



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.05.1997
COM(97) 202 final

96/0196 (PRT)

Amended 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 a (2)
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 1996⁽¹⁾.

The main aim pursued by this proposal is to adjust the rules on 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 1997⁽²⁾ and 27 February 1997⁽³⁾ respectively.

In drawing up this amended proposal the Commission took into account the amendments from the European Parliament which aim at strengthening the main provisions of its original proposal, and in particular :

- a) the definition of the concept of "indirect discrimination". The amended proposal is more in line with the current case-law of the Court of Justice;
- b) the scope of the Directive. The amended proposal updates the original proposal and takes into account Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC;
- c) the adjustment of the burden of proof. The amended proposal makes more apparent the link with the concept of indirect discrimination defined in Article 2 of the proposal and the circumstances in which an adjustment of the burden of proof can occur.

This amendment is presented by the Commission under the terms of Article 189a (2) of the Treaty.

⁽¹⁾ OJ N° C 332, 17.11.1996, p.11

⁽²⁾ OJ N° ...

⁽³⁾ OJ N° ...

**Amended Proposal for a Council Directive on the burden of proof in cases of
discrimination based on sex**

COMMISSION PROPOSAL

**AMENDED COMMISSION
PROPOSAL**

THE COUNCIL OF THE EUROPEAN
UNION,

THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Agreement on social policy annexed to the Protocol (N°14), 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,

- (1) 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;
- (2) Whereas the Community Charter of the Fundamental Social Rights of Workers acknowledges the importance of combatting all forms of discrimination, especially those based on sex, colour, race, opinions and

⁽¹⁾ OJ N° C ...

⁽²⁾ OJ N° C ...

beliefs ; whereas on 13 December 1995 the Commission adopted a Communication⁽¹⁾ on racism, xenophobia and anti-semitism;

- (3) 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”;
- (4) 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⁽²⁾ for a directive on the burden of proof in the area of equal pay and equal treatment for women and men;
- (5) Whereas the European Parliament in its Resolution of January 1994⁽³⁾ on the White Paper on European social policy asked the Commission to present a proposal for a directive regarding the burden of proof;
- (6) 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;
- (7) 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

⁽¹⁾ COM(95)653 final

⁽²⁾ OJ N°C176, 5.7.1988, p.5

⁽³⁾ OJ N°C43, 20.5.1995, p.63

said Agreement ; and whereas the latter forwarded their opinion to the Commission;

- (8) Whereas, after the second round of consultation, the social partners have not informed the Commission on their wish to initiate the process - possibly leading to an agreement - provided for in Article 4 of the said Agreement;
- (9) 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;
- (10) Whereas the principle of equal treatment has been set out in Article 119 of the EC Treaty and in Council Directive 75/117/EEC on equal pay for men and women, as well as 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;
- (10) Whereas the principle of equal treatment has been set out in Article 119 of the EC Treaty and in Council Directive 75/117/EEC on equal pay for men and women⁽¹⁾, as well as in Council Directive 76/207/EEC on access to employment, vocational training and promotion and working conditions⁽²⁾ Council Directive 86/613/EEC on workers engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of motherhood⁽³⁾, Council Directive 79/7/EEC on social security⁽⁴⁾, Council Directive 86/378/EEC on occupational social security schemes⁽⁵⁾, Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC⁽⁶⁾

⁽¹⁾ OJ N°L 45, 19.2.1975, p.19

⁽²⁾ OJ N°L 39, 14.2.1976, p.40

⁽³⁾ OJ N°L 359, 19.2.1986, p.56

⁽⁴⁾ OJ N° L 6, 10.1.1979, p.24

⁽⁵⁾ OJ N° L 225, 12.8.1986, p.40, as amended by Directive 96/97/EC of 20.12.1996, OJ L 46 of 17.2.97, p. 20

⁽⁶⁾ OJ N° L 145, 19.6.1996, p.4

- (11) Whereas Council Directive 92/85 on health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding⁽¹⁾ 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;
- (12) 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;
- (13) 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;
- (14) Whereas the Court of Justice of the European Communities has therefore held ⁽²⁾ 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

⁽¹⁾ OJ N° L 348, 28.11.1992, p. 1

⁽²⁾ Judgment of 17 October 1989 in Case C-109/88, *Danfoss*, [1989] ECR 3199, paragraph 16; judgment of 30 June 1988 in Case C-138/86, *Commission v. France*, [1988] ECR 3559, paragraph 27; judgment of 27 October 1993 in Case C-127/92 *Enderby v. Frenchay Health Authority*, [1993] ECR I-5535, paragraphs 13 and 14; and judgement of 31 May 1995 in Case C-400/93, *Royal Copenhagen*, [1995] ECR I-1275, paragraph 24.

the defendant when evidence of such discrimination is brought;

(15) 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;

(16) 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,

(15) Whereas it is all the more difficult to prove that discrimination exists when it is indirect; and whereas, given that the concept has not been incorporated into national law in all Member States, it is therefore important to define indirect discrimination precisely, and provide for criteria whereby it can be established whether or not indirect discrimination exists;

(16) Whereas the aim of ensuring an adequate shift in the burden of proof has not been 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 I : 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 the possible recourse to other competent authorities, are made more effective

Article 2
Definitions

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.

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

Article 2
Definitions

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, *inter alia* by reference to marital or family status.

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 *inter alia* to marital or family status, unless the aim pursued corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State, in itself is completely unrelated to sex and as such is objectively justified and unless the means of achieving this aim 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, 92/85/EEC and 96/34/EC;

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:

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 as defined in Article 2 establish, before a court or other competent authority, a fact or 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;

(c) deleted

- (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 interest 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**

Article 7 **Non-regression**

Implementation of the provisions of this Directive shall under no circumstances be sufficient grounds for justifying an absence of positive action measures or 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.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2000. 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.

Not more than two years after the date of implementation of this Directive, and every three years thereafter, Member States shall transmit information to the Commission with respect to progress made in the application of this Directive and trends in the use of provisions contained therein, to enable the Commission to draw up a report for the Council and European Parliament every three years.

Article 9

Addressees

This Directive is addressed to the Member States.

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DOCUMENTS

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