

Where a certain social level is to be achieved for all workers, this is done via minimum standards. The minimum level prescribed must be implemented throughout the Union, although the individual Member States may opt for higher standards. States have the choice between a high level of social protection or the competitive advantage of low production costs. Legislation on the working environment and working conditions can be adopted only in the form of directives setting “minimum requirements for gradual implementation” (Article 137(2)(b) EC).

The guarantee of equal pay and treatment is not a minimum standard; there is no less or more equality. But the relevant legislation adds minimum requirements aiming at the promotion of equality through certain bodies or procedures (for example, class action, burden of proof, and information of the workers). Such provisions are “minimum standards” regarding which a Member State may provide a higher level of protection.

2.6 Regulations, directives, recommendations: Their legal character and how they work⁵⁵

The Treaty establishing the European (Economic) Community is a primary source of supra-national law. Community legislation and the rulings of the European Court of Justice are secondary sources. Instruments of secondary law are regulations, directives, decisions and recommendations, adopted on the basis of the Treaty. How they operate is laid down in Article 249 EC:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.

A directive “shall leave to the national authorities the choice of form and methods”. Member States are thus free to implement a directive through existing structures and mechanisms, and at different levels – state,

⁵⁵ For relevant policies see: <http://europe.eu.int/scadplus/leg/en/s02205.htm>

regional and local. The governments represented in the Council decide upon the legal nature of secondary law; they prefer to use national institutions, rules and procedures, and therefore favour the adoption of directives. Regulations are restricted to common market issues, where the Community has exclusive competence. In the field of social policies, regulations are used to realize the freedom of movement of workers and related social security rights, for instance through Council Regulations (EEC) Nos. 1612/68 and 1408/71.

For social matters, directives are the usual instruments, and indeed for some areas the only admissible instruments. Directives have certain elements in common. They define the specific aims and addressees of the directive in question, and determine deadlines and obligations to be observed at the national level. Each directive imposes on Member States the duty to abolish any legislation or administrative rules that are incompatible with its aims. Access to justice must be enabled for all who consider themselves wronged by failure to comply with a directive. The entry into force is determined, as well as a deadline for transposal to the national level. Each directive states: “This Directive is addressed to the Member States”. The Member States are obliged to report, within a specified period, on the measures taken; these measures are subsequently examined by the Commission in view of compliance, and reported to the Council and the European Parliament. The reports are a useful source of inspiration for the implementation of Community law, or comparative labour and social law⁵⁶.

The European Court of Justice has frequently been requested to judge whether an individual can invoke direct rights from a directive, even though the directive is solely “addressed to the Member States”. The Court has developed various solutions to this legal problem. In the field of sex equality, it tends to derive rights directly from Article 141 EC on equal pay (former Article 119 EEC). Another way is to accord “immediate and direct effect” to specific provisions of a directive. For claims brought by a civil servant or public employee against the State, the latter has the double function of addressee of the directive and public employer. The Court therefore holds the State directly responsible for the full and effective implementation of all provisions of a directive. This jurisdiction is illustrated below by a number of examples.

⁵⁶ See, for instance, the following reports on Directives 92/85/EEC (Pregnant Workers) and 96/34/EC (Parental Leave): http://europa.eu.int/comm/employment_social/equ_opp/news/pregnant_en.htm and http://europa.eu.int/comm/employment_social/equ_opp/documents/com2003358_en.pdf

Member States are also financially liable if they do not, or do not in time, or do not correctly transpose a directive into national law. The problem of State liability in such a situation was raised in the case of two workers, Ms. Bonifaci and Mr. Francovich⁵⁷. They had suffered a loss of income because the Italian State had failed to implement Directive 80/897/EEC on the protection of workers in cases of insolvency. They therefore claimed compensation from the State. The Court judged as follows: if a State does not implement a directive during the time frame set, it is liable for the damage caused when the aim prescribed by the directive entails the grant of rights to individuals, when the content of rights can be clearly identified by the provisions of the directive, and when there is a causal link between the breach of State obligations and the damage sustained.

Article 249 EC states that recommendations have “no binding force”, but does this mean that they have no legal effect? This question was raised in the case of Mr. Grimaldi. He had applied for a pension to the Fonds des Maladies Professionnelles in Belgium, claiming that he suffered from an occupational disease, which the Fund denied. In contrast to Belgian law and practice, *Commission Recommendation 66/462/EEC on the conditions for granting compensation to persons suffering from occupational diseases* characterized his disease as “occupational”. The Court declared that, although a recommendation cannot in itself confer rights on individuals, the “national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law”⁵⁸. As a consequence of this highly disputed ruling, all courts in all the Member States are bound to consider even unilateral interpretations by the Commission.

It is thus up to the individual State to decide *how* a directive is applied. However, national law and practice must always cover the full scope of the directive, and implement it in time and effectively. If the aim of the directive is to grant and protect the rights of individuals – which is normally the case – the law must likewise grant individual rights in cases against any public or private employer. In many rulings regarding the *effet utile* of State measures, the Court has held the State liable for insufficient transposition.

⁵⁷ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italian Republic*, ECR 1991, p. I-5357; see also Case C-140/97, *Rechberger and Others v. Austria*, ECR 1999, p. I-3499 for further interpretation.

⁵⁸ Case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, ECR 1989, p. 4407.

2.7 Legal instruments in the field of social security related case law of the European Court of Justice

The most important provision on sex equality is the Article 119 of the Treaty of Rome (Article 119 EEC, now, after amendment, Article 141 EC). This Article applies to all occupational schemes and statutory schemes. Its first two paragraphs read as follows:

1. Each Member State shall ensure that the principle of equal pay for men and female workers for equal work or work of equal value is observed.
2. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in kind or in money, which the worker receives directly or indirectly, in respect of his employment, from his employer.

This Article was followed up by intensive secondary legislation with *Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women* (Equal Pay Directive). The content of the Equal Pay Directive entails, for the same work or for work to which the same value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. If a job classification system is used for determining pay, it must be applied on the same criteria for men and women. Employees wronged by the failure to apply this principle have the right of recourse to judicial authorities to pursue their claims. Member States must abolish all discriminatory provisions which do not comply with the principle of equal pay.

Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Equal Treatment Directive) aims to put into effect the principle of equal treatment for men and women as regards access to employment, vocational training, and working conditions (including social security). With respect to social security, further legislation has been envisaged. The directive prohibits any discrimination whatsoever on grounds of sex, either directly or indirectly, particularly with regard to marital or family status. Men and women are granted the same

⁵⁹ For legal texts see: http://europa.eu.int/comm/employment_social/equ_opp/rights_e