

# GENDER EQUALITY - CORE EU LAW CONCEPTS IN THE EQUAL TREATMENT DIRECTIVE

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The aim of this paper is, firstly, to give an insight in the notions of equal treatment and non-discrimination as defined in the Equal Treatment Directive<sup>1</sup> and interpreted by the European Court of Justice; and, secondly, to examine the limitations to scope of application of the Equal Treatment Directive. This analysis will then be used as a basis for assessment of the relevant provisions of the Maltese laws implementing the Equal Treatment Directive, namely the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta).

The Equal Pay Directive<sup>2</sup> will not be treated in this paper. It must be said though that the bulk of European Court of Justice case law regards the concept of pay as contemplated in the Equal Pay Directive (and article 141 of the EC Treaty).<sup>3</sup>

The effectiveness of legal provisions on gender equality in the employment context depends to a significant extent on the level of awareness of the stakeholders, including employees, employers, unions, NGOs and the national authorities. This seems to be particularly pertinent in the new Member States (EU10), including Malta, considering that the Community *acquis* came into force in those States relatively recently (1<sup>st</sup> May 2004) and that the respective local cultures may perhaps not boast a long-standing or advanced “equality culture”. With this in mind, it may be useful to describe what the prohibitions imposed and the rights conferred by the Equal Treatment Directive encompass and in particular what is understood by the core concepts of equal treatment, direct and indirect discrimination, harassment and sexual harassment. Whereas measures of positive action

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<sup>1</sup> 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 (as amended by Directive 2002/73/EC) (“the Equal Treatment Directive”)

<sup>2</sup> 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. For an overview of case-law, one may wish to refer to the Explanatory memorandum of the Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) COM(2004) 279 final

<sup>3</sup> See the Digest of case law under heading B-15.01 Égalité entre travailleurs masculins et travailleurs féminins ([http://curia.eu.int/common/recdoc/repertoire\\_jurisp/bull\\_cee/data/index\\_B-15\\_01.htm](http://curia.eu.int/common/recdoc/repertoire_jurisp/bull_cee/data/index_B-15_01.htm))

arguably belong to the realm of policy making and may therefore be categorised under rather vague terms or dynamic concepts such as “gender mainstreaming” without causing great concern, notions such as (direct and indirect) “discrimination”, “harassment” and “sexual harassment” actually define the scope of application of individual rights and, in certain cases, may constitute one of the elements of the description of a criminal offence.<sup>4</sup>

This paper adopts the following scheme:

- 1 The principle of equal treatment in terms of the Equal Treatment Directive
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## **1. The Principle of Equal Treatment in Terms of the Equal Treatment Directive**

The principle of equal treatment in the context of access to employment (including promotion and vocational training) and employment conditions means that any discrimination on grounds of sex either directly or indirectly by reference in particular to marital or family status is prohibited.<sup>5</sup>

For the purposes of this paper, reference will be made to the Equal Treatment Directive as amended by Directive 2002/73/EC. It should be borne in mind though that the deadline for implementation by the Member States of Directive 2002/73/EC is 5 October 2005 and that Member States whose laws, regulations or administrative provisions are not, for the time being, aligned with the amendments introduced by Directive 2002/73/EC, are not necessarily infringing Community law.

Directive 2002/73/EC has clarified what is understood by direct and indirect discrimination in a manner consistent with the Racial Equality and Employment Equality Directives<sup>6</sup> and has incorporated the notions of harassment and sexual harassment into the definitions

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<sup>4</sup> See articles 9(3), 10(3) of the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and article 30 of the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta)

<sup>5</sup> Article 2(1) of the Equal Treatment Directive

<sup>6</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

section of the Equal Treatment Directive. The same definitions are used in Directive 2004/113/EC<sup>7</sup> which contemplates the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services (albeit to a limited extent<sup>8</sup>). Moreover, an instruction to discriminate against persons on grounds of sex is deemed to be a form of discrimination by virtue of Directive 2002/73/EC.

With a view to updating, simplifying, modernising and improving the Community *acquis* in the area of equal treatment between men and women, the Commission has adopted a Proposal for a recast Directive.<sup>9</sup> In this proposal, the same definitions as those contained in Directive 2002/73/EC are applied to all areas covered by the proposal (including equal pay and occupational social security schemes).

### *1.1 The Meaning of the Principle of Non-Discrimination*

The prohibition on discrimination is traditionally regarded as the expression of the principle of equality, which is one of the fundamental principles of Community.<sup>10</sup>

The term discrimination as such refers to the application of different rules to comparable situations or the application of the same rule to different situations.<sup>11</sup> Thus, the prohibition on discrimination may, depending on the circumstances, entail an obligation to differentiate. Take, for example, a contractual term providing that an employer may dismiss workers of either sex after a stipulated number of weeks of continuous absence which is relied on to dismiss a pregnant worker because of absences due to incapacity for work resulting from her pregnancy. The situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same, and should not be treated to the same way, as that of a male worker who is ill and absent through incapacity for work for the same length of time.<sup>12</sup> Therefore to apply the term to her case would amount to discrimination.

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<sup>7</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>8</sup> Pursuant to article 3 of Directive 2004/113/EC, the scope of application of the Directive is limited to persons who provide goods and services which are available to the public (irrespective of the person concerned as regards both the public and private sectors, including public bodies) and which are offered outside the area of private and family life and the transactions carried out in this context. The Directive does not prejudice the individual's contractual freedom as long as the individual's choice of contractual partner is not based on that person's sex. Moreover, it does not apply to the content of media and advertising nor education. In order to prevent overlap with other Directives, the Directive does not cover matters of employment and education and, insofar as covered by other Community legislative acts, matters of self-employment. As regards the use of sex as an actuarial factor for the purposes of insurance and related financial services a moratorium is granted until 21 December 2007, reserving the possibility to Member States to allow certain exemptions that may be maintained after that date (see article 5 of the Directive).

<sup>9</sup> Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast version) COM(2004) 279 final

<sup>10</sup> See e.g. Case C-13/94 P. v S. [1996] ECR I-2143, para. 18

<sup>11</sup> See e.g. Case C-394/96 Brown v Rentokil [1998] ECR I-4185, para. 30; Case C-313/02 Wippel v P&C [2004] ECR

<sup>12</sup> Case C-394/96 Brown v Rentokil [1998] ECR I-4185

## 1.2 Prohibition of Discrimination on Grounds of Sex

The Equal Treatment Directive prohibits discrimination based on sex in the context of employment. In *P. v S.* the European Court of Justice held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure and that, accordingly, the scope of the Directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the Directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned.<sup>13</sup>

In later cases the Court seems to have been more reluctant to adopt a broad interpretation of discrimination based on sex. The Court stated in the *Grant* judgment that the reasoning in the *P. v S.* ruling (which leads to the conclusion that discrimination which is in fact based, essentially if not exclusively, on the sex of the person concerned is to be prohibited just as is discrimination based on the fact that a person belongs to a particular sex) is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation.

At the time of the decision in *Grant*, Community law did not cover discrimination based on sexual orientation, but the Court indicated that the Treaty of Amsterdam provided for the insertion in the EC Treaty of an Article 6a (now Article 13 of the EC Treaty) which would allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation. In fact, discrimination based on sexual orientation can now be tackled on the basis of the Employment Equality Directive.<sup>14</sup>

## 1.3 Definition and Examples of Direct Discrimination

Direct discrimination refers to situations where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.<sup>15</sup>

Examples of direct sex-based discrimination taken from the body of case-law developed by the European Court of Justice in relation to the Equal Treatment Directive are:

- (i) a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and women<sup>16</sup>;
- (ii) Member States laying down by legislation the principle that night-work by women is prohibited, even if that obligation is subject to exceptions, where night-work by men is not prohibited<sup>17</sup>;

<sup>13</sup> Case C-13/94 *P. v S.* [1996] ECR I-02143, para. 19-20. See also Case C-125/99 *D. v Council* [2001] ECR I-4319

<sup>14</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>15</sup> New article 2(2)

<sup>16</sup> Case C-271-91 *Marshall* [1993] ECR I-4367

- (iii) an employment contract for an indefinite period for the performance of night-time work concluded between an employer and a pregnant employee, both of whom were unaware of the pregnancy, which is held to be void on account of the statutory prohibition on night-time work which applies, by virtue of national law, during pregnancy and breastfeeding, or which is being avoided by the employer on account of a mistake on his part as to the essential personal characteristics of the woman at the time when the contract was concluded<sup>18</sup>.

According to settled case-law of the European Court of Justice, the dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex.<sup>19</sup> For instance, a woman who is accorded unfavourable treatment regarding her working conditions, in that she is deprived of the right to an annual assessment of her performance and, therefore, of the opportunity of qualifying for promotion as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave. Such conduct constitutes discrimination based directly on grounds of sex within the meaning of the Equal Treatment Directive.<sup>20</sup>

The Equal Treatment Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.<sup>21</sup> However, according to the Court, the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment.<sup>22</sup> Since the amendments of Directive 2002/73/EC it is now explicitly provided that less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC<sup>23</sup> constitutes discrimination within the meaning of the Equal Treatment Directive.

Although pregnancy as such is not in any way comparable to a pathological condition, dismissals which are the result of absences due to and illness attributable to pregnancy or confinement are not necessarily precluded by the Equal Treatment Directive, even where such illness first appeared during pregnancy and continued during and after the period of maternity leave. It appears that in such cases the Court will determine whether in the factual situation submitted to it, there are reasons to distinguish, from the point of view of the principle of equal treatment enshrined in the Directive, between an illness attributable to pregnancy or confinement and any other illness. Male and female workers are equally exposed to illness. Although certain disorders are specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same

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<sup>17</sup> Case C-345/89 Stoeckel [1991] ECR I-04047; cf. Case C-158/91 Levy [1993] ECR I-04287

<sup>18</sup> Case C-421/92 Habermann-Beltermann [1994] ECR I-1657

<sup>19</sup> See e.g. Case C-177/88 Dekker [[1990] ECR I-3941; Case C-394/96 Brown [1998] ECR I-4185, para.16 and references made there.

<sup>20</sup> Case C-136/95 Thibault [1998] ECR I-2011

<sup>21</sup> Article 2(3) and new article 2(7) of the Equal Treatment Directive

<sup>22</sup> Case C-207/98 Mahlburg [2000] ECR I-549

<sup>23</sup> 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

circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.<sup>24</sup>

However, since the coming into force of Directive 92/85/EEC (article 10), dismissal during the period from the beginning of pregnancy to the end of maternity leave is prohibited, save in exceptional cases unconnected with the woman's condition. It is clear from the objective of that provision that absence during the protected period, other than for reasons unconnected with the employee's condition, can no longer be taken into account as grounds for subsequent dismissal.<sup>25</sup> Moreover, pursuant to the amended Equal Treatment Directive a woman on maternity leave is entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.<sup>26 27</sup>

In *Webb* the Court held that the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive. This means that, for instance, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged. The fact that a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment is immaterial.<sup>28</sup> In *Tele Danmark* the Court ruled that the interpretation given in *Webb* cannot be altered by the fact that the contract of employment was concluded for a fixed term.<sup>29</sup>

Furthermore, the Court has endorsed the Commission's opinion that, since the employer may not take the employee's pregnancy into consideration for the purpose of applying her working conditions, she is not obliged to inform the employer that she is pregnant.<sup>30</sup>

#### 1.4 *Definition and Examples of Indirect Discrimination*

Indirect discrimination takes place 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.<sup>31</sup>

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<sup>24</sup> See Case C-179/88 *Handels - og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979 (the "Hertz" judgment)

<sup>25</sup> See Case C-400/95 *Larsson* [1997] ECR I-2757

<sup>26</sup> New article 2(7) of the Equal Treatment Directive

<sup>27</sup> As regards maternity leave see: Case C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* [1998] ECR I-06401

<sup>28</sup> Case C-32/93 *Webb* [1994] ECR I-03567

<sup>29</sup> Case C-109/00 *Tele Danmark A/S v Handels - og Kontorfunktionærernes Forbund i Danmark* (HK) [2001] ECR I-6993

<sup>30</sup> Case C-109/00 *Tele Danmark A/S v Handels - og Kontorfunktionærernes Forbund i Danmark* (HK) [2001] ECR I-6993; Case C-320/01 *Wiebke Busch v Klinikum Neustadt GmbH & Co.* [2003] ECR Page I-2041

<sup>31</sup> New article 2(2) of the Equal Treatment Directive. This new definition introduced by Directive 2002/73/EC reflects the Court's case-law according to which national rules discriminate indirectly against women where, although worded in neutral terms, they are more disadvantageous to women than men, unless that difference in treatment is justified by

Establishing what exactly falls within the boundaries of the concept indirect discrimination may sometimes prove to be a delicate exercise. To illustrate this with some examples of situations that are *not* covered by the Directive:

- (i) in the *Jackson and Cresswell* case<sup>32</sup> the Court decided that the Equal Treatment Directive is to be interpreted as not applying to a social security scheme, such as supplementary allowance or income support, simply because the conditions of entitlement for receipt of the benefits may be such as to affect the ability of a single parent to take up access to vocational training or part-time employment;
- (ii) the Equal Treatment Directive does not preclude the application of a national provision which does not take into account employees whose working hours are not more than ten hours per week or 45 hours per month when determining whether or not an undertaking must apply a system of protection against unfair dismissal, where it is not established that undertakings which are not subject to that system employ a considerably greater number of women than men. Even if that were the case, such a measure might be justified by objective reasons not related to the sex of the employees in so far as it is intended to alleviate the constraints weighing on small businesses<sup>33</sup>;
- (iii) national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted only as two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex.

This brings us to the two-step approach used in relation to indirect discrimination. In the first instance it is to be determined whether a given criterion applying irrespective of gender, actually affects a greater number of women than men. It should be noted that a situation may only reveal a *prima facie* case of indirect discrimination if the statistics describing that situation are valid, that is to say, if they cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant.<sup>34</sup>

If it is found to be the case that persons of one sex are put at a particular disadvantage compared with other persons of the other sex, the second step is to establish whether the measure chosen reflects a legitimate social policy aim, and is suitable and necessary for achieving that aim (objective justification and proportionality test). The national authorities have a certain margin of appreciation in the application of this test considering that, as Community law stands at present, social policy is a matter for the Member States, which enjoy a reasonable margin of discretion as regards the nature of social protection measures and the detailed arrangements for their implementation.<sup>35</sup>

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objective factors unrelated to any discrimination on grounds of sex. (Case 171/88 Rinner-Kuehn [1989] ECR 2743, para. 12; Case C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-0618, para. 22)

<sup>32</sup> Joined cases C-63/91 and C-64/91 Jackson and Cresswell [1992] ECR I-4737

<sup>33</sup> Case C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-618

<sup>34</sup> Case C-226/98 Jørgensen [2000] ECR I-2447, para. 33

<sup>35</sup> Most cases seem to regard comparability of part-time employment with full-time employment. In certain Member States (e.g. Germany) it is common ground that part-time workers are far more likely to be women than men see e.g.

## 1.5 *Harassment and Sexual Harassment as a Form of Discrimination*

Following the amendments introduced by Directive 2002/73/EC, harassment and sexual harassment are treated as forms of discrimination on grounds of sex.<sup>36</sup> Harassment is defined as an unwanted conduct related to the sex of a person occurring 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 is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurring, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.<sup>37</sup>

So far, no cases regarding harassment or sexual harassment have been ruled upon by the European Court of Justice.

## 2. **Exceptions and Limitations to the Scope of Application of The Equal Treatment Directive**

### 2.1 *Derogations*

Articles 30, 39, 46, 58, 64, 296 and 297 of the EC Treaty provide for derogations applicable in situations which may affect public security or public safety. Those articles deal with exceptional and clearly defined cases. The Court has clarified that it is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application. Thus, decisions taken by Member States in regard to access to employment, vocational training and working conditions, for instance, in the armed forces do not fall altogether outside the scope of Community law.

Under (old) article 2(2) of the Equal Treatment Directive<sup>38</sup>, Member States have the option of excluding from the scope of that Directive occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor. As a derogation from an individual right laid down in the Directive, that provision must be interpreted strictly and 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

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Case C-1/95 Hellen Gerster v Freistaat Bayern [1997] ECR I-5253; Case C-100/95 Brigitte Kording v Senator für Finanzen [1997] ECR I-5289; Case C-322/98 Kachelmann [2000] ECR I-7505; Case C-77/02 Steinicke [2003] ECR I-9027; Case C-187/00 Kutz-Bauer [2003] ECR I-2741. Also: Case C-226/98 Jørgensen [2000] ECR I-2447; Case C-79/99 Schnorbus [2000] ECR I-10997; Case C-319/03 Briheche [2004]

<sup>36</sup> Article 2(3) of the Equal Treatment Directive

<sup>37</sup> New article 2(2) and (3) of the Equal Treatment Directive

<sup>38</sup> Following the amendments by Directive 2002/73/EC, Member States may rely on the provisions of article 2(6) of the original Directive which entitles Member States to provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

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 pursued.

Derogations on the basis of (old) article 2(2) of the Equal Treatment Directive were allowed for instance for mid-wives.<sup>39</sup> The Court also recognised, for example, that sex may be a determining factor for posts such as those of prison warders and head of prison, for certain activities such as policing activities where there are serious internal disturbances, and for service in certain special combat units. The application of national provisions which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services is not allowed. Community law does not preclude compulsory military service being reserved to men.<sup>40</sup>

## 2.2 *The Delineation of the Scope of Application of the Equal Treatment Directive*

The scope of application of the Equal Treatment Directive is limited to access to employment, including promotion, and to vocational training and to working conditions.

In determining whether a given differential treatment amounts to a form of discrimination prohibited under Community law, regard should be had for differences in treatment that are allowed in terms of a certain Community instrument and that are therefore not covered by the Equal Treatment Directive. For instance, in the *Burton* case, applying different age conditions for men and women with regard to access to voluntary redundancy was not regarded as discrimination within the meaning of the Equal Treatment Directive. The Court considered that in deciding whether the difference in treatment in question is discriminatory within the meaning of the said Directive, account must be taken of the relationship between the measure at issue and national provisions on normal retirement age. The determination of a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law since Directive 79/7/EEC<sup>41</sup> allows Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.<sup>42</sup>

Nevertheless it is established case law that, in view of the fundamental importance of the principle of equal treatment, the exclusion of social security matters from the scope of the Directive provided for in article 1(2) must be interpreted strictly.<sup>43</sup> Thus, the Court has held that a scheme of benefits cannot be excluded from the scope of the Equal Treatment Directive solely because, formally, it is part of a national social security system. Such a scheme may come within the scope of the said Directive if its subject matter is access to employment, including vocational training and promotion, or working conditions. For instance, a benefit with the characteristics and purpose of family credit (i.e. an income-

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<sup>39</sup> Case 165/82 *Commission v UK* [1983]

<sup>40</sup> See: Case 222/84 *Johnston* [1986] ECR 1651; Case C-273/97 *Sirdar* [1999] ECR I-7403; Case C-285/98 *Kreil* [2000] ECR I-69; Case C-186/01 *Dory* [2003] ECR I-2479.

<sup>41</sup> 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

<sup>42</sup> Case 19/81 *Burton v. British Railway Board* [1982]

<sup>43</sup> Case 151/84 *Roberts v Tate & Lyle* [1986] ECR 703, para. 35; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, para. 36

related benefit which is awarded in order to supplement the income of low-paid workers who are responsible for a child) is concerned with both access to employment and working conditions and falls, therefore, within the scope of the Directive.<sup>44</sup> However, the Directive is not rendered applicable simply because the conditions of entitlement for receipt of benefits may be such as to affect the ability of a single parent to take up employment.<sup>45</sup>

### *2.3 The Symmetrical Concept of Equal Treatment and Conditions for Measures of Positive Discrimination*

Non-discrimination on the ground of sex is a symmetrical concept which protects both men and women. Taking into account that the promotion of equality between men and women, of which the principle of equal treatment is a cornerstone, is deemed necessary primarily because of the disadvantaged position of women, this type of symmetric and formal approach is not sufficient on its own to achieve substantive gender equality and is sometimes criticised because it tends to set male standards as the norm. However, the right of equal treatment is clearly a human right that is enjoyed by both men and women. In fact, in a considerable number of cases brought before the European Court of Justice sex discrimination was claimed by men.<sup>46</sup>

Promotion of substantive gender equality is allowed by virtue of article 2(4) of the original Directive of 1976 and article 141(4) of the EC Treaty<sup>47</sup>. Following the amendments by Directive 2002/73/EC recourse should be had to new article 2(8), which explicitly refers to article 141(4) of the EC treaty.

It is settled case-law that Article 2(4) is specifically and exclusively designed to authorise 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. It authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. However, the European Court of Justice has adopted a rather restrictive approach towards measures of positive discrimination.

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<sup>44</sup> Case C-116/94 Meyers v Adjudication Officer [1995] ECR I-2131

<sup>45</sup> Joined Cases C-63/91 and C-64/91 Jackson and Cresswell v Chief Adjudication Officer [1992] ECR I-4737, para. 27, 28 and 31.

<sup>46</sup> For instance, Mr. Burton claimed that he was treated less favourably than female employees in as much as the benefit concerned, linked to the normal retirement age, would have been granted to a woman of his age. Case 19/81 *Burton v. British Railway Board* [1982] Mr. Kalanke disputed a German system whereby women who have the same qualifications as men applying for the same post were to be given priority in sectors where they are under-represented. Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-03051. It was decided that a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women, while it is to men in the same situation as those women, cannot be allowed under Article 2(4) of the Directive (Case C-319/03 *Briheche* [2004]) See also: Case C-180/95 *Draehmpaehl v Urania* [1997] ECR I-2195; Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539; Case C-186/01 *Dory* [2003] ECR I-2479; Case C-476/99 *Lommers* [2002] ECR I-2891

<sup>47</sup> Article 141(4) EC Treaty reads: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."

At the heart of the landmark case *Kalanke* lay a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented. Since such a rule involves discrimination on grounds of sex, the Court considered whether such a national rule is permissible under Article 2(4) of the original Directive. As a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly. The Court reasoned that national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.<sup>48</sup>

*A fortiori*, it was not accepted that, pursuant to national legislation a candidate for a public post who belongs to the under-represented sex and possesses *sufficient* qualifications for that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.<sup>49</sup>

In contrast, national rules entailing positive discrimination that passed the proportionality test and that have therefore been declared compatible with the Equal Treatment Directive are those measures which are intended to give priority in promotion to women in sectors of the public service where they are under-represented if they do not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.<sup>50</sup>

Another example of a positive discrimination measure which was held to be compatible with article 2(1) and (4) of the Directive can be found in *Lommers*. This case concerned a scheme set up by a Dutch Ministry to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff was reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. However, such measure is acceptable only in so far, in particular, as the exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials.<sup>51</sup>

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<sup>48</sup> Case C-450/93 Eckhard Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051. its Communication on the interpretation of the judgment delivered by the European Court of Justice in Case C-450/93 (*Eckhard Kalanka v Freie Hansestadt Bremen*), the Commission expressed its belief that there are many forms of positive discrimination that are not affected by the *Kalanke* judgment, and that Member States and employers may avail themselves of a wide range of positive measures such as State subsidies granted to employers who recruit women in sectors where they are underrepresented, positive training-oriented action, vocational guidance

See also: Case C-319/03 Briheche [2004]

<sup>49</sup> Case C-407/98 Abrahamsson and Anderson v Fogelqvist [2000] ECR I-5539

<sup>50</sup> See: Case C409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363; Case C-158/97 Badeck e.a. [2000] ECR I-1875;

<sup>51</sup> Case C-476/99 Lommers [2002] ECR I-2891

### 3. The Case of Malta

In Malta there are two parallel, or perhaps complementary, laws with provisions implementing the principle of gender equality in employment: the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta).

Clearly, the Maltese legislator did not wish to merely copy the definitions of the Equal Treatment Directive. According to the definitions section in article 2 of the Equality for Men and Women Act (“EMWA”), “discrimination” means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than another person has been or would be treated on the grounds of sex or because of family responsibilities. The EMWA then goes on to specify that discrimination based on sex or because of family responsibilities is:

- (a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities;
- (b) treating a woman less favourably for reasons of actual or potential pregnancy or childbirth;
- (c) treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex;
- (d) any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Unlike the new definition of indirect discrimination in the Equal Treatment Directive, the description of (indirect) discrimination in article 2(3)(d) of the EWMA contains a statistical element.

“Discriminatory treatment” is defined in the Employment and Industrial Relations Act (“EIRA”) as any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association. For the purposes of article 26 of the EIRA, discriminatory treatment includes:

- (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience;

- (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment;
- (c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

“Sexual harassment”<sup>52</sup> means the unlawful activities listed in article 9(1) of the EMWA. On the basis of the said article it is unlawful for any person to sexually harass other persons, that is to say:

- (a) to subject other persons to an act of physical intimacy; or
- (b) to request sexual favours from other persons; or
- (c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or
- (d) the persons so subjected or requested are treated less favourably by reason of such persons’ rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.

This is supposed to be “without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act”. Article 29 of the EIRA deals with harassment - a term not defined as such - and states that:

“(1) It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

- (2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as “the victim”) by:
- (a) subjecting the victim to an act of physical intimacy; or
  - (b) requesting sexual favours from the victim; or
  - (c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where -

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<sup>52</sup> Guidelines on the matter of sexual harassment were published in April by the National Commission for the Promotion of Equality for Men and Women.

- (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim;
- (ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct."

Since a Directive is binding upon the Member States to which it is addressed as to the result to be achieved and thus leaves to the national authorities the choice of form and methods, the Maltese legislature cannot be said to infringe Community law just because it has adopted a number of specific provisions in relation to the most important forms of discrimination and/or working conditions, whilst confining itself in relation to other forms of discrimination and/or working conditions to a general provision, covering all other forms and/or conditions not specifically mentioned. It should therefore be determined whether the result sought to be achieved by the Directive has been attained.<sup>53</sup> In any event, when applying national law, in particular the provisions of a national law specifically enacted in order to implement a Directive, national courts are required to interpret their national law in the light of the wording and purpose of the Directive.<sup>54</sup>

At some points, the Maltese implementing provisions seem to go beyond what is required as per the Equal Treatment Directive. For instance, whilst the scope of application of the Directive covers vocational training, article 8(1) of the EMWA declares it unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in -

- (a) the access to any course, vocational training or guidance; or
- (b) the award of educational support for students or trainees; or
- (c) in the selection and implementation of the curricula; or
- (d) in the assessment of the skills or knowledge of the students or trainees.

The wording "any educational establishment or for any other entity providing vocational training or guidance" would seem ambiguous. One is led to wonder for example whether this would render it unlawful for an institute offering language courses (not as such intended as vocational training) by women to women to deny men access to the course or job posts, unless it can be demonstrated that it is a measure of positive action for the purpose of achieving substantive equality for men and women or that it falls under article 2(5) of the EMWA.<sup>55</sup>

Finally, it appears that there are some lacunae in the Maltese legal provisions of the EMWA and the EIRA implementing the Equal Treatment Directive, at least insofar as they aim to transpose the amendments introduced by Directive 2002/73/EC. For instance, whilst pursuant to new article 2(4) an instruction to discriminate against persons on grounds of sex

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<sup>53</sup> The European Court of Justice was faced with a similar situation in Case 163/82 Commission v Italian Republic [1983] ECR 3273

<sup>54</sup> See, as regards the Equal Treatment Directive, Case 222/84 Johnston [1986] ECR 1651; Case C-476/99 Lommers [2002] ECR I-2891

<sup>55</sup> It should be noted that Directive 2004/113/EC does not cover matters of education.

shall be deemed to be discrimination within the meaning of the Directive, no provisions to that effect are to be found in the EMWA or the EIRA.

#### 4. Concluding Remarks

In the debate on gender equality, the Equal Treatment Directive should be judged on its own merits. As an instrument to promote gender equality<sup>56</sup> it probably has limited potential. Perhaps it should rather be seen, first, as an instrument for the elimination of discrimination (direct and indirect) on the basis of sex, and, second, as a measuring stick for the lawfulness of national measures designed to promote full equality between men and women in practice.

Whilst formal equality of treatment is a necessary condition for substantive gender equality, it is obviously not a sufficient condition therefore. The creation of equal opportunities and the intervention of positive action are complementary means towards the creation of a true level playing field for men and women. Arguably equal opportunities and positive action are aims that may, to a certain extent, be better achieved through soft law and social dialogue.

Bearing in mind that the right not to be discriminated against on the basis of gender is a human right enjoyed equally by men and woman, one might appreciate that, although the Equal Treatment Directive allows for measures of positive action to be adopted by Member States, the European Court of Justice has condemned certain forms of positive discrimination such as rigid quota systems under which there is no possibility of taking particular individual circumstances into account.

As to the transposition into national law of the core concepts of the Community *acquis* in the field of equality of treatment between men and women, it may be useful to point out that the European Commission, in its proposal for a recast Directive, indicated that “Legislation ensuring equal treatment between men and women in the area of employment and occupation adopted under and/or covered by Article 141 EC should, for all areas covered, use the same concepts as those used in the legislation adopted recently such as Directive 2002/73/EC amending Directive 76/207/EEC, as well as in similar legislation adopted under Article 13 EC, to combat discrimination on grounds other than sex, insofar as the latter also concerns the area of employment, in order to ensure legal and political coherence between pieces of legislation, which have similar objectives. It is therefore necessary to ensure coherence between secondary legislation on identical issues, such as the concept of indirect discrimination or the need for Member States to have bodies for the promotion of equal treatment, in broader areas of employment and occupation and not only for matters covered by Directive 2002/73/EC, amending Directive 76/207/EEC.”

Looking at the case of Malta, concerns in relation to coherence and legal certainty might arise due to the fact that account should be taken of two separate pieces of legislation that, moreover, use definitions which are not identical to the ones used in the Community’s (gender) equality legislation. Technically speaking this does not necessarily mean that Malta

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<sup>56</sup> The promotion of equality between men and women is both a task and an aim of the Community according to Articles 2 and 3(2) of the EC Treaty

is in breach of Community law. Nonetheless, it could be argued that having a set of uniform and flexible definitions or provisions (and a central legal instrument), would avoid causing interpretation issues where strictly speaking there should be none and would leave less room to jeopardise to the harmonious application of Community law.

**Table of Correspondence - 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 (as amended by Directive 2002/73/EC)**

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 came into force in Malta upon its accession to the European Union on the 1<sup>st</sup> of May 2004. This date was also the implementation deadline for Malta.

The deadline for implementation by the Member States of 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 is the 5<sup>th</sup> of October 2005. In the Table below, the amendments introduced by Directive 2002/73/EC are printed in italics.

This Table of Correspondence was prepared for the purposes of the paper entitled “Core EU Law concepts of the Equal Treatment Directive” to serve as a tool for comparison of the provisions of the articles of Directive 76/207/EEC, as amended by Directive 2002/73/EC, with the relevant provisions of the Equality for Men and Women Act (Chapter 456 of the Laws of Malta) and the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) that, in the author’s view, appear to be relevant for the transposition of the provisions of said Directives.

<b>Directive 76/207/EEC, as amended by Directive 2002/73/EC</b>	<b>Equality for Men and Women Act (Chapter 456 of the Laws of Malta)</b>	<b>Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta)</b>
<p><b>1(1)</b> The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is herinafter [<i>sic</i>] referred to as ‘the principle of equal treatment.’</p>	<p><b>2(1)</b> [...] “employment” means any gainful activity including self-employment and includes promotion and transfer to another post, as well as access to vocational or professional training, the duration of the employment or its extension or termination; [...] “vocational training” includes all forms of vocational training and retraining.</p> <p><b>2(2)</b> For the purposes of this Act, and unless the context otherwise requires, the terms “man” and “woman” include males and females irrespective of their age.</p> <p><b>4(1)</b> It shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.</p>	<p><b>26(1)</b> It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment; (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment.</p> <p><b>26(4)</b> For the purposes of this article, the term “offering employment” includes recruitment or training of any person with a view to engagement in employment and in regard to a person already in employment, includes also promotion to a higher grade or engagement in a different class of employment</p>

	<p><b>4(2)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers -</p> <p>(a) manage the work, give promotions, distribute tasks, offer training opportunities or otherwise arrange the working conditions in a manner that employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities; or</p> <p>(b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; or</p> <p>(c) neglect their obligation to suppress sexual harassment as provided under article 9(2).</p> <p><b>8(1)</b> It shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in -</p> <p>(a) the access to any course, vocational training or guidance; or</p> <p>(b) the award of educational support for students or trainees; or</p> <p>(c) in the selection and implementation of the curricula; or</p> <p>(d) in the assessment of the skills or knowledge of the students or trainees.</p> <p><b>8(2)</b> Failure by the persons responsible for such establishments and entities to fulfil their obligation to suppress sexual harassment as provided under article 9(2) shall for the purposes of subarticle (1) of this article constitute discrimination.</p> <p><b>8(3)</b> It shall be the duty of educational establishments and entities providing vocational training, within the limits of their competence to ensure that curricula and textbooks do not propagate discrimination.</p>	<p><b>2(1)</b> In this Act, unless the context otherwise requires -</p> <p>[...] “conditions of employment” means wages, the period of employment, the hours of work and leave and includes any conditions related to the employment of any employee under a contract of service including any benefits arising therefrom, terms of engagement, terms of work participation, manner of termination of any employment agreement and the mode of settling any differences which may arise between the parties to the agreement; but it does not include professional ethics arising from any professional relationship between an employer and an employee; [...]</p>
<p><i>1(1a) Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.</i></p>		<p>(See articles 26-32 EIRA)</p>

<p><b>1(2)</b> With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.</p>		
<p><b>2(1)</b> For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever [<i>sic</i>] on grounds of sex either directly or indirectly by reference in particular to marital or family status.</p>	<p>(See articles 2(1) and 2(3) in combination with articles 4, 8 and 10)</p> <p><b>2(1)</b> [...] “discrimination” means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [<i>sic</i>] has been or would be treated on the grounds of sex or because of family responsibilities and “discriminate” shall be construed accordingly; [...]</p>	<p><b>2(1)</b> [...] “discriminatory treatment” means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association; [...]</p> <p><b>26(2)</b> For the purposes of this article, discriminatory treatment shall include:</p> <p>(a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience;</p> <p>(b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment;</p> <p>(c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.</p>
<p><b>2(2)</b> This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.</p>	<p><b>3</b> Nothing in this Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities.</p> <p><b>2(5)</b> In relation to access to employment, a less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the particular occupational activities concerned, or</p>	<p><b>26(3)</b> The provisions of subarticles (1) and (2) shall be without prejudice to the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act, and shall not apply to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where</p>

	<p>of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances:</p> <p>Provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement.</p> <p><b>20</b> The Minister may make regulations generally for giving effect to the provisions of this Act, and the enforcement thereof, and in particular, but without prejudice to the generality of the foregoing: (c) for the exemption of any person, or class of persons or body, from the requirements of article 4(1) in so far as it relates to article 4(1)(a) and (b), article 5 and article 10 as may be specified in the aforesaid regulations; provided that any such exemption shall only be prescribed by the Minister after consultation with the Commission and provided that such exemption shall be for a specified period of time which can be renewed by the Minister after consultation with the Commission.</p>	<p>the requirements are established by any applicable laws or regulations.</p> <p>(See article 84)</p>
<p><b>2(3)</b> This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.</p>	<p><b>2(4)</b> Nothing in subarticle (2) shall be deemed to constitute discrimination in so far as such treatment - (a) is given to grant special protection to women during childbirth or pregnancy; [...]</p>	<p><b>10</b> The Minister may, after consultation with the Board, make regulations establishing minimum periods of maternity leave, parental leave and leave for urgent family reasons to which an employee shall be entitled and the conditions regulating such entitlement</p> <p>(See Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003, as amended))</p>
<p><b>2(4)</b> 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).</p>	<p><b>2(4)</b> Nothing in subarticle (2) shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women.</p>	<p><b>26(2)</b> For the purposes of this article, discriminatory treatment shall include: (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience; [...]</p> <p><b>31.</b> Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations</p>

		to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.
<b>2(1)</b> For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.	(See articles 2(1) and 2(3) in combination with articles 4, 8 and 10)  <b>2(1)</b> [...] “discrimination” means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [ <i>sic</i> ] has been or would be treated on the grounds of sex or because of family responsibilities and “discriminate” shall be construed accordingly; [...]	<b>2(1)</b> [...] “discriminatory treatment” means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association; [...]
<b>2(2)</b> For the purposes of this Directive, the following definitions shall apply: - <i>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,</i> - <i>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,</i> - <i>harassment: where an 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,</i> - <i>sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the</i>	<b>2(1)</b> [...] “discrimination” means discrimination based on sex or because of family responsibilities and includes the treatment of a person in a less favourable manner than other person [ <i>sic</i> ] has been or would be treated on the grounds of sex or because of family responsibilities and “discriminate” shall be construed accordingly; [...]  <b>2(3)</b> For the purposes of subarticle (1) discrimination based on sex or because of family responsibilities is: (a) the giving of less favourable treatment, directly or indirectly, to men and women on the basis of their sex or because of family responsibilities; (b) treating a woman less favourably for reasons of actual or potential pregnancy or childbirth; (c) treating men and women less favourably on the basis of parenthood, family responsibility or for some other reason related to sex; (d) any treatment based on a provision, criterion or practice which disadvantages a substantially higher proportion of members of one sex unless that provision, criterion or	<b>26(2)</b> For the purposes of this article, discriminatory treatment shall include: (a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience; (b) actions which apply to an employee, terms of payment or employment conditions that are less favourable than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment; (c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

<p><i>purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.</i></p>	<p>practice is appropriate and necessary and can be justified by objective factors unrelated to sex.</p> <p><b>2(4)</b> Nothing in subarticle (2) [sic] shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women.</p> <p><b>2(1)</b>[...] “sexual harassment” means the unlawful activities listed in article 9(1); [...]</p> <p><b>9(1)</b> Without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say: (a) to subject other persons to an act of physical intimacy; or (b) to request sexual favours from other persons; or (c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or (d) the persons so subjected or requested are treated less favourably by reason of such persons’ rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.</p>	
<p><b>2(3)</b> <i>Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.</i></p> <p><i>A person’s rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.</i></p>	<p><b>2(1)</b> [...] “sexual harassment” means the unlawful activities listed in article 9(1); [...]</p> <p><b>9(1)</b> Without prejudice to the provisions of article 29 of the Employment and Industrial Relations Act, it shall be unlawful for any person to sexually harass other persons, that is to say: (a) to subject other persons to an act of physical intimacy; or</p>	<p><b>29(1)</b> It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as</p>

	<p>(b) to request sexual favours from other persons; or</p> <p>(c) to subject other persons to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of any written words, pictures or other material, where the act, words or conduct is unwelcome to the persons to whom they are directed and could reasonably be regarded as offensive, humiliating or intimidating to the persons to whom they are directed; or</p> <p>(d) the persons so subjected or requested are treated less favourably by reason of such persons' rejection of or submission to such subjection or request, it could reasonably be anticipated that such persons would be so treated.</p> <p><b>9(2)</b> (a) Persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place.</p> <p>(b) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable to prevent such sexual harassment.</p> <p><b>9(3)</b> Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (<i>multa</i>) of not more than one thousand liri or to imprisonment of not more than six months or to both such fine and imprisonment.</p> <p><b>4(2)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...]</p>	<p>offensive, humiliating or intimidating to such person.</p> <p><b>29(2)</b> It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by:</p> <p>(a) subjecting the victim to an act of physical intimacy; or</p> <p>(b) requesting sexual favours from the victim; or</p> <p>(c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where -</p> <p>(i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim;</p> <p>(ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.</p>
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	(c) neglect their obligation to suppress sexual harassment as provided under article 9(2).	
<i>2(4) An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.</i>		
<i>2(5) Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.</i>		
<i>2(6) Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.</i>	<p><b>2(5)</b> In relation to access to employment, a less favourable treatment which is based on a characteristic related to sex shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances:</p> <p>Provided that the burden of proof shall lie on the person who alleges that there is a genuine occupational requirement.</p> <p><b>10(1)</b> [...] Provided that the provisions of this subarticle shall not apply in such cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex.</p> <p><b>20</b> The Minister may make regulations generally for giving effect to the provisions of this Act, and the enforcement thereof, and in particular, but without prejudice to the generality of the foregoing: [...] (c) for the exemption of any person, or class of persons or body, from the requirements of article 4(1) in so far as it relates to article 4(1)(a) and (b), article 5 and article 10 as may be specified in the aforesaid regulations; provided that any such exemption shall only be prescribed by the Minister after consultation with the Commission and provided that such exemption shall be for a specified period of time which can be</p>	<p><b>26(3)</b> The provisions of subarticles (1) and (2) shall be without prejudice to the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act, and shall not apply to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations.</p>

	<p>renewed by the Minister after consultation with the Commission.</p> <p><b>3</b> Nothing in this Act shall be construed as affecting any rule relating to religious practice, access to priesthood or membership in any religious order or other religious communities.</p>	
<p><i>2(7) This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.</i></p> <p><i>A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.</i></p> <p><i>Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.</i></p> <p><i>This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (1) and 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). It is also without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.</i></p>	<p><b>2(4)</b> Nothing in subarticle (2) [sic] shall be deemed to constitute discrimination in so far as such treatment -</p> <p>(a) is given to grant special protection to women during childbirth or pregnancy; [...]</p>	<p><b>10</b> The Minister may, after consultation with the Board, make regulations establishing minimum periods of maternity leave, parental leave and leave for urgent family reasons to which an employee shall be entitled and the conditions regulating such entitlement</p> <p>(See Protection of Maternity (Employment) Regulations (Legal Notice 439 of 2003, as amended))</p>

<p><b>2(8)</b> <i>Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.</i></p>	<p><b>2(4)</b> Nothing in subarticle (2) [<i>sic</i>] shall be deemed to constitute discrimination in so far as such treatment - [...] (b) constitutes measures of positive action for the purpose of achieving substantive equality for men and women.</p> <p><b>7(1)</b> Spouses of self employed workers not being employees or partners, who participate in the activities of the self employed workers and perform the same or ancillary tasks as their spouse shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution.</p> <p><b>7(2)</b> The provisions of subarticle (1) shall not apply where the system of community of acquests or community of the residue under separate administration subsists between the spouses.</p>	<p><b>31.</b> Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.</p>
<p><b>3(1)</b> Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.</p>	<p>(See articles 2(1) and 2(3) in combination with articles 4 and 10)</p>	<p><b>26(1)</b> It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment; [...]</p> <p><b>26(4)</b> For the purposes of this article, the term “offering employment” includes recruitment or training of any person with a view to engagement in employment and in regard to a person already in employment, includes also promotion to a higher grade or engagement in a different class of employment</p>
<p><b>3(2)</b> To this end, Member States shall take the measures necessary to ensure that: (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished; (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be,</p>		

<p>or may be declared, null and void or may be amended;</p> <p>(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.</p>		
<p><b>3(1)</b> <i>Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:</i></p> <p><i>(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;</i></p> <p><i>(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;</i></p> <p><i>(c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;</i></p> <p><i>(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.</i></p>	<p><b>4(1)</b> It shall be unlawful for employers to discriminate, directly or indirectly, against a person in the arrangements made to determine or in determining who should be offered employment or in the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.</p> <p><b>4(2)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers -</p> <p>(a) manage the work, give promotions, distribute tasks, offer training opportunities or otherwise arrange the working conditions in a manner that employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities; or</p> <p>(b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; or</p> <p>(c) neglect their obligation to suppress sexual harassment as provided under article 9(2).</p> <p><b>8(1)</b> It shall be unlawful for any educational establishment or for any other entity providing vocational training or guidance to discriminate against any person in -</p> <p>(a) the access to any course, vocational training or guidance; or</p> <p>(b) the award of educational support for students or trainees; or</p> <p>(c) in the selection and</p>	<p><b>26(1)</b> It shall not be lawful for any person -</p> <p>(a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment;</p> <p>(b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment.</p> <p><b>26(4)</b> For the purposes of this article, the term “offering employment” includes recruitment or training of any person with a view to engagement in employment and in regard to a person already in employment, includes also promotion to a higher grade or engagement in a different class of employment</p> <p>(See article 84)</p>

	<p>implementation of the curricula; or (d) in the assessment of the skills or knowledge of the students or trainees.</p> <p><b>8(2)</b> Failure by the persons responsible for such establishments and entities to fulfil their obligation to suppress sexual harassment as provided under article 9(2) shall for the purposes of subarticle (1) of this article constitute discrimination.</p> <p><b>8(3)</b> It shall be the duty of educational establishments and entities providing vocational training, within the limits of their competence to ensure that curricula and textbooks do not propagate discrimination.</p> <p><b>10(1)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, it shall be unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans:</p> <p>Provided that the provisions of this subarticle shall not apply in such cases where employers prove that the work in connection with the situation advertised can only be performed by a person of a specific sex.</p> <p><b>10(2)</b> It shall not be lawful for persons to publish or display or cause to be published or displayed any advertisement which promotes discrimination or which otherwise discriminate.</p> <p><b>10(4)</b> For the purposes of subarticle (1), advertising includes disseminating information about the vacancy by word of mouth from person to person.</p>	
<p><b>3(2)</b> <i>To that end, Member States shall take the necessary measures to ensure that:</i></p> <p><i>(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;</i></p> <p><i>(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective</i></p>		

<p><i>agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations shall be, or may be declared, null and void or are amended.</i></p>		
<p><b>4</b><sup>57</sup> Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:</p> <p>(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;</p> <p>(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;</p> <p>(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.</p>	<p>(See articles 2(1) and 2(3) in combination with article 8)</p>	
<p><b>5(1)</b><sup>58</sup> Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.</p>	<p>(See articles 2(1) and 2(3) in combination with article 4)</p>	<p><b>26(1)</b> It shall not be lawful for any person - [...] (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment.</p>
<p><b>5(2)</b><sup>59</sup> To this end, Member States shall take the measures necessary to ensure that:</p> <p>(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;</p> <p>(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment,</p>		

<sup>57</sup> Deleted by Directive 2002/73/EC

<sup>58</sup> Deleted by Directive 2002/73/EC

<sup>59</sup> Deleted by Directive 2002/73/EC

<p>internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;</p> <p>(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised ; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.</p>		
<p><b>6</b> Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.</p>	<p>(See articles 5, 17 and 19)</p>	<p>(See article 30)</p>
<p><b>6(1)</b> Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.</p>	<p><b>5(1)</b> It shall be the duty of employers upon the request of any person claiming to have been sexually harassed or discriminated against, or upon a request made by the Commissioner acting upon a complaint or otherwise, to provide such person or the Commissioner, as the case may be, within ten working days of such a request with a report on the allegation made or the procedures used by the employers in the matter alleged to constitute such sexual harassment or discrimination.</p> <p><b>5(2)</b> The employers shall be entitled to claim from the person requesting the report, reimbursement of such reasonable expenses incurred in drawing up and making the report:</p> <p>Provided that such expenses may be recovered from the person responsible for such sexual harassment or discrimination if it is found that such sexual harassment or discrimination did in fact take place.</p> <p><b>19(1)</b> Without prejudice to the provisions of article 30 of the Employment and Industrial Relations Act, a person who alleges that any other person has committed in his or</p>	<p><b>30(1)</b> A person who alleges that the employer is in breach of, or that the conditions of employment are in breach of articles 26, 27, 28 or 29, may within four months of the alleged breach, lodge a complaint to the Industrial Tribunal and the Industrial Tribunal shall hear such complaint and carry out any investigations as it shall deem fit.</p> <p><b>30(2)</b> If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of reasonable sums of money as compensation to the aggrieved party.</p> <p><b>30(3)</b> For the purposes of hearing and deciding cases of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment, the Industrial Tribunal shall be composed of a chairperson alone in the manner set out in article 73(4).</p> <p><b>30(4)</b> Any action taken by a complainant in accordance with the</p>

	<p>her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.</p> <p><b>19(2)</b> In any proceedings under subarticle (1) it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of this Act.</p>	<p>provisions of this article shall be without prejudice to any further action that such complainant may be entitled to take under any other applicable law and shall also be without prejudice to any other action to which the respondent may be subject in accordance with any other applicable law.</p>
<p><b>6(2)</b> <i>Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.</i></p>	<p><b>19(1)</b> Without prejudice to the provisions of article 30 of the Employment and Industrial Relations Act, a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.</p>	<p><b>30(3)</b> If the Industrial Tribunal is satisfied that the complaint is justified, it may take such measures as it may deem fit including the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory and may order the payment of reasonable sums of money as compensation to the aggrieved party.</p>
<p><b>6(3)</b> <i>Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.</i></p>	<p>(See article 12(1))</p> <p><b>17(1)</b> The Commissioner may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of this Act.</p> <p><b>17(2)</b> The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of this Act.</p> <p><b>17(3)</b> If it appears to the Commissioner that persons who wish to make a complaint under subarticle (2) require assistance to formulate the complaint, the Commissioner</p>	

	<p>shall take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint.</p> <p><b>18(1)</b> After carrying out an investigation the Commissioner may -  (a) dismiss the complaint, or  (b) find that the complaint is proved and thereupon, shall:  (i) where the action complained of constitutes an offence, make a report to the Commissioner of Police for action on his part; or  (ii) where the action complained of does not constitute an offence, call upon the person against whom the complaint is directed to redress the situation, and mediate between the complainant and such person to settle the matter.</p> <p><b>18(2)</b> The findings of the Commissioner under subarticle (1) shall not be binding on the complainant and the person against whom the complaint is directed unless they expressly declare in writing to be so bound.</p> <p><b>18(3)</b> In respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe:  (a) the procedure whereby the Commissioner may require any person to furnish such information as may be necessary for the investigation, as well as the time within which and the manner in which such information is to be furnished;  (b) the procedures to be followed where a person fails to supply such information, the circumstances in which following an investigation as aforesaid, the Commission may itself take legal action.</p> <p><b>18(4)</b> Regulations under subarticle (3) may provide, in the case of an alleged discrimination by one person against another, the arrangements whereby the Commission may itself refer the matter to the competent civil court or to the Industrial Tribunal for redress:  Provided that nothing in this subarticle shall prevent any person having a legal interest from himself taking action for redress or where</p>	
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	<p>action has been taken by the Commission, from joining in and becoming a party to the suit.</p> <p><b>18(5)</b> The Commissioner and every other member of the Commission or any member of the staff of the Commission shall treat any matter coming to their knowledge in the course of an investigation as confidential and shall not disclose the same unless such disclosure is necessary in the course of a prosecution or an action for redress under this Act.</p>	
<p><b>6(4)</b> Paragraphs 1 and 3 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.</p>		
<p><b>7</b> Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.</p>	<p><b>4(2)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...] (b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; [...]</p>	<p><b>28</b> It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.</p>
<p><i>7 Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.</i></p>	<p><b>4(2)</b> Without prejudice to the provisions of article 26 of the Employment and Industrial Relations Act, employers shall also be deemed to have discriminated against a person if such employers - [...] (b) alter the working conditions, or the terms of employment of employees to the detriment of such employees after such employees have invoked any right accorded to him under this Act or claimed the performance in his favour of any obligation or duty under this Act; [...]</p>	<p><b>28</b> It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.</p>
<p><b>8</b> Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.</p>		
<p><b>8a(1)</b> Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and</p>	<p><b>11(1)</b> The Prime Minister shall upon the advice of the Minister appoint a Commission to be called the National Commission for the Promotion of</p>	

<p><i>support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.</i></p>	<p>Equality for Men and Women (hereinafter referred to as "the Commission") composed of a chairperson who shall be called the Commissioner for the Promotion of Equality (hereinafter referred to as "the Commissioner") and six other members, at least three of whom shall be women.</p> <p><b>11(2)</b> All the members of the Commission shall be appointed by the Prime Minister from among such persons appearing to him to be best suited to deal with issues of equality for men and women, and, or, administrative issues connected therewith.</p> <p><b>11(3)</b> Every member of the Commission shall hold office for a term of two years and may be re-appointed at the end of their term of office.</p> <p><b>11(4)</b> The Prime Minister may terminate the appointment of members of the Commission if he is satisfied that:</p> <p>(a) without the consent of the Commission the members failed to attend the meetings of the Commission during a continuous period of six months;</p> <p>(b) the members are undischarged bankrupt persons, or have made an arrangement with their creditors, or are insolvent or have been found guilty of any voluntary crime against the person; or</p> <p>(c) the members are incapable of carrying out their duties.</p> <p><b>11(5)</b> The quorum of the Commission shall be of four members, one of whom shall be the Commissioner.</p> <p><b>11(6)</b> The validity of any proceedings of the Commission shall not be affected by any vacancy among the members of the Commission or by any defect in the appointment of any member.</p> <p><b>11(7)</b> Decisions of the Commission shall be taken by the majority of the votes of the members present. The Commissioner shall also have a casting vote.</p>	
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	<p><b>11(8)</b> Subject to the provisions of this Act and of any regulation made thereunder, the Commission may appoint sub-committees and, in general, shall regulate its own proceedings.</p>	
<p><b>8a(2)</b> Member States shall ensure that the competences of these bodies include:</p> <p>(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;</p> <p>(b) conducting independent surveys concerning discrimination;</p> <p>(c) publishing independent reports and making recommendations on any issue relating to such discrimination.</p>	<p><b>12(1)</b> The Commissioner, with the assistance of the Commission, shall have the following functions, that is to say:</p> <p>(a) to identify, establish and update all policies directly or indirectly related to issues of equality for men and women;</p> <p>(b) to identify the needs of persons who are disadvantaged by reasons of their sex and to take such steps within its power and to propose appropriate measures in order to cater for such needs in the widest manner possible;</p> <p>(c) to monitor the implementation of national policies with respect to the promotion of equality for men and women;</p> <p>(d) to liaise between, and ensure the necessary coordination between, government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission from time to time;</p> <p>(e) to keep direct and continuous contact with local and foreign bodies working in the field of equality issues, and with other groups, agencies or individuals as the need arises;</p> <p>(f) to work towards the elimination of discrimination between men and women;</p> <p>(g) to carry out general investigations with a view to determine whether the provisions of this Act are being complied with;</p> <p>(h) to investigate complaints of a more particular or individual character to determine whether the provisions of this Act are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;</p> <p>(i) to inquire into and advise or make determinations on any matter relating to equality between men and women as may be referred to it by the Minister;</p> <p>(j) to provide assistance, where and as appropriate, to persons suffering from discrimination in enforcing</p>	

	<p>their rights under this Act;</p> <p>(k) to keep under review the working of this Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution;</p> <p>(l) to perform such other function as may be assigned by this or any other Act or such other functions as may be assigned by the Minister.</p> <p><b>17(1)</b> The Commissioner may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of this Act.</p> <p><b>17(2)</b> The Commissioner may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of this Act.</p> <p><b>17(3)</b> If it appears to the Commissioner that persons who wish to make a complaint under subarticle (2) require assistance to formulate the complaint, the Commissioner shall take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint.</p> <p><b>18(1)</b> After carrying out an investigation the Commissioner may -</p> <p>(a) dismiss the complaint, or</p> <p>(b) find that the complaint is proved and thereupon, shall:</p> <p style="padding-left: 40px;">(i) where the action complained of constitutes an offence, make a report to the Commissioner of Police for action on his part; or</p> <p style="padding-left: 40px;">(ii) where the action complained of does not constitute an offence, call upon the person against whom the complaint is directed to redress the situation, and mediate between the complainant and such person to settle the matter.</p> <p><b>18(2)</b> The findings of the Commissioner under subarticle (1) shall not be binding on the complainant and the person against whom the complaint is directed unless they expressly declare in writing to be so bound.</p>	
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	<p><b>18(3)</b> In respect of general investigations or of investigations upon complaints by the Commissioner, the Minister may prescribe:</p> <p>(a) the procedure whereby the Commissioner may require any person to furnish such information as may be necessary for the investigation, as well as the time within which and the manner in which such information is to be furnished;</p> <p>(b) the procedures to be followed where a person fails to supply such information, the circumstances in which following an investigation as aforesaid, the Commission may itself take legal action.</p> <p><b>18(4)</b> Regulations under subarticle (3) may provide, in the case of an alleged discrimination by one person against another, the arrangements whereby the Commission may itself refer the matter to the competent civil court or to the Industrial Tribunal for redress:</p> <p>Provided that nothing in this subarticle shall prevent any person having a legal interest from himself taking action for redress or where action has been taken by the Commission, from joining in and becoming a party to the suit.</p> <p><b>18(5)</b> The Commissioner and every other member of the Commission or any member of the staff of the Commission shall treat any matter coming to their knowledge in the course of an investigation as confidential and shall not disclose the same unless such disclosure is necessary in the course of a prosecution or an action for redress under this Act.</p>	
<p><i>8b(1) Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.</i></p>		
<p><i>8b(2) Where consistent with national traditions and practice, Member</i></p>		

<p><i>States shall encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.</i></p>		
<p><b>8b(3)</b> <i>Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.</i></p>		
<p><b>8b(4)</b> <i>To this end, employers should be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.</i> <i>Such information may include statistics on proportions of men and women at different levels of the organisation and possible measures to improve the situation in cooperation with employees' representatives.</i></p>		
<p><b>8c</b> <i>Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.</i></p>		
<p><b>8d</b> <i>Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied.</i>  <i>The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.</i></p>	<p><b>9(3)</b> Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine (<i>multa</i>) of not more than one thousand liri or to imprisonment of not more than six months or to both such fine and imprisonment.</p> <p><b>10(3)</b> Persons who act in breach of subarticle (1) or (2) shall be guilty of an offence against this article and shall, on conviction, be liable to the penalties established for contraventions.</p>	<p><b>32</b> Any person contravening the provisions of articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to a fine (<i>multa</i>) not exceeding one thousand liri (Lm 1000) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.</p>

<p><i>8e(1) Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.</i></p>	<p><b>6(1)</b> No bank or financial institution or insurance company shall discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self employment or the insurance of that business or the person in self employment.</p> <p><b>6(2)</b> Nothing in subarticle (1) shall be deemed to constitute discrimination in so far as the conditions under which the facility or the insurance cover is offered or withheld reflect genuine considerations based on the financial risk in the grant of such facilities or of such insurance cover.</p>	<p><b>31.</b> Subject to the foregoing, the Minister may, after consultation with the Board, prescribe regulations to give better effect to the provisions of articles 26, 27, 28 and 29 and in particular for the elimination of any discriminatory practices in the employment or in the conditions of employment of any person or class of persons, for providing equal opportunities of employment for classes of persons who are at a disadvantage and to regulate access to the Industrial Tribunal and investigation and hearing by the Industrial Tribunal of complaints of alleged discrimination, breaches of the principle of work of equal value, victimisation or harassment.</p>
<p><i>8e(2) The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.</i></p>		
<p><b>9(1)</b> Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof.</p> <p>However, as regards the first part of Article 3 (2) (c) and the first part of Article 5 (2) (c), Member States shall carry out a first examination and if necessary a first revision of the laws, regulations and administrative provisions referred to therein within four years of notification of this Directive.</p>	<p>(Date of coming into force: 9 December 2003)</p>	
<p><b>9(2)</b> Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.</p>		
<p><b>9(3)</b> Member States shall also communicate to the Commission the texts of laws, regulations and administrative provisions which they adopt in the field covered by this Directive.</p>		

<p><b>10</b> Within two years following expiry of the 30- month period laid down in the first subparagraph of Article 9 (1), Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.</p>		
<p><b>11</b> This Directive is addressed to the Member States.</p>		