

**The Costs of Non-Equality**  
**German Report**  
(final version)

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## **1 Equal opportunity legislation and social reality in Germany**

Since the late 60ies, gender relations have been at the heart of social debates in Germany, debates that have led to a redefinition of certain basic assumptions. The notion of natural differences between the sexes and hence of rigid gender roles, which still prevailed in the 50ies and 60ies, increasingly lost its social acceptance in the course of the 70ies. Gender differences no longer seemed biologically determined but were seen rather as the product of tradition and of role allocation processes. The notion of an innate difference between the sexes was replaced by egalitarian concepts of gender relations (Berghahn 1999).

This shift in attitudes in Germany reflected changes in gender relations that had already taken place in the wider society. Married women in Germany entered the labour market in large numbers after the mid-sixties. In the 50ies, female participation rates were around 30 per cent and increased during the years following the building of the Wall up to 50 per cent (Maier 1993: 259). Women's participation in education had also increased as demand for (female) labour in service jobs rose, particularly, from the 60ies onwards, in the expanding social services sector. An important role was also played by the new women's movement, which called into question traditional gender roles and lambasted patriarchal attitudes.

Women's and men's position in Germany is – legally – defined via different legal regulations: the Grundgesetz (Basic Law – Constitution) which includes as basic right equality and equal treatment, the Bürgerliche Gesetzbuch (BGB – Civil Code or Federal Statue Book) which includes regulations in family law and in employment or rather labour market issues like equal treatment in employment, equal pay etc. and other regulations concerning co-determination, tax regulations etc.

Despite the fact that Germany has today a wide range of legal regulations concerning equality of women and men, we would state that the social reality and the legal developments are contradictory processes which are deeply embedded in the norms and values of the society and the individuals. We start our introductory with a short comment on legal and societal developments with a

review of family law, as this is one key to understand Germany's labour market and family model.

It is evident from the evolution of the legal framework in West Germany that the housewife-male breadwinner model of the family was for a long time explicitly supported and propagated by the state. The well-being of the family was regarded more highly than that of individual women, even when the three-phase model developed in Sweden by Alva Myrdal and Viola Klein was being debated in Germany in the late 50ies.<sup>1</sup> In 1953, for example, the man still had the power to take all household decisions and could therefore determine where the woman lived and whether or not she should work. From 1958 onwards, married women were allowed to work 'in so far as this is compatible with their duties as housewives and mothers' (§ 1356 of the old Federal Statute Book – Civil Code). Thus market work by women was still regarded in law as atypical and in need of justification. It was not until 1977 that women achieved equality within the family: 'Both spouses are entitled to enter gainful employment' (§ 1355 of Federal Statute Book – Civil Code). In legal terms, 'married women did not acquire the uncurtailed freedom to choose a profession or to enter into employment contracts until 1977, when family law opened up scope for the redistribution of gender roles' (Matthies et al. 1994: 224).

In the social debates that went on throughout the 70ies, the close and exclusive bonding between young children and their mothers was increasingly called into question. What was emphasized instead was the emotional role of the father in raising children (Kolbe 2000). The importance of the family environment in the raising of children remained more or less unquestioned. As far as the law was concerned, the declining rigidity of gender roles was reflected rather in the notion of a harmonious process of negotiation within the family as to the allocation of market and family work. The state set no objectives for the equal distribution of market and family work. Women were supposed to be able to choose between career and family in accordance with the ideology of freedom of choice.

In reality, the existing statutory arrangements and measures, most of which are now formally gender neutral, support a conservative model of the family with a

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<sup>1</sup> Even Myrdal and Klein's three-phase model (Myrdal/Klein 1956) postulates that women have a particular responsibility for raising children, since the 'spiritual health and the happiness of future generations' is said to depend on such care being available (cf. Holst/Maier 1998).

male breadwinner and a wife who cares for the children and possibly works in a job that provides the household with a second income. Even the new legislation introduced since the 80ies has had little impact on this model. The legal advances made within the general framework of family policy have been restricted to the provision of a certain degree of social protection for family work and a limited modernization of women's role in the family.

German tax law still allows couples to choose between individual taxation for both spouses and the so-called 'spouse-based splitting' system. This encourages the spouse with the lowest earnings, usually the wife, to opt out of the labour market in order to look after (young) children within the family environment (cf. Buchholz-Willi 1992; Schratzenstaller 2002). The care for young children within the family is encouraged by the three years of child raising leave that can be taken following the birth of a baby and by the lack of alternatives offered by the under-developed public childcare infrastructure. Despite the formal gender neutrality of the leave arrangements, which allow both mothers and fathers to take child raising leave, the low level of financial compensation does not usually permit fathers to avail themselves of their formal entitlement. Thus the share of fathers taking leave has remained unchanged at less than two per cent since the introduction of the legislation in 1986 (Koch 2000).

The majority of mothers would like to have the option of working part-time when they return to the labour market following a period of child raising leave. Until 2001 this was made difficult by the legal framework, since it was only in the public services that there was a legal entitlement to work part-time. Since 2001 the new law on part-time work and the new act on parental leave allow the demand for part-time work in the private sector and first case law shows that courts often support women's demands (Schiek et al. 2002)

In the course of the 90ies, company agreements were concluded at firm or industry level in the private sector which offer opportunities for part-time working, albeit in most cases without any legally enforceable entitlement. The expansion of part-time work can also be regarded as problematic, since it tends to be viewed as relatively unskilled and is often available only in low or intermediate-status jobs. Part-time work became ideologically established in the 60ies as an opportunity for

married women to earn a second household income (Gottschall 1989; Maier 1993).

The inadequate provision of full-day childcare facilities is a further obstacle to women's entry into the labour market. The legal entitlement to a kindergarten place for children older than three years that exists since the first of January 1996 does provide in many cases only part-time care and is not necessarily extend to full-day care. Despite the formal gender neutrality and egalitarianism of family law, what emerges in reality tends to be a traditional gender model, with a single male breadwinner and a wife who works part-time after a career break taken for family reasons (cf. also Holst/Maier 1998).

However, the pattern of developments is thoroughly contradictory. One indication of the increasing importance of market work in women's lives is the increasingly shorter periods of time being devoted exclusively to child rearing and the decision of many women not to have children at all, or at least to delay the birth of their first child. The difficulty of putting an egalitarian model into practice in the institutional environment, and especially in a social infrastructure which, to say the least, renders the task more difficult.

One of the main aims of the new family policy provisions that came into force at the beginning of 2001 is to make it easier for both spouses to share the care of their children (cf. Koch 2000). Thus in future, under the new parental leave regulation both parents will be able to work part-time concurrently during the child raising leave and the allowance paid to the parent taking leave is to be raised to 900 DM by cutting the period over which it is paid to one year. The parents may choose this alternative. Similarly, the new right to work part-time irrespective of the family situation will make it possible for both men and women to adjust their working hours more closely to the needs of their families. Obstacles to the realization of these rights and provisions lie in the childcare infrastructure, which remains underdeveloped, and in the inadequate allowance of 900 DM paid to parents taking leave. There is also the question of the acceptability in both the workplace and the wider society of men taking child raising leave or opting to work part-time, since all the arrangements are voluntary and not legally enforceable at either individual or firm level. Despite the changes in the law, the prevailing model of the family in Germany will continue to be, de facto, the modernized variant of

the single male breadwinner model in which the woman generally works part-time in a job that does not pay a living wage and the man works full-time in his capacity as the family breadwinner.

Despite the arguments about the role in economic life to be played by women with children, which in Germany took place even within the women's movement, the demand for equal labour market opportunities for men and women was accepted in principle. However, equal opportunities policy never attained the high position on the political agenda that it has occupied in other countries or on the EU-level since the 70ies. Since the end of the 70ies, there has been much discussion of how best to attract more women into male-dominated skilled manual or technical occupations; more broadly, gender segregation in the labour market as a whole has also been a topic of debate (cf. Willms-Herget 1985; Rabe-Kleeberg 1987; Maier 1993). During the 80ies, women's ability to exert power and influence also became a topic of debate, as did the problems of highly qualified female workers and their chances of gaining access to management positions (cf. Brumlop 1992).

Equal opportunities legislation provides the background against which efforts to improve equal opportunities in the labour market unfold<sup>2</sup>. The basic principle of equality between men and women is not at issue in Germany today. It is enshrined in Article 3, paragraphs 2 and 3 of the Basic Law (Grundgesetz). Paragraph 2 establishes the principle of equality between the sexes, while paragraph 3 prohibits discrimination on grounds of sex, race, language, origin, faith, or religious, or political opinions. The Basic Law was amended in 1994 in order to promote equality of opportunities for women.

The extent to which this legislation requires the state to play an active role was the object of much debate and controversy in German society for a long time. The interplay between federal government and opposition policy, initiatives from the Länder, the impetus for reform unleashed by German unification and the requirements of European policy and legislation became a decisive factor in the development of equal opportunities legislation. It is only through this interplay that the new provisions contained in statutory instruments were introduced.

The first item of equality legislation, the 'Equal Treatment of Men and Women in the Workplace Act', came into force in 1980 at the request of the European

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<sup>2</sup> Unless otherwise indicated, the following statements are based on Berghahn 1993; 1999.



Community in order to bring German law into line with European law (§ 611 and 612 Civil Code). The law was criticized from the outset because of its limited scope. This criticism focused on two areas in particular: the lack of an obligation to put in place active equality policies and the question of how far positive action (including quota regulations) is a legally permissible approach to the reduction of gender segregation in the labour market.

Draft bills that sought to remedy these deficiencies were defeated in the lower house of the German Parliament in the early 80ies. The difficulties in carrying through more far-reaching legislation led initially to a shift in the focus of political activities towards equal opportunities arrangements below statutory level. From 1984 onwards, virtually all the Länder and the federal government gradually introduced measures below the statutory level to promote the interests of women working in the public sector.

Support for the demand for an active equal opportunities policy came from the so-called Benda Report, commissioned in 1986 by the Hamburg 'Equal Opportunities for Women' centre. The report confirmed in principle the constitutionality of equal opportunities programmes in the public service. Despite the considerable influence the report had on the political debate, the idea of equal opportunities legislation at federal level continued to meet with resistance.

As a result, legislative activity moved increasingly to the Länder, where equal opportunities legislation was gradually carried through. With the exception of Berlin and Brandenburg, provisions relating to recruitment or promotion are restricted to the public services. In Berlin and Brandenburg, suppliers who have put in place measures intended actively to promote women's interests are given preference when public contracts and subsidies are being awarded (Böhmer 1994). Today some other Länder regulations contain similar paragraphs (cf. Schiek et al. 2002). There are no evaluations on the impact of such regulations on women's employment prospects, the development of equality plans etc. in firms being suppliers of the public sector.

The various laws address issues related to recruitment and promotion and to the establishment of equal opportunities programmes in administrative bodies and other public institutions, including the introduction of family-friendly working hours. The debate on the possible introduction of positive discrimination in favour of

women has also left its mark on the legislation. Laws relating to recruitment or promotion frequently have a rider added to them, to the effect that women of equal aptitude, ability and performance are to be given preference over other candidates. This exhortation to give preference to women is enshrined with varying degrees of force in the equal opportunities legislation passed by the Länder: in some jurisdictions it is merely a target objective, while in others it is an obligation (Böhmer 1994).

Under this pressure from the Länder, the federal government finally passed the Second Equal Opportunities Act in 1994. The act makes an active equal opportunities policy in the public sector mandatory. Binding equal opportunities plans have to be drawn up and, on the basis of these plans, the share of women in those areas or levels of the hierarchy in which they are underrepresented has to be increased, under the provision of equal aptitude, ability and job performance. The call for women to be given preference is enshrined in the legislation with less force, since it is only a target objective. Furthermore, the provisions of the act relate only to the public service. Private business and industry is merely exhorted to take active measures at company level.

Following the debates of the joint constitutional committee of the two houses of the German Parliament that took place in the wake of German unification, the call for the state actively to support the practical implementation of equal treatment for men and women was enshrined in law. In 1994, the following rider was added to Article 3, paragraph 2 of the Basic Law: 'The state shall promote the actual implementation of equal treatment for men and women and shall work to eliminate existing disadvantages'. The unanimity among female members of the lower house of Parliament in demanding that the law be amended, together with massive support from extra-parliamentary groups, were important factors in getting the amendment passed. This marked a decisive phase in the dispute that had been going on for more than a decade around the demand that the state should adopt an active policy of legislation with the aim of realising equal opportunities for men and women.

A new equal opportunities bill at Federal level, which introduced several changes, is in force since December 2001. The changes include a strengthening of quota arrangements relating to individual cases, giving equal opportunities work greater

substance and a strengthening of the role of equal opportunities representatives in the public sector.

To date, demands for an active equal opportunities policy to be given a legal basis have been realised only in respect of the public service. Attempts to extend equal opportunities legislation to the private sector have so far foundered on resistance from businesses. In 2001 an 'Agreement to promote equal opportunities' was signed by the federal employer's association and the government. The agreement includes an obligation for evaluation of the policy measures and aims in 2003. Some firms do implement equal opportunity policy anyhow, the aim of the agreement was to prevent the government to develop a legal base covering the private sector.

First conclusions may be drawn here: in our opinion the German legal base of equal opportunities policies is quite well developed and the legal progress has been largely influenced by European law and by the case law of the European Court of Justice, by the German unification which changed partially the notion of the conservative model of women's labour market/family dilemma and by changes in the social norms and roles of Germany's society – especially regarding women's role in the labour market and the family.

There is no detailed research on the impact of equal opportunities legislation or other legislation on women's position/situation in the labour market in Germany – we will base our report therefore on a variety of different sources. As a first result of our research we may identify a need for any research on the interplay between legal regulations and developments in equal opportunities both in the market and the family sphere.

## **2 Impact assessment of the EU legislation**

### **2.1 Equal Treatment**

Under this topic we have to discuss a broad variety of labour law which is in fact regulating Germany's labour market. As there is no detailed analysis available covering the development and effectiveness of gender legislation law in different fields of labour law (and a great amount of labour law is – in fact – case law) we will concentrate the following analysis on several aspects of equal treatment in employment:

- a) occupational segregation
- b) vertical segregation
- c) part-time work
- d) working conditions

#### **2.1.1 Identify**

As already mentioned in the introduction, we may find some legal improvements over and above the EU legislation in the regulations concerning the public sector. Germany has today 17 specific acts on gender equality in public employment, one in each federal state and one on federal level. These acts prohibit discrimination, oblige public employers to implement 'equality plans' covering issues like equal access to training, promotion and higher paid positions, grant rights to women to be preferred in access to training, promotion etc. in all areas where we observe an unbalanced gender composition (occupational segregation). Additionally the employees have specific rights to balance work and care via part-time jobs and other working time arrangements (sabbaticals etc.). Special bodies, called Frauenbeauftragte or Gleichstellungsbeauftragte (equality officers), are implemented and have a broad variety of co-determination rights concerning all matters of equal treatment at the workplace, in implementing the 'equality plans' etc. Due to the political differences between the Länder we observe a variety in regulations, objectives and instruments implemented. The acts cover at least 4.1 million employees of the public sector (and some more in areas like publicly funded research institutes, public television and media etc.). The public sector

employs around twelve per cent of all employees in Germany and around seven per cent of all female employees.

Private sector: the implementation of the EU legislation is based on §§ 611a and 611b Civil Code – it was introduced in 1980 and changed during this period several times. Most changes were in response to European Court of Justice decisions. On firm level the relevant act is § 75 Works Constitution Act (Betriebsverfassungsgesetz), which states that employer and work councils have to survey that no one is treated differently due to gender. In § 80 the works councils duties are described pointing out that it is the task of the work council to enforce equal treatment of men and women, especially in terms of recruitment, employment, training, further training, promotion.

As far as we are able to assess this area, we can not observe any improvements over and above the EU legislation. The Government tried to stimulate equality policies in private employment via subsidies when firms hired women in male occupations, or public programmes like the awards ‘total e-quality’ or ‘family oriented firm’. The government does not intervene directly into collective agreements even in such cases where we find discrimination as collective bargaining is sheltered by the Constitution (see in detail under Equal pay). Some firms do have voluntary regulations concerning women's participation in training and promotion, some firms do have more generous working time regulations during parental leave etc. (see point 2.1.3.2 organisational level).

## **2.1.2 Assessment of progress towards achieving the objectives of equality**

There is progress towards a fuller implementation of equality legislation in the public sector, but progress in private sector employment is rather modest until now. We observe changes in the labour market which are called flexibilisation of labour contracts, working time etc. which do in fact discriminate against women or which stabilize the special situation of mothers in Germany via part-time jobs, jobs not covered by social security regulations etc. The concept of indirect discrimination which could be used to combat several forms of gender inequality is not part of action of labour market actors, neither on the societal, nor the organisational nor the individual level. This is partly due to the legal regulations in

labour law in Germany (case laws, no collective court actions, employers may justify unequal treatment by 'good reasons' in most legal acts and courts may follow these good reasons). But it is embedded deeply in the general notion of women being the second earner which makes equal treatment a less urgent need.

### **2.1.3 Impact of legislation on societal, organisational and individual level: evidences (studies and political activities)**

#### **2.1.3.1 Societal level**

The societal benefits of equal treatment in employment may be

- using the whole productive resources of the society in the labour market
- better allocation of resources (time and skills) when there is no discrimination in labour market positions
- no vast of a skilled and educated workforce by exclusion from certain jobs
- increase of size of educated and skilled workforce by signalling open and equal access to the labour market and all occupations and levels
- positive changes in workplaces and mode of production by developing a more 'human' work organisation when taking into account the diversity of the workforce and their different roles (mothers, fathers, high potentials)

Costs and negative side effects:

- costs of compliance with the legislation
- for example in Germany: public campaigns and programmes to stimulate employers to hire women in male occupations (no information available on the fiscal costs of these programmes/awards etc)
- as Germany has no central administrative body, the administrative costs of implementation are allocated within the courts, the public bodies which have to implement the positive action plans in the public sector or in labour market offices – again no information available on the amount of money involved

- equal access to labour market may effect division of labour in the society concerning women's and men's roles in labour market and family – this may cost some male privileges both in employment and in the family

### **2.1.3.1.1 Productive labour force**

#### *a) Occupational Segregation*

As in all other developed countries women's participation in higher education and in vocational training (which is still a major labour market entry path) increased dramatically during the last 30 years. Increases in educational level are connected with increases in employment rates, the higher the women's educational level, the higher the employment rate, even of mothers with small children (Klammer u.a. 2000; Engstler/Menning 2003). Increases in skill levels can be observed as a steady process over the last 30 years which results in a better skilled female and male workforce: in 1976 43 per cent of all women in employment had no vocational training at all (men 28 per cent), in 1998 the per centage was only 20 per cent (men 15 per cent) (Klammer u.a. 2000: 78). Women's proportion in secondary and tertiary education is above 50 per cent, in vocational training around 46 per cent. Skill level and employment level are connected but less equal as for men: women are more likely to be employed in jobs level below their skill level, and women's unemployment rate among highly skilled persons is much higher than for their male counterparts (Büchel/Weisshuhn 1997; Plicht/Schreyer 2002). In terms of the economic argument of efficient allocation of labour the German society may be characterized as under-utilising women's skills and capacities, the costs of these mismatches between skills and job positions may be high (no data/estimations available) as persons employed below their skill level do not develop the highest possible productivity, can be de-motivated and less engaged in the performance of their jobs. On the other hand – depending on the wage and performance relation on the organisational/firm level – higher skilled women may bring extra profits by being paid less but performing highly skilled tasks. In this case the efficiency argument would be fulfilled but the question of 'right prices' = wages in the labour market needs to be asked (whether men are paid too much or women are paid too less in relation to performance and skills). The promise of equal treatment in the labour market on one hand and the empirical facts that women need higher skills, better school diplomas etc. to

receive certain positions in employment had had an impact on girl's (women's/parents) investment in higher skills – resulting in the best skilled female labour force in Germany's history but employed in a highly segregated labour market both in terms of vertical and horizontal segregation.

Both dimensions of segregation may be seen as a problem, if one defines equal treatment as an objective which should distribute men and women equally over all occupations and hierarchical levels. The occupational segregation in Germany has remained stable over the last 30 years – we had some minor changes in certain occupations but the overall effects are minor. Occupational segregation includes unequal access to certain occupations, the concentration of women/men in certain occupations and sectors, combined and overlapped with lower pay in female dominated sectors and occupations (the evidence for this is underlined by all studies on pay gaps done during the last years, see Maier 2002; Engelbrech/Nagel 2002). Occupational segregation is part of the under utilisation of female labour potentials and part of the 'wrong' price system on the labour market. The legal regulations in Germany are such, that equal treatment in the access to training etc. is guaranteed but difficult to implement. There are no longer occupations reserved for men (only in mining) and the public labour market service (and other bodies involved in job search and recruitment) has the tasks to influence both women /men and employers to open up job opportunities both for men and women, specially in the so called 'future-technologies' and/or IT-occupations. In the 70ies and 80ies we had some Federal programmes, Länder programmes and local activities directed to open up male occupations for female applicants which offered financial subsidies to employers who recruited women/girls in non-traditional occupations or did marketing campaigns in schools and enterprises etc. (all programmes had been implemented in the area of vocational training only – no programmes related to employment). There is no information on the monetary costs available, but we can state that these programmes had only minor effects on either women's proportion in the male dominated vocations, or the chances of gender stereotypes of occupations or the willingness of employers to recruit women in certain job sectors. Nearly all legal regulations on workplace level which imposed higher costs on employers which de-segregated their jobs, like the ban of night work in manual jobs, the necessity to have separate toilets and lavatories once you employ women and men had



been abolished during the 80ies and early 90ies – but all these activities had no empirically measurable effect on occupational segregation. They had been useful on a symbolic level, demonstrating that women are able to learn all jobs, they are able to pass examinations with at least marks as good as their male counterparts etc. They could not change the occupational segregation in the labour market and women's position in male dominated occupations remained precarious in terms of employment stability, of promotion and unemployment (Ostendorf 1994; Ostendorf 1996; Plicht/Schreyer 2002).

*b) Vertical segregation*

I.e. the decreasing proportion of women in higher paid and hierarchically higher positions remained nearly unchanged over the last 20 years. Microcensus data show for 2000 that eleven per cent of all women in employment said they are in a managerial and/or leading position (including public civil servants like teachers), compared to 20 per cent of all men. Around one third of all persons in higher or managerial positions are female, a proportion only slightly higher than ten years ago. Of all male employees with a higher education (university/polytechnical) more than 64 per cent are in leading/managerial positions, compared to 46 per cent of all highly trained female employees. Highest management positions had been held by twelve per cent of the male academics and only four per cent of the female academics (BMFSFJ 2002: 38f.). The figures include private and public sector, so a relevant proportion of women in higher positions are teachers and doctors. Within university and research institutions women's proportion declines with each step in the hierarchy: only six per cent of all full-tenure professors (C 4) are women and only six per cent of all leading positions in research institutes are held by women (BMFSFJ 2002: 68). Compared to other women with a lower educational background, job positions of academic women are rather good – compared to men they face severe disadvantages (Plicht/Schreyer 2002). This situation is changing only very slowly, and given the fact that all public universities and research institutions do have positive action programmes concerning equality of women and men, the impact of these programmes seems to be marginal. Gender biased mechanisms of recruiting, promotion and net-working result in a stable vertical segregation which changes very slowly.

Again one can state that the society loses women's investment in human capital especially in science and management. This loss seems quite substantial given the demographic development of the next 30 years which will lead (given a similar rate of academically trained persons in coming cohorts) to a substantial need for persons in middle and higher management (cf. Kay 2002). Until now the German society as a whole is not ready to accept that women's integration in the labour market in all hierarchical positions will be an economic need – and will need changes in the organisation of employment and family life.

*c) Part-time work*

Part-time working is in Germany - compared to countries like the Netherlands or the UK – less widespread, in 2000 nearly 20 per cent of all employees had a part-time employment (including marginal part-time jobs). The modest overall percentage of part-time is due to the low percentage of men working part-time – in 2000 only five per cent of all men had a part-time job, most of them students or people in old-age part-time programmes. Of all women, however, 39 per cent worked part-time, this is a ratio above the average of the EU and nearly as high as in countries like Sweden, Denmark and Belgium. Around 87 per cent of all part-timers are women (BMFSFJ 2002: 74).

Part-time jobs are – more or less – restricted to certain tasks and hierarchy levels, we observe substantial lacks of skilled part-time jobs in middle and higher management of the private sector (in public sector more common). We register a falling full-time employment rate among women with children over the last 25 years (Engstler/Menning 2003: 112), pointing to the fact that labour market integration of mothers is in Germany often connected with part-time jobs. The expansion of part-time jobs over the last 23 years has helped to increase women's employment rate, but is based and establishes the special form of female labour force participation. The supply of female part-time work is higher than the actual demand by employers, we still observe a substantial lack in part-time jobs either for women returners after child care periods, and for single mothers or for highly skilled women in private industry (cf. Beckmann 2002)

The legal regulations concerning part-time work, especially the inclusion of part-time working persons in all equality related legislation, took a rather long time, and there remain many open questions. The development of German legal cases

during the 90s is characterised as a 'tough struggle' between the European Court of Justice and the Federal Labour Court concerning the rights of part-timers (cf. Goergens 1994; Colneric 1996), ending up with a series of decisions based on equal treatment regulations and the concept of indirect discrimination. Decisions covered a broad range of cases like the rights of part-time employed members of work councils to participate in full-time training and meetings, necessary duration of length of service for internal promotion, different treatment of part-timers in collective agreements, exclusion of part-timers from collective agreements, from occupational pension schemes and from the statutory sickness payments.

In 2001 a new Act on Part-time and Fixed Term Contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) came into force, aiming to strengthen the position of part-time workers and to allow more employee based working time flexibility. The act strengthens employees' right to work part-time in firms with more than 15 employees and for employees working more than six months in the firm. Employees have the right to ask for a reduction of working time. Employers may object in case of severe firm specific reasons caused by additional costs for necessary changes in the work organisation, the work flow and the security in the workplace/firm. We observe a quite wide definition of costs and reasons. On the other hand it is stated by the act that new positions should be advertised both for full-time and part-time employment – a possible chance to enlarge part-time employment in higher skilled positions. The act states quite clearly that a part-time employed persons may not be treated differently than a full-time employed persons, unless differential treatment is justified by objective reasons – a wide field of interpretation is opened up by this formula.<sup>3</sup>

An ex ante examination of the acts' possible effects on adjusting women's part-time wishes and employers part-time offers came to the conclusion that the act may help to strengthen women's position on one hand, that it may help men to express part-time wishes, however, it is counteracted by the vague regulations on reasons of differentiated treatment, the reasons to object part-time wishes and the missing possibility to return to full-time positions (Bauer 2001: 512). Other studies came to the conclusion that a legal right for part-time is strongly opposed by

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<sup>3</sup> A recent publication gives the following information: in 2001 85.000 persons (thereof 66.000 women) requested a reduction in working time. Most employers accepted the wishes, 17 court decisions concerning the right to part-time had been counted, thereof twelve court decisions had been in favour of the employee (DGB Bundesvorstand 2003: 12).

employers organisations as it intervenes in the employers autonomy concerning work organisation etc. and may therefore not be of great help. Concerning the equal treatment of men and women the study concludes: 'Given the actual conditions (in the labour market and the family; F.M.) the right may reinforce traditional gender roles' (Holst/Schupp 2000: 831).

#### *d) Working conditions*

Germany abolished all legal regulations concerning gender-differential treatment at the workplace and in working conditions since the end of the 80s. In 1994 all job positions (excluding mining and armed forces – the latter was changed after a ECJ decision) had been opened up for women including night work in manufacturing. Until 1994 Germany's regulations had been such, that women in non-manufacturing jobs like trade, hospitals and pubs had to work in night shifts, whereas only manual jobs in manufacturing had been banned. The debate on this topic found theoretical and empirical evidence pro and contra women's night work but ended at least with a general working time regulation for all in dependent employment, irrespective of gender. Data comparing 1993 and 1998 – years before and after the legal changes – do not show any impact: in 1993 7.8 per cent of all female employees in dependent employment worked sometimes in nights, 1998 the relevant proportion was 7.3 per cent in West Germany (East Germany 9.8 per cent for both years; Klammer et al. 2000: Table 4.A.16). As the ban of night-work hit only a very small number of women's employment (manual workers in manufacturing) we may not observe any empirical result on the macroeconomic level.

#### **2.1.3.1.2 Sustainable fertility rate**

Although we want to express our doubts, whether a sustainable fertility rate should be an aim of socio-economic policy in our societies, we accept that fertility rates may express mismatches and imbalances between societal spheres, like the reconciliation of work and family, fears concerning future developments, strong crises in labour markets and family relations etc. Germany has – since a longer time – a rather low fertility rate (and in East Germany we saw a dramatic decrease of fertility after the unification), which could be interpreted as a mismatch/imbalance between women's roles and wishes in families and the labour market. The German model for mothers of subsequent periods of employment –

childcare time off the labour market and re-entering the labour market on a part-time base in lower paid positions – seems to influence women's willingness to have children. 22 per cent of all women born 1955 remained without children – this is the highest proportion of childless women in the EU (cf. Engstler/Menning 2003: 90). Estimations for the cohorts born 1965 show for West Germany 31 per cent women without children, for East Germany 26 per cent (cf. Engstler/Menning 2003: 74). An analysis in 2000 of women aged between 35 and 39 years old shows a clear connection with skill levels in West Germany; 44 per cent of all women with university degree/PhD and 41 per cent of all women with a polytechnics degree had no child in the household – compared to 25 per cent of all women without a vocational training and a completed vocational training (Engstler/Menning 2003: 76).<sup>4</sup> Obviously the reconciliation problem is more pronounced for higher skilled women – an economic argument are the higher opportunity costs, as these women have invested more in their human capital so that years off the labour market (to care for children) are associated with higher costs than for lower skilled women. In fact we do have a higher labour force participation rate for higher skilled women than for lower skilled women. Under the actual conditions (no sufficient child care for children under three, high costs for privately organised child care, no working time flexibility in higher paid jobs etc.) highly skilled women in West Germany seem to adopt their labour market integration to the male norm.

For us it is an open question whether equal treatment in the labour market is a remedy. Compared to other EU-countries like Sweden or France Germany follows an explicit policy of non-working mothers with small children. The circumstances to combine motherhood and employment have to be changed at the same time, leaving open whether we should opt for a pronatalist policy or a policy of equality of fathers and mothers compared to each other and non-parents.

There are no special rights/obligations concerning fathers' roles in combining work and family.

The aim to prevent an aging society in Germany will not be reached via growing fertility rates within the future years: the number of children during the last 30

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<sup>4</sup> For East German young women the figures are quite different; the highest proportion without child in the household is for women without vocational training (maybe still in training) followed by women with the lowest school level (cf. Engstler/Menning 2003: 76).

years was always below the necessary net-reproduction rate so that you would need an average number of 2.1 children per women for the years to come, the actual rate is 1.5 (even countries like Ireland do have only a rate of 1.9; cf. Engstler/Menning 2003: 89).

We would like to stress other than demographic arguments in favour of having children, like having children is part of a human society, of a good life, makes life richer etc.

### **2.1.3.1.3 Reduction poverty/social exclusion**

It is a fact that having children combined with a withdrawal of mothers from paid employment increases families propensity to become (relative) poor. All studies reveal that families with a non-active mother or a mothers with only marginal part-time employment as well as single parents are deeply touched by precarious income circumstances and income poverty<sup>5</sup>. According to all empirical studies the situation is much worse in the Eastern part of Germany than in the Western part (cf. BMA 2001; BMFSFJ 2001; Deutsche Bundesbank 2002; Becker 2002). Data show in 1998 (following the new OECD definition) the following poverty constellations:

**Table 1 Poverty rates**

<b>West Germany 1998 % households with &lt; 60% median income</b>		<b>East Germany 1998 % households with &lt; 60% median income</b>	
Singles	22.1	Singles	36.1
Spouses – no child	7.3	Spouses – no child	10.9
1 child	10.7	1 child	16.0
2 children	7.6	2 children	13.1
3 and more	7.8	3 and more	18.3
Lone parents 1 child	30.4	Lone parents 1 child	39.4
2 children	35.8	2 children	45.9

Source: Becker 2002:133

The high proportion of single households is explained by two groups: single households are found among young people, which are still in vocational training, students or in first (low paid) jobs, and among old women which do receive a rather low pension due to previously low earnings over the employment-cycle.

<sup>5</sup> We do not go into detailed descriptions of poverty concepts, equivalence calculations used by different institutions like OECD, EU, Germany etc. (cf. Becker 2002: 128).

Using these data the analysis for West Germany covering the years 1973 to 1998 shows a dramatic increase in poverty rates especially among families with one child (from 2 per cent up to 10.7 per cent), whereas the poverty rate of spouses without children remained nearly the same (Becker 2002: 134). Mothers' integration in employment, either in full-time or part-time contributes substantially with around two fifth of the overall income (full-time) – if the mother is not in employment the households propensity for poverty is quite high (one child: 17 per cent with less than 50 per cent one mean income, two children 14 per cent with less than 50 per cent of mean income). Single parents do have a higher risk of poverty in general, which leads to 30,9 per cent of single parents with a income below 50 per cent of mean income. But of all lone parents without employment, 56 per cent are amongst the poor households (Becker 2002: 140). The monetary transfers (child allowance, tax reductions, parental allowance, social assistance and unemployment assistance) and the private transfers (fathers are obliged to contribute to the children's upbringing) are not sufficient to prevent poverty. Beckers analysis shows that employment of mothers, even in part-time jobs, keeps the households over the poverty line, whereas unemployment, non-employment and other forms of non-participation result in severe risks of poverty.

The analysis of the Deutsche Bundesbank is based on model-calculations (instead of empirical data) showing that the situation of single parents is massively influenced by the previous wage level: mothers with a very low market-income (less than 50 per cent of average) had an increase of income by parental allowance, child allowance and social assistance, when not in employment. When taking up marginal part-time jobs their income decreases (as social assistance and parental allowances are cut according to the wage income). For women with an average income and a higher income (200 per cent of average income) the income losses due to non-employment are dramatic, whereas their re-employment (assumed on the previous wage level) has a positive impact on the household situation (Deutsche Bundesbank 2002: 26f). Parents in spouse households do have massive decreases in household income, again dependant from previous income of the mother, which are only partially counteracted by the tax reductions (tax splitting system for married couples) – if women return to employment, some transfers like parental leave are cut and tax reduction decreases over proportionately the more similar the women's salary is to that of her husband (if

women and men earn the same, there is no tax reduction). The analysis of the Deutsche Bundesbank does not take into account that employment of the mother may be connected with child-care costs, so the conclusion of their calculations is: 'If mother's return to employment is connected with child-care costs, the additional income for the household is reduced further so that the monetary incentives to re-enter employment may be rather small' (Deutsche Bundesbank 2002: 29).

Costs of women's non-integration in the labour market are higher payments for social assistance, higher poverty rates of younger women and children in a rich society (social justice argument), high dependency rates of lone parents from social assistance programmes (which is supported by the way of calculating social assistance), lower fertility rates of better paid women (as the financial penalties of having children are high in the German welfare state). Again the lack of child-care at an affordable price level combined with a lack of labour demand, especially in part-time jobs, leads to a growing number of poor lone parents and poor households with children.

### **2.1.3.2 Organisational level**

German employers in the private sector started positive action programmes concerning women's recruitment, promotion and participation in training and further training during the early 80ies (for an overview of all relevant literature during this period see Peters 2002). In 1986 around 40 to 50 firms had positive action programmes, which aimed to increase equal opportunities at the workplace. Targets and instruments varied according to firm, firm size and sector, but most of the programmes concentrated on recruiting more women in male jobs (horizontal and vertical segregation), opening training opportunities and allowing mothers a longer period of parental leave (at that time legal right was 12 months) and (sometimes) the right to work part-time during parental leave or when returning to the workplace (cf. Brendl 1999). The development of firm-specific programmes had been supported by research and counselling, the development of guiding books and manuals either by the Federal or Länder Ministries or by employers organisations (on local, federal or sector level), sometimes by trade unions. The scientific debate in organisational theories and management theories started to discover the topic, especially women in management, too. During the early 90ies we observe a growing debate both in research and science and in relevant



management circles on positive action programmes. The programmes had been concentrated on human resource development to open new potentials for middle and higher management levels (cf. Brumlop 1992), to manage technical and organisational changes in typical female dominated workplaces (Schumm 2000) and the programmes concentrated mainly on the reconciliation of work and family (by special parental leave regulations) and the flexibilisation of working time.

A study covering a broad variety of sectors and firms made in the early nineties found that only twelve per cent of all programmes included the firms' duty to report, evaluate and monitor the results, and only 7 per cent of the firms had a women's representative or another person to control the implementation and the results. The authors found a substantial lack in nearly all programmes concerning the issues of sexual harassment, wages and equal pay, working conditions, work organisation. If mentioned at all, participation in further training remained addressed only to higher skilled women (Brumlop/Hornung 1994).

1998 a study analysed the equality related aspects of collective agreements and came to the conclusion that only a minority of equal treatment related aspects had been covered by these agreements but that some agreements highlight the necessity to integrate equal treatment/positive action in human resource policy of the organisations. In the 90ies as in the 80ies most positive action plans had been found in big firms, or in the public sector (Weiler 1998).

A study using firm data of all firms with dependant employees found in 1998 that only three per cent of all firms in West Germany and 3.3 per cent of all firms in East Germany had a positive action programme or written statements concerning equal treatment at the workplace, most of these firms being in the public sector (or previously public sector like German Telekom, Lufthansa) or in the banking sector (Beckmann/Möller 2002). Bendl (1999) came to the conclusion that positive action programmes had an positive impact on women's employment in such cases where 'a broad variety of relevant actors like the management, the work council and the employees had been involved positively', and where 'the firm-specific need to gain and hold skilled and motivated female employees had been pronounced and needed to be combined with increasing efficiency' (Bendl 1999:150).

A representative study in ten big firms (all international global players) which do have women's representatives as an institutionalised professional position as part

of the human resource management department, found that even during the early 90ies in a period where most of the firms undertook deep restructuring processes resulting in a decrease of employment and an increase of productivity, none of the firms cut the budgets or the position of the women's representatives – all of them integrated equal treatment policies in their strategic human resource management (Dudek-Marschus 1996).

There are special studies concerning women's position in the management (middle and higher management) showing the overall gap in managerial positions being reduced only very slowly. Germany is at the lower end of the ranking of industrialised countries with respect to women in management (cf. Wunderer/Dick 1997).

A study analysing the activities of firms which received the 'total e-quality' award (an initiative supported by a wide range of relevant actors, including the Federal Ministry, the social partners etc.) came to the conclusion that none of the firms had a financial cost/benefits analysis of equal treatment/positive action programmes but all firms stated that the benefits of a long-term resource planning, when offering highly skilled women instruments to combine work and family and of career planning, were much higher than the costs of the programmes. Additionally all firms report positive effects resulting from a better corporate identity, higher satisfaction with work and pay, the image of the firm is better (both in product markets and consumer relations and in labour market, i.e. attracting high potentials) (Busch/Engelbrech 2000).

Within the German speaking management schools there is an increasing literature on management and organisational concepts which allow the integration of equal treatment/opportunity policy in management theory<sup>6</sup>, the most recent concept is following the Managing Diversity concepts. This concept is based on the following assumptions:

- organisations need a different behaviour/concept in their human resources management due to the changing characteristics of the employees. The demographic development will lead to an decrease of the male, standard

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<sup>6</sup> Additionally there are manuals and studies on mentoring concepts, gender trainings, which describe instruments and develop practical tools. Mentoring programmes in IT-occupations are supported by the Federal Ministry (BMFSFJ 2002: 70).

worker in the younger and middle age groups. Women are among the new 'diverse' employees, so it is wise to develop concepts of integration

- if the organisation does not have a positive concept of managing diversity, diversity will/may create additional costs, either by legal cases (when persons are discriminated), or by transaction and communication costs, cost of demotivation and moral hazard etc.
- if the organisation develops a positive internal diversity management this may open new sources of creativity and problem solving capacities which are not as likely in homogenous organisations
- if organisations develop a positive diversity image this may help in recruiting the best, i.e. irrespective of gender, race, ethnicity etc. and may increase flexibility in the workplace and the work force
- a positive diversity image may help in product markets to identify diversified consumer needs, may help in attracting external money from women and other groups (stock market argument) and may increase the firm's potential in acting in international markets

Krell (2001) cites a study which shows that US-firms with managing diversity programmes do fairly better than others – studies for Germany are not yet available, as there are only very few firms following these concepts (Krell 2001).

Other organisations like some Trade Unions or the Federal Ministry actually develop gender mainstreaming principles to change organisational structures and policies with the aim to improve equality at the workplace. The implementation of the gender mainstreaming policy is just at the beginning but will be used to influence the organisations policy internally and externally. It is too early to comment on these concepts but they may exert some influence, too.

The last stream of actual concepts is found in the concepts of a 'family-oriented human resource policy' supported by other awards like the Hertie-Stiftung. These concepts aim at creating a balance between work and life, especially life with children and the award-winning firms do have working time flexibility programmes, flexible arrangements in parental leave regulations (holding contact with the person in parental leave, offering part-time jobs during leave, participation on training during leave etc.). The instrument of family-oriented human resource

management is part of the human resource policy of some firms, although, the number is not very big (the same holds true for firms with the total e-quality award – only 100 firms in Germany received this award since 1997) (cf. Gemeinnützige Hertiestiftung/BMWI 2001).

Actually, we could not find any studies on the equal opportunities policies and their impact in public sector employment. A recent report of the Federal Ministry of Families, Seniors, Women, and Youth about women in Germany refers in one chapter to the employment situation of female civil servants at federal level. It shows that 250.000 women were employed on federal level in the year 2000; this were 45 per cent of all employees at federal level, or 38.5 of all fulltime and 83.8 per cent of all part-time employees. The share of part-time employees amounted to 14.5 per cent of all civil servants at federal level. The number of low-paid women was compared with men above average. The share of fulltime female civil servants at all civil servants in the higher service at federal level increased from 11.6 in mid 1995 to 15 per cent in 2000, and in the upper intermediate service from 12.6 to 17.5 per cent. At the same time the corresponding absolute figures rose too, although the total number of employees declined. The share of women achieving a career advancement at the supreme federal authority (oberste Bundesbehörde) amounted to 36 per cent in 1999/2000. Most of these women arose from the intermediate to the upper intermediate service at federal level. The share of women who were promoted to the upper intermediate service at federal level amounted to 87.5 per cent in 1999/2000; for comparison: only 12.5 per cent of all female civil servants reached a promotion in the same period (see BMFSFJ 2002: 50f.).

### **2.1.3.3 Individual level (households)**

As far as we know there are no studies/data available on the costs and benefits of equal treatment on the household level. We do not have any information neither on the number of legal cases concerning issues of equal treatment, nor the topics most prominent among these cases nor the costs associated with these cases. We assume, that a variety of cases is brought to courts concerning pregnancy, failure of getting a job in a male dominated occupation, failure of getting a higher paid job etc. But we do not have any evidence for these cases and their impact on individual's situation. There must be a broad variety of case law, and some of the

most influential decisions of the ECJ had been related to German cases like *Bilka*, *Rummler*, *Kowalska*, *Kalanke*, *Marschall*. The ECJ has set standards for the whole EU-legislation. All cases mentioned here are part of the 'Equal Treatment' dimension and refer both to the public and private sector.

We do not have any information concerning the individual costs (material and immaterial) when individuals go to court.

What we can report are initiatives and programmes of the Federal Government to support women's vocational choices in non-traditional jobs (brochures, girl's day, federal employment service initiatives, target 40 per cent women in new IT-occupations; cf. BMFSFJ 2002: 51, 56, 70) – the impact is unclear.

There are information campaigns 'More time for fathers' to encourage fathers to take up parental leave.

## **2.2 Equal pay**

In Germany a majority of employees is still paid according to collective agreements. The landscape of collective agreements is characterised by sectoral agreements. There are also firm-specific agreements which cover a small number of employees. Firms which are neither member in an employers' association nor do have a firm specific agreement may follow the respective collective agreement voluntarily. For the relevance of collective agreements in Germany at present see Maier 2002: 31f.

Collective agreements regulate basic pay<sup>7</sup> and additional wage elements, which are performance allowances (e.g. piecework or premium wage) and extra pay (for example shift-work supplements, holiday pay, Christmas bonus). Other additional payments as for instant bonuses at the end of the year or company based pension payments are normally not part of collective agreements, but they can be part of works council agreements, supplemental workplace agreements or individual labour contracts. The basic pay is the most relevant component of the overall pay which amounts to 60 or 70 per cent of the individual effective earnings. Collective agreements apply directly for unionised employees, for non-unionised workers they frequently apply by individual labour contracts, which then point out existing

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<sup>7</sup> The methods used for basic pay differentiation are the summarial or analytical job evaluation. These systems are normally part of the collective remuneration agreement, but there also exist classification systems on firm level. The summarial evaluation system dominates in Germany.

collective agreements (see WSI et al. 2001: chapter 2 and 6; Meine/Ohl 2001: 129ff.).

Legal regulations for equal pay between men and women aim at eliminating any possibility of discrimination in the area of employment relationships (see Pfarr/Bertelsmann 1981: 50). Pay in the sense of Article 141 para 2 means 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment from his employer.' According to paragraph 2 pay encompasses

- a) basic and additional pay,
- b) contractual and non-contractual pay,
- c) each kind of benefits which concludes deferred benefits (for instant travel facilities obtainable on retirement, pensions) and social security benefits.

The right to equal pay for equal work and work of equal value comprises all agreed and non-agreed wage components and gender pay discrimination may occur in each of the above mentioned elements.

Pfarr/Bertelsmann undertook a comprehensive analysis of legal practice in Germany (inventory of legal cases up to 1989 and annotations) referring to all fields of pay discrimination in 1981 and 1989. Two other studies of 1998 highlight the basic pay legislation in Germany. Both studies conducted the German discussion on basic pay discrimination in the last years, which focussed on indirect pay discrimination and on the composition of collective agreements in the sense of satisfying the requirements of European law (see Feldhoff 1998; Winter 1998).

As far as we know there does not exist any study up to now which undertook an impact assessment of the legal equal pay practice and its effects on the labour market in Germany. Such an analysis is missing for all remuneration components and for all levels which are to be discussed in this report, that is the societal, organisational and household level. Anyhow, there are several studies, enquiries and reports, which deal with some aspects of equal pay between men and women. In doing so, particularly basic pay took a centre stage. The following parts therefore concentrate above all on the development and effectiveness of equal pay legislation in the field of basic pay. The concentration on basic pay results last but not least from the fact, that meanwhile mainly three problems are to be solved in Germany: indirect pay discrimination on grounds of sex, determination of equal

pay for work of equal value and finally the question to what extent collective pay agreements breach the requirements of European Law. The problem of direct pay discrimination plays only an inferior role at present.

Pay discrimination of part time workers is discussed together with equal treatment. Pay discrimination and pension systems are discussed in part III. We find similar mechanisms for pay discrimination within performance allowances as we have in the sector of basic pay discrimination (see Krell/Tondorf 2001). This pay component has not been analysed until now. This can be justified among other things with the data collection on pay which is still unsatisfactory in Germany.

## 2.2.1 Identify

### 2.2.1.1 Legislation to date

Overall, European law has been very important for the development of equal pay legislation in Germany (see Bertelsmann 1994). Table 2 gives an overview of the legal norms and the persons covered by equal pay legislation.

**Table 2** Legal norms on equal pay in Germany

Legal basis	Article/ para	Persons covered
Basic Law (Grundgesetz)	Article 3 para 2 and 3	all employees
Civil Code (Bürgerliches Gesetzbuch)	§ 612 para 3	except civil servants
Works Constitution Act (Betriebsverfassungsgesetz)	§§ 75, 80, 84, 85, 86a und 99	employees on firm level to whom the Works Constitution Act applies

The development of equal pay legislation and the debate on low female incomes in Germany can roughly be divided into four phases:

1. Initially realisation of the principle of 'equal pay for equal work' (gleicher Lohn für gleiche Arbeit).
2. As of 1955 followed the postulation of 'equal pay for work of equal value' (gleicher Lohn für gleichwertige Arbeit).
3. Using the concept 'gleicher Lohn für gleichwertige Arbeit' changed as well the perspective from direct to indirect pay discrimination.
4. Since the end 90ies broader discussions on the relevance of EU legislation on equal pay for the composition of collective pay agreements began.

The German Constitution of 1949 states in Article 3 para 2 that men and women have the same rights. Article 3 para 3 also states that no one shall be prejudiced or favoured on grounds of gender. With reference to equal pay Article 3 para 2 and 3 brought about positive results: Until 1955 special wage groups for women were allowed in collective agreements. These wage groups permitted lower wages for women even if they did the same work as men. In 1955 they were declared unconstitutional and were replaced by so called light-work wage groups or bottom wage groups (Leichtlohngruppen) defining that the work done by employees in such job is light and easy work. They were set up parallel to the 'normal' wage groups (see Pfarr/Bertelsmann 1981: 27f.; Jochmann-Döll 1990: 200f.).

Until 1980 Article 3 para 2 Civil Code stayed the only legal norm which demanded equal treatment and equal pay. Even 1957 nothing changed although Article 119 (141) postulated explicitly the principle of equal pay for men and women. In 1975 directive 75/117/EEC was passed. The member states were requested to adopt regulations and laws within one year which would carry into effect Article 119 (141). The German government refused to follow this request because Article 3 para 2 and 3 Civil Code would already accomplish the demands of Article 119 (141) and no other measures would therefore be necessary. The legislator not became active until the European Commission instituted a legal proceeding against Germany as a result of a violation of the contract. In 1980 a new paragraph was integrated into the Civil Code requiring equal pay not only for equal work but also for work of equal value (see Jochmann-Döll 1990: 175ff.; Winter 1998: 201).

The implementation of the light-work wage groups in the collective agreements since 1955 already had changed the discussion from the demand for 'equal pay for equal work' to 'equal pay for work of equal value'. The changed Civil Code of 1980 then brought about that work evaluation became important for the implementation of the principle of equal pay for work of equal value. Albeit the already 1980 existent criticism on the prevailing methods of job evaluation in Germany the new paragraph of the Civil Code says that job evaluation systems should be used to identify work of equal value. However, the paragraph does not clearly define 'work of equal value' (see Pfarr/Bertelsmann 1981: 271). As a result of the legislation, job evaluation became a main tool for proving the equal value of jobs in Germany.



There have been no major legal changes since 1980. A second sentence was added to Article 3 para 2 Basic Law in 1994 which says that the state promotes equal opportunities of men and women and works towards the elimination of still existing disadvantages. This means also that the state has to carry into effect the principle of equal pay for work of equal value. As an employer the state is directly indebted to the principle of equal pay for work of equal value. With reference to the private sector the state can set forth a general framework of conditions without impairing the autonomy of collective bargaining. As long as it does not prescribes the evaluation of occupations to the unions and management, in principle it has a lot of room for manoeuvre (see Winter 1998: 201ff.; Winter 2003: 46).

According to the Works Constitution Act collective bargaining has clear priority over workplace bargaining in Germany. Nevertheless, there are some options for work councils which could enforce the principle of equal pay (see table 1 and Jochmann-Döll 1990: 195f.; Winter 1998: 224f.; Hayen/Nielen 2001; Horstkötter 2002). However, one has to act on the assumption that work councils are rarely active. This is not only due to a lack of time and experiences but also because of a structural lack of power.

### **2.2.1.2 Any non legislative initiative as well as developments associated with the right of equal pay**

Since the 50ies we have different activities initialised mainly by the trade unions, but also by single female employees. When women were fighting for wage increments they mostly were supported by trade unions. The most significant campaign to have female-dominated work upgraded started at the end of the 80ies. It was conducted by female members of the trade union of the public sector<sup>8</sup> from Hesse (see Dürk 1991 und 1994). Women of different occupations started to examine their workplace. The activities were documented in several publications which were entitled 'Women want more'. The women analysed several occupational groups as for instant manual workers, librarians and typists (see Kraus 1994; Kraus/Gumpert 1998).

Since the mid 90ies discrimination free pay scales (Entgeltregelungen), classification systems (Eingruppierungsregelungen) and job evaluation procedures

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<sup>8</sup> ÖTV which now is a part of the newly founded trade union ver.di.

(Arbeitsbewertungsverfahren) are discussed more intensively. To check existing collective pay agreements as well as payment systems on the firm level legal guidelines based on already existing legal norms and decisions were developed. Furthermore, decisions of the European and the German Labour Court were analysed so that they indicate the way how to proceed in case of an indirect pay discrimination in Germany (see Winter 1994: 149f.; Winter 1998; Feldhoff 1998; Colneric 1999).

The development of guidelines for discrimination-free assessment of work released a still reserved debate above all in the trade unions of the metal and the public sector on whether collective agreements accomplish the demands of EU legislation or not. This debate is still going on and did not show any positive effects until today. Nevertheless, a lot of trade unions awarded contracts for a legal opinion on their collective agreements. The legal opinion was asked to indicate whether there is potential for discrimination as well as breaches against European law. Some of the advisory opinions were compiled by job evaluation experts. There are also trade unions which developed their own codes of practice for the application of the principle of equal pay for men and women.

There have always existed several claims of individual employees which refer to all pay components. Two publications document and review detailed the actions and decisions until 1989. However, both studies fail to undertake an analysis of the total number, costs and effects of litigations. In case of claims female employees are normally supported by trade unions. A right for collective claims (Verbandsklagerecht) and group or class claims (Gruppenklagen) is discussed since several years but it is still not realised (see Pfarr/Bertelsmann 1981; Pfarr/Bertelsmann 1989; Winter 1998; Pfarr 2002).

### **2.2.1.3 Improvements over and above the EU legislation**

Compared to EU legislation German equal pay legislation neither contains improvements nor advancements. On the contrary, Winter assumes, that the German equal pay legislation is too inexplicit and indistinct, as parts of the EU legislation can not be identified within the national legislation. Consequently, the employees are not able to clearly perceive and realise their rights. This would be not only a handicap but also breaking with EU legislation (see Winter 1998: 247).

Institutionalised mechanisms to implement the principle of equal pay are still missing in Germany. The actors who are committed to the principle of equal pay (i.e. employers' associations, trade unions; single employers; works councils and governmental institutions) have been dormant so far. Here, the public employer did not set a good example until now. Claims have been only little successful as they are characterised by considerable process-related obstacles. Besides, only individual claims are possible in Germany. Furthermore, the main actors of equal pay (single employers, employers' associations and trade unions) are not encouraged to follow the principle of equal pay for work of equal value (see Winter 1998: 285ff.).

All things considered, no impulses have been sent from Germany until now. Thereby a debate which starts again and again proves to be outstanding inhibitory. There is still no clear agreement on whether the collective bargaining autonomy which is ensured by German Basic Law (Article 9 para 3) is breached if employers' associations and trade unions are requested to change collective pay agreements according to the principle of equal pay. This discussion experienced a new impetus when Article 3 para 2 was amended in 1994. Pfarr (2002) assumes that regulations which accomplish the principle of equal pay would be allowed. This is why she developed 'Ideas of a law to accomplish the principle of equal pay' (Pfarr 2001b). Pfarr's concept is based on Ontario's pay equity legislation.

### **2.2.2 Impact of legislation on societal, organisational and individual level: evidences (studies and political activities)**

As stated at the beginning of point 2.2 we have no studies which evaluate labour market effects of equal pay legislation. In the following, we therefore focus on selected studies and national evaluations which mostly only describe the existent situation. Where available, data on costs or negative side effects will be taken into account. Possible societal, organisational and individual/household benefits and negative side effects respectively costs of equal pay which were taken from the selected studies, are given in the table 3.

**Table 3 Benefits and negative side effects/ costs of equal pay**

	<b>Benefits of equal pay</b>	<b>Negative side effects/ costs of equal pay</b>
<b>Societal level:</b> <ul style="list-style-type: none"> <li>• <b>productive -labour force</b></li> <li>• <b>fertility rate</b></li> <li>• <b>poverty/ social exclusion</b></li> </ul>	increasing labour productivity better qualified labour increasing purchasing power readiness to invest in childcare readiness to joint childcare in terms of an egalitarian relationship more choice over domestic division for labour with respect to childcare lower social security contributions (e.g. reduction of adjustment payment for pensions) prevents poverty in old age and social exclusion in prime age	— increasing opportunity cost (decision against having children) declining wage level and increasing social security contributions
<b>Organisational level</b>	more flexible, integrated workforce as jobs paid according to same value system promotes recruitment and retention	—
<b>Individual level</b>	division of domestic labour according to preferences and household circumstances)) supports investment in education provides individual right to same return to labour	—

### 2.2.2.1 Societal level

In 1999 the German parliament asked the government to present a detailed report on the job and income situation of women and men (see WSI et al. 2001). The report came to the conclusion that many of Germany's collective agreements are not in line with European law concerning the job evaluation systems used. They are neither transparent, nor comparable and include many direct and indirect discrimination against female-dominated jobs. The income report of 2001 replaced the government's reports of many years (from 1969 to 1998) on the character, extent and achievement of complaints referring to the implementation of Article 141 (see Unterrichtung der Bundesregierung über die Art, den Umfang und den

Erfolg der von ihr oder den Länderregierungen vorgenommenen Beanstandungen betreffend die Anwendung des Artikels 141 [119] EWG-Vertrag über gleiches Entgelt für Männer und Frauen). A total of eleven reports were published since 1969.

**Table 4**                      **Development of the distribution of employees according to light-wage groups<sup>9</sup>**

Year	Total number of employees					Number of employees in light-work groups				
	Total (1.000)	Men		Women		Total (1.000)	Men		Women	
		Total (1.000)	%	Total (1.000)	%		Total (1.000)	%	Total (1.000)	%
1979	1343	1125	84	218	16	140	28	20	112	80
1985	1098	953	87	145	13	88	17	19	71	81

Source: Unterrichtung durch die Bundesregierung 1985

In 1966, the German government got the binding mandate to prove existing collective agreements whether they still have 'female' wage groups or 'light' wage groups. To abolish still existing female or light wage groups the government cooperated with the social partners. 1973 the report officially asserted that female wage groups no longer exist within collective payment agreements. This means that it took 17 years to abolish these wage groups since they were declared illegal.

The light wage groups, in which almost only women were grouped, remained a continuous problem (see table 3 and Drohsel 1986, p. 191ff.). In 1998, still 26 collective pay agreements with light wage groups existed. The last report of 1998 shows some interesting developments. On the one hand six collective agreements with light wage groups were newly adopted in eastern Germany. On the other hand increasingly men are grouped into light wage groups. Finally, only a comparatively small share of employees is grouped into light wage groups (see Unterrichtung der Bundesregierung 1998).

As the employers argued for a long time (and in parts certainly still do so) that light wage groups were not discriminating against women the government awarded a research contract in 1973. The definite result of the study was that encumbrances

<sup>9</sup> Since 1985 the data on the distribution of employees according to light-wage groups could not be surveyed any more as the Federal Statistical Office changed the wage data. The following reports therefore only estimated the number of men and women.

and strains at the examined industrial female dominated workplaces were not at all 'light', not even if women moved light objects (see Rohmert/Rutenfranz 1975).

The forthcoming report on women's income shall concentrate on job evaluation, classification systems (Eingruppierungssysteme) and collective payment agreements, as a particular deficiency was detected in this area (see above). As a result of the income report of 2001 the government initiated an international conference in 2002 and drew up a national handbook about the application of the principle of equal pay for work of equal value for men and women (see BMFJSF 2003; Tondorf/Ranftl 2003).

### **2.2.2.2 Organisational level<sup>10</sup>**

The Confederation of German Employers' Association (Bundesvereinigung der Arbeitgeberverbände – BDA) is convinced that existing wage differentials between men and women are the result of different 'job biographies'. This position has been presented in a study of the Institute of German Economy (Institut der deutschen Wirtschaft – IW) which is employer related. The study took the viewpoint that direct gender discrimination no longer exists in Germany, and that existing pay differentials between men and women could be explained by the different gender-specific job biographies (see Schäfer 2001). Unsurprisingly, the BDA also rejects all binding regulations on gender equality and consequently on equal pay. The idea of a law on equal opportunities in the private sector proposed by the government was not accepted (see Pfarr 2001). The BDA instead preferred to reach a bilateral agreement with the government on the subject.

Compared to the employers German trade unions widely believe that gender based wage discrimination still exists despite the equal pay legislation and progresses made in collective agreements. They initiated various actions in relation to pay equity which can be divided in three groups: activities to increase public awareness on gender pay discrimination, research to identify causes and practice of equal pay and implementation of procedures to combat gender discrimination.

The trade union of the metal sector (IGM) and the trade union of the salaried employees (Deutsche Angestelltengewerkschaft – DAG) for instant compiled

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<sup>10</sup> In this part we refer in parts to Soumeli/Nergaard 2002.

guidelines about the implementation of the principle of equal pay (see IG Metall 2001, DAG 1998). In addition some legal opinions were requested. The legal experts should examine whether existing collective pay agreements comply with EU law (see e.g. Winter 1997 for the trade union of the public sector [ÖTV], division public sector; Degen/Tondorf 1998 for the trade union of the metal sector; Appel 1999 for the ÖTV, division churches). Based on the legal opinion, which indicated every time considerable potential for indirect discrimination as well as breaches against European law, also expert's reports of work scientists were furnished. They should describe the general potential of discrimination within job or performance evaluation and suggest improvements (see e.g. Weiler 1998 for the Trade Union of Nutrition, Consumption and Public Houses [Gewerkschaft Nahrung, Genuss Gaststätten – NGG]; Tondorf 2002 for the unified service sector union, division printing industry [Vereinigte Dienstleistungsgewerkschaft – ver.di]).

In 1998, the ÖTV set up an upgrading commission in order to draw up concrete proposals for gender fair job evaluation within the public sector. In the metalworking sector, the bargaining parties have been negotiating over a modernisation of job evaluation systems, including for example the creation of joint agreements for blue- and white-collar workers. Within this context the IG Metall metalworkers' union is demanding a reassessment of various jobs dominated by women (see Nauditt 1999). Although less discriminatory job evaluation processes were discussed a lot during the last years, there are still no and – as it seems so far – won't be collective agreements that deal explicitly with that issue within the IG Metall.

In order to verify whether the discrimination potential diagnosed in the legal appraisal actually exists in practice, the ÖTV awarded a contract for research to be carried out. It was conducted under the heading 'Discrimination-free evaluation of (service) work' (see Krell et al. 2001). The project was based on a comparison in which selected male-dominated and female-dominated work was reassessed. In the same year a similar project was conducted under the title 'Discrimination-free job evaluation at German universities' (see Stefaniak 2002).

### **2.2.2.3 Individual level (households)**

Evidences to measure the impact of legislation on individual or household level are number, costs and results of litigations as well as number of women receiving

wage increments. As above mentioned, we have no studies in Germany which refer to this field. Nevertheless, we assume that the recourse to labour law is rarely used in Germany. Jochmann-Döll (1990, p. 195) compiled a list more than ten years ago which shows some successful court decisions. The list (see table 4) makes clear that there is only a small number of women receiving wage increments as a result of claims. This is above all due to the fact that once women claim for equal pay it is an individual claim concerning only the individual.

**Table 5**                      **Examples of wage increments for women by way of court action (individual payment claims)**

Year	Claimant/ employer	No. of women receiving wage increments	Supporting trade union
1979	Roth	5	IG Metall
1980	Schmalbach-Lubeca	37	IG Metall
1980	Schmalbach-Lubeca	90	IG Metall
1980	Thyssen	24	IG Metall
1981	Kromberg & Schubert	4	IG Metall
1981	Dibona	new collective agreement after filing the lawsuit	NGG
1982	EZA-Verbrauchermarkt	1	HBV
1982	Esbella-Verbrauchermarkt	1	HBV
1982	Triumph-Adler	12	IG Metall
1985	Eckes & Co.	9	HBV
1986	Dato Druck	1	IG Druck und Papier
1988	Kromberg & Schubert	8	IG Metall
total number of women		192	

Source: Jochmann-Döll 1990, p. 195

## **2.2.3 Assessment of progress towards achieving the objectives of equality**

### **2.2.3.1 Progress**

Even if the implementation of the equal pay principle is not progressive compared to EU demands there has been slight forward motion in recent years. This is



above all due to EU initiatives. We observe minor developments in the following fields: The state initiated some activities since the end 90ies which shall enforce implementing equal pay also in the private sector (Report on women's and men's employment and income in 2001, Equal Pay Guideline in 2003 and Equal Pay Conference in 2002). The state and ver.di are revising the agreement for salaried employees in the public sector (Bundesangestelltentarifvertrag – BAT) at present. Among other things it is planned to modify the salary grading system providing that it complies with the principle of equal pay for work of equal value. It is scheduled to conclude this process until 2005. But it have been in particular some trade unions who checked their wage agreements in the last years. As German employers' associations generally are convinced that the existing wage gap between men and women is the result of different vocational training or working hours and not of indirect discrimination for instant by job evaluation they don't see any particular need for action in the field of gender pay policy.

### **2.2.3.2 Barriers to achieving equality**

- reports on equal pay should be compiled at regular intervals and collective agreements should systematically be monitored
- in order to observe positive or negative developments statistics on wage should be improved and allow easy handling: it is still difficult/complicated to gather data on agreed wages which explicitly indicates the distribution of men and women according to wage groups or which informs about the distribution of supplements or performance wages etc.
- legal regulations should be amended: the still open question about the relation between the principle of equal pay and the autonomy of collective bargaining is to dissolve; legal procedure should be simplified
- general standard of knowledge about indirect discrimination and the principle of equal pay for jobs of equal value is to improve
- lack of knowledge about how to composite a discrimination-free job and performance evaluation
- profound analysis of existing agreed and above all firm-level job and performance evaluation necessary

- lack of positive examples on firm level

## **2.3 Maternity and parental leave**

### **2.3.1 Identify**

The first maternity leave regulation (following the eight weeks period after the birth of a child)<sup>11</sup> dates from 1979. The act on maternity leave gave mothers in employment due to social security contributions the right to take a subsequent leave of four months. The employer had no right of dismissal during this period, a maternity allowance of 750 DM was paid. The maternity allowance was financed by the Federal state via general taxes.

The Christian-Democrat/Liberal government changed this law in 1986 in the following way:

- all mothers/fathers, irrespective of whether in employment or not, have the right to receive parental allowances, which was paid - in the beginning – for a maximum of ten months
- employed parents receive the parental allowance only when they take up parental leave. Parental leave was – at that time – for a maximum of twelve months. Parents were allowed to work part-time with a maximum of 19 hours. Parents had to choose which parent took the leave but could change this three times during the three years period. Persons in parental leave do have a certain protection against dismissal and have the right to return to an equivalent workplace
- parental allowance was – till 2001 – paid up to a maximum of 600 DM dependent on household income

Since 1986 the law has been changed several times especially by prolongations of the duration of the leave (today the maximum is three years), parental allowances are paid for a maximum of two years now (the maximum amount now 307 €).

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<sup>11</sup> Maternity leave connected with the birth is six weeks before and eight weeks after birth. This act was introduced in 1968, is still in force, includes since 1997 domestic servants, early born children. Payments during the 14 weeks: single employer combined with health insurance, since 1997: small enterprises fund in which all firms with less than 20 employees irrespective of whether employing women have to pay contributions

Since 1996 all parents have the right to a kindergarten-place for children over the age of three, although the law only guarantees a place for five hours/daily.

In 2001 a substantial reform came into force: parents may now take parental leave (which is now called parental time as the word leave is in German associated with the word holiday/leisure time) together at the same time, with a maximum of 30 hours weekly working time for each parent. The allowance is still 307€, paid for 24 month. There had been changes in the relevant household income to include more parents into the full payments. If parents choose to take parental allowance and leave only for twelve months the amount paid increases up to 460€ per month. New is also that parents may take twelve months (of the overall 36 months) between the third and eighth birthday of the child. All regulations concerning workplaces of parents are a legal entitlement, but employers may object if there are 'urgent firm specific reasons' not to accept the employees' wishes.

The German regulations are different from EU legislation as they cover a longer period of leave and do have a financial compensation (although quite low) – if these are improvements or disincentives for parents, especially mothers, to combine family and employment is a question to be discussed in the following sections. On firm level some firms do offer even longer periods of parental leave (up to 7 years), which are unpaid and are associated with a termination of the employment contract – they include a vague relation between the employee and the firms.

All in all we may state that parental leave and parental allowance do have a high take-up rate, nearly all parents participate in both parts (in 2000 95 per cent of all eligible parents took up parental leave, thereof 2,4 per cent fathers; BMFSFJ 2002: 83). A study on women having had a child since 1992 demonstrated that in West Germany only eleven per cent of the mothers with a first child and 18 per cent of the mothers with at least two children remained in employment, only four per cent combined parental leave with a part-time job. In East Germany the situation was even worse: only seven per cent resp. nine per cent remained in employment and only four per cent combined parental leave with a part-time job. The vast majority of mothers takes parental leave as full-time out of employment for substantial periods of time. Of all mothers which returned to employment (around 53 per cent) only a minority took a short leave with less than six months (13

per cent), 19 per cent took seven to twelve months, 27 per cent 13 to 24 months and 29 per cent between 25 and 36 months (maximum period) (cf. Beckmann/Engelbrech 2001),

### **2.3.2 Assessment of the progress towards achieving the objectives of equality**

The changes in the legal regulation coming in force 2001 react on problems connected with the special construction of parental leave till 2001: the duration of leave was – in general – quite long, leading to problems with re-integration, loss of workplace related human capital both for firms and women, inflexibility with working time restrictions (maximum of 19 hours/week), inflexibility in sharing the parental leave between mothers/fathers etc. The new regulation tries to offer more flexible solutions as parents are allowed to work part-time with a maximum of 30 hours/each (research shows that women often prefer working times around 27 to 30 hours, cf. Holst/Schupp 2000), there is more flexibility to take parental leave after the third birthday of the child. What remains unchanged is the financial compensation (to choose a shorter period of parental allowances is in favour of the Federal budget and not the parents...!), the right of the employer to veto certain demands because of ‘urgent reasons’ (which is a stronger right in favour of the employees than before where we had ‘good reasons’ to veto demands) and – even more important – the lack of (affordable) child-care facilities for children under the age of three in West Germany. As long as the supply of child-care is insufficient, women will take rather long leaves.

Another problem is the reintegration into employment: in East Germany, women wishing to return from parental leave found their employing firms closed down, or with massive reductions in the workforce. The increase of fixed-term contracts leads to an increase of parents which are not fully covered by the regulation: if your contract ends during parental leave, you have no right to return to your previous work place. Another problem is connected with most mothers wish to work part-time (only 20 per cent of returning mothers worked full-time, cf. Beckmann/Engelbrech 2001): there is no strict right to return on a part-time job. Germany changed the act on part-time employment in 2001, and strengthened individual employees’ position in the bargaining process over part-time and full-time. The first data show some effects: in 2001 85.000 persons (thereof 66.000

women) requested a reduction in working time. Most employers accepted the wishes, 17 court decisions concerning the right to part-time had been counted, thereof twelve court decisions had been in favour of the employee (DGB Bundesvorstand 2003: 12).

### **2.3.3 Impact of legislation on societal, organisational and individual level: evidences (studies and political activities)**

#### **2.3.3.1 Societal level**

- *Macroeconomic effects*

Parents in (statutory) parental leave are counted statistically as employed – de facto they are in non-employment. In 2002 the IAB counted 408.000 parents/mothers in parental leave. Parental leave participants count for 1.2 per cent of the overall number of employees (Bach et al. 2003). As these parents are not in employment they reduce the pressure on the labour market. When parental leave was introduced in 1986 the instrument was characterised as a labour market regulation act, which aims to reduce the pressure on the labour market exerted by the growing number of labour market entries of women. Not the reconciliation of work and family had been intended but the partial exclusion of mothers from the labour market (Landenberger 1991). This dramatic (side-) effects could be studied after the unification, when a majority of young East German mothers lost employment during or after parental leave – parental leave served as a smooth exclusion mechanism in a period of massive employment reductions (cf. BMFSFJ 1995).

- *Fiscal costs of the German model*

There is no complete and comprehensive analysis of the fiscal effects of the Germany model of mothers non-integration in employment. But there are some interesting studies showing overall monetary costs, namely an analysis made by the Deutsche Bundesbank and a study on the fiscal effects of mothers' integration in the labour market (DIW 2002).

**Table 6**                      **Family related expenditures**

	<b>in Billion Euro 1999</b>
<i>Fiscal programmes</i>	
child allowances	29.5
<i>Transfer payments</i>	
parental allowance	3.9
contribution to pension systems (years in parental leave)	11.9
social assistance	4.0
other transfers	7.5
<i>Services of public sector</i>	
child care	7.4
youth aid	8.0
schools	45.3
higher education	10.3
<i>Social security systems</i>	
co-insurance of married persons without own employment	11.4
maternity payments	2.8
orphans	1.1
unemployment payments	0.5
Total as per cent of GNP	7.6
Additionally: Tax splitting system	24.0

Source: Deutsche Bundesbank 2002: 22

The data provided by the Deutsche Bundesbank show the direct costs associated to the German way of combining motherhood and non-employment: one of the biggest financial items are the contributions to pensions systems which the State pays for mothers in parental leave, followed by the co-insurance of married persons (mainly in health insurance, covers not only non-employed mothers but children as well), whereas child care is only a minor item in the public budget. The tax splitting system is not included in the Bundesbank analysis, but is a relevant item for the public budget and (as pointed out in chapter on poverty) for families as it 'allows' the non-employment of mothers which do have a husband with a sufficient income.

The analysis of the DIW estimates now – based on empirical data on mother's non-employment, either unemployment or 'discouraged worker' or housewives on job search – the average annual gross income, taking into account full-time/part-time wishes, education and skill level, job experience and length of previous

service. All mothers with at least one child between two and twelve years old which is not in a full-time child-care facility and which wish to re-enter employment had been taken into account. Given a sufficient child-care facility and appropriate employment in the labour market, these women – this is the assumption of the study - would return to employment. The study calculates then the impact of this employment growth on additional taxes for the State, the additional social security contributions to the different social security insurances and the decrease in social assistance plus the impact on the employment in child-care facilities.

**Table 7 Gross Fiscal Impact of Mothers Employment in €  
(data based on year 2000)**

<b>Group (number of persons involved)</b>	<b>Taxes</b>	<b>Contributions</b>	<b>Social assistance</b>
Unemployed mothers (121.000)	470 mill.	700 mill.	—
Mothers – wish to return within one year (273.000)	1.1 billion	1.6 billion	—
Mothers – wish to return within five years (1.235.000)	6 billion	8.9 billion	—
Mothers receiving social assistance (244.000)	—	—	1.5 billion
Additional employees in child-care facilities (430.000)	1.2 billion	4.4 billion	—

Source: DIW 2002

The conclusion of the calculations say that public investment in child-care, which would enable mothers to return to the labour market would increase public revenues both for the state and the social security insurances. Compared to the expenditure of 7.4 billion for child care in 1999, the additional taxes and contributions amount for nearly nine billion of additional taxes and 15.6 billion additional contributions. Even if we assume that the expenditure for child-care will increase by 100 per cent, the fiscal effects would be positive.

### **2.3.3.1.1 Investing in a productive labour force**

All studies in Germany point to the fact that parental leave – as it is actually embedded in the institutional framework of labour market and family policy - acts as a disincentive for mothers to invest regularly and continuously in the development of human capital and may act as a negative signal towards employers' propensity to invest in young women's human capital, too (for an

overview on theoretical aspects see Radke/Störmann 1998, Jungwirth 1998 and 1999).

Empirical data show that each prolongation of parental leave immediately was taken up by parents (the supply finds a demand) and leads to a prolongation of women's withdrawal from employment (Ondrich et al. 1996). The longer the interruption period, the higher the losses in human capital related to labour market skills, as technical and organisational changes have influenced parental leaver's specific skills and productivity. Beblo/Wolf found in their study on wage gaps that each year of non-employment due to parental leave decreases the wages substantially, the relative size of decrease depending from the occupation and the sector (Beblo/Wolf 2000).

Most studies come to the conclusion that long periods of parental leave set the wrong signal on the labour market and opens up possibilities of 'statistical discrimination' and that it is necessary not only to organise training for female returners but to organise training during parental leave periods to keep human capital up-to-date (cf. Jungwirth 1999: 193).

The state offered, via the federal employment service (BA) and other Länder programmes, special training and further training activities for (unemployed) female returners as part of active labour market policy. These programmes had been rather successful in terms of labour market integration of female returners and the relevant regulations in the *Arbeitsförderungsgesetz* and *SGB III* had been changed to allow more female returners to participate in these programmes (for example: less strict entry criteria returners as a target group defined) (cf. Müller/Kurz 2002).

The last changes in the overall labour market policy in Germany – associated with the concept of a group called 'Hartz-Kommission' – may lead to a reduction of programmes offered to female returners as the new guideline is now to offer participation in programmes only to unemployed persons which receive benefits from the BA (most married women do not receive means tested benefits and long term parental leave leads to exclusion from these benefits) and to offer programmes only if the re-employment quota of participants is over 60 per cent. The effects of the new regulation are not yet empirically studied, but single examples (like in Berlin) show a tendency to reduce returners-programmes.



### **2.3.3.1.2 Sustainable fertility rate**

We do not have any empirical data/studies discussing the impact of parental leave regulations on fertility rates – as pointed out in the section 2.1.1.2, Germany's fertility rates is declining since a long time, and the introduction of maternity leave and parental leave had no impact on the trend, as far as we can observe it. Parental leave offers a certain – although precarious – security that the society cares for mothers, but it offers the partial withdrawal from employment without the corresponding security if return.

### **2.3.3.1.3 Reduction poverty/social exclusion**

As pointed out in section 2.1.1.3, is mothers withdrawal from employment, even when receiving parental allowance and other financial incentives, one of the poverty risks in Germany, not only in households with a low income but in household with a medium/average income, too. Parental leave, in the form offered now, is a substantial problem for lone mothers, as the lack of child-care does allow the combination of employment and upbringing of a child only under difficulties. The high ratio of lone mothers receiving social assistance (in 2000 more than 25 per cent of all lone mothers with children under the age of 18 received social assistance, BMFSFJ 2002:109) is a clear indicator for the exclusionary impact of the German reconciliation policy. On the other hand: as lone mothers are forced to combine employment and children is the take up rate of parental leave lower among lone mothers than among co-habiting or married mothers (Engstler/Menning 2003: 116).

### **2.3.3.2 Organisational level**

Studies found that employers, especially in small and medium sized enterprises, expect losses of firm-specific human capital due to the three years parental leave, around one forth of all firms said, that even in low skilled jobs the maximum leave period should be less than two years, 80 per cent of all firms said (in 1992), that a longer than three to five years withdrawal is negative for the persons re-employment chances. The study found additionally evidence that parental leave combined with the right to return may act as discrimination against young women as 20 per cent of all firms stated that parental leave is a disincentive to employ young women (Pfarr 1994).

As pointed out before, only a minority of mothers combined parental leave with part-time work, so that the actual effect is – from the side of the firm – a non-employment situation.

In the mid 80ies some firms offered even longer periods than the statutory leave regulations as part of their positive action programmes. The risks of longer periods of non-employment are even higher so that these regulations had been criticised right from the beginning, including their legal insufficiencies like loss of all firm-specific regulations when returning etc. (cf. Lippmann 1998). Today the focus of positive action during parental leave is more on human-capital related programmes (like including persons on parental leave in internal training programmes) or offers parental leavers flexible part-time or marginal jobs during the leave. Some firms developed child-care facilities either by building up firm-specific child-care or by buying a professional service for child care and offering these to employees. We find a broad variety of help and services, although concentrated in certain sectors which see women as a productivity reserve (cf. Rühl 1998; Jungwirth 1999).

Actually we do not have any quantitative data concerning the number of firms or of employees covered by special programmes, nor do we have any estimates on firms' costs associated with these programmes.

### **2.3.3.3 Individual level (households)**

If the introduction of parental leave regulations (gender neutral compared to maternity leave regulations prior to 1986) did have an impact on the private division of work, fathers role in households and bargaining position of women in the family, has been a subject of many studies. The overwhelming results are that the parental leave regulation did not change anything substantial (given the traditional division of labour, the gender-specific wage gaps in most families and the lack of child-care), in contrary: it stabilized the mother's withdrawal from employment by offering some financial incentives (parental leave allowances, tax reductions and pension payments) without guaranteeing a proper return to employment (for an overview of these studies see Krug 1998)<sup>12</sup>. As fathers are not obliged to take parts of parental leave, their propensity to do so is minimal, not

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<sup>12</sup> In East Germany the parental leave regulation even 're-established' a model which had been largely disappeared: mother's withdrawal from the labour market (cf. BMFSFJ 1995)

only in households where their earnings are higher. Their low take-up rate is mainly influenced by gender stereotypes in the family and at the workplace (Peinelt-Jordan 1996; Engstler/Menning 2003: 118).

### 3 Sexual harassment

#### 3.1.1 Identify

##### 3.1.1.1 Legislation to date

Compared to German equal pay legislation and to European Law until 2002 legislation on sexual harassment is more progressive in Germany. Nevertheless, there are still significant adjustments necessary to accomplish Directive 2002/73/EC. Table 8 again gives an overview of legal norms and persons covered by legislation on sexual harassment.

**Table 8 Legal norms on sexual harassment in Germany**

Legal basis	Article/ para	Persons covered
Employees Protection Act (Beschäftigtenschutzgesetz)	§§ 1 to 7	all employees
Works Constitution Act (Betriebsverfassungsgesetz)	§§ 75, 80, 84, 85, 86, 86a	employees on firm level to whom the Works Constitution Act applies
Penal Code (Strafgesetzbuch)	§§ 174 para 1 no 2, 177-178, 185 and 223	employees affected by sexual harassment

In the context of the Second Equal Treatment Law (2. Gleichstellungsgesetz) a separate act to protect employees from sexual harassment at work came into force in Germany. The so called Employees Protection Act (Beschäftigtenschutzgesetz) of 1994 does not regard sexual harassment as discrimination but as violation of women's and men's dignity. Both, private and public employees are covered by the Law. It admits employees the right to complain and protects them against discrimination in case they resisted sexual harassment by a complaint (see Degen 1999 and 2001).

Employers of the public and private sector are responsible to protect male and female employees against sexual harassment at workplace and they are obliged to take measures which anticipate sexual harassment. Article 3 para 1 Employees Protection Act refers to the Works Constitution Act, which formulates in Article 75

para 1 general principles of equality covering non-discrimination on the basis of gender and race. Article 4 para 1 number 1 Employees Protection Act allows for additional works council agreements, which are subject of enforceable workers participation (erzwingbare Mitbestimmung) according to the Works Constitution Act (see Degen 1999 and 2001).

Collective and works council agreements are progressively tackling workplace violence (see Weiler 1998: 51ff.). The most famous agreement is that one of Volkswagen AG which was adopted in 1996. This agreement has inspired many other agreements and has been actively promoted with sample agreements being provided as policy models.

### **3.1.1.2 Any non legislative initiative as well as developments associated with sexual harassment**

Several studies have been carried out into the incidence, types, and perceptions of sexual harassment in Germany. The first national study commissioned by the Ministry of Family, Seniors, Women, and Youth (Bundesministerium für Familie, Senioren, Frauen und Jugend: BMFSFJ), surveyed the incidence, responses to, and consequences of sexual harassment (Holzbecher et al. 1991). Other studies have reported on harassment in both, the public (Schneble/Domsch 1989) and the private sector (Maenz 1994). Further studies give attention to selected aspects of sexual harassment (e.g. the subjective experience of sexual harassment, see Brandstedt et al. 1992) or to sexual harassment in specific sectors as in single towns or universities (see e.g. Bitsch 1993).

A more up-to-date study funded by the Ministry of Labour and Social Affairs (Bundesminister für Arbeit- und Sozialordnung) examines the extent, structure and consequences of mobbing at the workplace – i.e. bullying and harassment (see Meschkutat 2002). To check up on the implementation and effectiveness of the Employees Protection Act in the private sector the Federal Ministry of Family, Seniors, Women, and Youth awarded a contract for legal opinion in 2001. The report's results are still not available (see BMFSFJ 2002, p. 170).<sup>13</sup>

Trade unions deal with sexual harassment for a long time and commissioned as well as the Government guidebooks. The guidebooks explain how women shall

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<sup>13</sup> Further, see [www.hu-berlin.de:54321/forschung/fdb/deutsch/PJ/PJ2929.html](http://www.hu-berlin.de:54321/forschung/fdb/deutsch/PJ/PJ2929.html).

operate in case of actual sexual harassment in a company (e.g. see Plogstedt/Degen 1992 for the Federation of German Trade Unions [Deutscher Gewerkschaftsbund]). Particularly, single women visualised the problem of sexual harassment on firm level since the end 70ies in Germany. These women published various reports of experience (see e.g. Doris B... 1962; Plogstedt/Bode 1984).

### **3.1.1.3 Improvements over and above the EU legislation**

All things considered, the Employees Protection Act alone was and is not able to change the situation in favour of women affected by sexual harassment. This can be explained among other things with weak regulations of the Employees Protection Act. Deficient sanctions provoke often that the employer not even follows the duty to hang out the law at a public place. This applies above all to the private sector. Due to institutionalised women's representatives things changed more in the public sector. Furthermore the stronger employment security in the public sector encourages women to battle against sexual harassment (see Degen 2001: 153f.).

Changes in misogynist organisational structures are only possible if the Employees Protection Act is amended: Sexual harassment has not only to be accepted as discrimination on ground of gender, but also networking, cooperation and a Federal authority are necessary. As long as there are no institutionalised contact persons and contact points legal efforts will still remain predominately without effect in Germany (see Degen 2001: 158).

### **3.1.1.4 Impact of legislation on societal, organisational and individual level: evidences (studies and political activities)**

As there are no studies which combine legislation on sexual harassment and labour-market effects the following analysis concentrates on selected German surveys and political or other activities referring to sexual harassment. Where available, data on costs or negative side effects and benefits will be taken into account. Possible benefits and negative side effects are listed in table 9; they were taken from the selected studies for this report. We think that it is problematical to

handle the social and structural problem of sexual harassment from the viewpoint of a cost-benefit analysis.

**Table 9**                      **Benefits and negative side effects/ costs of sexual harassment**

	<b>Benefits of sexual harassment</b>	<b>Benefits of no sexual harassment</b>	<b>Negative side effects/ costs of sexual harassment</b>
<b>Societal level:</b>			
<b>productive labour force</b>	—	important for non traditional job entry and retention of trained staff	suboptimal use of the factor labour and reduction of productivity (as a result of: see beyond)
<b>fertility rate</b>	—	—	—
<b>poverty/ social exclusion</b>	—	promotes desegregation and thereby increases women's access to employment	—
<b>Organisational level</b>	creation of distance and therewith avoidance of envy and arrangements (Rastetter 1999) well adopted employers (Rastetter 1999) stabilisation of the division of labour between men and women (Rastetter 1999)	taking responsibility for organisational culture may have positive spin-offs; should promote recruitment and retention	substantial loss of output by employee's illness, decreasing motivation and resignation (Rastetter 1999) loss of face (Rastetter 1999)
<b>Individual level</b>	—	supports right to keep/ make choice, demonstrate capacities	absence due to illness (Holzbecher et al 1991) loss of work related satisfaction (Holzbecher et al.)

#### **3.1.1.4.1 Societal Level**

We did not find evidence for this point.

#### **3.1.1.4.2 Organisational Level**

While there are numerous additional guidelines and works council agreements in the public sector (which is due to the institutionalised women's representatives – see above) works council agreements are an exception in the private sector. A report on behalf of the Federation of German Trade Unions (see Weiler 1998) mentions only four companies which signed works council agreements referring to the Employees Protection Act. These companies are EMI-Elektra GmbH Köln, Thyssen Stahl AG, Volkswagen AG and Deutsche Lufthansa. Only one trade union adopted a single-employer agreement and an umbrella agreement. Both agreements contain only very general regulations on sexual harassment. The trade union of the metal sector (IG Metal) has published ten example agreements on the internet, all following the same structure but adjusted to the special characteristics of each enterprise.

Rastetter (1999), who discusses general consequences of sexual harassment at work on the organisational level, states that there are only few studies on negative or positive organisational impacts of sexual harassment. She points out that companies rarely act against sexual harassment because of its dual structure: beside negative effects sexual harassment would provide functional aspects too (see table 9). As there exists no German study she mentions an American survey which pointed out, that sexual harassment at Federal authorities evokes costs amounting to \$ 135 millions p.a.

#### **3.1.1.4.3 Individual level (household)**

The results of the first nationwide study in Germany (see Holzbecher et al. 1991) showed that 72 per cent of the women employees of ten different sector and work places had experienced a situation which they interpreted as sexual harassment. 40 per cent of the women gave detailed descriptions of events they particularly remembered. The study indicated that sexual harassment affects women's health and well-being in serious ways: 80 per cent of the women who had experienced

sexual harassment reported that they noticed physical or psychological changes as a consequence of the harassment. For a fifth of the women the experience of sexual harassment lead to less work-related satisfaction (see table 9).

The same survey (see Holzbecher et al. 1991) also tried to give an overview of the legal situation in Germany. It could be shown that most of the litigations took place at the criminal and not at the labour court. The problem of sexual harassment often hides behind claims for dismissals protection or job references. Bertelsman et al. (1996) document in their manual only 13 decisions on sexual harassment at the labour court between 1956 and 1991.

### **3.1.2 Assessment of progress towards achieving the objectives of equality**

#### **3.1.2.1 Progress**

Since the adoption of the Employees Protection Act a considerable increase of intra-firm discussions and litigations can be observed. Unfortunately, we did not find any definite data on this. However, it proves problematical that the right to complain (§ 3 Employees Protection Act) has only been thought through little. There are considerable problems in handling complaints and legal proceedings. Anyway, since the law came into force courts take sexual harassment more seriously (see Degen 1999 and 2001).

#### **3.1.2.2 Barriers to achieving equality**

- still absence of institutionalised contact persons and contact points
- no women's representatives in the private sector
- no central external coordination cite with extensive competencies (e.g. Federal authority)



## **4 Social and economic impact of the recasting**

### **4.1 Actuarial calculations in occupational pension benefits**

The information available on occupational pensions schemes in Germany is rather scarce: it is impossible to get empirical data in more detail. We present here what we could get and find:

- Coverage of occupational pension systems: in Germany, occupational pension systems are voluntarily both for employers and employees. They are not yet a major source of pension income of actual pensioners: in 2000, actual pensioners received only five per cent of their income from occupational pensions, 85 per cent from the statutory general system and ten per cent from private sources like life-insurances etc. For actual pensioners the state pension still plays the dominant role.
- The information on coverage of employees is rather incomplete: in 1999 around 64 per cent of all employees in private manufacturing industry were covered by a occupational pension scheme and around 28 per cent of all employees in retail sector were entitled to such pensions. Around 4.8 million employees of the public sector (except civil servants) are covered by the public sectors occupational pension scheme, which is the biggest system. Estimates find, that the overall number of employees covered by occupational pensions schemes may be around 15 million employees, that is around 50 per cent of all dependent employees in Germany (Deutscher Bundestag 2001).
- Until the reform on pension schemes in 2001 (called 'Riester-Rente' after the former Minister of Labour Walter Riester), the dominant form of occupational pensions schemes was a 'pay-as-you-go' system on firm level: the companies built company pensions reserves, which reduce the profit before taxes and had been used to pay pension benefits at retirement age (Direktzusage). Employers could use these reserves for investment in the own firm or on the stock market etc. The legal regulations of these reserves are not very strict, the rights of the employees are covered by a pension-insurance-corporation. These systems are wide spread, estimates say that around 7,7 million employees are covered by these firm-specific pensions reserves. Around 370 billion DM had been allocated to company pension reserves in 2000 (Deutscher Bundestag 2001).

A similar system is called *Unterstützungskasse* (supporting fund), here again the company pays the contributions but pays these to an independent insurance corporation – amount of contributions and conditions are regulated on firm level (around 44 billion DM are allocated to supporting funds in 2000).

The public sector follows a similar scheme with a slightly different form of calculating employers contributions (not annually calculated contributions but several years as base of calculations).

Both systems follow in large parts the same rules as the statutory state system: contributions are paid according to a percentage of the employees' wages, benefits are calculated as a mixture of level of contributions and duration of contribution payments. As far as we know are these systems 'gender-neutral', as the benefits are not calculated according to actuarial calculations. Gender differences in benefits/pension result from lower earnings and shorter employment duration, resp. lower contributions. These systems tend to be benefit oriented schemes, not contribution oriented schemes.

Even before 2001 and enforced by the 'Riester-Rente' act in 2001 we have other forms of occupational pension schemes in which private insurance companies are involved:

- *direct insurance (Direktversicherung)*: the employer concludes a life-insurance contract with an insurance company in favour of the employee (around 74 billion DM in 2000)
- *pension insurance funds (Pensionskassen)*: independent insurance funds run by several firms of a sector (125 billion DM)
- *pension funds (Pensions-Fonds)*: these privately run pension funds are now introduced as an alternative to the other forms, the funds are able to invest freely in the (bond) markets. Private banks, investment firms and insurance companies are running these funds, employers conclude a contract with one of the numerous suppliers. Compared to the other two 'private' forms, the pension-funds are more freely in contracts and investment behaviour (Deutscher Bundestag 2001).

The 'Riester' Act allows employees to demand from the employer to transfer components of the wage into occupational pension schemes

(Entgeltumwandlung). Some sectors like the Metal-industry social partners founded own companies like the 'Metall-Rente' which offer employees better conditions than private contracts. Some big companies like VW introduce new pension funds which substitute the other forms of occupational pension schemes and transfers all of them into the new scheme (see Eiro online 2001). For all employers participating in new schemes we have tax reductions, the same is true for the employees.

When the reform came into force in 2001 the expectations concerning the development of occupational pension schemes had been quite euphoric, as this was seen as a first step of a fundamental reform of Germany's pension system. The massive marketing for occupational pension schemes and private pension savings had not such overwhelming effects as had been expected. Therefore the actual take up rate is modest and below the expectations.

Actuarial calculations may be used in all schemes in which the employer uses a private insurance company, bank or investment company – i.e. in all cases like Direktversicherung, Pensionskasse and Pensionsfonds. These schemes may be contribution oriented schemes. These contribution oriented occupational pension schemes calculate benefits not only related to contributions but also related to the statistical risk of duration of payments of benefits. In calculating the gender specific risks men and women with the same amount of contributions will receive a different pensions: women's pensions being ten to 15 per cent lower than men's (Birk 2003).

This problem had been discussed in depth during the reform process in 2000 and 2001 – women's organisations, the social-democratic party's women's group, trade unions and others demanded that the state subsidy (tax reduction) should be bound to the obligation to use uni-sex tariffs or to compensate for actuarial calculations by paying higher employer contributions. But at the end the insurance industry and employers associations had been successful so that the 'Riester' act does not demand uni-sex tariffs.

During this political conflict a majority of legal experts supported the argument that uni-sex tariffs or equal contributions = equal benefits are not necessarily demanded by German equality laws, i.e. that statistical discrimination is in accordance with the law. Only a minority of lawyers disagreed and found that uni-

sex tariffs or other forms of non-discriminatory forms of occupational pensions schemes are demanded by European and German law (cf. Birk 2003). Birk points explicitly to the point that especially the new form of Entgeltumwandlung (parts of wage taken as contributions) requires the elimination of gender-specific discrimination as occupational pensions are explicitly part of the wage.

We do not have any information how widespread gender differences in occupational pension schemes are, there is no information available on the number of firms or employees under these schemes. However, we know, as there was a public dispute, that the 'Metall-Rente', which covers more than three million employees in the metal-industry, does not offer uni-sex tariffs – the argument is that in a voluntary system uni-sex tariffs would result in higher contributions for men, which would lead in consequence to the fact that men are paying for women. Men would then choose other 'products' like life insurances etc. which will not force them to pay for women.

We expect a growing importance of occupational pensions schemes (pillar II) and private pensions schemes (pillar III) for private households and employees, as the statutory state pension scheme is under a growing economic and demographic pressure which leads – in fact – to falling statutory pensions for the future generations. The 'Riester' reform act was only the first step, others will follow the next years: increases in the retirement age up to 67, decreases in the calculations of pensions levels (down to 65 per cent of life-long earnings/contributions), slower increases of actual pensions etc, All these reforms will contribute to peoples' propensity to invest more in private and occupational pension schemes.

If occupational pension schemes should become part of the mandatory system, most lawyers agree that then a system of gender neutral regulations (as in the state pension system) seems unavoidable, but has to be accompanied by a system of risk pooling as it is used today in the statutory systems and in statutory health insurance.

## **4.2 Innovative Provisions**

We are not quite sure what is expected to be assessed here: the socio-economic impact of innovative provisions on women's labour market position? Or on the

development of equal opportunities policy in all fields concerning work and life of men and women?

We would like to discuss more generally the possible impact of the different elements having the mind the political debates and movements/pressure in Germany:

- *equality bodies*: as the legal expert has already pointed out, the way how to implement an equality body seems to be left quite openly. When looking back on the 'German way' of implementing the EU-directives, in most fields Germany was reluctant in going beyond the minimum requirements. Given the rather complex situation concerning the federal structure of Germany, with a strong tendency to implement Federal agencies only very restrictively and with the consensus of all Länder, it does not seem to be very likely that Germany will create and implement a strong and powerful body on Federal level. Nevertheless, a central agency with the tasks as described in Article 8a even with a limited power would help to assist in developing a positive climate towards equality/anti-discrimination policy, could improve information, studies, research etc., a field, which is by no means in good shape in Germany today. We have a lack of implementation of equality issues on all levels of activities mentioned in the Article 8a, a lack which makes this report so difficult. The reports of the Federal Ministry of Family, Seniors, Women and Youth published on issues of equality (both in legal and in material forms) are not sufficient and systematic enough to improve knowledge on equality problems in Germany. What is of interest here would be the relation of the new agency to the gender mainstreaming approach, i.e. the interrelation with other state activities (on all levels Federal, Länder and communities), with activities of the employment service, the social partners (collective bargaining outcomes) and legal activities in courts etc. In an actual debate of the Green parties parliamentary group (19<sup>th</sup> of May 2003), some groups supported the idea of an equality body, but all of them pointed to the necessity of sufficient economic capacities of the body and independency with respect to the government (employer associations and trade unions are in favour of a semi-partite body or the integration of such a body in already existing bodies like the federal employment service (see documents provided by the Green Party Parliamentary Group 2003).

- *equality plans*: as described in length in the previous chapters, we do have equality plans in employment in the public sector of Germany. These equality plans are – more or less – highly developed and binding for the public sector activities. The impact on women's employment is rather limited, albeit positive action is part of the plans. The plans did not change women's employment situation very dramatically, but there is some progress, concerning the proportion of women in higher positions. Some spectacular ECJ cases result from German public sector equality plans. What is still weak are the rights of women's representatives, the sanctions and the missing right for class action. The private sector, until now, has only in small parts equality plans, these plans are voluntarily and the women's representatives do not have any rights of implementation, of sanctions or other instruments to enforce the equality plan on the different level of organisations. The Government choose the way of informal and non-legislative initiatives in the private sector (agreement with the employer association,<sup>14</sup> best practice awards). In 2001 a fully developed legal proposal (Gleichstellungsgesetz für die Privatwirtschaft), which was flexible and enforceable had been rejected by the Government and the employer associations (and in parts by women's representatives of some big firms, which argued that voluntary equality plans are more efficient as they are based on the interests of the employer himself and not imposed by an external agency). Again, we think a regulation on EU-level, which positively addresses the issues equality plan, information/statistics, measurement of implementation and reports how the goals had been achieved (and why not, if not) would help to strengthen women's position in Germany. As mentioned, there are already initiatives and there is a certain pressure on the Government and the employers, which could be supported by an EU-initiative. The employers' association is strongly opposing additional regulations beyond the existing level, whereas others like the trade unions, women's ngos and the Green party are in favour of a legal regulation concerning the private sector (see documents provided by the Green Party Parliamentary Group 2003).

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<sup>14</sup> In 2001 an "Agreement to promote equal opportunities" was signed by the federal employer's association and the government. The agreement includes an obligation for evaluation of the policy measures and aims in 2003. Some firms do implement equal opportunity policy anyhow, the aim of the agreement was to prevent the government to develop a legal base covering the private sector

- *preventive measures*: As social partners and collective agreements are still the most relevant actors in the field of employment, working conditions, pay regulations, working time regulations, vocational and occupational training, occupational pension schemes etc. and we could find the most missing initiatives in implementing gender mainstreaming in the National Action Plans in the pillar on social partner activities, we think that such an article should have a prominent place, at least on the background of the German situation. Social partner activities on national, sectoral or firm-level should be enforced on one hand, the (non-) discriminating impact of their activities should be examined more precisely on the other hand. Gender mainstreaming in collective bargaining is of major importance, even given the recent attacks against collective agreements.
  
- *sanctions*: Most equality activities are not accompanied by massive sanctions, if the private or public employer or other actors do not act in accordance to the law. The sanctions especially in the Germany are rather weak, 'peanuts' in comparison to the benefits of discrimination. We would like to make a general statement here: once employers have massive benefits by employing (skilled) women in low paid jobs, by keeping a homogenous workforce (vertical and horizontal segregation), by externalising all costs of family/children care to the employee etc. and the State wants to change their behaviour (because of macroeconomic efficiency, equity and equality and other social arguments), he has either to offer massive incentives (subsidies/tax reductions etc.) or to threaten the discriminating employer by massive disincentives (sanctions). The higher the (direct and indirect) 'costs' of discrimination the more likely the change of behaviour. We would therefore stress economic cost/utility arguments in favour of more efficient sanctions. We think that a positive incentive will be in most cases less efficient than a massive sanction. 'Soft' law is an instrument which may help in rising awareness and sensitivity but beyond 'soft' law we think we need more powerful instruments. Again: the employer association is strongly opposing any changes in the existing regulations of sanctions, whereas trade unions and other support more efficient sanctions.

### 4.3 Equal pay and gender pay gap

Different factors anticipate that the right of equal pay for work of equal value has not yet become legal reality in Germany. The causes of still limited effects are in parts due to the German rules of entitlement. The following list outlines essential shortcomings of equal pay legislation in Germany (see Winter 1998 and 2003):

- First, the possibilities for legal action are very restricted. Once women claim for equal pay, it is an individual claim. Groups of plaintiffs or organisations are not authorised to file suit. No class action possible.
- Secondly, rules of procedure for the application of the principle of pay equity are missing (Ontario model). Rules of procedure would above all compel the social partners responsible for the remuneration structures to discharge their duties.
- Finally, one of the main point seems to be the absence of institutions that are commissioned to inform and teach about the legal basis and its implementation, with controlling authorities and possibly the power to initiate legal action.

➤ *To what extent would a requirement for an independent review/analysis of job grading be helpful in strengthening equal pay legislation?*

A contract for a legal opinion on the federal employees' collective pay agreement commissioned by the trade union for public services, transport and traffic (ÖTV, now part of the trade union ver.di) and carried out by Winter (1997) brought not only about that other trade unions followed and commissioned corresponding expert opinions on their payment agreements (see point 2.2.1.2). The legal reports also initiated a more intensive debate on the composition of a discrimination free assessment of work within collective payment agreements which should meet with the demands of EU legislation (see Naudit 1999). Furthermore, the ÖTV awarded two contracts for research projects to be carried out. These projects were based on a comparison in which selected male- and female dominated work in the public sector was reassessed (see Krell et al. 2001; Stefaniak et al. 2001). After all, both the legal opinions and the results of the projects led to a discussion about the renewal of the employees' collective pay agreement in the public sector (see point



2.2.3.1). Overall, the systematic examination of an (highly complex) classification system and remuneration agreement in the public sector had considerable effects – noteworthy, not only the trade union but also the public employer were involved in this process.

This example stresses that a requirement for an independent review or analysis of job grading in fact could be helpful in strengthening equal pay legislation.

➤ *What is the current involvement of the state or social partners in monitoring equal pay and in what ways could monitoring be made more effective?*

The state published a comprehensive report on women's and men's employment and income in 2001. This report describes above all the general status quo. One chapter deals with German job evaluation systems and payment agreements, another, really small chapter deals with an analysis of statistical shortcomings (see WSI et al.: chapter 6 and 8 and see Maier 2002). The government plans that the next report solely concentrates on job evaluation and classification systems (Einruppierungssysteme). The Government published also an equal pay guideline just now (see Tondorf/Ranftl 2003) and carried out an international equal pay conference in the last year (see BMFSFJ 2003). Within the German trade unions only ver.di is dealing explicitly with gender pay equity in the public sector at the moment (see 2.2.3.1).

➤ *How restrictive do you regard the current restriction of EU law to pay comparisons within the same employer for the purpose of establishing equal value or work rated as equivalent?*

Already the comparison within the same employer with different branches and heterogeneous work places proves to be outstanding problematic, namely in a political not in a scientific sense. The reluctance of workplace and at the same time always pay comparisons is backed by an imprecise or better: complicate legislation in sense of its interpretation. The problem of comparisons became apparent in one of the research projects of the ÖTV (see Krell et al. 2001). In the course of this project difficulties arose on the one hand when choosing comparable pairs, on the other hand when presenting the results of the comparison. Both, the choice and the results were criticised (again: in a political not in a scientific way) not only because the comparable pairs belonged to

different branches but also because they were subject to different collective payment agreements.

Viewing the formation of comparable pairs in practice, the existing equal pay legislation should as the above example shows be formulated more precise. In doing so the possibilities of choosing comparable pairs should be amplified so that jobs which are subject to different collective pay agreements and to different branches within the same employer explicitly can be compared. As in Germany still exists a strong gender-specific job segregation we assume that it would be important to allow comparisons between different employers or at least with the aid of hypothetical comparators.

- *What would be the potential benefits of extending the scope for comparisons across employing organisations or allowing the use of hypothetical comparators for equal pay claims?*

There are considerable pay differences between sectors and jobs in Germany whereby earnings in female dominated sectors and jobs are throughout lower than in male dominated sectors and jobs (for data see Maier 2002; WSI et al 2001). Having in mind these strong gender wage differentials between different sectors and jobs we assume that a comparison of different employers and sectors could support a more transparent wage system and thereby reduce the structural problem of indirect pay discrimination.

#### **4.4 Eliminating derogations**

The German system develops slowly into the direction given by the directive: retirement age and pension age are increasing for women, widows pensions are decreasing – there is a longer period of transition, because a rapid introduction would increase old women's poverty dramatically. Most female pensioners do have a higher widows' pensions than own pensions. As we developed at many places of this report the majority of German women is still living a discontinuity in employment (and therefore in contributions to own pensions etc.). The individualisation of rights and benefits in pensions, the increase in pension/retirement age creates a problem, if the labour market integration of women does not allow a full individual pension, an employment contract in higher age groups etc. The direction followed by the Government is therefore one sided,

as it takes special rights away without giving/offering equal opportunities in a material sense. We think we are in need of a combined strategy, based on the increase of women's labour force participation in jobs with wages sufficient for independent living and reduction of housewife-regulations in Germanys social security and tax law. The recent developments in the labour market, the rapid increase of 'mini-jobs' below the social security level, the decreases in unemployment benefits etc., the increase of female 'discouraged workers' on one hand, and the new elements of higher retirement age, falling widow's pensions etc. will resulting in a growing number of 'poor' old women for the next generations to come.

#### **4.5 Positive Action**

As the German equal opportunities policies have – right from the beginning – included positive action as a central element and as positive actions have been one of the elements heavily under controversy (especially in legal terms, given our Constitution), we would like to strengthen the arguments in favour of positive action. We think a positive definition of positive action is necessary and would help to clarify the legal definition of equality and discrimination. The provision in our Constitution is nowadays more open for positive action and this approach should be strengthened. We agree from the German situation that an encouragement for positive action is quite more efficient than a permissive or exemption approach. The cases of Kalanke and others show clearly that there is a need for encouraging positive action, on all levels of actors. Positive action is the counterpart to sanctions and helps to remedy unequal outcomes of policies.

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