



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 03.09.1997
SEC(97) 1443 final

96/0196 (PRT)

COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT

pursuant to the first subparagraph of Article 189 c (b) of the EC-Treaty

CONCERNING THE COMMON POSITION ADOPTED BY THE COUNCIL ON THE
AMENDED PROPOSAL FOR A COUNCIL DIRECTIVE ON THE BURDEN OF
PROOF IN CASES OF DISCRIMINATION BASED ON SEX

In 1988, the Commission submitted a proposal¹ for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men. The legal basis used, namely Articles 100 and 235 of the Treaty establishing the European Economic Community, required unanimity. However, it was not possible to achieve this.

After the entry into force of the Treaty on European Union, the Commission then undertook to institute the procedure provided for under Article 3 of the Agreement on Social Policy annexed to the Treaty. Following consultations with the social partners, the Commission considered that Community action was required to ensure proper observance of the principle of equal treatment, and therefore decided to submit a proposal² for a Directive based on Article 2(2) of the Agreement on Social Policy annexed to the Treaty on European Union.

This new proposal had the same objective as that dating from 1988 and proceeds from the following observation. Despite a fairly comprehensive Community legal framework, equality is still not accessible to everyone in the European Union. Sexual discrimination still exists and the sufferers are unable to put a stop to it. One of the main procedural problems encountered by people who are discriminated against is proof, which plaintiffs find difficult and sometimes impossible to establish under normal circumstances, partly because it is the defendant who normally has the relevant information and evidence.

The Commission's proposal draws on the principles established by the Court of Justice concerning the burden of proof, and aims to increase legal certainty by incorporating these into an act of Community law.

¹ OJ C 176. 5.7.1988. p. 5.

² OJ C 332. 7.11.1996. p. 11.

The **Economic and Social Committee (ESC)** adopted its opinion on 27 February 1997³.

The ESC broadly welcomed the Commission's initiative and considered that Community action was needed to uphold and enforce the principle of equal treatment.

Drawing attention to the fact that Community law does not include any definition of the term "indirect discrimination", the ESC welcomed the Directive's definition in line with the criteria laid down by the Court of Justice, since it enhances legal certainty.

The ESC proposed that Article 4(1), concerning the allocation of the burden of proof, be simplified in such a way that it is made easier for the plaintiff to furnish proof, while at the same time giving the defendant the opportunity to demonstrate that there has been no discrimination on the grounds of sex. Finally, it drew attention to the particular situation of small and medium-sized enterprises, but stressed that the Directive should apply wholly and unreservedly to SMEs.

The **European Parliament** delivered its opinion (first reading) on 10 April 1997⁴. This contains 20 amendments to the Commission's original proposal, which are basically intended to strengthen the Directive on a number of points:

- definition of "indirect discrimination". Parliament would like the criteria according to which the existence or otherwise of indirect discrimination may be established to be set out more precisely;
- scope of the Directive. Parliament wanted to see the addition of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, the CEEP and the ETUC;
- the provisions concerning the allocation of the burden of proof;
- the preparation of a report by the Commission concerning the application of the Directive following its introduction.

Of the 20 amendments proposed by Parliament, 12 were either fully or partially accepted by the Commission and included in its amended proposal⁵ for a Directive, which was submitted to the Council on 14 May 1997.

On 27 June 1997, the **Council** unanimously adopted a common position with a view to adopting the Directive on the burden of proof in cases of discrimination based on sex.

The **Commission** has expressed reservations regarding the following points:

³ OJ C 133, 28.4.1997, p. 34.

⁴ Doc. EP 258.436.

⁵ OJ C 185, 18.6.1997, p. 21.

Article 2 (definition of "indirect discrimination"): The Council's common position uses a definition which does not take into consideration all the elements of the rulings of the Court of Justice.

The definition set out in the Commission's original proposal contained the four elements which have consistently recurred in the judgments of the Court. The Commission regards it as difficult to accept only some of these elements: each of them is justified by the inclusion of the others, and it is precisely the way in which they tie in with each other that gives the definition its coherence. The fact that this will be the first time that a Directive in this area contains a definition of "indirect discrimination" makes the common position even more difficult to accept.

Article 3 (scope of the Directive): The Council refused to extend the scope of this Directive to cover the directives applying the principle of equal treatment in connection with social security schemes (Directives 79/7/EC, 86/378/EEC and 86/613/EEC). It adopted a joint declaration together with the Commission (see Annex).

The Commission has difficulties with the approach taken in the common position. According to the rulings of the Court of Justice, the shifting of the burden of proof is justified in cases where it is necessary in order not to deprive workers who have been discriminated against of the means to effectively enforce the principle of equal treatment. The Commission considers that the principle laid down by the Court is a general one which should be applied in all directives aimed at upholding the principle of equal treatment between the sexes.

The Council otherwise adopted only very few of the amendments proposed by Parliament which had been accepted by the Commission and included in its amended proposal, despite the fact that the Commission drew the Council's attention on a number of occasions to the importance that Parliament attached to its amendments.

ANNEX

General Secretariat
of the Council

Brussels, 27 June 1997

SN 157/2/97 (SOC)
REV 2
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**COUNCIL (LABOUR AND SOCIAL AFFAIRS)
LUXEMBOURG, 27 JUNE 1997**

Subject: "Burden of proof" Directive
Doc. 9332/97 SOC 162 + 9333/97 SOC 163
(Item 5 on the provisional agenda)

Declaration of the Council and the Commission

Re Article 3(1)(a)

"The Council requests that the Commission, in its report to be submitted pursuant to Article 7, also examine the question of the scope of the Directive. In this regard, due account will be taken of the rulings of the Court in all the areas of social policy looked at which have a bearing on the general principle of non-discrimination."