculation of sickness, accidents at work, and occupational disease allowances and disability pension, so that she would be entitled to a lesser amount than if she had been working. Besides, insurance against old-age during maternity leave is provided in a lesser amount than during period actually worked. During maternity leave, contributions to old-age insurance constitutes only 20% of allowance (equivalent to gross wage) while during the period actually worked those contributions constitute 24,79% of wages. Since self-employed persons are subject to the same social insurance principles, self-employed persons during and after maternity leave face and might face similar disadvantages as employed persons described above.

Legal regulation of paternity under EC and Latvian law

EC Law

The status of the right to paternity leave under EC law is poor. First, because it is optional and second, because it does not draw any parallels with the period of maternity leave which is provided in order to ensure motherhood. Thus, legitimatisation of fatherhood does not resolve the problem of the discriminatory second purpose of maternity leave. Besides, no provision requires parental leave to be of the same length and period of maternity leave, which exceeds the 6-8 weeks necessary for physical recovery after childbirth. It follows that although amendments to Directive 76/207 referring to paternity leave is a considerable step towards sex equality, nevertheless it is just at the stage of beginning and far from the requirements of substantive equality, since it does not require revision of maternity leave and does not require an award to fatherhood and motherhood of equal rights to leave.

Latvian law

Latvia has made a positive step towards substantive equality by introducing the right to paid paternity leave. However, the length of paternity leave is incomparably short to the length of maternity leave, which exceeds the period for physical recovery. If a father has the right to 10 days leave for enhancement of fatherhood, then a woman has the right to at least 10 weeks leave for the same purpose, not taking into account the time given for establishing a relationship with the child parallel to physical recovery.

Although the right to paternity leave is introduced, nevertheless Latvia has failed to implement that right in conformity with the principle of equal treatment between the sexes as regards social rights, because fathers on paternal leave - as opposed to mothers on maternity leave - are not awarded any social insurance, which could adversely affect their social insurance rights after that leave. In particular, a father - due to absence of social insurance on account of paternity leave - risks not qualifying for old-age and disability pension, as well as for unemployment allowance. Besides, the formula for calculating sickness allowance does not provide for exemption of periods of paternity leave, unlike periods of maternity leave. Although there is no explicit provision under EC law for equal treatment as regards paternity leave and social rights, nevertheless Directive 79/7 prohibits discrimination, while in Latvia the social security umbrella law provides for prohibition of discrimination¹⁰⁵, which allows claiming equal treatment for men on and after paternity leave.

¹⁰⁵ Par sociālo drošību: LR likums. Latvijas Vēstnesis, 1995. 21.septembris, nr.144 (Law on social security), Article 2¹.

Legal regulation of child-care under EC and Latvian law

EC Law

Although adoption of Directive 96/34 was a big step towards sex equality, nevertheless its provisions are minimal. First, because of the short duration of child-care leave required, and second because provisions requiring pay or allowance during that leave are absent. Besides - and this is the most important aspect of Directive 96/34 - it does not preclude the Member States from adopting the right to child-care leave of different length, dependent on the sex of the person. Most probably the general principle of equality between men and women under EC law could consider as discriminatory the grant of child-care leave of different length dependent on sex. However, this does not preclude the Member States from granting child-care leave in the form of extended maternity leave, as legitimised in *Hofmann*¹⁰⁶.

The weakness and poverty of Directive 96/34 is not only pointed out by scholars¹⁰⁷, but is also reflected by the paucity of preliminary questions that came before the ECJ on its interpretation. Despite 10 years having passed since adoption of Directive 96/34 and recognition of child-care as one of the key aspects impeding attainment of equal opportunities and participation of men and women in the employment market¹⁰⁸, no new legislative initiatives have been taken so far. The principle of equality between the sexes is not enforceable under EC law as regards social security matters, since this is explicitly exempted by Article 7(1)(b) of Directive 79/7.

Latvian law

Although since adoption of new child-care allowance policies, in particular by raising the amount of child-care allowance until a child reaches the age of one almost up to the level of previous salary, nevertheless this was not intended to evaluate the previously unpaid work of child-raising predominantly by women, but rather because of growing awareness of the dramatically decreasing birth rate and consequent ageing of the population. Besides, child-care allowance reform adopted in its first wording was intended to strengthen women in their traditional

¹⁰⁶ Case 184/83, *Ulrich Hofmann v Barmer Ersatzkasse*, ECR 1984 Page 03047.

¹⁰⁷ See *in this regard* Siofra O'Leary, *Employment Law at the European Court of Justice. Judicial Structures, Policies and processes*, Hart Publishing, 2002, at page 239 and Eugenia Caracciolo di Torella, *Childcare, employment and equality in the European Community: first (false) steps of the Court*, 2000, 25 E.L.Rev. June, Sweet & Maxwell and Contributors.

¹⁰⁸ See "A Roadmap for equality between women and men – 2006-2010 – Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions" which was adopted on 1 March 2006.

roles by providing that higher financial means justifies prohibition of part-time work, thus diminishing the possibility of effectively reconciling work and family life and future opportunities in the labour market.

The right to child-care leave provided for both parents has so far been of little use, because of the stereotypes prevailing in society and still produced by politicians and the mass media by calling increased child-care allowances “‘mummies’ salary”. No political discussion has been raised so far in the public domain in Latvia on unequally shared breaks on account of child-care leave between both parents as an obstacle for attaining sex equality. Even the Constitutional Court of Latvia ruled on the prohibition to combine paid child-care leave with part-time work not from the perspective of sex equality or Article 91 of the Constitution, but from the perspective of family rights or Article 110 of the Constitution¹⁰⁹. Although the Constitutional Court of Latvia declared that total exclusion of the right to child-care allowance of those parents willing to combine part time work with child-care, is unconstitutional, nevertheless it led to an even more senseless provision on child-care leave and allowance.

Amendments providing that one parent is entitled to 50% of child-care allowance even if she/he works full-time lacks the sense of child-care leave and allowance as such. Besides, it makes combining paid child-care leave by both parents on a part-time basis impossible. As a result, the traditional division of responsibilities between parents is the only acceptable way for the majority of the population of Latvia, taking into account their difficult financial situation.

The disproportion of women and men taking child-care leave is dramatic. Nevertheless, no political steps are taken towards changing attitudes. Politicians are ready to deal only with the consequences caused to women in the labour market on account of child-care leave. However, Latvian law allows for contesting indirect discrimination against women in the field of statutory social security arising due to child-care leave. These are in particular, decrease in old-age and disability pension, and allowances for sickness, maternity, accident at work or occupational disease. Article 2.¹ of the Law on social security precludes indirect discrimination based on sex in the whole social security system in Latvia and no provision refers to the exemption provided by Article 7(1)(b) of

¹⁰⁹ Latvijas Republikas Satversmes tiesas 2005.gada 4.novembra spriedums lietā Nr.2005-09-01 „Par Valsts sociālo pabalstu likuma 7.panta pirmās daļas 1.punktā ietvertā nosacījuma – „ja šī persona nav nodarbināta (nav uzskatāma par darba ņēmēju vai pašnodarbināto saskaņā ar likumu „Par valsts sociālo apdrošināšanu”_ vai ir nodarbināta un atrodas bērna kopšanas atvaļinājumā” – atbilstību Latvijas Republikas Satversmes 91., 106. un 110.pantam”. Decision of the Constitutional Court of Latvia in case No.2005-09-01 “On Compliance of the Condition Incorporated in Section 7 (Item 1 of the First Paragraph) of the Law on State Social Allowances” – “if this person is not employed (is not considered to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave” with Articles 91, 106 and 110 of the Republic of Latvia Satversme (Constitution), available at <http://www.satv.tiesa.gov.lv/>

Directive 79/7. Several cases would possibly compel the respective state institutions to rethink policies regarding child-care leave and more concentrate on those issues from the perspective of sex equality.

Chapter 15.

Proposals

EC law

Proposal for legal technique (method) for accommodating pregnancy and maternity under substantive equality

Whether comparator is necessary

The comparator is the essence of sex equality law¹¹⁰. Although a substantive equality approach does not require a comparator, nevertheless a comparator is necessary in order to recognize how a disadvantaged group is affected adversely by prevailing norms and in order to set a point of departure for benefit redistribution¹¹¹. Thus the author argues that sex equality law requires a comparator, because this is the basic element on which the legal technique of equality law is built. Existence of a comparator does not prevent equality being substantive, and in this regard the author agrees with Mjoll, who considers that the strictness of review of a given situation testifies to whether a formal or substantive equality approach is applied¹¹².

The situation with a comparator as regards rights during pregnancy and maternity is complicated. First of all, rights during pregnancy and maternity comprise two elements – negative obligations to refrain from discriminatory treatment, and positive obligations requiring special treatment¹¹³. Second, both negative and positive obligations entail two issues – treatment and pay.

¹¹⁰ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 217, paragraph 489, Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 29, Robert Wintemute, When is Pregnancy Discrimination Indirect Sex Discrimination?, *Industrial Law Journal*, Vol 27, No.1, March 1998, Industrial Law Society, at page 25, Evelyn Ellis, Recent Developments in European Community Sex Equality Law, *CMLR*, 35, 1998, Kluwer Law International, at page 395.

¹¹¹ Robert Wintemute, When is Pregnancy Discrimination Indirect Sex Discrimination?, *Industrial Law Journal*, Vol 27, No.1, March 1998, Industrial Law Society, at footnote 7 the role of comparator is substantiated as follows:

“To some women, and some members of minorities defined by ethnicity, disability or sexual orientation, comparison is anathema because of the implication that the comparator represents ‘the norm’. But comparison is both an essential aspect of equality arguments and a social reality where society is set up by majority or a dominant group (men) with its own needs in mind. Because the status quo reflects the needs of this majority or men, the minority or women must use comparisons with the majority or men to show how the status quo affects them adversely”.

¹¹² Oddny Mjoll Arnardottir, “Equality and Non-Discrimination under the European Convention on Human Rights”, Martinus Nijhoff Publishers, The Hague/London/New York, 2003, at page 31.

¹¹³ Robert Wintemute, When is Pregnancy Discrimination Indirect Sex Discrimination?, *Industrial Law Journal*, Vol 27, No.1, March 1998, Industrial Law Society, at page 35.

See for a different concept of positive and negative protective measures Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and

As regards negative obligations, the Court has chosen a male comparator. Although in such negative obligations cases as *Dekker*¹¹⁴ and *Hertz*¹¹⁵ the Court ruled that a male comparator is irrelevant, nevertheless the model of treatment required by the Court is presumed treatment of a male in the same situation. Since a male cannot be pregnant, he could never be refused employment or dismissed on grounds of pregnancy, thus since non-discrimination law requires equal treatment irrespective of sex, in order not to be discriminated against a pregnant female - as regards access and dismissal¹¹⁶ - must be treated as if she were male, thus not pregnant.

Positive obligations, however, require special treatment where a male cannot be the comparator, but importantly here - absence of a comparator concerns treatment, not pay. As regards pay, a male comparator is the right one in order to ensure equal distribution of benefits or equality of results, but special treatment must be provided not according to the comparator but according to the special needs of women based on pure biological differences.

Who is the right comparator?

It is true that a woman during pregnancy and maternity could have several comparators – e.g., all other workers, male workers, sick male workers, herself not being pregnant¹¹⁷. It is true that all these groups could be comparators, but not under sex equality law. Under sex equality law, the sex of a person is a prohibited trait; thus, comparison to a group which does not consist exclusively of persons belonging to the opposite sex would fall not under sex equality law but under the general principle of equality.¹¹⁸

Are situations comparable?

Another element of equality law is comparability of situations. One could argue that a woman during pregnancy and maternity cannot be compared

Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 108, paragraph 222.

¹¹⁴ Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

¹¹⁵ Case C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979.

¹¹⁶ According to Article 10 of Directive 92/85 dismissal of a pregnant worker entails not only negative but also positive measures, which is not discussed in the present sentence.

¹¹⁷ Simon Honeyball, *Pregnancy and Sex Discrimination*, Industrial Law Journal, Vol 29, No.1, March 2000, Industrial Law Society, at page 50, Robert Wintemute, *When is Pregnancy Discrimination Indirect Sex Discrimination?*, Industrial Law Journal, Vol 27, No.1, March 1998, Industrial Law Society, at page 25, Sandra Friedman, *Discrimination Law*, Oxford University Press, 2002, at page 9.

¹¹⁸ This is what Simon Honeyball argues, in *Pregnancy and Sex Discrimination*, Industrial Law Journal, Vol 29, No.1, March 2000, Industrial Law Society and Sacha Prechal, *Equality of treatment, non-discrimination and social policy: achievements in three themes*, Common Market Law Review 41, pages 533-551, 2004, Kluwer Law International.

with a man because they are in different situations. However, sex equality law prohibits differentiation on grounds of sex, thus substantively the sex of a person cannot be a reason for discriminatory or less favourable treatment.

Here, the argument of Levits fits perfectly. He contends that the principle of general equality and the principle of non-discrimination are of opposite construction. If the former principle requires that two similar situations must be treated similarly, but two different situations differently, then the latter principle requires the opposite – two different situations, which are considered different because of a prohibited trait (sex), must be treated equally. This is of course mentioned as regards negative obligations, but could as well be applied to positive obligations. Namely, in a situation where males and females receive different treatment according to biological differences, it is a valid argument for an equal pay claim, since equality is not only about treatment but also and mostly about financial resources.

Moreover, according to the strictness of the review doctrine proposed by Mjoll, this is exactly the case – thorough comparison of situations of men at work and women on maternity leave would prove that their financial needs or rights to previous standard of living do not differ, thus they are in comparable situations and deserve equal treatment as regards pay. In this regard, the author proposes to add to Levits' construction the following – two different situations, which are different because of biological differences between sexes, must be treated equally as regards pay.

Direct or indirect discrimination?

Since in *Dekker* the Court found discrimination on grounds of pregnancy to be direct sex discrimination, many writers have been involved in discussion whether pregnancy and maternity discrimination is direct or indirect.

Robert Wintemute argues that direct discrimination occurs where a woman is in the same situation as a man but is treated differently because of pregnancy (*Dekker, Webb*), while indirect discrimination occurs where a woman is in a different situation with her special needs which need to be accommodated - requires neutral treatment (pregnancy-related illness – *Hertz*, maternity pay – *Gillespie*)¹¹⁹.

¹¹⁹ Robert Wintemute, When is Pregnancy Discrimination Indirect Sex Discrimination?, *Industrial Law Journal*, Vol 27, No.1, March 1998, Industrial Law Society, at pages 30-31.

Foubert argues that determining the kind of discrimination depends on the angle from which the law is formed. In particular, she argues about the facts in *Thibault*¹²⁰ that:

It all depends on the rule that is being tested: the neutral rule of six months' presence at work (which would imply indirect discrimination), or the rule that the period of maternity leave should be added to another period of absence (which would involve direct discrimination)¹²¹.

Following direct and indirect sex discrimination definitions provided by amended Directive 76/207, it is indeed highly complicated to distinguish between direct and indirect sex discrimination regarding pregnancy and maternity cases. Notwithstanding, the author of this thesis would argue that the Court in *Dekker* established a new trait which precludes discrimination against pregnancy (and presumably maternity). Although pregnancy is a sub-trait of the trait "sex", nevertheless the author suggests that according to the wording of the *Dekker* judgment¹²² the Court intended that sub-trait to function independently. Thus it means that pregnancy is a sub-trait of sex discrimination law, which always creates direct discrimination based on sex.

Consequently, all discussion on whether pregnancy (maternity) discrimination is direct or indirect becomes useless, since irrespective of the neutrality of the provision or composition of the affected group, less favourable treatment on grounds of pregnancy (or maternity) is declared to be direct sex discrimination. However, it is clear why discussion on pregnancy discrimination as direct or indirect has arisen. First of all, the author suggests that the Court in *Dekker*¹²³ considered ruling that discrimination on the grounds of pregnancy is direct discrimination, because at the time of delivery of that judgment indirect discrimination could be proved only by statistical data. That made it practically impossible to prove indirect discrimination on grounds of pregnancy.

Presently, however, the situation has changed, in that the wording of the definition of indirect discrimination provided for by amended Directive 2002/73 allows for a hypothetical comparator. Secondly, at the time of delivery of the *Dekker* judgment the Court did not acknowledge

¹²⁰ Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault*, European Court Reports 1998 Page I-02011.

¹²¹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 180, paragraph 402.

¹²² Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941, paragraph 12:

"In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such refusal therefore constitutes direct discrimination on grounds of sex"

¹²³ *Ibid.*

what kind of difficulties it would have to face in future cases as regards pregnancy and maternity because of holding it as direct discrimination. In particular, difficulties concerned redistribution of resources by putting a considerable financial burden on employers and thus making a substantive approach to pregnancy and maternity issues incomprehensible to the majority of society and policies of the Member States. This led to the mess described above. In particular, as Sacha Prechal rightly points out¹²⁴, recognition of pregnancy discrimination as direct and consequently under EC law not allowing for justification, posed another problem – the Court instead of qualifying direct discrimination cases has held that situations are incomparable. The brightest example is *Gillespie*¹²⁵. To resolve this problem within the scope of pregnancy as direct discrimination of sex, some scholars¹²⁶ suggest allowing justifications for direct discrimination but only for limited instances provided by written legislation. At the same time, other scholars consider justification of direct discrimination as undermining the dignity of the person¹²⁷. In this regard, it is noteworthy to mention that EC legislation allows direct discrimination on grounds of disability to be avoided through the “reasonable accommodation” argument¹²⁸.

Thoroughness of review as legal technique (method) and how to promote substantive equality.

Although the present writer finds the Mjoll doctrine - which provides that a formal or substantive equality approach depends on thoroughness of review on comparability of situations – to be the most appropriate legal technique for attaining substantive equality, nevertheless there are two problems relating to its application.

First, it may lead to empowerment of sexes in their traditional roles. As the brightest example is part-time workers’ discrimination cases, which through the concept of indirect discrimination accommodate the fact that women usually work part-time in order to be able to do

¹²⁴ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at page 545.

¹²⁵ Case C-342/93, Case C-342/93, *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*, European Court Reports 1996 Page I-00475.

¹²⁶ Sacha Prechal, Equality of treatment, non-discrimination and social policy: achievements in three themes, *Common Market Law Review* 41, pages 533-551, 2004, Kluwer Law International, at page 545, John Bowers, Elena Moran and Simon Honeyball, Justification in Direct Sex Discrimination: A Reply, *Industrial Law Journal*, Vol 32, No.3, September 2003, Industrial Law Society, at page 187.

¹²⁷ John Bowers, Elena Moran and Simon Honeyball, Justification in Direct Sex Discrimination: A Reply, *Industrial Law Journal*, Vol 32, No.3, September 2003, Industrial Law Society, at page 185 refers to the opinion of Gill and Monaghan.

¹²⁸ Article 5 of Directive 2000/78 and see also Lisa Waddington and Mark Bell, More Equal than others: Distinguishing European Union Equality Directives, *CMLR*, 38, 2001, Kluwer Law International, at pages 596-597.

unpaid home work¹²⁹. On the other hand, the law may not do very much about changing of stereotypes, this is more the task of education policy, but the present generation living in traditional patriarchal roles deserves *de facto* equality now notwithstanding the fact of accommodation of traditional roles.

The second problem relates to the limited competence of the EC legislator and the ECJ as interpreter, which does not allow for thoroughness of review when assessing comparability of situations. This is because of a major deficiency of EC sex equality law, which applies to labour market issues only¹³⁰, but ignores the fact that inequality has its roots in family life¹³¹. While this remains so, attainment of substantive equality under EC law will be impossible. However, there have been a number of cases where the cause of a regrettable judgment delivered by the ECJ was the formal approach taken by the Court rather than its limited competence under EC law¹³². This fact has much to do with the general opinion prevailing in society and among judges who are members of that society. So, development of the case-law of the ECJ itself testifies to how the Court itself has changed social values, which consequently allows for a more thorough review of comparability of the situations in question¹³³. It follows that notwithstanding the difficulties and limited competence of the ECJ as regards possible application of thoroughness of review, it is the best way towards attainment of substantive equality.

Proposal for maternity and paternity leave cost-bearing

In a considerable part of the cases decided by the ECJ, the real cause of pregnancy discrimination was the cost borne by the employer on account

¹²⁹ See in this regard the section on Indirect discrimination and Hugh Collins, *Discrimination, Equality and Social Inclusion*, The Modern Law Review, Blackwell Publishing, January 2003, Vol.66, No.1, pages 16-42, at page 30.

¹³⁰ Of course by Directive 2000/4/113 the field of application is extended, but it has no meaning concerning the problem presently discussed.

¹³¹ Petra Foubert, "The Legal Protection of the Pregnant Worker in the European Community" "Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America", Kluwer Law International, The Hague/London/New York, 2002, at page 94, paragraph 197.

¹³² See in this regard, Tamara Harvey, Jo Shaw, *Women, work and care: women's dual role and double burden in EC sex equality law*, Journal of European Social Policy, 1998, Vol.8, SAGE, London, Thousand Oaks and New Delhi.

¹³³ See for example, cases with regard to protection concerning pregnancy-related illness C-179/88, *Handels- og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening*, European Court Reports 1990 Page I-03979 versus case C-394/96, *Mary Brown and Rentokil Limited*, European Court Reports 1998 Page I-04185, also the right to adoption leave Case 163/82, *Commission of the European Communities v Italian Republic*, European Court reports 1983 Page 03273 versus the provisions of Directive 96/34, status of employment-related social allowances joined cases C-63/91, C-64/91, *Sonia Jackson et Patricia Cresswell v Chief Adjudication Officer.*, European Court Reports 1992 Page I-04737 versus case C-116/94, *Jennifer Meyers v Adjudication Officer*, European Court Reports 1995 Page I-02131.

of maternity leave¹³⁴. This suggests that on many occasions discrimination arises due to improper division of costs.¹³⁵ In order to avoid statistical discrimination against women in the labour market, the cost of maternity leave must be taken off the employer as much as possible¹³⁶. Instead, maternity benefit may be provided under statutory social security schemes or other collective funds, where either all workers or all employers would contribute a certain levy in order to bear maternity costs under the principle of solidarity¹³⁷. Although Foubert¹³⁸ proposes to share maternity costs between the mother and father, the present author finds this proposal totally unfitted to the reality of new Member States, where incomes are so low as not to allow for savings.

Proposals for the future

There are several more points of crucial importance which must be advised for revision under EC law. Those are:

- Rethinking the legal basis for Directives 92/85 and 34/96, likewise with Directive 2006 in order to clearly bring questions of regulating biological differences between the sexes and reconciliation of work and family life within the framework of EC sex equality law.
- Rethinking special protection during pregnancy and maternity in order to accommodate only biological differences¹³⁹ in order to provide equal rights to motherhood and fatherhood.
- For more effective attainment of those goals, use of more economic than human rights arguments is essential. Although openly no one denies the importance of observing human rights, nevertheless financial interests play a major role. Proposed amendments to EC legislation must be substantiated by the argument that equal-parenting ensures more available work force, keeps women workers within the labour market, while empowerment of fatherhood distributes cost-bearing connected with child-care among employers and decreases statistical discrimination

¹³⁴ See for example, case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*, (1990) ECR page I-03941.

¹³⁵ Siofra O’Leary, *Employment Law at the European Court of Justice. Judicial Structures, Policies and processes*, Hart Publishing, 2002, at page 212. She states:

“Nowhere is the State factored into the equation as a third, yet implicated party, to which costs can be spread”

¹³⁶ As Siofra O’Leary mentions, in *Employment Law at the European Court of Justice. Judicial Structures, Policies and processes*, Hart Publishing, 2002, at page 213, footnote 104, the Government of the UK in order to implement Directive 92/85 chose to pass the whole burden of maternity benefit to employers.

¹³⁷ Such a requirement is also stipulated by Article 6(8) of ILO Maternity protection convention No.183.

¹³⁸ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 218, paragraph 491.

¹³⁹ *Ibid.*

against women. Those improvements will also stimulate an increased birth-rate.

All those measures taken together improve the economy of the Member States, allowing attaining of political and economic aims, and at the same time raising the level of human rights protection. An equal-parenting approach will also stimulate rethinking of the male norm as the point of departure instead of providing for a norm presenting a worker with family responsibilities¹⁴⁰.

Latvian law

Proposals for amendments to Latvian Labour Law

*In order to avoid misinterpretation and misapplication of special protection measures awarded to pregnant workers and workers during maternity and paternity periods, Article 29(1) must be amended with explicit norms providing that less favourable treatment on grounds of pregnancy, maternity (including breastfeeding), or paternity constitutes direct discrimination based on sex.

*Article 29(1) must provide that prohibition of discrimination concerns not only notice of dismissal but also dismissal itself and non-renewal of fixed-term contract on discriminatory grounds.

*Article 29(3) should not indicate that direct discrimination may be justified. Instead, present Article 29(3) may be formulated as provided by Article 4(1) of Directive 97/80.

*Article 29(3) must be amended in order to provide claimants with an effective right to a reversed burden of proof. In this regard, Article 29(3) must explain that ‘facts’ here means not evidence but facts indicating *prima facie* discrimination

*Article 32(1) should provide for a positive instead of a negative obligation to address job advertisements to persons of both sexes. That will clarify the obligation of employers when formulating job advertisements.

*Article 34(2), which provides that no instatement may be required by a discriminated person, must be revised, since in a small country in certain circumstances the obligation to conclude an employment contract may provide the only effective remedy. While Article 34(2) does not provide for instatement, the one-month term for bringing a claim must be revised, since as correctly pointed out by the judge in *Kozlovska*¹⁴¹ such a short one-month term may be justified only in cases possibly resulting in a

¹⁴⁰ Petra Foubert, “The Legal Protection of the Pregnant Worker in the European Community” “Sex Equality, Thoughts of Social and Economic Policy and Comparative Leaps to the United States of America”, Kluwer Law International, The Hague/London/New York, 2002, at page 353, paragraph 776.

¹⁴¹ Jelgavas tiesas 2006.gada 25.maija spriedums lietā Nr.15066406.

reinstatement obligation for the purposes of legal certainty of the employer.

*Article 37(7) should provide for two weeks compulsory maternity leave instead of four.

*Article 47 must provide that in case of dismissal during the probation period of a pregnant worker, a dismissal notice must be given in writing with duly substantiated grounds.

* In order to comply with the principle of equivalence, the one month term provided by Article 60(3) for contesting unequal pay must be prolonged to two years, as applicable to other claims arising on account of pay. Besides, Article 60(3) must specify that missing the term for bringing an action does not preclude claiming equal pay at any time as regards the current situation.

*Article 75 must provide for the situation where a worker has not had salary on account of maternity leave, taking into account that calculation of average wages for that worker may not be less favourable.

*Article 36 must provide that pregnancy may not be taken into account when assessing suitability of state of health of a candidate for performance of the work in question.

*Article 138(6) must clearly provide that night work is prohibited for pregnant workers, workers who have recently given birth, or who are breastfeeding - only if it is specified by a medical certificate

*The legislator must rethink the provisions of Articles 53(2), 134(2), 136(7) and 138(6) providing that women are awarded special protection one year after birth-giving, because it does not reflect the biological differences of the female sex, but rather a socially-construed stereotype of the woman as child-carer.

*Article 134(2) stipulating that the employer must provide a woman with part-time work for a year after child-birth if she so requires, discriminates against male workers by not allowing male workers effectively to reconcile work and family life and by setting different conditions for child-care according to sex. Besides, this provision must be analysed together with the right to divided child-care allowance – 50% of the allowance to each parent who works part-time on account of the rights provided by Article 134(2).

*Article 147(1) providing for the right to ante-natal examinations during working time if such examinations are not possible outside it, must provide, according to the requirements of Article 9 of Directive 92/85, that during those examinations the employer has an obligation to provide this right without loss of pay.

Proposals for amendments to Latvian statutory social security law

Maternity leave

In order to comply with the provisions of Directive 79/7, the only possible way is to insure women during maternity against all social risks in the same way as any worker actually working, or if women are self-employed – in the same way as any self-employed person actually performing activity. For the purposes of guaranteeing equal rights, the level of social insurance must correspond to previous salary.

However, if following the equality principle accurately, then social insurance during maternity leave must include any pay rise, since otherwise persons on maternity leave will be placed in a less advantageous position in comparison with their working colleagues, since in case of a pay rise social insurance contributions and consequently social insurance allowances of working colleagues would be higher than those of persons on maternity leave, because their social insurance contributions will not reflect the pay rise. Consequently, in order to eliminate this discriminatory situation, contributions during maternity leave against all social insurance risks must be in an amount corresponding to the salary which a person on maternity leave would have received if she was present at work.

Paternity leave

Since the right to paternity leave is an exclusive right granted to male persons only, this period must be awarded special rights on the same basis as award of rights during maternity. Although no explicit social security rights during paternity leave are provided under EC and Latvian law, nevertheless in order to comply with the principle of equality provided by Directive 79/7 and Article 2¹ of the Law on social security¹⁴², fathers on account of paternity leave like mothers on maternity leave may not be subject to less favourable treatment in the field of social security. Thus the author sees award of full social insurance during paternity leave by the state as the only solution.

Child-care leave

First of all, the legislator must think of provisions of Latvian law which allow any indirect discrimination arising out of low social insurance during child-care leave to be caught. Here, there may be two solutions – to provide persons on child-care leave with statutory social insurance in the amount of their previous wages, or to implement the provisions of Article 7(1)(b). However, the second solution is questionable, because Directive 79/7 is subject to progressive implementation of the equality principle in social security matters, which means that under Article 8 the

¹⁴² Par sociālo drošību: LR likums. Latvijas Vēstnesis 1995. 21.septembris, Nr.144 (Law on Social Security).

Member States shall periodically review exemptions allowed under Article 7(1). Consequently, it is highly questionable whether the Commission in the present situation will allow Latvia to step backwards after having once already decided that exemption under Article 7(1)(b) must be deleted. Instead, it is reasonable for the Ministry of Welfare to calculate the possible expenses of the state budget or social insurance budgets¹⁴³ on account of full statutory social insurance of persons on child-care leave.

The legislator must rethink the aim and purpose of child-care allowance provided under Latvian law, since now it provides child-care allowance to one of the parents even if he/she works full time; on the other hand it does not in reality provide for the possibility of one parent to work part-time, since it involves financial loss. Such a provision will be effective with regard to the best possible child-care, involvement of fathers in child-care, and leaving mothers within the employment market only if both parents could receive child-care allowance in an amount of 50% under condition that they work part-time and share child-care responsibilities between them.

Proposals for amendments to other laws

*Latvian Civil law must be amended by Article 1403¹ as soon as possible. Since the wording of that provision is very general and does not provide for nuances required by EC law, after the amendments responsible institutions must provide the public with exhaustive information on proper interpretation and application of Article 1403¹ according to EC law requirements.

*Article 1635 must be amended by insertion of discrimination cases as not requiring proof of the existence of moral damage. Besides, the Civil law must provide that in order to obtain financial loss on account of discrimination, proof of existence of fault may not be required.

*Article 2(4) of Law on the state civil service must be amended as soon as possible in order to implement EC law provisions of equal treatment in the field of public service.

¹⁴³ It was proposed recently by the Ministry of Welfare to move child-care allowances from the category of state allowances paid from the state budget under statutory social insurance schemes paid by social insurance contribution budgets. LM Grib atcelt kopšanas pabalsta griestus, portāls www.delfi.lv, publicēts 2006. 20.jūlijā, <http://www.delfi.lv/archive/article.php?id=15004402> (aplūkots 2006. 20.jūlijs)

Thesis for defence

EC law

*The 'difference' approach presently used by EC law does not guarantee substantive equality between the sexes. However, this finding has its explanation not in the fact that the 'difference' approach is based on a formal equality approach, but in the fact that the ECJ has applied an incoherent legal technique for comparison of situations. So, in order to attain substantive equality there is no need to switch from the 'difference' approach to the substantive equality approach, but to apply doctrine which provides that a substantive equality outcome depends on the thoroughness of review of the comparable situations in question. Besides, the essence of equality law lies in the existence of a comparator, whether real or hypothetical. This is important to escape recognition of a *sui generis* situation which may lead to unequal treatment. Thoroughness of review of the situations in question, which is governed by biological differences based on sex, must provide equality of results. Thoroughness of review of situations must also provide for equality of result in situations where differences of treatment have arisen due to stereotypes and there is no possibility to eliminate such actually existing disadvantage through other measures. Moreover, in cases where disadvantage may be eliminated, thoroughness of review of situations must lead to an outcome which provides for equal opportunities. However, it must be taken into account that full application of the legal technique of thoroughness of review by the ECJ is restricted on account of its limited competence, which deals with aspects of organization of family life, which is the source of inequality, only to a certain extent.

*Not taking into account deficiencies of legal technique, attaining substantive equality is also precluded by the fact that special protection during pregnancy and maternity is provided by Directive 92/85, which constitutes part of health and safety provisions, not EC sex equality law. Such legal basis allows the ECJ to avoid reviewing pregnancy and maternity cases in the context of sex equality, which moves away from attaining substantive equality.

*Some scholars consider that several provisions of Directive 92/85 are discriminatory. The author has analysed the case law of the ECJ interpreting Directive 92/85, and has drawn the conclusion that the ECJ interprets the provisions of Directive 92/85 in a more discriminatory way than they actually are.

*Although EU institutions in their political documents provide that both parents play an equal role in child-care and upbringing, nevertheless normative acts provide different rights for motherhood and fatherhood respectively. Evidence of this appears from the length of maternity leave,

which exceeds the time for accommodating biological differences, and the aims of leave defined by the ECJ which provides for special protection of motherhood. Since EC law does not protect fatherhood, it violates the equal treatment principle and does not stimulate attainment of self-provided objectives in the field of human rights and economic development. Besides, the EU legislator fails to take into account that excessive protection during pregnancy and maternity increase the possibility of discrimination against all women in the labour market.

Latvian law

Labour law

*In order to avoid misinterpretation and misapplication of special protection measures awarded to pregnant workers and workers during maternity and paternity periods, Article 29(1) should be amended with explicit norms providing that less favourable treatment on grounds of pregnancy, maternity (including breastfeeding) or paternity constitutes direct discrimination based on sex.

*Article 29(1) should provide that prohibition of discrimination concerns not only notice of dismissal but also dismissal itself and non-renewal of fixed-term contracts on discriminatory grounds.

*Article 29(3) should not indicate that direct discrimination may be justified. Instead, the present Article 29(3) may be formulated as provided by Article 4(1) of Directive 97/80.

*Article 29(3) should be amended to provide claimants with effective rights to reversed burden of proof. In this regard, Article 29(3) should explain that 'facts' here means not evidence according to the Civil Procedure law but facts indicating *prima facie* discrimination.

*Article 32(1) should provide for a positive instead of a negative obligation to address job advertisements to individuals of both sexes. That will clarify the obligation of employers when formulating job advertisements.

*Article 34(2) which provides that no instatement may be required by a discrimination victim should be revised, since in a small country in certain circumstances the obligation to conclude an employment contract may be the only effective remedy. While Article 34(2) does not provide for instatement, the one-month term for bringing a claim should be revised, since as correctly pointed out by the judge in the *Kozlovska* case, such a short term - one month - may be justified only in cases possibly resulting in a reinstatement obligation for the purposes of legal certainty of employers.

*Article 37(7) should provide for two weeks compulsory maternity leave instead of four.

*Article 47 should provide that in case of dismissal of a pregnant worker during the probation period, a dismissal notice must be given in written with duly substantiated grounds.

* In order to comply with the principle of equivalence, the one-month term provided by Article 60(3) for contesting unequal pay should be prolonged to two years as applicable to other claims arising on account of pay. Besides, Article 60(3) should specify that missing of the deadline for bringing an action does not preclude claiming at any time equal pay as regards the current situation.

*Article 75 should provide for the situation where a worker has not had salary on account of maternity leave taking into account that calculation of average wages for that worker may not be less favourable.

*Article 36 should provide that pregnancy may not be taken into account when assessing suitability of state of health of the candidate for performance of work in question.

*Article 138(6) should clearly provide that night work is prohibited for pregnant workers, workers who have recently given birth or who are breastfeeding only if this is specified by medical certificate

*The legislator should rethink the provisions of Articles 53(2), 134(2), 136(7) and 138(6) providing that women are awarded special protection one year after childbirth, because this reflects - not the biological differences of the female sex, but rather a socially-construed stereotype of women as main child-carers.

*Article 134(2) - stipulating that employers must provide a woman with part-time work for a year after child-birth if she requires - again stresses the stereotype of woman as the main child-carer.

*Article 147(1) - providing for the right to ante-natal examinations during working time if such examinations are not possible outside it - should provide that during those examinations the employer must provide this right without loss of pay, in accordance with the requirements of Article 9 of Directive 92/85.

Statutory social insurance law

* Article 7(2) of the Law on social allowances should be amended by providing that an individual is precluded from the right to child-care allowance if he/she or the other parent is on maternity or paternity leave.

*In order to comply with the provisions of Directive 79/7, women during maternity should be insured against all social risks like any worker actually working; or, if women are self-employed – like any self-employed person actually performing an activity. For the purposes of guaranteeing equal rights, the level of social insurance should correspond to the previous salary.

*Since the right to paternity leave is an exclusive right granted to males only, this period must be awarded special rights on the same basis as the

award of rights during maternity in accordance with the principle of equal treatment, under the provisions of the Law on social security¹. According to this, individuals on paternity leave must be socially insured against all risks provided by the statutory social security scheme.

*In order to eliminate the present situation, allowing bringing a claim on indirect discrimination against women after child-care leave regarding less advantageous treatment in statutory social security schemes, the Latvian state should calculate the possible expenses of either the state or social insurance budget for full social insurance of persons during child-care leave. According to the availability of financial resources, Latvia has either to provide parents with full social insurance during child-care leave or ask the European Commission for permission to provide exemption under national law, in order to discharge its responsibility for this indirect discrimination.

*The legislator should rethink the aim and purpose of child-care allowance provided under Latvian law, since now it provides child-care allowance to one of the parents even if he/she works full time, but on the other hand it does not in reality provide for the possibility for one parent to work part-time, since it involves financial loss. Such provision will be effective with regard to the best possible child-care, involvement of fathers in child-care and leaving mothers within employment market only if both parents receive child-care allowance in an amount of 50% on condition that they work part-time and share child-care responsibilities between them.

Other laws

*Long-term service pensions provided by special national laws fall within the concept of equal pay; thus they are subject to stricter review from the point of view of equal treatment.

*Latvian Civil law should be amended by Article 1403¹ as soon as possible. Since the wording of that provision is very general and does not provide for the nuances required by EC law, after amendments the responsible institutions should provide the public with exhaustive information on proper interpretation and application of Article 1403¹ according to EC law requirements.

*Article 1635 should be amended by inserting that discrimination cases do not require proof of existence of moral damage. Besides, the Civil law should provide that in order to obtain financial loss on account of discrimination, proof of existence of fault may not be required.

*Article 2(4) of the Law on the state civil service should be amended as soon as possible in order to implement EC law provisions of equal treatment in the public service field.

¹ Par sociālo drošību: LR likums. Latvijas Vēstnesis 1995. 21.septembris, Nr.144 (Law on Social Security).

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C-158/97	Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen, <i>European Court reports 2000 Page I-01875</i>
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C-185/97	Belinda Jane Coote v Granada Hospitality Ltd., <i>European Court reports 1998 Page I-05199</i>
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C-309/97	Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse, <i>European Court Reports 1999 page I-02865</i>
C-333/97	Susanne Lewen v Lothar Denda, <i>European Court reports 1999 Page I-07243</i>
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C-79/99	Julia Schnorbus v Land Hessen, <i>European Court reports 2000 Page I-10997</i>
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T-333/99 CFI	X v European Central Bank, <i>European Court reports 2001 Page II-03021; Page IA-00199; Page II-00921</i>

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C-438/99	Maria Luisa Jimenez Melgar v Ayuntamiento de Los Barrios, <i>European Court reports 2001 Page I-06915</i>
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C-62/01 P	Anna Maria Campogrande v Commission of the European Communities, <i>European Court reports 2002 Page I-03793</i>
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C-342/01	Marka Paz Merino Gomez v Continental Industrias del Caucho SA, <i>European Court reports 2004 Page 00000</i>
C-380/01	Gustav Schneider v Bundesminister für Justiz
C-397/01 and C-403/01	Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV., <i>European Court reports 2004 Page I-08835</i>
C-4/02; C-5/02	Hilde Schönheit v Stadt Frankfurt am Main (C-4/02) and Silvia Becker v Land Hessen (C-5/02), ECR 2003 Page 00000
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C-25/02	Katharina Rinke v Ärztekammer Hamburg., <i>European Court reports 2003 Page I-08349</i>
C-77/02	Erika Steinicke v Bundesanstalt für Arbeit, <i>European Court reports 2003 Page I-09027</i>
C-147/02	Michelle K. Alabaster v Woolwich plc and Secretary of State for Social Security, ECR 2004 Page 0000
C-172/02	Robert Bourgard v Institut national d'assurances sociales pour travailleurs indépendants (Inasti). <i>European Court reports 2004 Page I-05823</i>

C-196/02	Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE, OJ C 106, 30.04.2005., p.1
C-220/02	Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich, ECR 2004 Page 00000
C-284/02	Land Brandenburg v Ursula Sass. , <i>European Court reports 2004 Page I-11143</i>
C-285/02	Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen, <i>European Court reports 2004 Page I-05861</i>
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C-173/03	Traghetti del Mediterraneo SpA, in liquidation v Repubblica italiana,
C-191/03	North Western Health Board v Margaret McKenna, OJ C 281, 22/11/2005, p.2
C-203/03	Commission of the European Communities v Republic of Austria, <i>European Court reports 2005 Page 00000</i>
C-319/03	Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice, <i>European Court reports 2004 Page I-08807</i>
C-350/03	Elisabeth Schulte, Wolfgang Schulte v Deutsche Bausparkasse Badenis AG,
C-356/03	Elisabeth Mayer v Versorgungsanstalt des Bundes und der Länder, OJ C 57, 05.03.2005., p.11
C-519/03	Commission of the European Communities v Grand Duchy of Luxembourg, OJ C 143, 11.06.2005. p.11
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