

**Proposal for a Directive of the European Parliament and of the Council amending Council 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**

(2000/C 337 E/33)

(Text with EEA relevance)

COM(2000) 334 final — 2000/0142(COD)

(Submitted by the Commission on 11 July 2000)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and, in particular, Article 141(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) Article 3(2) of the Treaty imposes an obligation to aim to eliminate inequalities, and to promote equality between men and women.
- (2) The principle of equal treatment between men and women is a fundamental principle of Community law as referred to in Article 141 and in particular in paragraph 3, which addresses specifically sex discrimination related to employment and occupation.
- (3) In its Resolution of 29 May 1990 on the protection of the dignity of women and men at work <sup>(1)</sup>, the Council affirmed that sexual harassment in the workplace may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Council Directive 76/207/EEC <sup>(2)</sup>. A statement to that effect should be included in the Directive itself, sexual harassment usually affects the individual's work performance and/or creates an intimidating, hostile or offensive environment.
- (4) Directive 76/207/EEC does not define the concept of indirect discrimination. It is thus appropriate to insert such a definition consistent with that of Council Directive 97/80/EC of 15 December 1997 <sup>(3)</sup> on the burden of proof in cases of discrimination based on sex, as amended by Directive 98/52/EC <sup>(4)</sup>.

(5) The scope of the occupation activities that Member States seek to exclude from the scope of Directive 76/207/EEC should be restricted. The extent to which some activities may not be excluded should be specified in accordance with the case-law of the Court of Justice of the European Communities.

(6) The Court of Justice has consistently recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during and after pregnancy. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding <sup>(5)</sup>, aims to ensure the protection of the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding. The recitals of that Directive provide that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women who are on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women. The protection of employment rights of women, in particular as regards their right to return to work falls within the scope of Directive 76/207/EEC. That right should be explicitly guaranteed to women who have recently given birth.

(7) The possibility for Member States to maintain or adopt positive action measures is enshrined in Article 141(4) of the Treaty. This Treaty provision makes the existing Article 2(4) of Directive 76/207/EEC redundant. The publication of periodical reports by the Commission on the implementation of the possibility offered by Article 141(4) will help Member States to compare the way it is implemented and citizens to have a full picture of the situation existing in each Member State.

(8) The Court of Justice has ruled that, having regard to the fundamental nature of the right to effective judicial protection, employees enjoy such protection even after the employment relationship has ended <sup>(6)</sup>.

<sup>(1)</sup> OJ C 157, 27.6.1990, p. 3.

<sup>(2)</sup> OJ L 39, 14.2.1976, p. 40.

<sup>(3)</sup> OJ L 14, 20.1.1998, p. 6.

<sup>(4)</sup> OJ L 205, 22.7.1998, p. 66.

<sup>(5)</sup> OJ L 348, 28.11.1992, p. 1.

<sup>(6)</sup> Case C-185/97 Coote [1998] ECR I-5199.

- (9) The Court of Justice has ruled that, in order to be effective, the principle of equal treatment implies that, whenever it is breached, the compensation awarded to the employee discriminated against must be adequate in relation to the damage sustained <sup>(1)</sup>.
- (10) To provide a more effective level of protection to workers who are discriminated against on grounds of sex, associations or legal entities should also be empowered to exercise the rights of defence on behalf or in protection of any person who considers himself or herself wronged because the principle of equal treatment has not been applied to them.
- (11) Member States should promote social dialogue between the social partners to address different forms of discrimination based on sex in the workplace and to combat them.
- (12) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under Directive 76/207/EEC.
- (13) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.
- (14) Directive 76/207/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 76/207/EEC is hereby amended as follows:

1. In Article 1, the following paragraph 1a is inserted:

'1a. Member States shall introduce such measures as are necessary to enable them actively and visibly to promote the objective of equality between men and women by its incorporation, in particular, into all laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1'.

2. The following Article 1a is inserted

*'Article 1a*

Sexual harassment shall be deemed to be discrimination on the grounds of sex at the workplace when an unwanted conduct related to sex takes place with the purposes or effect of affecting the dignity of a person and/or creating

an intimidating, hostile, offensive or disturbing environment, in particular if a person's rejection of, or submission to, such conduct is used as a basis for a decision which affects that person.'

3. Article 2 is amended as follows:

- (a) In paragraph 1, the following subparagraph is added:

'Indirect discrimination, for the purposes of the first subparagraph, shall exist 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.'

- (b) Paragraph 2 is replaced by the following:

'2. Member States may provide, as regards access to employment, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational requirement.

Derogations to the principle of equal treatment shall remain within the limits of what is appropriate and necessary in order to achieve the aim in view.'

- (c) In paragraph 3, the following subparagraph is added:

'A woman who has given birth shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post with no change in her working conditions.'

- (d) Paragraph 4 is replaced by the following:

'4. On the basis of the information provided by Member States pursuant to Article 9, the Commission will adopt and publish every three years a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141(4) of the Treaty.'

4. In Article 3(2), the following paragraph (d) is added:

'(d) any provision contrary to the principle of equal treatment concerning membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations shall be declared null and void or may be amended.'

<sup>(1)</sup> Case C-180/95 Draehmpaeh [1997] ECR I-2195.

5. Article 6 is replaced by the following:

*'Article 6*

1. Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4, and 5 to pursue their claims by judicial process after possible recourse to other competent authorities, even after the employment relationship has ended.

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure that reparation for the loss and damage sustained by a person injured as a result of discrimination contrary to Articles 3, 4 or 5 may not be limited by an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the lapse of time until actual payment of the capital sum awarded.'

6. The following Article 8a, 8b and 8c are inserted:

*'Article 8a*

1. Member States shall provide for an independent body for the promotion of the principle of equal treatment between women and men. This body may form part of independent, pre-existing agencies charged at national level with, in particular, the safeguard of individuals' rights.

2. Member States shall ensure that the functions of the independent bodies referred to in paragraph 1 include receiving and pursuing complaints from individuals of discrimination on grounds of sex, starting investigations or surveys concerning discrimination on grounds of sex and publishing reports on issues relating to discrimination based on sex.

3. Member States shall ensure that associations, organisations or other legal entities may pursue, on behalf of the complainant with his or her approval, any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

*Article 8b*

1. Member States shall take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Member States shall encourage the two sides of industry without prejudice to their autonomy to conclude agreements, at the appropriate level, laying down anti-discrimination rules in the field of equality of treatment between women and men.

*Article 8c*

Member States shall lay down the rules or penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 31 December 2001 at the latest and shall notify it without delay of any subsequent amendment affecting them.'

*Article 2*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2001 at the latest or shall ensure, by that date at the latest, that management and labour introduce the requisite provisions by way of agreement.

Member States shall take all necessary steps to enable themselves at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. The Member States shall communicate to the Commission, within three years of the entry into force of this Directive, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

3. Without prejudice to paragraph 2, Member States shall communicate to the Commission, every three years, the texts of laws, regulations and administrative provisions of positive measures adopted pursuant to Article 141(4) of the Treaty.

*Article 3*

This Directive is addressed to the Member States.