

GENDER EQUALITY IN EMPLOYMENT IN THE EU AND MALTA: AN OVERVIEW BY THE NATIONAL COUNCIL OF WOMEN

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1. Overview of Equal Treatment for Men and Women in European Union Legislation

Equal treatment for men and women is a fundamental principle of the European Union. From the beginning the provisions of primary legislation set out in the Treaty of Rome stated this and since then, subsequent amendments have reinforced it, making it integral to the European Union's Social Policy.

The principle of equal treatment had developed from an isolated provision of equal pay in the Treaty of Rome, to a very important and far reaching *acquis* in the area of equality - a feature that sets Europe to the fore internationally. Article 2 EC recognises equality between men and women as a fundamental principle and one of the objectives and tasks of the community. Moreover, under Article 3(2) EC a specific mission is conferred on the Community i.e. to mainstream equality between men and women in all activities. The Amsterdam Treaty increased significantly the primary law and the European Union's ability to take action in the area of equal opportunities and equal treatment between men and women by giving to the Community legislator specific legal bases (articles 13, 137, 141 EC).

The European Court of Justice has stressed that Article 141 forms part of the social objectives of the Community which is not merely an Economic Union but at the same time intended by common action to ensure social progress and seek constant improvement in living and working conditions. The Court concluded that the economic aim pursued by Article 141 EC is secondary to the social aim, which constitutes the expression of a fundamental right.

The Charter of fundamental rights of the European Union, signed in Nice on the 7th December 2000, also recognizes in Article 23 equality between men and women as a fundamental principle.

The existing Directives have laid the legal ground for radical changes in national legislation, attitudes and practices while the Court by its caselaw has helped clarify and further develop the interpretation and scope of the principle of equal treatment.

From a first directive (75/117/EEC) on equal pay which was adopted on the basis of article 100 in 1975, and which further implemented and applied ex-Article 119 of the EC Treaty, the scope of equal treatment has been extended to cover other areas of social policy. In 1976 a second Directive, dealing with equal treatment relating to access to employment, vocational training, promotion and working conditions (Directive 76/207/EEC) was adopted on the basis of ex-Article 235 EC. In 1979, a third Directive (79/7/EEC) relating to the progressive implementation of the principle of equal treatment in matters of social security (statutory schemes) was adopted on the basis of ex-Article 235 EC.

In 1986, two further Directives were adopted, one on the basis of ex-Articles 100 and 235 of the EC Treaty in relation to occupational social security schemes (86/378/EEC) and the other on the basis of ex-Article 235 of the EC Treaty on the application of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC)

The successive modifications of the Treaty permitted the adoption of Directives with new legal bases and under other procedures emphasizing *inter alia* the role that the social partners can play in the area of equality, namely Directive on the protection of pregnancy and maternity (92/85/EEC) adopted on the basis of ex-Article 18A of the EC Treaty and on parental leave (96/34/EC). Directive 96/34/EC was the first directive adopted following the first agreement of social partners at Community level after the Maastricht Treaty under Agreement on social policy, annexed to the Protocol (No.14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 4(2) thereof.

Following a series of important judgements of the Court of Justice, it was felt necessary to adopt the post-Barber Directive 96/97/EC, amending Directive 86/378/EEC, in order to ensure conformity between Directive 86/378 and ex-Article 119 (new Article 141) as interpreted in the Barber and subsequent judgements.

Caselaw of the Court and the need for effectiveness of Community law prompted the Council, on the basis of a Commission proposal, to adopt Directive 97/80/EC on the burden of proof under Agreement on social policy, annexed to the Protocol (No.14) on social policy annexed to the Treaty establishing the European Community and in particular Article 2(2) thereof.

Based on different legal bases, the existing directives with their amendments provide a strong legislative environment. There is no doubt however that they need to be updated and

simplified in order to guarantee greater clarity and certainty across an enlarged Union and in order to make them more readable.

The recent modification of Directive 76/207/EEC by Directive 2002/73/EC, adopted under the specific legal base of Article 141 (3) EC which was introduced by the Amsterdam Treaty also demonstrated that the legislator agreed that there is a real need to update existing Directives (some of which are more than 20 years old). Directive 2002/73/EC takes into account the new developments in the Treaty (the legal means to implement the principle of equal treatment and work towards achieving equality between men and women was considerably enhanced after the Amsterdam Treaty) the case law of the Court (which developed considerably the principle of equal treatment) and the adoption of other similar legislation (Directive 2000/43/EC and 2000/78/EC based on Article 13 EC).

2. EU Directives on Gender Equality in Employment - An Overview

Directive 75/117/EC on equal pay for male and female workers, enshrining the principle of 'equal pay for equal work' laid down in Article 119 and introducing the concept of 'equal pay for work of equal value'.

Directive 76/207 (9th February 1976) on the implementation of the principle of equal treatment with regard to access to employment, vocational training, promotion and working conditions which provides that the 'principle of equal treatment' means 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. The Directive provides for an opportunity for positive measures. Council Directive 76/207/EEC does not define the concepts of direct and indirect discrimination.

On the basis of Article 13 of the Treaty, the Council has adopted Directive 2000/43/EC (29th June 2000) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC (27th November 2000) establishing a general framework for equal treatment in employment and occupation which defines direct and indirect discrimination.

Directive 79/7 on the progressive implementation of equal treatment with regard to statutory social security measures.

Directive 86/378/EEC on implementation of equal treatment in occupational schemes of social security (subsequently amended by Directive 86/977/EC).

Directive 86/613/EEC on equal treatment for men and women carrying out a self-employed activity, including agriculture.

Directive 92/85/EC improving the health and safety of workers who are pregnant or who have recently given birth.

Directive 96/34/EC on parental leave.

Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. Under the terms of this Directive, the onus is on the defendants accused of discrimination to prove that the principle of equal treatment has not been violated.

Directive 2002/73/EC (23rd September 2002) amending Council Directive 76/207/EEC covers the following:

- defining direct and indirect discrimination
- harassment and sexual harassment
- preventive measures
- unfavourable treatment of women related to pregnancy or maternity constitutes direct discrimination
- paternity leave
- positive action (optional)
- protection even after the employment relationship has ended
- adequate compensation, no a priori fixing of upper limit of compensation and no award of interest
- time limits for bringing actions
- adequate legal protection
- dialogue with social partners and non-governmental organisations
- effective and dissuasive sanctions

Council Directive 97/80/EC (15th December 1997) on the Burden of Proof in cases of discrimination based on sex.

Council Directive 92/85/EEC (19th October 1992) on the Burden of Proof. Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Council Directive 92/85/EEC) also to be covered by the burden of proof (Article 4 *Burden of Proof*. It shall be for the respondent to prove that there has been no breach of the principle of equal treatment)

3. Overview of Maltese Legislation

(a) Gender Equality in The Employment and Industrial Relations Act (EIRA) (2002)

The Conditions of Employment (Regulation) Act had been enacted nearly 50 years ago; in fact some of the provisions of the CERA were outdated and needed to be changed since they did not counter effectively to the present requirements of Malta's workforce.

With effect from 27th December 2002, the Employment and Industrial Relations Act 2002 (EIRA) came into force. This Act replaced what was previously the Conditions of Employment (Regulation) Act and the Industrial Relations Act and also includes a series of Regulations that were previously issued as legal notices in the White Paper: Employment Relations Act and Industrial Relations Act of December 2001.

The EIRA provides for enhanced rights for Maltese workers and aims to promote a better arrangement between working and family life.

Discrimination Related to Employment

The EIRA introduces provisions on “Protection against discrimination related to employment”. These articles are further enhanced in an Act to promote equality for men and women, which was signed by the President of Malta on 4th February 2003 (see below).

The EIRA stipulates that a person whether male or female cannot be discriminated against, from advertising a vacancy to the selection procedure of applicants. In addition the EIRA also states that an employer cannot employ a person having fewer qualifications than a person of the opposite sex. The employer cannot distribute tasks or work on the basis of discriminatory treatment. Employees in the same class of employment, whether male or female are entitled to the same remuneration for work of equal value. Both the EIRA and the Act to promote equality for men and women introduce the protection against harassment and sexual harassment at the place of work.

Part-Time Employees Regulations, 2002

The significant aim of this Regulation is to remove discrimination between part-time and comparable whole time employees. Nonetheless, different treatment could be justified on objective grounds.

A part-timer shall be entitled to the pro-rata benefits of whole time employees if:

- The part time employment is also the principal employment of the employee concerned AND
- He/she is employed for not less than twenty hours a week.

In cases where the maximum number of hours permissible in terms of the recognized conditions of employment for a part-time employee is less than twenty hours a week, a part-timer shall be entitled to the pro-rata benefits of whole time employees if:

- The part time employment is also the principal employment of the employee concerned;
- He/she is employed for not less than fourteen hours a week.
- The pro rata benefits include: Public holidays, Annual leave, Sick leave, Birth leave, Bereavement leave, Marriage leave and Injury leave
- Any other leave to which a whole time employee is entitled (vide parental leave).
- Statutory bonuses and other income supplements to which comparable whole time employees are entitled. (This was not the case before the Act came into effect)

These part-timers are also entitled to participate in vocational training programmes available to whole time employees.

The Regulations also state that part time employees are to be informed about opportunities available to work as a whole time employee and vice versa.

A Part-time employee also has access to the Industrial Tribunal if he feels that his employer has infringed a right conferred on him by these regulations.

Parental Leave Entitlement Regulations, 2003

The Parental Leave Entitlement Regulations 2002 have been repealed and are now replaced by the Parental Leave (Entitlement) Regulations 2003, Legal Notice 225 of 2003.

These regulations apply to:

- Both male and female parents.
- Whole time employees as defined in the Act.
- Part timers who are entitled to pro rata leave and who have been in the employment of the same employer for a cumulative period of at least twelve months.

The entitlement consists of unpaid parental leave of up to three months (i.e. 13 weeks) until the child has attained the age of eight years and such leave is to be availed of in established periods of one month each. This provision applies to birth, adoption and also legal custody of a child.

The regulation also specifies the manner in which such leave may be taken: *“the employer together with the employee may decide whether to grant the parental leave on a full time or a part time basis, in a piecemeal way or in the form of a time credit system”*.

Any balance of parental leave not availed of during employment with a company is carried forward if there is a change in employer or if the employee changes jobs. This is a point that would need clarification during recruitment, since the regulations specify that employers are to keep records of the parental leave granted to employees and have to submit written statements of the parental leave balance even after termination of employment upon request by the employee.

Employees have to give employers at least three weeks’ notice in writing specifying the beginning and the end of the parental leave.

The Regulation allows for cases where the employer may postpone the granting of parental leave. These ‘justifiable reasons’ include:

- Places where the work is of a seasonal nature;
- Where a replacement cannot be found within the notice given by the employee;
- Where the specific employment of the employee requesting parental leave is of strategic importance to the undertaking or place of business;
- Where the business does not employ more than ten persons;
- Where a significant proportion of the workforce applies for parental leave simultaneously.

- Where the employee is still undergoing the 6 month period from date of resumption after the maternity leave:

Provided that an employer who decides to postpone the granting of parental leave shall inform the employee in writing of the reasons for the postponement within 2 weeks. The postponement by the employer of the taking of parental leave is to be without prejudice to the employee's right to take the parental leave entitlement at the latest before the child reaches 8 years of age and if such postponement may result in the loss of the parental leave entitlement or part thereof, it shall be the duty of the employer to immediately grant parental leave for a period equivalent to the leave still unavailed of, or for such other lesser period as may be requested by the employee.

The Director of Employment and Industrial Relations shall act as mediator in cases of disagreement between employer and employee related to the entitlements covered by the regulations.

Any person contravening the provisions of these regulations shall be guilty of an offence and shall be liable, on conviction, to a fine of not less than 50 liri and not more than 500 hundred liri.

(b) Income Tax Reforms - Separate Income Tax Assessment, 1990

The 1990 amendments to the Income Tax Act were welcomed by Maltese married working women and their spouses as the new law meant that the working woman's income would no longer form part of an aggregate income for the year's assessment but would be assessed separately and consequently income tax payments would be considerably lower. This measure was introduced as an incentive to encourage married women to remain within the workforce, where their moving out is nowadays considered to be a loss of investment as well as a loss of potential.

(c) Social Security Act, 1987

The Social Security Act of 1987 replaced and consolidated previous enactments which covered national insurance, national assistance, and related matters. The National Insurance Act of 1956 and the National Assistance Act of 1956 were separate enactments rooted in two different concepts. The National Insurance Act was a contributory scheme, gender neutral but reflecting the social structure of the '50s in that the married male was the working partner who needed insurance while the wife was only entitled to a derived right. The National Assistance Act was a non-contributory scheme, usually directed at the male head of household as he was the one to register as unemployed.

Reforms in Social Security were carried out in 1991 to remove discrimination between married and single employees, giving the former the entitlement to sickness and unemployment benefits without losing out on National Insurance contributions paid before marriage and cessation of work at the time of marriage. Up to this date contributions paid by single female workers were not taken into consideration for social security purposes once they married.

In August 1999 The Commission for the Advancement of Women (Department of Women in Society) commissioned the law firm Muscat Azzopardi, Spiteri and Associates to study the provisions of Act X of the Social Security Act of 1987 and its subsidiary legislation with the aim of identifying those provisions which are gender-biased or gender-sensitive, as well as with the objective of identifying gender-sensitive situations which are not contemplated under current legislation and make recommendations accordingly. The report was finalized in February 2000.

In the introduction to the text the researchers wrote that the realities of social security and the cultural attitudes and mores that gave rise to them, were previously thought of as being cast in stone. For the best part of the century, but mainly in the last three decades, they have been questioned. The great racial debates which hit the United States of America in the 1960s, and Britain in the 1970s, only served to focus attention on another social and legislative anomaly. As the cry went up for equal treatment under the law for whites and blacks, it became impossible to ignore the social and legal injustice perpetrated by inequality of gender. The report highlighted worrying factors in social security, including the fact that women who dedicate themselves to child-raising and housekeeping do not have a pension cheque of their own, leading to poverty and vulnerability in the case of a marriage breakdown, and that women with no income of their own are extremely vulnerable. The report makes some interesting highlights, including that of “... *the misconception that only those who work for 15 years without a break are entitled to a pension*”. This misconception is widely held, apparently based on a misunderstanding, for it is not true that a person, whether male or female, must work for 15 unbroken years so as to receive a pension. The number 15 refers to the minimum yearly average contributions that one must pay during a period of 30 years of contribution so as to qualify for the minimum pension. The figure of 15 is equivalent to 750 contributions.

Further on the Report points out that:

“Right through the Schedules to the Social Security Act, there is reference to ‘a married man who is maintaining his ‘wife’. Nowhere is there a reference to a married woman who is maintaining her ‘husband’” .

The White Paper - Pensions Adequate and Sustainable (November 2004) draws attention to the need for measures to increase the participation of women in the labour market. The current consultation process should address these and other issues.

(d) Act to Promote Equality for Men and Women (2003)

This Act makes it unlawful for employers to discriminate in employment on the basis of sex or because of family responsibilities. This includes treating women less favourably for reasons of actual or potential pregnancy, parenthood, family responsibility or for some other reason related to sex.

- It also makes provision for indirect discrimination so that any treatment based on a provision, criterion or practice which disadvantages a substantial proportion of members of one sex is unlawful unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.
- It shall be unlawful for employers to discriminate directly or indirectly against a person in the recruitment stage, management of works, in giving promotions, distributing tasks, altering the working conditions or the terms and conditions on which the employment is offered or in the determination of who should be dismissed from employment.
- The burden of proof falls on the employer.
- The Act, in line with the Employment and Industrial Relations Act, makes sexual harassment unlawful, but does not include harassment.
- It also provides anti-discrimination measures where banks and financial institutions or insurance companies are concerned so that it is unlawful to discriminate against any person in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self employment.
- Spouses of self-employed workers not being employees or partners, who participate in the activities of the self-employed workers and perform the same or ancillary tasks as their spouses shall be entitled to receive from their spouse a fair compensation for their activity commensurate to the value of their contribution.
- The Act also states that it is unlawful to discriminate in education and vocational guidance and in advertising.
- The Commissioner may initiate investigations and take action following an investigation.
- A person who alleges that any other person has committed an act in his or her regard which under any of the provisions of this Act is unlawful shall have a right of action before the competent court of civil jurisdiction.
- The Minister may make regulations generally for giving effect to the provisions of this Act and the enforcement thereof.
- The Equality Act does not include the principle of Equal Pay for Work of Equal Value which is found in the Employment and Industrial Relations Act.

Implementation

- The National Commission for the Promotion of Equality for Men and Women set up by this Act has a legal personality. It has a number of functions, including investigating complaints of discrimination and acting as mediator when necessary; providing assistance where necessary; advising the Minister concerned regarding amendments where necessary.
- The Commission's main thrust is in the areas of investigating complaints and discrimination in advertising.
- There is also the need to ensure harmonization with the Employment and Industrial Relations Act regarding the principle of Equal Pay for Work of Equal Value which is not in the Equality Act.

- The Commission needs to take measures to pave the way for the implementation of the EU Directive on Access to Goods and Services, which comes into force in 2007.
- There is also dire need to ensure that both private and public sectors have a gender equality and sexual harassment policy in practice and reports are drawn up regularly.
- The Commission has been the first National Commission to publish a Quality Service Charter, however it requires more human, financial and technical resources to be able to carry out its work more efficiently.

4. Equal Treatment and the Constitution of Malta

The highest law of the Land, the Constitution of Malta in Section 14 and Section 45 (both of which were amended by Act XIX of 1991) provides for equal treatment between men and women. Hence Malta's commitment to fundamental human rights is also highlighted in these provisions which give the woman an equal right to that of the man. The Constitution establishes that if any other law is inconsistent with the Constitution the Constitution prevails, thus making this right attained by women even more fundamental.

Section 14 of the Constitution provides that:

“The State shall promote the equal right of men and women to enjoy all economic, social and cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men”.

Section 32 of the Constitution, under Chapter IV which deals with the fundamental rights and freedoms of the individual, guarantees equality between men and women:

“Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest.....”

Section 45(1) binds the State not to legislate any provision that is discriminatory either of itself or in its effect. Moreover Section 45(2) lays down that:

“No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority”.

The term “discriminatory” is defined in the Constitution as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description” (The Constitution of Malta - Article 45 (3)).

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