

European Women Lawyers Association

Association Internationale sans but lucratif (AISBL)

*Avenue Louise 486/3 (Jodocy), B- 1050 Bruxelles, Belgique
Tel.: ++32-2-648.98.50, Fax: ++32-2-648.36.43, email: info@ewla.org
www.ewla.org*

FIRST POSITION OF EWLA ON THE ARTICLE 13 GENDER EQUALITY DIRECTIVE

EWLA welcomes the Commission's initiative to draft a proposal for a gender equality Directive based on Art. 13 TEC and wishes to contribute to the elaboration of this very important instrument. EWLA presents to the Commission, the Council and the European Parliament and to all interested actors, a first position, with the reservation of further contributions on this matter.

I. The nature of the gender equality principle to be implemented by the new Directive.

1. The general features of the Directive, the selection of the matters that it will include and the way in which they will be dealt with are necessarily conditioned by the nature of the gender equality principle and its position in the Treaty.

2. **Gender equality** has been for a long time recognised as a fundamental principle and a fundamental right by the ECJ. Moreover, the Amsterdam Treaty makes it a «*task*» and an «*aim*» of the Community (Art. 2 TEC) and imposes on the Community not only an anti-discrimination policy in respect of gender, but furthermore, the **positive obligation** to «*eliminate inequalities*» and to «*promote equality between men and women in all its activities*» (Art. 3(2) TEC), i.e. in all fields of EC jurisdiction, including, but not limited to, employment, occupation and social security. This positive obligation is imposed on all EC/EU institutions and organs when they exercise their respective powers, including the power to propose and enact legislation in any field, irrespective of the particular legal basis of this legislation (see Art. 7 (ex 4) TEC), as well as on Member States.

3. The concept of «*inequality*» is wider than and different in nature from the concept of «*discrimination*». Gender «*inequalities*» are *de facto* situations. They affect mainly women, due to prejudices and stereotypes concerning their role and capacities, which the ECJ and the other EC institutions deplore, and which have infiltrated social and economic structures, thus making gender inequalities structural and systemic. **Women**, the main victims of gender inequalities, **are neither a group nor a minority** and the inequalities they suffer from are often multiple. By making gender equality a task and EC/EU aim and by demanding the elimination of inequalities, Arts. 2 and 3(2) TEC **require substantive gender equality which does not allow derogations** and cannot be achieved without **positive action, in the first instance in favour of women**, since they are the main victims of gender discrimination (see *infra* Nos 22-24)..

4. **Article 13 TEC enables the Council** to «take appropriate action» «*to combat discrimination*» based on the grounds it enumerates. Although «*sex*» is among them, it differs fundamentally from and cannot be dealt with like the other grounds, due to the fundamental and transversal character of the gender equality principle and the specificity of gender discrimination and inequalities. Arts. 2 and 3(2) TEC **require** (not only enable) **that all EC/EU institutions and organs** (not only the Council) «eliminate» (not just «combat») gender «inequalities» (not only gender «discrimination»).

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5. Consequently, the fundamental Treaty approach to “sex” or “gender” is **not only an anti-discrimination approach, but furthermore, a proactive, substantive equality approach**. The fundamental provisions of Arts. 2 and 3(2) TEC set the framework within which the implementation of Art. 13 in respect of “sex” or “gender” has to be made and they condition this implementation. **The Treaty, therefore, requires not a framework Directive, not an anti-discrimination Directive, but a proactive gender equality Directive**, covering all fields of Community jurisdiction, such as those enumerated in Art. 3(1) TEC and in Part III of the TEC (Community policies), with the exception of those covered by Art. 141(3) TEC (*infra* II). **This Directive should allow no derogations or exceptions and should provide for positive action in all fields.**

6. **Gender inequalities in any field** have also consequences in the field of employment, occupation, social security and social cohesion and they result in poverty and social exclusion, which are increasingly feminised. **They are thus related to all aspects of EC/EU social policy and they serve a multiplicity of EC/EU fundamental social and economic objectives.**

7. Moreover, since the promotion of gender equality is an **EC/EU objective** and certain issues to be dealt with by the new Directive are directly affecting the functioning of the common market and are serving the EC/EU social and economic strategic goals, Art. 13 can be used as a legal basis in conjunction, where necessary, with **Arts. 308 (ex 235), 94 (ex 100) or 67(1) (ex 73o) TEC**.

8. However, whatever the main or subsidiary legal basis, **in no case should it be forgotten that the Directive constitutes an implementation of the fundamental gender equality principle and a fulfilment of the positive obligation to promote it, as imposed by the Treaty. This Directive should be inspired by the other Art. 13 Directives (2000/43 and 2000/48), but it should go even further**, in view of the fundamental and transversal character of the gender equality principle, the imperatives of Arts. 2 and 3(2) TEC and the specificity of gender discrimination and inequalities.

9. A Directive on gender equality in the fields not covered by Art. 141(3) TEC is an “appropriate action” and has an added value, since serious gender inequalities and the constant violation of women’s human rights in all fields are persisting, as EC/EU institutions and international organisations deplore it, and gender equality cannot be sufficiently achieved by the Member States. Such a Directive will thus conform also to Art. 5 TEU (principle of subsidiarity).

II. The scope and contents of the new Directive

10. EWLA reserves its position on the exact scope of and the more particular issues to be dealt with by the new Directive. By this first contribution it presents certain relevant general observations, in particular regarding the scope of this Directive as related to the scope of Art. 141(3) TEC.

a) The scope of Art. 141(3) TEC

11. In order to see what issues the new Directive should deal with, we should first delimit the scope of **Art. 141(3) TEC**, which requires the adoption of measures to ensure the application of the gender equality principle “*in matters of employment and occupation*”. This is also important in view of the procedure according to which these measures have to be adopted. The procedure of Art. 251 TEC, to which Art. 141(3) TEC refers, is a co-decision procedure involving the Parliament as a co-legislator and requiring not unanimity, but qualified majority in the Council. This procedure is followed for the amendment of Directive 76/207. The Art. 13 TEC procedure allows only a “Council directive” and requires unanimity in the Council.

12. “*Matters of employment and occupation*” are, in the first place, those covered by Article 141 itself (equal pay) and Directives 75/117 (equal pay), 76/207 (equal treatment), 86/613 (self employed) 92/85 (pregnancy), 96/34 (parental leave), as well as the burden of proof in matters of discrimination covered by these Directives (Directive 97/80).

13. Matters **related to** employment and occupation, such as *social security of workers and unemployed persons*, are also obviously covered by Art. 141(3) TEC. They are related to the matters of Directives 79/7 (statutory social security), 96/97 (occupational social security) and the pending Directive proposal(s) on social security. The occupational social security matters covered by Art. 141 fall, in any event, within the scope of Art. 141(3), since they are covered by Art. 141(1).

b) Maternity, paternity and the reconciling of family and work: relevant measures should be based on Art. 141(3), but the new Directive should include a horizontal provision thereon.

14. *Maternity protection*, which is dealt with by Directive 92/85, and the more general issue of *reconciling family and work*, which is now partly addressed by Directive 96/34, also fall within the scope of Art. 141(3) as concerns **measures aiming at guaranteeing them**. This means that either new directives providing for such measures or amendments to the above directives, including the extension of their scope to include further measures, should be based on Art. 141(3).

15. It should be recalled that the *reconciling* of family and work is recognised by the ECJ¹ and the Resolution on the balanced participation of women and men in family and working life² as a *principle* of Community law, a *right* of men, women and children, a natural corollary to gender equality, a condition for its effective achievement and a significant *acquis communautaire*. The implementation of this principle is a condition for achieving the fundamental EC/EU social and economic goals, as the Nice Council reaffirmed by adopting the European Social Agenda.

16. Family responsibilities to be reconciled with work include, according to the above Resolution, “the care to be provided for *children, elderly, disabled or other dependent persons*”. This wider concept of family responsibilities is also reflected in **Directive 96/34** (parental leave), which stipulates in its Preamble that it introduces “means of reconciling work and family life”, and which requires “measures to entitle workers to time off from work [...] on grounds of *force majeure* for urgent family reasons” (Clause 3), in addition to parental leave.

17. Thus **the right to reconcile family and work is larger in scope than maternity and paternity rights** and includes **individual rights** that should be **guaranteed and protected against any discrimination in any field**. Therefore, all gender equality directives should contain a provision, worded in a positive way, so as to make it clear that measures relating to such rights are necessary, that they constitute in no case derogations from the gender equality principle and that any unfavourable treatment directly or indirectly related to such situations and rights is prohibited.

18. Consequently, while measures for the protection of maternity, paternity and the reconciling of family and work fall within the scope of directives based on Art. 141(3) TEC, **the new Directive should include a horizontal provision which will stipulate that such measures do not constitute discrimination or derogations from the gender equality principle and will prohibit any direct or indirect discrimination, directly or indirectly related to maternity, paternity, family situation or the reconciling of family and work, within the whole scope of the new Directive.** This is required by the fundamental gender equality principle and for the fulfilment of the

¹E.g., in Cases C-243/95 *Hill* [1998] ECR I-3739, para. 42; C-1/95 *Gerster* [1997] ECR I-5253, para. 38.

² Resolution of the Council of 29.6.2000, on the balanced participation of women and men in family and working life OJ C 218, 31.7.2000, p. 5.

strategic social and economic EC/EU goals. It is of capital importance for the future of Europe, indeed for its very survival.

19. Moreover, Art. 141(3) TEC should be interpreted in a large and teleological way, so that gender equality, a fundamental and transversal EC principle, a fundamental human right, an EC/EU “*task*” and “*aim*” can be “*promoted*” as required by Art. 3(2) of the Treaty. This so, because the procedure provided by Art. 141(3) is more favourable than the one provided by Art. 13 TEC (*supra* No 11).

c) Certain other horizontal provisions to be included in the new Directive

20. The **scope** of the new Directive must be formulated so as not to exclude the fields that will eventually be added to EC/EU jurisdiction in the future. For this purpose, the provision relating to the scope of the new Directive should stipulate that it applies to fields not covered by Art. 141(3) TEC [cf. Art. 2(1) Directive 96/97, occupational social security] and should mention indicatively the fields that it covers and/or stipulate that it applies to any future field of EC/EU jurisdiction.

21. The new Directive must include **definitions of direct and indirect discrimination** for its purposes, analogous to those of the other two Art. 13 Directives.

22. The new Directive must **prohibit, within its whole scope, harassment, sexual harassment, instructions, incitement or pressure to discriminate or harass, and any advertisement directly or indirectly discriminating on grounds of sex, family situation, paternity, maternity or reconciling of family and work, or affecting the dignity of women or men, girls or boys.**

23. The new Directive **should not allow any exceptions or derogations**, as they are incompatible with the fundamental and transversal character of the gender equality principle and the nature of gender discrimination and inequalities to be eliminated. Research and experience moreover show that they lead to serious abuse and perpetuate the inferior status of women, which is a serious concern in the Union, as recognised and deplored by the ECJ and other EC/EU institutions.

24. The new Directive must include **a general provision on positive action in all fields** that it covers, which should not only refer to the *underrepresented sex*, but should **also require that disadvantages**, in these fields, **be effectively prevented or compensated** (cf. Art. 141(4) TEC) and that positive action should be **in the first instance in favour of women**, since it is they who are the main victims of gender discrimination (cf. Declaration No 28 annexed to the Amsterdam Treaty).

25. The new Directive must require **real and effective judicial protection**, including effective **access to court** and **effective, proportionate and dissuasive sanctions** for any infringement of the Directive or of national provisions that are consistent with it, which must not only be provided for by Member States, but also effectively applied by all their competent organs.

26. The new Directive must include an Article on the **burden of proof**, analogous to the one in the other two Art. 13 Directives, which should apply to any field and case covered by this Directive.

27. The new Directive must provide for **independent bodies** to control its application and for the *locus standi* of these **bodies**, **NGOs** and **trade unions** to bring individual and group cases to courts.

EWLA expects that the competent EC institutions, fully aware of their responsibility for the future of Europe, will contribute to a Directive that will fulfill the requirements of the Treaty, will promote the achievement of the Union’s strategic social and economic goals and will render its social and economic policy consistent and coherent.