



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 27.03.1996  
COM(96) 93 final

96/0095 (CNS)

Proposal for a  
COUNCIL DIRECTIVE  
amending Directive 76/207/EEC on the implementation of the principle of  
equal treatment for men and women as regards access to employment,  
vocational training and promotion, and working conditions

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(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. Introduction

On 17 October, 1995, the European Court of Justice delivered its judgment in Case C-450/93, (Eckhard Kalanke v Freie Hansestadt Bremen), which has given rise to a great deal of controversy throughout Europe. This controversy was caused by the uncertainty created by the judgment concerning the legitimacy of quotas and other forms of positive action aimed at increasing the numbers of women in certain sectors or levels of employment.

Equal treatment between men and women at work constitutes a fundamental right, as has been acknowledged by the European Court of Justice in its judgment in Case 149/77, Defrenne III. The Commission considers that, at a time when equality of opportunity for women has been recognized at the highest level (Essen, Cannes and Madrid European Councils) to be a task of paramount importance - together with the fight against unemployment - it is crucial to reaffirm the need to use, where appropriate, "positive action" measures to promote equal opportunities for women and men, in particular by removing existing factors of inequality which affect women's opportunities in the employment area.

The Commission has always adopted a very favourable attitude towards positive action. In 1984, it put forward a proposal for a recommendation on the promotion of positive action<sup>(1)</sup> which was adopted by the Council.

In the Kalanke case, the issue was whether a German law on positive action was compatible with Directive 76/207/EEC<sup>(2)</sup> or whether it exceeded the exception for positive action laid down therein. The law of the Land of Bremen on equal opportunities in the public sector provides that, as regards both recruitment and promotion in sectors where women are under-represented, namely if they do not represent 50% of the personnel in the different grades of the category concerned, a woman having the same qualifications as a male applicant must be given preference over him.

The Court had to decide whether it was lawful to give women preference over male candidates in the event of a promotion in sectors where they were under-represented provided that their qualifications were the same.

The Commission, in its Communication of ... has made clear its interpretation of this judgment, as well as its own appreciation of positive action.

In its judgment, the European Court of Justice makes it clear, amongst other points, that "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive".

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(1) Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ No L 331, 19.12.1984, p. 34).

(2) Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ No L 39, 14.2.1976, p. 40).

The Commission considers that the Court has only condemned the special feature of the Bremen law which consists in the automaticity of the measure, giving women absolute and unconditional right to appointment or promotion. Therefore, the Commission takes the position that the only type of quota system which is unlawful is one which is completely rigid and does not leave any possibility of taking account of individual circumstances. Member States and employers are thus free to have recourse to all other forms of positive actions, including flexible quotas.

The Commission is anxious that the controversy to which the Kalanke case has given rise should be ended definitively. Therefore, notwithstanding the limited nature of the impact of this judgment as properly construed, the Commission believes that it is necessary to amend the wording of Article 2(4) of Directive 76/207/EEC so that the text of the provision specifically permits the kinds of positive action which remain untouched by Kalanke. Thus, all kinds of positive action will be permitted, provided they allow for the assessment of the particular circumstances of the individual case.

The amendment is of an interpretative nature.

## **II. Comments on the Articles**

### **Article 1**

The text reflects the interpretation of the Kalanke judgment by the Commission according to which a wide range of action (see Communication on the Kalanke judgment) to promote access to employment and promotion of members of the under-represented sex continues to be legal. "Positive action" measures have to leave the possibility for the employer to assess particular factors that justify the choice of a person who does not belong to the under-represented sex.

The wording takes account of the fact that equality policy is a policy to promote equal opportunities for men and women.

### **Articles 2 and 3**

These Articles contain the usual provisions for transposal into the national law of the Member States.

## **III. Justification for the proposal with regard to the principle of subsidiarity**

The proposal for an amendment of Directive 76/207/EEC complies with the principle of subsidiarity as regards its two criteria, namely necessity and proportionality as laid down in Article 3b of the Maastricht Treaty.

The first criterion, namely the necessity to undertake Community action, is satisfied in that action is required in order to avoid possible confusion on the part of national and Community authorities at all levels that are called upon to apply Community law and particularly Article 2(4) of the existing Directive 76/207/EEC. The Kalanke judgment has given rise to diverging interpretations that threaten the effectiveness of positive action in favour of the under-represented sex. As it is generally recognized that equal access to

employment is one of the most important conditions for the implementation of the principle of equal treatment which is one of the fundamental rights forming part of the general principles of Community law<sup>(3)</sup>; the amendment will help to enable the implementation of the Directive in a consistent and uniform manner.

As for the second criterion, the proposed Directive corresponds to the requirement of proportionality in so far as the amendment is only of a declaratory nature and does not alter the scope of the Directive.

### **Consultation process**

The Commission has consulted the social partners on the Communication on the Kalanke case. This proposal for an amendment of Directive 76/207/EEC reflects the interpretation given in the Communication and transforms the contents of the Communication into a legally-binding document.

### **Application in the EEA States**

Directive 76/207/EEC is part of the acquis communautaire of the Agreement on the European Economic Area that entered into force with effect from 1 January 1994.

Directive 76/207/EEC features in the list of the instruments of secondary legislation agreed by the EEA States (Annex XVIII, point 18).

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<sup>(3)</sup> See inter alia Case C-149/77 (Defrenne III, judgment of 15 June 1978).

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament<sup>(1)</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>(2)</sup>,

Whereas Article 2(4) of Council Directive 76/207/EEC<sup>(3)</sup> states that "this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)";

Whereas the Member States have undertaken various forms of positive action in order to achieve the implementation of the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion, as well as in respect of working conditions;

Whereas in the light of the case law of the Court of Justice of the European Communities, notably in its judgment of 17 October 1995 in Case C-450/93 (Kalanke v Freie Hansestadt Bremen)<sup>(4)</sup> concerning Article 2(4) of Directive 76/207/EEC, positive action measures may favour the access of the under-represented sex to employment, appointment and promotion to particular posts, including the giving of preference to the under-represented sex, provided that any system providing for such preference allows account to be taken of the particular circumstances in a given case;

Whereas it is appropriate to clarify Article 2(4) of Directive 76/207/EEC in a manner consistent with the case-law;

Whereas positive action measures should be capable of benefiting members of whichever sex is under-represented in a given sector or level of employment;

Whereas the Treaty provides no powers other than those in Article 235 for the adoption of this Directive,

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(1)

(2)

(3) OJ No L 39, 14.2.1976, p. 40.

(4) [1995] ECR I-3051.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Article 2(4) of Directive 76/207/EEC is replaced by the following:

" 4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the under-represented sex in the areas referred to in Article 1(1). Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case."

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 December 1998 at the latest or will ensure by that date at the latest that management and labour have introduced the necessary measures by agreement, the Member States being required to take any necessary measure enabling them at any time to be in a position to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the Council  
The President

## IMPACT ASSESSMENT FORM

### **IMPACT OF THE PROPOSAL ON BUSINESS, WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES**

Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The objective is to clarify an act of secondary legislation (Directive 76/207/EEC) as interpreted by the Court of Justice. A proposal for an amended Directive is the only way to do this.

Who will be affected by the proposal?

As the amendment has a clarifying character only, employers are no more affected than they already are by Directive 76/207/EEC.

What will businesses have to do to comply with the proposal?

In so far as businesses have plans for preferential access of the under-represented sex, they have to provide for a clause that allows for the assessment of the individual case.

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# DOCUMENTS

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