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COMMUNITY LAW AND WOMEN



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1. COMMUNITY LAW AND WOMEN (1)

1.1 What is Community law?

Community law is an independent legal system, i.e. independent of the legal systems of the Member States. Its sources are written (e.g. the Treaties, secondary legislation), unwritten (e.g. general legal principles, tradition) and the decisions adopted by the governments of the Member States meeting within the Council. Women as such are primarily concerned by the written sources, particularly Article 119 of the Treaty of Rome and certain Council Directives.

1.2 Article 119

The principal written source of Community law is the contents of the Treaties establishing the European Communities, including the annexes, protocols, acts concerning the accession of new members, etc.

Only one of these Treaties, the Treaty of Rome of 25 March 1957 establishing the European Economic Community, contains an article (Article 119) relating specifically to women, albeit only in the capacity of workers.

This Article lays down that each Member State must ensure and maintain the principle that men and women should receive equal pay for equal work:

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

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

Equal pay without discrimination based on sex means

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

(1) cf: - Court of Justice of the European Communities, European Documentation 1983.

The essentially economic nature of the "Common Market" accounts for the fact that this distinction between the sexes was made in the context of employment. This aim of this Article was, moreover, to encourage free competition between the industries of the Member States by avoiding any distortion of competition stemming from a lower paid female workforce. Its objective did not result from the general principle of equal treatment of men and women; however, it is on this Article that legislation and action in favour of women are based.

1.3 Council Directives

The second written source of Community law is secondary legislation, which is the law created by the Community institutions, e.g. Regulations, Decisions, Directives. Up to now five Directives have been adopted in this field.

Following difficulties encountered in applying Article 119, it proved useful to carry out studies on this question; then, in 1961, the Council of Ministers, acting on the basis of a Commission Recommendation which reminded Member States of their obligations, adopted a Resolution calling on the Member States to take appropriate action.

Following this, the Resolution of 21 January 1974 on a four-year action programme (1) showed the Council's intention to adopt the necessary measures to achieve, among other objectives, "equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay"; the Council held the view that "economic expansion is not an end in itself but should result in an improvement of the quality of life as well as the standard of living".

In order to implement this programme, the Council therefore adopted Directive 75/117/EEC of 10 February 1975 on equal pay for men and women (2), then Directive 76/207/EEC of 9 February 1976 on equal treatment (3), followed by Directive 79/7/EEC of 9 December 1978 on equal treatment in matters of social security (4). More recently, it has adopted Directive 86/378/EEC of 24 July 1986 (5) on equal treatment in occupational social security schemes and Directive 86/613/EEC of 11 December 1986 (6) on equal treatment between men and women engaged in self-employed occupations and protection of self-employed women during pregnancy and motherhood.

(1) OJ C 13, 12.2.74.

(2) OJ L 45, 19.2.75, p. 19.

(3) OJ L 39, 14.2.76.

(4) OJ L 6, 10.1.79.

(5) OJ L 225, 12.8.86.

(6) OJ L 359, 19.12.86.

A Directive is a legal instrument adopted by the Council which facilitates the implementation of Community law in that it imposes an obligation on Member States to take national measures to achieve the result laid down in the Directive within a certain time limit.

A set of legal instruments has therefore been established to promote equal treatment of men and women as regards employment. Far from being fixed, it may be added to - this was done recently and will be again soon - in order to make the application of the principle of equal treatment in employment matters more effective. It envisages the possibility of measures adapted to economic and social developments. The Commission programme on the promotion of equal opportunities for women 1982-85 (1) stressed, among other things, the need to extend the existing legal framework and to clarify certain points of law.

1.4 The precedence of Community law over national law

One of the fundamental characteristics of the European Community is that Community law is an autonomous legal system with its own institutions which have sovereign rights. These institutions are not therefore dependent on the Member States in carrying out their tasks and Community law is applicable as such in the Member States. The principle of direct applicability does not mean that all provisions of Community law have a direct and immediate effect but that "certain provisions are likely to have direct effects according to their wording, objective and function". Article 119 is directly applicable.

Community law establishes rights and obligations for the Community institutions, the Member States and individuals. That Community law should take precedence over national law is logical and essential; the European Community could not function if Member States could, if they chose, disregard Community law. Therefore, any provision of national law which is incompatible with Community law is inapplicable (2). Member States may not adopt or maintain measures which are likely to jeopardize the functioning of the Treaties.

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- (1) See page 78, COM/81/758 Final, and Women of Europe, Supplement No. 9.
(2) Costa ENEL, [1964] ECR 1441.
Article 189(2) of the EEC Treaty; Article 117 of the EEC Treaty.

The European Court of Justice (1) has the task of interpreting Community law to ensure that it is applied in a uniform way (2); no national court has gone against its interpretation.

1.5 The infringement procedure pursued by the Commission of the European Communities against a Member State

By virtue of the fact that Community law takes precedence over national law, Member States are required to ensure that Article 119 is applied and the objectives of Directives achieved.

In the event of failure to do so, i.e. where a Member State does not comply with Community law, what can the Commission do as "guardian of the Treaties"?

The infringement procedure pursued by the Commission is as follows: (3)

An infringement by a Member State may be presumed or established in one of several ways:

- a Member State fails to inform the Commission of the legal measures that it has taken to adapt national law to Community law, although it is obliged to do so;
- the Commission may itself rule that the measures are inadequate;
- an individual, or legal person, submits a complaint to the Commission against a measure which is incompatible with Community law and the Commission finds, after examining the matter, that the complaint is well-founded.

When an infringement has been established, the Commission sends a letter to the Member State in question through the intermediary of that State's Permanent Representation to the Communities, complaining of the infringement of Community law and inviting it to submit its observations within a given period. This stage of the procedure allows the situation to be clarified and unnecessary actions avoided.

If no reply is received, or if the reply is inadequate, the Commission sends a reasoned opinion calling on the State in question to put an end to the infringement within a given period.

If the Member State does not comply with the opinion, the Commission may bring an action before the Court of Justice asking it to find that the Member State has failed to fulfil an obligation. (4)

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- (1) See page 113.
 - (2) Article 164 of the EEC Treaty.
 - (3) Articles 169-171 of the EEC Treaty.
 - (4) See page 144.

If the Court finds that the Treaty has been infringed, the Member State is obliged to take the necessary measures to comply with the Court's ruling. However, the judgment itself cannot compel the Member State to take measures and no penalty can be imposed. Nevertheless, the Member States take the necessary measures to put an end to the infringement as part of the process of building the Community.

1.6 An individual's right to bring proceedings

Under the second paragraph of Article 173 of the EEC Treaty, an individual may bring an action to have a decision by a Community institution annulled, provided that the decision in question is addressed to that person or, although addressed to other persons, is of direct and individual concern to the person in question. Consequently, an individual cannot bring an action to have a Directive annulled.

A person who, for example, finds that a Member State has failed to fulfil an obligation under Article 119 or under the Directives cannot bring a corresponding action before the Court of Justice (only the Commission and the Member States may do this). The person may submit a written complaint to the Commission; after examining the matter, the Commission may record it in the register of complaints, and it then addresses a request to the Member State, through its Permanent Representation to the European Communities, for additional information and initiates an infringement procedure.

Any person who considers that his rights under Community law have been infringed may bring an action before the national courts of his own country.

The national court may ask the European Court for a ruling on the validity of the secondary Community legislation that it is called on to apply in the case in question and/or on the interpretation of such secondary legislation and of the Treaties. Only the national court may decide that a reference for a preliminary ruling on the validity of interpretation of the act in question is necessary. The judgment of the Court of Justice is binding only on the national courts required to settle a dispute arising under national law (1).

This reference for a preliminary ruling procedure ensures that Community law is applied in a uniform manner and makes a very positive contribution towards the penetration of Community law into national systems. The Court has been asked on several occasions to give its interpretation of the substance and scope of Article 119 and some of its judgments have become well known (2).

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- (1) For more details on these procedures, see page 113 below.
 - (2) cf pages 116 et seq.

2. COUNCIL DIRECTIVE 75/117/EEC ON THE APPROXIMATION OF
THE LAWS OF THE MEMBER STATES RELATING TO THE
APPLICATION OF THE PRINCIPLE OF EQUAL PAY FOR
MEN AND WOMEN

2.1 Introduction

Article 100 of the EEC Treaty lays down that the Commission may propose to the Council legal instruments for harmonizing the laws of the Member States.

Directive 75/117/EEC was adopted by the Council on 10 February 1975. The Commission reported to the Council (1) - pursuant to Article 9 of that Directive - on the application of the directive as at 12 February 1978 (2).

After describing the situation as regards legislation and collective agreements, the Commission came to the conclusion that the principle of equal pay had not been fully implemented in any Member State. It therefore instituted infringement proceedings against a number of Member States.

The situation has developed since then and the entry into force of the directive on equal treatment has made it easier to achieve equal pay.

You will find below the content of Directive 75/117/EEC, a list of the implementing measures taken by the Member States, a list of the infringement proceedings initiated by the Commission and the main features of the national implementing measures. As far as possible this information has been brought up to date to reflect the situation existing as at 30 May 1986 (3).

2.2 The content of the Directive

The text adopted by the Council on 10 February 1975 affirms:

- the principle of equal pay, that is to say that "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration" is required (Article 1):

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- (1) COM (78) 711.
 - (2) The report was updated at the end of September 1978 by means of footnotes.
 - (3) Information on the situation in Greece, Spain and Portugal in respect of Article 119 and the Directives is to be found on pages 103 et seq.

- that where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex (Article 2.2);
- that the Member States shall within one year put into force legislation banning all legal or administrative measures contrary to the principle of equal pay in collective agreements and individual contracts of employment (Articles 3 and 4);
- that all employees who consider themselves wronged by failure to apply the principle of equal pay must be able to institute legal proceedings against their employer and must be protected against dismissal by the employer as a reaction to such proceedings or to their claiming their rights (Articles 2 and 5);
- that employees must be informed at their place of employment of the new measures taken (Article 7).

2.3 Difficulties encountered in applying the principle

Problems in applying the principle were met in respect of:

- a. The definition of pay set out in Article 119; problems related, for example, to:
 - social security benefits (1) and pension provisions (the European Court has ruled that the amounts included in gross wages which determine the calculation of the other allowances in relation with wages may be considered as remuneration even if they are paid into a pension fund);
 - the concept of head of household, traditionally assigned to a man, who thus sometimes finds himself entitled to allowances;
 - higher wages paid to men supposed to be doing night work or work requiring strength, but not in fact doing such work;
 - the assumption that women have a lower output.
- b. The comparison between the wages of male and female workers:

(1) See Judgment of the Court of Justice, 25.5.1971, p. 117

- the interpretation of the concept of "the same work" must be widened to cover "work to which equal value is attributed" (1); no restriction of this concept can be accepted (2);
- where there are no male workers in the same unit, comparison may prove difficult; Dutch law may serve as an example in resolving this difficulty.

c. Collective agreements

Direct discriminations (for example, different pay scales for men and women) have virtually disappeared, but difficulties arise with indirect discriminations which are difficult to detect (physical strength may, for example, be highly rated in classification systems). The part played by both sides of industry, the Labour Inspectorate - where such a thing exists - and the Equal Opportunities Commissions is essential for monitoring proper application of the principle of equal pay (3).

- d. Any differences in pay for part-time and full-time work constitute a form of indirect discrimination. (The European Court has ruled that such differences in remuneration are contrary to Article 119 when they are a means of reducing the wages of part-time workers, such workers being mainly women.) (4)
- e. The Directive aims at making it easier for women to institute legal proceedings, which means that they are informed of their rights, that they are aware of opportunities for redress and are protected against dismissal in retaliation for making a complaint or going to court. There is in fact little recourse to the courts, except in the United Kingdom, where the aid and advice provided by the Equal Opportunities Commission is highly positive - thanks to its powers.

Among other things, note should be taken of the difficulty of suing when the burden of proof devolves upon the worker.

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- (1) See Judgment of the Court of Justice, 8.4.1976, page 118.
 - (2) See Judgment of the Court of Justice, action for failure to fulfil an obligation, Commission v. United Kingdom, 61/81, page 145.
 - (3) See COM 78 (711) final.
 - (4) Judgment of 31.3.1981, Mrs Jenkins v. Kingsgate, see page 124.

3. IMPLEMENTATION OF DIRECTIVE 75/117/EEC

3.1 List of the main provisions and national implementing measures (Article 119 of the EEC Treaty and Directive 75/117)

Belgium

- Royal Decree of 22 July 1964 (replaced by the Royal Decree of 29 June 1973) on the Financial Regulations concerning staff employed in the public service.
- Article 14 of Royal Decree No. 40 of 24 October 1967 on the employment of women, introduced by the Law of 16 March 1971, as Article 47a, into the Law of 12 April 1965 on the protection of employees' remuneration.
- Royal Decree of 9 December 1975 giving binding force in the private sector to Collective Employment Agreement No. 25 concerning equal pay for men and women concluded on 15 October 1975 within the National Labour Council.
- The Law of 4 August 1978 on economic revival, Title V of which deals with equal treatment for men and women, particularly as regards terms and conditions of employment, including remuneration.
- Royal Decree of 10 September 1981 amending the Royal Decree of 30 January 1967 granting a household or housing allowance to staff employed in the public service.

Denmark

- Law No. 489 of 12 September 1919 on state employees, as amended by subsequent laws on state employees, such as that of 6 July 1958 on the pensions and remuneration of civil servants; the latest is Law No. 291 of 18 June 1969.
- Central Agreement concluded in April 1973 between the Confederation of Employers (DA) and the Confederation of Workers (LO).
- Law No. 32 of 4 February 1976 on equal pay for men and women.

Federal Republic of Germany

- Basic Law of the Federal Republic of Germany of 23 May 1949 (Article 3).

- Law of 5 January 1972 on labour relations at the workplace.
- Federal Law of 15 March 1974 on staff representatives and Länder laws on staff representatives (applicable to all public services).
- Law of 9 April 1949 (version of 25 August 1969).
- Law of 13 August 1980 on equal treatment for men and women at the workplace and maintenance of rights in the event of transfer of the establishment (inclusion in the Civil Code of the principle of equal pay "for the same work or for work to which equal value is attributed").

Greece

- The Constitution of 1975, Article 22(1).
- Law No. 45 of 1975, which incorporates International Labour Convention No. 100.
- Law 1414/84, which entered into force on 2 February 1984, concerns the application of the principle of equal treatment for men and women in employment relations. Article 4 guarantees equal pay for equal work.

France

- Preamble to the 1946 Constitution (confirmed by the preamble to the 1958 Constitution).
- Law of 11 February 1950 on collective agreements (supplemented by the Law of 13 July 1971).
- Decree of 23 August 1950 laying down a national guaranteed minimum wage (SMIG) (and subsequent provisions) and Law of 2 January 1970 introducing a minimum growth wage (SMIC) (and implementing provisions).
- Order of 4 February 1959 laying down general staff regulations (Article 7 and Article 44, final paragraph, amended by Law No. 75 599 of 10 July 1975).
- Law of 22 December 1972 on equal pay for men and women (and implementing decree of 27 March 1973).
- (Decree of 2 May 1979 abrogating a discriminatory provision on the granting of a housing allowance to heads of household only in the mining industry.)

- Law 83/635 of 13 July 1983 amending the Labour Code and the Penal Code as regards equality of men and women at work.

Spain

- The Constitution of 1978, Article 35.
- Law No. 8/1980 of 10 March 1980 on the status of employees, Articles 17.1 and 28.
- Law on the public service.

Ireland

- Law of 1 July 1974 (Anti-Discrimination (Pay) Act 1974) prohibiting wage discrimination, amended by the Employment Equality Act 1977 of 1 June 1977.

Italy

- 1947 Constitution (Article 37).
- Law No. 604 of 1966 on individual dismissals.
- Law No. 300 of 20 May 1970 on the status of employees.
- Law No. 903 of 9 December 1977 on equal treatment for men and women with regard to employment.

Luxembourg

- Law of 22 June 1963 laying down the rules applying to civil servants' salaries.
- Grand-Ducal Decree of 22 April 1963 determining and regulating the minimum wage (and subsequent provisions) and the Law of 12 March 1973 revising the minimum wage.
- Law of 12 June 1965 on collective labour agreements.
- Grand-Ducal Regulation of 10 July 1974 on equal pay for men and women.
- Law of 8 November 1981 (equal treatment).
- Law of 20 May 1983 amending the conditions governing award of the head of household allowance.

Netherlands

- Law of 27 November 1968 introducing a minimum wage and compulsory minimum holiday pay and Decree of 29 November 1973 introducing a minimum wage for young persons.
- Law of 20 March 1975 establishing the right of men and women to equal pay for work of equal value.
- Law of 2 July 1980 on equal treatment for men and women in the public services.

Portugal

- Constitution of 1976, revised in 1982 (arts. 13, 36, 46, 48, 60, 74).
- Civil Code (art. 1671 (1) and (2)).
- Decree-Law N° 392/79 dated 20 September.

United Kingdom

- Equal Pay Act 1970 of 29 May 1970.
- Equal Pay Act (Northern Ireland) 1970 of 17 December 1970.
- Equal Pay Ordinance 1975 Gibraltar of 24 October 1975.
- Sex Discrimination Act of 12 November 1975, Schedule 1 of which contains the amended and supplemented text of the Equal Pay Act 1970.
- Sex Discrimination (Northern Ireland) Order of 2 July 1976, Schedule 1 of which contains the amended and supplemented text of the Equal Pay Act (Northern Ireland) 1970.
- The Ordinance of 24 October 1975 extended to Gibraltar the right to equal pay.
- Statutory Instrument No. 1794/83, Statutory Instrument No. 1807/83, (Equal Pay Amendment Regulations of 7 December 1983): entered into force on 1 January 1984.

3.2 Implementation of Directive 75/117/EEC by Belgium

- 3.2.1 Article 1 of Collective Labour Agreement No. 25 of 15 October 1975 states that equal pay for men and women implies, for the same work or for work of equal value, the elimination of all discrimination based on sex. This principle must be observed in all aspects and conditions of pay, including methods of job evaluation, choice of criteria, their weighting and the way in which evaluation factors are embodied in pay components.

It should be added that Title V of the Law of 4 August 1978 on equal treatment lays down that terms and conditions of employment are to be understood as meaning "the provisions and practices relating, in particular, to remuneration and its protection" (Article 128).

- 3.2.2 Any regulations or administrative provisions constituting discrimination are void and any person may invoke this nullity before the courts.

Those provisions of collective agreements contrary to laws or decrees, international treaties and regulations having binding legal force in Belgium are regarded as void (Article 51 of the Law of 5 December 1968). At the same time, the Law of 4 May 1978 states that those provisions of individual agreements and those employment regulations which are contrary to the principle of equal treatment (including equal pay) are void.

- 3.2.3 It is illegal to dismiss or amend the conditions of employment of a person who has lodged a complaint at company or Inspectorate level or taken legal action to obtain his rights. If the reasons given for the dismissal have no bearing on such a complaint, the burden of proof lies with the employer. If the employee is not reinstated, he must be paid compensation (Article 7 of Agreement No. 25 and Article 136 of the Law of 4 August 1978).

- 3.2.4 Application of the principle is monitored by the Inspection des lois sociales (Social Legislation Inspectorate). To inform employees, the text of Collective Agreement No. 25 must be annexed to the works regulations of the undertaking. A brochure explaining this Agreement has been disseminated by the Commission du Travail des Femmes (Commission on the Employment of Women) and the Ministry of Labour's Commissariat général à la promotion du travail. The Commission du Travail des Femmes may report infringements to a number of bodies, including the Inspection des lois sociales (1).

- 3.2.5 As regards opportunities for redress, employees in the private sector (Law of 12 April 1965, Article 47a and Agreement No. 25 of 15 February 1975, Article 5) and of the public sector (Law of 4 August 1978) have the right to take legal action against any infringement of the principle of equal treatment. The employers' organizations and the workers' organizations may institute legal proceedings (Article 4, Law of 5 December 1968 and Law of 4 August 1978).

(1) For a description of the committees/commissions on equality or employment set up in the Member States, see "Equality between men and women", Council of Europe, Strasbourg, 1982.

Trade organizations may defend the rights of their members even against the latter's wishes. A joint commission specializing in equal pay and equal treatment for men and women, set up under Agreement No. 25 to give its opinion to the relevant court on legal actions in this field, met for the first time on 7 March 1983 and gave its opinion to a court in Antwerp.

An annulment action may be instituted before the Council of State against an act or a regulation of an administrative authority which is contrary to Article 119 of the EEC Treaty and the Directives.

Discriminatory collective agreements may be the subject of recourse to the Council of State and the industrial tribunals (if the agreement in question is given binding legal force by Royal Decree) or to the labour tribunals only if the agreement is not given binding legal force.

3.2.6 Infringement proceedings initiated by the Commission:

Reasoned opinion sent on 8 March 1980. Referral to the Court of Justice on 16 March 1981. Reason: the Royal Decree of 30 January 1967 granted household and housing allowances to married men but to women only if they had a dependent child. The Royal Decree of 10 September 1981 enabled the Commission to withdraw its complaint and shelve infringement proceedings.

3.2.7 A clause guaranteeing application of the principle of equal pay is not necessarily included in collective agreements, since Collective Agreement No. 25 should apply to all sectoral agreements. It should be noted that all agreements have to be lodged with the Ministry of Labour's registry of collective employment agreements.

3.3 Implementation of Directive 75/117 by Denmark

3.3.1 Any employer who employs men and women for the same job is obliged to pay them the same wages for the same work (Law of 4 February 1976).

Infringement proceedings initiated by the Commission:

The Law of 4 February 1976 refers only to the "same work", an infringement of Article 1, which is mandatorily applicable to work of equal value.

Notice served on 30 March 1979.

Reasoned opinion sent on 25 October 1982.

Denmark replied that the words "samme arbejde" implied more than the words "same work" and that they included "work of equal value".

The Commission referred the matter to the Court of Justice on 18 July 1983 (Case 143/83).

The Court's judgment was delivered on 30 January 1985, and found for the Commission.

3.3.2 Under the agreements concluded in April 1973 between the confederations of employers and employees:

- the agreed standard wage for women is the same as that for men, including the cost of living allowance and the other agreed supplements payable in respect of time work, with the exception of the heavy work allowance;
- daily, weekly and monthly rates are governed by the same rules.

In 1958 equal treatment was introduced in respect of the pensions and remuneration of male and female civil servants. Furthermore, the Law of 4 February 1976 makes no distinction between the public and private sectors.

3.3.3 The government maintains that there are no discriminatory legislative or administrative clauses. All employment contracts contrary to the principle are null by virtue of the law on equal pay or by virtue of collective agreements.

Infringement procedure: there is no provision for declaring discriminatory collective agreement clauses null (infringement of Article 4). See preceding procedure.

3.3.4 An employee dismissed after demanding equal pay as provided for by law must be paid compensation by his employer (Article 3, Law of 4 February 1976).

3.3.5 Monitoring of application of the principle is in the hands of the trade organizations, which supervise the application of collective agreements - there must be a staff representative in any undertaking employing more than six persons. The "Council for Equality" (Ligestillingsradet), set up by the government, keeps under review the application of the principle.

3.3.6 As regards the right of legal redress, an employee who considers himself wronged, or an organization on behalf of its members, may lodge a complaint with the relevant court ("Byret" - industrial tribunal). Civil servants have the same right. The Council for Equality may help persons who consider themselves wronged to institute legal proceedings, but may not institute such proceedings on their behalf.

3.3.7 Number of legal proceedings instituted: not one related to equal pay.

3.3.8 The Council for Equality has published brochures on this matter for the information of employees.

3.3.9 The Law of 4 February 1976 supplements collective agreements. The agreements of April 1973 did away with any wage discrimination in previous agreements. All the agreements contain clauses guaranteeing application of the principle.

3.4 Implementation of Directive 75/117 EEC by the Federal Republic of Germany

3.4.1 Up to 13 August 1980 the Basic Law was the only regulation in force in this field at federal level. The adoption of the Law of 13 August 1980 enabled the Commission to shelve the infringement procedure initiated on 10 May 1979, when the Federal Republic was served notice that it should take specific measures to implement the Directive.

3.4.2 The principle of equal pay is based on the following:

a. The Basic Law (Article 3(2): "Men and women shall have equal rights."

The Basic Law (Article 3(3): "No one may be privileged or suffer discrimination because of his or her sex, parentage, race, language, homeland and origin, faith, or religious or political opinions."

b. The constitutions of the Länder.

3.4.3 The Law of 13 August 1980 on the principle of equal treatment for men and women in respect of access to employment, training and promotion, and terms and conditions of employment incorporates the following articles in the Civil Code:

Remuneration is defined by the various regulations as all the payments made by the employer to his employees on the basis of the employment contract or within the framework of that contract, whether directly or indirectly, in cash or in kind or in the form of other benefits: wages, supplements, bonuses, redundancy payments and company pensions, and benefits such as, for example, holiday pay, etc.

3.4.4 Jobs are considered to be equivalent where two persons do not carry out identical work, but where, generally speaking, taking account of the training, the responsibility, the working conditions and the effort involved, there are no significant differences between the two jobs.

- 3.4.5 One job is identical with another where the work performed by one person is the same as that performed by another. There is thus no difference in the type of work, the work procedure and the surroundings.
- 3.4.6 Some people do jobs which only seem different. In such cases, it is necessary to examine whether, despite the differences in the work performed, the two jobs should not be placed in the same category.
- 3.4.7 Under paragraph 611 a, I of the Civil Code (principle of non-discrimination) employers are forbidden to exercise any kind of discrimination vis-à-vis their employees based on sex in connection with an agreement or a measure, in particular in connection with a contract of employment, promotion, the exercise of their decision-making powers or a dismissal. Differences in treatment based on sex are permissible where sex is an essential condition for the performance of the job in question.
- If, in the event of legal action, an employee cites facts which imply that there has been discrimination based on sex, the burden of proof lies with the employer. The Youth and Family Ministry's Department for Women may advise persons who are victims of discrimination.
- 3.4.8 Paragraph 611 a, II of the Civil Code lays down that failure to sign a contract of employment for reasons based on sex obliges the employer to compensate the employee; the same applies to discrimination in respect of promotion.
- 3.4.9 Paragraph 611 a, III of the Civil Code lays down that the period of time within which legal action may be taken to obtain damages because of an infringement of the principle of non-discrimination is two years.
Paragraph 201 of the Civil Code applies in such cases.
- 3.4.10 Paragraph 611 b of the Civil Code (vacancies) lays down that an employer may not declare a job vacant for women only or for men only either within the undertaking or publicly, except in the cases set out in paragraph 611 a, I of the Civil Code.
- 3.4.11 Paragraph 612, 3 (remuneration) lays down that - for the same work or for equivalent work - remuneration lower than that paid to a person of the other sex may not be agreed on.
Payment of a lower wage may not be justified on the grounds that there are rules intended to protect employees of a specific sex.

Paragraph 611 a, I applies by analogy (1).

3.4.12 The Commission initiated an infringement procedure: notice was served on 15 January 1982; a reasoned opinion was sent on 29 September 1982; a decision to refer the case to the Court of Justice was taken on 26 April 1983.

Among other grounds for complaint the measures adopted apply only to the private sector (the Federal Republic takes the view that the public sector is not concerned, even though the Court of Justice has ruled that the principle of equal pay should apply to both sectors (case 43/75 and case 58/81) (2). It should also be noted that the laws applying to the public sector do not give a clear definition of equal pay. On 9 November 1983 the case (248/83) was brought before the Court of Justice, which found against the Commission since it had been unable to demonstrate that there had been pay discrimination on grounds of sex.

3.5 Implementation of Directive 75/117 by France

3.5.1 The Law of 22 December 1972, No. 72.1143, which established the principle of equal pay, followed by Decree 73.360 of 23 March 1973 and the Decree of 2 May 1979, supplemented existing machinery in this field (see table above).

Pay means the ordinary basic or minimum wage or salary and all benefits and supplements paid directly or indirectly in accordance with identical rules. The categories, criteria of classification or promotion and all bases for calculating pay must be the same for both sexes. The bill passed by the Assemblée Nationale in January 1983 will supplement existing legislation by defining work of equal value.

Law 83.635 of 13 July 1983 on occupational equality between men and women also covers remuneration and gives the following definition of work of equal value:

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- (1) For the situation in the Federal Republic, see also: M. Pfarr and M. Bertelsman: Lohngleichheit, Schrittenreihe des Bundesministers für Jugend, 1981 and Dr Molitor: Die Lage der Frau im Recht der Arbeit, X. Internationaler Kongress, 10.8.1982, Federal Republic of Germany.
- (2) See pages 118 and 146.

"occupations are considered as being of equal value if the persons employed are required to have comparable qualifications as attested by certificates and diplomas or occupational experience, to have equivalent skills, experience and responsibilities, and to be subject to similar physical and mental demands."

- 3.5.2 Persons who consider themselves wronged may institute legal proceedings, in particular by lodging complaints with the "Conseils de Prud'hommes" (industrial tribunals), which rule whether the law has been applied or not. If the complaint is contested, procedure is set out by a decree which specifies the facts which must be submitted to the labour inspector and the form of the enquiry he is required to conduct.

Where there is no Conseil de Prud'hommes able to rule on the matter in question, the dispute is placed before the court empowered to deal with labour questions. Application to the court must be personal and individual, but the employee may enlist the aid of or sometimes have himself represented by a trade-union representative.

In certain cases the unions may apply to the courts to enforce the equal pay principle as a third party or as a principal, if it is admitted that the whole trade is affected by individual acts infringing that principle.

Public sector employees who consider themselves wronged by an administrative decision may apply to the "Tribunaux administratifs" (administrative courts) or the Council of State or to both these bodies in turn.

An employer who fails to observe the equal pay principle may be sentenced to a term of imprisonment. The bill passed by the Assemblée Nationale in December 1982 lays down, following an amendment, that the burden of proof lies with the employer.

Collective agreements must contain clauses relating to settlement procedures in respect of problems presented by application of the Law of 13 July 1971.

See 5.5.11 below (burden of proof).

- 3.5.3 The order of 4 February 1959, as amended by Article 7 of Law No. 75.599 of 10 July 1975, lays down that no distinction may be made between male and female civil servants, though, in some cases, exceptions may be made in respect of recruitment (1).

(1) Implementation by France of Directive 76/207 EEC, see page 49.

- 3.5.4 The Decree of 2 May 1979, which abrogated a discriminatory provision on the allocation of a housing allowance in the mining industry to heads of household only, enabled the Commission to shelve the infringement procedure it had initiated (notice served on 3 April 1979, case shelved on 5 December 1979).
- 3.5.5 Article 3 of the Law of 22 December 1972 lays down that any provision contrary to the equal pay principle is null and void.
- 3.5.6 Labour inspectors or other inspectors with similar duties are entrusted with the task of ensuring that the equal pay principle is applied.
- 3.5.7 Article L.140.2 to 7 of the Labour Code lays down that information shall be made available by means of notices displayed at the workplace and at places where employees are recruited. The "Comité du Travail féminin" (Committee on the Employment of Women) also plays a part in providing information.
- 3.5.8 It should be noted that almost the whole of the industrial sector is covered by collective agreements. Some categories of employees in some areas (retail trade, domestic staff, hotel trade, etc.) are not covered. Collective agreements must be registered with the secretariat of the Conseil de Prud'hommes or, in certain cases, with the registry of the relevant local court.
- In undertakings employing more than 300 persons the works council is required to set up a commission to examine the terms and conditions of employment and the working conditions of women.

Collective agreements which are likely to be extended must contain provisions regarding the application of the equal pay principle (Article 133-3 of the Labour Code) (1).

(1) For a more detailed account of the situation in respect of collective agreements, see the Commission's report to the Council, referred to earlier.

For the situation in France, see also: Droit et Travail des femmes; un bilan critique, Comité du Travail féminin; 1981, Paris.

The government has set up an advisory body, the "Comité du Travail féminin", which, among other things, examined the specific problems of female employees and which was consulted on the drafting of the bill on equal pay passed by Parliament (Law of 22 December 1972). One of this committee's current demands is a revision of job classifications. The Baudoin Report of October 1979 on "discriminations and disparities in the employment of women" comes to some fairly negative conclusions about the real situation of female employees.

3.6 Implementation of Directive 75/117 by Ireland

3.6.1 Any agreement under which a woman is employed in a given place must contain a clause to the effect that she is entitled to the same wage as a man employed in that place by the same employer where both perform like work. Where there is no such agreement, Article 2 of the Anti-Discrimination Act of 1974 provides that the terms and conditions of employment of the employee in question shall include an implied clause conferring entitlement to equal pay which shall take precedence over an express clause to the contrary.

Two persons are regarded as being employed on like work where:

- both perform the same work under the same or similar conditions or where each is fully interchangeable with the other in relation to the work;
- the work performed by one is of a similar nature to that performed by the other and any difference between the work performed or the conditions under which it is performed is infrequent or of little consequence;
- the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to the physical effort involved, responsibility, etc.

The Anti-Discrimination Act likewise applies to all persons working for the armed forces, the police and the prison services.

3.6.2 As regards the right of redress, Article 7 of the Employment Equality Act of 1 June 1977 amending the Anti-Discrimination (Pay) Act of 1974 lays down that any dispute between an employee and his employer may be submitted to the Equality Officer for investigation. If an equal pay clause has been infringed, the Employment Equality Agency may take the same action. The Equality Officer then draws up a recommendation, which he forwards to the parties concerned and then to the court. The employer may appeal to the court against this recommendation or its non-application. The person who considers himself wronged, the union or staff representatives and the Employment Equality Agency may lodge a

complaint with the Labour Court or the courts of law. The Employment Equality Agency may lodge complaints with the courts about vacancy notices, attempts to pressure individuals and discriminatory practices. The same opportunities for legal action are open to employers in the public sector as in the private sector.

3.6.3 Number of legal actions

Verdicts delivered: 1976 = 3, 1977 = 16, 1978 = 52,
1979 = 52, 1980 = 65, 1981 = 55,
1982 = 27
Enquiries conducted: 1979 = 99, 1980 = 107, 1981 = 57,
1982 = 24

3.6.4 Article 5 of the Anti-Discrimination (Pay) Act of 1974 lays down that if pay regulations or clauses in collective agreements provide for pay differences related to sex, such provision shall be null and void.

3.6.5 Any contract not containing an express equal pay clause is regarded as containing an implied clause establishing the principle of equal pay.

3.6.6 Any dismissal resulting from the fact that an employee has asserted his right to equal pay is an offence. The dismissed person may take legal action before the courts of law, the burden of proof lying with the employer. The employer is liable to a fine. Reinstatement may also be ordered. The employee may also, if he so prefers, lodge a complaint with the Labour Court, which then conducts an investigation, following which it may impose a fine on the employer, order the payment of compensation to the employee and his reinstatement.

3.6.7 There is no administrative supervision of the application of the principle. In the event of a dispute at law or a discriminatory practice, an Equality Officer is entitled to enter the premises of an undertaking and to demand access to records and documents to obtain information for his investigation or to ensure that the principle is being implemented.

The Commission on the Status of Women, set up in 1970, may draft recommendations and its proposals were taken into account in the drafting of the Anti-Discrimination (Pay) Act of 1974.

In 1977, the Employment Equality Act set up the Employment Equality Agency to conduct official investigations, issue summonses to end discrimination and monitor the implementation of the relevant laws.

- 3.6.8 Employees have been informed about the principle by the media and by the publication of brochures.
- 3.6.9 Eighty per cent of employees are covered by collective agreements. There is no requirement to register such agreements with a central body, but any clause which lays down, for example, different pay scales for men and women or is discriminatory is under all circumstances legally null and void.

3.7 Implementation of Directive 75/117 by Italy

- 3.7.1 Article 37 of the Constitution provides that "a working woman shall have the same rights and receive the same pay for equal work as a working man".

The Government states that the principle of equal pay applies both to like work and to work of equal value and that the systems of job classification used in collective agreements are common to men and women and exclude all discrimination based on sex.

Article 2 of the Law of 9 December 1977 on equal treatment for men and women with regard to employment provides that "female employees are entitled to receive the same pay as male employees for identical work or work of equal value" and that "the systems of job classification used to determine pay shall adopt criteria common to men and women".

- 3.7.2 As regards the right of redress, individuals are entitled to take legal action to assert their rights to equal pay. Law No. 533 of 11 August 1973 provides for a simplified procedure and financial assistance for litigant parties of slender means in the event of individual employment disputes. The legal action is initiated by the person concerned. A conciliation procedure may be initiated by a trade union before a provincial conciliation board of the Office of Employment. Civil servants may use recognized hierarchical channels in the case of any decision subject to internal appeal and, in other cases, make application to the administrative courts or, in special cases, the Head of State. The task of the "Comitato Nazionale per l'Attenuazione Lavoratrici" (Equal Treatment and Opportunities Committee), set up in October 1982, is to take a position on complaints regarding discriminatory acts.

- 3.7.3 Between 1 January 1973 and 31 December 1977 some ten judgments relating to the equal pay principle were delivered, generally based on national legislation.
- 3.7.4 Article 19 of the Law of 1977 lays down that all internal provisions and administrative acts by the State, provisions of collective agreements or individual contracts of employment, company rules and staff regulations contrary to the provisions of that law shall be null and void.
- Article 13 of the Law of 9 December 1977 states that "any agreement or act dismissing an employee, discriminating against him in respect of qualifications or functions, transfers or disciplinary measures or prejudicing him in any other way on grounds of sex shall be null and void".
- 3.7.5 Article 37 of the Constitution lays down that dismissal on the grounds of a claim or of legal action to ensure compliance with the principle of equal pay is illegal. (See also Article 13 of the Law of 1977 above.) Furthermore, Law No. 604 of 1966 and Law No. 300 of 1970 limit the right of dismissal by the employer to "just cause" and "justified reasons".
- 3.7.6 Article 37 of the Constitution instructs the Labour Inspectorate to supervise application of the principle, its inspectors being regarded as police officers. The Law of 1977 provides that discrimination may be punished by fines.
- 3.7.7 The trade unions and the Committee on the Employment of Women are responsible for informing employees about the principles.
- 3.7.8 Collective agreements cover 90% of employees. It was not considered necessary to include a specific clause guaranteeing equal pay.

3.8 Implementation of Directive 75/117 by Luxembourg

- 3.8.1 Article 1 of the Grand-Ducal Regulation of 10 July 1974 provides that "all employers shall pay men and women the same pay for like work or for work of equal value".

Article 2 stipulates that pay means the ordinary basic or minimum wage or salary and all other benefits and supplements paid directly or indirectly in cash or in kind.

According to Article 3, the various components of remuneration must be fixed in accordance with identical rules, the categories and criteria of classification and promotion and all other bases for calculating pay, in particular the methods of job assessment, must be common to employees of both sexes.

- 3.8.2 As regards the right of legal redress, Article 6 of the Regulation states that disputes shall be submitted to the relevant court.
If the person in question is bound by a collective agreement and if the legal action arises out of its provisions in respect of equal pay, any trade union which is party to this agreement may involve itself in that legal action on grounds of collective interest. A person employed in the public sector must lay his case before the Comité du contentieux (Disputes Committee) of the Council of State, unless his employment relationship is covered by a collective agreement, in which case the labour tribunal is the relevant body.
- 3.8.3 Number of applications to the courts:
some thirty actions have been brought before the industrial tribunal by employees in the private sector (commerce and banking) relating to the household allowance, and others will shortly be brought before the Council of State against the Government in respect of the head of household allowance.
- 3.8.4 Article 1 of the Law of 12 March 1973 lays down that the principle shall apply to all employees of normal physical and mental aptitude regardless of sex. However, a discrimination was noted and the Commission initiated an infringement procedure and sent a reasoned opinion on 19 May 1980. The reason for the procedure was that the criteria for the award of the household allowance and the housing allowance are not in line with the equal pay principle.
Article 9 of the Law of 22 June 1963 lays down that a head of household allowance is granted to a female civil servant only if her spouse suffers from a disability or an illness which makes it impossible for him to meet household expenses and if his income is below the minimum wage.
(A similar allowance is paid under the terms of some collective agreements to employees in the private sector. From the legal point of view, the Law of 12 December 1972 recognized that both spouses have equal rights and obligations; the concept of head of household has thus already been done away with.)

Judgment of the Court of Justice delivered on 9 June 1982 (1)
(Case 58/81)

The Law of 20 May 1983 amending the conditions governing the award of the head of household allowance led the Commission to close proceedings on 18 July 1984.

- 3.8.5 Article 4 of the Grand-Ducal Regulation lays down that any provision in a collective agreement, in a contract of employment or in company rules constituting discrimination in respect of remuneration is null and void.
- 3.8.6 An employer must inform the person concerned in writing of the reasons for his dismissal. Any dismissal for unlawful reasons or constituting an economically and socially abnormal act is improper. Article 15(2) of the Law of 24 June 1970 and Article 22(6) of the consolidated text of 12 November 1971 provide that a person wronged in this way may sue for damages.
- 3.8.7 Article 5 lays down that supervision of application of the principle is the responsibility of the Inspection du Travail et des Mines (Labour and Mines Inspectorate). Collective agreements must be submitted to the Labour Inspectorate before they are put into force.
- 3.8.8 No specific channels have been provided for the information of employees. There have been articles in the publications of the trade unions and the women's movements.
- 3.8.9 Collective agreements apply to 70% of manual workers, while some sectors (white-collar and professional) are without such agreements.

All collective agreements are required to contain provisions for applying the equal pay principle.

In its opinion of 15 September 1980, the Committee on the Employment of Women called on the Government and the Chamber of Deputies to reconsider draft law No. 2375. The Committee said that the draft could be criticized on the grounds that it provided for splitting of the allowance in cases where both spouses are civil servants (a married couple who are both civil servants would have to be content with the two halves of the allowances, whereas a couple one of whom was a civil servant and the other employed in the private sector would each receive the full allowance). The opinion likewise described as unsatisfactory the provision for splitting the allowance in half or applying a pro rata system where one

(1) See Judgment of the Court of Justice in an action for failure to fulfil an obligation, *Commission v. Grand Duchy of Luxembourg*, page 146.

spouse is engaged in part-time work. Finally, two divorced employees without dependants, for example, would each receive the full allowance, while a married employee whose spouse is not working and who has children to look after would receive only one allowance.

The Committee proposes two solutions, one aimed at avoiding an increase in existing inequities and the other at reducing these inequities by reallocating the contribution revenue available for family allowances, the recipients bearing the heaviest burdens being favoured at the expense of those who have no dependants to support.

3.9 Implementation of Directive 75/117 by the Netherlands

3.9.1 Article 2 of the Law of 20 March 1975 on equal pay for men and women lays down that all contracts of employment shall entitle an employee to establish against his or her employer entitlement to a wage equal to that normally received by an employee of the other sex for work of equal value. Article 1 specifies that wages mean the pay owed by an employer to an employee for work carried out, not including rights or allowances arising out of pension schemes.

Dutch law takes a generous approach in establishing the equal pay principle: a comparison is made with the wages usually paid by the undertaking in question to an employee of the other sex performing work of equal or essentially equal value. Failing that, another undertaking is used as a reference. Pay is regarded as being equal if it is calculated on identical bases and account is taken of the non-financial benefits included in the remuneration.

The value of work is calculated by means of a valid job assessment system.

Article 2 of the Law of 20 March 1975 specifies that a contract of employment shall enable an employee to claim the right to pay equal to that received by an employee of the other sex for work of equal value.

Infringement procedure: the Law of 20 March 1975 excluded the public services from application of the principle. A reasoned opinion was sent on 19 May 1980. The case was shelved by the Commission on 10 December 1980.

3.9.2 The Government's decision to limit the guarantee for the minimum legal wage to married heads of household and to unmarried heads of household with a dependent child under the age of 18 gave rise to numerous protests.

The "Breed Platform Vrouwen voor Economische Zelfstandigheid" (Women for Economic Independence) organization sent a petition to the European Parliament stressing that this measure will have a discriminatory effect on married women.

The Law of 2 July 1980 extended the application of the principles of Directive 75/117 and Directive 76/207 to the public, commercial and public-law sectors.

- 3.9.3 A person considering himself to have been wronged may apply on his own account for redress to the judge (Kantonrechter) of a court of first instance. He may also have himself represented - for example, by a trade-union official.

The Equal Opportunities Commission set up in 1980 may advise individuals in cases of failure to fulfil the obligations laid down by the law. A draft law provides for the setting up of a commission empowered to conduct investigations and independent research and to receive complaints from persons who are not directly victims of discrimination (Emancipatiecommissie).

Civil servants may apply for redress to the judge (ambtenarenrechter) specializing in administrative litigation and, if they wish to appeal, to the Centraal Raad von Beroep (central appeal council).

- 3.9.4 Number of actions before the courts: up to April 1983, 12 judgments had been handed down relating to equal pay (Law of 20 March 1975).
- 3.9.5 The Government states that there are no provisions contrary to the equal pay principle in existing agreements. Any clause providing for the payment by the employer of a wage lower than that to which the employee is entitled is null and void.
- 3.9.6 Any unilateral termination of a contract of employment must first be authorized by the head of the Regional Employment Office - which is regarded as providing adequate protection for any employee wishing to assert his legal rights. No specific measure has therefore been taken.
- 3.9.7 There is no administrative monitoring of the application of the principle.
- 3.9.8 The Equal Opportunities Commission has distributed an explanatory brochure and a form which can be filled in to register a complaint and obtain the Commission's opinion.
- 3.9.9 One third of employees are not covered by a collective agreement or are covered by a collective agreement which does not deal with remuneration (mainly executives, middle and lower grade office workers, part-time employees, some employees in the banking and insurance sector, domestic staff, etc.).

3.9.10 Collective agreements do not contain explicit clauses guaranteeing application of the principle. Discriminations arising out of specific benefits granted to young heads of household have been done away with.

3.10 Implementation of Directive 75/117 by the United Kingdom

3.10.1 The Equal Pay Act of 29 May 1970, which came into force on 29 December 1975, does away with discrimination between men and women by establishing the right of all women to equal treatment with regard to pay and other terms of their contracts of employment where they are employed on work similar to as performed by men or where they are employed on work rated as being equivalent by a job evaluation exercise.

Infringement procedure initiated by the Commission:
Reasoned opinion sent on 8 March 1980.

Reasons: the Commission took the view that under Section 1(4) and (5) a woman could obtain equal pay for work which, though not the same work, is equivalent to the work performed by a male employee only if a job evaluation exercise were carried out in the establishment in question.

Judgment by the Court of Justice, 6 July 1982, case 61/81 (1)

Following this judgment by the Court of Justice, the Equal Opportunities Commission proposed in an opinion submitted to the Government that the definition of work rated as equivalent should be flexible and that Equality Officers should be appointed and empowered to conduct investigations into complaints and make recommendations to the industrial tribunals. Thus Statutory Instruments No. 1794/83 and 1807/83 entered into force on 1 January 1984 (Equal Pay Amendment Regulation of 7 December 1983).

The Commission closed the case on 18 July 1984.

3.10.2 Section of the Equal Pay Act aims at eliminating all discrimination in collective agreements and employers' pay structures.

(1) See page 145, Judgment in an action for failure to fulfil an obligation, Commission v. United Kingdom.

- 3.10.3 The European Court of Justice's judgment in the case of Worringham and Humphreys v. Lloyds Bank of 11 March 1981 (1) was particularly important. This was the first time that the principle embodied in Article 119 was applied to a case involving a clause relating to death or retirement under section 6(4) of the Sex Discrimination Act and section 6(1A) of the Equal Pay Act, although the Court of Appeal took the view that such matters did not fall within the field of application of those Acts.
- 3.10.4 In the wake of the European Court of Justice's judgment in the Jenkins & Kingsgate case (2), which stated that Article 119 forbade discrimination, the President of the Employment Appeal Tribunal took the view that the concept of indirect discrimination contained in the Sex Discrimination Act could be incorporated in the Equal Pay Act. The EOC felt that it would be necessary to amend the Act.
- 3.10.5 Section 2 of the Equal Pay Act states that any employee who considers himself wronged may complain to an Industrial Tribunal. The Secretary of State for Employment may take legal action if the person in question fails to do so himself.
- 3.10.6 In some cases the EOC has the right to assist the plaintiff and to institute legal proceedings, but it may not apply to the courts if it appears that the aggrieved person does not intend to do so. The EOC may carry out investigations on the application of the Equal Pay Act; it carried out 319 such investigations in 1981. The Central Arbitration Committees examine collective agreements submitted by a trade union, the Secretary of State for Employment or an employer with a view to eliminating any discriminatory features.

The same facilities are available to employees in the public sector, for the Equal Pay Act applies to them as well. The EOC has proposed to the Government that the burden of proof be more evenly distributed (at present the burden of proof normally lies with the plaintiff, though under certain circumstances it may lie with the employer).

(1) See page 123.
(2) See page 124.

- 3.10.7 The Equal Pay Act applies to all employees in the private and public sectors. Section 1(9) of the Act excludes members of the armed forces and any women's service administered by the Defence Council. The Act specifies that the Secretary of State or Defence Council shall not make any instrument if the instrument has the effect of making a distinction, as regards pay, allowances or leave, between men and women who are members of those forces or of any such service, not being a distinction fairly attributable to differences between the obligations undertaken by men and those undertaken by women.
- 3.10.8 The Government states that there is no legislation contrary to the equal pay principle. The Secretary of State for Employment may submit pay arrangements to the Central Arbitration Committee, so that the latter may decide what amendments are necessary to remove any discrimination between men and women. Section 1(1) of the Equal Pay Act states that an equal pay clause shall be implied in a women's contract of employment even if it is not actually included. It is the business of the Central Arbitration Committee to remove any discriminatory clauses from collective agreements submitted to it. The amendments which the Committee may make are specified by the Act and these amendments must be reflected in the contracts of employment of the persons concerned. Section 77(3) of the Sex Discrimination Act renders null and void any clause in a contract excluding or limiting a provision of the Equal Pay Act.
- 3.10.9 It is illegal to dismiss any person asserting his rights to equal pay and the aggrieved person who has so applied to the Court is entitled to damages.
- 3.10.10 There is no administrative supervision of application of the equal pay principle. The EOC was set up by the Sex Discrimination Act of 1975 to work towards the elimination of discrimination, to issue non-discrimination notices and to monitor application of the Act. The EOC may give assistance to aggrieved persons wishing to apply to the courts. The function of the Advisory, Conciliation and Arbitration Service (ACAS) is to advise and assist employers and employees on request and to provide conciliation facilities in cases where complaints have been made to an Industrial Tribunal over infringements of the Equal Pay Act, so as to avoid application to the courts. The Central Arbitration Committee may indicate amendments to be made to collective agreements or pay structures.

- 3.10.11 To inform employees the Government has published a guide to the Equal Pay Act, as well as brochures, and carried out a publicity campaign via the media.
- 3.10.12 Not all employees are covered by collective agreements, but some of these are covered by other pay arrangements, notably those established by wages boards or councils, which are comparable in certain aspects to collective agreements. The collective negotiation system is voluntary and does not make collective agreements legally binding. Some agreements are notified semi-officially to the Ministry and, according to the Government, are in conformity with the Act (1).
- 3.10.13 Applications to an Industrial Tribunal: between 1 January 1981 and 31 December 1981 (Equal Pay Act) = 54, of which 27 were heard by a tribunal and 9 were settled by conciliation.
- | | | |
|--------------|---------------|------------|
| 1976 = 1,742 | 1977 = 751 | 1978 = 343 |
| 1979 = 263 | 1980 = 91 (2) | |

3.11 Infringement procedures initiated by the Commission
(Directive 75/117)

3.11.1 **Belgium**

- Reasoned opinion sent on 19 May 1980; referral to the European Court of Justice on 16 March 1981.
- Reason: household allowances granted to all married male civil servants, but to female civil servants only if they have a dependent child.
- The Commission shelved the procedure after the Royal Decree of 10 September 1981.

3.11.2 **Denmark**

- Service of notice on 30 March 1979; reasoned opinion on 25 October 1982.
- Reasons: (a) the Law of 4 February 1976 applies only to "the same work" (infringement of Article 1);
(b) no provision for declaring discriminatory clauses in collective agreements null and void.

(1) For further details on the collective agreement situation in the various Member States, see COM(78) 711 final.
(2) Source: 6th annual EOC report, 1981.

The matter was referred to the Court of Justice on 18 July 1983 (Case 143/83).

The judgment was delivered on 30 January 1985.

3.11.3 Federal Republic of Germany

- Service of notice on 3 April 1979.
- Reasons: all case law based exclusively on the general terms used in Article 3 of the Basic Law of 1949.
- Adoption of the Law of 13 August 1980 made it possible to shelve the case on 10 December 1980.
- See infringement procedure against the Federal Republic of Germany, Directive 76/207/EEC (Case 248/83) and judgment of 21 May 1985.

3.11.4 France

- Service of notice on 3 April 1979.
- Reasons: housing allowances and housing conditions allocated in a discriminatory manner.
- The decree of 2 May 1979 made it possible to shelve the case on 5 December 1979.

3.11.5 Luxembourg

- Service of notice on 3 April 1980. Referral to the European Court of Justice on 16 March 1981.
- Reason: head of household allowances.
- Judgment delivered on 9 June 1982 (1).
- A law of 20 May 1983 has amended the conditions governing the award of head of household allowance and enabled the Commission to close the case on 18 July 1984.

3.11.6 Netherlands

- Reasoned opinion on 19 May 1980.
- Reason: the Law of 20 March 1975 excluded the public services from its field of application.
- Case closed on 10 December 1980, after the entry into force of the Law of 2 July 1980 extending equal pay and equal treatment to the public service.

3.11.7 United Kingdom

- Reasoned opinion on 8 March 1980. Referral to the Court of Justice on 13 March 1981.

(1) See page 146.

- Judgment delivered on 6 July 1982.
- Reason: a woman could obtain equal pay for work equivalent to the work performed by a male employee only if a job evaluation exercise were carried out in the establishment in question (1).
- Notice served on 3 April 1979.
- Reasoned opinion on 19 May 1980. Case referred to the Court of Justice on 18 March 1981.
- Judgment delivered on 6 July 1982.
- Statutory Instrument No. 1794/83 came into effect on 1 January 1984 amending the Equal Pay Act in accordance with the Commission's wishes (Equal Pay Amendment Regulation of 7 December 1983).
Case closed on 18 July 1984.

(1) See page 145.

4. CCOUNCIL DIRECTIVE 76/207/EEC ON THE
IMPLEMENTATION OF THE PRINCIPLE
OF EQUAL TREATMENT FOR MEN AND WOMEN

4.1 Content of the Directive

1. Article 2.1 defines the principle of equal treatment, which means that there shall be no discrimination on the grounds of sex either directly or indirectly by reference in particular to marital or family status. The Directive also covers indirect discrimination, i.e. situations where discrimination is not overt and is therefore all the more difficult to eliminate.
2. Equal treatment must be applied as regards access to employment, including promotion, and to vocational training and as regards working conditions. (Equal treatment in matters of social security is not included in this Directive.)
3. In these areas, any laws, regulations and administrative provisions contrary to the principle of equal treatment must be abolished, and any provisions contrary to the principle included in collective agreements, individual contracts of employment or in internal rules of undertakings must be declared null and void or amended.
4. Not only the instruments but also practices must conform to the principle: the Directive seeks to establish a positive legislation prohibiting de facto discrimination and allowing any victims the right of redress.
5. Provision is made for exceptions to the principle. Under Article 2.2, Member States may 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 i.e. jobs which for inherent objective reasons can be carried out by persons of one or other sex only (1).
The list of occupational activities excluded from the scope of the Directive should be periodically revised by the Member States.
6. The Directive is without prejudice to measures for the protection of women, particularly as regards pregnancy and maternity. "This Article (Article 2.3) should be interpreted strictly, and the provisions taken to grant leave or other advantages for the purposes of bringing up children... should accordingly be applied to workers of both sexes". (2)

(1) COM(80) 832 fin. p. 39.
(2) COM(80) 832 fin. p. 62.

7. Similarly, positive discrimination, namely measures to promote equal opportunity, in particular by rectifying existing inequalities, is not contrary to the principle of equal treatment.

The Commission has reported to the Council on the situation at 12 August 1980 with regard to the implementation of the principle of equal treatment for men and women as regards access to employment and promotion, access to vocational guidance and training and working conditions (1). The following pages contain a list of national implementing measures, certain aspects concerning the application of the Directive and a list of infringement proceedings.

4.2 Difficulties encountered in implementing the principle

Certain points have raised or raise problems:

- a) The lack of a precise definition of "equal treatment".
- b) The difficulty of identifying indirect discrimination and of defining the concept itself. United Kingdom legislation makes a better attempt to define the concept.

In reply to the Written Question from the Member of the European Parliament, Mrs Lizin, of 9 March 1981, the Commission stated that the term indirect discrimination "should be interpreted as referring to hidden discrimination which might in practice affect workers of one sex as a result of marital or family status being taken into account in determining the rights covered by the two Directives" (76/207 and 79/7/EEC). (2)

The concept of indirect discrimination was confirmed by the Court; see Case 61/77 (ECR 78, pp. 450-452), Case 20/71 (ECR 72, page 345) and Case 32/71 (ECR 72, page 363).

For the last two judgments, see Chapters 11 and 12 of this Supplement.

The Court considers that indirect discrimination on grounds of sex arises where equal treatment is formally applied but results in material inequalities on account of the criterion used. This mainly occurs where women are discriminated against; to establish indirect discrimination it is not necessary that all women should be placed at a disadvantage by the criterion used. The effect of apparent equal treatment at work is analysed; the question whether discrimination is intentional is not entered into.

(1) COM(80) 832 fin.

(2) OJ C 129/22 and p. 78 Action 1.

- c) The exclusion of certain occupational activities has particularly affected the public sector; various problems arose including:
- cases of exclusion that did not conform to a strict interpretation of Article 2.2,
 - rather general clauses, whereas the Directive calls for a list of the excluded occupations to be subject to review.
- d) The "protective" legislation referred to in Article 3.2 with respect to access to employment and Article 5.2 is that which excludes women from certain occupations, ostensibly for their protection, or stipulates that they should be entitled to special working conditions. The Directive provides for the repeal of this legislation when the concern for protection which originally inspired it is no longer well founded. Lists of these exceptions reveal a lack of homogeneity at Community level and the absence of clearly defined justifications (1). Although the protection of pregnancy is not covered by the Directive, pregnant women are not excluded from the field of application of the Directive. Such discrimination is formally prohibited in all the Member States.
- e) Problems have arisen with respect to equal access to vocational training at school (Article 4). Member States have not complied with the Directive or only partially; this point is important for the training of future women workers.
- f) The terms "working conditions" were not defined in Article 5. They should be understood in the broad sense. Many forms of discrimination in working conditions are linked to family status and the traditional role of women (for example, parental leave). Although social security could well be regarded as a working condition, Article 1.2 of the Directive states that provisions concerning the implementation of the principle of equal treatment in matters of social security will be adopted later. An initial Directive on equal treatment in matters of social security was adopted on 19 December 1978 and was followed by a second, adopted on 24 July 1986, applying the principle of equality to occupational social security schemes.
- g) With respect to vocational guidance and training (Article 4), the Directive does not define what is meant by training, but the provisions of Article 4 together with the work done in preparation make it possible to identify the types of training which would have to be covered by implementing measures:
- vocational training in secondary and higher education (general education is not covered),

(1) On this subject see the report COM(80) 832 fin.

- advanced training and retraining organized by the public services or employers,
- training and advancement schemes within public and private undertakings.

(Private vocational guidance and training establishments are not concerned.)

- h) The content of collective agreements should be systematically examined (assessment criteria can be discriminatory, or provision may be made to first lay-off part-time workers, etc.).

5. IMPLEMENTATION OF DIRECTIVE 76/207/EEC

5.1 List of the main implementing measures adopted or already in force in the Member States

5.1.1 **Belgium**

Article 6 of the Constitution
Title V of the Law of 4 August 1978
Implementing measures of Title V:

- Royal Decree of 27 November 1978 (officials and bodies responsible for the supervision and execution of Title V).
- Royal Decree of 8 February 1979 (Cases where sex may be specified in conditions of employment).
- Royal Decree of 6 August 1981 (conditions of access to certain occupations).
- Royal Decrees of 8 January 1980 and 27 February 1981 (paid annual holidays).
- Royal Decree of 16 October 1981 (definitions of the concepts of vocational guidance and training referred to in Article 124).
- Royal Decree of 29 October 1982 idem Article 125 (French-speaking community).
- Royal Decree of 29 September 1982 idem Article 125 (Flemish authorities).
- Royal Decree of 17 February 1981 (implementing Article 135).
- Draft Royal Decree drawn up by the Ministry of Education (public section, vocational training at school).
- Decree of July 1981 (leave to bring up a child) and the Decree of 29 June 1983 (access to vocational training at a school).

5.1.2 **Denmark**

- Law of 12 April 1978 on equal treatment for men and women with respect to employment (No. 161).
- Law 162 of 12 April 1978.
- Law 174 of 12 April 1978 on the Equal Treatment Commission.
- Law 117 of 28 March 1984.

5.1.3 **Federal Republic of Germany**

- Basic Law of 23 May 1949, Article 3(2) and (3), Article 33(2).
- Law of 15 January 1972, Article 75(1).
- Law of 15 March 1974, Article 64(1).
- Law of 25 June 1969 amended by Law of 23 July 1979.
- Law of 14 August 1969 amended by Law of 14 February 1976.
- Law of 13 August 1980.

5.1.4 France

- Preamble to the 1946 Constitution.
- Law 75/625 of 11 July 1975, amending and supplementing the Labour Code with respect to the rules concerning women's employment and Article L 298 of the Social Security Code, and Articles 187(1) and 416 of the Penal Code.
- Law 75/599 of 10 July 1975 (Application of the principle of equal treatment to Ordinance 59/244 of 4 June 1959 (general staff regulations for officials)) amended by Law 82/380.
- Law 82/380 of 7 May 1982.

- Decree 82.866 of 15 October 1982.
- Law 83.635 of 13 July 1983.
- Law 84/16 of 1 January 1984.

5.1.5 Ireland

- Employment Equality Act of 1 June 1977.
- European Communities (Employment Pay Equality) Regulations, notified in October 1982.

5.1.6 Italy

- Law 903 of 9 December 1977.
- Law 300 of 20 May 1979.

5.1.7 Luxembourg

- Law of 8 December 1981 (equal treatment).

5.1.8 Netherlands

- Law 86 of 1 March 1980 (private sector).
- Law 384 of 2 July 1980 (public sector).
- Preliminary draft law.

5.1.9 United Kingdom

- Sex Discrimination Act of 12 November 1975.
- Sex Discrimination Order of 2 July 1976.
- Operations at Unfenced Machinery (amendment) Regulations 1976.

5.1.10 Greece

- 1975 Constitution, Article 4(2). It is broader in scope than the first three Directives but provides for exceptions to equal treatment.
- Law 1414/84 of 30 January 1984 on application of the principle of equal treatment for men and women in employment relations.

5.2 Implementation of Directive 76/207 by Belgium

- 5.2.1 The definition of equal treatment in the Directive is incorporated in the Law of 4 August 1978. The Law includes no definition of indirect discrimination, but the prohibitions laid down give some idea of what constitutes indirect discrimination. For example, Article 121(1) prohibits the use in job advertisements or notices concerning employment of wording which, although not explicit, indicates or implies the worker's sex.
- 5.2.2 Title V of the Law of 4 August 1978 provides that the principle of equal treatment shall apply in the private and public sectors with respect to access to employment, promotion (including the self-employed occupations), working conditions and dismissal.
- 5.2.3 The Law specifies that provisions contrary to the principle of equal treatment are void, including provisions in collective agreements.
- 5.2.4 The principle must be implemented in practices, that is in any isolated or repeated act on the part of a public or private body, employer or person with respect to a person or group of persons. Injured persons have a right of appeal under Article 131 of the Law of 1978.
- 5.2.5 Article 121 of the Law of 1978 stipulates that equal treatment must be applied in the provisions and practices relating to conditions of access and selection, including selection criteria for occupations or jobs in self-employed activities, regardless of the activity and at all levels of the hierarchy. The prohibition applies to the public, private and self-employed sectors, and persons responsible for job advertisements or notices concerning employment and promotion (1).
- 5.2.6 Access to employment of pregnant women: Women are not required to declare their condition but a prior medical examination may be required.
- 5.2.7 The law prohibits any reference to sex in conditions or criteria regarding access to guidance, training, apprenticeship, further training, retraining and social advancement or the use of terms that imply discrimination. Similarly, a person may not be hindered or denied access to guidance, training, etc., for explicit or implicit reasons directly or indirectly based on sex.

(1) See page 44.

- 5.2.8 The application of Article 125 of the Law which incorporates into Belgian Law the rules laid down in Article 4 of the Directive was subordinated to the adoption of Royal Decrees defining what is meant by vocational guidance and training.

Infringement proceedings initiated by the Commission:

Formal notice to adopt the necessary implementing measures with respect to guidance and training: 30 July 1980.

Reasoned opinion: 8 May 1981.

The Royal Decree of 16 October 1981 prescribing what must be understood by vocational guidance and vocational training referred to in Article 124 of the Law limited the concept of vocational guidance and training to apprenticeship for a trade or occupation in undertakings and departments in the private and public sectors (not educational establishments). The Commission considered that the Directive had been infringed in all aspects of vocational guidance and training within the meaning of Article 4 apart from those areas covered by the Royal Decree of 16 October 1981.

Case brought before the Court of Justice on 1 June 1982 (Case 164/82). (1)

The Royal Decree of 29 October 1982 defined vocational guidance and training for the purposes of the application of Article 125, but Section 2 of Chapter II has not yet been applied in the case of vocational training covered by the Commission du Pacte scolaire (Schools Pact Committee).

General education establishments are not required to be mixed.

With respect to the case brought before the Court of Justice (Case 164/82), the Commission withdrew the action after the adoption by Belgium on 29 June 1983 of a Royal Decree regarding equal treatment with respect to access to training at school.

- 5.2.9 Two decrees were adopted on 29 September 1982 and 29 October 1982 respectively, by the Flemish authorities and authorities of the French community stating what should be understood by vocational guidance and training. In the case of the public sector (vocational training at school) a draft Royal Decree is under consideration by the Comité Général de Consultation Syndicale de la Fonction Publique (General Committee for the consultation of trade unions in the public service sector).

- 5.2.10 Vacancy notices or conditions of access to certain occupations (2), such as actor, actress, model, etc., or occupations in countries outside the EEC where local laws or customs make it expedient to fill the post with a person of a particular sex, may contain references to sex.

(1) OJ C 164/7. See page 153.

(2) See page 91.

Some occupational activities (youth care, civilian employees in military security departments, the Gendarmerie, local police force, firemen, etc.) remain outside the field of application of the Directive. In the case of prison warders, a two-year experiment was initiated at the beginning of 1982.

In response to a parliamentary question the Ministry of Education replied that all training courses in fisheries and maritime occupations offered by the Ministry of Education are accessible to men and women (see complaint concerning the College of Nautical Studies in Antwerp). Infringement proceedings are however pending in regard to the (infringement of Articles 1 and 4 of the Directive) denial of access of women to training as engineer officers in accordance with protective legislation.

- 5.2.11 Equal treatment must be enforced in all conditions and practices relating to working conditions and dismissal (Article 127) in the public and private sectors.
- 5.2.12 Action to seek legal remedy may be brought before a competent court by any individual who considers himself aggrieved, employers' organizations, trade unions in the public and private sectors and organizations representing self-employed workers. The burden of proof lies with the injured party, but Article 136(2) provides for the burden of proof to be reversed and imputed to the employer where the worker is dismissed or the terms of employment are unilaterally amended during the twelve months following the lodging of a complaint. Convention No. 25 set up a special equal opportunity committee to advise the judiciary (first meeting March 1983).

The Commission on Women's Employment is also empowered to give advice. A draft decree relating to the public sector is under preparation which will set up a committee empowered to give advice to the judiciary.

The Government published a booklet explaining the opportunities for recourse: "Equal treatment for men and women: a law that concerns you".

- 5.2.13 Under Article 136 of the Law of 4 August 1978, in the public and private sectors, an employer may not dismiss a worker or unilaterally change the working conditions of a worker who has registered a complaint within the undertaking or with the Labour Inspectorate or has initiated legal proceedings under equal treatment legislation. If an employee is dismissed, he or she may seek reinstatement in his or her former post; otherwise the employer can be ordered to pay compensation.

5.2.14 A Royal Decree will determine the cases in which positive discrimination measures may be taken. According to an opinion of the Commission on Women's Employment, authorization should for example be given in some cases for specific training to enable women to obtain a qualification or level of education which it had been impossible for them to attain at school, or for specific educational and vocational guidance measures for girls.

5.2.15 Job offers or advertisements:

It is forbidden to refer to the sex of the worker in job offers or in advertisements relating to the job and to promotion or to use in such offers or advertisements terms which, even though not explicit, indicate or hint at the sex of the worker. It is applicable to the public or private sectors, self-employed occupations and all who disseminate notices in the media. Civil penalties are applied. A survey in March 1981 confirmed that the majority of advertisements in the press failed to comply with the law. Most advertisements by temporary employment businesses were discriminatory. The results were forwarded to the Labour Inspectorate by the Ministry of Employment. The Government has published a booklet entitled "How to formulate a vacancy notice".

5.2.16 A Royal Decree of July 1981 put an end to discrimination with regard to parental leave.

5.3 Implementation of Directive 76/207 by Denmark

5.3.1 The definition of the principle of equal treatment in the Directive is supplemented by the prohibition of discrimination against pregnant women (Law No. 161 of April 1978). The Law is aimed at eliminating discrimination on grounds of sex either directly or indirectly, by reference in particular to marital or family status.

The laws guarantee application of the principle where it is not already guaranteed under a collective agreement in the public and private sectors in relation to:

- access to employment and transfer, including the self-employed occupations, and promotions;
- access to vocational guidance and training, including the self-employed occupations;
- working conditions and dismissal.

Employers are bound by these last two points only where they employ men and women at the same work place.

Infringement proceedings initiated by the Commission:

Formal notice: 30 July 1980.

Reasoned opinion: 15 April 1982.

Referred to the Court of Justice, September 1973,
Case 149/83.

The draft law supplementing the law in effect adds a paragraph extending the scope of the Directive to provisions in internal company rules concerning more than one employer or more than one undertaking while maintaining the original restrictive wording; thus the discriminatory measures deriving from Articles 6 and 4 of the current law are not abolished.

The case was removed from the register after Parliament adopted the amendment recommended by the Commission (Law No. 117 of 28 March 1984).

- 5.3.2 The law stipulates that any contractual provisions, including those set out in collective agreements, company rules and articles of professional associations that are contrary to the principle of equal treatment are automatically void. The laws concerning employees, agricultural workers, paid domestic help and seamen were amended. Legal and de facto forms of discrimination are covered. Wronged persons have the right of appeal.
- 5.3.3 The law authorizes exclusions from the field of application of the Directive in the case of certain occupational activities and the training pertaining thereto: entry to the ministry, sales staff for ladies' underwear, employment in branches of undertakings based abroad, jobs in the army involving women in combat (1).
- 5.3.4 Derogations with respect to the protection of women are authorized under Article 11(2) of the law on equality. For example, there are differences in the minimum height requirements for men and women applicants for the police force to give them equal opportunities for admission.
- 5.3.5 Employers in the public and private sectors must treat men and women equally with respect to recruitment, transfer and promotion (Article 2). Vacancy notices may not state that the post is exclusively or preferably reserved for persons of a specified sex.
- 5.3.6 An employer may not refuse to employ a woman on grounds of pregnancy. This is an offence liable to civil and criminal law penalties. Women are not required to declare their condition.

(1) For more details, see page 91, action 3.

- 5.3.7 The law provides that employers employing men and women at the same work place must treat them equally in respect of vocational guidance, training, further training and retraining, whether the training is provided directly by the employers themselves or on their behalf.
(Infringement proceedings initiated by the Commission: see above.)
No training establishment or undertaking may refuse access to a pupil on the grounds of sex. The wronged party may claim compensation.
- 5.3.8 Although the law does not define working conditions, the explanatory memorandum states that the terms must be interpreted very widely since they concern all conditions in which work is carried out (including dismissal) whether such conditions are fixed under collective agreement or imposed by the employer.
- 5.3.9 The principle of equal treatment applies to the public and private sectors, but discrimination between the sexes may be justified in cases where men and women work in different undertakings.
Infringement proceedings were initiated by the Commission (see above).
- 5.3.10 Any wronged employee may take legal proceedings in the ordinary courts (Byret). Where the employee in question is covered by a collective agreement which includes a provision to ensure equal treatment, he should inform his trade union which will then take the matter before the competent industrial authority.
Self-employed workers and applicants who are not yet employees but want to undergo vocational training may if exposed to discriminatory treatment take the matter before the ordinary courts of law. The burden of proof lies with the injured party.
- 5.3.11 Number of cases: two cases were brought before the Supreme Court (Højesteret). One case went before the Court of Appeal (Lansret). It concerned employment in a lunatic asylum. Two cases concerned the Merchant Navy.
- 5.3.12 Vacancy notices and job advertisements:
The law applies to public and private sector employees and all persons or bodies issuing vacancy notices (placement services). Where direct recruitment is authorized, newspapers print the statutory provisions at the top of the page while sometimes printing discriminatory advertisements.
Infringements may be subject to civil and criminal penalties.

5.4 Implementation of Directive 76/207 EEC by the Federal Republic of Germany

- 5.4.1 Since on 10 May 1979 the Federal Republic of Germany had not adopted specific measures to implement the Directive, the Commission forwarded a formal notice. As a result of the law adopted on 13 August 1980 the Commission has shelved the case. The law, however, contains an amendment to the Civil Code which, given its place in German law, concerns neither the public sector nor the self-employed. Equal treatment is assured only to workers in the private sector. The Federal Republic considers that employment relations in the public sector are not covered by the Directive. The Court of Justice, however, has affirmed that the principle of equal pay applies to both the public and private sectors (1).

The Commission has therefore initiated infringement proceedings by formal notice of 15 January 1982, followed by a reasoned opinion on 29 September 1982 (for the other grounds see below). At the end of April 1983 the Commission decided to refer the matter to the Court of Justice.

The matter was referred to the Court of Justice on 9 November 1983 (Case No. 248/83). The Court gave judgment on 21 May 1985, finding against the Commission, the Federal Republic having accepted that the Directive applied to the public sector and demonstrated that in any event equal treatment was assured by the law as at present drafted.

- 5.4.2 Direct and indirect forms of discrimination are prohibited; the ban on discrimination is general and cannot be lifted in the case of an individual contract (Article 611 a I of the Civil Code).
- 5.4.3 Any provisions contrary to the principle in laws, collective agreements, etc. are void. Any employer, regardless of the size of the firm, must observe the principle of equal treatment.
- 5.4.4 The legal instruments require observance of equal treatment in respect of workers in the private sector, job applicants and persons in retraining. Article 33(2) of the Basic Law assures equal treatment with respect to access to employment and promotion in the public service. Equal treatment is applicable to working conditions (dismissal, recruitment, work content, promotion, further training) in the private sector.

(1) Case 43/75, Defrenne v. Sabena, and 58/81 COM v. Luxembourg, see page 118 and page 146.

The content of the expression "working conditions" is not specified in Article 67 of the law on the representation of Federal staff which affirms equal treatment as regards working conditions in the public sector. No specific measure has been taken to ensure equal treatment for self-employed workers.

- 5.4.5 Equal access to private vocational training establishments or in-firm training derives from Article 611 a of the Civil Code. Access to technical and vocational training at school would call for specific measures.
- 5.4.6 Marital or family status is not listed as a particular source of discrimination. Refusal to recruit a pregnant woman may be contrary to Article 611 a I. According to legal precedents, a pregnant woman is not required to declare her condition unless asked by the employer and unless she is unable to perform the work in question.
- 5.4.7 An exception is made to the principle (Article 611 a I.2) where the employer considers that the sex of the worker is a determining factor in establishing an employment contract. Similarly, under Article 611 a I.3 difference in treatment is permissible where it is based on objective factors (height, qualifications, training, experience or health).

The Commission has initiated infringement proceedings on this point (the same proceedings as the above): the Civil Code does not comply with the aims of the Directive, which provides that exclusions must be specified and subject to review.

- 5.4.8 A wronged worker may put his case to a member of the works council to work out a solution with the management. Workers in the private sector can institute proceedings before the labour court for breach of the law incorporating Community law and the law on the internal organization of firms. Workers in the public sector can claim redress before the labour court for infringement of the implementing law, and before an administrative tribunal for infringement of the law on the representation of Federal employees.

The right to claim redress is individual. The burden of proof lies with the employer (Article 611 a I.3). An applicant who is refused a post cannot invoke the prohibition on discrimination set out in Article 611 a I in order to obtain the post. He is entitled to compensation if the employer is found to be at fault.

A worker in the private sector who has brought an action may not be dismissed or suffer any prejudice on account of such action.

With respect to claims for damages in the case of failure to conclude a contract of employment with a person on grounds of sex, German law requires the employer to pay damages only where breach of trust has occurred. The Commission initiated infringement proceedings by serving notice on 23 December 1983, withdrawing the case in February 1986.

On this same question, see the Judgment of the Court of Justice of 10 April 1984, von Colson v. North-Rhine Westphalia (Case 14/83) set out in Chapter 12.10.1.

The Government has published a booklet including explanations on possibilities of recourse (Information Bulletin, "Treffpunkt").

5.4.9 Positive discrimination measures are provided for in the case of working conditions, working time, paid holidays, protection of pregnant women and mothers, safety at work, continuity of remuneration during maternity and post-natal leave. The Commission initiated infringement proceedings (withdrawn following the judgment in Case 14/83) in respect of the law on the protection of maternity, amended on 25 June 1979, which provides that leave following maternity leave may be granted only to the mother.

5.4.10 The law provides that employers in the private sector must draw up vacancy notices without discrimination in regard to sex, but this provision is not subject to any controls or penalties. A circular authorizes registration of vacancy notices specifying one sex with the employment offices. Although no statutory obligation is applicable to the public sector, the Government claims there is no discrimination. The Commission has initiated infringement proceedings (Case 248/83; see page 151): discriminatory offers should be illegal and the persons concerned should have means of redress.

5.5 Implementation of Directive 76/207 by France

5.5.1 On 13 July 1983 the National Assembly adopted Law 83/635 amending the Labour Code (Chapter 4, Title III, Book I; Title III of Book III). Law 83/635 embodies the principle of equal treatment in general, but does not apply to the public sector.

Law 84/16 of 11 January 1984 establishes the principle of equality in the public sector.

However, Law 83/635 does not incorporate the definition of the principle of equal treatment set out in the Directive nor does it make specific reference to indirect discrimination.

5.5.2 The Preamble to the Constitution guarantees equal rights for men and women in all areas. The instruments in force do not

prohibit discrimination based on family or marital status with the exception of the Law of 11 July 1975 amending the Labour Code in respect of women's employment, and which refers to discrimination in access to employment and in cases of dismissal on the grounds of "family situation". The 1983 Law also refers to discrimination based on sex or family situation.

- 5.5.3 The 1983 Law affirms the principle of equality at work with respect to recruitment, renewal of contract, promotion and training. However, it does not apply to the public service, where equal rights for all are guaranteed under Law 84/16.
- 5.5.4 Law 83/635 prohibits sex-based discrimination with regard to remuneration, training, job classification, promotion and transfer.
- 5.5.5 Law 83/635 provides that the inclusion of a clause reserving the benefit of any measure to one or more workers on the basis of sex in a collective agreement or employment contract will render it void.

De facto discrimination with respect to recruitment and dismissal is prohibited.

- 5.5.6 In the public sector, the Law of 10 July 1975 provides for derogations where warranted by the nature of the job or the conditions in which it is carried out. It does not stipulate that such derogations are permissible only in cases where the sex of the worker constitutes "a determining factor" as stated in Article 2.2 of the Directive.

The Commission initiated infringement proceedings against France (formal notice: 30 July 1980 and reasoned opinion 12 May 1981) on the grounds that Law 75/599 authorized derogations in the public sector with respect to recruitment and different conditions of access for men and women; nor was any procedure for the periodic review of exclusions stipulated.

With the adoption of Law 82/380 of 7 May 1982 the infringement proceedings were closed. The Law specifies that no distinction is to be made between men and women, but in the case of certain sections listed by decree of the Council of State after consulting the Higher Council for the public service, separate recruitment procedures for men and women may be adopted if the sex of the worker constitutes a "determining factor in performing the duties carried out by employees in these sections".

New infringement proceedings were initiated by the Commission by formal notice on 24 August 1982, for the Commission did not consider that the Directive had been implemented (separate recruitment procedures).

Law No. 84/16 of 11 January 1984 incorporating statutory provisions with regard to the public service made it possible to close the infringement proceedings. On examination, however, it proved to contain derogations from the principle of equality in respect of certain sections, listed by decree of the Council of State, after consulting the Higher Council for the public service and the joint technical committees, separate recruitment procedures for men and women may be adopted if the sex of the worker constitutes a determining factor in performing the duties carried out by employees in these sections. In short, the present situation is practically identical to the earlier situation, except that the list of sections will be shorter than in the past. Accordingly, a further infringement procedure is to be expected.

- 5.5.7 Under Law 83/635, temporary measures may be adopted to establish equal opportunities for women. Law No. 79/569 had already eliminated age restrictions as regards access to employment in the public service for certain categories of women.
- 5.5.8 The burden of proof lies with the employer. A worker who has brought an action and is dismissed is entitled to reinstatement. Trade unions may institute civil proceedings before any court to defend the interests of an occupational sector and are also entitled to institute proceedings in respect of an individual worker if he or she has no objection.
- 5.5.9 Work of equal value is defined as follows in the Law: Occupations are considered as being of equal value if the persons employed are required to have comparable qualifications as attested by certificates and diplomas or occupational experience, to have equivalent job-related skills and responsibilities and to be subject to similar physical and mental demands (Article L 140-2 of the Law).
- 5.5.10 Vacancy notices and job announcements must be drawn up "without regard to the sex or family situation of the candidate unless the sex of the person concerned is a determining factor". A circular of 21 April 1983 requires notices of competition for the public service to refer to the masculine and feminine form of job titles, and where it is impossible to find a suitable term, to add the words "men and women" after the title.

- 5.5.11 Access to employment by pregnant women: employers may not seek information in this connection. Women are not required to declare their condition. A ban on the dismissal of pregnant women is a general principle of the law and penalties for infringement are imposed under criminal law.
- 5.5.12 A report concerning the situation and general conditions of employment and training for men and women must be presented each year by the head of the firm to the works council. This report, having been amended, if necessary, in line with the opinion of the works council, must be forwarded to the Labour Inspectorate.
- 5.5.13 Law 83/635 sets up a National Council for equal treatment of men and women at work under the Ministry responsible for women's rights, labour, employment and vocational training. The task of the Council is to participate in the definition, implementation and application of a policy of equal treatment for men and women at work.

5.6 Implementation of Directive 76/207 by Ireland

- 5.6.1 In October 1982 Ireland notified the European Communities (Employment Equality) Regulations which enabled the Commission to suspend the infringement proceedings under way (1). The Regulations amend the 1977 Employment Equality Act by eliminating all impediments to the training and recruitment of men to the midwifery profession, put an end to discriminatory practices in access to employment in single sex institutions for the sick (see below) on the grounds of decency.
- 5.6.2 The Act of 1 June 1977 provides for the elimination of direct and indirect discrimination. The 1982 Regulations have made it possible to limit the exclusions previously authorized in cases where the sex of the worker is one of the qualifications for a given post. The Regulations ensure equal treatment in areas that were previously excluded.

Section 2(b) of the 1977 Act provides that discrimination based on marital status is illegal. There are no special provisions with respect to discrimination based on family status. The Employment Equality Agency has proposed to the Minister for Labour an amendment to the 1977 Act to take account of these forms of discrimination.

The Act covers equal treatment with regard to access to employment and promotion (private, public, self-employed), vocational guidance in firms, vocational training and working conditions in the public and private sectors.

(1) See page 53.

- 5.6.3 All laws, regulations and administrative provisions contrary to the principle of equal treatment are tacitly abolished. Any provision contrary to the law in a collective agreement, employment contract or order is void.
- 5.6.4 De facto discrimination is prohibited and victims of such discrimination have a right of redress. The Employment Equality Agency is empowered to investigate discriminatory conduct.
- 5.6.5 The Act allows for the exclusion of a number of jobs where the sex of the person concerned is a determining factor. The Act does not apply to employment in the armed forces and the prison service (see below). It provides for exclusion from employment on the grounds of sex of persons responsible for care in an establishment confined to persons of one sex, for example psychiatric hospitals, and restricts access of men to training in midwifery.

Infringement proceedings initiated by the Commission:
Formal notice on 29 July 1980 to review exceptions applicable to State registered nurses and nurses responsible for special care.

Reasoned opinion: 9 October 1980.

The infringement proceedings were suspended following notification of the European Communities (Employment Pay Equality) Regulations, 1982, which eliminated the exceptions relating to training in midwifery and employment in establishments confined to persons of one sex requiring supervision.

With respect to employment in psychiatric hospitals, discussions are under way between the Employment Equality Agency, trade-union representatives and management.

Plans should be made relating to the following areas:

- elimination of upper age limits for recruitment,
- introduction of open recruitment for psychiatric nursing staff,
- promotion based on merit.

The 1977 Act (Section 12) excludes from its field of application employment in the armed forces and the police force, the prison service and work with the immediate family.

On 8 March 1983 the Commission served formal notice on Ireland with respect to the above exclusions.

Women are recruited to certain posts in these sectors. The Equal Pay Act is applicable to such persons but not the 1977 Employment Equality Act.

With respect to apprenticeship with the army and the air force, the Employment Equality Agency has pleaded in vain for the apprenticeship competitions to be open to women. According to the Agency, the fact that the armed forces are excluded from the field of application of the Directive does not shield the Government from infringement proceedings under Article 169 of the EEC Treaty for infringement of Article 2(2) of the Directive.

More recent recruitment conditions for apprenticeship posts (1983) contain discriminatory requirements and if no amendments are made by the authorities between now and the date of recruitment the Equality Employment Agency would envisage the possibility of lodging a complaint with the Commission.

Section 12 of the 1977 Act lists a number of jobs that are excluded. No provisions are made for a periodical review of the list.

Infringement proceedings: the Commission sent a reasoned opinion on 15 March 1984.

- 5.6.6 The Act prohibits any discrimination with respect to recruiting methods, job offers and access to promotion in all cases where successful applicants would be performing materially similar tasks. Section 7 lays down that private employment agencies shall not practise any discrimination in the terms in which they offer, refuse or omit to provide any services.
- 5.6.7 Discrimination is prohibited with respect to formal provisions and practices concerning placement and guidance offered by private employment agencies.
- 5.6.8 Access to employment of pregnant women:
The Act makes no provision on this point, but discrimination may be recognized as a result of reference to marital status or sex. Women are not required to declare that they are pregnant to a prospective employer.

The Unfair Dismissals Act provides that employers do not have the right to dismiss an employee because she is pregnant except where she is unable to carry out her work satisfactorily, has rejected another offer of employment appropriate to her condition, or where continuation of her work would infringe a statutory requirement and the employer has no suitable vacant post to offer.

- 5.6.9 Positive discrimination:
The Law states that it is not discriminatory to provide training for a specific occupation for persons of one sex if, during the preceding 12 months, an insignificant number of persons of this sex were engaged in the occupation in question.

Programmes have also been set up for women wishing to resume employment.

- 5.6.10 Vocational training is understood to mean any system of instruction enabling the person taught to acquire, retain or perfect skills required for the exercise of an occupational activity and which can be considered as designed exclusively as a preparation for such activity.

The Act does not apply to general education establishments. It covers all types of technical and vocational training establishments at secondary, higher and university education levels. Equal access to vocational guidance organized by business undertakings is also covered.

The Act prohibits any public or private person, organization or employer providing vocational training from practising discrimination with respect to conditions of access to courses; they may not refuse or omit to mention the possibilities of access to one such course or practise discrimination in the organization of the courses (Section 61).

- 5.6.11 Working conditions are not defined in the Act but Section 3 prohibits discrimination with regard to conditions of employment, overtime, jobs, disciplinary measures, dismissals, lay-offs, redundancies, short-time working, etc. for the public and private sectors.

- 5.6.12 Any laws and regulations contrary to the principle of equal treatment have been repealed. If any employment contract for a woman does not contain an equality clause it must be added except where it can be proved that the difference is not based on sex.

- 5.6.13 The right of redress is granted to all persons except in the case of excluded occupations. The Commission initiated infringement proceedings on 29 July 1980 (see above). The infringement proceedings were suspended with the notification of the European Communities Regulations in October 1982. No amendment seems to have been introduced on this point. Cases are brought before the Labour Court which endeavours to settle the matter by conciliation or submits it to the Equality Officer who may conduct an investigation, and draw up a recommendation which is conveyed to the parties concerned and the court. The parties may introduce an appeal either against this recommendation or on the grounds that it has not been implemented.

The court then delivers a ruling establishing whether or not discrimination has taken place and awarding compensation where necessary.

An employer who does not implement a Labour Court ruling is liable to a fine.

The Employment Equality Agency has certain powers: it may apply for a High Court injunction in cases of persistent discrimination, institute proceedings in certain cases and conduct investigations. It may assist wronged persons to

prepare their cases and lodge their complaint with the court. The onus of proof rests with the complainant except in cases relating to dismissal by reason of an attempt to assert rights under the Act when the employer must satisfy the court that the worker was not dismissed because he or she wished to assert their rights.

The right of redress is an individual right but it does not prevent the court, after having duly investigated the case, from deciding that all or a number of women are entitled to equal treatment in compliance with the Act and that the ruling applying to one member of the group also applies to all or certain other members of that group.

Actions to claim legal redress can be brought by individuals or by groups. Trade unions can claim redress on behalf of an injured party. The case may be brought before the Labour Court or an ordinary court.

Number of cases relating to the Employment Equality Act 1977.

- Rulings by the Labour Court:

1978 - 5; 1979 - 14; 1980 - 14; 1981 - 20; 1982 - 12

- Cases referred for investigation:

1979 - 19; 1980 - 30; 1981 - 23; 1982 - 35

5.6.14 The law contains no provision regarding the provision of information to workers. The Ministry of Labour has published an explanatory booklet about the provisions of the law. It is available from inter alia offices of the National Manpower Service.

The Employment Equality Agency has published a number of pamphlets on the two Directives and has inter alia conducted media campaigns.

5.6.15 Vacancy notices and job advertisements:

It is illegal to publish advertisements relating to employment worded in such a way that the reader might conclude there was an intention to discriminate. If the occupation is not covered by the Act, advertisements must stipulate that the applicant's sex is an occupational qualification for the job or that the law prohibits the employment of women for the job in question.

The law applies to the public and private sectors.

The Employment Equality Agency has the right to take legal action in cases of infringement.

5.7 Infringement of Directive 76/207 by Italy

5.7.1 Article 1 of Law No. 903 and Article 15 of Law No. 300 seek to eliminate discrimination.

There is no definition of indirect discrimination but, for example, Article 2 prohibits discrimination that occurs indirectly, through preselection methods.

The terms used in the Directive concerning discrimination based on marital or family status are also used in the Law.

The 1977 Law covers equal treatment in access to employment and promotion (private and public sectors and self-employed occupations), access to and content of vocational guidance, remuneration, age limits and leave of absence to look after a child. Article 13 of Law No. 903 covers other conditions of employment.

5.7.2 Any legislative provisions contrary to the law are null and void; any provisions in collective agreements or individual contracts of employment, company rules and articles of professional associations which are contrary to the law are also void.

5.7.3 The law prohibits de facto discrimination in the areas it covers. Victims of de facto discrimination have the right of redress. There is still a problem with regard to areas not covered by the law, in particular working conditions other than those listed.

The law asserts that no discrimination exists where a particular sex is required for certain occupations, e.g. fashion, the arts and entertainment. Occupations in the armed forces are the only exceptions. Women have been admitted to the police force since the enactment of Law No. 903. The Government declared that women are on an equal footing with men in the fire service, the civil guard, the prison service and the customs service. No provision is made for reviewing the exceptions.

Law No. 903 is regarded as positive discrimination in itself. Any discrimination based on sex is prohibited at all levels of the hierarchy as regards access to employment and promotion whatever the conditions of recruitment and whatever the sector of activity. Discrimination is prohibited even if exercised indirectly by means of preselection procedures, in printed form or any form of advertisement specifying a particular sex as a condition of recruitment.

The provisions of the law in respect of access to employment are applicable to the public and private sectors and self-employed activities.

Access to employment of pregnant women:

The law prohibits discrimination in access to employment on the grounds of pregnancy; consequently, any enquiry prior to recruitment is prohibited.

The expression "working conditions" is understood to cover the aspects of the employment relationship explicitly referred to in the law and in respect of which discrimination is prohibited. For example, remuneration, classification, retirement age, parental and adoption leave, industrial accidents, social security and dismissal.

The system of redress provided for in Article 15 of Law No. 903 refers solely to behaviour contrary to the provisions in Article 1 (access to employment) and Article 5 (ban on assigning women to work during specific hours in factories).

Proceedings initiated by the Commission on this point:

Formal notice: 4 May 1981. Action brought before the European Court on 1 June 1982. Hearing on 22 March 1983. Case 163/82 (1).

The Court delivered its judgment on 26 October 1983; it ruled in favour of the Italian legislation (see 13.4).

- 5.7.4 Certain provisions concerning parental leave and the possibility to be absent during a child's first year of life do not conform to the principle of equality.

The Commission has initiated infringement proceedings on the provision concerning leave for adoption, which is denied to men. Formal notice: 30 July 1980. Opinion: 4 May 1981. Action brought before the Court, see case 163/82 above.

Italy is the only country where provision is made for remuneration during parental leave.

- 5.7.5 Persons who consider themselves wronged may claim redress before the magistrate competent for the place where the offence was committed. The legislation, however, does not cover the entire field of application of the Directive. Action to claim legal remedy may be brought by trade unions. Public employees on the other hand must bring their case before the administrative tribunals. Workers in the private sector, the self-employed and applicants for private training courses are entitled to claim legal remedy and must bring their case before the local magistrates (pretore). The burden of proof lies with the employer.
- 5.7.6 The law contains no provision regarding information. The trade unions have distributed booklets.
- 5.7.7 At present, a survey of indirect discrimination is under way in the appropriate circles.

(1) OJ C 160/7, 25.6.82; hearing report page 147.

5.7.8 Cases brought to court:

Some 30 rulings have been handed down in this area. There was one remarkable case in which the Council of State rejected as unfounded the claim of a woman who had been refused access to the Naval Academy.

5.8 Implementation of Directive 76/207 by Luxembourg

5.8.1 The Commission initiated infringement proceedings against Luxembourg for failure to apply the Directive.

Formal notice to adopt specific measures: 19 July 1979.

Reasoned opinion: 28 March 1980.

Following adoption of the Law of 8 December 1981 the infringement proceedings were filed.

The Law of 8 December 1981 on equal treatment of men and women applies to access to employment, promotion, guidance, training, further training and retraining, access to a self-employed occupation and working conditions (Article 1). The principle implies the absence of any discrimination based on sex, either direct or indirect, by reference in particular to family or marital status (Article 2).

Examination of this law by the Commission revealed that its scope of application with regard to persons was not clearly specified and it also lacked a clear definition of working conditions. Finally, Article 2 allows restrictions on access which run counter to the Directive.

The Commission sent a formal notice on 5 July 1983 and a reasoned opinion on 18 April 1984. (Case 180/86 - 21.7.86)

5.8.2 Any provisions in an agreement, regulation or law contrary to the principle of equal treatment as defined by the law is null and void (Article 6).

5.8.3 Provisionally, legal and administrative provisions restricting the employment of women in the following areas are not considered contrary to the law: night work; army volunteers; employment as officers, sergeants and constables in the police force and the gendarmerie; the customs service; the priesthood; the postal service; prison warders; the forestry service; bailiffs (1).

(1) For more details, see Action 3, page 91.

The Law provides that after consulting the trade associations and the Committee on Women's Employment, the Government may determine when sex may be specified as one of the conditions of employment, including the training leading to it, or where the nature of the activity is such that sex constitutes a determining factor (Article 3).

- 5.8.4 Measures to promote equal opportunities and measures to protect women, particularly in the case of pregnancy or maternity, are not considered as contrary to the Law (positive discrimination).
- 5.8.5 De facto discrimination is prohibited with regard to access to all types and all levels of vocational guidance, training, further training and retraining (Article 4) and as regards working conditions (Article 5) and access to employment (Article 3).
- 5.8.6 The Law prohibits any reference to sex in the conditions or criteria for access to vocational guidance, training, further training or retraining, or the inclusion in these conditions or criteria of clauses which amount to or imply discrimination based on sex; the presentation of training courses as more suitable for one sex; refusal of access to one of the above-mentioned areas for reasons directly or indirectly related to the person's sex.
- 5.8.7 Working conditions are not defined. Article 5 ensures equality in working conditions and dismissal. The Law provides that employers or those publishing vacancy notices or job announcements may not refer, even implicitly, to a particular sex. Provision is made for criminal law penalties against offenders.
- 5.8.8 The Law provides for protection against dismissal, the main reason for which is based on the employer's reaction to: a reasoned complaint made either within the undertaking or private or public department which employs the worker, or to the Inspectorate of Labour, or legal proceedings aimed at enforcing compliance with the principle of equal treatment in the sectors referred to in the Law (Article 8).

The right of redress: claims in the private sector are brought before the court competent on matters concerning employment contracts, and in the public sector before the Conseil d'Etat, Claims Committee.

The right to claim redress is individual but if the complaint concerns the application of the principle of equal treatment under a collective agreement, the trade unions may take part in the proceedings. The burden of proof lies with the complainant.

- 5.8.9 A worker who is not recruited on account of pregnancy may claim redress. She is required to inform the employer of her condition.
- 5.8.10 The Inspectorate of Labour and Mines and the employment authorities are responsible for ensuring application of the principle.
- 5.8.11 Number of cases: no case concerning application of the Law of 8 December 1981 has yet been before the Court. However, some 30 cases are before the arbitration tribunal concerning the award of the household allowance in the private sector, and cases will soon be brought before the Conseil d'Etat against the Government with respect to the head of household allowance (1).

5.9 Implementation of Directive 76/207 by the Netherlands

- 5.9.1 The Commission served notice on the Netherlands to adopt specific measures to implement the Directive on 10 May 1979. One Law was adopted on 1 March 1980 and another on 2 July 1980. The infringement proceedings were suspended.
- 5.9.2 The Laws refer to indirect discrimination and discrimination based on family and marital status. The Government considers that the concept of "family breadwinner" may constitute a form of indirect discrimination. The laws are applicable to all workers in the public and private sectors and all self-employed persons. They cover access to employment and promotion, equality of access to vocational guidance, promotion, further training and retraining, training in firms, vocational guidance, working conditions and termination of employment.
- 5.9.3 Any clauses that conflict with the prohibition of discrimination in all matters covered by the Directive are void.
- 5.9.4 The Laws protect de facto discrimination in the areas covered by the Directive.

(1) See implementation of Directive 75/117, page 24.

5.9.5 Exclusion from certain activities (1):

Women are admitted to the armed forces and the police but not to all activities. Provision is made for a derogation from the principle of equal treatment in cases where sex constitutes a determining factor.

Infringement proceedings initiated by the Commission:

Formal notice: 6 April 1982. The laws establish a framework for exceptions that are not in accordance with Articles 2.2 and 9.2 of the Directive. Regulation 1957/250 on subsidies for family support services is not in accordance with Article 3.

Article 1 of Law No. 86 of 1 March 1980 and Article 1 of Law No. 384 of 2 July 1980 amending Dutch legislation applicable to the private and public sectors provide that equal treatment provisions are not applicable:

- when concluding an employment contract,
- in respect of access of workers to training,
- to working conditions, promotion or termination of an employment contract when sex is a determining factor.

This is a general derogation - (grounds of morality are even cited) - which is not in accordance with the aims of the Directive. The Directive implies that a list of excluded occupations and, where applicable, the training courses leading thereto, must be prepared; any exception to the principle, however, does not concern the conditions of employment relating to these occupations.

However, certain occupations are closed to members of one sex or the other; for example, men may not be employed as home helps. Article 7 of the Law of 1 March 1980 provides for the continued temporary payment of a special "bread winner's" allowance to male workers under 23.

The Netherlands Government does not believe a list of exceptions is required by the Directive, for it would be difficult to provide for all cases.

With respect to the access of men to employment as home helps, the decision of the Minister for Social Welfare that where a feminine form is used for a job title it is implicit that men may also take up this occupation has eliminated this infringement.

Infringement proceedings: a reasoned opinion was sent on 29 May 1983. Grounds: under the legislation public and private employers are entitled to derogate from the principle of equal treatment under a general clause which

(1) For more details see Action 3, page 91.

a) provides that certain occupations and, where applicable, the training courses leading thereto, may be excluded from the field of application of the Directive (as provided by the Directive) including promotion and working conditions, which is contrary to the Directive;

b) does not list the occupations excluded from the field of application of the Directive.

5.9.6 There are no legal provisions concerning pregnant women. According to the Government, an employer may not in principle question a worker on this point and pregnancy may not be invoked as grounds for refusal to recruit.

5.9.7 With respect to access to all types and levels of vocational guidance, training, further training and retraining in firms the principle applies to public and private establishments and to training in firms. Exceptions: training colleges for priests and nuns.

In the case of training subsidized by the State the loss of entitlement to a subsidy may constitute an additional penalty.

5.9.8 The expression "working conditions" is not defined in legal instruments. It is generally taken to mean all the rules workers can expect the employer to observe under the employment contract.

5.9.9 The legislation on equal treatment does not expressly provide for legal remedy, but injured persons in the private and public sectors, self-employed workers and persons undergoing training may appeal for annulment or request the Court to rule that the act in question is illegal. Individuals have the right to claim legal redress and the burden of proof lies with the complainant.

5.9.10 The Law provides that dismissal of a worker on the grounds that the worker has complained through legal or other channels against a presumed discrimination is null and void.

The worker may claim the dismissal to be invalid by notifying the employer within two months of termination. This protection applies only to workers in the private sector.

Equal treatment is not guaranteed by all collective agreements, internal company rules, etc. but the provisions laid down in agreements or in internal company rules are considered to be equally applicable to men and women. Workers have the right of redress.

5.9.11 Vacancy notices and job advertisements:

The law applies to both the public and private sectors. Where sex is given as a condition of employment reasons must be supplied. Only the injured persons and trade unions may come before the Court. The National Department of Psychological Research may suspend cases of illegal recruitment in the public sector.

A survey of small advertisements appearing on Saturday over three months found that 59% of the 1,783 cases of discrimination in the wording of vacancies favoured men (mainly in the catering trade, construction and industry) and 41% favoured women (mainly health and education).

Number of cases: two Court rulings concerning the March 1980 Law (equal treatment) and two concerning the Law of 2 July 1980 (public sector).

- 5.9.12. A draft law has been tabled amending the Labour Law of 1919 with a view to repealing the ban on nightwork.

5.10 Implementation of Directive 76/207 by the United Kingdom

- 5.10.1 The definition of discrimination in Article 2.1 of the Directive is not incorporated in the legislation but a distinction is drawn between two types of discrimination based on sex:

- direct discrimination occurs where persons of one sex are treated less favourably than those of the other;
- indirect discrimination: United Kingdom legislation is an exception among the Member States in that it seeks to define the concept: Section 1(1) of the Sex Discrimination Act and Article 3.1 of the Northern Ireland Order state that indirect discrimination occurs where a requirement or condition applied to persons of both sexes operates to the detriment of one sex and cannot be shown to be justifiable irrespective of the sex of the person to whom it is applied.

The Act contains provisions designed to eliminate certain forms of inequality together with restrictions and exceptions. The adjectives "direct" and "indirect" are used in the handbooks explaining the Act. The term "indirect" is in current use to describe the situations referred to in the Act. Section 1(1)(b) states "a person discriminates against a woman if he applies to her a requirement or condition which he applies or would apply equally to a man but which is such that

the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and which is to her detriment because she cannot comply with it".

Some examples of indirect discrimination that are illegal under the Act are given: requiring qualifications more commonly found in workers of one sex, even where they are not needed for the job; setting an age limit of 30 for recruitment examinations.

Any provisions connected with marital status which, for example, require a woman to resign upon marriage are illegal. The law makes no reference to family status, however; this made it possible for the Employment Appeal Tribunal to rule that in the event of dismissal a pregnant woman had no recourse under the Act.

- 5.10.2 Access to employment of pregnant women: a woman is not required to declare her condition but in the event of dismissal she has no recourse, as noted above.
- 5.10.3 The Act and the Northern Ireland Order cover the public and private sectors, full-time or part-time work, access to employment, promotion, vocational guidance and training and their content, access to benefits, facilities or services provided by the employer, and protection against dismissal or unfavourable treatment. The definition of employment covers self-employed workers who undertake to work on a personal basis under contract.
- 5.10.4 The Act does not provide for nullity of clauses contrary to the principle in collective agreements, internal company rules or the rules governing the self-employed occupations. It does, however, establish that any condition constituting discrimination in individual employment contracts is null and void (Section 77).

Infringement proceedings initiated by the Commission:

The Act does not provide for the nullity of contrary clauses in accordance with Articles 3(2)(b), 4(b) and 5(2)(b) of the Directive.

Formal notice: 29 July 1980.

Reasoned opinion: 9 October 1981.

Case brought before the European Court: 3 June 1982 (1).

Conclusions of the Advocate-General: 7 June 1983.

The Court delivered its judgment on 8 November 1983, finding in favour of the Commission (see 13.5).

- 5.10.5 De facto discrimination is illegal and any injured person has the right of redress.

(1) OJ C 165/9, 2.7.1982 and page 149.

5.10.6 Certain occupational activities and the related training are excluded from the field of application of the Directive:

- employment in private households (Section 6(3)(a) of the Act and Article 8(3)(a) of the Northern Ireland Order);
- businesses with five employees or less (Section 6(3)(b) and Article 8(3)(b));
- access of men to the profession of midwife (Section 20 and Article 20).

Infringement proceedings initiated by the Commission: (see above).

Formal notice concerning these exceptions: 29 July 1980.

Reasoned opinion: 9 October 1981.

Case brought before the Court: 3 June 1982. As seen above, judgment delivered on 8 November 1983.

The following are also excluded:

- partnerships involving five or fewer partners (Section 11),
- Ministers of Religion (Section 19) and those serving in the armed forces, including the navy and the air force (Section 85(4)).

A number of posts are open to women in the armed forces but not as combat troops and not on warships. Women are required to resign on marriage. The law requires the Government to consult the Equal Opportunities Commission on any proposals to amend the list of exceptions.

The Equal Opportunities Commission is examining the question of oil rigs, where the situation varies from one company to another, with a view to the adoption of an Order in Council.

Section 7 of the Act and Article 10 of the Order provide for exceptions for such occupations as actor, fashion model, etc., posts where it would be impossible to provide separate accommodation for male and female workers (e.g. on ships and remote building sites) and jobs where men and women require special care (e.g. in prisons, hospitals, etc.) (1).

Infringement proceedings with respect to the latter point initiated by the Commission. Formal notice: 1 July 1982. Commission Decision of 25 April 1983 to send reasoned opinion. Proceedings subsequently suspended.

5.10.7 Conditions of access to employment and selection criteria: it is unlawful for an employer to apply discriminatory selection criteria or refuse to offer employment to a person on grounds of sex or marital status (Section 6).

(1) See also Action 3, page 91.

Public and private employment agencies are prohibited from discriminating against women (Section 15). It is further prohibited to publish any advertisement which indicates, or might be understood to indicate, an intention to discriminate (Section 38).

- 5.10.8 The Act defines training as including all forms of education and instruction. However, the Government states that single-sex establishments providing general education and not any form of vocational or technical training are outside the scope of the Directive. Thus, they are not bound to admit pupils of the opposite sex (Section 26).
- 5.10.9 Public or private bodies or employers providing vocational training may not exercise discrimination in the conditions of access to training (or to guidance in the case of training bodies) (Sections 6, 14, 29 and Articles 8, 17 and 30).
Discrimination in advertisements relating to guidance or training is prohibited.
- 5.10.10 Collective agreements, company staff rules and codes governing self-employed occupations containing discriminatory clauses on training are not affected by the Act, but any discrimination resulting in practice would be illegal. Under the Act, however, contrary clauses in individual labour contracts are considered null and void. The Equal Opportunities Commission may lodge a complaint (or make an enquiry) to eliminate discrimination in collective agreements (in 1981, 3,132 enquiries were made: 1,033 relating to application of the Sex Discrimination Act and 319 to the Equal Pay Act; 232 on education and 815 on advertisements).
- 5.10.11 The expression "working conditions" is not defined in the Act. It requires equal treatment in the areas of the employment contract not covered by the Equal Pay Act.
- 5.10.12 Section 6 of the Act and Article 8 of the Order prohibit discrimination by employers in the public and private sectors in respect of working conditions or conditions of dismissal, access to benefits, facilities and services.

Some collective agreements and Wages Orders may contain discriminatory clauses in respect of part-time workers. If these agreements make specific reference to the sex of the worker they may be submitted to the Central Arbitration Committee for amendment.

- 5.10.13 Individuals in the public and private sectors, the self-employed and candidates for training who consider they are the victims of discrimination on grounds of sex or marital

status in the sphere of employment or training have the right to bring an action to claim redress before an industrial court (Section 63 of the Act, Article 63 of the Order).

The burden of proof is on the complainant, who may be represented by another. When the complainant can establish that dismissal has taken place, the burden of proof is reversed. In cases of indirect discrimination, when the complainant has submitted sufficient proof, the respondent must prove that the condition or requirement is justified on grounds other than sex. Forms have been drawn up which the complainant may use in order to challenge in writing the person he accuses of discrimination. The questions and answers can be admitted as evidence in legal proceedings.

- 5.10.14 Number of cases: 1 January - 31 December 1981 (Sex Discrimination Act) = 259, including 92 court rulings. 1976 - 243; 1977 - 229; 1978 - 171; 1979 - 178; 1980 - 180 (source: 6th EOC Annual Report).
- 5.10.15 Reprisals against a person who has initiated legal proceedings as provided by the law, or has furnished proof or information in connection with proceedings initiated by others are considered to be discriminatory acts (Section 4).
- 5.10.16 The aims of the Act have been disseminated by the media and a series of guides and pamphlets have been published by the Ministries and the EOC.
- 5.10.17 The Act makes no general provision for positive discrimination but empowers employers, the Manpower Services Commission, the Industrial Training Boards, to organize special training schemes for persons of a particular sex where the number of persons of this sex recruited for specific jobs in the preceding 12 months has been low or to encourage persons of this sex to take advantage of available job openings (Sections 47 and 48 of the Act and Articles 48 and 49 of the Order).
- 5.10.18 Gibraltar: Implementing measures concerning Gibraltar have not yet been notified. The Commission has initiated infringement proceedings in this connection. Formal notice: 1 July 1982.
- 5.10.19 Vacancy notices and job advertisements: All forms of discrimination in vacancy notices are prohibited. They must be so worded as to leave no doubt. The Equal Opportunities Commissions (United Kingdom and Northern Ireland) alone may refer cases to an industrial tribunal. They may ask a County Court to issue an injunction or court order suspending the discriminatory advertisement.

5.11 Infringement proceedings initiated by the Commission

5.11.1 **Belgium**

Formal notice: 30 July 1980

Reasoned opinion: 8 May 1981

Grounds: (a) Failure to give effect to Article 4 of the Directive

(b) Leave for bringing up children granted only to women employees in the public sector.

With respect to (a) the Royal Decree of 16 October 1981 has since been issued but the concept of vocational guidance and training should not be restricted to apprenticeship for a trade or occupation in the private or public sector, undertakings or services, as specified in that Decree.

Case brought before the Court: 3 June 1982 and hearing on 22 March 1983, Case 164/82 (1).

As regards point (a), the Commission withdrew the action when Belgium adopted the Royal Decree of 29 June 1983.

As regards point (b), a Royal Decree put an end to discrimination in this area.

5.11.2 **Denmark**

Formal notice: 30 July 1980

Reasoned opinion: 15 April 1982

Case brought before the Court in September 1983. Case 149/83.

Grounds: Principle of equal treatment applies only in respect of men and women employed at the same work place, which limits the effect of the principle. The law also limits the effect of the principle to vocational guidance and training leading to paid employment.

Case 149/83 was withdrawn from the register when Parliament adopted the amendment recommended by the Commission (Law No. 117 of 28 March 1984).

5.11.3 **Federal Republic of Germany**

Formal notice to adopt specific measures implementing the Directive: 10 May 1979. Adoption of the Law of 13 August 1980 led to suspension of the infringement proceedings by the Commission.

Formal notice: 15 January 1982. Reasoned opinion: 29 September 1982. Decision to refer the case to the Court: 26 April 1983.

Grounds: The law does not respect the principle of equal treatment in self-employed occupations and the public service, nor in vocational training programmes at school. It does not list the occupations that are excluded. It provides for leave for bringing up children for women only.

Non-discrimination is not guaranteed in respect of vacancy notices.

After sending a reasoned opinion on 29 September 1982, the Commission referred the matter to the Court of Justice on 9 November 1983 (Case 248/83). The Commission also

(1) See page 153.

initiated new infringement proceedings (former Case 119/83). Formal notice was served on 23 December 1983 on the grounds that following failure to conclude an employment contract with a person on grounds of sex, German law requires the employer to pay damages only if breach of trust has occurred, thus limiting the possibilities for claiming greater damages. (See the judgment of the Court of 10 April 1984, Case 14/83, set out in Chapter 12.10.)

5.11.4 France

1. Formal notice: 30 July 1980. Reasoned opinion: 12 May 1981.
Grounds: infringement of Article 3 of the Directive.
The law authorizes exceptions in the public sector with respect to recruitment and allows different requirements for men and women.
Case filed.
2. Formal notice: 24 August 1982. The Commission found that Law 82/380 did not comply with the Directive (derogations with regard to recruitment).
3. Following the adoption of Law 84/16 of 11 January 1984 the infringement proceedings were closed. The new law is being examined.

5.11.5 Ireland

1. Formal notice: 29 July 1980. Reasoned opinion: October 1981.
Grounds: a) midwifery profession open only to women
b) restrictions on the right of legal redress
c) certain occupations excluded from the application of the principle of equal treatment.
The Commission has suspended infringement proceedings since the notification in October 1982 of the European Communities (Employment Pay Equality) Regulations.
Case filed: 26 April 1983.
2. Formal notice: 8 March 1983. Reasoned opinion: 15 March 1984.
Exclusion of certain occupations from the scope of the Directive.

5.11.6 Italy

Formal notice: 30 July 1980. Reasoned opinion: 4 May 1981.
Case brought before the Court: 3 June 1982.
Case 163/82. Hearing: 22 March 1983.
Grounds: a) working conditions contain exceptions to the principle of equal treatment: the law requires equal treatment only in respect of certain working conditions;

- b) only women entitled to three months' leave following the adoption of a child (infringement of Articles 5 and 6).

The Court gave judgment on 26 October 1983 (see Chapter 13.4).

5.11.7 Luxembourg

Formal notice to adopt specific measures implementing the Directive of 19 July 1979. Reasoned opinion: 28 March 1980. Grounds: Failure to implement the Directive.

The Law of 8 December 1981 led to the suspension of proceedings.

After examining the new law the Commission initiated fresh infringement proceedings, brought before the Court on 23 April 1986 (Case 180/86).

Grounds: The Grand Duchy has maintained provisions contrary to Article 3 of the Directive: reserving certain public posts for former "army volunteers" and restricting women's access to police jobs.

5.11.8 Netherlands

1. Formal notice to adopt specific measures implementing the Directive: 10 May 1979.

Adoption of two Laws on 1 March 1980 and 1 July 1980 led the Commission to suspend infringement proceedings.

2. Formal notice: 6 April 1982. Reasoned opinion sent on 20 May 1983.

Grounds: Laws No. 86 of 1 March 1980 and No. 384 of 2 July 1980 called into question.

Derogation from the principle under a general clause.

5.11.9 United Kingdom

1. Formal notice: 28 July 1980.

Reasoned opinion: 9 October 1981. Case brought before the Court on 3 June 1982 (Case 165/82) (1).

Conclusions of the Advocate-General: 7 June 1983.

Grounds: a) the law makes no provision for the nullity of contrary clauses in accordance with the Directive;

b) Section 77(1) of the Sex Discrimination Act applies the Directive only partially in the case of self-employed activities, contrary to Articles 3, 4 and 5 of the Directive;

c) Section 6(3) excludes from the field of application employment in private households and businesses with five employees or fewer, which is contrary to Article 2;

d) certain restrictions on access to the mid-wifery profession for men (Section 20).

(1) See page 149

The Court gave judgment on 8 November 1983 (see chapter 13.5).

2. Formal notice: 1 July 1982. Commission decision to send a reasoned opinion: 26 April 1983.
Grounds: Section 7(2)(b)(c)(d) of the Sex Discrimination Act provides for an exception to the principle of equality with respect to the provision of special care. Implementing measures for Gibraltar have not been notified.
A reasoned opinion was sent on 10 May 1984. The proceedings were suspended.

5.12 Some examples of complaints before the Commission

1. The following case is described in detail as an example. The employment of a British woman teacher under contract to the British Ministry of Defence, for the Armed Forces stationed in Germany, was terminated following her marriage. She approached a Member of the European Parliament who informed Mr Richard's Head of Cabinet. The Directorate-General for Social Affairs decided to take note of the complaint. The Commission requested information from the United Kingdom Government. Following this an amendment to the contracts was introduced allowing women to marry while under contract; but it remains to be seen whether a married woman may be recruited (married men are recruited). The Commission has requested further clarification on this point.

The case has been dropped following a change in the rule.

2. Complaint lodged by the Comite de Liaison et de Solidarite des femmes belges following the dismissal of 13 women employed by Beckart-Cokrill. The Committee alleged that Articles 2.5.1 and 7 of Directive 76/207 and Article 1 of Directive 75/117 had been infringed.
In this firm, women who were not heads of families were required to work part-time to release full-time posts for men (at a time when work was lacking in the men's workshop and not in the women's) and avoid the dismissal of 13 woman workers. Following a strike by the women employees, a joint committee countenanced the dismissal of the 13 women who had been the most active in the dispute. Public opinion was alerted by the Women's Liaison Committee. the dismissed women submitted a petition to the European Parliament. The Commission requested explanations from the Belgian Government. A complaint has been lodged with the Social Legislation Inspectorate.

3. Complaint lodged by the Comité de Liaison des femmes belges on 22 October 1981.
According to the Committee the Royal Decree of 24 December 1980 allows indirect discrimination against married women for it awards higher allowances to heads of household, which by definition excludes women.
The infringement comes within the scope of Directive 79/7 (the concept of head of family must be eliminated in social security matters).
This infringement was the subject of a formal notice issued to Belgium by the Commission on 5 July 1983 (see Chapter 6.5.1).
4. Following the complaint lodged by an MEP on 21 May 1981 concerning the refusal to admit girls to the College of Nautical Studies at Antwerp (French-speaking section) on 7 July 1980, the Commission has requested the Belgian Government for information on several occasions.
This complaint has been shelved.
5. A complaint was lodged regarding the refusal by the British Ministry of Education to award to a student in receipt of a grant and the mother of one child, a supplementary allowance for a dependant on the grounds that she had not been married before beginning her studies.
6. A complaint was lodged by the Dutch Equal Opportunities Council on 20 June 1984. Under the new social security arrangements introduced on 1 January 1983 the concept of "breadwinner" has taken the place of the former concept of "head of household". A problem has arisen regarding the interpretation of Directive 79/7/EEC relating to indirect discrimination in the case of an increase in respect of a dependent spouse. The Commission believes that this retrograde step would be justified only in cases where the measure would guarantee a minimum income. (See Chapter 6.5.8.)
7. The French CFDT trade union has lodged a complaint with the Commission regarding discrimination in access to employment in the public service. It is expected that the Commission will initiate new infringement proceedings (see Chapter 5.5.6).
8. The complaint lodged by the Italian body "Il Tribunale 8 Marzo" has not been followed up by the Commission. According to this body, the Law of 25 March 1983 on recruitment by name which enables employment offices to recruit 50% of workers by this method is likely to have a negative impact on the recruitment of women (previously, employment offices were required to recruit applicants in numerical order). After examination the Commission did not proceed with this complaint.

(On this same subject, please refer to Written Questions Nos. 2290/82 and 2357/83 by Mrs Cinciari Rodano.)

6. COUNCIL DIRECTIVE (79/7/EEC) ON THE PROGRESSIVE
IMPLEMENTATION OF THE PRINCIPLE OF EQUAL
TREATMENT FOR MEN AND WOMEN IN
MATTERS OF SOCIAL SECURITY

6.1 What is a statutory social security scheme?

The content of such a scheme is established by law, without any consultation with undertakings or occupational sectors. There are many inequalities between men and women although both pay the same contributions, which are generally related to earnings. There is one inequality that does not derive from the scheme itself: on average women's earnings are lower than men's since they are generally employed in lower-paid occupations, with the result that their pensions are correspondingly lower.

A few examples of discrimination

Some schemes establish a different notional income for men and women. Benefits acquired by one or other spouse are automatically paid to one member of the couple (the husband).

There is sometimes a difference in retirement age for men and women.

A married woman who does not have a job is dependent on her husband and is covered by his insurance as regards sickness benefits, but the reverse is rare and a husband who is not employed could not - or only with great difficulty - be covered by his wife's insurance.

Contributions by an insured man gives his widow entitlement to a pension but a widower would not be entitled to a pension on the death of his insured wife.

6.2 Occupational or supplementary schemes

Their content is established through concertation within the undertaking or occupational sector concerned. Their scope is limited to a specific sector (company schemes, schemes under collective agreements, etc.). They supplement the statutory schemes, particularly but not exclusively with regard to retirement pensions.

There are many forms of discrimination in these schemes, for example: some schemes are open only to men; married women are sometimes excluded from certain schemes; women's membership may be optional; the requirement to work full time in order to belong to certain schemes has the effect of mainly excluding women from these schemes.

6.3 Article 119 and equal treatment in matters of social security

In its judgment of 25 May 1971 (Defrenne v Sabena (1)) the European Court of Justice stated that social security contributions directly governed by the legislation, excluding any element of agreement within the undertaking or occupational branch concerned and applicable to the general categories of workers did not constitute a "consideration" within the meaning of Article 119 and consequently were not included in the concept of "pay". Consequently, legal proceedings cannot be instituted in respect of discrimination deriving from the application of a statutory social security scheme nor can it be banned under Article 119 (2).

Following this judgment the Directive on equal pay 75/117/EEC could have covered benefits under occupational social security schemes but it was decided to exclude discrimination in this field from the scope of the Directive.

Article 1.2 of Directive 76/207/EEC provides that "with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application". In pursuance thereof the Commission proposed a legal instrument covering statutory and occupational schemes. The Council of Ministers, however, adopted a Directive of more limited scope providing for the gradual implementation of the principle of equal treatment in statutory social security schemes with provision for exceptions. Occupational schemes were subsequently covered by the Directive of 24 July 1986.

6.4 Content of Directive 79/7/EEC

The Directive applies to the "working population - including self-employed persons, workers and self-employed persons whose activities are interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired or invalided workers and self-employed persons" (Article 2).

Its substantive scope is limited to "statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, unemployment; social assistance, insofar as it is intended to supplement or replace the schemes referred to above" (Article 3(a)(b)).

"The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status."

(1) See page 117.

(2) Judgment of the Court, see page 116 et seq.

Exceptions: the Directive does not apply to survivors' benefits nor those concerning family benefits (Article 3.2). It is possible to exclude from the scope of the Directive the determination of pensionable age, advantages granted to persons who have brought up children, granting of increases of long-term invalidity, old age, industrial accident and occupational disease benefits for a dependent wife (Article 7).

The Directive covers increases in sickness and unemployment benefits in respect of a spouse and increases in all areas in respect of a child.

The Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of 22 December 1978 (end 1984). This particularly long time limit reflected the difficulties of implementing the Directive which, despite its limited scope, could partly be ascribed to its financial implications.

6.5 Initial implementation of the Directive

Directive 79/7 has led to changes in the Member States' legislations. The amendments and remaining forms of discrimination are given below merely to illustrate a stage in a changing situation.

In its interim report on the application of the Directive (COM(83)793 final), the Commission emphasized the need to observe the deadline (22 December 1984) by which Member States should have made the necessary amendments to their legislation.

6.5.1 **Belgium**

To eliminate discrimination with respect to the concept of 'dependant' in the areas of disability and sickness (in particular for health care) three Royal Decrees were adopted in 1980. Other measures will be taken.

- A Decree of 23 January 1980 introduced a wider definition of a 'worker with a dependant' to include women with dependent spouses.
- A Decree of 16 May 1980 established the principle of equal treatment for men and women with regard to dependants under the health care scheme (compulsory health insurance).

In future, a husband may be classed as a dependant in the same way as a wife; the husband or wife may be in charge of the household; if the parents are separated any children will be the dependants of the parent who provides for them.

- A Decree of 30 June 1980 on health care and disability specifies that either the husband or the wife may be in charge of the household.

Discrimination has been noted with respect to:

- unemployment: an unemployed head of household, whether man or woman, has certain advantages (only 5% of unemployed women are heads of household). Unemployed women suffer a reduction in the maternity leave allowance.
- Part-time work: provisions applying to part-time work may be a source of indirect discrimination since these measures mainly concern women;
- Pensions: benefits calculated at the "household" rate are restricted to married male workers; discrimination exists in respect of minimum pension rights and retirement age.

On the basis of a complaint lodged by the Comité de Liaison des Femmes the Commission served formal notice on Belgium on 7 September 1984; this notice was supplemented on 18 June 1985, and a reasoned opinion was submitted on 2 June 1986. The Royal Decree of 24 December 1980 which introduced the notion of cohabitation for purposes of establishing the amount of unemployment benefit constitutes more severe indirect discrimination than previously permitted.

The Court of Justice concluded that, in the context of transitional provisions regarding the obligation imposed on Member States by Community law, on no account should a Member State, during the transitional period, adopt measures that would aggravate the situation in respect of the said obligation. (Case 77/82, Anastasia Peskeloglou v Bundesanstalt für Arbeit, 23 March 1983.)

6.5.2 The **Danish Government** has forwarded a list of laws enacted between 1974 and 1980 which have anticipated the Directive.

- Law No. 66, 21 February 1978 (daily allowance)
- Law No. 94, 9 March 1976
- Law No. 324, 19 June 1974 (hospitals)
- Law No. 677, 15 December 1978 (disability pensions)
- Law of 15 December 1978 (old-age pensions)
- Law No. 79, 8 March 1978 (industrial accidents)
- Law No. 609, 29 November 1978 (family allowances)
- Law No. 333, 27 June 1980 (social assistance)
- Law No. 203, 3 June 1978 (supplementary pensions)
- Law No. 373, 15 August 1980 (unemployment benefit).

Denmark considers that existing forms of discrimination are covered by the exceptions provided for by the Directive.

Old-age and disability pensions: women who are not Danish nationals but are or have recently been married to a Danish national are entitled to the same pension rights as Danish women (Article 7(1)(c)).

A wife's allowance is granted to a male holder of an old-age or disability pension. A wife aged 62-67 is not herself entitled to a pension (Article 7(1)(c)).

"Single" women are entitled to an old-age pension at the age of 62 (Article 7(1)(a)).

Widows' disability pensions: the period of residence of the deceased spouse may sometimes serve as the basis for calculation (Article 7).

Widows' pensions: there is no corresponding widowers' pension (Article 3(2)).

Social assistance: women who are not Danish nationals but are or have been married to a Danish national have the same rights as the latter to social assistance in the form of regular maintenance payments (outside the scope of the Directive).

The Danish Government has examined certain situations with regard to pensions (indirect discrimination).

6.5.3 **France** does not consider that any new measures are necessary to conform with the Directive and invokes the exceptions provided for under Article 7(1)(a) and (b).

6.5.4 **Luxembourg**

The Commission served formal notice on 4 August 1986, following failure to implement the Directive within the time specified.

6.5.5 **Germany**

Germany legislation is being examined to determine whether any reforms are necessary. It has been found that the tables showing certain notional figures for remuneration for periods to be regarded as periods of insurance should be amended, for there are differences in remuneration for each sex.

The Federal Republic of Germany reports that under the Economic Recovery Law designed to promote employment and reduce the Federal budget, adopted on 20 January 1982, contributions payable to the Statutory Pension Scheme for Men and Women have been harmonized at a standard rate with effect from 1 January 1983.

6.5.6 **Ireland**

Since April 1979, social security contributions have been assessed on a percentage basis up to a certain ceiling with the same percentage rates and ceilings applying to men and women. However, the period during which unemployment benefits are paid is shorter in the case of married women, implying effective discrimination.

In the case of flat-rate disability and unemployment benefits most married women receive less than other beneficiaries, which is contrary to Article 4(1).

Under the social insurance and social assistance schemes, the conditions on which increases in benefits for dependants may be paid are different for men and women, which is contrary to Article 4(1).

A working party has been entrusted with the task of examining the concept of 'dependants' and problems connected with the application of the principle of equal treatment in matters of social security and has presented a report to the Irish Government (1).

6.5.7 Italy

The Government considers that Law No. 903 of 9 December 1977 anticipated the Directive and even goes one step further for it eliminates discrimination in family allowances and widows' pensions and takes initial action to establish a common retirement age.

The changes introduced by the above Law are the following:

- Under Article 4, women may now elect to work for as many years as men to obtain an identical pension. In the private sector firms cannot oblige women to retire before they have acquired entitlement to a full pension.
- Under Article 7, men may stop working for up to six months during the first year of a child's life provided the mother has renounced this right or the father alone takes care of the child. During the six months, a daily allowance is paid (30% of the parent's remuneration). The conditions under which this allowance is awarded are similar to those applicable in the case of sickness. It excludes home workers and domestic staff.
- Under Article 9, the father or the mother equally may apply for and obtain family allowances and increases in benefits. The same rights and restrictions apply to men and women and pensioners.
- Under Article 10, men and women working in agriculture now benefit from the same protection against industrial accidents.

(1) The Commission initiated infringement proceedings for failure to implement the Directive within the time specified, serving formal notice on 4 August 1986.

- Under Article 11, men and women now enjoy the same entitlement to pensions - disability, old-age, survivors, etc. (see Article 12).
- Under Article 12, men and women are now entitled to the same benefits, particularly in the case of industrial accident or occupational disease (see Article 11 above).

6.5.8 Netherlands

Since 20 December 1979, men and women - both single and married - may claim a disability pension (AAW) in their own name. Husband or wife may apply for benefits for dependent children.

On 17 July 1981 a proposal was submitted to the Economic and Social Committee to eliminate the following discrimination: a married couple is entitled to a pension (AOW) only if the husband (regarded as the breadwinner) is over 65, even if his wife is older than he is.

There are at present three different unemployment insurance schemes (80%, 75% and supplementary benefit). It is proposed to amalgamate these schemes and eliminate the discriminatory provisions.

A complaint was lodged with the Commission concerning the new social security scheme, under which the concept of "head of household" has been replaced by that of "breadwinner", which constitutes a form of indirect discrimination against married women workers (Law of 1 January 1983). A problem of interpretation of the Directive arises regarding the notion of indirect discrimination in the case of increases in respect of dependent spouses. A retrograde step would be justified only if this measure guaranteed a minimum income.

6.5.9 United Kingdom

Amendments to the 1980 Social Security Act and the 1980 Northern Ireland Social Security Order refer mainly to dependants' benefits.

A married woman - living with her husband - who claims an increase in benefit (national insurance or industrial injuries insurance) for her children:

- is no longer required, as of November 1983, to show that her husband is incapable of self-support; the only condition is that his weekly earnings do not exceed the increase.
- this last condition was to be lifted in November 1984.

Concerning a married woman's claim for an increase in benefit for her husband:

- from November 1983, with respect to unemployment, sickness benefit or maternity allowance, an increase for a dependent spouse may be obtained on the same conditions by a man or woman;
- from November 1983, notwithstanding the exception provided for in Article 7(1)(d) of the Directive, a wife may claim an increase in her invalidity pension in respect of her husband provided his earnings do not exceed the increase claimed.

Increases for certain members of the family (e.g. female relatives acting as unpaid housekeepers) will be eliminated because the conditions of award depended on the sex of the dependant (no new cases to be allowed from November 1981). Existing increases should be phased out by November 1983.

Increases in benefit for child carers will be allowed regardless of the sex of the child carer on the understanding that if this person is a man the increase will be paid only if it would have been paid to a husband. The income ceiling applicable to the husband is applied to the man looking after the child.

At present, increases in benefit for adult dependants - claimed by persons of pensionable age - can be paid only if the latter are entitled to a retirement pension. Under provisions to be announced later, increases in benefit will be paid at the same percentage rate as applied to increases in retirement pension.

From November 1983, the industrial injuries scheme was to be expanded so that provisions governing the award to a husband of an increase in respect of his wife would apply also to a wife's claim in respect of her husband.

The definition "incapable of self-support", which is superfluous in the case of dependants' benefits, was deleted from Schedule 20 of the 1975 Social Security Act and Schedule 17 of the Northern Ireland Social Security Order, with effect from 1983.

Cases of discrimination have been noted in regard to:

- entitlement to supplementary pensions;
- family income supplement (this requires one full-time income: the husband's);

- free health care when in other EEC countries: a husband may obtain care for his dependent wife but the reverse is possible only if the husband is disabled;
- certain benefits considered outside the scope of the Directive.

6.5.10 Gibraltar

There seemed to be two points on which Gibraltar did not fully conform to the Directive. Both points were settled in January 1985.

Women paid lower contributions than men, contrary to Article 4(1); since 1980, however, men's and women's contributions had been increased by the same amount each year and the remaining differences in contributions were eliminated in January 1985.

From January 1985, women's right not to pay contributions was abolished. However, in accordance with Article 7(1)(e) this right was maintained for those women who had already chosen to exercise it.

Since January 1985, a man has been entitled to a retirement pension by virtue of his wife's contributions.

6.5.11 Certain other questions are raised by the implementation of the Directive

Different practices could arise as a result of the exception provided for in Article 7 concerning the calculation of the amount of pensions.

Certain categories of workers insured under special schemes (civil servants, seamen, farm workers) in many countries should be taken into consideration.

The concept of indirect discrimination poses problems of interpretation.

In its interim report (COM(83)793 final) the Commission concedes that the question of indirect discrimination, reference to marital or family status, the concept of "head of household" and increases for dependent spouses are complex problems.

As far as the Commission is concerned, indirect discrimination should be interpreted as referring to hidden discrimination which in practice affects workers of one sex only as a result of marital or family status being taken into account in determining the rights covered by the field of application of the Directives.

The Court of Justice provided part of the answer in the context of Case 96/80 (see Chapter 12.7, page 124).

In the report, the Commission emphasizes that reference to marital or family status (including cohabitation) is not in itself prohibited by the Directives (see Article 4 of Directive 79/7/EEC which concerns "increases due in respect of a spouse and for dependants"). What is prohibited is that such references should give rise to discrimination.

In this context the Commission has considered whether a problem of indirect discrimination arises in connection with the concept of head of household and increases for dependent spouses.

The concept of head of household has practically disappeared in civil law but still appears, however, in certain social security provisions. Related concepts also exist which imply that one spouse is subordinate to or financially dependent on the other.

The Commission feels that this principle is incompatible with the concept of equal treatment.

This is one of the reasons why Directive 79/7/EEC makes no reference to the concept of head of household; it refers to spouses and dependants and authorizes, under long-term benefit schemes only, derogations with regard to the derived entitlement of a dependent spouse.

The interim report also draws attention to the conflicting opinions as to whether by making a distinction between "spouse" and "dependant", Article 4 prohibits increases in respect of a dependent spouse.

The intention in practice is certainly not to prohibit such increases, but to allow either husband or wife to claim them where the spouse is dependent. In practice, however, the beneficiary is in most cases a man.

The Commission considers that these increases can be justified only in the case of social benefits guaranteeing a minimum income.

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- (1) This chapter is a translation from the French original based on the interim report on the progressive implementation of Directive 79/7/EEC submitted by the Commission in January 1984. By October 1986, when our gathering of information for this update was concluded, the staff of DG V had virtually completed the final report, which supplements and partly invalidates the information in this chapter. The latter report, which should be ready by the time of publication of this supplement to Women of Europe, will be available from any EEC Information Office.

7. COUNCIL DIRECTIVE 86/378/EEC ON THE IMPLEMENTATION OF
THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN
IN OCCUPATIONAL SOCIAL SECURITY SCHEMES

7.1 Introduction

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

Occupational schemes fall between statutory social security schemes and purely private insurance contracts. Unlike the former, their content is not therefore defined by law; but, unlike the latter, it is not defined, either, by free negotiation between individuals and insurance companies. The schemes supplement the benefits provided by statutory social security schemes (for old age/survival, unemployment, invalidity, sickness) or, more rarely, replace them.

They include:

- 1) schemes based on collective agreements between employers' and workers' representatives and applying to an undertaking, an occupational sector or several such sectors;
- 2) company schemes, set up or planned unilaterally by the employer for the benefit of his workers or certain categories thereof, whether he allocates specific reserve funds for this purpose or uses the services of an insurance company (group insurance, for example) or finances the planned benefits under the heading of staff expenditure;
- 3) schemes set up by the representatives of a self-employed occupation (craftsmen, doctors, lawyers, etc.).

The new legal instrument concerns all these types of scheme. The basic distinguishing feature of occupational schemes - unlike, for example, purely individual insurance - is that affiliation to such schemes forms part of the conditions of employment in the sense that it derives, directly or indirectly, from the contract of employment or from the exercise of the occupational activity in question.

The second paragraph of Article 119 of the Treaty lays down that "pay", means not only the wage but also any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer. The benefits provided by occupational schemes thus fall within the scope of that paragraph.

With regard to the Directive's material field of application, while the same risks must be covered as those provided for by the Directive of 19 December 1978, the area covered as far as employees are concerned must be widened to include all benefits which may be deemed to fall within the scope of the second paragraph of Article 119.

On the other hand, the field of application with regard to persons and the scope of the principle of equal treatment correspond with the relevant provisions of the Directive on statutory social security schemes.

Women benefit proportionately less than men from occupational schemes because such schemes are often lacking in firms employing chiefly female labour and because of the exclusion of part-time work from many occupational schemes. For these two reasons wider social protection initiatives are necessary. The social protection of part-time work, the subject of a Commission proposal for a Directive, will have the effect of affording to part-time workers protection equivalent to that afforded to full-time workers.

The Commission will in the near future submit to the Council proposals aimed at regulating the matters at present excluded from Directive 79/7/EEC and the present Directive. The Directive will help to bring legal certainty to an area in which the application of the principle of equal treatment is still subject to considerable doubt.

7.2 The content of the Directive

The aim of the Directive is implementation of the principle of equal treatment in occupational social security schemes (Article 1).

Like previous Directives concerning equal treatment, the Directive's field of application with regard to persons relates to all categories of the working population, whether wage-earners or self-employed, including the sick, pensioners, the unemployed and the disabled (Article 3).

The material field of application includes occupational schemes which cover the risks provided for in the Directive on equal treatment in statutory social security schemes: sickness, invalidity, old age, industrial accidents/occupational diseases and unemployment. This correspondence is explained by the close relationships between statutory and occupational schemes (Article 4).

In the case of employees it includes all social benefits, whether in cash or in kind, which may be provided by these schemes, in so far as they constitute a consideration in respect of their employment. However, Article 9 gives Member States the right to defer compulsory application of the Directive as regards the pension awarded to the surviving spouse.

Article 5 defines the scope of the principle of equal treatment in occupational social security schemes: the absence of any discrimination, de jure or de facto, based on sex, either directly or indirectly by reference, in particular, to marital or family status (as in the case of statutory schemes). The Article also recalls that this principle is without prejudice to any provisions relating to the protection of women on maternity grounds.

To avoid misunderstandings, Article 6 lists a number of provisions which are contrary to the principle of equal treatment. This list is not exhaustive.

A few examples from Article 6:

- Certain occupational schemes, particularly pension schemes, are open solely to men; women are excluded from them. In other cases, the exclusion relates only to married women.
- Others are compulsory for men, but optional for women.
- The fixing of a lower age for women than for men as a condition for the granting of the retirement pension is relatively frequent in occupational schemes. (This is frequently encountered in countries whose statutory schemes also provide for this particular feature.)
- In some occupational pension schemes which apply the system whereby contributions are accumulated to build a capital sum (money purchase system), this sum is transformed into a pension on the employee's retirement and, at the time of this operation, the amount of the pension will be calculated assuming a life expectancy which differs for men and women. The woman's pension, for example, will be lower than that of her male colleague because she is expected to draw it for a longer period.
- Differing rates of contribution according to the sex of the worker are excluded.

Member States must take all measures necessary to ensure that provisions contrary to the principle of equal treatment are rendered null and void or amended. Such provisions cannot, of course, be approved or declared compulsory by the public authorities (Article 7). The deadline for application is three years from 30 July 1986.

The Member States may defer compulsory application of the principle of equal treatment as regards:

- determination of pensionable age for the purpose of granting old-age or retirement pensions;
- pension awarded to the surviving spouse (Article 9).

There is a special link in these two fields between the provisions of occupational schemes and the corresponding provisions of statutory schemes.

Any person who is a victim of discrimination has a right to pursue his claims at law (Article 11).

Workers are protected against dismissal following on a complaint aimed at ensuring that the principle of equal treatment is complied with (Article 11).

8. COUNCIL DIRECTIVE (86/613/EEC) ON THE APPLICATION OF THE PRINCIPLE OF EQUAL TREATMENT BETWEEN MEN AND WOMEN ENGAGED IN AN ACTIVITY, INCLUDING AGRICULTURE, IN A SELF-EMPLOYED CAPACITY, AND ON THE PROTECTION OF SELF-EMPLOYED WOMEN DURING PREGNANCY AND MOTHERHOOD

8.1 The aims, scope and provisions of Directive 86/613/EEC

The Directive covers self-employed workers, including farmers and members of the liberal professions, and their spouses, not being employees or partners, who habitually participate in the activities of the self-employed worker (Article 2). The aspects covered by the Directive are the same as those covered by Directives 76/207/EEC and 79/7/EEC, "especially in respect of the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity including financial facilities" (Article 4).

The Directive also deals with the formation of companies between spouses, and with social security cover for spouses. With regard to protection during pregnancy and motherhood, the Directive confines itself to requiring Member States to "examine" the conditions under which self-employed women have access to services supplying temporary replacements or existing national social services and are entitled to cash benefits under a social security scheme or under any other public social protection system (Article 8).

As provided in the other Directives on equal treatment, Member States are required to establish the right of recourse to the courts, where it does not exist already, for the purpose of securing the rights embodied in the Directive, and to publicize the measures adopted pursuant to the Directive (Articles 9 and 10).

The general time-limit for bringing the necessary laws, regulations and administrative provisions into force is 30 June 1989.

9. THE COMMUNITY ACTION PROGRAMMES

9.1 Introduction

In May 1980 the Commission organized a conference in Manchester which brought together representatives of the various national committees for equal opportunities and women's employment. The conference took stock of action taken so far, and what remained to be done. The conclusions reached were further developed by the European Parliament's ad hoc committee on women's rights, which had prepared the Resolution on the position of women in the European Community, adopted on 11 February 1981 (1).

Pursuing the same objectives, the Commission drew up a Community Action Programme on the Promotion of Equal Opportunities for Women 1982-1985 (2), having consulted representatives of the two sides of industry. The Programme was drafted in cooperation with equal opportunities and women's employment committees in the Member States, which the Commission brought together in a standing liaison committee to advise it on these matters. The European Parliament's support for these actions is particularly important.

The Commission's Programme covers two types of action, one aimed at strengthening the rights of the individual, as a means of achieving equal treatment, the other at the practical achievement of equal opportunities, particularly by means of positive action.

As part of the first type of action the Commission aimed to step up its efforts to ensure the application of existing Directives, the adoption of new Community instruments and the revision of national legislative provisions. Examples of such actions, some of which have already led to amendments to proposed legal instruments or to preliminary drafts, are given below. The results of this programme are described below.

Carrying on the work started with this first Programme to promote equal opportunities for women, the Commission approved a second, the Medium-term Community Programme 1986-90 (3).

9.2 Action Programme 1982-1985

The results of the 1982-85 Programme are reviewed in a report on application of the New Community Action Programme on the promotion of equal opportunities for women (1982-1985) (COM(86) 204 final) submitted by the Commission to the Council early in 1986.

(1) OJ C 50 of 9.3.81, p. 35.

(2) Bulletin of the European Communities and Women in Europe, supplement No. 9.

(3) Bulletin of the European Communities, supplement No. 3/86, and Women in Europe, supplement No. 23.

9.2.1 Implementation of existing Community Directives on equal treatment for men and women

Action 1: reinforcing and monitoring application of the Directives

"To reinforce and monitor the practical application of the Directives in the Member States, their progress and the interpretation given to Community measures at national level, with particular attention to indirect discrimination."

The Commission has developed contacts through the Advisory Committee on Equal Opportunities for men and women; this Committee was set up by a Commission Decision of 9 December 1981 (82/43/EEC) (1), to assist the Commission. Since the Manchester Conference, the Commission has organized regular meetings of committees and commissions on equal opportunities for women or for women's employment, in an informal liaison group. The Commission thought it essential that this group, which it consults regularly, should be given a formal structure, as it also provides liaison between national bodies for the promotion of equal opportunities. Ten organizations representing both sides of industry are represented on the Committee as observers. The first meeting was held on 11 and 12 March 1982. It dealt specifically with desegregation in public services, the effect of taxation on the employment of women, and the setting-up of a network to monitor application of the Directives.

A network of independent experts from all Member States has been set up to monitor the practical and legal implementation of Directives, and to note obstacles and cases of discrimination. They keep in close contact with the members of the Advisory Committee on Equal Opportunities, national committees for women's employment, etc. This group held its first meeting on 12 January 1983 in Brussels, dealing mainly with the concept (and cases) of "indirect discrimination", for which a British member of the network suggested the following definition: "Indirect discrimination is the operation of a law, practice, arrangement or requirement which is neutral and equal on its face, but which in practice has a disproportionately adverse impact and cannot be justified by the requirements of the job or basic necessity irrespective of sex". In May 1983 the experts submitted a report to the Commission concerning the situation in the Member States.

(1) OJ L 20/35, 28.1.82.

This network of experts continues to operate, keeping the Commission up to date with new provisions adopted in each country and the activities of bodies concerned with equality:

- In Belgium, under Article 135 of the Law of 4 August 1978, two committees, for the public and private sectors respectively, prepare reports, on request, for courts hearing actions having a bearing on equality between men and women.
- In France, the Law of 13 July 1983 provides for the creation of a Council on Occupational Equality between Men and Women under the ministers responsible for women's rights, labour, employment and vocational training. The Council has the task of participating in the definition, implementation and application of policy on occupational equality between men and women (Article L 330.2).
- In Greece, Law No. 1288/82 set up a Council on equality between the sexes which gives opinions and submits proposals to the Prime Minister; it is an independent department under the ministry attached to the President's office. Law No. 1414/84 established a structure setting up an office for equality between the sexes in each labour inspectorate and two departments for equality between the sexes in the Ministry of Labour, one in the working conditions directorate and the other in the labour council.
- In Ireland, an inter-departmental working party on women's affairs and family law reform was set up in 1983 to assist the Minister of State for women's affairs in identifying ways of eliminating existing discrimination and promoting positive measures.
- In Italy, a decree of 8 October 1982 set up, under the Ministry of Labour, a national committee on the application of the principle of equal treatment with the task of formulating proposals, suggesting measures and ways and means of abolishing discrimination and obstacles to the achievement of equality, and expressing opinions on legal proceedings brought by women in this field.
- In the Netherlands, in May 1981 the Emancipatieraad (equal opportunities council) became the Government's external advisory body, and the Government is now required to seek its opinion in good time on all matters concerning equal treatment.
- In the United Kingdom, the Secretary of State for Employment is advised by the Advisory Committee on Women's Employment (ACWE).

- In the Federal Republic of Germany, no new bodies have been set up, but those already in existence have been given wider powers, both at Federal and at Land level.

9.2.2 Legal redress in respect of equal treatment

"To encourage workers to avail themselves of little-used means of redress (including reversal of the burden of proof)."

In 1984 the Commission had a comparative analysis made of the arrangements for redress available in the Member States in relation to the provisions of Article 119 of the EEC Treaty and Directives 75/117 and 76/207 (Doc. V/564/84). The conclusion that this study seems to indicate is that in those countries where special bodies offering advice and assistance have been set up, or more flexible means of redress made available, female workers have become more aware of their rights of recourse to the courts.

Provision is made in Belgium, the Federal Republic of Germany, Ireland and the United Kingdom for reversal of the burden of proof (the employer or whoever is accused of discrimination being required to prove that there has been no discrimination).

9.2.3 Action 3: revision of national and Community protective legislation

"To abolish in accordance with Directive 76/207 unjustified protective legislation in the field of access to employment and working conditions and to promote equal standards of protection for men and women."

In 1982 the Commission carried out a study on protective provisions and activities remaining outside the scope of the Directive on equality of treatment (Doc. V/707/3/82). Legislation protecting women is based on a traditional view of the respective roles of men and women, which is to some extent based on obvious physiological differences, and this has meant that women have been spared certain types of work. But existing legislation sometimes fails to protect them against working conditions which are particularly hard on women, while in other cases it perpetuates the marginalization of women's work.

According to this study, discrimination takes the following forms:

- discrimination challenged on principle as being contrary to the Directive (e.g.: midwives (D), nightclubs (F, L), small undertakings (UK), teaching in corrective education (F), nursing staff (IRL), postmen (L), bailiffs (L);

- unjustified discrimination requiring the adoption of progressive measures: armed forces (F, D, I, IRL, NL, UK), police (DK, F, IRL, L), gendarmerie (F, L), firemen (IRL, L, NL);
- admissible discrimination: clergy, actors, male singers, artists and models;
- discrimination calling for further study: prison staff (B, DK, D, F, IRL, L, UK), combat units (all countries);
- protective measures unrelated to a desire for specific protection which should be abolished or made applicable to both sexes: working time (D, GR, NL, UK); time off for housework (D); leave for family reasons (F, NL); ban on Sunday working (D, F, GR, IRL, NL, UK);
- measures for social reasons which are no longer relevant to the role of women today: ban on night work in industry (all countries except DK);
- measures to help women avoid particularly arduous working conditions (to be generalized) i.e. the availability of a chair in shops, etc. (F, IRL, NL); the right to a break (D, F, GR, UK);
- measures intended to spare women certain types of particularly arduous working conditions (to be abolished) i.e. ships' crews, navying (B, D, UK), work in blast furnaces (D, IRL).

The majority of the Member States are currently reviewing their protective legislation, particularly in regard to bans on night work and to work in mines.

9.2.4 Action 4: equal treatment in matters of social security

"To achieve equal treatment in occupational social security schemes. To extend the principle of equal treatment provided for in Directive 79/7 to the sectors not falling within its present scope or in which an exception could be made. To establish gradually the individual social security entitlement of married women or women cohabiting."

Equal treatment in this field must be brought about in stages. Directive 79/7 applies to statutory schemes only. A further Directive concerning occupational schemes (1) has therefore been adopted.

(1) See page 84.

The Commission is furthermore preparing a legal instrument designed to eliminate discrimination in areas not covered by Directive 79/7. It is also studying the implications of the concept of head of household as applied in social security, with a view to "individualizing" the entitlement to benefits of married women and women cohabiting. Regarding the concepts of head of household and indirect discrimination, see 6.5.11 above.

9.2.5 **Action 5: application of the principle of equal treatment to self-employed women and to women in agriculture, particularly in family enterprises**

"To improve the occupational status of self-employed women and of women in agriculture and to affirm equal access to employment, promotion and vocational training."

Although Directive 76/207 is applicable to the self-employed (trade, crafts, liberal professions) and to agriculture, many aspects related to these activities are not adequately covered. The Commission therefore made a study of current measures in the Member States in areas specific to women workers which were not covered by Community Directives, with the aim of defining the occupational status of self-employed women and women in agriculture, and establishing their rights as regards social security benefits and remuneration.

On the basis of this study, various proposals were formulated with a view to drawing up a legal instrument, to which end a proposal for a Directive was submitted to the Council of Ministers. This proposal seeks to ensure that women have access to recognized status (as paid workers or partners) or to establish certain rights for spouses working in a self-employed capacity (own entitlement to social security, vocational training and professional representation). It also provides for the protection of pregnancy and maternity through replacement services or a system of compensation (social security or other form of social protection). This proposal is at present being discussed by the Council.

A Memorandum on income taxation and equal treatment for men and women, submitted by the Commission to the Council, was published on 14 December 1984 (COM(84) 695 final).

Provisions should be made for the following situations:

- (a) at present, the work of a spouse who helps to run a family business not established as a company is not given full recognition; the husband is often the sole head of the undertaking. The spouse does not generally benefit from the growth in assets which is the result of her work. In the event of the death of the owner, and failing a system of preferential rights for the surviving spouse or any other system whereby she would receive a share of the firm's assets representing her own work, she can be excluded from the undertaking to the benefit of other heirs.

National legislation sometimes imposes restrictions on the formation of a company by spouses jointly operating a business, which might otherwise be a way of ensuring that the work of either spouse is recognized for the purposes of inheritance.

- (b) Taxation: generally speaking, salary paid to the spouse can only be deducted from the taxable income of the owner of the business up to a certain limit. As a result, the spouse's salary tends to be lower than that which would be paid to another wage-earner. The separate taxation of spouses, or full deductibility from the owner's taxable income of the salary paid to the spouse, are the sort of measures which could in varying degrees eliminate existing discrimination.
- (c) In most countries, spouses jointly operating a family business cannot build up entitlement to retirement or invalidity pensions, or maternity benefit in their own right.
- (d) The spouse of a self-employed person does not always have access to the same training facilities as the self-employed person; another form of discrimination occurs when the cost of the spouse's training cannot be deducted as business expenses.
- (e) Women who wish to be self-employed encounter particular difficulties; first of all there are traditional attitudes which discourage young girls from training for certain types of work, or which prevent women from setting up their own business. In some countries, moreover, legislation does not favour the granting of loans to women, as a result of the way matrimonial law operates.
- (f) The spouse of a self-employed person, who takes part in running a family business, should always have the same rights within trade organizations as the self-employed person himself.

The Commission has lent support to the formation of self-employed women's associations and organization of training courses (on management, for instance).

9.2.6 Action 6: taxation and the employment of women

"To implement the principle of equal treatment by revising income tax systems which appear to have an indirect adverse effect on women's employment, their right to work and their promotion in employment."

The Commission is particularly concerned about the negative effect of income tax on the incentive to work for married women. "The main features of income tax systems which could have special impact on the work decisions of married women are whether or not the earned incomes of spouses are aggregated, the distribution of allowances between the husband and wife and how these change when the wife enters the labour market, and the progressivity of the tax schedule" (1).

In view of the fact that the tax systems which apply in certain Member States adversely affect equal opportunities for women, the Commission has undertaken a comparative analysis of taxation systems in the Community (2).

On the basis of this analysis, the Commission adopted, in December 1984, a Memorandum (3) stating that a system of totally independent taxation should be recommended, taking the principle of equal treatment into account.

9.2.7 Action 7: parental leave, leave for family reasons

"To extend parental leave and leave for family reasons and at the same time to build up the network of public facilities and services."

One of the ways chosen to achieve the progressive harmonization of individual responsibilities is to extend parental leave and leave for family reasons and at the same time to improve public facilities and services.

Parental leave is a relatively recent element in working conditions; one could define it as leave granted to a male or female worker with family responsibilities in respect of a dependent child, of a duration to be determined and within a given period following the end of maternity leave.

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- (1) Community action programme COM(81) 758 final.
 - (2) Study V/2798/1/82.
 - (3) COM(84) 695 final.

Leave for family reasons is leave which a male or female worker with family responsibilities may obtain in the case of sickness of a child or another member of the family of which the worker is part, or in such circumstances as are deemed appropriate.

It is not the first time that the Commission has tackled these questions. It has pointed out that leave and other benefits granted following maternity leave are covered by Article 5 of Directive 76/207/EEC since they do in fact constitute working conditions (see above, infringement procedures initiated by the Commission against Member States).

Parental leave exists in three Member States: Belgium (public sector), France and Italy (paid). In Germany, under the Law of 1 July 1979, the mother alone is entitled to four months' paid leave in addition to maternity leave. In the United Kingdom the mother may take time off work after maternity leave. In France parental leave was introduced by the Law of 12 July 1977. In Greece, maternity or adoption leave for the father or the mother is provided for in a draft law on the protection of motherhood and facilities to enable working parents to bring up their children. Conditions governing parental leave should be such that a free choice is available in practice.

Leave for family reasons varies from country to country as to practical details and duration. Generally speaking, it is paid, and granted to the father as well as the mother. A Community instrument could provide for leave of this kind in case of sickness of a child, a spouse, a close member of the family or the person looking after the children, or school holidays, etc. Such leave should be paid and provisions concerning guaranteed employment, entitlement to social security and seniority should be clearly specified.

A proposal for a Directive was lodged with the Council on 22 November 1983. Parliament and the Economic and Social Committee have delivered their opinions. An amended proposal (COM(84) 631 final of 9 November 1984) is at present under study within the Council.

The current proposal contains four sections, on general provisions, specific provisions for parental leave, leave for family reasons, and implementing provisions.

9.2.8 **Action 8: protection of women during pregnancy and motherhood**

"To abolish discrimination against pregnant women in recruitment, to improve and harmonize maternity leave and to promote paid leave for ante-natal check-ups."

The Commission has undertaken a comparative study and assessment of the financial implications of the measures already adopted by Member States with a view to identifying the most appropriate protective provisions for maternity and finding better ways of transferring the financial responsibility to public funds rather than leaving it to employers.

When it has completed the necessary consultation procedures, the Commission will examine the desirability of proposing harmonization of Member States' legislation.

9.2.9 **Development of positive action**

"To promote at national level framework legislation to develop positive action."

The legal provisions on equal treatment are designed to afford rights to individuals; they are inadequate for the elimination of all forms of discrimination unless parallel action is undertaken, either by governments or other bodies responsible for social policy, to counteract or compensate the effect of existing social structures on individual behaviour. Such action may take different forms ranging from information campaigns, through action which public authorities may take when awarding public contracts, to policies for diversifying vocational training and measures aimed at eliminating inequalities which restrict women's opportunities.

A seminar, attended by policy makers and trades unions, was held in Athens in September 1983 to discuss the situation and the measures to be taken. At this seminar the role of the European Social Fund and the European Centre for the Development of Vocational Training was emphasized. Attention was drawn to the need for a Community instrument to promote positive action. It was generally underlined that, in times of crisis, greater efforts needed to be made and that the first objective at the present time was to change attitudes not only on the part of men, governments and employers but of women themselves, who should be informed of their rights and the procedures for enforcing them.

On 24 April 1984 the Commission submitted to the Council a draft recommendation on the promotion of positive action for women, the aim of which was to promote the establishment at national level of legal and political frameworks to foster the development of measures to promote equal opportunities for women (COM(84) 234).

The recommendation proposed that the Member States adopt and promote appropriate positive action measures designed to:

- (a) eliminate or counteract the prejudicial effects on women in employment or seeking employment arising from existing social attitudes, behaviour and structures based on perceived division of roles in society between men and women;
- (b) encourage the participation of women in all occupations and sectors of working life where they are at present under-represented, and at all levels of responsibility.

The draft became the Council Recommendation of 13 December 1984 on the promotion of positive action on behalf of women (OJ L 331 of 19.12.1984). This is an important step towards equal opportunities.

The Member States have already adopted a number of measures, some of which are set out in the Commission's progress report on the implementation of the Community Action Programme (COM(83) 781). All countries have set up many training and apprenticeship programmes aimed at broadening occupational choices. For example, measures concerning the regional placement offices in Denmark, or the training of vocational guidance counsellors in the Federal Republic of Germany and in the United Kingdom contribute to the desegregation of the labour market.

The Commission is currently drawing up a recommended code of conduct for use as a reference guide by all people involved in organizing positive action.

9.2.10 **Action 10: integration into working life** (in particular with respect to new technologies)

"To promote the diversification of occupational choices for women and the mastering of new technologies, with particular reference to guidance and initial and continuing training."

Attention should be drawn to the contributions made in this connection by the European Social Fund and CEDEFOP. In addition, the Commission has supported specific action (for example, a unit offering an introductory course in micro-processing was set up in Paris) and seminars to prepare girls

for these branches; a study has been made of the opportunities and hazards associated with the electronic office in the context of women's employment.

An experimental network of equal opportunities advisers from each Member State has been set up to foster integrated national programmes on education and training, with particular emphasis on new technologies.

In addition, during 1985 and 1986 the Commission ran a series of round table discussions in the various Member States, all on the central theme of how women can be integrated into the world of new technologies and what can be done to avoid the adverse effects that can stem from the changes brought about by new technologies.

9.2.11 **Action 11: vocational choices**

"To make girls, their families and their schools aware of the job opportunities available to girls."

The Commission has set up a network of equal opportunities advisers with the task of identifying obstacles, shortcomings in education systems and vocational training courses, and assessing experiments in diversification of training. On the basis of results obtained, each adviser will be called upon to indicate what action is needed in his or her national education and training system to bring about the desired changes.

9.2.12 **Action 12: desegregation of employment**

"To promote desegregation in employment in all sectors and occupations and at all levels of the occupational hierarchy."

The public sector was the first to be chosen: the Commission carried out a comparative analysis of desegregation in the public service in selected Member States. In this connection, the Commission intends to bring together the national officials responsible for personnel policy in the public service to make a study of positive action taken in each country.

The cooperative sector is another where the Commission has been active more recently: having carried out a study, it has provided support, including financial backing, for the formation of cooperatives set up by women.

In the banking and industrial sectors, a campaign to raise awareness was organized, with a large number of seminars and cooperation on running action-research projects in various banking institutions.

9.2.13 **Action 13: analysis of trends in female employment**

"To assess progress made towards achieving equal treatment in employment and working conditions and towards achieving desegregation."

Here again a group of experts was set up to establish more appropriate common indicators for monitoring women's employment trends and the impact of national policies in this respect.

The results of the studies will form the main basis of the Commission's policy on women's employment.

9.2.14 **Action 14: application of the principle of equal treatment to women immigrants**

"To promote the right of immigrant women to equal access to employment and training."

The Commission has analysed instances of discrimination in legislation and administrative practices. At the same time, CEDEFOP has evaluated vocational and language training measures implemented in the Member States and organized a seminar on this theme.

9.2.15 **Action 15: sharing of occupational, family and social responsibilities**

"To enable men and women to live parallel and complementary occupational, family and social lives."

The Commission organized studies on the following subjects having a direct bearing on this theme: women's position in decision-making bodies (1), the findings of which will provide the basis of the proposals that the Commission is drawing up on Community guidelines; the infrastructure of social and public facilities (child-minding) (2), a fundamental matter to be resolved when considering the sharing of family responsibilities; and the general topic of the sharing of occupational, family and social responsibilities (3).

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- (1) Doc. V/1181/82
 - (2) Doc. V/1784/83
 - (3) Doc. V/484/84

9.2.16 Action 16: development of public attitudes

"To make the public at large and those directly concerned aware of the positive aspects of a change in attitudes."

There is strong opposition to the trend towards equality for women. Stereotyped attitudes and discriminatory behaviour persist and tend to intensify in a context of economic crisis. Hence the need to emphasize the new values, particularly via the mass media.

The Commission is intensifying its information campaigns (seminars, meetings, publications, etc.), directed in particular towards women's groups and associations, the press and the media in general, and specialists such as the legal profession.

Parallel studies were made of the image of women presented on television and the position of women working in television. These studies served as the groundwork for a seminar held in Brussels in 1985 with a view to increasing the awareness of television managements and encouraging them to take positive action to improve the position of women and eliminate stereotypes distorting their image.

9.3 Medium-term Community Programme 1986-90

The 1982-85 Programme set in train a series of actions and created a dynamic which the Commission considered it necessary to maintain. In the light of the experience gained, there was an essential need for a further Programme to provide a framework for the Commission's initiatives aimed at promoting equality between the sexes.

The objectives of this medium-term Programme (1) were defined by the Commission as follows:

- To consolidate rights under Community law, particularly by improving the application of existing provisions and adopting the proposals under examination;
- To follow up and develop action launched under the 1982-85 Action Programme, in particular the networks for contacts and exchanges which represent a new form of social dialogue in this area, and which have made a very positive contribution;
- To intensify efforts to involve all those concerned through a broader dialogue and a consciousness-raising campaign aimed at the people involved and at a wider target public;

(1) COM(85) 801, page 2.

- To develop and intensify support for specific actions, in particular those intended to develop women's employment;
- To develop and adopt such action, in particular with regard to the most vulnerable and/or disadvantaged categories;
- To examine the situation in the new Member States of the Community;
- To continue and strengthen positive action at the level of Community staff policy.

The Commission intends to pursue these objectives by concentrating on seven framework actions, in which it trusts it will be supported by cooperation from the Member States: improved application of existing provisions; education and training; employment; new technologies; social protection and social security; sharing of family and occupational responsibilities; and increasing awareness - changing attitudes.

10. THE SITUATION IN GREECE, SPAIN AND PORTUGAL

10.1 Introduction

These are the three countries which joined the European Communities most recently (Greece in 1981, Spain and Portugal in 1986), and they are currently going through a period of adapting their legislation to Community law. Hence this chapter dealing with them specifically.

10.2 Greece

Since the date of Greece's accession, Community law has been part of its domestic law. Greece should have taken the measures necessary to implement Directives 75/117/EEC and 76/207/EEC by 1 January 1981. It may be considered that the time-limit was implicitly extended. Article 4(1) of the 1975 Constitution establishes equality of rights between the sexes. The Civil Code was recently amended in accordance with the principle of equality between men and women, by Law No. 1329 of 15 February 1983 on application of the constitutional principle of equality between men and women in civil life (together with the implementing law), in commercial legislation and in the law of civil procedure. In addition, the provisions of the Civil Code concerning family law have been partially modernized.

10.2.1 **The principle of equal pay for men and women** is based on Article 22(1)(2) of the Constitution which states that all workers, regardless of sex or other distinction, are entitled to equal pay for work of equal value. This rule is incorporated in Article 119 of the EEC Treaty and Directive 75/117/EEC. The rule laid down by Article 4 and Article 22 was accompanied by a transitional provision: the transitional period for provisions contrary to Article 4(2) expired on 31 December 1982 and regarding Article 22(1) on 11 June 1978. In addition, International Labour Convention No. 100/1951 was ratified and implemented by Law No. 46/1975.

On 6 December 1984 the Commission sent to the Council a report on the implementation of the principle of equal pay for men and women in Greece (COM(84) 667 of 4 December 1984).

The Greek Government drew up a draft law transposing the detail of Directives 75/117/EEC and 76/207/EEC into national law. This draft led to Law No. 1414/84 of 30 January 1984 concerning application of the principle of equality between men and women in employment relationships, which entered into force on 2 February 1984.

From a legal point of view this new law supplemented and improved certain important points in the legislation already in force in Greece before accession. Particular mention might be made of the concept of remuneration, non-discrimination as regards occupational classification and the conditions for granting marriage and dependent child allowance, the abolition of discriminatory clauses in collective agreements, the provision of information for workers, etc.

Since 2 February 1984 equal treatment has been based on Law 1414 concerning application of the principle of equal treatment for men and women in employment relationships and other matters. Its scope is more limited than that of the Directive. The Law specifies that the provisions apply to workers employed under private law and all those engaged in the liberal professions. They do not, therefore, apply to the self-employed and to public service workers. The Law prohibits discriminatory job offers, and an employer may not refuse to recruit a woman on the grounds that she is pregnant. Under Article 5, discrimination is prohibited with regard to working conditions and promotion.

Dismissal of a person who seeks to bring an action concerning the observance of equal treatment is prohibited. Articles 8 and 9 set up an Equal Opportunities Department in the Ministry of Labour, with an Equal Treatment Office in each Labour Inspectorate and an Equal Opportunities Unit attached to the National Labour Council of the Ministry of Labour.

Article 10 provides for positive action with respect to men and women and persons with special commitments (e.g. single persons bringing up one or more children).

Article 11 concerns the review of protective legislation. Article 12 specifies that administrative penalties (fines) will be imposed on employers who fail to comply with the Law. In case of dispute the employer should approach an administrative tribunal.

Until the adoption of Law 1414, equal pay for men and women had been based on Article 22(1)(2) of the Constitution, which states that all workers, regardless of sex or other distinctions, are entitled to equal pay for work of equal value. In addition, ILO Convention No. 100/1951 had been ratified and implemented under Law 46/1975. The principle of equal pay for men and women has been applied in limited fashion by the courts so far. The Council of State judgment 4256/1979 and the Supreme Court of Appeal Judgment 1465/1980

related to family allowances paid directly by the employer. The Higher Courts have decided that this allowance constitutes a component of remuneration, but responsibility for the household devolves on the husband, and the conditions of entitlement to this allowance are not the same for married women as for married men. It should be noted that in February 1983, Law 1329 eliminated the notion of 'head of household' applied to the husband.

In judging the second case, the court of first instance had accepted the women workers' case, based on Convention 100, concerning the definition of remuneration. Although in Judgment 4256/1979 the Council of State had refused to apply the principle of equal pay to family allowances, in Judgment 520/1983 the Council of State applied the principle of equal pay on the basis of Article 22(1)(2). This case concerned the award of family allowances by the Public Power Corporation to male employees and to female employees only if their husbands did not work for the Public Power Corporation or in the public service sector. Until the adoption of Law 1414 the principle of equal treatment was based on Article 4(2) of the Constitution, the scope of which is broader than that of the Directives.

In 1981 and 1982 two judgments extended the application of the principle of equal treatment in firms to working conditions (Judgment 819/81) and recruitment conditions (Judgment 879/82).

Any discrimination based on sex should have been eliminated in all areas by 31 December 1982 under Article 116(1) of the 1975 Constitution, which established a transitional period for the elimination of provisions then in effect which were contrary to the principle of equality between men and women.

10.2.3 **Other examples of discrimination** contrary to Directive 75/117/EEC:

- In collective agreements different job classifications for men and women have been eliminated. Job titles are now applied to both sexes but the less well paid jobs are still mainly held by women.
- The requirements for less well paid jobs are typically feminine.
- Bonuses, constituting wage increases, are based on earnings and are awarded for work mainly performed by men.
- Collective agreements exist which provide for different wage levels for men and women for the same work or work in the same category.

The number of wage-earners covered by collective agreements is not known. Even in sectors covered, where the scope of an agreement is not wide, a claim can be brought only against employers who are members of the signatory employers' organizations. In some regions, certain occupations, for example catering, are not covered by collective agreements.

- 10.2.4 The principle of equal treatment is based on Article 4(2) of the Constitution. This rule is incorporated in Directive 76/207/EEC. The scope of Article 4(2) is broader than that of Directives 76/207/EEC and 79/7/EEC.

In addition, in Judgment 520/1981 the Supreme Court of Appeal decided that Article 22(2) can serve as a basis for a claim by workers if they are offering the same services under the same working conditions.

Two recent Judgments have extended the application of the principle of equal treatment in firms to working conditions (Judgment 819/1981) and recruitment conditions (Judgment 879/1982).

Any discrimination based on sex should have been eliminated in all areas by 31 December 1982 under Article 116(1) of the Constitution, which established a transitional period for provisions contrary to equality between men and women in existence before the 1975 Constitution.

- 10.2.5 **Further examples of discrimination:**

- Access to certain types of vocational training is open to women only (midwifery, kindergarten teachers, nurses);
- Quotas are laid down by sex (training for primary school teachers);
- Vacancy notices specifying one sex as a requirement (banks, public undertakings); or quotas may be fixed.

- 10.2.6 By requiring Greece to adopt supplementary measures the Directives will facilitate application of the constitutional rule and will clarify it, for example in the case of exceptions to the principle allowed under Article 116(2). The Ministry of Labour has announced that a draft law on equal treatment in working conditions and promotion will be prepared.

- 10.2.7 With respect to Directive 79/7/EEC, the time-limit for implementation is the same for Greece as it is for the other Member States. Some measures adopted by decree have partially implemented the provisions of the Directive.

Thus, Decree No. 1362/1981 eliminated discrimination with respect to the right to medical care for members of the family insured by the social insurance organization (IKA). Likewise, under the Act of 31 June 1981 wives of retired persons have individual entitlement to an old-age pension from the agricultural insurance organization (OCA). Law No. 1287/1982 grants these women the same pension rights as men, and lays down that married women in rural areas have an individual entitlement to an old-age pension on the same conditions as men (even if the husband contributes to another organization).

- 10.2.8 There are a great many provisions favouring women: they are entitled to early retirement after 15 years of work if they have young children. A daughter may be entitled to her father's pension throughout her life if she remains single, and may regain her entitlement upon divorce.
- 10.2.9 The Labour Inspectorate is responsible for monitoring application at the workplace of the principle of equal treatment enshrined in law.
- 10.2.10 **Right of redress**

Wage-earners may submit individual complaints to the Labour Inspectorate. This was the only means of redress outside the courts available to them until Law No. 1264/82 empowered the trade unions, on the occasions when they are required to meet the employer, to inform the latter of wage-earners' complaints and, if necessary, exert pressure to ensure that the principles of the law are applied.

A worker may bring a complaint before the civil courts acting as industrial tribunals. A court may, for example, order an employer to pay compensation amounting to the loss of earnings suffered. If the employment contract is found to be contrary to the law on equal pay or treatment, it may be declared void. The same possibilities are open to employees in semi-public or public undertakings.

Public service employees may settle their disputes through official channels. They may bring a complaint before the Council of State to have an administrative provision concerning remuneration cancelled. Public servants may bring a claim concerning working conditions before an administrative appeals court of the Council of State. They may go before a civil court to obtain compensation if promotion is refused or in case of dismissal.

A special procedure is followed in cases concerning remuneration of self-employed persons brought before the court; a so-called ordinary procedure is followed in other types of case. In all cases the burden of proof lies with the complainant.

- 10.2.11 **Protection in case of dismissal:** reprisals against a worker who has appealed to the Labour Inspectorate are illegal.
- 10.2.12 Law No. 1288/82 set up the Council for Equality, an advisory body.

10.3 Spain

The past ten years or so have seen what could be described as radical changes in women's legal status in Spain.

In 1975 the Civil Code was amended by Law No. 14/1975, recognizing women's full legal capacity, independent of their fathers' or husbands' "guardianship". This reform was followed by a succession of others, introduced in the spirit of the 1978 Constitution; under these reforms, women acquired equal status with men in marriage and with regard to children, specifically in respect of filiation, parental authority and property rights between husband and wife (Law No. 11/1981), and nationality (Law No. 52/1982).

As in Portugal, the transition to a democratic system, with a Constitution drawn up in keeping with the spirit of the age, brought formal recognition of equality of treatment between men and women (Articles 1.1 and 14 of the Constitution).

10.3.1 The principle of equal treatment in relation to work

The two main, not to say only, sources of law prohibiting discrimination based on sex in relation to work are the Spanish Constitution (SC) of 1978 and the Workers' Statute (WS) of 1980.

The Spanish Constitution of 1978 does not merely declare, in common with other constitutions, that equality is an essential constituent element of a legally established social and democratic State (Article 1.1 SC); nor was it considered sufficient to include sex discrimination among the forms of discrimination proscribed as contrary to the principle whereby all Spaniards are equal before the law (Article 14 SC). In the provision establishing equality in relation to work, the Constitution refers specifically to non-discrimination based on sex: "All Spaniards have the duty to work and the right to work, to a free choice of occupation or activity, to promotion through work and to remuneration sufficient to meet their needs and those of their family, and shall in no circumstances be subjected to discrimination based on sex" (Article 35.1 SC).

The scope and significance of this constitutional structure have to be determined in the light of the judgments of the Constitutional Court.

Article 14 of the Constitution protects a "subjective right of citizens to obtain equal treatment" (Judgment 2/83 of 24 January 1983). However, the Court has specified that unequal treatment is not always discriminatory, but only where "the inequality of treatment is unreasonable and therefore unjustified" (Judgment 34/81 of 10 November 1981), so that where there is an objective and reasonable justification, there is no discrimination. The Court does not treat equality as an absolute principle "according to which it is permissible to leave out of consideration the existence of objective factors reasonably justifying inequality of legal treatment (...) still less (...) where the rule refers to (...) factual circumstances which are inherently unequal, the very objective of which is to help restore or promote real equality" (Judgment 3/83 of 25 January 1983); again, "a breach of the principle of equality could arise only where, given the prerequisites for equality of situations between persons covered by the rule, such persons were treated differentially as a result of arbitrary or unjustified conduct" (Judgment 23/81 of 10 July 1981).

The promotion of equality in practice is a responsibility of the public authorities (Article 9.2), "given the social and democratic nature of the State legally established by our Constitution and the obligation laid on the State by Articles 9.2 and 35 (...) to promote conditions conducive to real and effective equality between individuals and groups" (Judgment 81/82 of 21 December 1982).

The Court has in addition determined that equality of treatment in relation to work is a fundamental right (and therefore one which can be protected by recourse to the courts): "Article 14 of the Spanish Constitution, which enshrines the equality of all Spaniards before the law, prohibits discrimination based inter alia on any personal or social condition or circumstance, which undoubtedly includes the status of employer or employee" (Judgment 3/83 of 25 January 1983). This removes all doubt as to whether the right not to be discriminated against on grounds of sex in relation to work is included among the fundamental subjective rights which can be protected by recourse to the courts.

The constitutional principle of non-discrimination in relation to work (Article 35.1 SC) has been embodied in the Workers' Statute and the Basic Law on Employment, in the following terms:

General principle: "In the employer/employee relationship, employees shall have the right: (...) (c) not to be discriminated against on grounds of sex, marital status (...) social status (...)" (Article 4.2.c WS).

Job classifications and criteria for promotion: "The employer shall apply common rules for employees of both sexes" (Article 24.2 WS).

Equal pay: "The employer shall provide equal pay for equal work, both in wages and in any wage-related supplementary payments, without any discrimination based on sex" (Article 28 WS).

Working conditions: "All provisions under regulations, clauses in collective agreements, individual agreements or unilateral decisions on an employer's part that entail favourable or unfavourable discrimination (...) on grounds of sex (...) in relation to employment, pay, working hours or other working conditions shall be deemed null and void. Any exclusions, restrictions or priorities must be sanctioned by law and must then be freely agreed. Notwithstanding the provisions of the foregoing paragraph, the Government may apply measures on restrictions, duration or priority for employment aimed at facilitating the placement of older workers, those with impaired capacity for work, the unemployed or those seeking a first job. Similarly, the Government may grant subsidies or other forms of aid with a view to fostering employment for workers in the groups mentioned in the foregoing paragraph" (Article 17 WS).

Specific training programmes: "The Government shall adopt programmes aimed at fostering employment for workers facing special difficulties in gaining access to the labour market, particularly (...) women with family responsibilities" (Article 10.1 of the Basic Law on Employment).

Placement: "Equality of opportunity and treatment in relation to work shall be a basic principle of policy on placement, and no distinction, exclusion or priority shall be established on grounds of (...) sex, (...)" (Article 38.2 of the Basic Law on Employment).

Thus, in addition to the constitutional protection and the rights of redress deriving from it (on grounds of unconstitutionality, ordinary protection, and protection) the principle of equality in relation to work is rooted in the Workers' Statute, so that any breach of the provisions quoted above can be challenged in an action before the industrial tribunals. If, as has occurred on numerous occasions, the ordinary courts or the Central Industrial Tribunal give judgment without regard to the constitutional principle of equality in labour relations between individuals, such judgment is open to appeal.

The drafting of the provisions of the Workers' Statute cited above seems to leave no scope for discrimination against women in relation to work which is still recognized as legal (if it is accepted that the subsisting "protective" rules are not, in certain circumstances, discriminatory in their effect).

The Spanish Government is currently drawing up a legal instrument to supplement the provisions in force and to adapt them to the Community Directives.

10.4 Portugal

The legal status of women in Portugal, in the sense of attaining equality of rights and opportunities, was profoundly altered by the 1976 constitution (revised in 1982) which resulted from the 1974 revolution.

Immediately after democracy was introduced, various decree-laws were promulgated and opened the doors to women, making available to them careers in local government (DL 251/74), diplomacy (DL 308/74) and the magistracy (DL 492/74).

The Constitution lays down the principle of universal equality and non-discrimination in the fields of sex (article 13) ; equality between spouses (article 36) ; participation in social and political life (articles 46 and 48) ; equal treatment at work, without discrimination (article 60) ; and equality of opportunity in education (article 74).

The constitutional principles relating to rights, liberties and guarantees are directly applicable and binding upon public and private bodies (article 13 (1) of the Constitution).

The Civil Code was brought into line with the Constitution by DL 496/77 which made important changes in Family Law, notably in establishing equality of rights and duties between spouses and abandoning the concept of the man as the head of family (article 1671 (1) and (2)).

10.4.1. Equality of opportunity and treatment at work and in employment

This principle is guaranteed by DL 392/79 dated 20 September 1979. According to its preamble "it is designed to create standards to define the legal framework suitable for applying the constitutional principles to the reality of the working world and labour laws and also to provide implementing procedures which would make it feasible to apply the said standards and principles."

It should be noted that in formulating this text the Portuguese legislator drew upon community directives 75/117 and 76/209.

Persons covered by the law : DL 392/79 applies to all workers. Domestic and home service relationships do not have a specific set of regulations. Its extension to government service (state, local and municipal) is now before the Council of Ministers for approval.

Material scope of application : Women are guaranteed access to any employment, profession or job (article 4 (1)). Work which is considered by law to constitute an actual or potential danger to the genetic function is prohibited or circumscribed.

The limitations imposed have to be reexamined from time to time in the light of the latest scientific and technical knowledge in order to be updated, revoked or made applicable to all workers (article 8 (1) and (2)).

Confining recruitment to one sex or the other in fashion, art or theatrical work is not deemed to be discrimination, provided that the work to be done is qualitatively different (art. 7 (3)).

Definition of remuneration : In guaranteeing equal pay for equal work or work for the same value this Decree-Law defines remuneration as including not only the salary in money or kind but also all supplements and services received by a worker as a result of the working relationship (article 2 c).

Indirect discrimination : The Decree-Law prohibits all direct or indirect discrimination based on sex (art. 3 (1)). It does not consider as discriminatory temporary arrangements giving a preference based on sex in order to correct an imbalance, as a social value (article 3 (2)).

Positive action : It is the duty of the state to promote, stimulate and coordinate vocational guidance and training courses for women, and special preference will be given to young people aged between 14 and 24 who do not have a compulsory school leaving certificate and to women heading single-parent households (article 5).

Offers of employment : Advertisements for jobs and other forms of publicity must not contain matter which is directly or indirectly discriminatory (article 7).

Remedies : Workers who consider themselves discriminated against have the right to take legal action either alone or through the trade union representing him or her (article 16 (1)).

Any penalty applied against the worker within one year after a claim of discrimination has been upheld, will be deemed to be victimization (article 11 (2)).

Reversal of the onus of proof : In the case of wage discrimination, the onus is on the employer to prove that any actual wage differences are based upon a factor other than sex (article 9 (4)).

A female worker need only point out the worker or workers in relation to whom she feels discriminated against (article 9 (4)).

11. THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

11.1 Introduction to the European Court of Justice

In order to guarantee that the Member States do not apply or interpret Community law in different ways, the Treaties gave the Court of Justice of the European Communities, based in Luxembourg, the task of ensuring that "in the interpretation and application of the Treaties the law is observed".

The Court consists of 13 Judges who are appointed by common accord of the Governments of the Member States. They hold office for a renewable term of six years. The Judges select one of their number to be President of the Court.

The Court is assisted by six Advocates-General, who are appointed according to more or less the same criteria as Judges and whose function is "acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court, in order to assist the Court in the performance of the tasks assigned to it". The Advocates-General do not represent the European Communities and their opinion is not binding on the Judges (1).

The Judges and Advocates-General appoint the Registrar of the Court for a renewable term of six years. The Court applies and interprets Community law exclusively. It cannot therefore interpret or rule on the validity of provisions of national law, but it can, if asked, rule on the conformity of a provision of national law with Community law.

It should be noted that although the Court is the Community's supreme judicial authority, it is not the only body which enforces Community law, since the national courts also have jurisdiction to apply and interpret Community law, in so far as its provisions produce direct effects under national law and create individual rights which national courts must protect. National courts may, and in some cases must, ask the Court to interpret Community law or to rule on the validity of acts by the Council and the Commission.

(1) The first woman member was appointed on 18 March 1981: she is Mrs. Simone Rozes, former President of the Tribunal de Grande Instance (Regional Court), Paris.

11.2 References for preliminary rulings

Where an individual who considers that his rights have been infringed as a result of failure to apply Community law brings an action before the competent national court, it may be that the court called on to deal with the matter finds there is a problem regarding the interpretation of Community law. It then applies to the Court for a ruling. Any national court may ask the Court for a ruling on the interpretation of primary or secondary Community law, regardless of its type (common law, administrative, social, etc.) or position in the judicial hierarchy. Nevertheless, for some courts, reference to the Court of Justice for a ruling is optional, whereas for others it is compulsory (1). Finally, only the national court may take the decision to ask the Court of Justice for a preliminary ruling.

Accordingly, through the procedure of a reference for a preliminary ruling regarding interpretation, the Court informs the national court of the meaning of the Community law in question (2).

The Court "rules" and the fact that it alone is competent to give a preliminary ruling ensures that the law is applied in a uniform manner, which is essential when one considers that in the Member States there are, in all, more than a thousand courts of first instance and a hundred appeal courts.

The Court, then, defines Community law and facilitates its integration. Its ruling is binding on the national court and any court called on to apply this point of Community law must follow the judgment.

Article 119 of the Treaty of Rome has given the Court occasion to clarify important points of law and some judgments have gone down in the annals of case law (cf. judgments below).

11.3 Proceedings against a State for failure to fulfil an obligation

We saw above that the Commission may initiate proceedings before the Court of Justice if a Member State has failed to take the necessary measures to bring national law in line with Community law or has failed to fulfil one of its obligations under the Treaty. These are proceedings for failure to fulfil an obligation (Articles 169 and 171 of the EEC Treaty). If the Court finds that the Treaty has been infringed, the Member State in question must take the necessary measures to comply with the judgment.

On the other hand, the judgment can neither formally oblige the Member State to put an end to the contravention, nor do away with the measure in question itself. Experience has shown, however, that Member States sooner or later take the necessary measures.

(1) Article 177 of the EEC Treaty.

(2) Articles 177 and 219 of the EEC Treaty.

11.4 Proceedings for annulment brought by individuals

"Individuals may bring proceedings for annulment under Article 173(2) of the EEC Treaty or Article 146(2) of the EAEC Treaty. Private individuals may institute proceedings only against decisions which are addressed to them or against decisions which, although addressed to another person, are of direct and individual concern to the former." (1)

Several judgments have been delivered by the European Court of Justice in connection with differences in the treatment of male and female officials (see Chapter 14).

(1) As already stated, an individual cannot therefore bring proceedings to have Directives annulled.

12. **JUDGMENTS OF THE COURT: REFERENCES FOR
PRELIMINARY RULINGS** (equal pay and working
conditions for men and women; equal treatment
in social security schemes)

12.1 Table of judgments and cases pending

<u>Judgment of</u>	<u>Case</u>
25.5.71 G. Defrenne v Sabena	80/70
8.4.76 G. Defrenne v Sabena	43/75
15.6.78 G. Defrenne v Sabena	149/77
27.3.80 Macarthys v W. Smith	129/79
11.3.81 Worringham & Humphreys v Lloyds Bank	69/80
31.3.81 J.P. Jenkins v Kingsgate Ltd.	96/80
9.2.82 Garland v British Rail Engineering	12/81
16.2.82 A. Burton v British Railways Board	19/81
10.4.84 Von Colson and Kamann v North Rhine Westphalia	14/83
10.4.84 Harz v Deutsche Tradax GmbH	79/83
12.7.84 U. Hofman v Barmer Ersatzkasse	184/83
18.9.84 W.G.M. Liefding v Directie van het Akademisch Ziekenhuis bij de universiteit van Amsterdam	23/83
26.2.86 Joan Roberts v Tate & Lyle Industries Ltd.	151/84
26.2.86 Miss M.H. Marshall v Southampton & South West Hampshire Area Health Authority	152/84
13.5.86 Bilka Kaufhaus GmbH v Karin Weber von Hartz	170/84
15.5.86 Johnston v Chief Constable of the Royal Ulster Constabulary	222/84
26.2.86 Beets-Proper v Van Lanschot Bankiers NV	262/84
1.7.86 Rummer v Dato-Druck GmbH	237/85
24.6.86 Drake v The Adjudication Officer	150/85

Cases pending:

- Tevling-Worms v Het Bestuur van de Bedrijfsvereniging voor de Chemische Industrie	30/85
- Staat der Nederlanden v Federatie Nederlandse Vakbeweging	71/85
- Newstead v Department of Transport	192/85
- The State v Minister for Social Welfare	286/85
- Clarke v Chief Adjudication Officer	384/85
- Murphy v An Bord Telecom	157/86

12.2 Judgment of 25.5.1971 in Defrenne v Sabena (Case 80/70) (1)

12.2.1 **The facts**

Miss Defrenne was engaged as an air hostess by Sabena on 19 December 1951. On 15 February 1968, Miss Defrenne's contract was terminated under Clause 5 of the contract of employment of Sabena air crew, which provides that women shall cease to be members of the crew on reaching the age of 40 years.

On 9 February 1970, Miss Defrenne made an application to the Belgian Conseil d'Etat for annulment of Article 1 of the Royal Decree of 3 November 1969 which excludes air hostesses from the pension scheme to which other members of the air crew are entitled. (In the case of air hostesses, service before the age of 40 is taken into account only in accordance with the conditions of the general scheme, not the more favourable conditions laid down by the special scheme, and they cannot claim any seniority pension before the age laid down by the general scheme (60 years for women and 65 years for men)).

Miss Defrenne relied on Article 119 of the Treaty of Rome. By order of 4 December 1970, the Belgian Conseil d'Etat referred the following question, among others, to the Court for a preliminary ruling under Article 177 of the EEC Treaty: "Does the retirement pension granted under the terms of the social security financed by contributions from workers and by State subsidy, constitute a consideration which the worker receives indirectly in respect of his employment from his employer?"

12.2.2 **Judgment of the Court**

The Court ruled that the concept of 'pay' as defined in Article 119 of the EEC Treaty does not include social security schemes or benefits, particularly retirement pensions, directly governed by legislation (statutory schemes) without any element of agreement within the undertaking or the occupational branch concerned.

The part due from the employers in the financing of such schemes does not therefore constitute a direct or indirect payment to the worker (2).

(1) (1971) ECR 445.

(2) See page 84.

12.2.3 Therefore, situations involving discrimination resulting from the application of such a system are not subject to the requirement of Article 119. On the other hand, it appears that benefits under occupational schemes could form part of the pay within the meaning of Article 119 of the EEC Treaty, if the criteria used by the Court to exclude benefits under statutory schemes from the concept of pay are taken into consideration.

Following this judgment and its implicit effect, it would have been logical for the Directive on equal pay to cover benefits under occupational social security schemes. In fact, it was not until 1986 that occupational schemes were included in a legal instrument.

12.3 Judgment of 8 April 1976 in Case 43/75 (Defrenne v Sabena) (1)

12.3.1 The facts are the same as for the previous case, but on 3 March 1968, Miss Defrenne brought an action before the Tribunal de Travail of Brussels for compensation for the loss she had suffered in terms of salary, allowance on termination of service and pension as a result of the fact that air hostesses and male members of the air crew performing identical duties did not receive equal treatment.

The Tribunal de Travail of Brussels dismissed all Miss Defrenne's claims as unfounded. On 11 January 1971 she appealed to the Cour du Travail of Brussels which, on the question of arrears of salary, decided, in pursuance of Article 177, to ask the Court for a number of preliminary rulings:

- Does Article 119 of the Treaty of Rome introduce directly into the domestic law of each Member State of the European Community the principle that men and women should receive equal pay for equal work and does it, therefore, independently of any national provision, entitle workers to institute proceedings before the national courts in order to ensure its observance, and if so as from what date?
- Has Article 119 become applicable in the domestic law of the Member States by virtue of measures adopted by the authorities of the European Economic Community or must the national legislature be regarded as alone competent in this matter?

12.3.2 Judgment of the Court

On the first question, the Court ruled that:

The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to protect

(1) (1976) ECR 455.

the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their direct origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

The Court reached this conclusion by drawing a distinction, within the whole area of application of Article 119, between direct and overt discrimination which is identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and, secondly, indirect and disguised discrimination which is identified by reference to more explicit implementing provisions of a Community or national character.

The direct effect of the principle of equal pay referred to in the first paragraph of Article 119 was limited to direct and overt discrimination (1).

On the second question, the Court ruled that the application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962 and by the new Member States as from 1 January 1973. Furthermore, Directive 75/117/EEC did not change the original scope of Article 119, it merely improved its application. The principle of equal treatment is incorporated into the domestic legal system not by law or national decree but by the law ratifying the EEC Treaty.

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- (1) In his opinion on Case 96/80 (Mrs. Jenkins v Kingsgate) the Advocate-General stated with regard to the terminology used that instead of employing the expressions "direct and overt" or "indirect and disguised" it was more accurate to say that Article 119 had no direct effect where a court could not apply its provisions on the basis of simple criteria that they themselves establish and where, consequently, implementing legislation, whether Community or domestic, was necessary to establish the criteria applicable in the case in question. (1981) ECR 938.

12.3.3 This judgment is important since it acknowledged the direct effect of Article 119, i.e. it does not require any other implementing measures, whether of a domestic or Community character, to be applied by a national court. This direct effect of the principle is restricted to direct and overt discrimination. This restriction has important consequences, particularly as regards discrimination under occupational social security schemes which is generally neither direct nor overt.

The Court of Justice has not, moreover, given a precise definition of indirect discrimination (1).

12.4 Judgment of 15 June 1978 in Case 149/77 (Defrenne v Sabena) (2)

12.4.1 On 16 September 1976, Miss Defrenne had lodged an appeal before the Cour de Cassation, Belgium, against the judgment of the Cour du Travail, Brussels, of 23 April 1975 (cf. 2nd case Defrenne v Sabena) in so far as that judgment upheld the judgment of the Tribunal du Travail, Brussels, of 17 December 1970 on the second and third heads of claim (which sought an order to Sabena to pay a supplementary allowance on termination of service and compensation for the damage suffered as regards her pension).

By judgment of 28 November 1977, the Cour de Cassation, Belgium, Third Chamber, decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

Must Article 119 of the Treaty of Rome which lays down the principle that "men and women should receive equal pay for equal work" be interpreted by reason of the dual economic and social aim of the Treaty as prescribing not only equal pay but also equal working conditions for men and women, and, in particular, does the insertion into the contract of employment of an air hostess of a clause bringing the said contract to an end when she reaches the age of 40 years, it being established that no such limit is attached to the contract of male cabin attendants who are assumed to do the same work, constitute discrimination prohibited by the said Article 119 or by a principle of Community law if that clause may have pecuniary consequences, in particular, as regards the allowance on termination of service and pension?"

(1) cf. action I of the programme on page 88.

(2) (1978) ECR 1365.

12.4.2 Judgment of the Court

As regards the scope of Article 119 of the EEC Treaty, the Court ruled that Article 119 of the EEC Treaty cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women.

On the question of the existence of a general principle prohibiting discrimination based on sex as regards conditions of employment and working conditions the Court ruled that at the time of the events which form the basis of the main action there was, as regards the relationships between employer and employee under domestic law, no rule of Community law prohibiting discrimination between men and women in the matter of working conditions, other than the requirements as to pay referred to in Article 119 of the Treaty.

- 12.4.3 This judgment defines the scope of Article 119. It cannot be interpreted as prescribing, in addition to equal pay, equality in respect of the other working conditions applicable to men and women.

12.5 Judgment of 27 March 1980 in Case 129/79 (Macarthy Ltd v Wendy Smith (1))

- 12.5.1 From 1 March 1976, Mrs Wendy Smith was employed as stockroom manager by Macarthy Ltd, wholesale dealers in pharmaceutical products (salary of £50 per week). She complained of discrimination on the grounds that her predecessor, a man whose post she took over four months after his departure, received a salary of £60 per week. Mrs Smith brought proceedings before an Industrial Tribunal on the basis of the Equal Pay Act 1970. This tribunal ordered Macarthy to pay the applicant a salary equal to that of her predecessor.

Macarthy appealed to the Employment Appeal Tribunal which dismissed the appeal by decision of 14 December 1977 (a decision which referred to Article 119 and to the Judgment of the Court of Justice of 8 April 1976 in Case 43/75 - Gabriel Defrenne v Sabena). Macarthy made a further appeal to the Court of Appeal.

The Court of Appeal decided to stay proceedings until the Court of Justice had given a preliminary ruling on the following two questions:

(1) (1980) ECR 1275.

- Is the principle of equal pay for equal work contained in Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC confined to situations in which men and women are contemporaneously doing equal work for their employer?
- If the answer is in the negative, does the said principle apply where a worker can show that she receives less pay in respect of her employment from her employer:
 - (a) than she would have received if she were a man doing equal work for the employer; or
 - (b) than had been received by a male worker who had been employed prior to her period of employment and who had been doing equal work for the employer?

12.5.2 Judgment of the Court

On the first question, the Court referred to the judgment of 8.4.76 in the Defrenne case in restating that the first paragraph of Article 119 applies directly, and without the need for more detailed implementing measures on the part of the Community of the Member States, to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question; for example, cases where men and women receive unequal pay for equal work carried out in the same establishment or service.

In such a situation, the Court states that it is necessary to establish whether there is a difference in treatment between a man and woman performing "equal work" within the meaning of Article 119. The scope of that concept, which is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question, may not be restricted by the introduction of a requirement of contemporaneity.

On the second question, the Court ruled that the principle of equal pay enshrined in Article 119 applies to the case where it is established that, having regard to the nature of her services, a woman has received less pay than a man who was employed prior to the woman's period of employment and who did equal work for the employer.

12.5.3 This judgment further clarifies the distinction between the type of situation in which Article 119 has a direct effect and that in which it does not, but once again by reference to the criterion of direct and overt discrimination as opposed to indirect and disguised discrimination; it also states that the concept of "equal work" within the meaning of this article is not confined to situations in which men and women are contemporaneously doing equal work for the same employer.

12.6 Judgment of 11 March 1981 in Case 69/80 (Worringham and Humphreys v Lloyds Bank (1))

12.6.1 In May and September 1977, two employees of Lloyds Bank, supported by the Equal Opportunities Commission, commenced proceedings before an Industrial Tribunal under the provisions of Section I(2)(a) of the Equal Pay Act 1970, seeking relief from the alleged contravention of the equality clause incorporated in their contracts of employment.

The inequality of pay brought before the national court was alleged to result from the provisions of the two retirement benefit schemes (one for male employees and one for female employees) relating to the obligation on staff under the age of 25 to pay contributions. Male staff under the age of 25 are required to contribute 5% of their salary to their scheme, whereas this requirement does not apply to female staff. To cover these contributions, Lloyds add an additional 5% to the gross salary paid to these male employees. Furthermore, the amount of the salary, in which the above-mentioned 5% contribution is incorporated, helps to determine the amount of certain benefits and social advantages.

When this case was rejected by the tribunal, the two applicants appealed to the Employment Appeal Tribunal, on the basis of Article 119 of the Treaty and Article 1 of the Directive 75/117/EEC and also Articles 1(1) and 5(1) of Directive 76/207/EEC. The tribunal held that there was an inequality of pay within the meaning of the Equal Pay Act, without further examining the arguments put forward by the parties under Community law.

(1) (1981) ECR 767.

In its turn, Lloyds appealed against that decision to the Court of Appeal in London which, pointing out that the problem in question involved provisions of Community law, submitted to the Court of Justice under Article 177 of the Treaty the following reference for a preliminary ruling, among others:

- Are contributions paid by an employer to a retirement benefits scheme or rights and benefits of a worker under such a scheme, "pay" within the meaning of Article 119 of the EEC Treaty?

12.6.2 **Judgment of the Court**

The Court ruled that amounts which determine other benefits linked to salary were part of the pay of the employee within the meaning of the second paragraph of Article 119, even if they were deducted at source by the employer and paid into a pension fund on behalf of the employee.

- 12.6.3 In its judgment, the Court referred to previous decisions (judgment of 8 April 1976 in *Defrenne v Sabena* and judgment of 27 March 1980 in *Macarthys Ltd v Wendy Smith*) on the direct effect of Article 119 and clarified the concept of pay. The Court did not rule on the problem of occupational schemes in its entirety, replying that a contribution paid by an employer in the name of employees by means of an addition to the gross salary constituted "pay" within the meaning of Article 119.

Such a judgment demonstrates the limitations of case law on equal treatment, in the absence of Community measures resolving the problems of supplementary schemes. (cf. Article 3(2) of the Directive on equal treatment in matters of Social Security (occupational schemes))

12.7 **Judgment of 31 March 1981 in Case 96/80 (Jenkins v Kingsgate Ltd) (1)**

- 12.7.1 Mrs Jenkins, an employee of Kingsgate Ltd, worked part-time. Her hourly rate of pay was lower than that of full-time male colleagues. Mrs Jenkins brought an action in the first instance before the Industrial Tribunal, alleging a contravention of the equality clause incorporated into her contract under the Equal Pay Act 1970, Section 1(2)(a) of

(1) (1981) ECR 919.

which lays down that the principle of equal pay for men and women applies in every case where a woman is employed on "like" work with a man in the same employment.

Having failed to obtain satisfaction, the applicant appealed, with the support of the Equal Opportunities Commission, to the Employment Appeal Tribunal.

This Tribunal considered that the case raised questions of the interpretation of Community law and referred a number of questions to the Court for preliminary rulings, including the following:

- Does the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Directive 75/117/EEC require that pay for work at time rates shall be the same, irrespective of the number of hours worked each week or of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers for doing 40 hours per week than to workers doing fewer than 40 hours per week?

12.7.2 Judgment of the Court

The Court ruled that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the pay of part-time workers on the ground that the group of workers is composed exclusively or predominantly of women.

In the recitals, the Court states that "the ban on discrimination is no more than the expression of the general principle of equality underlying the fundamental principles of Community law; according to this principle comparable situations must not be treated differently, unless a differentiation is objectively justified". Consequently, the author of the measure from which the discriminatory result derives must supply proof that his action was motivated by reasons that could be objectively justified without any intention to discriminate.

12.7.3 In its judgment, the Court refers to its previous decisions on the direct effect of Article 119 (judgments of 8 April 1976 in *Defrenne v Sabena*; of 27 March 1980 in *Macarthys v W. Smith* and of 11 March 1981 in *Worringham and Humphreys v Lloyds Bank*).

As regards the terminology used, reference should be made to the opinion of the Advocate-General in footnote (1) on page 157.

12.8 Judgment of 16 February 1982 in Case 19/81 (*Arthur Burton v British Railways Board*) (1)

12.8.1 Mr Burton was employed by the British Railways Board. As part of a reorganization, British Railways made an offer of voluntary redundancy to some of its employees on certain terms (men aged over 60, women over 55). In August 1979, Mr Burton, aged 58, applied for voluntary redundancy. His application was rejected on the ground that he was under the minimum age of 60. Mr Burton maintained that he had been treated less favourably than a female employee in as much as the benefit would have been granted to a woman aged 58. Mr Burton complained to an Industrial Tribunal which rejected his claim; he appealed to the Employment Appeal Tribunal, relying on Article 119 of the EEC Treaty, Article 1 of Directive 75/117/EEC and Articles 1, 2 and 5 of Directive 76/207/EEC.

The Employment Appeal Tribunal asked the Court for a number of preliminary rulings on, among others, the following questions:

1. Is a voluntary redundancy benefit, which is paid by an employer to a worker wishing to leave his employment, within the scope of the principle of equal pay contained in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC?
2. If the answer to Question 1 is in the negative, is such a voluntary redundancy benefit within the scope of the principle of equal treatment for men and women as regards working conditions contained in Article 1(1), Article 2(1) and Article 5(1) of Directive 76/207/EEC?

(1) (1982) ECR 555.

12.8.2 Judgment of the Court

The Court ruled that:

- the principle of equal treatment contained in Article 5 of Directive 76/207/EEC applies to the conditions of access to voluntary redundancy benefit paid by an employer to a worker wishing to leave his employment.
- the fact that access to voluntary redundancy is available only during the five years preceding the minimum pensionable age fixed by national social security legislation and that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive 76/207/EEC.

12.8.3 In this judgment, the Court ruled on the discriminatory nature of a difference in the retirement age for men and women, stating that such a difference is not in itself discrimination prohibited by the Treaty. The age difference fixed by the employer was not the result of his decision but of a difference laid down in national social security legislation.

12.9 Judgment of 9 February 1982 in Case 12/81 (Garland v British Rail Engineering) (1)

12.9.1 The appellant, Mrs Garland, was a married woman employed by British Rail Engineering Ltd (a wholly owned subsidiary of the British Railways Board, a public authority charged by statute with the duty of providing railway services in Great Britain). During the period of their employment, all employees of British Rail Engineering enjoyed certain valuable travel facilities which were also extended to their spouses and dependent children. On retirement, former employees, men and women, continued to enjoy travel facilities but they were reduced in comparison with those they had enjoyed during the period of their employment. However, although male employees continued to be granted facilities for themselves and for their wives and dependent children as well, female employees no longer had such facilities granted in respect of their families.

The matter was brought before three different tribunals in turn, and only provisions of the Sex Discrimination Act were invoked on each occasion.

Then the case reached the House of Lords where issues of Community law were raised. Accordingly, the House of Lords put a number of questions to the Court for preliminary rulings, including the following:

Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees, is this contrary to

- (a) Article 119 of the EEC Treaty?
- (b) Article 1 of Directive 75/117/EEC?
- (c) Article 1 of Directive 76/207/EEC?

12.9.2 **Judgment of the Court**

The Court ruled that where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination within the meaning of Article 119 against former female employees who do not receive the same facilities.

- 12.9.3 This judgment follows the case law of the Court of Justice: (Judgment of 25 May 1971 in "Defrenne": the concept of pay covers any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer); (Judgment of 31.3.1981 in "Jenkins": Article 119 applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the Article in question, without domestic or Community measures being required to define them with greater precision in order to permit of their application).

12.10 **Judgment of 10 April 1984 in Case 14/83 (Sabine von Colson and Elisabeth Kamaan v Land North Rhine Westphalia)**

- 12.10.1 These two persons underwent a period of training in the Werl prison at the end of their social workers' course. They applied for vacant posts at the same prison. The governor of the prison stated that he preferred to take on a man without experience rather than a woman.

The Arbeitsgericht Hamm asked the Court of Justice for a preliminary ruling on the following questions:

1. Does it follow from Council Directive 76/207/EEC of 9 February 1976 that discrimination on the grounds of sex in relation to access to employment must be sanctioned by a requirement that the discriminating employer conclude a contract of employment with the candidate discriminated against?
2. If question 1 is answered in the affirmative:
 - (a) Is the discriminating employer required to conclude a contract of employment only if it can be established that the candidate discriminated against is objectively - according to permissible selection criteria - more suitable for that post than the candidate with whom a contract of employment was concluded?
 - (b) Or, is the employer also required to appoint the candidate discriminated against if that candidate and the successful candidate are objectively equally suitable?
 - (c) Finally, must the candidate discriminated against be appointed even if objectively he is less suitable than the successful candidate, but it is established that from the outset the employer, on account of the sex of the candidate discriminated against, disregarded that candidate in making his decision on the basis of permissible criteria?
3. If the solution depends on the candidate's suitability, is it a matter entirely for the court to determine?
4. If the above question is answered in the affirmative:

where there are more than two candidates for a post and from the outset more than one person is on the ground of sex disregarded for the purposes of the decision made on the basis of permissible criteria, is each of those persons entitled to the grant of a contract of employment?

Is the court in such a case obliged to make its own choice between the candidates discriminated against?

12.10.2 Judgment was delivered on 10 April 1984 (Case 14/83, similar to Case 79/83, see below 12.12).

The Court replied that in the event of discrimination based on sex in respect of access to employment, the Directive did not provide for a penalty if the employer failed to conclude an employment contract with the victim of discrimination. Although the Directive made it plain that the Member States were free to select the penalties to be imposed in cases of discrimination, it implied that if a Member State chose to impose a penalty in the form of damages for an offence against the principle of non-discrimination, the penalty should have sufficient deterrent effect.

12.11 Judgment of 18 September 1984 in Case 22/83 (WGM Liefthoek v Directie van het Academisch Ziekenhuis bij de Universiteit van Amsterdam and in eight other actions)

12.11.1 The Central Raad van Beroep has asked the Court of Justice for preliminary rulings on the following questions:

1. Must the term "pay" appearing in Article 119 of the EEC Treaty be construed as including the "compensation" or, in certain cases, the amount referred to as the "over-compensation" which the employing public authority used to pay to the tax authorities in excess of the maximum contributions due under the Old-Age Law and the Widows and Orphans Law but which now no longer need be transferred by such an authority?
2. If the answer to the first question is in the affirmative, must Article 119 of the Treaty be construed as meaning that the system applying in the Netherlands based on the "Wet Gemeenschappelijke Bepalingen Overheidspensioenwetten" (Law laying down common provisions with regard to laws governing the pensions of public officials) must be regarded as being contrary to the principle that men and women should receive equal pay for equal work laid down in Article 119 because under that system, in these cases in which the joint contributions due under the Old-Age Law and the Widows and Orphans Law for a married couple employed in the public service exceed the maximum amounts of contributions due, the contributions are primarily paid by the husband's employer while the wife's employer continues to transfer contributions only in so far as the maximum amount of contributions due is not exceeded?

12.11.2 Judgment of the Court

In its judgment of 18 September 1984, the Court ruled that a social security scheme under which:

1. the contributions are calculated on the basis of the employee's salary but are subject to a ceiling;
2. a husband and wife are treated as one person, the contributions being calculated on the basis of their combined salaries, subject once again to the upper limit;
3. the State is bound to pay, on behalf of its employee, the contribution owed by him, and
4. where husband and wife are both civil servants, the authority employing the husband is primarily responsible for paying the contributions and the authority employing the wife is required to pay the contributions only in so far as the upper limit is not reached by the contributions paid on behalf of the husband,

is incompatible with the principle of equal pay for men and women for equal work in so far as the resulting differences between the gross salary of a female civil servant whose husband is also a civil servant and the gross salary of a male civil servant directly affect the calculation of other pay-related benefits such as severance pay, unemployment benefit, family allowances and loan facilities.

12.12 Judgment of 10 April 1984 in Case 79/83 (D. Harz v Deutsche Tradax GmbH)

- 12.12.1 Miss Harz, a commercial engineer, had applied for a post advertised by Deutsche Tradax GmbH. The firm informed her that the post in question was restricted to male candidates. Miss Harz brought an action before the Arbeitsgericht (Labour Court) in Hamburg, to compel the firm to take her on and in addition to pay compensation (DM 12,000) on the grounds that it had infringed Articles 2 and 3 of Directive 76/207/EEC.

According to the Labour Court, the principle of equal treatment as regards access to employment can be implemented by imposing penalties such as requiring the employer to conclude a contract of employment or granting the person discriminated against the right to compensation,

the amount of which is sufficiently high to constitute a genuine economic sanction. The Law (Article 611(2) of the BGB (Civil Code)) provides for compensation for breach of faith of DM 2.31.

The Labour Court asked the Court of Justice for a preliminary ruling on a number of questions relating to any right of a person to a contract of employment with an employer who refuses to take them on and to the payment of compensation.

12.12.2 Judgment of the Court

The Court ruled that:

- the Directive does not require the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against;
- the Directive implies that if a Member State chooses to sanction the discrimination on grounds of sex regarding access to employment by the award of compensation, then in order to ensure that it has a deterrent effect that compensation must be adequate.

12.13 Judgment of 12 July 1984 in Case 184/83 (Ulrich Hofmann v Barmer Ersatzkasse)

12.13.1 Mr Hofmann is the father of an illegitimate child whom he has recognized. He was granted unpaid leave by his employer from the end of the statutory protective period of eight weeks granted to the mother until the child reached the age of six months, while the mother continued to work. He asked the Barmer Ersatzkasse for an allowance for the duration of the maternity leave in accordance with the social protection laws covering the mother, a request which was refused on the grounds that only mothers were entitled to maternity leave. According to the Sozialgericht (Social Court), the authors of the legislation had deliberately refrained from introducing parental leave. Mr Hofmann maintained before the Court that the object of introducing maternity leave was not in fact to protect the mother's health but to allow her to care for the child.

The Sozialgericht asked the Court whether the fact that at the end of the eighth week of convalescence, paid leave is granted only to working mothers, constitutes an infringement of Articles 1, 2 and 5 (1) of Directive 76/207/EEC.

The Commission supported Mr Hofmann's position: if national laws to protect women in the case of pregnancy and maternity leave also serve the interest of the child, the objectives should be achieved by means which preferably are non-discriminatory, e.g. granting leave to the father. The Commission pointed out that in several Member States legislation is tending towards granting parental leave or leave for bringing up a child. It has expressed its intention of bringing actions against Member States which continue to apply measures similar to the maternity leave arrangements laid down under German law.

12.13.2 **Judgment of the Court**

The Court held the view that the Directive is not intended to cover questions relating to family organization or to change the couple's arrangements for sharing responsibilities and that maternity leave comes within the scope of Article 2(3) of the Directive ("this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards maternity"). Such leave may, then, be restricted to the mother to the exclusion of any other person.

12.14 **Judgment of 26 February 1986 in Case 152/84 (Miss Marshall v Southampton and South West Hampshire Area Health Authority (Teaching))**

12.14.1 Miss Marshall was born in 1918. From 1966, she worked for the authority in question which, in March 1980, dismissed her on the ground that she had passed the normal retirement age applicable to women (the authority had a general policy, implicit in the contract of employment, that female employees retire at 60 and males at 65). Miss Marshall had therefore been granted a two-year derogation from this principle. She suffered a financial loss as a result of her dismissal. Under UK legislation, the State pension is granted from the age of 65 for men and 60 for women, and payment of the pension is suspended if the employee continues to work.

The appellant maintained that her dismissal was an act of discrimination on grounds of sex prohibited by the Sex Discrimination Act 1975 and Directive 76/207/EEC.

The Industrial Tribunal hearing the case ruled that the application could not be brought under the Sex Discrimination Act (Section 6(4) of this Act allows discrimination on grounds of sex where it arises from a provision on retirement).

The Court of Appeal in London referred the following questions to the Court of Justice:

- (1) Whether the respondent authority's dismissal of the appellant after she had passed her sixtieth birthday pursuant to policy and on the grounds only that she was a woman who had passed the normal retirement age applicable to women was an act of discrimination prohibited by Directive 76/207/EEC?
- (2) If the answer to question 1 is in the affirmative, whether or not the said Directive can be relied upon by the appellant in the circumstances of the present case notwithstanding the inconsistency (if any) between the Directive and Section 6(4) of the Sex Discrimination Act of 1975?

12.14.2 Judgment of the Court

On the first question, the Court found in the affirmative, ruling that the dismissal of a woman on the sole ground that she had reached or passed the age entitling her to a State pension, this age being different for men and women under domestic legislation, was an act of discrimination on grounds of sex prohibited by Article 5(1) of Directive 76/207/EEC.

On the second question, the Court decided that Article 5(1) of the Directive could be relied upon against a State authority with a view to having any domestic provision which was incompatible with Article 5(1) declared null and void.

12.15 Judgment of 26 February 1986 in Case 151/84 (Joan Roberts v Tate & Lyle Industries Ltd)

12.15.1 Joan Roberts had been employed by this firm for 29 years and was 53 when she was dismissed. The normal age for granting a pension from the occupational pension fund is 65 for men and 60 for women, although it is possible for male employees made redundant to draw a pension 10 years prior to their normal retirement age and female employees made redundant to draw a pension 5 years prior to their normal retirement age. Mrs Roberts maintained that such treatment was discriminatory and incompatible with the Sex Discrimination Act 1975 and with Community law.

The Industrial Tribunal held that Section 6(4) of the Sex Discrimination Act allowed discrimination in the case of retirement age.

The Court of Appeal in London has asked the Court for a preliminary ruling on the following questions:

- (1) Whether or not the respondents discriminated against the appellants contrary to the Equal Treatment Directive by arranging for male employees who were made redundant to receive a pension from the occupational pension fund ten years prior to their normal retirement age of 65, but arranging for female employees who were made redundant to receive a pension only five years prior to their normal retirement age of 60, thereby arranging for both men and women to receive an immediate pension at the age of 55?

- (2) If so, whether or not the principle of equal treatment can be relied upon by the appellant in the circumstances of the present case in national courts and tribunals, notwithstanding the inconsistency (if any) between the Directive and Section 6(4) of the Sex Discrimination Act 1975?

12.15.2 Judgment of the Court

The Court ruled that the correct interpretation of Article 5(1) of Directive 76/207/EEC was that a clause in a collective agreement setting the same age for male and female employees for eligibility for an early retirement pension in the event of redundancy, the normal retirement age being different for men and women, did not constitute discrimination on grounds of sex.

12.16 Judgment of 15 May 1986 in Case 170/84 (Bilka-Kaufhaus GmbH v Karin Weber von Hartz)

12.16.1 The Bundesarbeitsgericht (Federal Labour Court) - third senate - has asked the Court for a preliminary ruling on the following questions:

- (1) May there be an infringement of Article 119 of the EEC Treaty in the form of "indirect discrimination" where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme, although such exclusion affects disproportionately more women than men?
- (2) If the first question is answered in the affirmative:
 - (a) Can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store sector there are no reasons of commercial expediency which call for the pursuit of such a staff policy?
 - (b) Is the undertaking under an obligation to construct its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?

Reference should be made to:

- the Court's judgment in case 80/70 (see page 117): the second paragraph of Article 119 extends the concept of pay to any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer;
- Case 69/80 (see page 123), where the Court ruled that a contribution to a pension scheme paid by an employer on behalf of the employees by means of an addition to the gross salary, constituted pay within the meaning of Article 119(2) of the EEC Treaty;
- Case 96/80 (see page 124), as regards the existence of indirect discrimination in the case of a difference in pay between full-time and part-time workers.

Reference should also be made to the Directive on the implementation of the principle of equal treatment for men and women under occupational social security schemes (see 7.2, page 85).

12.16.2 Judgment of the Court

On the first question the Court of Justice ruled that, in the case before it, there was an infringement of Article 119 in the form of indirect discrimination unless it could be shown that the employer had taken the action in question on the grounds of objectively justified factors wholly unconnected with discrimination based on sex.

On the first part of the second question the Court accepted that such action could be justified as long as it was established that the means employed to achieve the objective envisaged corresponded to a real need of the employer and were appropriate and necessary in order to achieve the objective of employing as few part-time workers as possible. On the second part, the Court found that there was no such obligation under Article 119.

12.17 Judgment of 15 May 1986 in Case 222/84 (Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary)

12.17.1 Mrs M. Johnston was recruited by the Royal Ulster Constabulary as a part-time constable in March 1974, and was taken on on a full-time basis as from September of the same year. In 1980 her full-time contract was terminated, and she reverted to part-time employment. The Chief Constable had decided that year that the number of women employed on a full-time basis was to be kept to the strict minimum, on the ground that they were neither trained nor authorized to carry firearms. Mrs M. Johnston brought an action before an Industrial Tribunal, claiming that this decision infringed Directive 76/207/EEC. The Industrial Tribunal put the following questions on application of the Directive to the Court of Justice:

1. Can discriminations that are necessary in order to safeguard national security and uphold law and order be excluded from the field of application of Directive 76/207/EEC?
2. Can the occupation of police auxiliary, which entails the use of firearms, and the training for it, be considered as being covered by the exception allowed under Article 2.2?
3. What are the criteria to be adopted by States in deciding whether a given occupation can be included among those referred to in Article 2.2?
4. Can the exclusion of women from the occupation in question be regarded as being covered by Articles 2.3 and 3.2(c) (protective legislation)?
5. If so, what are the criteria that States must apply when deciding whether or not it can?
6. Can the principle of equal treatment established in the Directive be relied upon by a claimant before national courts?
7. If so, would it be possible to invoke the procedure prescribed in Article 224 of the EEC Treaty to avoid application of the Directive? Could a private individual claim non-compliance with this Article if the consultation among States for which it provides has not taken place?

12.17.2 Judgment of the Court

In Article 6, the Directive protects judicial supervision of its application in practice, establishing that it is mandatory for an action claiming rights granted under the Directive to be heard.

Derogations from the principle of equal treatment applied on grounds of law and order may, in certain circumstances, be regarded as exceptions covered by Article 2.2.

The ban on carrying firearms cannot be regarded as falling within the scope of Article 2.3 (protection of women).

Private individuals may institute proceedings seeking application of the Directive (Articles 3.1 and 4.1 in this case) if the State authority exceeds the limits allowed under Article 2.2.

12.18 Judgment of 26 February 1986 in Case 262/84 (Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV)

12.18.1 This action was brought by a woman employee whose contract of employment was terminated when she reached the age of 60, whereas the employer "retires" its male employees at the age of 65. In an appeal action before the Hoge Raad, it was asked whether termination of a contract of employment on retirement age was a condition of employment. In this connection, the Court of Justice was asked for a preliminary ruling on the following question:

Does Directive 76/207/EEC allow Member States to exclude termination of a contract of employment from conditions of employment where there is an explicit or implicit clause under which such termination coincides with the age at which the employee becomes entitled to a retirement pension?

12.18.2 Judgment of the Court

Basing itself on Article 5.1 of the Directive, the Court replied in the negative.

12.19 **Judgment of 1 July 1986 in Case 237/85 (Gisela Rummler v Dato-Druck GmbH)**

12.19.1 Gisela Rummler brought an action before the national courts (Arbeitsgericht) in which she claimed, under the collective agreement covering the printing industry, that she was entitled to a higher grading corresponding to the work she was doing. Seeking guidance on the job classification appropriate for the claimant, the Oldenburg Arbeitsgericht asked the Court of Justice for preliminary rulings, based on Directive 75/117/EEC, on the following points: whether strength or physical effort were to be taken into account in classifying a job; whether the physical effort required of women was to be taken into account; finally, whether a job classification system based on physical effort was legal if it did not expressly mention one or other sex.

12.19.2 **Judgment of the Court**

The Court of Justice ruled that Directive 75/117/EEC allowed a system of job classification to take account of physical effort or muscular fatigue for the purposes of determining pay as long as such effort was necessary and other criteria excluding all discrimination based on sex were applied. In addition, it was to be deduced from Directive 75/117/EEC that:

- the criteria applied in classifying jobs into different pay levels had to ensure equal pay for equal work, irrespective of a worker's sex;
- classification criteria could not be based on the average physical effort of which a given sex was capable;
- if it was not to be discriminatory in its overall effect, a job classification system had to be based, as far as possible, on criteria taking account of the special aptitudes of each sex.

12.20 **Judgment of 24 June 1986 in Case 150/85 (Jacqueline Drake v The Adjudication Officer)**

12.20.1 Relying on Directive 79/7/EEC, Jacqueline Drake questioned the legality of the social services' decision not to grant her the statutory benefit for a person looking after his or her spouse who was disabled.

The questions raised revolved around interpretation of Articles 3.1(a) and 4.1 of the Directive. Specifically, they were: is the benefit granted by the State to a person, not gainfully employed, who looks after a severely disabled person part of the statutory system of protection against invalidity risks (Article 3.1(a)), and if so, would it be discriminatory to withhold such benefit from a married woman whose husband met all or part of the material requirements when no such restriction is applied to a married man in the same circumstances of dependency (Article 4.1)?

12.20.2 Judgment of the Court

The Court answered both questions in the affirmative.

12.21 Cases pending

12.21.1 Case 30/85, Mrs Teulingworms v Het Bestvor Van de Bedrijfsvereniging voor de Chemische Industrie

The object of this action is to determine whether a social security scheme under which benefits vary in amount according to claimants' marital status and family circumstances is compatible with Article 4.1 of Directive 79/7/EEC.

12.21.2 Case 71/85, Staat der Nederlanden v Federatie Nederlandse Vakbeweging

The question raised here is whether Article 4 of Directive 79/7/EEC has been applicable since 23 December 1984 in relation to Article 13.1 of the Wet Werkloosheidsvoorziening.

12.21.3 Case 192/85, George Noel Newstead v the Department of Transport and Her Majesty's Treasury

This case turns on the applicability of Article 119 of the EEC Treaty and Directives 75/117/EEC and 76/207/EEC. Can an employer who pays his male and female employees equally deduct contributions to its widows' pension fund from the salaries of its male single employees' salaries but not from those of its female single employees? Are the Directives directly applicable?

12.21.4 Case 286/85, the State v the State (Ireland)

Direct effect of Article 4 of Directive 79/7/EEC and date from which it is deemed to have been operative.

12.21.5 Case 384/85, Jean B. Clarke v The Chief Adjudication Officer

Does Article 4.1 of Directive 79/7/EEC have direct effect, so that a woman has been eligible for a disability pension since 22 December 1984 by virtue of having, prior to that date, adequately met the requirements giving a man eligibility for the same pension, irrespective of the fact that she did not previously fulfil an additional requirement stipulated under domestic law exclusively in respect of the category of women to whom she belongs?

12.21.6 Case 157/86, Mary Murphy v An Bord Telecom

This case is over the applicability of Article 119 of the Treaty and Directive 75/117 in the case of a claim for equal pay in which the claimant's work has been held to be of greater value than that of the person referred to for comparison purposes.

13. **JUDGMENTS OF THE COURT IN PROCEEDINGS AGAINST
MEMBER STATES FOR FAILURE TO FULFIL AN OBLIGATION**
(equal pay and treatment for men and women)

13.1 **Table of judgments delivered and cases pending or withdrawn from the register**

Judgment of	Case
9.06.82 Commission of the EC v Grand Duchy of Luxembourg	58/81
6.07.82 Commission of the EC v United Kingdom	61/81
26.10.83 Commission of the EC v Italy	163/82
8.11.83 Commission of the EC v United Kingdom of Great Britain and Northern Ireland	165/82
31.01.85 Commission of the EC v Denmark	143/83
21.05.85 Commission of the EC v Federal Republic of Germany	248/83

Case pending:

Commission of the EC v Luxembourg	180/86
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Cases withdrawn from the register:

Commission of the EC v Denmark	149/83
Commission of the EC v Belgium	164/82

13.2 Judgment of 6 July 1982 in Case 61/81 (Commission v United Kingdom of Great Britain and Northern Ireland)

- 13.2.1 On 18 March 1981, the Commission brought an action under Article 169 of the EEC Treaty for a declaration that the United Kingdom had failed to fulfil its obligations under the Treaty by failing to adopt the laws, regulations or administrative provisions needed to comply with Council Directive 75/117/EEC as regards the elimination of discrimination for work to which equal value is attributed. In support of its contention, the Commission refers to the judgment in the Jenkins case, which determined the objectives of the Directive. Article 1 of the Directive was not applied.

Under the Directive, the job classification system is merely one of several methods for determining pay for work to which equal value is attributed, whereas under the Equal Pay Act, it is the sole method. Moreover, workers in the United Kingdom are unable to have their work rated as being of equal value with comparable work if their employer refuses to introduce a classification system. Ultimately, there can be no right to equal pay where no classification has been made.

13.2.2 Judgment of the Court

The Court ruled that by failing to introduce into its national legal system, in implementation of the provisions of Council Directive 75/117/EEC of 10 February 1975, such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom had failed to fulfil its obligations under the Treaty.

A bill amending the Equal Pay Act is now being drafted, following the Court's judgment.

13.3 Judgment of 9 June 1982 in Case 58/81 (Commission v Grand Duchy of Luxembourg) (1)

13.3.1 The Commission of the European Communities brought an action on 16 March 1981 for a declaration that by not adopting within the period prescribed in Article 8(1) of Directive 75/117/EEC the measures necessary in order to eliminate discrimination in the conditions for the grant of head of household allowances to civil servants, the Grand Duchy of Luxembourg had failed to fulfil its obligations under the EEC Treaty (Articles 3, 4 and 8).

In Luxembourg, the head of household allowance is granted to State civil servants pursuant to Article 9 of the amended Law of 22 June 1963 (laying down the scheme for the remuneration of civil servants) which states, among other things, that "a civil servant having the status of head of household shall be granted a head of household allowance".

The following are regarded as heads of household: a male married civil servant and also a female married civil servant whose husband suffers from an infirmity or serious illness rendering him incapable of providing for the household expenses or whose husband receives an income lower than the minimum social wage.

Municipal officials and employees are also affected and there are similar provisions in certain collective employment agreements, for example those of insurance and bank clerks (2).

13.3.2 Judgment of the Court

The Court ruled that "by not adopting within the period prescribed in Article 8(1) of Directive 75/117/EEC the measures necessary to eliminate discrimination in the conditions for the grant of head of household allowances to civil servants, the Grand Duchy of Luxembourg has failed to fulfil one of its obligations under the EEC Treaty".

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- (1) For the earlier proceedings, see chapter on the implementation of Directive 75/117/EEC, page 24.
- (2) A change is under way in this area but progress on the elimination of such discrimination is slow since it involves additional costs for employers.

13.4 **Judgment of 26 October 1983 in Case 163/82 (Commission of the European Communities v the Italian Republic)**

13.4.1 In the first place, the Commission pointed out that Law No. 903 regulated certain working conditions such as remuneration (Article 2), retirement age (Article 4) and the right to take leave of absence from work in the case of adoption (Article 6), but failed to cover all working conditions, notwithstanding the much wider nature of the provisions contained in Article 5 of Directive 76/207/EEC. The Italian Government replied that examination of the provisions of the aforesaid Law No. 903 showed that discrimination based on sex was prohibited in relation to access to employment, vocational guidance, vocational training, advanced vocational training and retraining (Article 1), remuneration and job classification systems for determining remuneration (Article 2), assignment of grading, duties and career development (Article 3), retirement age (Article 4) and entitlement to take leave in certain circumstances (Article 6). Article 15 of Law No. 300 of 20 May 1970 had been amended by Article 13 of Law No. 903 so as to render void any agreement or measure based on sex, aimed at dismissing a worker or likely to have an adverse effect on a worker's interests.

The Court ruled that the Commission had not shown that those specific provisions, combined with a general supplementing provision, had left some areas of the scope of the Directive unprovided for.

The Commission pointed out in the second place that Law No. 903 of 1977 gave a mother who adopted a child of less than six years of age at the time of adoption the right to statutory leave and the corresponding financial allowance during the first three months after the child entered the adoptive family and the right to a certain period of leave (without according the adoptive father similar rights).

Article 7 of Law No. 903 gave a working father the leave entitlement granted under Article 7 of Law No. 1204 of 1971, even if he was a father by adoption, in lieu of the working mother or where the care and custody of the children were given to the father. However, the father was not granted the right accorded to the adoptive mother to maternity leave for the first three months following the actual entry of the child into the adoptive family.

The Court upheld the view of the Italian Government that this distinction was justified by the concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new-born child in the family. The difference in treatment therefore could not be regarded as discrimination.

Thirdly, the Commission maintained that the Italian Republic had failed to comply with Article 6 of the Directive.

In its view, Article 15 of Law No. 903 restricted the legal remedies to breaches of Articles 1 and 5 of that Law, by not giving a legal remedy to a worker who considered himself adversely affected by failure to comply with other provisions of the Directive. The Commission pointed out that Article 6 made no distinction between access to employment (Article 3) access to training and promotion (Article 4) and working conditions (Article 5).

The Italian Government contended that workers who had been discriminated against could rely on Article 24 of the Constitution which stated that "any person may bring proceedings to protect his rights and lawful interests". The restricted applicability of the judicial procedure laid down by Article 15 of Law No. 903 was explained by the fact that the procedure was a special one which had been found to be necessary by reason of the special nature of discrimination as regards access to employment, training and promotion at work.

The procedure referred to in Article 15 was an emergency one. Article 700 of the Italian Code of Civil Procedure, a general rule of procedure, allowed measures required to avoid irremediable damage to be obtained urgently; that provision could be relied upon in all areas where the Directive applied which were not covered by Article 15 of Law No. 903.

The Court ruled that the application had to be dismissed, since the Commission had not contested the explanations given by the Government of the Italian Republic.

13.5 Judgment of 8 November 1983 in Case 165/82 (Commission of the European Communities v the United Kingdom of Great Britain and Northern Ireland)

13.5.1 In the United Kingdom the Directive was implemented, with regard to Great Britain, by the Sex Discrimination Act 1975 and, with regard to Northern Ireland, by the Sex Discrimination (Northern Ireland) Order of 1976. For practical purposes the contents of these legislative measures were identical. The Act entered into force on 12 November 1975.

Section 1(1) in particular provided that there was discrimination by a person against a woman if

- (a) on the ground of her sex he treated her less favourably than he treated or would treat a man, or
- (b) he applied to her a requirement or condition which applied or would apply equally to a man but -
 - (i) which was such that the proportion of women who could comply with it was considerably smaller than the proportion of men who could comply with it, and
 - (ii) which he could not show to be justifiable in respect of the sex of the person to whom it was applied, and
 - (iii) which was to her detriment because she could not comply with it.

Section 6(1) and (2) concerned discrimination against those seeking employment and employees; nevertheless, Section 6(3) exempted employment for the purposes of a private household and cases where the number of persons employed by the employer, added to the number employed by any associated employers of his, did not exceed five (disregarding any persons employed for the purposes of a private household).

Likewise, Section 20 of the Act provided that the provisions of Section 6(1) and (2)(a) did not apply to midwives and that Section 14 concerning vocational training bodies did not apply to training as a midwife.

A letter of formal notice was sent by the Commission on 29 August 1980.

The Commission considered that the United Kingdom had failed to comply with its reasoned opinion and brought the matter before the Court by an application dated 28 May 1982.

The Commission claimed that although Section 77(1) of the Act provided that a term of an individual contract was void in the circumstances set out therein, similar provisions did not exist for collective agreements, internal rules of undertakings or rules governing independent occupations and professions.

The Directive imposed the obligation of taking those measures which were necessary to ensure that given provisions were (at law) null and void or declared null and void (by the courts) or amended (by the courts).

The Commission furthermore considered that the terms of Section 6(3) of the Act which excluded employment for the purposes of a private household, or where five or fewer persons were employed,* from the general prohibition of discrimination contained in the Act were contrary to the terms of the Directive, in particular Articles 3, 4 and 5.

The Government of the United Kingdom stated that in its view its legislation was in all respects in keeping with the spirit of the Directive.

With regard to employment for the purposes of a private household and in small-scale undertakings, the Government claimed that the sex of the worker constituted a determining factor for many occupational activities by reason of the context in which these activities were carried out. The kind of employment in question frequently involved very close personal relationships between employer and employee.

With regard to an employer who did not employ more than five employees (disregarding any persons employed for the purposes of a private household), that exception was justified and came within Article 2(2) of the Directive because of the close personal relationships that often exist in small undertakings.

With regard to midwives, the United Kingdom Government concluded that the present restrictions on the training and employment of men as midwives should now be lifted.

Orders giving effect to this decision were being prepared under Section 80(1)(a) and paragraph 3 of Schedule 4 to the Sex Discrimination Act 1975. It was anticipated that the changes effected by the orders would come into operation by the end of August 1983.

13.5.2 **Judgment of the Court**

The Court ruled that the United Kingdom had failed to fulfil its obligations by not adopting the measures needed to ensure that any provisions contrary to the principle of equal treatment contained in collective agreements or in the staff rules of undertakings or in the rules governing independent professions or occupations were void or could be

declared void, or amended, and by excluding from the application of that principle employment for the purposes of a private household and any case where the number of persons employed did not exceed five. As regards the employment of midwives (access to the occupation and training) the Court dismissed the Commission's complaint.

13.6 Judgment of 30 January 1985 in Case 143/83 (Commission of the European Communities v the Kingdom of Denmark)

13.6.1 The Commission based its case on the Danish Government's failure to fulfil its obligations under Directive 75/117/EEC in that Danish legislation did not embody the notion of work of equal value, but only that of equal work, and failed to make provision giving a worker who was not receiving equal pay for work of equal value the right to bring a claim before the courts.

13.6.2 Judgment of the Court

After determining that the wording of the Danish law set out the principle of equal pay in a more restricted form than that set out in the Directive and did not refer to "work of equal value", the Court found that since it had not adopted within the time-limit prescribed all the measures required to conform with Directive 75/117/EEC of 10 February 1975, the Kingdom of Denmark had failed to comply with its obligations under the EEC Treaty.

13.7 Judgment of 21 May 1985 in Case 248/83 (Commission v Federal Republic of Germany)

13.7.1 In this action the Commission submitted to the Court of Justice five grounds on which it alleged that the FRG had failed to fulfil its obligations as regards incorporating into its legislation a number of provisions of Directives 75/117/EEC and 76/207/EEC.

According to the Commission the constitutional guarantees of equality between the sexes and the right to make a free choice of occupation were insufficient to establish that equal treatment and pay in the public service and access to self-employed occupations were adequately protected. In addition, the FRG had not specified which occupations were regarded as being excluded from the field of application of Directive 76/207/EEC (Article 2.2), so that it was not in a position to fulfil its obligations under Article 9.2 of that Directive.

Finally, the FRG had taken no steps to oblige employers to comply with the principle of non-discrimination in vacancy notices in that it had made no provision for the right of legal redress against an employer failing in this obligation.

13.7.2 **Judgment of the Court**

The Court only accepted that there had been an infringement in the failure to specify the occupations excluded in accordance with Article 2.2 of Directive 76/207/EEC.

13.8 **Case pending:**

13.8.1 **Case 180/86 (Commission v Luxembourg)**

The Commission's action is based on Luxembourg's possible infringement of Article 3 of Directive 76/207/EEC in reserving certain jobs in the public service for former "Army volunteers" and in restricting access by women to appointment as officers and other ranks in the police and gendarmerie.

13.9 **Cases withdrawn:**

13.9.1 **Action brought on 1 May 1982 by the Commission of the European Communities against the Kingdom of Belgium (Case 164/82)**

Equal treatment as regards vocational guidance, training, advanced training and retraining is covered by a statutory measure in Belgium (Article 125 of the Law on Economic Reorientation of 4 August 1978).

In the absence of a Royal Decree, which is a condition for the effective implementation of Article 125, the Commission requested the Belgian Government, by letter of 3 July 1980, to submit its observations on this matter.

Subsequently, the Royal Decree of 16 October 1981 defining, with a view to equal treatment for men and women, the concept of vocational guidance and training referred to in Article 124 of the above-mentioned Law, entered into force.

Maintaining that the infringement of which the Kingdom of Belgium was accused continued to exist in respect of all aspects of vocational guidance and training (Article 4 of the Directive) other than those covered by the Royal Decree of 16 October 1981, the Commission referred the matter to the Court on 17 May 1982.

In the Commission's view, the concept of vocational guidance and training to be adopted for the application of the Directive was evidently not limited simply to learning a trade or occupation in undertakings and departments in the private or public sector, as laid down in the Royal Decree of 16 October 1981.

According to the Belgian Government, Article 5 of the Directive, dealing with working conditions, was fully covered by the Belgian regulations. The only matter of contention was vocational training.

The regulations implementing Article 4 of the Directive were now largely a matter for the two linguistic communities (Flemish and French). Vocational training other than in schools did not come under a national Ministry.

Only vocational training in schools was administered by the national authorities.

The order of the Flemish Executive prescribing what must be understood by vocational guidance and vocational training was adopted on 29 September 1982, and its French equivalent on 29 October 1982.

The Commission withdrew its action as Belgium had adopted a Royal Decree on 29 June 1983 on equal treatment as regards access to training in schools.

14. **JUDGMENTS OF THE COURT OF JUSTICE:**
PROCEEDINGS FOR ANNULMENT BROUGHT
BY INDIVIDUALS (differences in
treatment of male and female officials)

14.1 **Judgments:**

Judgment of		Case
7.06.72	Luisa Bertoni v European Parliament	20/71
7.06.72	M. Bauduin v Commission of the EC	32/71
20.02.75	Ch. Van den Broeck v Commission of the EC	37/74
20.02.75	J. Airola v Commission of the EC	21/74
14.12.79	Evelyn Devred v Commission of the EC	257/78
8.10.86	Clemer v Commission of the EC	91/85
20.03.84	Razzouk v Commission of the EC	75/82

14.2 **Judgment of 7 June 1972 in Case 20/71 (Luisa Bertoni, wife of Sereno Sabbatini, v European Parliament)**

14.2.1 Miss Luisa Bertoni, an Italian national, who entered the service of the European Parliament on 1 January 1960, received the expatriation allowance as prescribed by Article 69 of the Staff Regulations.

On 4 November 1970, Miss Bertoni married Sereno Sabbatini who was not an official of the Communities. On 17 November 1970 Mrs Sabbatini Bertoni was informed that she would lose, as from 1 December 1970, her right to an expatriation allowance in accordance with Article 4(3) of Annex VII to the Staff Regulations.

(An official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household.)

On 15 February 1971, Mrs Sabbatini Bertoni asked the administration of the European Parliament to review the decision depriving her of the expatriation allowance. Her request was rejected.

An application was lodged with the Court on 26 April 1971 by Mrs Sabbatini Bertoni who maintained that Article 4(3) of Annex VII to the Staff Regulations was contrary to, inter alia, Article 119 of the EEC Treaty (equal pay for men and women, "pay" also covering any consideration which the worker receives directly or indirectly from his employer - including, therefore, the expatriation allowance.

14.2.2 **Judgment of the Court**

The Court ruled that "the Staff Regulations cannot however treat officials differently according to whether they are male or female, since termination of the status of expatriate must be dependent for both male and female officials on uniform criteria, irrespective of sex"; and that "by rendering the retention of the allowance subject to the acquisition of the status of head of household - as it is defined in Article 1(3) - the Staff Regulations have created an arbitrary difference of treatment between officials".

On the definition of indirect discrimination applied by the Court in this case, cf. Chapter 4.2(c).

14.3 **Judgment of the Court of 7 June 1972 in Case 32/71 (Bauduin, wife of Jose Abel Chollet v Commission of the European Communities)** (1)

14.3.1 Miss Bauduin, a French national, entered the service of the Commission of the European Communities in Brussels on 2 July 1962 and was awarded an expatriation allowance as prescribed by Article 69 of the Staff Regulations. On 31 October 1970 Miss Bauduin married Mr Jose Abel Chollet, a Belgian national, who was not an official of the Communities. On 2 May 1971, in accordance with Article 90 of the Staff Regulations, Mrs Chollet Bauduin submitted to the President of the Commission, through official channels, a complaint against the withdrawal of her expatriation allowance. On 18 June Mrs Chollet Bauduin instituted proceedings before the Court.

The conclusions were the same as in the Bertoni case, the Court having joined the two cases for the purposes of the oral procedure.

14.4 **Judgment of the Court of 20 February 1975 in Case 21/74 (Airola v Commission of the European Communities)** (2)

14.4.1 On 1 January 1964, Mrs Airola, who was born in Belgium, became a student trainee at the Joint Research Centre at Ispra.

On 25 April 1965 she married an Italian. Under Italian law she acquired Italian nationality but she made a declaration under Article 22 of the Belgian Law codifying the law on acquisition, loss and reacquisition of nationality to retain her Belgian nationality in the eyes of Belgian law. On 23 November 1966, she entered service as an official at the Joint Research Centre in Ispra, but received no expatriation allowance. After several applications to the administration, she brought an action before the Court on 13 March 1974 requesting the Court to order the Commission to pay her the expatriation allowance.

The Court ruled that "the concept of 'nationals' contained in Article 4(a) must be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations" and that "such unwarranted difference of treatment between female officials and officials of the male sex would result from an interpretation of the concept of 'nationals' referred to above as also embracing the nationality which was imposed by law on an official of the female sex by virtue of her marriage and which she was unable to renounce".

(1) (1972) ECR 363.

(2) (1975) ECR 221.

14.5 **Judgment of 20 February 1975 in Case 37/74 (Chantal Van den Broek v Commission)** (1)

Mrs Van den Broek was born in France. She had lived in Belgium since September 1961. When she married a Belgian national on 28.10.1961 she acquired Belgian nationality and lost her French nationality, not having made a declaration that she wished to retain French nationality. She entered the service of the Commission on 11 May 1965 and was not granted the benefit of the expatriation allowance provided for under Article 69.

After a number of internal appeals and requests, she lodged an application with the Court on 27 May 1974. The Court referred to the Airola judgment in stating that "although on her marriage, the Belgian nationality of her husband had been conferred upon her, the applicant could have renounced it and thus retained her nationality of origin, and her application, must, accordingly, be dismissed".

14.6 **Judgment of 20 March 1984 in Case 75/82 (Mr Chehab Razzouk v the Commission of the EC)**

14.6.1 On the basis of Article 119 of the Treaty of Rome, Article 79 of the Staff Regulations and the principle of equal treatment, Mr Razzouk, the widower of a Commission official, applied to the Court for a ruling that the Commission was obliged to grant a widower's pension for himself and an orphan's pension for his son, so that the Commission's decision refusing these pensions should be set aside.

14.6.2 **Judgment of the Court**

The Court found for Mr Razzouk. This judgment meant that the Commission would be obliged in future to pay widows' and widowers' pensions at the same rate.

(1) (1975) ECR 235.

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