



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.07.1996
COM(96) 340 final

96/0196 (PRT)

Proposal for a
COUNCIL DIRECTIVE

on the burden of proof in cases of discrimination based on sex

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. INTRODUCTION

1. On 27 May 1988 the Commission submitted a proposal⁽¹⁾ for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men. The Economic and Social Committee delivered its opinion on 27 October 1988⁽²⁾ and the European Parliament on 15 December 1988⁽³⁾.
2. This proposal was discussed by the Council on several occasions between 1988 and 1994. The legal basis - Articles 100 and 235 - requires unanimity, but this was not achieved. At the Council meeting of 23 November 1993, eleven of the (then) twelve Member States reached a consensus on the basis of the proposals from the Greek and Belgian Presidencies. As the required unanimity could not be obtained, the Commission undertook to initiate the procedure under Article 3 of the Agreement on social policy annexed to the Treaty on European Union.
3. On 5 July 1995 the Commission therefore gave its approval for consultation of the social partners on a text outlining the Commission's past initiatives and proposals on the burden of proof. The document also set out the European Court of Justice's case law in this matter. 39 organizations were consulted. After the consultation period of six weeks had been extended, the Commission received 20 replies.
4. All the replies stressed that correct application of Community legislation on equal opportunities for men and women was vital. As a result, the fact that it is difficult and sometimes impossible in practice for plaintiffs to prove that a manifest difference in employment constitutes illegal discrimination is commonly seen as an obstacle to full implementation of the principle of equality. The vast majority of the replies refer to the settled case law of the Court of Justice in this matter.
5. After studying these reactions, the Commission decided on 7 February 1996 to launch the second round of consultation of the social partners under Article 3(3) of the Agreement on social policy. During the second round, the Commission clearly announced its intention of presenting a directive on this matter. As regards the probable content of the directive, it made it known that it intended to propose a change rather than a complete reversal of the burden of proof. It also stated that it would put forward a definition of the concept of indirect discrimination in the light of the Court's case law. The same 39 organizations were consulted. After the consultation period of six weeks had been extended, the Commission received 19 replies.
6. As in the first round, all the respondents consider that it is important to apply the principle of equality correctly. Having said that, some organizations (especially the employers' federations) think that the Court's case law as it stands guarantees full application of this principle. Others (the trade union federations) claim that the case law is far from being applied effectively and plead for the adoption of a binding instrument which some respondents feel should provide for a clear reversal of the burden of proof along with a definition of indirect discrimination.
7. In the light of these consultations, the Commission considers that Community action is necessary to ensure that the principle of equal treatment is complied with scrupulously and has therefore decided to present a proposal for a directive.

(1) OJ No C 176, 5.7.1988, p. 5.

(2) OJ No C 337, 31.12.1988, p. 58.

(3) OJ No C 12, 16.1.1989, p. 180.

II. CONTEXT

1. General considerations

8. Promoting equal opportunities for women and men has been a key policy of the European Community for 20 years. Starting with Article 119 of the Treaty of Rome, a sound legal basis was established guaranteeing men and women the right to equal pay for the same work or work of equal value⁽⁴⁾, and equal treatment as regards all aspects of work, including self-employed work⁽⁵⁾, and various aspects of social security⁽⁶⁾. The directive on the protection of pregnant women⁽⁷⁾ also contributes to achieving the principle of equal treatment. These guarantees of equality have been transposed into national law and have considerably improved the economic, occupational and social situation for men and women throughout the European Union.
9. However, although the legal framework is fairly comprehensive, equality is still not accessible to everyone in the European Union⁽⁸⁾. Sexual discrimination still exists and the sufferers are still unable to put a stop to it for several reasons. Not enough is known about Community law in this matter, either by individuals or in legal circles, some of the complex concepts (such as indirect discrimination) are difficult to understand, legal proceedings - in which, moreover, it is very difficult to prove discrimination - are held to be protracted and costly and, what is more, there are no effective penalties which act as a deterrent to discrimination.
10. The procedural problems encountered by people who are discriminated against and the fact that they do not know their rights effectively deprive them of much of their ability to enforce the fundamental rights enshrined in Community legislation. One of the main problems here is proof, which plaintiffs who have been discriminated against find difficult and sometimes impossible to establish under normal circumstances, partly because it is the defendant who normally has the relevant information and evidence. Another major problem is understanding and applying the concept of indirect discrimination.
11. Fourth medium-term Community action programme for equal opportunities for men and women (1996-2000) adopted by the Council on 22 December 1995⁽⁹⁾ sets itself the goal of improving the conditions for exercising rights to equality. In the Communication accompanying the proposal⁽¹⁰⁾, the Commission made provision for information and awareness-raising activities and campaigns designed to promote a better understanding and improved application of such rights. It also stated that it had undertaken to initiate the procedure under Article 3 of the Agreement on social policy annexed to the Treaty on European Union with respect to the burden of proof.

⁽⁴⁾ Council Directive 75/117/EEC, OJ No L 45, 19.2.1975, p. 19.

⁽⁵⁾ Council Directives 76/207/EEC, OJ No L 39, 14.2.1976, p. 40 and 86/613/EEC, OJ No L 359, 19.12.1986, p. 56.

⁽⁶⁾ Council Directives 79/7/EEC, OJ No L 6, 10.1.1979, p. 24 and 86/378/EEC, OJ No L 225, 12.8.1986, p. 40.

⁽⁷⁾ Council Directive 92/85/EEC, OJ No L 348, p. 1.

⁽⁸⁾ *Access to Equality between Men and Women in the European Community*. Records of the Proceedings of the European Conference. Louvain-la-Neuve, 1992
Sex Equality Litigation in the Member States of the European Community: A Comparative Study. B. Fitzpatrick et al 1994
The Utilisation of Sex Equality Litigation Procedures in the Member States of the European Community: A Comparative Study. B. Fitzpatrick et al 1996.

⁽⁹⁾ Council Decision 95/593/EEC of 22 December 1995, OJ No L 335, 30.12.1995, p. 37.

⁽¹⁰⁾ COM(95) 381 final.

12. In its Resolution of January 1994⁽¹¹⁾ on the White Paper on European Social Policy, the European Parliament asked the Commission to present a directive on this matter. It is therefore a question of taking up the matter again on the basis of the consensus which has emerged in the Council.

2. Adjustment of the rules on the burden of proof

13. The Court of Justice first examined the question of the burden of proof back in 1989, ruling in a case of indirect discrimination in the context of equal pay in *Danfoss*⁽¹²⁾. In this case, the Court had to decide whether, if an enterprise's wage structure lacks transparency, it is up to the employer to prove that his remuneration practice is not discriminatory, when a female worker establishes that, for a relatively high percentage of the workforce, women are paid less than men on average. The Court (paragraph 13) stressed that in a situation where "a system ... is completely lacking in transparency is at issue, female employees can establish differences only so far as average pay is concerned. They would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of introducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory". The Court went on to say (paragraph 14) that "the concern for effectiveness which thus underlies the directive [75/117/EEC (and in particular Article 6)] means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality". As regards lack of transparency, the Court showed great concern at this phenomenon in *Commission v France*⁽¹³⁾, which dealt with an intransparent recruitment system.
14. This case law was developed in *Enderby*⁽¹⁴⁾ in 1993. Here, the situation was different as the pay system was transparent. The Court stressed (paragraph 18) that "where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is in fact not discriminatory".
15. In its judgment of 31 May 1995 in *Royal Copenhagen*⁽¹⁵⁾, the Court confirmed its case law, stressing that (paragraph 24) "the Court has, however, held (judgment of 27 October 1993 in *Enderby*) that the burden of proof, which is normally on the worker bringing legal proceedings against his employer with a view to removing the discrimination of which he believes himself to be the victim, may be shifted when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay".
16. Court thus holds that the burden of proof must be shifted when discrimination appears to exist possibly in connection with a lack of transparency in the system used. If this proves to be the case, the burden of proof must revert to the defendant in order for the principle of equality to be applied in practice.

(11) OJ No C 43, 20.2.1995, p. 63.

(12) Case C-109/88, judgment of 17.10.1989, ECR 1989, p. 3199.

(13) Case C-318/86, judgment of 30 June 1988, ECR 1988, p. 3559.

(14) Case C-127/92, judgment of 27.10.1993, ECR 1993, p. I-5535.

(15) Case C-400/93, judgment of 31.5.1995, not yet published.

17. The concept of shifting the burden of proof (as an exception to the general principle) is not unknown in the positive law of the Member States. Seven countries (Austria, France, Germany, Italy, Finland, Spain and Sweden) have explicit regulations transferring the burden of proof in cases of discrimination based on sex. The other eight (Belgium, Denmark, Greece, Ireland, Luxembourg, the Netherlands, the United Kingdom and Portugal) have special rules on the burden of proof in the specific areas of pay, dismissal and maternity.
18. This legal interpretation is, moreover, not unfamiliar in Community law, as it exists in the area of consumer protection. The 1985 Directive⁽¹⁶⁾ provides that the producer is liable for damage caused by a defective product unless he can prove the contrary.

3. Indirect discrimination

19. Neither Article 119 of the Treaty nor Directive 75/117/EEC contains any reference to indirect discrimination. However, all the other directives adopted subsequently in this area prohibit both indirect and direct discrimination based on sex. All the same, there is no definition of indirect discrimination in the secondary legislation. It can be described as discrimination which, "although it does not actually refer to sex, has effects in practice which are no different to unequal treatment which is expressly linked to sex"⁽¹⁷⁾.
20. The Court has delivered a great many judgments⁽¹⁸⁾ in which it defines and prohibits this form of discrimination. This applies equally in the matter of equal pay.
21. The hallmarks of indirect discrimination are as follows:
 - 21.1 In the first place, discrimination must result from an apparently neutral criterion which affects a greater number of persons of one of the sexes. Examples of the type of criteria which could result in differences in treatment are marital status, part-time employment, mobility and length of service. As regards the second aspect, i.e. that the neutral measure affects a considerably larger proportion of persons of one sex, the Court held that this was a matter of fact which it was for national courts to determine.

⁽¹⁶⁾ Council Directive 85/374/EEC of 27 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ No L 210, 7.8.1985, p. 29.

⁽¹⁷⁾ Conclusions of Advocate-General M. Mancini in *Teuling*, 30/85.

⁽¹⁸⁾ Cases 96/80 *Jenkins*, ECR 1981, p. 911; 170/84 *Bilka*, ECR 1986, p. 1607; 237/85, *Rummler*, ECR 1986, p. 2101; 30/85 *Teuling*, ECR 1987, p. 2497; 171/88 *Rinner-Khün*, ECR 1989, p. 2743; 102/88 *Ruzius*, ECR 1989, p. 4311; 109/88 *Danfoss*, ECR 1989, p. 3199; C-33/89 *Kowalska*, ECR 1990, p. I-2591; C-184/89 *Nimz*, ECR 1991, p. I-2265; C-360/90 *Bötel*, ECR 1992, p. I-3589; C-226/91 *Molenbroek*, ECR 1992, p. I-5943; C-328/91 *Thomas e.a.*, ECR 1993, p. I-1247; C-343/92 *Roks e.a.*, ECR 1994, p. I-571; C-317/93 *Nolte*, ECR 1995, p. I-4625; C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 *Helmig e.a.*, ECR 1994, p. I-5727; C-444/93 *Megner and Scheffel*, ECR 1995, p. I-4741; C-280/94 *Posthuma-van Damme e.a.*; C-547/93 *Lewark*; C-8/94 *Laperre*, not yet published.

- 21.2 In the second place, once it has been established that there is a difference in treatment as a result of a neutral criterion being applied, the defendant may prove that he or she is pursuing an important aim in so doing. This aim, as such, must be deserving of protection and must be sufficiently important to justify it taking precedence over the principle of equal treatment. Examples of such aims which could justify the principle of equal treatment being waived are a genuine need on the part of the enterprise, guarantee of a social level of minimum subsistence for persons with dependent children or spouse (in Member States where this concept exists) or aims enshrined in Member States' social policy.
- 21.3 In the third place, the means employed to achieve the aim must be suitable and necessary. As a rule, the Court leaves it to the national court to decide, regarding it as a matter of fact. In the field of social policy, however, the Court has, in some cases, held that the national legislature might reasonably consider that the means were appropriate for attaining a legitimate objective and were necessary, hence concluding that they did not constitute sexual discrimination.
- 21.4 Finally, in the case of indirect discrimination there is a shift in the burden of proof. First, the existence of a difference in treatment resulting from the application of a criterion or measure which is apparently neutral must be established and then it is up to the defendant to prove that he or she is pursuing an important objective by appropriate and necessary means.
22. There is a specific definition of indirect discrimination in Ireland, Italy and the United Kingdom. In six other countries (Belgium, Denmark, Finland, Greece, the Netherlands and Sweden) this concept is not really defined but discrimination on the basis of criteria such as family status or others is expressly forbidden. In the other Member States (Germany, France, Spain, Luxembourg, Austria and Portugal) the term "indirect discrimination" does not occur as such in the legislation. However, a general ban on discrimination based on sex also covers this specific form of discrimination.

III. JUSTIFICATION WITH REGARD TO SUBSIDIARITY

23. The reason why de facto discrimination still exists is because it is difficult or even impossible to prove the existence of discrimination based on sex. Even though both the relevant Community law and national legislation quite clearly affirm the principle of equal treatment, there are obstacles to applying it in practice, especially with regard to proof.
24. The use of a Community legislative instrument in this area is in keeping with the principle of subsidiarity. The Court of Justice's case law with regard to the burden of proof in the Member States is far from being applied uniformly. The Community instrument is necessary to enable the case law relating to the burden of proof and indirect discrimination to be applied effectively and uniformly, and both to make it clear that the Court's case law relating to the burden of proof extends to areas of equal treatment other than equal pay and to facilitate the transposition into national law of the concept of indirect discrimination, which is not always properly understood. Moreover, the content of the proposed instrument complies with the principle of proportionality, as it will lay down minimum requirements, giving the Member States the greatest possible latitude in determining how the principle of shifting the burden of proof in the matter of equal treatment is to be applied. It should also be stressed that the Council is favourably disposed towards this proposal. In November 1993, eleven of the then twelve Member States were in favour of adopting a directive on this subject.

25. The Community legislation will have no direct impact on enterprises' operations. In the first instance, it will not cover the internal organization of enterprises but will apply solely where legal redress is sought. This means that enterprises will not have to adopt specific measures to adapt to the change in procedure. In the second instance, this Directive does not aim to create any new rights, as it both follows the line of reasoning adopted in the Court's case law and is intended to bring about more effective application of the principle of equal treatment which is part of the *acquis communautaire* and is already a fundamental right under the general principles of Community law⁽¹⁹⁾. Finally, such legislation will not impose any administrative, financial or legal constraints which could hinder the creation and development of SMEs.

IV. COMMENTARY ON THE ARTICLES

26. The legal basis is Article 2(2) of the Agreement on social policy annexed to the Treaty on European Union⁽²⁰⁾, which expressly provides for Community legislation on equal treatment. Article 2(2) also provides for legislation to take the form of a Council directive. The Agreement on social policy was chosen as the legal basis because the Commission's 1988 proposal was blocked in the Council.
27. The proposal for a Directive comprises three chapters - general provisions, specific provisions on the burden of proof, the definition of indirect discrimination and the procedure for obtaining evidence, and final provisions.

Chapter I, General provisions

This chapter covers the aim and scope of the Directive.

Article 1 - Aim

This Article indicates the aim of the Directive and is largely based on Article 6 of Council Directive 76/207/EEC.

Article 2 - Definition

This Article defines the principle of equal treatment and draws on existing Community provisions.

Article 3 - Scope

The Directive is to apply to all Community equality provisions and hence all public and private procedures except criminal procedures.

Chapter II, Specific provisions

This chapter deals with three specific issues - the burden of proof, the procedures to be followed to obtain evidence and the concept of indirect discrimination.

⁽¹⁹⁾ See, *inter alia*, Case C-149/77 (*Defrenne III*), judgment of 15 June 1978, ECR 1978, p. 1365.

⁽²⁰⁾ "With a view to achieving the objectives of Article 1, the Community shall support and complement the activities of the Member States in the following fields:

(...)

- equality between men and women with regard to labour market opportunities and treatment at work".

Article 4 - Burden of proof

This Article sets out how the burden of proof is shifted in accordance with the Court's case law. In paragraph 1 the Commission proposes that the burden of proof reverts to the defendant as soon as the plaintiff has established, by showing a fact or a series of facts, the existence of less favourable treatment caused by apparent discrimination (*Royal Copenhagen*, paragraph 24). The defendant must then prove that the principle of equality has not been infringed by showing that there are objective reasons unrelated to sex which justify the difference in treatment (*Enderby*, paragraph 19). Once the presumption of discrimination has been established, the Member States are asked to place the onus on the defendant to provide conclusive evidence that the difference in treatment was not illegal, with the plaintiff enjoying the benefit of any doubt concerning the exact interpretation of the facts.

The defendant's intentions to discriminate or not may not be taken into account in such cases.

Paragraph 2 authorizes the Member States to reverse the burden of proof altogether and is introduced to comply with the principle of subsidiarity and to take account of the fact that this Directive contains minimum requirements. In this case, as soon as the plaintiff claims that he or she has been a victim of less-favourable treatment, it is for the defendant to prove positively and objectively that discrimination has not taken place.

Article 5 - Procedures

This Article requires that information necessary to present a case can be obtained from the party in whose possession it is or who can reasonably be asked to collect it, if doing so does not impose too heavy a burden on this party.

Article 6 - Indirect discrimination

This Article sets out the concept of indirect discrimination as defined by the Court.

Chapter 3, Final provisions

This chapter mainly contains provisions taken from Community equality directives, including the information of the persons concerned and directives laying down minimum requirements on social matters.

Proposal for a
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on the burden of proof in cases of discrimination based on sex

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Agreement on social policy annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 2(2) thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

Acting in accordance with the procedure referred to in Article 189c of the EC Treaty, in cooperation with the European Parliament⁽³⁾,

Whereas, on the basis of the Protocol on social policy annexed to the Treaty, the Member States, except the United Kingdom of Great Britain and Northern Ireland (hereinafter called "the Member States"), wishing to implement the Social Charter of 1989, have established an Agreement on social policy;

Whereas the Community Charter of the Fundamental Social Rights of Workers acknowledges the importance of combating all forms of discrimination, especially those based on sex, colour, race, opinions and beliefs; whereas on 13 December 1995 the Commission adopted a Communication⁽⁴⁾ on racism, xenophobia and anti-semitism;

Whereas paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers concerning equal treatment for men and women provides, *inter alia*, that "action should be intensified to ensure the implementation of the principle of equality for men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development";

Whereas the Council, despite the existence of a broad consensus amongst the majority of the Member States, has not been able to act on the proposal⁽⁵⁾ for a directive on the burden of proof in the area of equal pay and equal treatment for women and men;

Whereas the European Parliament in its Resolution of January 1994⁽⁶⁾ on the White Paper on European social policy asked the Commission to present a proposal for a directive regarding the burden of proof;

Whereas the Commission, in accordance with Article 3(2) of the Agreement on social policy, has consulted the social partners at Community level on the direction Community action might take with respect to the burden of proof in cases of discrimination based on sex;

(1) OJ No C

(2) OJ No C

(3) Opinion of the European Parliament of ... (OJ No C ...), common position of the Council of ... (OJ No C...).

(4) COM(95) 653 final.

(5) OJ No C 176, 5.7.1988, p. 5.

(6) OJ No C 43, 20.2.1995, p. 63.

Whereas the Commission, considering Community action advisable after such consultation, once again consulted those social partners on the content of the envisaged proposal in accordance with Article 3(3) of the said Agreement; and whereas the latter forwarded their opinion to the Commission;

Whereas, after the second round of consultation, the social partners have not informed the Commission of their wish to initiate the process - possibly leading to an agreement - provided for in Article 4 of the said Agreement;

Whereas, in accordance with Article 1 of the Agreement, the Community and the Member States have set themselves the objective of improving living and working conditions; whereas effective implementation of the principle of equal treatment for men and women contributes to achieving this aim;

Whereas the principle of equal treatment has been set out in Article 119 of the EC Treaty and in Council Directive 75/117/EEC⁽⁷⁾ on equal pay for men and women, as well as in Council Directive 76/207/EEC⁽⁸⁾ on access to employment, vocational training and promotion and working conditions, Council Directive 86/613/EEC⁽⁹⁾ on workers engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of motherhood, Council Directive 79/7/EEC⁽¹⁰⁾ on social security and Council Directive 86/378/EEC⁽¹¹⁾ on occupational social security schemes;

Whereas Council Directive 92/85/EEC⁽¹²⁾ on health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding also contributes to effectively achieving the principle of equal treatment between men and women; whereas that Directive should not work to the detriment of the aforementioned directives concerning equal treatment; whereas workers covered by that Directive should equally benefit from the change of the rules regarding the burden of proof;

Whereas effective implementation of the principle of equal treatment requires that additional measures be taken in relation to procedure and evidence to be provided before national courts or other competent authorities;

Whereas plaintiffs would be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination was not to impose upon the defendant the burden of proving that his practice is not in fact discriminatory;

Whereas the Court of Justice of the European Communities has therefore held⁽¹³⁾ that the rules regarding the burden of proof must change when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, it must revert to the defendant when evidence of such discrimination is brought;

(7) OJ No L 45, 19.2.1975, p. 19.

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

(9) OJ No L 359, 19.12.1986, p. 56.

(10) OJ No L 6, 10.1.1979, p. 24.

(11) OJ No L 225, 12.8.1986, p. 40.

(12) OJ No L 348, 28.11.1992, p. 1.

(13) Judgment of 17 October 1989 in Case C-109/88, *Danfoss*, [1989] ECR 3199, para. 16; judgment of 30 June 1988 in Case C-318/86, *Commission v France*, [1988] ECR 3559, para. 27; judgment of 27 October 1993 in Case C-127/92, *Enderby v Frenchay Health Authority*, [1993] ECR I-5535, paras. 13 and 14; and judgment of 31 May 1995 in Case C-400/93, *Royal Copenhagen*, [1995] ECR I-1275, para. 24.

Whereas it is all the more difficult to prove that discrimination exists when it is indirect; and whereas it is therefore important to define indirect discrimination precisely;

Whereas the aim of achieving an adequate shift in the burden of proof is not achieved satisfactorily in the Member States and in accordance with the principles of subsidiarity and proportionality set out in Article 3b of the Treaty establishing the European Community; this aim must be attained at Community level; whereas this Directive confines itself to the minimum action required and does not go beyond what is necessary for that purpose,

HAS ADOPTED THIS DIRECTIVE:

Chapter 1: General provisions

Article 1

Aim

The aim of this Directive is to ensure that measures taken by the Member States in the application of the principle of equal treatment in order to enable all persons, who consider themselves wronged by failure to apply to them the principle of equal treatment, to pursue their claims by judicial process after possible recourse to other competent authorities, are made more effective.

Article 2

Definitions

1. For the purposes of this Directive, the principle of equal treatment shall mean the absence of any discrimination based on sex, either directly or indirectly, particularly by reference to marital or family status.
2. For the purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination exists where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex, by reference in particular to marital or family status, unless the aim pursued by the application of the provision, criterion or practice is objectively justified and the means of achieving it are appropriate and necessary.

Article 3

Scope

1. This Directive shall apply to:
 - (a) the situations envisaged by Article 119 of the Treaty and Directives 75/117/EEC, 76/207/EEC, 79/7/EEC, 86/378/EEC, 86/613/EEC and 92/85/EEC;
 - (b) the situations envisaged by any Community measure adopted in the future relating to the principle of equal treatment which does not expressly exclude its application;
 - (c) any civil or administrative procedure concerning the public or private sectors which provides for means of redress under national law in pursuance of the measures referred to in points (a) and (b).
2. This Directive shall not apply to criminal procedures, unless otherwise provided for by the Member States.

Chapter II: Specific provisions

Article 4

Burden of proof

1. Member States shall take such measures as are necessary in accordance with their national judicial systems:
 - (a) to ensure that where persons who consider themselves wronged by failure to apply to them the principle of equal treatment establish, before a court or other competent authority, facts from which discrimination may be presumed to exist, it shall be for the respondent to prove that there has been no contravention of the principle of equal treatment. The plaintiff shall benefit from any doubt that might remain;
 - (b) to ensure that it is for the defendant, when it applies a system or a decision lacking transparency, to prove that the apparent discrimination is due to objective factors unrelated to any discrimination based on sex;
 - (c) to ensure that the plaintiff does not have to prove the existence of any fault on the part of the defendant to establish that the ban on discrimination based on sex has been infringed.
2. This Directive does not prevent Member States from introducing evidential rules which are more favourable to the plaintiff.

Article 5

Procedures

Member States shall introduce into their national legal systems such measures as are necessary to ensure that:

- (a) the courts and other competent authorities may give such directions as are necessary for an effective investigation of any complaint relating to discrimination;
- (b) the parties concerned have all the relevant information in the possession of the other party or which may reasonably be assumed to be in its possession and which is necessary for them to exercise their rights. Parties are required to provide only pieces of information whose disclosure would not substantially damage their interests in connection with matters other than the litigation concerned.

Chapter III: Final provisions

Article 6

Information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all relevant persons by all appropriate means, for example at their place of employment.

Article 7

Non-regression

Implementation of the provisions of this Directive shall under no circumstances be sufficient grounds for justifying a reduction in the general level of protection of workers in the area to which it applies, without prejudice to the right of the Member States to respond to changes in the situation by introducing laws, regulations and contractual arrangements which differ from those existing when this Directive was notified, as long as the minimum requirements in the Directive are complied with.

Article 8

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001. 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 9

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

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