



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.11.1997
COM(97) 624 final

96/0196 (PRT)

Re-examined proposal for a

COUNCIL DIRECTIVE

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

(presented by the Commission pursuant to Article 189 c (d)
of the EC Treaty)

EXPLANATORY MEMORANDUM

The initial proposal for a Council Directive on the burden of proof in cases of discrimination based on sex, based on Article 2 (2) of Protocol (N°14) on social policy, annexed to the Treaty, was submitted by the Commission to the Council on 20 September 1996¹.

The main aim pursued by this proposal is to adjust the rules of the burden of proof in cases of discrimination based on sex and to ensure that procedural measures taken by Member States in this respect are made more effective.

The European Parliament and the Economic and Social Committee gave their opinion on 10 April 1997² and 27 February 1997³.

On 14 May 1997, the Commission transmitted to the Council an amended proposal⁴. The Council agreed on a common position on 24 July 1997⁵, which was adopted by the European Parliament on 6 November 1997 subject to 6 amendments. Out of these amendments, the Commission accepted four.

As regards the amendments accepted, the Commission has the following comments to make.

Amendment 1

Subject Insert in a recital a reference to the three social security Directives (79/7/CEE, 86/378/CEE and 86/613/CEE)

Comment Is in line with the Commission's opinion to include these three Directives in the scope of this Directive

Amendment 2

Subject Re-inserts recital 12 of the Commission's original proposal about the necessity of adopting additional measures in this area

Comment Corresponds to the Commission's opinion. This recital explains the need to adopt additional measures to ensure an effective implementation of the principle of equal treatment

Amendment 3

Subject Inserts in the definition of the concept of "indirect discrimination" more elements directly derived from the case-law

¹ OJ N° C 332, 17.11.1996, p. 11

² OJ N° C 132, 28.4.1997, p. 219

³ OJ N° C 133, 28.4.1997, p. 34

⁴ OJ N° C 185, 18.6.1997, p. 21

⁵ OJ N° C 307, 8.10.1997, p. 6

Comment Is more in line with the case-law of the Court of Justice

Amendment 4

Subject Inserts a reference to the three social security Directives in the scope of the Directive

Comment Is in line with the Commission's opinion. The Commission considers that the principle laid down by the Court as regards the shift of the burden of proof is a general one which should be applied in all Directives aimed at upholding the principle of equal treatment between the sexes.

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COMMON POSITION

RE-EXAMINED PROPOSAL

Recital 8

Whereas the principle of equal treatment was stated in Article 119 of the Treaty and in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and in 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;

Whereas the principle of equal treatment was stated in Article 119 of the Treaty and in Council Directive 75/117/EEC on equal pay for men and women and in Council Directive 76/207/EEC on access to employment, vocational training and promotion and working conditions, Council Directive 86/613/EEC on workers engaged in an activity, including agriculture, in a self employed capacity, and on the protection of motherhood, Council Directive 79/7/EEC on social security and Council Directive 86/378/EEC on occupational social security schemes

Recital 11 a (new)

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;

Article 2.2

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 disadvantages a substantially higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Article 2.2

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, unless the aim pursued corresponds to a real need on the part of the undertaking or meets a necessary aim of the policy of a Member State and can be justified by objective

factors unrelated to sex, and the means of achieving that aim are appropriate and necessary.

Article 3.1.a

1. The Directive shall apply to:

a) the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC;

1. The Directive shall apply to:

a) the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC, 79/7/EEC, 86/378/EEC, 86/613/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC;

The Commission cannot accept the following amendments proposed by the Parliament

Amendment 5

Subject Insertion of a new Article 4a (about procedures)

Comment The deletion of Article 5 of the Commission's original proposal in the common position, that the amendment wishes to re-insert, does not really do any harm. In fact, that Article provided for something which already exists, in one way or another, in all the Member States' legal systems.

Amendment 6

Subject Inserts the obligation for the Member States to transmit on a regular basis information on the application of the Directive to the Commission, and for the Commission to draw up a report every three years.

Comment The wording of the common position is acceptable and is the outcome of a compromise which was difficult to reach.

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DOCUMENTS

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7