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COMMISSION STAFF WORKING DOCUMENT

EVALUATION

of the

Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security

{SWD(2019) 451 final}

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ACRONYMS AND ABBREVIATIONS

AROPE	At risk of poverty or social exclusion rate
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
COM	European Commission
ECLI	European Case Law Identifier
EEC	European Economic Community
EIGE	European Institute for Gender Equality
EU	European Union
Eurostat	Statistical Office of the European Union
ILO	International Labour Organization
LFS	Labour Force Survey
MISSOC	Mutual Information System on Social Protection
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OPC	Open Public Consultation
REFIT	Regulatory Fitness and Performance Programme
SWD	Staff Working Document
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

SECTION 1: INTRODUCTION

Purpose and scope of the evaluation

This staff working document (SWD) gives an overview of the results of the ex-post evaluation of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security ('the Directive').

This evaluation does not arise from an obligation of the Directive. Rather, it is part of the Commission's initiative announced in its 2012 Communication¹ to regularly assess the regulatory fitness and performance (REFIT) of existing EU legislation with the aim of identifying potential regulatory cost reduction or simplification.

In line with the 'better regulation' requirements², the evaluation assesses the Directive's effectiveness, efficiency, relevance, coherence and EU added-value. It examines to what extent the impact of the Directive has realised its objectives and what aspects may have prevented or hampered such objectives from being achieved. The evaluation assesses whether the Directive's provisions have been 'fit for purpose' between 1979 and today. On relevance, it assesses whether the EU action has been and remains relevant in this area, is consistent with the other EU gender equality directives, provides clear added value compared to action that can be taken at Member State level, or gives rise to any unnecessary costs when applying the Directive. The evaluation questions are presented in Annex 2.

In addition, the evaluation provides evidence and conclusions that may form the basis for a possible future revision of the Directive aimed at keeping the latter up to date and/or addressing a number of shortcomings to its effectiveness, efficiency, relevance, coherence and/or EU added-value.

The evaluation covers the same geographical scope as the Directive itself – i.e. the entire EU. It focuses on the objectives and area set out in the Directive. It covers all the Directive's core provisions and evaluates to what extent the Directive has reached its objective – i.e. to progressively eliminate discrimination on the grounds of sex in matters of statutory social security.

The study to support the evaluation (support study) was completed in June 2016³. Ahead of this, to collect evidence and feed into this evaluation, in 2015 the Commission surveyed

¹ COM(2012) 746, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Regulatory Fitness, 12.12.2012

² The REFIT evaluation of the Directive is announced in the Commission staff working document 'REFIT: Initial results of the mapping of the *acquis*' (SWD(2013) 401 final) and is part of the Commission's 2015 work programme (Annex 3 (COM (2014) 910 final of 16.12.2014)

³ Final report is available at <https://publications.europa.eu/pl/publication-detail/-/publication/c820b68d-e680-11e9-9c4e-01aa75ed71a1/language-en>

Member States on the implication of the landmark case C-318/13⁴ of the Court of Justice of the European Union (CJEU) and launched an internet-based public consultation. Furthermore, additional research and bilateral consultations with Member States were conducted by the Commission in the course of 2017-2019. All findings are reflected in this SWD.

Although national transposition measures were not the main object of this evaluation, a general overview of the Directive's implementation was also included to have a fuller picture (See Section 4).

SECTION 2: BACKGROUND TO THE INTERVENTION

This section provides a short description of the content and objectives of the Directive and its intervention logic.

2.1 Description of the intervention and its objectives

The Directive aims to ensure the implementation of the principle of equal treatment of men and women in matters of statutory social security, i.e. social security schemes established by national legislation of EU Member States. To achieve its goal, the Directive explicitly prohibits all discrimination on the ground of sex whether directly or indirectly by reference in particular to marital or family status. The Directive requires Member States to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment be abolished. Within 6 years of the notification of the Directive to the European Commission (19 December 1978), Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive; one year later, i.e. within 7 years following its notification, Member States had to provide all necessary information to the Commission to enable it to draw up a report on the application of the Directive⁵.

The principle of equal treatment between women and men (as pursued in the Directive) protects European citizens against discrimination on grounds of sex, as regards the scope of social security schemes and the conditions for accessing them, the obligation to pay into the schemes and the way contributions are calculated, the way benefits are calculated and the conditions governing the duration and retention of entitlement to such benefits. Such discrimination may be direct, e.g. persons in similar situation are treated in a different way on ground of sex or, more typically, indirect, e.g. where an apparently neutral provision, criterion or practice puts persons of one sex at a particular disadvantage, unless that provision, criterion

⁴ Case C-318/13 – Proceedings brought by “X”, ECLI:EU:C:2014:2133.

⁵ COM(88)769.

or practice is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

From the personal coverage point of view, the Directive applies to the *working population*, to *retired or disabled workers*, and to *self-employed* persons. It does not apply to persons who have never worked or who are not seeking employment⁶. The scope *ratione personae* also excludes people working in unpaid domestic or care work, in which women have traditionally played and still play a major role. In *Johnson*⁷ the CJEU clarified that the Directive applies only to persons who are available on the labour market or who have ceased to be so owing to the materialisation of one of the risks specified in the Directive. This means that a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children does not come within the scope of the Directive, since the interruption of employment due to the bringing up of children is not one of the risks listed in the Directive. The interpretation in the *Züchner*⁸ ruling of the CJEU further confirms that the personal scope of the Directive does not extend to care work carried out by women privately. Following this interpretation, a person engaged in care work may still be regarded as coming within the scope of the Directive as a person seeking employment the search of which is made impossible by the materialisation of one of the social risks, such as old-age, specified in Article 3(1)(a) of the Directive. However, the person concerned must prove that he or she was a person seeking employment when one of the risks specified in Article 3(1)(a) of the Directive materialised.

From the perspective of its material scope, the Directive applies to *contingencies* listed and defined in the Convention Nr. 102 of the International Labour Organisation and the European Code of Social Security drawn up by the Council of Europe in 1964, with the exception of widowhood, maternity and family charges. Thus, the Directive applies to statutory social security schemes which provide protection against the risks of *sickness, disability, accidents at work and occupational diseases, unemployment and old age* – risks which are traditionally associated with work in the labour market. Social assistance arrangements are covered by the Directive to the extent that they supplement or replace social insurance payments for one of the contingencies covered by the Directive, e.g. the supplementation of insurance benefits by means-tested allowances to meet basic living standards and payments to long-term unemployed persons whose insurance benefits are exhausted. As such, the Directive recognizes the fact that the same contingencies can be covered in different ways in different countries, sometimes by contributory benefits and sometimes by a mixture of contributory and non-contributory benefits. Social assistance payments related to contingencies other those listed in the Directive are not covered.

⁶ Joined cases C- 48/88, 106/88 and 107/88, J. E. G. Achterberg-te Riele and others v Sociale Verzekeringsbank, ECLI:EU:C:1989:223.

⁷ Case C-31/90, Elsie Rita Johnson v Chief Adjudication Officer, ECLI:EU:C:1991:311.

⁸ Case C-77/95, Züchner v Handelskrankenkasse (Ersatzkasse) Bremen, ECLI:EU:C:1996:425.

Survivors' benefits and family benefits are expressly excluded from the Directive's field of application. This area was left for further legislative intervention, which did, however, never happen due to a lack of political support by Member States⁹. However, the principle of equal treatment included in the Directive is without prejudice to the provisions relating to the protection of women on grounds of *maternity* and this matter was regulated subsequently in Directive 92/85/EEC¹⁰ (for workers) and Directive 2010/41/EU¹¹ (for self-employed). Also, social partners agreed in 1996 on parental leave for women and men; this agreement was adopted as EU law¹². The latter Directive was revised in 2010 and most recently in 2019 with the adoption of the Work-life balance for parents and carers directive¹³ which ensures two months of paid and non-transferable parental leave for parents and 10 days of paid paternity leave for working fathers.

Article 7 of the Directive provide the Member States the faculty to exclude from the application of the principle of equal treatment a limited number of matters in regard to:

- pensionable age;
- advantages granted to retired persons who have brought up children;
- old-age or disability benefit entitlements by virtue of derived entitlements of a wife;
- increases of long-term benefits for a dependent wife; and
- the consequences of the exercise, before the Directive's adoption, of a right of option not to acquire rights or incur obligations under a statutory scheme.

These limitations to the Directive's scope had the objective to provide flexibility to Member to progressively implement the principle of equal treatment in certain matters of social security having urge financial and societal implications. The Directive required Member States making use of that faculty, to periodically examine the continued need to exclude these categories in the light of social developments (Article 7(2)).

The logic of the intervention could be visualised as follows:

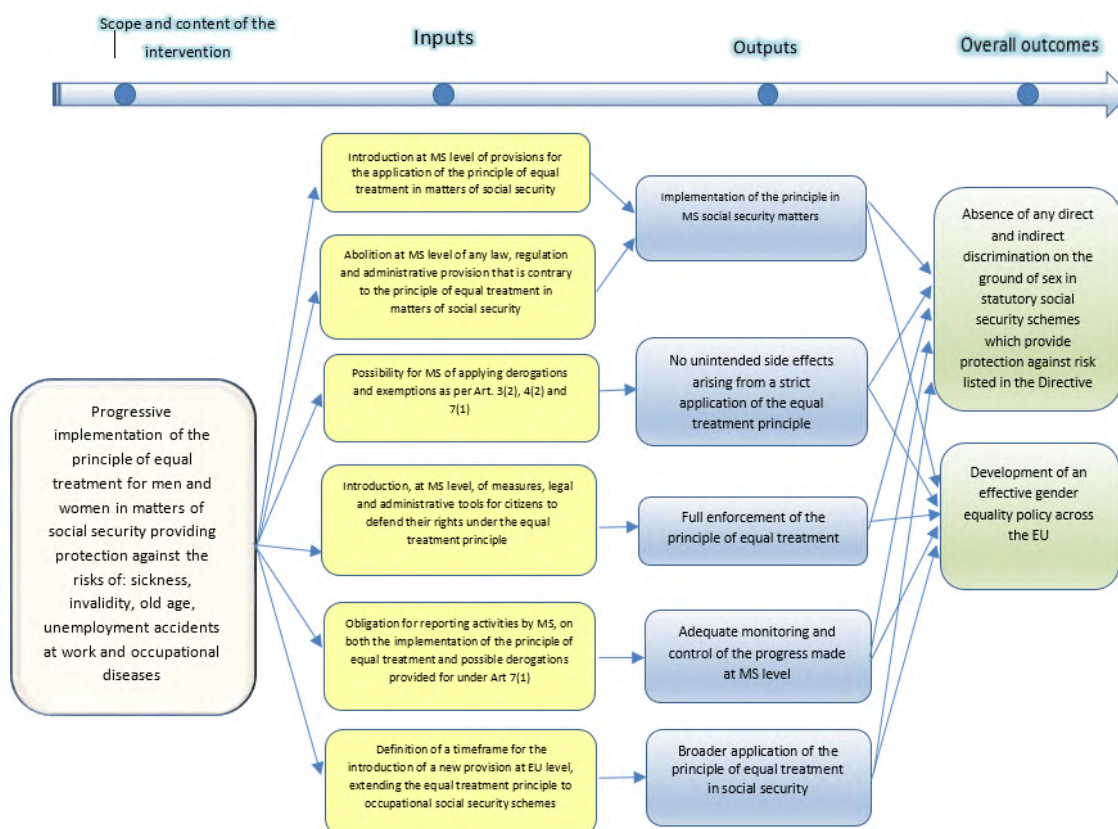
⁹ COM (2001) 763 final.

¹⁰ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). OJ L 348, 28.11.1992, p. 1–7.

¹¹ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. OJ L 180, 15.7.2010, p. 1–6.

¹² Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145 , 19/06/1996 P. 0004.

¹³ Directive (EU) 2019/1158 of the European Parliament and the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12/7/2019, p.79.



2.2 Baseline

Gender equality has been a long-standing policy commitment of the European Union. Sixty years ago the principle of equal pay for equal work was included in the Treaty of Rome and equality between women and men became one of the European Union's founding values.

The Directive was adopted in 1978, at the height of the EU's (at that time still the 'European Economic Community') endeavour for equal treatment. It was triggered by the 1974 Social Action Programme¹⁴ which among others included the objective to bring about equality between women and men in the labour market and to gradually extend social protection, particularly within the framework of social security schemes, to categories of persons not covered or inadequately provided for under existing schemes.

The background to the Directive's adoption was the need to tackle the structural inequality of working women and men in society, ensure their equal treatment in statutory social security

¹⁴ COM(73) 1600 Final.

systems across the EU and prohibit direct and indirect discrimination, in particular discrimination based on marital or family status.

Before the Commission presented a proposal for a directive in 1977, it undertook a study¹⁵ on the differences in treatment between men and women in the field of social security. This study highlighted the need for the EU's intervention concluding that socio-economic realities no longer justified social security systems being oriented exclusively towards the man as the breadwinner and head of the household. Social welfare model existed at the time was centred on the idea that the household serves as the reference unit for social provisions that are redistributed internally as a private matter. Social norms on gender roles in the family were implicit: with welfare States becoming more generous in the post WWII period, there was no 'need' for women to contribute to the family income, and they were supposed to take up their role as carer of the family. On the other hand, men's salary, being the primary and often the only income for the family, deserved better protection. Before the Directive was adopted, the family, for the purpose of social security, was presumed to include an economically active male 'breadwinner' and a dependent female, who was at home, caring for the family and having no paid employment. This social and family background justified disparities in the treatment of women and men.

However, the social climate of the 70's, changes in the labour market such as the increasing relevance of the service economy, a shift in attitudes towards women's participation in the labour market, the search for economic independence of women and for women's rights, resulting in an increasing economic activity of (married) women¹⁶, and changing social rules (e.g. the introduction of divorce laws), all put into question the assumptions behind the male breadwinner model and exposed unjustified differences in treatment of women and men including in the area of social protection.

Although at that time the notion of head of household (or head of family) had practically disappeared in civil law, it was still applied in certain social security branches with the implication that in a married couple one spouse was subordinate to or financially dependent on the other (head of household/breadwinner). Even when women actively started to enter the employment market, the breadwinner/dependent model continued to be the basis of social security. The countries where social security systems were attuned to the breadwinner model at that time were in particular Belgium, the Netherlands, Ireland and the UK. Wives remained presumed to be dependent; even if they received – often limited – benefits, it was the men who automatically or even exclusively qualified for certain higher and longer benefits or for dependents' allowances.¹⁷

For example, in the Netherlands, married women in paid work making social insurance contributions, were unable to claim unemployment benefits from the tax-financed scheme

¹⁵ Unequal Treatment of men and Women in Social Security, Commission of the European Communities, 1976

¹⁶ Catherine Huskyns and Linda Luckhaus, *The European Community Directive on Equal Treatment in Social Security, Policy and Politics*, 1989, 321-55.

¹⁷ Sacha Prechal, Noreen Burrows, *Gender Discrimination law of the European Community*, 1990.

(Wet Werkloosheidsvoorziening) if they were not the breadwinner in the household (*kostwinner*)¹⁸. They were also unable to claim their pension rights under the national old age pension scheme (the '*Algemene Ouderdomswet*'). Ireland equally was characterized as a 'strong male breadwinner' system.¹⁹ Married women suffered from a number of specific forms of discrimination; for instance, were considered as dependants if they were living with their husbands, regardless of actual dependency; husbands could only be considered as dependants if they were incapable of self-support and wholly maintained by their wives. Married women were ineligible for means-tested unemployment assistance. More generally, women suffered inequalities in the employment area: until the 70's it was common for women to leave paid work and in some cases even to be forced to leave paid work upon marriage.²⁰ In Belgium, married women were rarely able to gain access to, for example, unemployment and sickness benefits, or to old age pensions. Retirement pensions were paid at two rates: either at 70 per cent or at 60 per cent of the annual average salary earned over the working life where the higher rate was only paid to married men with dependent spouses, who were always considered to be 'heads of households', while women could only receive the 60 per cent (single person's) pension rate²¹. Also in the United Kingdom, in the mid-70's many women's opportunities to build up personal entitlements to contributory benefits or to establish themselves as claimants of means-tested benefits were limited.²²

Section 3: METHOD

3.1 Process

The evaluation process was steered by an Interservice Steering Group (ISG) chaired by the Directorate-General for Justice and Consumers and involving representatives of the Directorates-General for Employment, Social Affairs and Inclusion, the Legal Service and the Secretariat-General. The ISG brought together members with different functions providing the necessary mix of knowledge and experience. The ISG monitored the process, to ensure that the evaluation be impartial, useful and of the necessary quality.

The evaluation started in December 2014, when the ISG was set up. In February 2015, the ISG validated the evaluation mandate and terms of reference for commissioning an evaluation support study. Following a call for tender, the Commission signed a contract with Ernst & Young Advisory Services SCRL in May 2015, with a kick-off meeting to discuss with the contractor the approach and objectives of the evaluation. Based on the requirements of the

¹⁸ Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law (Socio-legal Studies) by Julia A. Sohrab, Dartmouth Pub Co, 1996, p. 154.

¹⁹ Ibid p. 166.

²⁰ Ibid p. 166.

²¹ Ibid, p.181.

²² Ibid, p.193.

‘better regulation’ initiative launched in May 2015, an evaluation roadmap was prepared and published in September 2015²³.

The contractor delivered its final report in June 2016²⁴. To complement its evidence base, the Commission subsequently monitored the situation in Member States and the implications of the case law of the Court of Justice.

Further procedural information is included in Annex 1.

3.2 Methodology and information collection

The evaluation included extensive data-gathering on the Directive’s implementation across the EU and the extent to which Member States made use of the available derogations. Data and information were gathered through a range of approaches. Extensive desk research yielded a number of research studies and reports published by the EU institutions (e.g. European Commission, European Parliament, European Institute for Gender Equality (EIGE), Eurofound), national institutions, and academic researchers (both legal and policy) regarding the situation of women and the population in general from the perspective of social security and labour market, as well as gender equality aspects directly and indirectly related to it. Available data and statistics from Eurostat and other sources were also reviewed at this stage.

Desk research was conducted using the literature available at EU and national level. It included relevant literature on the national and European legal framework of reference, previous studies on the topic and national implementation reports that Member States submitted to the Commission. The analysis of the Directive’s transposition and implementation started from the Commission’s implementation reports of 1984, 1988 and 1995. These reports served as one of the main sources of information and provided initial findings on the Directive’s implementation and enforcement. An extensive literature review allowed the evaluation to gather information on recent social security reforms across the EU, in particular the factors impacting gender gaps. The European Network of Legal Experts in Gender Equality and Non-Discrimination report of 2007²⁵ gave an overview of the Directive’s implementation in each Member State and presented the structure of their pension systems. Another network report of 2010²⁶ provided information on direct and indirect discrimination in the statutory and occupational old-age pension. The EU’s Mutual Information System on

²³ http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_032_evaluation_directive_equal_treatment_of_men_and_women_in_social_security_en.pdf

²⁴ <https://publications.europa.eu/pl/publication-detail/-/publication/c820b68d-e680-11e9-9c4e-01aa75ed71a1/language-en>

²⁵ European Network of Legal Experts in Gender Equality and Non-Discrimination, Report on Directive 79/7/EEC and Directive 86/378/EEC as amended by Directive 96/97/EC.

²⁶ European Network of Legal Experts in Gender Equality and Non-Discrimination, Report on Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries.

Social Protection ('MISSOC') tables²⁷ provided detailed and up-to-date information on the key aspects of Member States' social protection systems. Statistical evidence was based on the OECD and Eurostat databases.

Fieldwork research by experts of the external contractor relied on both written contributions and interviews with relevant stakeholders. Targeted interviews with stakeholders involved in social security and gender equality were conducted in 21 Member States (in total 75 stakeholders were interviewed). They included representatives of ministries, national institutions for social security, national equality bodies, supreme courts, academics and experts in the field. Interviews were tailored to different stakeholders' roles and responsibilities. This made it easier to triangulate data and information and ensure that the evaluation was as transparent and reliable as possible. The interviews served the purpose of confirming, investigating and better understanding the main issues that emerged from the desk research.

The overview of Member States' legislation on equal treatment and statutory social security matters included laws, regulations and administrative procedures adopted to transpose the Directive into the national legal systems and social security schemes. It also looked at the enforcement decisions taken by national courts ensuring the Directive's proper interpretation and implementation.

During the evaluation process, other EU directives on equal treatment between men and women were also considered. The purpose was to assess whether the approach used in the Directive is consistent or whether there are inconsistencies among different pieces of EU legislation dealing with gender equality in statutory social security, occupational social security and voluntary insurance arrangements.

The legislative overview on how aspects relevant to the Directive are reflected in national legislation was based on the Commission's implementation reports and on MISSOC tables on the applicable statutory basis for all the statutory schemes. The analysis was triangulated with information provided by relevant stakeholders during the interviews and also fed into it the country fiches prepared during the evaluation.

Finally, the relevant CJEU case-law was analysed. This was case-law stemming from preliminary ruling procedures on cases pending before national courts and from infringement procedures following complaints based on the Directive's provisions. The analysis was used to understand the CJEU's interpretation of the principle of equal treatment and the impact of this on the Directive's scope and potential modernisation.

In addition to the above-mentioned information-gathering and assessment, the Commission conducted an additional gathering of information which complemented the evidence base for the REFIT exercise:

²⁷ <https://www.missoc.org/missoc-database/comparative-tables/>

1) The findings of the Commission's monitoring

Firstly, through a questionnaire to Member States in March 2015 on the implications of the CJEU ruling in the 'X' case²⁸, the Commission asked Member States to indicate whether and to what extent gender-specific actuarial rules are applied in Member States' statutory social security systems. If so, the Member State were asked what measures they were taking or planning to take, following the Court's ruling, to discontinue the use of such actuarial rules. The results of this information-gathering are presented in this SWD (see Section 4).

Furthermore, the monitoring process also included the results of bilateral communications with Member States on questions related to the potential non-compliance of national legal provisions with the Directive and CJEU case law, including the ruling in the 'X' case.

2) Web-based public consultation

The European Commission prepared and conducted a 12-week open public consultation from September to December 2015²⁹ (on the EU Survey website, in all EU languages), to obtain additional qualitative data, in accordance with the better regulation guidelines. This public consultation helped to collect the views from the public on the Directive's implementation and application, including on its effectiveness, relevance and EU added value. The questions for the open public consultation were prepared in close cooperation with members of the ISG. An announcement about the public consultation was sent (with a reminder) to Member States' Permanent Representations to the EU and to the secretariat of the Social Protection Committee³⁰. Information about the public consultation was also published on the Directorate-General for Justice and Consumers' website and Twitter account. The overview of the results of the public consultation is presented within Annex 3 of this SWD.

The data collected from these sources was used to respond to the evaluation questions. Findings from the data collected constituted the basis for assessing how the Directive scored on the five evaluation criteria of effectiveness, efficiency, relevance, coherence and EU added value.

3.3 Limitations — robustness of findings

It was difficult to obtain primary information from experts and institutional stakeholders on gender in statutory social security. Some experts had extensive knowledge about social security and reforms but were not sufficiently familiar with gender equality issues. Other experts – researching on gender discrimination — were more focused on issues closely related to social policy in general, but out of the scope of Directive 79/7/EEC (e.g. equal pay, gender gaps in the workforce). As a consequence, not many experts contacted during the evaluation

²⁸ Case C-318/13 – Proceedings brought by “X”, ECLI:EU:C:2014:2133.

²⁹ http://ec.europa.eu/justice/newsroom/gender-equality/opinion/150901_en.htm

³⁰ The Social Protection Committee (SPC) is an EU advisory policy committee for Employment and Social Affairs Ministers in the Employment and Social Affairs Council, established by the TFEU (Article 160).

process had an understanding of both social security and gender issues. On the side of stakeholders, their views often conveyed an individual rather than a holistic perspective.

As for institutional stakeholders, they generally lacked the institutional memory and knowledge about the Directive, particularly when it came to the scope of the Directive or details related to REFIT criteria. This has been one of the key difficulties for the evaluation process. Institutional stakeholders at national level currently dealing with social security schemes hardly refer to the Directive in their ordinary practice. This is because the principle of equal treatment has been (or is thought to be) fully incorporated in their national laws and measures, and these have now become the main terms of reference. The lack of stakeholder expertise on the topic has hampered the collection and analysis of data and has especially affected the assessment of the Directive's impact at national level. To remedy this situation the original list of interviewees was modified several times and progressively extended to reach the targeted number of contributions.

It has equally proven difficult during the evaluation process to obtain quantitative data on the potential costs and benefits generated by the Directive's application. This was mainly due to the difficulty of extracting data on the Directive from wider data sets and to the fact that the Directive was in place for a long time. A complete picture could therefore not be established, in particular as regards evaluating progress over time.

Another factor is that costs are mainly indirect and benefits are mainly attributable to an increase in people's well-being. By definition, such costs and benefits cannot be directly linked to the specific Directive. In addition, in EU Member States which joined after the Directive was adopted, the process of compliance with the Directive coincided with the EU accession process. Thus, quantifying costs is not feasible because of the complexity of separating any cost attributable to the Directive from the overall costs incurred by these Member States during the accession process.

As regards the internet-based public consultation, there are inherent limitations in the findings of such consultation, which cannot provide statistically significant results. As in most on-line surveys, the answers received reflect the views of self-selected stakeholders and not a representative sample of the entire population with a stake in this domain. In addition, in this case, the 40 responses received through the public consultation fell below expectations and provided a weak input basis for the study's analysis. These responses may therefore not be considered statistically representative. Nevertheless, the public consultation results have been a source of information for the evaluation. It also provided stakeholders with the opportunity to officially (and if desired publicly) assert their positions regarding the Directive and highlight related issues - such as the social security situation of carers. In order to overcome the limitations of the internet-based consultation, a targeted consultation was conducted by the external contractor with interviews of experts in the field across many Member States.

SECTION 4: IMPLEMENTATION / STATE OF PLAY

4.1 Implementation / state of play

Member States have implemented the provisions of the Directive through different approaches, usually by means of both specific amendments to the social security legislation and horizontal legislation.

The implementation period of the Directive was quite long – within 6 years of its notification to the European Commission, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive. Member States had to carry out a systematic examination of all their statutory schemes applying to the various categories of persons (employees, self-employed, civil servants, etc.) which might be covered by the Directive. The examination had to cover all aspects of the legislation: scope of the schemes concerned, conditions of access, obligation to pay contributions, calculation of contributions, calculation of benefits, conditions governing the duration, and retention of entitlements to benefits. In addition, Member States could not undertake measures that would run counter to the achievement of the Directive's objective.

Article 9 requires the Commission to draw up a report on the Directive's application seven years after its publication. The Commission carried out a review to assess whether the Directive's objectives had been achieved, which resulted in an interim report³¹ in 1984 and in a final implementation report³² in 1987. Later, in 1995, the Commission published a specific report on the Directive's transposition in Portugal and Spain³³. These three reports confirmed that Member States took the necessary legal measures to ensure equal treatment of men and women and the Directive's positive impact across Member States. This was reflected in the scope of the schemes, the conditions of access, the obligation to contribute and the calculation of benefits. However, the reports still highlighted a number of problems of possible indirect discrimination in some countries, for example, where part-time workers are treated differently than full-time employees. This is particularly relevant in the context of the Directive, given the higher proportion of women who take on part-time work due to their caring responsibilities, which affects their pay and career progression.³⁴ This problem, already highlighted in the past, remains very relevant today.

To implement the Directive some Member States had to undertake major reforms introducing equal treatment of men and women in matrimonial and family affairs, calculating family benefits, fixing the retirement age for women and calculating pensions. In particular, this process led to the gradual individualisation of entitlements and the sustainable implementation

³¹ COM(83)793.

³² COM(88)769.

³³ COM(95)418.

³⁴ Eurostat (2018), Part-time employment and temporary contracts – annual data [lfsi_pt_a].

of the principle of equal treatment of women and men in Member States' statutory social security systems. By today, the principle of equal treatment for men and women in relation to statutory social security matters appears to be fully integrated in Member States' national legislation, based on modernised key concepts used in the social security legislation — e.g. instead of the notion 'head of household', national rules now refer to 'workers'.

While the implementation of the Directive did not seem to present major problems in Germany, Denmark, France and Italy, it did bring about certain difficulties for a number of countries. When the implementation period of the Directive had expired, on 23 December 1984, there were still several Member States which had not complied with it – Belgium, Ireland, Luxembourg, the Netherlands and the United Kingdom. Particularly in these Member States, the process of implementation required to amend a large number of laws, regulations and administrative provisions relating to social security in order to bring them into line with the principle of equal treatment. For example, in Luxembourg the necessary legislation was only adopted 1985, after a second attempt in the national parliament, and followed by implementing measures only in 1986. Some Member States took measures which did not cover all the provisions which should have been implemented. For instance, in the Netherlands and the United Kingdom, some categories of unemployed (Netherlands) and severely disabled (United Kingdom) remained excluded from the application of the equal treatment principle³⁵. The Irish Act on Social Welfare adopted in 1981 gave rise to the preliminary ruling of the CJEU in Case 377/89 – under this legislation the unemployment benefits received by married women were less than those paid to married men and single persons and they were paid for a shorter period.³⁶

Other difficulties in the implementation were caused by the Directive itself. Ambiguities relating to the concept of social security, the scope of application and certain problems of interpretation have been addressed in a number of rulings of the CJEU. In 1984, in its interim Report on the application of the Directive,³⁷ the Commission attempted to clarify several matters by way of examples. These uncertainties and problems of interpretation are gradually disappearing as the case law of the CJEU in this area dynamically developed.

Exclusions and derogations

Article 3(2) of the Directive provides for exclusions from the material scope of the Directive. These exclusions from the material scope of the directive relate to survivors' and family benefits. Secondly, Article 7(1) provided to the Member States the faculty not to apply the principle of equal treatment in certain areas. The list of these exclusions was extended in the course of negotiations in the Council of Ministers in 1977.³⁸ Finally, according to both the

³⁵ COM (88) 769 Final, p. 117.

³⁶ Case C-377/89, *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney*, ECLI:EU:C:1991:116, para 4.

³⁷ COM(83) 793 Final of 6 January 1984

³⁸ Catherine Huskyns and Linda Luckhaus, *The European Community Directive on Equal Treatment in Social Security, Policy and Politics*, 1989, 321-55.

preamble and Article 4(2), the Directive is not applied to the protection of mothers on the grounds of maternity.

Exclusions on the basis of Article 3(2) of the Directive

Survivors' benefits are explicitly excluded from the Directive's scope by Article 3(2). The reason behind this exclusion is the traditional family model where the death of the husband, as sole breadwinner, caused financial problems to the wife and children. A widow's pension was intended to alleviate such financial hardship. Family benefits are also excluded from its scope, except when they are intended to increase the protection for risks listed in Article 3(1)(a)³⁹. The explanation of such exclusion was that such benefits concern family policy rather than working conditions.⁴⁰

As regards benefits that are *excluded* from the scope of the Directive, the evaluation found that most of the Member States do not — or no longer — exclude survivors' or family benefits from the principle of equal treatment, even if it is allowed under Article 3(2) of the Directive. Nearly all of the Member States have amended previous regulations removing direct discrimination on matters related to *survivors' benefits*. Thus, existing rules regulating this area, namely on the conditions of access, entitlement and the calculation of the amount of benefits, are formulated in a gender neutral fashion. Only in Cyprus are widows eligible to receive a percentage of their husband's pension if they were maintained by their spouse. In several Member States, some temporary exemptions to the principle of equal treatment for this matter remain in place (Sweden⁴¹, Slovakia⁴² and the UK⁴³).

Parental leave benefits are recognised as family benefits within the meaning of Articles 1(z) and 3(1)(j) of Regulation No 883/2004⁴⁴. The evaluation found that the eligibility to family benefits in Member States is mostly determined on the basis of household income or in proportion to the number of children in the family. Therefore, no direct discrimination seems to exist in relation to such benefits.

³⁹ Sickness, disability, old age, accidents at work and occupational diseases, unemployment.

⁴⁰ Sacha Prechal, Noreen Burrows, Gender Discrimination law of the European Community, 1990

⁴¹ The Swedish pension system allows widows married before 1990 to receive a widow's pension, while the same is not granted to widowers. Social Insurance Code (Socialförsäkringsbalken) of 2010, Section E

⁴² Under a transitory derogation, a survivor's pension is granted to a woman who divorced before 1 January 2004 with alimony entitlement assigned by court but not to a man in the same condition. Law on Social Insurance (Zákon o sociálnom poistení) No. 461/2003 and Law on Old-age Pension Savings (Zákon o starobnom dôchodkovom sporení) No. 43/2004.

⁴³ In the UK, women widowed before 2001 have transitory special benefits with a widow's pension paid up to the pensionable age also without a dependent child, while the same would be refused to men in equal conditions.

⁴⁴ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123

As regards benefits that are *included* in the scope of the Directive, the evaluation identified that in 20 Member States⁴⁵, there are family benefits that are arguably granted by way of increases of benefits due in respect of the social risks covered by the Directive.

In this regard it is important to mention that most of the public consultation respondents, representing different stakeholder groups, are convinced that family benefits should not be linked to a specific gender. Instead, the benefits should cover specific living circumstances regardless of gender, in accordance with the principle of equal treatment. These benefits must be for the person who actually incurs expenses and spends time raising children, rather than for a man or a woman.

Derogations on the basis of Article 7(1) of the Directive

These derogations were originally intended to allow Member States to progressively adapt their legislation in particularly sensitive areas (such as the eligibility criteria used in statutory pension systems, tackling the gender pension gap), given also the financial implications of any change in these matters. These derogations were not designed as an automatic right for Member States to exclude certain aspects of social security from the scope of application of the equal treatment principle. Article 7(2) requires Member States to periodically examine the matters excluded ‘in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned’. In addition, in the *Hepple* case⁴⁶, the Court stressed that when it comes to the link and ‘coherence between the old-age pension scheme and other benefit schemes, it must be considered whether it is objectively necessary for different age conditions based on sex to apply to the benefit at issue’.

However, the evaluation found that a number of Member States still use the faculty under Article 7(1) to exclude certain matters from the Directive’s scope of application. This raises the issue of whether 40 years after the adoption of the directive Member States can still use this derogation without making any effort to remove the related inequality.

In practice, the derogations provided for in letters c), d) and e) of Article 7(1)⁴⁷ have seldom been used.

Old-age and retirement pensions

According to Article 7(1)(a), Member States retained the right to exclude from the scope of the Directive the determination of the age at which workers acquire the right to receive ‘old-age and retirement pensions’ and also the consequences which the choice of certain age-limits

⁴⁵ Belgium, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK.

⁴⁶ Case C-196/98, Regina Virginia Hepple v Adjudication Officer and Adjudication Officer v Anna Stec., ECLI:EU:C:2000:278, para 30.

⁴⁷ Letters c), d) and e) of Article 7(1): d) the granting of old age or invalidity benefit entitlements by virtue of derived entitlements of a wife; d) the granting of increases of long-term invalidity, old age, accidents at work and occupational disease benefits for a dependent wife; e) the consequences of the exercise, before the adoption of the Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

may entail for other social security benefits. At first glance, this derogation has apparently gradually lost its relevance. Indeed, since the beginning of the previous decade, an absolute majority of Member States equalised the pensionable age in statutory social security for men and women or approved reforms aimed at gradual equalisation of the pensionable age in the years ahead. In some countries, for example Austria, such decision was triggered by the Constitutional Court decision which ruled that different pension ages of men and women is unconstitutional and that the difference in retirement age may lead to women being disadvantaged in working life and provide further grounds for discrimination⁴⁸. Similarly, the Croatian Constitutional Court held⁴⁹ that equalisation should be implemented, otherwise women are discriminated against because they cannot work longer if they wish to - in contrast to men who are able to work longer. At the moment, there are only a few examples of gender-segregated retirement age left. Romania has not yet adopted legislation equalising the retirement age for men and women and Poland recently stopped the process of equalisation and thus re-established the differentiated retirement age⁵⁰. This latter action raises legal concerns as regards its compatibility with the objective of the Directive towards implementing equal treatment of women and men in statutory social security. The Commission has started an infringement procedure as regards this action of Poland.

Specific advantages for the bringing up of children

Article 7(1)(b) allows Member States to grant specific advantages for parents bringing up children. The use of this derogation needs to be assessed in the light of the interdependence of this subject with other policy areas such as female employment, family policy and tackling the gender pension gap. Member States can be divided into 3 groups:

- Member States making an explicit distinction in the statutory social security entitlements to persons having brought up children, e.g. a lower pensionable age or different calculation of the old-age benefit for mothers only (e.g. Spain, Slovakia, Czechia, Italy, Germany, Hungary, Poland);
- Member States granting advantages listed in Article 7(1)(b) only to the mother if not agreed to the contrary (e.g. UK, Greece);
- Member States granting advantages in a fully gender neutral way (e.g. Austria, Estonia).

The evaluation suggests that the main reason for applying the derogation provided for in Article 7(1)(b) is cultural, based namely on the recognition of the prevailing role of women in bringing up children at the time when the Directive was adopted.

For example, in Germany, child care may generate individual pension credit points which are then relevant for pension amount purposes, with fathers being only entitled to child-raising

⁴⁸ VfSlg 12568/1990.

⁴⁹ U-I-1152/2000, U-I-1814/2001, U-I-1478/2004, U-I-3137/2004 and U-I-3760/2005 of 18 April 2007.

⁵⁰ The differentiation in the retirement age for women and men was still in the process being removed, when the Law of 16 November 2016 reinstalled different retirement ages for women (60) and for men (65).

credits if they are the main carers and the mother agrees to this⁵¹. Even more significantly, the reform of 1 July 2014 has extended this right to parents who have brought up children before 1992, through the so-called ‘mother’s pension’. In Italy, women can benefit from advantages of old-age pension related to child rearing and the coefficients of transformation fixed for maternity are favourable, as for each child a woman’s retirement age decreases by 4 months up to a maximum of 12 months⁵².

The derogation provided for in Article 7(1)(b) remains active today. For example, on 1 February 2019, a Law on a parental supplementary benefit (Act on Parental Supplementary Benefit, ‘Mama 4 Plus’ initiative⁵³) came into force in Poland. This act introduced a new benefit in the form of a mother's retirement pension, paid from the general retirement fund organised by the Social Insurance Institution (ZUS) or from the special Agricultural Insurance, reserved for farmers and their family members (KRUS). All mothers who have given birth to at least four children and raised them instead of performing paid work are entitled to this pension. The pension may be also granted to the father, after reaching the age of 65 years, who raised at least four children, but only in case the mother died, abandoned the children or ceased to provide care for them for a prolonged period. It is estimated that ‘Mama 4 Plus’s’ retirement pensions will cover over 80, 000 people⁵⁴. Another example requiring additional attention is the constitutional law in Slovakia adopted in 2019, setting a lower retirement age for women having raised at least one child⁵⁵.

Derived entitlements and benefits for dependent wife

According to Article 7(1)(c-d), Member States are allowed to exclude from the application of the principle of equal treatment two categories of derived rights, in particular: (c) the granting of old-age or disability benefit entitlements by virtue of the derived entitlements of a wife and (d) the granting of increases of long-term disability, old-age, accidents at work and occupational disease benefits for a dependent wife. These derogations are additional to the exclusions set in Article 3(2) regarding survivors’ benefits.

The analysis at Member State level shows that derived rights are no longer used outside the field of survivors’ benefits, especially in the area of Article 7(1)(c) - old-age or disability benefit entitlements by virtue of the derived entitlements of a wife. The last Member State in which the entitlement to a pension by virtue of the paid contribution of the spouse existed was the UK; however, such provision has been repealed with effect from 6 April 2010.

The increases of long-term disability, old-age, accidents at work and occupational disease benefits for a dependent wife referred to in Article 7(1)(d) are instead more commonly used among Member States. However, they are gender neutral except in Cyprus, where the definition of ‘dependent’ differs between men and women. Thus, in the case of a male

⁵¹ http://www.gesetze-im-internet.de/sgb_6/_249.html

⁵² European Commission (2015). Report by the European network of legal experts in the field of gender equality, Gender Equality Law in 33 European Countries.

⁵³ <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20190000198/O/D20190198.pdf>

⁵⁴ European network of legal experts in gender equality and non-discrimination: <https://www.equalitylaw.eu/>

⁵⁵ https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/99/vyhlasene_znenie.html

beneficiary, the spouse is ‘dependent’ if she lives with - or has been maintained by – the beneficiary and receives no pension from the Social Insurance Fund, regardless of whether she is working or not. In the case of a married female beneficiary, her husband is deemed dependent if he is unable to support himself, is wholly maintained by her and receives no pension from the Social Insurance Fund. Consequently, the treatment of the two spouses is different and based on the male breadwinner approach. Furthermore, if both spouses are entitled at the same time to increases for dependents, the payment to dependents is only payable to the spouse entitled to the higher benefit.

Right of option not to acquire rights

The derogation laid down by Article 7(1)(e) allows the Member States to exclude from the scope of the Directive ‘the consequences of the exercise, before the adoption of the Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.’ This provision has almost never been used by Member States, except in the UK, where married women who before April 1977 chose not to be insured are excluded from the Contribution-based Jobseekers' Allowance.⁵⁶

Evolution of the derogations provided in Article 7(1)

Finally, it is important to highlight that the Directive requires Member States to consider any of the above-mentioned derogations in the light of the provision requiring them to examine whether social developments continue to justify the above derogations (Article 7(2)) and to inform the Commission why they want to maintain any existing derogations (Article 8(2)). In practice, however, Member States invoking or maintaining derogations do not meet these requirements.

In the same line, the case law of the Court has also highlighted the temporary nature of the derogations provided for by the Directive.⁵⁷

4.2 Enforcement and means of redress

At EU level, the Commission monitors the Directive’s application in all Member States and assesses complaints received from citizens and stakeholders. Despite the declaration of the Directive’s full transposition into national law, the monitoring by the Commission revealed cases where Member States were not applying the legislation correctly. Since the Directive came into force, 58 infringement procedures based on its provisions were launched - only four of them in the last 10 years. Two of these 58 infringement procedures resulted in a referral to the CJEU.

In the years following the Directive’s adoption, the CJEU has played and continues to play a crucial role in the Directive’s application. The Court’s case law provides a consistent

⁵⁶ <https://www.gov.uk/jobseekers-allowance/what-youll-get>

⁵⁷ See, for example, Case C-9/91, *The Queen c/ Secretary of State for Social Security, ex parte the Equal Opportunities Commission*, ECLI:EU:C:1992:297, paragraph 15, quoted fully below, in section 5.1.

interpretation of the Directive's concepts, thus ensuring its uniform application across the EU and reducing the amount of litigation based on its provisions. The support study highlights this key role of the CJEU, which extensively clarified the interpretation of the Directive's provisions, defined its scope of application and clarified cases of indirect discrimination. Member States gradually adapted their national legislation to the CJEU's jurisprudence, which resulted in better achieving the Directive's objective.

The CJEU has stated in a number of decisions⁵⁸ that the Directive does not confer to Member States the power to make conditional or to limit the application of the principle of equal treatment within its field of application. In addition, the Directive itself is sufficiently precise and unconditional to allow individuals, in the absence of national implementing measures, to rely upon it before the national courts as from 23 December 1984 (i.e. the date in which the Directive had to be implemented by each Member State). The reason was to preclude the application of any national provisions inconsistent with the Directive.⁵⁹ It follows that in the absence of transposition at national level, the Directive's provisions remain the only valid point of reference. The result of these judgments have also contributed to giving separate and justiciable rights to individuals, which can be enforced in national courts prevailing over any contradictory national provision.

In the landmark 'X' case (C-318/13)⁶⁰, the CJEU stated that a different life expectancy cannot be considered an objective ground to justify gender-segregated actuarial factors to be used in statutory social security. In the context of the present evaluation, the Commission did a specific check to determine whether the Member States' transposing legislation complies with the ruling in the 'X' case. Some Member States (including Finland, which was directly involved in the 'X' case) took proactive steps to amend the national provisions that allowed gender-segregated actuarial factors to be used in their social security. However, the Commission found that in four Member States (Austria, Belgium, Bulgaria and Italy), gender-specific actuarial factors continue to be used in certain branches of statutory social security covered by the Directive. Most of them undertook and amended their legislative and administrative acts following bilateral communication with the Commission. For example, the Bulgarian Social security code has recently been amended⁶¹. It appears that only in Italy this question remains open⁶². In Lithuania, while no gender-specific actuarial factors were used in practice, until 2017 national equality legislation implicitly allowed its application in the area of social security⁶³.

⁵⁸ See for instance Case C-384/85, *Jean Borrie Clarke v Chief Adjudication Officer*, and Case C-154/92, *Remi van Cant Rijksdienst voor pensioenen*.

⁵⁹ In relation to the Directive 79/7/EEC being directly effective see Case C-71/85, *State of the Netherlands v. Federatie Nederlandse Vakbeweging*; Case C-384/85, *Jean Borrie Clarke v Chief Adjudication Officer*, and Case C-102/88, *M. L. Ruzius-Wilbrink contre Bestuur van de Bedrijfsvereniging voor Overheidsdiensten*.

⁶⁰ Case C-318/13 – Proceedings brought by “X”, ECLI:EU:C:2014:2133.

⁶¹ § 53 of the Code inserted a new paragraph 4 in Article 169: '(4) Sex may not be taken into consideration as an actuarial factor when determining the amount of supplementary lifelong old-age pension.'

⁶² Act on insurance against accidents at work and occupational diseases, Presidential Decree No n.1124/1965.

⁶³ Legislation was subsequently amended in 2017 to be aligned with the Courts ruling in the 'X' case.

At national level. In accordance with Article 6 of the Directive, all Member States have, at least to some degree, implemented supporting mechanisms ‘to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process [...]’ regarding their rights enshrined in the Directive.

All Member States have an administrative, judicial or constitutional procedure for appeals against a national law, regulation or administrative practice potentially breaching the principle of equal treatment enshrined in Article 4(1) of the Directive.⁶⁴ While administrative procedures are the general method enabling citizens to defend their rights against actions or decisions taken by public bodies or against rules contrasting with principles set at a higher legislative level, constitutional procedures refer in general to infringements on the grounds of human rights. Labour or civil courts dealt with such kind of claims in 7 Member States.⁶⁵

The analysis of the relevant national-court level case law across 28 Member States has revealed that litigating about unequal treatment on the grounds of sex in the field of social security is rather rare. Among those existing national cases the calculation of the pension amounts for women has been one of the most litigated matters. National courts in two countries⁶⁶ also paid attention to the area of actuarial factors applied in social security.

In several Member States,⁶⁷ there are quasi-judicial procedures often transversal to the field of equal treatment. Such procedures are usually dealt with by the national equality bodies⁶⁸. However, often these equality bodies tend to lack any enforcement powers, resorting to the role of making only non-binding recommendations. In this context, it is worth mentioning that the Directive does not include any provision, requiring Member States to establish equality bodies having the competence to act on the matters covered by the Directive.

The support study highlights that due to the peculiar nature of indirect discrimination and the comparatively weak monitoring system on such matters, its consistent enforcement may not be fully ensured. The most worrying finding of the support study with respect to enforcement is the lack of effective monitoring of court rulings at national level: some Member States have no obligation to publish the rulings of their national courts. Failing to publicise and to provide information on such decisions may negatively affect the process of eradicating discrimination on the ground of sex in matters of social security and in other areas. Furthermore, consulted stakeholders highlighted the rather weak role of national bodies, in particular in detecting potential discrimination.

⁶⁴ For instance, in Spain, the claim may cover a double purpose: (i) the social security benefit; and (ii) the consequences of the breach of fundamental rights. Case (i) pertains to the area of administrative procedures; case (ii) is a constitutional right.

⁶⁵ Austria, Belgium, Estonia, Greece, Poland, Slovakia and Spain.

⁶⁶ Greece and Bulgaria.

⁶⁷ Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Netherlands, Romania, Spain and the United Kingdom.

⁶⁸ <http://equineteurope.org/what-are-equality-bodies/european-directory-of-equality-bodies>

SECTION 5: RESULTS OF THE EVALUATION

The Directive was evaluated on the basis of five REFIT criteria: effectiveness, efficiency, relevance, coherence, and EU added value.

5.1 Effectiveness

Effectiveness is the extent to which the Directive has had a positive impact on the objectives it is intended to reach.

The Directive has significant positive impact on the Member States' statutory social security systems⁶⁹ namely their personal scope and entitlement conditions. Eliminating differences in treatment for similarly situated persons can therefore mean that women were given, for the first time, the opportunity to claim certain benefits on terms equal to men.

The Directive has contributed to improvement in the national social security models from breadwinner-based to equal and modern types of families across the EU. In particular this was relevant and effective in 'old Member States' at the time of the transposition of the Directive. For example, as soon as the Directive entered into force, the first changes to the Belgian legislative framework were introduced by means of specific amendments to the existing national laws and decrees or through new general laws. A Decree of 23 January 1980 introduced a wider definition of a worker with a dependent to include women with dependent spouses. In the Netherlands, in 1979 the Dutch legislator removed the discriminatory provisions for incapacity for work and granted the right to such benefits regardless of sex or marital status. The Dutch law of 23 March 1985 allowed married women to claim pensions in their own right⁷⁰. In Germany, the law adopted on 20 January 1982 harmonized the contributions payable to the statutory pension scheme for men and women at a standard rate with effect from 1 January 1983. As required by the Directive, all Member States have established procedures for claims against any failure to apply the principle of equal treatment. The effect of the Directive was confirmed by the interviewed stakeholders.

Nonetheless, the analysis of both the existing case law and the residual sources of gender discrimination in national statutory social security suggests some shortcomings in the existing framework.

First of all, although all Member States have transposed and fully implemented the Directive, the evaluation highlights a limited number of cases where direct and indirect discrimination on the grounds of the Directive may be presumed to persist.

⁶⁹ Community Law and Women, X/152/87-EN, 1987, Commission of the European Communities, Directorate-General Information, Communication, Culture, p.76.

⁷⁰ Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law (Socio-legal Studies) by Julia A. Sohrab, Dartmouth Pub Co, 1996, p. 55

Personal scope of the Directive

The Directive has a very strict personal scope, which is employment-related and does not cover someone who has never worked. In *Archterberg-te Riele*⁷¹, the CJEU has confirmed it pointing out that persons who give up work for a reason other than social risk covered by the Directive (Article 3(1)), for example, to look after children, fall outside the scope. In the ruling in *Johnson*⁷² the Court has tightened this interpretation and ruled that, according to its Article 2, the Directive does not apply in principle to a person who has interrupted his or her occupational activity in order to attend to the upbringing of his or her children and who is prevented by illness from returning to employment. However, if that person was actually seeking employment and his or her search was interrupted by the materialization of one of the social risks specified in Article 3(1)(a) of the directive, that person may still be regarded as falling within the scope of Directive. In that case, it is unnecessary to make a distinction according to the reason for which that person left previous employment.⁷³ Given the fact that those who give up work to look after children are largely women, it appears that they are disproportionally excluded from the protection of a risk of illness or sickness that arises after they have quit paid employment.

Direct discrimination

Instances of presumed direct discrimination were also spotted during the evaluation. For example, in the UK, the calculation of contributions for the graduated retirement benefit is lower for women. Even if this applies only to graduated contributions⁷⁴ between 1961 and 1975 and affects a limited number of insured people, it raises an issue regarding the existence of a potential direct discrimination.

Moreover, some Member States, such as Hungary and Italy grant access to early retirement to men and women under differing conditions. These differences do not seem to be objectively linked to the exclusion set in Article 7(1)(a), as the pensionable age is meanwhile being/has been equalised in Italy and Hungary respectively. In Bulgaria, since 2017 the retirement age is being increased by a different number of months for men and women, until reaching 65 years for men and 65 years for women alike (in 2037). Meanwhile, from January 2018, the required period of insurance is being increased by two months per calendar year until it reaches 37 years for women and 40 years for men. However, the Bulgarian Social Security Code provision regulating the general pension scheme requires different length of contribution periods for men and women, thereby raising an issue regarding a possible direct discrimination that does not seem to be objectively linked to the exclusion set in Article

⁷¹ Joined cases C- 48/88, 106/88 and 107/88, J. E. G. Achterberg-te Riele and others v Sociale Verzekeringsbank, ECLI:EU:C:1989:223.

⁷² Case C-31/90, Elsie Rita Johnson v Chief Adjudication Officer, ECLI:EU:C:1991:311.

⁷³ Idem, paragraphs 18-23 and conclusions of the judgment.

⁷⁴ The Graduated Retirement Benefit is an early form of earnings-related pension, intended to top-up the basic pension. It is based on graduated contributions paid on earnings between 1961 and 1975.

7(1)(a) of the Directive. Doubts may also arise with respect to the calculation formula applied in Slovenia for the old-age and disability pension: the percentage is 26% for men and 29% for women for the first 15 years; this percentage is subsequently increased by 1.25 for each additional year of insurance period. Therefore, women have a 3 percentage points advantage over men in the calculation ratio for the first 15 years. As consistently held by the European Court of Justice in a number of cases,⁷⁵ it is not allowed to maintain different calculation methods when the retirement age is equal for men and women. Therefore, such provisions raise issues regarding possible direct discrimination on the grounds of sex according to Article 4(1) of the Directive.

Indirect discrimination

Possibly due to the lack of definition of the notion of “indirect discrimination” in the Directive, Member States have been rather slow in properly addressing this area. Indirect discrimination was raised by a number of respondents in the public consultation as an area of concern. In the *Laperre* judgment,⁷⁶ the Court recalled that Article 4(1) of the Directive precludes the application of national measures formulated in neutral terms but disproportionately affecting women. The Court recognised that the conditions relating to previous employment and age laid down by certain national unemployment benefits schemes gave rise to indirect discrimination against women, since women were much less likely to fulfil them than men. At the same time, however, the Court specified that if the measures concerned reflect a legitimate social policy aim of the Member State and are based on objective factors, there is no discrimination on grounds of sex. In order to be justified, such measures must pass both the legitimate objectives and proportionality scrutiny as set out by the Court in *Bilka*⁷⁷.

The recent CJEU ruling in *Elbal Moreno*⁷⁸ highlights further the risks of indirect discrimination. Such risks are primarily created by the less favourable conditions for part-time or intermittent workers, usually women. Following this ruling, Spain has introduced measures to expand the recognition of benefits to part-time workers⁷⁹. This can be taken as a clear example of the need to ensure implementation of the equal treatment principle even in the face of apparently gender neutral provisions. Another example is the recent judgment in *Villar Láiz*⁸⁰, where the CJEU questioned the way Spanish legislation calculates retirement pensions

⁷⁵ Case C-9/91; Case C-154/96 & Joined cases C-377/96 to C-384/96.

⁷⁶ Case C-8/94 *Laperre v. Bestuurscommissie Beroepszaken in de Provincie Zuid-Holland*, ECLI:EU:C:1996:36, para. 14.

⁷⁷ Case C-170/84, *Bilka v Weber von Hartz*, ECLI:EU:C:1986:204.

⁷⁸ Case C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, ECLI:EU:C:2012:746.

⁷⁹ Law 1/2014, of 28 February, for the protection of part-time workers and other urgent measures in the economic and social order.

⁸⁰ Case C-161/18, *Villar Láiz v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, ECLI:EU:C:2019:382.

for part-time workers. The Court found that such a way of calculation is particularly disadvantageous to female workers and that there is no proportionality between the pursued aim (the protection of a social security system that relies on contributions) and the means used to achieve it.

These cases highlight a potential disparity of treatment of part-time workers, who usually are mostly women. The Commission's report⁸¹ on the implementation of the Barcelona targets highlights the differences across Member States regarding the reasons why women work part time. More than 10% of women are working part-time in the Netherlands, Austria, the UK, Germany, Belgium, Luxembourg and Ireland because of caring responsibilities (see Figure 1). Such workers benefit from lower salaries, lower social security payments and lower levels of protection, for example in relation to pensions.

Figure 1. Part-time employment, women and men, % of total employment (age group 20-64)

Member State/Year	Men				Women			
	1993	2000	2010	2018	1993	2000	2010	2018
European Union - 28 countries			7.1	8.0			30.8	30.8
Belgium	2.1	4.4	8.1	9.4	28.7	35.0	41.9	40.5
Bulgaria			2.0	1.6			2.4	2.0
Czechia		1.5	2.1	2.5		8.5	9.0	10.8
Denmark	5.5	6.3	10.1	12.1	32.7	30.8	34.2	31.0
Germany (until 1990 former territory of the FRG)	2.6	4.4	8.3	9.3	33.0	38.8	45.9	46.7
Estonia		5.3	5.9	6.8		9.5	13.1	14.7
Ireland		4.8	10.5	9.1		28.3	33.0	28.5
Greece	2.1	2.1	3.3	6.0	7.2	7.4	10.1	13.2
Spain	1.9	2.5	4.9	6.4	14.1	16.6	22.4	23.6
France				7.6				28.7
Croatia			5.0	3.5			9.3	6.6
Italy	2.3	3.5	4.9	7.9	11.6	16.5	28.8	32.4
Cyprus		3.2	4.9	7.4		13.1	11.5	14.2
Latvia		9.0	7.4	4.5		11.9	10.8	9.6
Lithuania		8.9	6.4	5.1		10.6	8.9	8.7
Luxembourg		1.5	3.2	5.3		25.9	35.7	31.4
Hungary		1.5	3.6	2.5		4.8	7.6	6.2
Malta		1.9	4.2	6.0		14.8	23.3	21.7
Netherlands	11.8	14.9	20.1	23.0	63.6	69.4	74.8	73.8
Austria		3.7	7.9	9.9		33.9	44.2	47.6
Poland		6.3	4.6	3.6		11.7	10.6	9.5
Portugal	3.0	3.5	4.9	5.4	10.5	13.8	12.3	10.2
Romania		11.6	9.5	6.0		15.4	9.8	6.6
Slovenia		3.9	6.4	5.3		6.4	12.4	13.6
Slovakia		0.9	2.5	3.1		3.0	5.1	6.9
Finland		6.3	7.9	8.8		15.0	17.3	18.8
Sweden		7.9	11.5	11.9		32.7	38.9	31.7
United Kingdom	3.9	5.8	9.3	9.6	42.8	42.6	40.8	38.6

Source: Eurostat 1993-2018, [lfsi_pt_a].

The possibility to exclude permanently from the application of the principle of equal treatment those matters related to advantages in respect of old-age pension schemes to persons

⁸¹ Report from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions on the development of childcare facilities for young children with a view to increase female labour participation, strike a work-life balance for working parents and bring about sustainable and inclusive growth in Europe (the "Barcelona objectives") COM(2018) 273 final.

who have brought up children (Article 7(1)(b)), could cast some doubts on the overall effectiveness of the Directive. The support study underlines that Article 7(1)(b) allows Member States to retain potential sources of indirect discrimination arising in this field. This may be the case when replacement contributions (i.e. publicly funded contributions for social insurance awarded during the interruption of working activity for reasons of maternity, childrearing or others) are paid at a lower level than the full amount of the previous income of the employee on leave. This eventually indirectly discriminates against women who are overrepresented among those interrupting their job for child-caring activities⁸², and therefore have pension amounts often reduced due to such interruptions.

However, the Court has ruled that:

“it can be deduced from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain **temporarily** the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems”.⁸³

Data show that in 2016, the average employment rate of women with one child under 6 was 9 percentage points lower than that of women without young children, with this difference reaching above 30 percentage points in several Member States. In some Member States, 25% of inactive women are inactive due to caring responsibilities.⁸⁴ Furthermore, as a Commission report⁸⁵ highlights, differences across Member States are very striking when considering the reasons why women withdraw from the labour market or work part time. More than 10% of women in Malta, Ireland, Cyprus, Romania, Poland, Italy, Spain, Croatia and Bulgaria are inactive because of their personal or family responsibilities, mostly for looking after children or incapacitated adults (Figure 2 below).

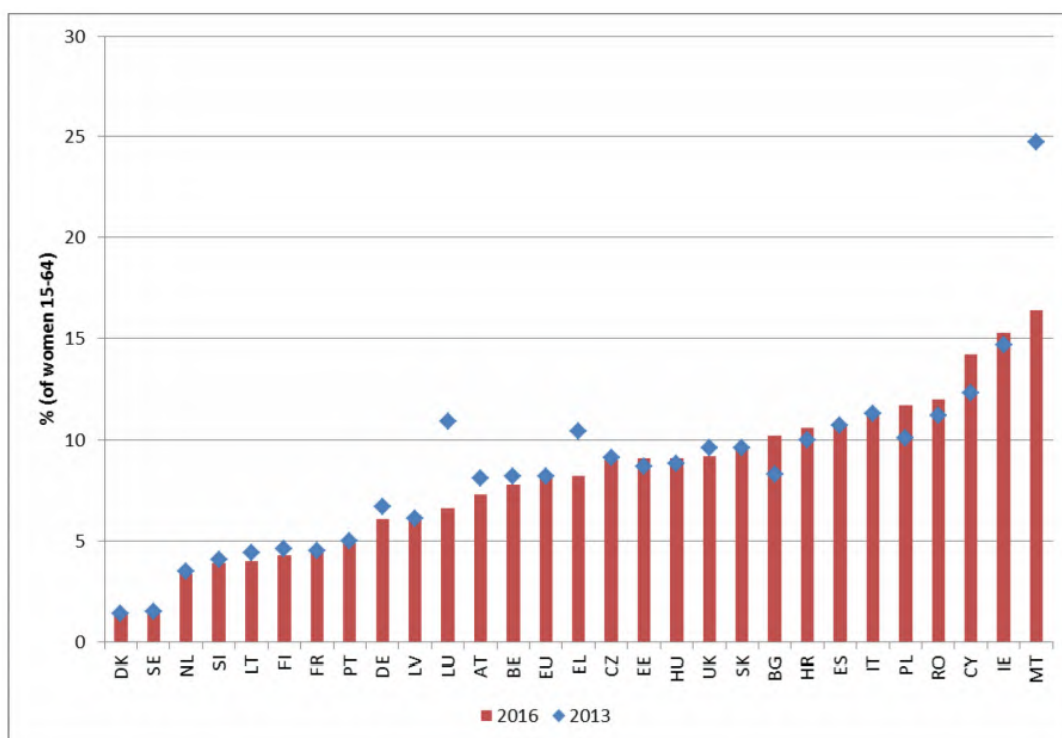
Figure 2. Inactivity due to personal and family responsibilities (looking after children or incapacitated adults and other family or personal responsibilities), women, %

⁸² See Labour Force Survey ad-hoc modules of 2010, Eurostat [lfso_10]parlea].

⁸³ Case C-9/91, *The Queen v/ Secretary of State for Social Security*, ex parte the Equal Opportunities Commission, ECLI:EU:C:1992:297, paragraph 15, emphasis added.

⁸⁴ Report from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions on the development of childcare facilities for young children with a view to increase female labour participation, strike a work-life balance for working parents and bring about sustainable and inclusive growth in Europe (the "Barcelona objectives") COM(2018) 273 final, p. 2.

⁸⁵ Ibid, p. 5.



Source: Eurostat, LFS 2013-2016.

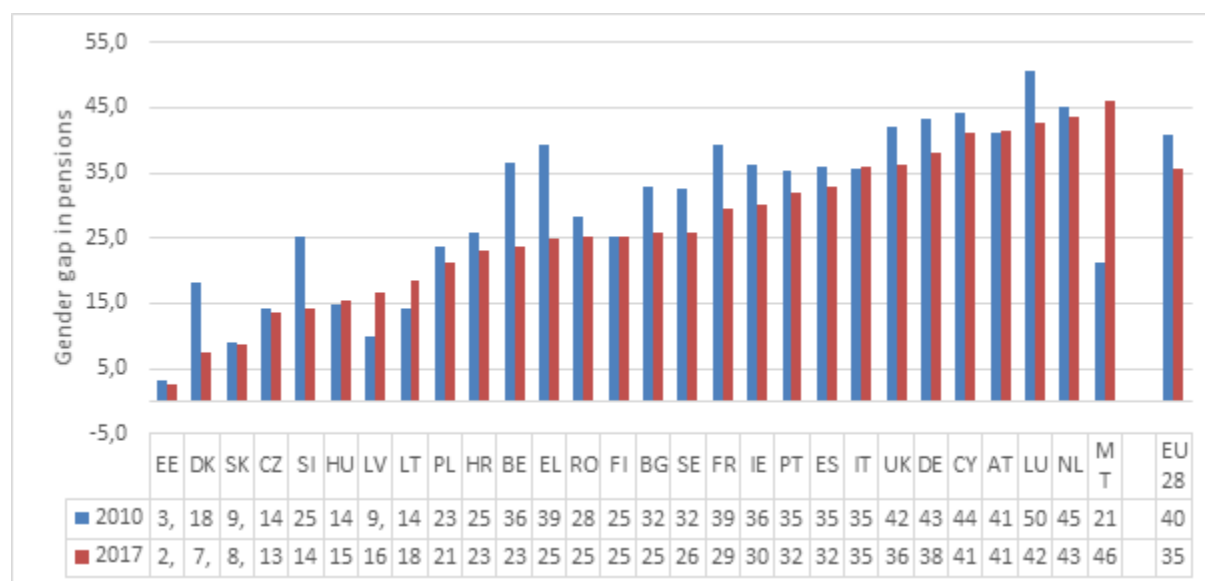
Furthermore, the mere existence of the derogation from the principle of equal treatment may hamper the achievement of full gender equality by *de facto* restricting the possibility to find indirect discrimination through the interpretative power of the CJEU. This can be seen in the decision of the CJEU in *Gómez-Limón Sánchez-Camacho*⁸⁶, where the Court concluded that it is a Member State's prerogative to regulate the periods of interruption of employment due to the bringing up of children covered by derogation 7(1)(b). Stakeholders participating in the public consultation admitted that such systems should become more gender neutral to encourage both men and women to work on equal footing and leave a positive impact on future pension rights. There should be no difference in these advantages, which are justified by the nature of the career break, irrespective of whether the person concerned is a woman or a man.

As already pointed out in the previous section of this SWD, the existence of exclusions and derogations from the scope of application of the principle of equal treatment could lead to unintended side effects, if the case law of the CJEU had not clarified that these derogations are temporary. For example, the derogation allowing Member States to keep different pensionable ages for men and women, which used to be lower for women, seems to have had an impact on the lower participation of women in the labour market. In the end, this could reduce the possibility for these women to adequately benefit from statutory social security and build more entitlements to their future pension which in turn may have an impact on

⁸⁶ Case C-537/07 - *Gómez-Limón Sánchez-Camacho*, ECLI:EU:C:2009:462, p. 61.

increasing these women's risk of poverty and the gender pension gap⁸⁷. In any event, the side effect of this derogation is diminishing, given that the overwhelming majority of Member States have equalised or approved reforms to equalise gradually the pensionable age for men and women. Nevertheless, reflections of past inequalities caused by different retirement age for women and men complemented by other factors (such as gender pay gap, unequal share of caring responsibilities, etc.) are reproduced in today's pensions⁸⁸ and visible in the gender pension gap. The 2018 Pension Adequacy Report⁸⁹ highlights that the gender gap in pensions (Figure 3, updated with the latest data available) can be explained by women's lower lifetime earnings, their smaller or interrupted social security contributions due to caring responsibilities, including during pregnancy, and their greater propensity to work part-time.

Figure 3. Gender gap in pensions, pensioners aged 65-79, 2010 and 2017, %



Source: Eurostat, EU-SILC. Notes: 2010 data for HR; sorted by data for 2016

Procedures for claims

The risks of direct and indirect discrimination are linked to the enforcement and monitoring of the application of the national provisions implementing the Directive. The possibility to detect cases of direct and especially of indirect discrimination appears to rely mainly on individual claims or complaints, which entail costs and time-consuming procedures for citizens.

As required by the Directive, all Member States have established procedures for claims against any failure to apply the principle of equal treatment. Administrative procedures are the general method for enabling citizens to defend their rights against actions or decisions taken

⁸⁷ European Institute for gender equality, Gender gap in pensions in the EU, 2015, See: http://eige.europa.eu/sites/default/files/documents/MH0415087ENN_Web.pdf

⁸⁸ Men, Women and Pensions, Platon Tinios, Francesca Bettio and Gianni Betti in collaboration with Thomas Georgiadis, European Commission, 2015, p. 10.

⁸⁹ Ibid, p. 60.

by public bodies or against rules contrasting with principles set at a higher legislative level. Claims related to social security can be addressed by labour or civil courts in 7 Member States.⁹⁰ In some Member States (France, Spain), special procedures common to the area of social security are clearly established in national law. In several Member States,⁹¹ there are quasi-judicial procedures dealt with by the national equality bodies. Quasi-judicial procedures in the field of equal treatment or anti-discrimination and special procedures common to the area of social security are generally faster and less burdensome than conventional judicial procedures, and in some cases even free of charge.⁹² More generally, a complaint concerning a social security matter can usually be filed and addressed to the institution in charge of the social security branch responsible for implementing the discriminating provision; this is the case, for instance, in Bulgaria, Czechia, Hungary and the United Kingdom.

However, the support study points out that people who have suffered unequal treatment are often prevented from using these procedures to challenge unequal treatment in social security schemes covered by the material scope of the Directive. The reasons for this are, according to the interviewees, the persistence of little incentives to proceed, the scarce awareness of the population on the overall legal framework on gender equality and on the Directive's provisions, the complexity of national redress procedures, and the insufficient role of national equality bodies in Member States. In some Member States, the proceedings are lengthy and the probability of success is considered to be low. Thus the 2018 EU Justice Scoreboard⁹³ highlights that the time to resolve administrative cases is the longest in Cyprus, Malta, Greece, Italy and Portugal. Furthermore, some interviewees referred to lack of funding which may hinder the proper functioning of anti-discrimination bodies. For instance, in Italy, providing assistance in the field of social security is particularly challenging, due to current budget constraints and a scattered financing across the different ministries and sectors.

Finally, on the actual implementation and enforcement of the principle of equal treatment, the evaluation refers to the fundamental role of the CJEU in clarifying the main concepts and scope of the Directive and seeking to ensure their uniform application in all Member States. The jurisprudence of the Court has quite significantly impacted the area of statutory social security — it has helped to develop criteria to define the scope of the Directive and the concepts used in it (e.g. the meaning of indirect discrimination and under what conditions it should be outlawed). As such, the CJEU jurisprudence has had an important role in ensuring the Directive's effectiveness.

⁹⁰ Austria, Belgium, Estonia, Greece, Poland, Slovakia and Spain.

⁹¹ Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Netherlands, Romania, Spain and the United Kingdom.

⁹² Austria, Bulgaria, the Netherlands and Romania.

⁹³ https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf, Figure 11

5.2 Efficiency

Efficiency is the extent to which the objectives pursued by the Directive are met in the most cost-effective way, taking into account the regulatory burden it triggers and the benefits it brings.

In assessing the Directive's efficiency, the evaluation process was hindered by the limited data collection on the costs entailed by the Directive. Because of this, it was not possible to apply a standard quantitative methodology for a cost-benefit analysis. While a higher degree of gender equality is deemed beneficial to the social security system — increasing its efficiency and people's well-being — the available literature on cost-benefit analysis does not provide any applicable analytical methodology to measure such an increase. Therefore, the evaluation of this criterion in the support study was based on a qualitative evaluation of the costs and the beneficial outcomes, as reported by the interviewed experts and stakeholders during the evaluation.

In general, equal treatment legislation has a particular impact on poverty and social exclusion. Women are at greater risk of poverty than men but this risk is much greater, both in absolute and in relative terms for older people. The Directive had an effect towards the gradual individualisation of social security rights of citizens, which increases economic independence of women, generating a number of positive economic effects. As pointed out previously in this Section, the implementation of the Directive had an impact on the change of the concept of existing national social security models from a single breadwinner type to more equitable types where both women and men have equal access to social security schemes despite their marital or family status.

Such social changes have had a positive impact on public expenditures and on the financial sustainability of the national social protection systems. Ensuring equal treatment of women and men in statutory social security and removing barriers to working wives on access to membership to schemes and entitlements has encouraged better participation in the labour market (the average employment rate of women in the EU increased has from 57.9% in 2001 to 67.4% in 2018⁹⁴) and has helped to ensure that working women contribute to social security in the same way as men. These changes have led to an increased number of people contributing to the tax-based or contribution-based statutory social security systems and ensure the financial viability of social security systems. More generally, the study⁹⁵ conducted by the European Institute for Gender Equality shows that improving gender equality has strong, positive GDP per capita impacts that grow over time. In its study of 2016⁹⁶ the

⁹⁴ Eurostat data.

⁹⁵ Economic Benefits of Gender Equality in the European Union: Report on the empirical application of the model, European Institute for Gender Equality, 2017, See: <https://eige.europa.eu/publications/economic-benefits-gender-equality-european-union-report-empirical-application-model>

⁹⁶ Eurofound (2016), The gender employment gap: Challenges and solutions, Publications Office of the European Union, Luxembourg, see: <https://www.eurofound.europa.eu/publications/report/2016/labour-market/the-gender-employment-gap-challenges-and-solutions>

European Foundation for the Improvement of Living and Working Conditions (Eurofound) also confirmed the impact of the gender employment gap on the EU GDP. Furthermore, it confirmed that the participation in the labour market has not only economic implications, but also social effects - it improves a person's perceptions of their overall quality of life and improves the quality of society.⁹⁷

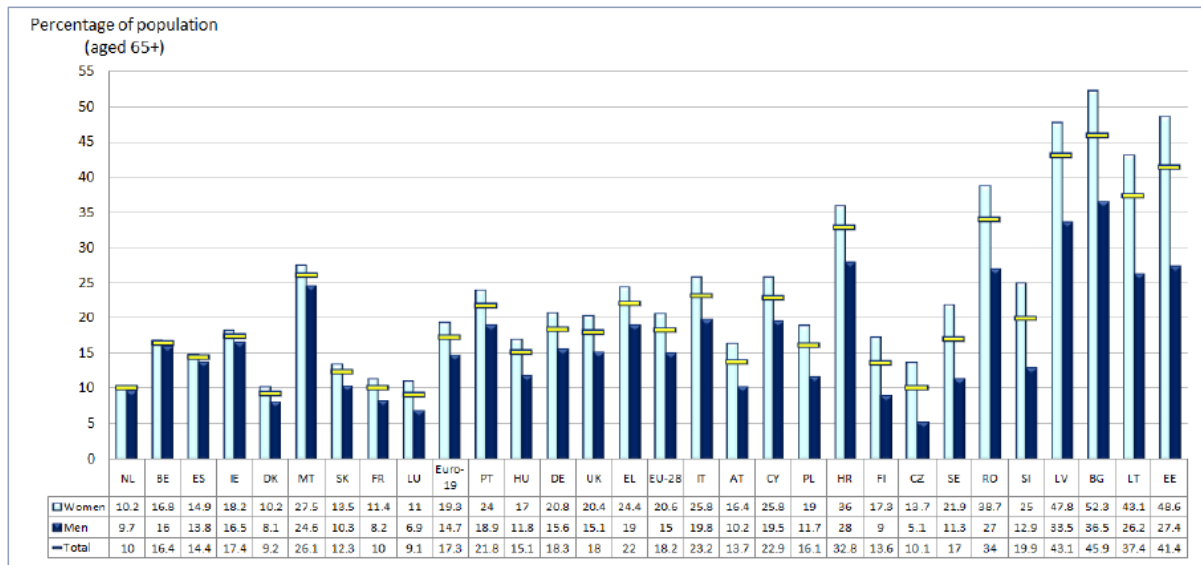
Nevertheless, as it is highlighted in the Commission's Pension Adequacy Report, one in five women aged 65 or over is still at risk of poverty or social exclusion in the EU. In 2016, the 'at risk of poverty or social exclusion rate' (AROPE) for women ranged from around 10 percent in the Netherlands and Denmark to over 50 percent in Bulgaria and over 40 percent in the Baltic States. The highest gender differences in the AROPE rate are observed in Estonia, followed by Lithuania, Bulgaria and Latvia⁹⁸. Findings in the 2018 Pension Adequacy Report show that women continue to be overrepresented among the recipients of minimum benefits, despite the fact that the share of minimum income recipients among women has decreased more rapidly in recent years. Despite the increased rate of female participation in the labour market, the gender gap in pensions and the higher risk of poverty among women still persist. On average, women earn considerably less than men – partly because they are more often employed in low-paid occupations and sectors, less frequently in management positions and more often work part time or in marginal employment where a person fails to generate the earnings needed to achieve a minimally acceptable standard of living. This directly impacts the gender gap in pensions. Therefore, as it was concluded in the 2018 Pension Adequacy Report⁹⁹, reducing the inequalities requires a more holistic approach including equal opportunity policies targeted at women and men of working age (promoting the work-life balance and equal distribution of caring responsibilities, addressing labour market participation and career opportunities, work intensity and career breaks) and pension policies that adequately protect care-related breaks.

Figure 4. The AROPE rate of older people, by gender, 2016

⁹⁷ Ibid.

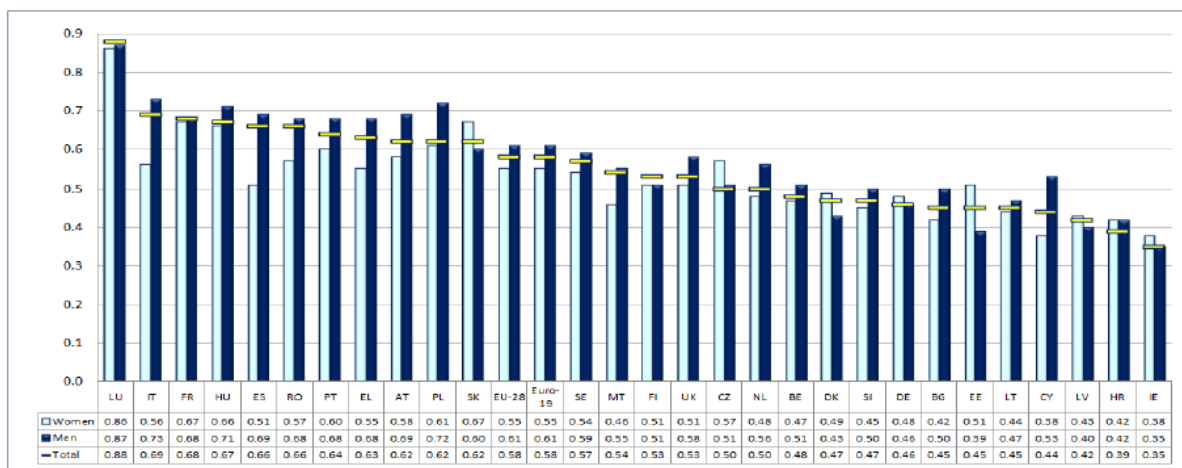
⁹⁸ Pension Adequacy Report 2018 – Current and future income adequacy in old age in the EU, European Commission, <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8084&furtherPubs=yes>

⁹⁹ Ibid, p. 17-18.



Source: Eurostat, EU-SILC.

Figure 5. Aggregate replacement ratio by gender, 2016



Source: Eurostat, EU-SILC.

Direct costs resulting from the Directive's application (i.e. by amending existing national provisions, monitoring and enforcement activities) are borne exclusively by the national public administrations. Businesses and individuals, on the other hand, are not required to take any specific actions that would lead to a cost to be taken into account in the evaluation.

The evaluation examined three categories of costs which Member States (their national public administrations) potentially faced:

1) *implementation costs*: costs resulting from the introduction of new laws, regulations, procedures, etc. Article 5 requires Member States 'to ensure that any laws, regulations and

administrative provisions contrary to the principle of equal treatment are abolished'. In addition, Articles 8(2) and 9 require that Member States communicate to the European Commission any measures implemented to comply with the Directive. All the experts consulted stated that implementation costs have been either low or very low (and in some cases there were no costs, considering that the legal frameworks in some Member States were already implementing equal treatment on the basis of sex in social security). In this respect, it is important to note that the Directive set a six-year transposition period - its deadline for the transposition was 22 December 1984; all newly acceding countries were required to comply with this legal instrument before joining the EU.

It is also worth mentioning that under Union law, Member States have full discretion for designing their statutory social security schemes. However, by doing so, they must respect the principle of equal treatment set out in the Directive. This implies that when the CJEU rules that there has been an infringement to the Directive, Member States can freely decide of the most appropriate means to remove the source of discrimination and mitigate any financial implications. Nevertheless, because the Directive has a direct vertical effect (i.e. on the Member State and its administration)¹⁰⁰, when the CJEU finds a measure to be discriminatory, the Member State concerned is required to afford the most favourable treatment to all persons covered by the Directive, pending the removal of such discrimination. Moreover, the removal of discriminatory measures cannot be avoided by invoking their financial impact. For example, the case *Buchner and Others*¹⁰¹ provides a clear example where the mere budgetary considerations brought up by the Austrian Government, which claimed that the removal of the discriminatory measures would have major financial repercussions, were not considered sufficient by the CJEU to justify the difference in treatment based on gender-specific age in relation to the granting of an early-old age pension on account of incapacity for work.

Overall, the evaluation finds that in Member States in which the implementation of the Directive required more in-depth amendments to the social security system (e.g. the Netherlands, Spain), the public administration has incurred higher costs due to the substantive changes of laws, regulations and work processes. However, none of the stakeholders interviewed considered implementation costs to be too burdensome.

2) *monitoring costs*: costs for the personnel employed to monitor and report. Most of the experts interviewed considered monitoring and reporting costs to be low or very low. None of the interviewees considered these costs burdensome. The reasons are twofold. First, the Directive does not require Member States to implement a specific mechanism (i.e. a committee, agency or ombudsman) to monitor and report on a regular basis to the Commission. Second, Member States are only requested to periodically examine the validity of the derogations allowed by the Directive (Article 7(2)). They are to communicate to the Commission any legal and administrative provisions adopted on the grounds of the Directive

¹⁰⁰ Following case C-71/85, *State of the Netherlands v Federatie Nederlands Vakbeweging*, ECLI:EU:C:1986:465.

¹⁰¹ C-104/98, *Buchner and Others*, ECLI:EU:C:2000:276.

and, where relevant, inform the Commission why they are maintaining any existing derogations (Article 8(2)). Interviewed stakeholders reported that Member States did not implement any additional mechanisms to monitor the Directive, which is why costs are relatively low. Furthermore, the mechanism Member States use to monitor covers a broader scope of protected grounds (not only beyond sex, but also often more than those addressed by the EU directives on equal treatment). As a result, it is not possible to determine the monitoring and reporting costs relating to the implementation of this Directive on its own.

3) *enforcement costs*: costs associated with the introduction of new mechanisms for claims. On enforcement costs, the evaluation highlights that no additional *ad hoc* enforcement mechanisms were implemented in any of the Member States. Disputes about equal treatment for men and women in social security are generally brought before national courts (as is the case for any other matter related to discrimination on grounds covered by EU/national legislation).

The support study considered that based on stakeholders and experts' opinions, benefits outweigh — or at least are proportional to — the costs generated by the Directive. Interviewed stakeholders generally considered the costs to implement, monitor and enforce the equal treatment principle as marginal in comparison with the beneficial outcomes that this principle generates.

5.3 Relevance

Relevance is the extent to which the Directive's objective (implementation of the principle of equal treatment for men and women in matters of social security) the scope and mechanisms of the Directive are appropriate to address the main gender differences in statutory social security systems and whether the Directive is still a relevant tool to address them.

The evaluation found no basis to question the continuing relevance of the principle of equal treatment enshrined in the Directive. It did find, however, some discrepancy between the relevance of the Directive's objective of ensuring the equal treatment principle in statutory social security and the relevance of some of the Directive's provisions setting exclusions or derogations from the scope of this principle.

The public consultation also asked participants whether they perceive the Directive as a relevant legal instrument to eliminate inequalities and promote equality between men and women in the matters it regulates. The respondents, both from the public and the non-governmental sector, as well as individuals — consider that the Directive has been relevant for achieving the objectives set out by the EU legislator. They also consider that the Directive has adequately addressed the socio-economic realities of the late 70's, providing a decisive push towards equal treatment of men and women in relation to statutory social security schemes.

Some stakeholders participating in the public consultation considered that the legislation has the perverse effect of encouraging women either not to work at all or just enough to supplement the man's income a little bit. Trade unions highlighted that this type of legislation can encourage regulations within national systems indirectly promoting gender inequality and that this could work against achieving the Directive's objectives.

The support study suggests that the exclusion of survivorship and family benefits as well as the derogations, particularly those related to the retirement age and advantages to persons who have brought up children, might not effectively make it possible to ensure that social security schemes are gender neutral. These exclusions and derogations are therefore considered to be an obstacle to the achievement of full gender equality in the area of statutory social security. The burden of caring responsibilities remains far from being equally shared and such situation reinforces the fragmentation in women's professional careers. Such inequalities tend to be mirrored, often in the form of indirect gender discrimination, by social security systems, especially when old-age pension schemes are based on the lifetime employment record of the person and establish a strong link between benefits and contributions.

Regarding the derogation related to the advantages to persons who have brought up children (Article 7(1)(b)), 35% of public consultation participants considered the need for this derogation to be relevant, mainly in order to grant substantial equality between men and women. 20% of these respondents pointed out that there should be no difference in these advantages related to childcare periods, which are justified by the nature of the career break, irrespective of whether the person concerned is a woman or a man. Some stakeholders underlined that career breaks do not always occur because of childcare, but also because of the need to care for other relatives (sick or old).

On the other side of the spectrum, some interviewed stakeholders and experts considered that the Directive appears to be outdated and not really aligned with current needs perceived at national level - 'when such exclusions were drafted, society was different and the majority of women did not work. They affirm that nowadays the majority of both spouses work and therefore the underpinnings of such measure appear somewhat weaker'.

Interviews have shown that stakeholders have different views as regards the temporary nature of the derogations in the Directive. However, as explained before, the derogations listed in Article 7(1) were not designed as an automatic right for Member States to exclude certain aspects of social security from the scope of application of the equal treatment principle. Article 7(2) requires Member States to periodically examine the matters excluded to ascertain whether there is justification for maintaining the exclusions concerned. This aspect is important, in particular when considering situations such as the one in Poland, which recently decided to undo the process of equalisation of the retirement age for women and men¹⁰². Reverting to gender-specific eligibility conditions raises questions on the compatibility of

¹⁰² Dz.U. 2017 poz. 38.

such national decisions with the spirit of this Directive and the existing EU case law¹⁰³. In this regard the Directive is deemed to be relevant, especially given its general purpose of ‘progressively’ implementing the principle of equal treatment in the area of social security.

In *Van Cant*,¹⁰⁴ the Court concluded that that ‘once the Member State has acted to abolish discrimination from a previously exempt area, however, it cannot rely on the derogation to continue discriminatory practices in that area.’ In the *Equal Opportunities Commission*¹⁰⁵ case, the Court left open the possibility for a Member State to maintain temporarily different rules between men and women for contributing to the pension system, owing to the different pensionable age and in light of the financial equilibrium of the system.¹⁰⁶ Furthermore, following the case law of the CJEU, it is up to Member States to define their social policy measures and in doing so, subject to proportionality, they have a margin of discretion¹⁰⁷ in designing the way in which the measures are implemented.

Finally, the support study highlights that recent landmark rulings of the CJEU¹⁰⁸ have confirmed that the Directive continues to be relevant and have opened up new perspectives to further enforce the principle of equal treatment in statutory social security on the basis of the Directive’s existing provisions. New preliminary ruling cases continue to appear, which shows that gender inequalities in social security schemes are well-entrenched. As an example, in the *WA* case¹⁰⁹ which is currently pending before the CJEU, the national court asks whether a rule of national law which increases the amount of a woman’s pension in relation to a specified percentage which is based on the number of children the woman has had and that does not grant this right to men in an identical situation, infringes the principle of equal treatment which prohibits all discrimination on grounds of sex.

5.4 Coherence

Coherence is the extent to which the provisions of the Directive are mutually reinforcing or include contradictory elements (‘internal coherence’) and the extent to which the Directive is coherent with other related EU acts or policies (‘external coherence’).

The analysis of external coherence concerned the following:

¹⁰³ See C-172/02, *Bougard*, ECLI:EU:C:2004:283, para. 28.

¹⁰⁴ C-154/92 - *Van Cant v Rijksdienst voor pensioenen*, ECLI:EU:C:1993:282, para 13.

¹⁰⁵ Case C-9/91, *The Queen v Secretary of State for Social Security, ex parte Equal Opportunities Commission*, ECLI:EU:C:1992:297.

¹⁰⁶ See also *De Vriendt*, C-377/96 to C-384/96, point 26.

¹⁰⁷ C-343/92 - *Roks and Others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others*, ECLI:EU:C:1994:71.

¹⁰⁸ *Elbal Moreno*, *Villar Láiz* and ‘X’ cases.

¹⁰⁹ C-450/18 - *WA*.

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) Directive 2000/43/EC¹¹⁰;
- Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹¹¹;
- Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC¹¹² (this Directive will be repealed with effect from 2 August 2022, by the new Directive 2019/1158/EU on work-life balance for parents and carers¹¹³);
- Directive 2010/41/EC of the European Parliament and of the Council of 7 July 2010 on equal treatment between men and women in an activity in a self-employed capacity¹¹⁴;
- International Labour Organisation convention Nr. 102 concerning Minimum Standards of Social Security ¹¹⁵.

5.4.1 Internal coherence

The evaluation found that the coherence of the structure of the Directive, as well as the way in which its provisions complement each other can be improved. This is due to some discrepancies between the stated purpose of the Directive in its Article 1 and the results that can be achieved under its ‘operational’ provisions. The existence of provisions set out in Article 7(1) allowing Member States to derogate from the principle of equal treatment in relation to certain key questions and the areas excluded from the material scope of the Directive (Article 3(2)) without clear limitation on time can be considered as a source of uncertainty in relation to the attainment of its objective enshrined in Article 1.

As pointed out above in previous sections, although the practice of invoking derogations set out in Article 7(1) is diminishing across the EU and the Court made clear that they are temporary, there are new occurrences in which some Member States newly invoke different treatment in statutory social security matters (such as gender-specific retirement age, conditions for entitlements based on number of raised children, etc.). Therefore, in this context, it can be concluded that, despite the purpose declared by the Directive, the lack of clarity of the transitional nature of the derogations set out in Article 7(1), which do not set any time limit, is a source of potential legal uncertainty that may run against the achievement of equal treatment between men and women.

¹¹⁰ OJ L 204, 26.7.2006, p. 23.

¹¹¹ OJ L 373, 21.12.2004, p.37.

¹¹² OJ L 68, 18.3.2010, p. 13.

¹¹³ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019.

¹¹⁴ OJ L 180, 15.7.2010, p.1-6.

¹¹⁵ https://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no::p12100_instrument_id:312247

5.4.2 External coherence

The external coherence analysis was performed against a selected number of acts of secondary EU legislation in the area of equal treatment and UN conventions.

Overall, the evaluation confirmed that the Directive coexists with other EU directives on equal treatment without interference in their scope. No major inconsistency has been detected in particular in its relationship with Directive 2006/54/EC and Directive 2004/113/EC - the directives covering so-called 2nd and 3rd pension pillars¹¹⁶, except on some specific points.

Firstly, one crucial difference between the Directive and the Directive 2006/54/EC concerns the pensionable age, in the sense that the derogation set out in Article 7(1)(a) of Directive does not exist in Directive 2006/54/EC. While Directive foresees the possibility to set a different pensionable age in statutory social security, no difference between women and men is allowed in occupational social security covered by Directive 2006/54/EC. This aspect is particularly relevant in situations where Member States establish gender-specific retirement age in relation to certain types of civil servants. As a recent example, the Commission opened an infringement against Poland after the introduction of a different retirement age for female judges (60 years) and male judges (65 years).¹¹⁷ According to the applicable EU law, the concerned scheme is classified as an occupational social security scheme, therefore covered by Directive 2006/54.

Secondly, the Court, in its *Test-Achats* ruling,¹¹⁸ held, in the context of Directive 2004/113/EC, that the use of gender as a factor to calculate premiums and benefits for insurance and related financial services may not result in differences in individuals' premiums and benefits. This ruling has *de facto* removed any exception to this principle in Article 5(1) of Directive 2004/113/EC, which is applicable to financial services, including individual pension saving plans.

Similarly, in the 'X' case, the Court has further clarified that actuarial factors are forbidden in statutory social security, covered by Directive 79/7/EEC. Nevertheless, no such prohibition has been confirmed in regard to occupational social security, covered by Directive 2006/54/EC. This inconsistency shows the need for aligning the directives, taking into account the existing CJEU jurisprudence, in particular as regards the use of actuarial factors. This would require a revision of certain provisions of Directive 2006/54/EC¹¹⁹, which are inconsistent with the overall framework of protection against gender-based discrimination and the Court's jurisprudence. This aspect was included into the scope of the ongoing

¹¹⁶ www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_645751.pdf

¹¹⁷ Case C-192/18 *Commission v Poland*, pending.

¹¹⁸ Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, ECLI:EU:C:2011:100.

¹¹⁹ Namely its provisions in Article 9 (1) (h-j).

evaluation¹²⁰ of the provisions of Directive 2006/54/EC implementing the Treaty provisions on equal pay.

Attention may also be drawn to the coherence of the Directive with Directive 2000/43/EC ('Race Directive')¹²¹. Although the later covers discrimination based on racial and ethnic origin, it also prohibits direct and indirect discrimination, *inter alia*, in relation to social protection. However, contrary to the Directive, the Race Directive does not provide for any derogation which can be invoked by Member States to delay or not ensure equal treatment.

Furthermore, most of the EU equal treatment directives adopted after 2000 contain provisions defining key concepts necessary for a more effective implementation and enforcement of the principle of equal treatment: direct and indirect discrimination, burden of proof, role of equality bodies in protecting victims of discrimination. This is not the case of Directive 79/7.

The support study finds, moreover, that although the Directive seems formally coherent with the revised Framework Agreement on Parental Leave (Directive 2010/18/EU)¹²², this is an area where indirect discrimination in social security may still exist because of the differences of views as regards the temporally nature of the derogations allowed by Article 7(1)(b). In particular, the Parental Leave Directive entitles male and female workers to an individual right to parental leave for taking care of a child until a given age below 8 years and establishes the principle that the parental leave is not transferable between the two parents. Nevertheless, the Parental Leave Directive only requires Member States to fulfil some minimum standards, such as a minimum individual right of 4 months parental leave with at least 1 month granted on a non-transferable basis. Data show that parental leave is still predominantly taken by women. Therefore, the transferability of the part of parental leave, which still exists in most Member States' labour law, as well as the longer periods of parental leave above the minimum standard set in Directive 2010/18/EU, still often compel women to assume the biggest share of the time off from work to care for the child. The imbalance in the design of work-life balance policies between women and men reinforces gender stereotypes and differences between work and care. The support study considers that this proves to be detrimental to the acquisition of related social security rights and impacts gender-based gaps including gender pension gap. The existing Parental Leave Directive will be replaced, as of 2 August 2022, by the new Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. This new directive aims to promote the uptake of leave by men by creating reserved periods of leave for fathers (non-transferable to the mother) that are compensated, via paternity leave (two weeks) and a period of paid parental leave (extended to two months).

¹²⁰ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3415794_en

¹²¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

¹²² Replaced by the new Directive (EU) 2019/1158 of the European Parliament and the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12/7/2019, p. 79.

As regards the Directive 2010/41/EU, the two Directives are coherent, in that both set out minimum rights for the self-employed men and women with respect to access to social security schemes. Directive 79/7/EEC provides for equality between men and women in social security and applies to the “working population”, including self-employed persons.¹²³ Directive 2010/41/EU provides that, when Member States have a system of social protection for self-employed workers, they must take the necessary measures to ensure that spouses and life partners can benefit from social protection.¹²⁴

In relation to the coherence with existing international legal instruments, namely the Convention of the International Labour Organisation nr.102 concerning Minimum Standards of Social Security¹²⁵, it is important to highlight that the Directive goes beyond the concept of single breadwinner recognised by the Convention, promoting individualised social security entitlements and expressly aiming at the implementation of equal treatment between women and men.

5.5 European added value

EU added value refers to any additional effects or positive change which are due to EU intervention as compared with the effects that could have been achieved by Member States if they acted. European added value may result from different factors: coordination gains, legal certainty, greater effectiveness, etc.

The evaluation support study, in particular on the basis of stakeholders’ opinion, found that the Directive is of rather high European added value. It contributes to the development of EU gender equality policy and helps to combat discrimination on the grounds of sex in social security matters across the EU in a more coordinated way ensuring homogeneous respect of the principle of equal treatment between women and men in social security in EU Member States.

The evaluation identified that European added value is three-fold across the EU. In Member States in which there was no legislation enforcing the principle of equal treatment between men and women in social security, or more specifically, working women were discriminated against in terms of their access to social security schemes and social entitlements, the Directive generated clear European added value and was a key driver to help integrate the principle of equal treatment and adapt national social security legislation. Furthermore, its key elements related to relevant concepts and the scope of application of the principle of equal treatment ensured a more harmonised effect across the EU without undermining Member States’ exclusive competence in designing their national social security systems. Although the absence of or unclarity of certain definitions (e.g. on indirect discrimination) and the list of

¹²³ Article 2 of Directive 79/7.

¹²⁴ Article 7 of Directive 2010/41.

¹²⁵ https://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no::p12100_instrument_id:312247

derogations has had a certain effect on its legal clarity, the CJEU's interpretative role has helped to ensure the interpretation of its legal provisions and a more coherent implementation across the EU.

In Member States in which the principle of equal treatment was already incorporated in the national legal system, the Directive reaffirmed this principle and helped to develop accordingly specific measures for social security. This was also the case of new Member States which had already developed frameworks on gender equality when they joined the EU, often beyond the Directive's provisions.

The effect of the Directive has been less visible only in Member States in which gender equality had been deeply rooted in national policies for decades¹²⁶.

Furthermore, the Directive still provides a relevant and reliable starting point for candidate countries seeking to join the EU and for countries that might enter this process in the future.

The stakeholders interviewed acknowledge that the Directive has helped to establish the principle of equal treatment across the EU and to design specific national legislative instruments and measures on equal treatment for men and women in matters of social security. They recognise that since its adoption in the late 1970s, the Directive has continued to trigger important steps in promoting the principle of equal treatment in national social security schemes across the EU — a process that, without the EU instrument, could have been either slower or less effective. As it was already highlighted in this SWD, in the mid-1970s women's opportunities to build up personal entitlements to contributory benefits and to establish themselves as claimants of various means-tested benefits were often limited since social security systems were often attuned to the breadwinner model. After the Directive was adopted, it triggered a shift towards a more consistent approach to equal treatment in social security matters across Member States, a shift which would most probably not have been realised if this matter would have been left exclusively to Member States. The implementation of the obligations under the Directive have led to a substantial abolition of national legislation conflicting with the principle of equal treatment (as required by Article 5 of the Directive). Even after its enactment, almost a decade was needed for some Member States (e.g. the United Kingdom, Luxembourg) to adapt their social security systems in line with the requirements of the Directive. Furthermore, the Directive played a pivotal role in triggering faster social change across the EU, towards the individualisation of social security rights, better financial independence of women including in old-age as well as more legal certainty for people exercising their free movement right in the EU.

The recent CJEU jurisprudence mentioned in Section 3 above confirms the Directive's continued relevance and EU added value. Indeed, the Directive continues to impact key features of Member States' social security systems and to help achieve more equal treatment between women and men in this and related domains.

¹²⁶ SE, FI, DK.

The support study highlights the Directive's significant political and social value, since it still helps to raise awareness of the importance of gender equality in social security and sustains Member State commitment. The *Elbal Moreno* case¹²⁷ confirms the Directive's added value and its potential to trigger future developments, especially for part-time employees, which are more likely to be precariously treated in social security than full-time employees. Furthermore, the 'X' case¹²⁸ clearly opens the way to adapt the use of gender-specific actuarial factors in other areas, especially in matters related to occupational social security covered by Directive 2006/54 in a way coherent with the principle of equal treatment of women and men. This case confirms that the Directive potentially helps to further develop EU gender equality policy as a whole, in particular by ensuring a more consistent approach related to occupational and private social entitlements covered by other EU gender equality legislation (Directives 2006/54 and 2004/113 respectively).

The stakeholders interviewed believe that the 'constitutional nature' of the general principle of equal treatment between women and men within European Union law renders any eventual repeal of the Directive not only unrealistic but would also be inconsistent with the current legal framework and the objectives of the Treaties and the Charter of Fundamental Rights. Furthermore, from a substantive point of view, repealing the Directive would weaken people's ability in the EU to enforce their rights and initiate proceedings against Member States for acts violating the principle of equal treatment. The CJEU could no longer continue to play its crucial role of scrutinizing persisting inequalities in social security in the light of the principle of equal treatment between women and men, as shown above.

In light of the above, it may be concluded that the Directive has been and continues to be an important trigger for implementing the principle of equal treatment between men and women in social security matters. All these aspects assessed by the evaluation confirm the Directive's continuing European added value and argue in favour of further developing the gender equality legal framework.

SECTION 6. CONCLUSIONS

Overall, the evaluation shows that the Directive's application has helped to foster implementation of the principle of equal treatment between men and women in social security across the EU and change women's role in society — from breadwinner-based to equal and modern family models of shared responsibilities that we observe today in Europe. All Member States have implemented the Directive's provisions in their national legislation. At the same time, even if the overall assessment is positive, the evaluation has also brought to light a number of gaps and shortcomings in the scope and implementation of the Directive.

¹²⁷ Case C-385/11, *Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, ECLI:EU:C:2012:746.

¹²⁸ Case C-318/13, *Proceedings brought by "X"*, ECLI:EU:C:2014:2133.

The Directive, constructed to serve as a tool to ensure equal treatment between men and women in statutory social security, is generally considered to be **effective**. The Directive has helped to gradually transform Member States' social security systems from a 'single breadwinner' model where often working women were discriminated against, in particular by reference to their marital or family status, to a model where affiliation to social security system and entitlements are individualised, working women are treated in the same way as working men and not discriminated as it is illustrated in the baseline model. The Directive has also helped to ensure the sustainability of the gender equality principle in social security and still plays an important role as a benchmark both for acceding countries and to detect persisting inequalities in social security.

At the same time, the evaluation finds that there is room for improving the effectiveness of the Directive. First of all, the continuous use by some Member States of the possibility of not applying the principle of equal treatment to certain matters listed in Article 7(1) may cause unintended side effects and disadvantage women. There are some cases (such as lower pensionable age for women, less favourable conditions for part-time or intermittent workers, etc.) where direct and indirect discrimination on the grounds of the Directive presumably exist and have negative effects; such discriminations hinder female labour market participation and prevent the reduction of the gender pension gap. The existing national provisions which claim to be based on such derogations often strengthen the stereotypical division of social gender roles.

Monitoring and enforcing the effective implementation of equal treatment between men and women at national level is a difficult and yet crucial task to ensure full effectiveness of the Directive's provisions.¹²⁹ An active participation of national equality bodies in both the monitoring of the application of national legislation and the identification of potential sources of indirect discrimination is an important condition to help in addressing the discrimination. In this regard, it is important to mention recently adopted Commission recommendation establishing standards for national equality bodies¹³⁰ and calling Member States to ensure that national equality bodies are independent, with sufficient resources to carry out their tasks.

On **efficiency**, since the Directive is not considered to have created tangible administrative burden or significant compliance/implementation costs for Member States and its provisions are mostly setting out principles rather than procedures, the potential for simplification is deemed limited. The benefits which the Directive generates (particularly reducing the risk of poverty, contributing to the reduction of public costs to social assistance) are likely to outweigh any marginal costs. A higher degree of gender equality benefits the whole social system — increasing its efficiency and enhancing the well-being of citizens.

Regarding **relevance**, two factors — exclusions and derogations — have limited the Directive's relevance within its scope of application to statutory social security. As the

¹²⁹ See Support study, p. 167.

¹³⁰ C(2018) 3850 final, https://ec.europa.eu/info/sites/info/files/2_en_act_part1_v4.pdf

economic and social context has evolved since the enactment of the Directive, some provisions (such as in Article 7(1) allowing Member States to derogate from the principle of equal treatment) that were intended to improve women's position in society are now considered to be outdated and have even proved to be counterproductive. This is due, both to the questionable impact of pursuing gender equality through certain types of gender-specific advantages and because they have had the consequence of generating covert indirect discrimination. The temporary nature of the limitations to the Directive's scope has been referred to by the CJEU in the *Hepple* case, mentioned above.

While some of the experts interviewed no longer consider the Directive as a legislative landmark since more recent and relevant laws have been established at national level, another group of experts still deems the Directive relevant in addressing issues related to gender discrimination in social security matters. This latter view seems confirmed by the continuing referrals for preliminary rulings by national courts, bringing to light persisting inequalities in social security. Furthermore, the Directive still serves as a reference for countries in the process of joining the EU or planning to enter the process in the future and may act as a safeguard against any temptation to challenge the gender equality principle. This latter element is particularly relevant in light of the worrying rising backlash against gender equality visible in a number of EU Member States.

The evaluation did not find any compelling arguments supporting the possibility for Member States to continue to make use of the derogation under Article 7(1), particularly if the area of family benefits becomes subject to the principle of equal treatment, in particular after the recent directive on work-life balance for working parents was adopted, and further coherence is strived for through a consistent application of the non-transferability of parental leave. In order to prevent backlashes against gender equality, the evaluators consider that it would be useful¹³¹ to clarify that once the way towards full equalisation (in particular as regards the retirement age) has been taken, backwards steps are precluded.

The Directive is partially **coherent** with the other EU directives on equal treatment of men and women and remain valid for the Commission's priorities on gender equality. Nevertheless, the evaluation of coherence has uncovered areas needing attention, in particular regarding its internal coherence. The Directive's objective aiming at a progressive implementation of the principle of equal treatment in statutory social security does not seem coherent with some of its provisions allowing Member States to derogate from the principle, especially taking into account that the latter initially were considered as transitional measures for Member States towards the gradual adaptation of their system and the implementation of the equal treatment principle. Furthermore, certain doubts remain with regard to the coherence of the Directive with the provisions of Directive 2006/54/EC, which at least according to its provisions still allows gender-specific actuarial factors to be used under certain conditions. A coherent approach to the area of actuarial factors appears to be necessary in order to ensure

¹³¹ See Support study, p. 160.

that, irrespective of the applicable legislation (be it the one regulating purely occupational schemes, with gender specific actuarial factors allowed on the basis of an explicit provision of Directive 2006/54/EC, or that regulating the rest of social security and private social security arrangements,¹³² where they are prohibited), the substance of the protection applied remains homogeneous.

The evaluators consider that a codification of the CJEU case law in the Directive¹³³ would have an added value to ensure its correct implementation. This is the case, in particular, for the personal and material scope of the Directive, and the explicit prohibition of the use of gender-specific actuarial factors. In addition, the explicit inclusion of the concept of indirect discrimination, including the latest interpretation of the objective justification test as applied by the Court in the cases *Georgiev*¹³⁴ and *Elbal Moreno*¹³⁵, would help in addressing forms of discrimination typically arising in cases of part-time, intermittent or minor employment.

There is no doubt that the Directive has clear **added value** to achieve the implementation of the principle of equal treatment between men and women in matters of social security. This directive, together with two other directives¹³⁶ adopted as a follow-up to the Commission's 1974 Social Action programme, did not only have an important symbolic value, but did constitute a valuable leverage pressing for change in the legal systems of the Member States¹³⁷. It establishes minimum standards, continuously secures the sustainability of the principle of gender equality in social security across the EU and creates an important benchmark for acceding and candidate countries. Moreover, the Directive remains an important point of reference in the case law generated by courts throughout the EU. It serves as an instrument to tackle cases of gender discrimination in matters of social security arising from the application of national legislation. Finally, the CJEU has clearly affirmed the direct vertical effect of article 4(1) of the Directive - in absence of national appropriate measures for the implementation of the principle of equal treatment.

The views of Member States and other stakeholders expressed in the public consultation (see Annex 3) and interviews confirm the above conclusions.

In addition to the specific gaps and shortcomings set out above, and despite the evolution towards increased gender equality in European society, the full implementation of the Directive remains hindered by a cultural pattern characterised by persisting stereotypes on the role of women in society, especially as regards caring activities and work patterns. This

¹³² On the basis of either Directive 79/7/EEC or Directive 2004/113/EC, respectively.

¹³³ See Support study, p. 163.

¹³⁴ Joined cases C-250/09 and C-268/09, Vasil Ivanov Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv, ECLI:EU:C:2010:699.

¹³⁵ Case C-385/11, Isabel Elbal Moreno v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS), ECLI:EU:C:2012:746.

¹³⁶ Directive 75/117/EEC on equal pay and Directive 76/207/EEC on working conditions and access to employment.

¹³⁷ *Sexing the Benefit: Women, Social Security and Financial Independence in EC, Sex Equality Law (Socio-legal Studies)* (Hardcover) by Julia A. Sohrab, Dartmouth Pub Co, 1996, p. 85.

pattern results in a frequent latent gender discrimination against women, which is visible in the persistent disparities in women's labour market participation, the gender pay, earnings, and pension gaps, the lack of women in decision-making positions, etc. It therefore remains a continuous challenge to eradicate gender discrimination – and particularly indirect discrimination.

It may be concluded that the Directive's original objectives have been achieved to a great extent, but that more could be done to complete the implementation of the principle of equal treatment in the area of statutory social security. While the Directive remains generally fit for purpose, the evaluators concluded that further efforts should be undertaken not only to reduce and clarify the exclusions and derogations from the principle of equal treatment, but also to detect and combat possible instances of indirect discrimination. The evaluators therefore recommend the introduction of a non-regression clause would secure acquired rights in gender equality and prevent ever possible backlashes. An extension of its scope of application to matters excluded from the scope of the Directive (survivorship and family benefits), derogation and social assistance, would help to overcome some of the counterproductive effects described above and contribute to completing the implementation of the principle of equal treatment for men and women in social protection.

The above conclusions must be considered in light of the legal and political obstacles which a possible revision of the Directive would encounter. First of all, any amendments to the Directive is subject to the principle of unanimity as provided for by Article 19 of the TFEU. Experience with the adoption of the Directive itself in 1979 and the failed attempt in 1987 to complete the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes¹³⁸ show that progress in this area would require a broad and strong political will inspired and driven by the goal to realise full gender equality as one of the fundamental values on which the European Union is built.

¹³⁸ OJ C 309, 19 November 1987, COM(87) 494 final.

ANNEXES

Annex 1 — Procedural information

Agenda planning reference: 2015/JUST/032

Work programme reference: CWP/2015/CWP2015REFIT

An inter-service steering group (ISG) was set up in December 2014. It was composed of representatives of the Directorates-General for Employment, Social Affairs and Inclusion, the Legal Service and the Secretariat-General.

An external contractor was commissioned to gather data to evaluate the Directive. The ISG validated the terms of reference on 6 February 2015. These were published as a request for services JUST/2014/RDIS/FW/EQUA/0124 under the multiple framework contract JUST/2011/EVAL/01 (2015/03).

Ernst & Young Advisory Services SCRL was commissioned to evaluate Directive 79/7/EEC as part of the Commission's regulatory fitness and performance (REFIT) programme. The contract was signed on 16 May 2015.

To perform the assessment, the evaluation included an extensive literature review and an evaluation of the Directive's impact on how the principle of equal treatment was incorporated into Member States' statutory social security schemes. The fieldwork research relied on both written contributions and interviews with relevant stakeholders.

E&Y delivered its final report on 24 June 2016. The draft final report was shared with ISG members and validated.

The evaluation was complemented by ad hoc monitoring of the implication of CJEU case-law (a questionnaire was sent to Member States in March 2015) and an internet-based public consultation (launched from 21 September to 11 December 2015). The process of the evaluation was complemented by further desk research and bilateral consultations with Member States as regards potential non-compliance with relevant EU legal provisions and CJEU case law (2017-2018).

Agenda Planning — Timing

<i>Milestone</i>	<i>Date</i>	<i>Description</i>
1.	06/02/2015	TOR — approval
2.	08/01/2015	Start of the evaluation project Start activities Policy Evaluation Project Steering Group
3.	14/03/2015	Questionnaire sent to Member States on implications of the 'X' case
4.	16/05/2015	External contractor (EY) is selected and contract is signed
5.	22/05/2015	Kick-off meeting with the contractor
6.	21/09/2015	Launch of public consultation (12 weeks) — in all official languages
7.	11/12/2015	End of public consultation
8.	28/10/2015	First version of draft final report on evaluation sent by EY — followed by Commission remarks (11/12/2015)

9.	29/02/2016	Second version of draft final report on evaluation sent by EY — followed by Commission's additional remarks (22/03/2016)
10.	22/06/2016	Final version of evaluation report presented by the external contractor and circulated to members of the ISG
11.	10/10/2016	Draft SWD prepared
12.	2017-2018	Monitoring of development in MS and bilateral communication and subsequent update of the SWD
13.	From 08/07/2019 to 17/07/2019	Updated draft SWD sent to ISG members
14.	29/07/2019	Launch of inter-service consultation
15.	From 04/09/2019 to 01/10/2019	Finalisation of the SWD
16.	10/2019	Publication of SWD and Support study

Annex 2 — Evaluation questions

Nine evaluation questions based on REFIT evaluation criteria (effectiveness, efficiency, relevance, coherence, sustainability and European added value) have been used to evaluate the Directive.

The questions that have been examined in Section 5 are the following:

Effectiveness

What the observed effects are and how do the observed effects correspond to the Directive's objective (to progressively eliminate discrimination on the grounds of sex in matters of statutory social security)? What aspects helped to achieve the objective? What aspects prevented or hampered achievement of the objective?

Efficiency

To what extent were the costs resulting from the Directive's implementation proportionate to the results and benefits?

Relevance

How well does the Directive's objective still correspond to the needs in the Member States?

Coherence

To what extent is the approach taken by the Directive to ensure equality between men and women and to combat discrimination based on sex consistent with the approach taken by the EU in or any other relevant EU legislation (e.g. related to gender equality)?

European added value

To what extent does the Directive help to develop gender equality policy across the EU? To what extent does the Directive help to combat discrimination based on sex? Would repealing the Directive have adverse consequences?

Annex 3 — Public consultation: Synopsis report

I. The consultation mechanism

This annex offers a brief overview of the input received from the public consultation on the implementation and application of the Directive.

The consultation complied with the European Commission's minimum standards for public consultations. The target groups included the public and stakeholders, EU Member States, EU institutions and other bodies, national, regional and local authorities, intergovernmental and non-governmental organisations, researchers with an interest in gender equality and/or social security issues, equality bodies, social partners, civil society organisations and other organisations or individuals. The public consultation was open from 21 September 2015 to 11 December 2015. An online questionnaire was available in all official EU languages and contributions could be submitted in any official EU language. The online questionnaire included five questions, formulated in the context of the REFIT exercise and covering practically all important aspects of the Directive. An additional incentive for stakeholders to participate was the Commission's commitment that the feedback on the Directive's implementation and application would be instrumental for the Commission's reflections on whether to propose action to modernise the Directive and if so what form it could take.

This public consultation mechanism enabled the Commission, as organiser, tried to reach the widest possible circle of stakeholders simultaneously. The broad visibility and relatively long period of the consultation, combined with maximum openness for participation (through internet, in all official EU languages) and the transparent and clear formulation of the questions meant that all relevant stakeholders had an opportunity to provide input.

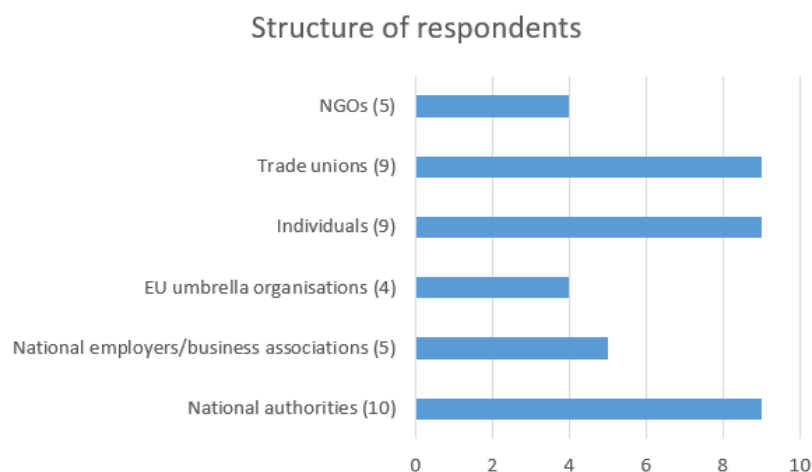
The consultation process was made even more transparent by the Commission's requirement that organisations wishing to submit comments had to provide the Commission and the public at large with information about who and what they represent by registering in the Transparency Register and subscribing to its Code of Conduct. On the other hand, standard data protection was also assured by providing the contributors with the option to object to the publication of personal data on the grounds that publishing such data would harm their legitimate interests. Detailed information on privacy rulings for the public consultation was contained in a specific privacy statement¹³⁹.

II. Summary of views expressed in the context of the consultation mechanism

The consultation mechanism gathered feedback from **40 respondents** (Germany-8; Austria-5; United Kingdom-3; Portugal-2; Italy-2; Sweden-2; Latvia-2; Poland-2; France-1; Czechia-1;

¹³⁹ http://ec.europa.eu/justice/newsroom/gender-equality/files/privacy_statement.pdf

Estonia-1; Cyprus-1; Bulgaria-1; Luxembourg-1; Netherlands-1; Slovakia-1; EU level-5) — mainly representing national authorities (10) and trade unions (9), but also individuals (9 contributions), NGOs (5), companies and industry/business associations (5), as well as other stakeholders, namely European umbrella organisations (4). The geographical scope of respondents includes 17 EU Member States (AT, BE, BG, CY, CZ, DE, EE, FR, IT, LV, LU, NL, PL, PT, SE, SK, UK).



In general, support was expressed for the Directive's objectives and its continuation.

1. Relevance

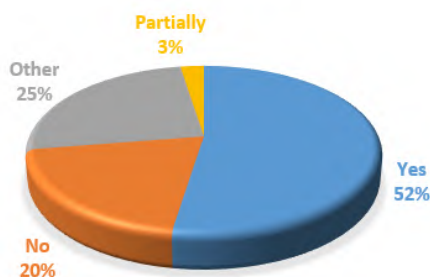
The first question asked was whether the stakeholders perceive the Directive as a relevant legal instrument to eliminate inequalities and promote equality between men and women in the matters it regulates. This question was divided into 3 parts to address 3 types of material scope covered by the Directive:

1a – in statutory social security schemes providing protection against the risks of sickness, disability, old age, unemployment, as well as accidents at work and occupational diseases



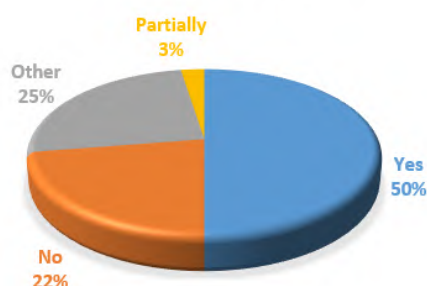
1b – in social assistance, in so far as it is intended to supplement or replace the above schemes

QUESTION 1B



1c - in social security schemes financed by social security contributions/public revenue and administered by private insurance or management companies

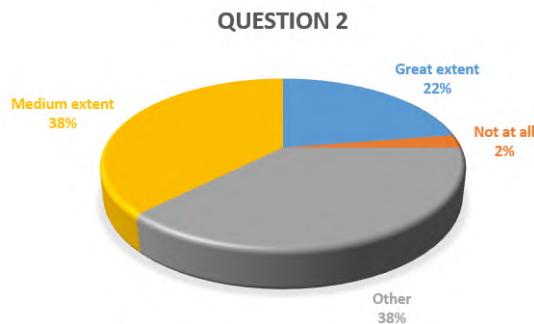
QUESTION 1C



In general, the respondents — both from the public and the non-governmental sector, as well as individuals — consider that the Directive has been relevant in achieving the objectives set out by the EU legislator. The Directive has adequately addressed the socio-economic realities of the late 1970s, providing a decisive push towards equal treatment of men and women in statutory social security schemes. The Directive has focused on harmonisation rather than uniformisation of national legislation. Member States have thus remained responsible, in exercising power not transferred to the Union legal order, for determining the structure and characteristics of their social security systems. Practically all of the State authorities that took part in the public consultation report that the Directive has been successfully implemented in their national legislation.

2. Achievement of objectives

The second question asked to what extent the Directive's objectives have been achieved and what, if any, factors have hindered their achievement.



The general opinion is that the Directive's objectives have progressively been achieved, to the extent that awareness has been raised about issues of equal treatment between men and women, in particular the gender pay gap. The Directive is assessed as beneficial in helping to eliminate inequalities in relation to risks of sickness, disability, old age, unemployment, as well as accidents at work and occupational diseases. However, specialised NGOs emphasise the lack of attention given to informal carers.

The national legislation of EU Member States is recognised (both by public authorities and NGOs, trade unions and business associations) as being in line with the Directive. However, NGOs highlighted the issue that inequality remains persists in certain areas.

Trade unions and NGOs assume that even in national legislative environments where the Directive is perceived as being of little practical application — e.g. in the northern European countries, with their long tradition of treating men and women equally — this piece of EU legislation may act as a safeguard against any temptation to challenge the gender equality principle. At the same time, the non-governmental sector for the most part makes a distinction between the formal objectives, generally regarded as attained, and actual employment conditions. Some trade unions believe that the European labour market mostly embeds gender inequalities¹⁴⁰ which eventually determine gender discrimination, including in social security schemes. This situation results in women finding it more difficult than men to access adequate statutory and non-statutory social security schemes, which are mostly contributory schemes, thus directly linked to the professional lives of people at work.

There are also contrasting opinions, mostly from companies and industry/business associations, on whether the Directive's objectives have been successfully achieved. Some consider the Directive outdated, because the legal instrument has not kept pace with the amendments to the Treaties and the incorporation of the Charter of Fundamental Rights into the Treaties. This would prevent the objectives from being fully achieved. Business representatives think that at the latest when the Treaty of Amsterdam came into force some thoughts should have been given to social policy and improving the protection offered by the Directive against discrimination. It is pointed out that none of the 'modern' directives enacted

¹⁴⁰ Both vertical and horizontal occupational segregation, pay gaps for equal work, greater precariousness of female employment characterised by seasonality in hiring and involuntary part-time work, the enormous difficulties in reconciling work and family responsibilities, almost exclusively falling on women.

since 2000 deal with the equal treatment of women and men in the area of statutory social security. Stakeholders from industry opine also that tax and social security legislation is still biased in favour of single earner households. The legislation therefore has the perverse effect of encouraging women either not to work at all or just enough to supplement the man's income a little bit.

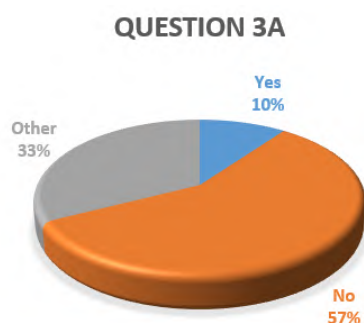
Some trade unions point to the fact that the Directive may potentially encourage regulations within national systems indirectly promoting gender inequality and therefore work against achieving the Directive's objectives. Examples of this are the derogations from equal treatment in Article 7(1)(c) and (d) — it is suggested that if these exceptions were to remain, they should be gender neutral.

Participating NGOs seem to share the view that the greatest factor hindering the achievement of the Directive's aims are the persisting inequality between men and women in career patterns and the sharing of household tasks and family care. Job segregation and an unequal distribution of part-time work between men and women are also contributing factors. Gender discrimination plays a strong role, especially when combined with age discrimination: older women are said to be among the groups with the highest rates of inactivity. Social security benefits linked to contribution levels by and large replicate these inequalities, although a number of mitigation mechanisms exist in social transfers.

3. Exclusions

The third question the public consultation asked was whether any exclusions laid down in Article 3(2) of the Directive (for survivors' benefits and family benefits) are still justified. This question was divided into 2 parts to address different types of benefits excluded from the scope of the Directive:

3a- Survivors' benefits



Stakeholders' opinions differ on this issue. Some NGOs consider that the exclusion is justified in countries where pension calculations are still not equal for men and women because of unequal treatment (e.g. salary, length of service, types of contract). Shifting family

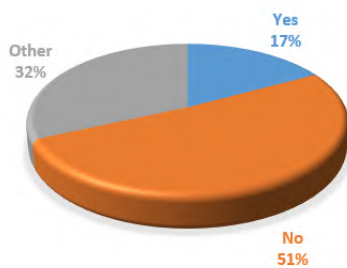
structures (co-habitation, divorce, separation, etc.) must be taken into account. This means that identical treatment should be ensured for widows and widowers and implementing measures should be taken for single parents. Moreover, survivor's benefits are perceived as a redistribution instrument, since women have a longer life expectancy than men. Therefore, they help to close the gender pension gap and reduce poverty among older and especially very old women (over 80 years old).

Other opinions — mostly from industry and business associations — consider the exclusion not justified and suggest it to be dropped, because the principles of equal treatment and non-discrimination should be applied without exception to all benefits awarded under social protection systems. Where the duration of payment of the widower's/widow's pension depends on the length of the marriage and the age difference in the couple, couples with a large age difference but a short marriage are at a disadvantage. This is because the qualification period has not been completed and therefore only a single payment is due, rather than regular social coverage in the form of a widower's/widow's pension. It therefore seems unjustified to exclude survivor's benefits from the scope of application of the Directive. Also, Europe is now reaching a point where the generation of women who entered the labour force are starting to retire. As a result, the reasons for the exceptions are considered invalid. In the extreme, some respondents claim that this exclusion was not justified even when the Directive was adopted and should definitely be abolished.

A third group of opinions (expressed by some public authorities, trade unions and members of the public) tends to seek some middle ground, recognising that the exclusion of the survivors' benefits is partly still justified. As long as gender inequalities persist in accessing the labour market and welfare system, this provision makes sense as partial compensation. Some stakeholders point out that in certain Member States such benefits can be claimed by children of the deceased person, while the spouse is entitled only to his/her own individually earned rights. Therefore such benefits do not influence decisions about working and family responsibilities which later lead to pension gaps. Admittedly, in some countries exclusions for survivors are based on income criteria (access to survivors' benefits being conditional on an upper income limit), not on gender-related criteria. Yet other respondents believe that the exclusion is only justified if all structural lock-ins into the bread-winner model are eliminated; as long as other roles/forms of work (mainly carried out by women) are not recognised and given equal value as productive (profit or growth-oriented) work (mainly carried out by men), the exclusion cannot be justified.

3b - Family benefits

QUESTION 3B



Given the profound changes in family structures (more women at work, lower fertility rates, more single parent families, smaller families) and an increasingly more balanced sharing of family responsibilities by fathers, some respondents — public authorities, but also certain industry and trade union representatives — are of the opinion that family benefits should be dropped from the scope of exclusions under the Directive. This would also be consistent with national social security legislation, where a ‘gender neutral’ approach has been taken. Even for social risks more closely associated with women, measures and actions have been adopted to combat gender inequality, promote equality between men and women on the labour market and within the family, and better reconcile professional, family and private life. It is also opined that this exclusion is no longer justified, especially in those countries with a long history of promoting gender equality in all labour legislation and practices, namely the Nordic countries.

Other stakeholders (NGOs, State authorities) believe that the exclusion is nevertheless justified because there are still inequalities in the treatment of men and women. Family benefits promote equality between the sexes, since the benefits are paid to the parent who actually takes care of the child (the majority of single parents are young women). An argument advanced in favour of maintaining this exclusion is the fact that family allowances are an important source of financial support for women.

Most of the respondents, representing most of stakeholder groups, are convinced that family benefits should not be linked to a specific gender. Instead, the benefits should cover specific living circumstances regardless of gender, in accordance with the principle of equal treatment. These benefits must be for the person who actually incurs expenses and spends time raising children, rather than for a man or a woman. This should be the norm rather than privileging one gender over another in granting family benefits. In some EU Member States family benefits take the form of birth grants (entitlement to the birth grant being linked to family income).

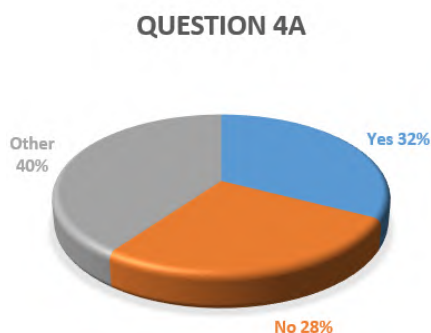
4. Derogations

The fourth question asked whether any derogations permitted by Article 7(1) of the Directive are still justified.

The general opinion — represented basically by public authorities and certain NGOs — seems to be that recourse to the exceptions under Article 7(1)(a), (b), (c) and (d) may still be justified in some countries with more traditional family models based on the role of the patriarchal family providing welfare. However, some stakeholders explicitly doubt whether EU legislation should help to perpetuate this model. It is believed that if these exceptions are maintained, they should be made temporary, thus moving towards a ‘gender neutral’ approach to social security in the EU.

Others claim that the legal situation created by Article 7(1) and its derogations has become untenable. These derogations should be examined in the light of the requirements imposed by Article 23(1) and Article 51(1) of the Charter of Fundamental Rights. Some trade unions believe that, in the context of the Charter, there is no objective justification for the further validity of the provisions on derogations.

4a - Excluding from the scope of the Directive the equal treatment of men and women in the determination of pensionable age.



According to some, this derogation should remain because the provision allows for the quick and legally secure allocation of time spent raising children if the parents have not agreed on an allocation of time, which is the procedure required by national legislation in some Member States. Moreover, this derogation is still considered necessary, since Member States are still solely responsible for designing their social security systems. Some believe that the derogation should be kept for a period long enough to allow for the complete elimination of this type of inequality. The stakeholders recall that women in most Member States (and especially in the ‘new’ Member States) see retiring earlier than men as an advantage and an achievement; they would be against a single retirement age for both men and women. Other stakeholders, to the contrary, consider that men and women should statutorily retire at the same age. In their view, gender differences in statutory retirement ages should be progressively eliminated, as they were also historically associated with inequality in pension payments between men and women. However, to achieve gender equality, effective retirement ages should also be equalised. This is only possible if there are more active labour market policies and specific support services, life-long learning and skills validation for women who come out of longer career breaks after a period of child care or informal long-term care. Nevertheless, it is constantly recalled that the CJEU ruled that the differentiated

treatment of the retirement age, which is permitted for a transitional period under the derogation in the Directive, serves a legitimate social purpose. The Member States are thus free to maintain different rules for men and women's retirement age.

4b - Excluding from the scope of the Directive the advantages granted in old-age pension schemes to persons who have brought up children or the acquisition of benefit entitlements after career breaks to bring up children.



The need for this derogation is considered relevant, mainly in order to grant substantial equality between men and women. An additional reason to preserve the derogation is the complex demographic situation in a number of Member States. Policies compensating for the bringing up of children are seen as potentially increasing the birth rate and the number of families raising children. Although some childcare models have created financial incentives for paternity leave in certain EU Member States, fathers rarely take family-related leave. Consequently, it is believed that childcare almost exclusively leads to an interruption in women's careers. That is why, as certain stakeholders point out, periods for childcare are being credited in many systems. At the same time, however, in their opinion these systems could become more gender neutral to encourage both men and women to work on equal footing and leave a positive impact on future pension rights. There should be no difference in these advantages, which are justified by the nature of the career break, irrespective of whether the person concerned is a woman or a man. Stakeholders further recall that career breaks do not always occur because of childcare. Someone may also stop working to care for other relatives (sick or old). It is therefore, recommended that the Directive also addresses informal care for other dependent family members.

4c - Excluding from the scope of the Directive the granting of old-age or disability benefit entitlements by virtue of the derived entitlements of a wife.

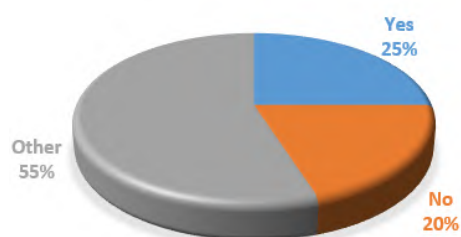
QUESTION 4C



The exclusion of old-age or disability benefit entitlements by virtue of the derived entitlements of a wife is perceived by respondents as based on the one-earner model, which does not no longer reflect today's families anymore. Entitlements could also be based on individual rights, not on those earned by a partner. In general, it is believed that — despite the perception that the provision is not clear and causes problems of interpretation — the derogation can be maintained, although the derived entitlements should not be granted to a particular gender ("wife"), but to both spouses. The same principles should apply for derived entitlements whether they are granted to a man or woman, especially if there is a big difference in pension: both genders should be treated equally, which will *de facto* predominantly benefit women because of their higher life expectancy and lower pensions. On the other hand, the individualisation of entitlements *per se* would not solve the problem of reduced rights in the event of career breaks or reduced working hours. It is recalled that the employee still has to pay into a social security scheme even if this is in addition to a universal scheme — the level of benefits is often very low and supplemented by benefits from voluntary pension contributions, while a part-time worker or someone who has taken a career break will be less able to contribute to these schemes.

4d - Excluding from the scope of the Directive the granting of increases in long-term disability, old-age, accidents at work and occupational disease benefits for a dependent wife.

QUESTION 4D



Some stakeholders claim that this derogation is an obvious example of unequal treatment and that there is no objective justification for it in primary EU law. However, the predominant view seems to be that in order for this derogation to be abolished, labour market patterns must be substantially equal. In most EU Member States this is still not the case. Specific rules for a

transition period might therefore be required, before introducing more gender-neutral rules. This derogation is deemed necessary as long as a ‘policy of European solidarity’ has not been implemented at European level and there is no certainty that the EU will take the best systems into account as possible models. Another reason cited for maintaining this derogation is that the way these insured events are managed largely depends on the design of the national social security systems. Overall, the predominant view remains that the derogation should be permitted for increases granted to a dependent spouse, while schemes that grant increases in pensions only to the wife are in violation of the principles of EU law.

5. Possible modernisation

The fifth question was whether the Directive needs to be modernised, and if so, in what way.



In general, while the majority of the respondents do not see any imminent need to open the Directive for modernisation nor any added value in merging it with other directives, they opine that the limited personal and material scope of the Directive is outdated. Stakeholders (mostly from the public sector, but also NGOs) believe that its terminology needs to be adapted, e.g. so as to encompass new family structures including, for instance the category of registered partners. Derogations should be limited and a more gender neutral line taken to align the Directive’s provisions with demographic changes and profound alterations in family structures. The provisions need to be made more consistent with other social policy objectives in the EU, such as promoting equality between men and women on the labour market and within the family. In order to accommodate current requirements, certain provisions hindering employment would have to be addressed.

Taking into account current standards, as interpreted by certain contributors from the trade unions group, some exceptions in the Directive are not aligned with the societal situation of the Member States. It is recalled, for example, that when the Directive was drafted in 1978, many women did not work. Today this is not the case anymore and the women who entered the labour force are reaching retirement. Exceptions from equal treatment such as those under Article 7(1)(c) and (d) can even encourage regulations within national systems that indirectly promote gender inequality. Accordingly, the trade unions maintain that such exceptions should be abolished to encourage the Member States to implement gender neutral rules and

apply the principle of equal treatment in social security to all benefits granted under the social security systems and schemes in force. To accommodate such a suggestion, derogations to protect national schemes or provisions that are discriminatory in themselves need to be removed.

Several NGOs recommend extending the scope of the Directive to people who are considered 'inactive' or outside the labour market because they are caring for a family member — mostly women who are mothers fall into this category. Therefore, non-governmental respondents from several Member States support the idea of addressing the social security and pension rights of informal carers, e.g. by including a minimum provision for care credits in statutory schemes.

Some trade unions see a better coordination with other relevant EU legal instruments as a step forward. Other respondents from the same group suggest to adopt a combined approach to equal treatment and thus broaden the scope of Directive 2006/54/EC, which already covers several areas. If this approach is not pursued, they suggest to include the innovations of Directive 2006/54/EC in the Directive: definitions of the concepts of 'direct' and 'indirect' discrimination; a rule on 'positive action' provision; an expanded provision on judicial remedies; a provision on the competence of equality bodies.

The fact that indirect discriminatory treatment has not been properly assessed or addressed by the Directive is perceived by trade unions and NGOs as a serious problem. Some believe that the Directive should provide more powerful tools to prevent and above all reveal indirect discrimination by clarifying what is understood by indirect discrimination in the context of this legal instrument.