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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the implementation of the principle of equal opportunities and equal treatment of  
men and women in matters of employment and occupation**

(recast version)

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. GENERAL CONSIDERATIONS

The objective of this proposal for a European Parliament and Council Directive is to simplify, modernise and improve the Community law in the area of equal treatment between men and women by putting together in a single text provisions of Directives linked by their subject in order to make Community legislation clearer and more effective for the benefit of all citizens. This proposal for a Directive is also grounded in the general context of the new legal and political environment which aims to make the Union more open, understandable and relevant to daily life.

Equal treatment for men and women is a fundamental principle of the European Union. From the beginning the provisions of primary legislation set out in the Treaty of Rome stated this and since then, subsequent amendments have reinforced it, thus making it integral to the European Union's social policy.

The principle of equal treatment has developed from an isolated provision on equal pay in the Treaty of Rome, to a very important and far reaching *acquis* in the area of equality— a feature that sets Europe to the fore internationally. Article 2 EC recognises equality between men and women as a fundamental principle and one of the objectives and tasks of the Community. Moreover, under Article 3(2) EC a specific mission is conferred on the Community i.e. to mainstream equality between men and women in all its activities.

The Amsterdam Treaty increased significantly the primary law and the European Union's ability to take action in the area of equal opportunities and equal treatment between men and women by giving to the Community legislator specific legal bases (articles 13, 137, 141 EC). These Treaty developments constitute an explicit embodiment of the Court's statement that the elimination of discrimination based on sex forms part of fundamental rights. The Court has stressed that Article 141 (as it had previously in the case of ex-Article 119 of the EC Treaty) forms part of the social objectives of the Community, which is not merely an Economic Union but is at the same time intended, by common action, to ensure social progress and seek constant improvements in living and working conditions. The Court has concluded that the economic aim pursued by Article 141 EC is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental right<sup>1</sup>.

The Charter of fundamental rights of the European Union, signed in Nice on the 7<sup>th</sup> December 2000, also recognises in Article 23 equality between men and women as a fundamental principle.

Significant progress has also been accomplished in terms of secondary legislation. The existing Directives have laid the legal ground for radical changes in national legislation, attitudes and practices, while the Court by its caselaw has helped to clarify and further develop the interpretation and scope of the principle of equal treatment.

From a first Directive (75/117/EEC) on equal pay which was adopted on the basis of ex-Article 100 in 1975, and which further implemented and applied ex-Article 119 of the EC Treaty, the scope of equal treatment has been extended in order to cover other areas of social

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<sup>1</sup> Judgment of the Court of 10 February 2000. *Deutsche Post AG v Elisabeth Sievers (C-270/97)* and *Brunhilde Schrage (C-271/97)*. Joined cases C-270/97 and C-271/97. ECR 2000 p. I-00929

policy. In 1976 a second Directive, dealing with equal treatment relating to access to employment, vocational training, promotion and working conditions (Directive 76/207/EEC), was adopted on the basis of ex-Article 235 EC. In 1979, a third Directive (79/7/EEC), relating to the progressive implementation of the principle of equal treatment in matters of social security (statutory schemes), was adopted on the basis of ex-Article 235 EC.

In 1986 two further Directives were adopted, one on the basis of ex-Articles 100 and 235 of the EC Treaty in relation to occupational social security schemes (86/378/EEC) and the other, on the basis of ex-Article 235 of the EC Treaty, on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (86/613/EEC).

The successive modifications of the Treaty permitted the adoption of Directives with new legal bases and under other procedures emphasising, inter alia, the role the social partners can play in the area of equality, namely Directives on the protection of pregnancy and maternity (92/85/EEC) adopted on the basis of ex-Article 118A of the EC Treaty and on parental leave (96/34/EC). Directive 96/34/EC was the first Directive adopted following the first agreement of social partners at Community level after the Maastricht Treaty under 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 4 (2) thereof.

Following a series of important judgements of the Court of Justice, it was felt necessary to adopt the post Barber Directive 96/97/EC, amending Directive 86/378/EEC, in order to ensure conformity between Directive 86/378 and ex-Article 119 (new Article 141), as interpreted by the Court in the Barber and subsequent judgements.

Caselaw of the Court and the need for effectiveness of Community law prompted the Council, on the basis of a Commission proposal, to adopt Directive 97/80/EC on the burden of proof under 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.

Based on different legal bases, the existing Directives (with their amendments) provide a strong legislative environment. There is no doubt, however, that they need to be updated and simplified in order to guarantee greater clarity and certainty across an enlarged Union and in order to be more readable.

The recent modification of Directive 76/207/EEC by Directive 2002/73/EC, adopted under the specific legal base of Article 141(3) EC which was introduced by the Amsterdam Treaty, also demonstrated that the legislator agreed that there is a real need to update the existing Directives (some of which are more than twenty years old). Directive 2002/73/EC takes into account the new developments in the Treaty (the legal means to implement the principle of equal treatment and work towards achieving equality between men and women was considerably enhanced after the Treaty of Amsterdam), the caselaw of the Court (which developed considerably the principle of equal treatment) and the adoption of other similar legislation (Directives 2000/43/EC and 2000/78/EC based on Article 13 EC).

In this context, the legislation on equal treatment between men and women has been identified as a priority policy area for simplification, modernisation and improvement<sup>2</sup>. The general aim of simplifying and improving the legislative environment is particularly relevant in the case of equal treatment legislation as individual men and women are directly affected by it and need to have their individual rights clearly set out.

## **2. RESULTS OF THE CONSULTATIONS AND OF THE IMPACT ASSESMENT**

In July 2003, the Commission launched a consultation on the Web<sup>3</sup>, aimed at inviting Member States, and other stakeholders (Social Partners, NGOs, Women's associations as well as individuals) to present their views on the Commission's initiative. The consultation was based on an Options Paper setting out the three options which could be pursued in the process of simplification, modernisation and improvement of legislation in the field of equal treatment between men and women. Thirty responses were received from Member States, social partners, institutions dealing with equal treatment and NGOs. The comments were throughout constructive. Most of the responses took the view that simplification, modernisation and improvement are necessary. In broad terms, the Governments who responded, as well as the stakeholders from industry, commerce and the liberal professions, sought an approach that implied less change, while more far reaching changes to the Community legislative framework were favoured by representatives of employees and NGOs.

An informal meeting with experts from Member States, Acceding Countries and EFTA Countries took place on 3 October 2003. The meeting was used to further explain the policy options and to have a more in-depth discussion on these options. The Commission's initiative to clarify and simplify Community legislation, while preserving the *acquis*, was broadly accepted as the correct approach. Pure codification was favoured by some participants but it appeared that others were more in favour of moderate changes through a recasting of the existing legislation while some others again supported a more far reaching approach. The importance of preserving the present *acquis* fully, while integrating only those judgements of the Court that were well established jurisprudence, was stressed.

An informal exchange of views also took place with the social partners represented at EU level (UNICE, CEEP, UEAPME, ETUC).

On 19 October 2003, the Commission's Advisory Committee on equal opportunities adopted an Opinion on this issue, while clarifying that given the nature of the Committee and the status of its members, the opinion does not reflect nor bind Member State Governments. The opinion is in favour of a new recast directive including the maternity directive. UNICE's, UEAPME's and CEEP's representatives adopted a separate position, attached to the Opinion, in favour of a simplification without any modification to existing legislation.

The Commission's services also conducted an Extended Impact Assessment (attached as an annex).

In the light of the comprehensive analysis of possible options for the improvement of the EC equal treatment legislative framework, it appears that a new recast directive, would best meet

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<sup>2</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 24.1.2003 "Updating and simplifying the Community *acquis*", COM(2003)71final.

<sup>3</sup> [http://europa.eu.int/comm/employment\\_social/news/2003/jul/consultation\\_en.html](http://europa.eu.int/comm/employment_social/news/2003/jul/consultation_en.html).

the requirements of updating, simplifying, modernising and improving the Community acquis in this area. It is therefore proposed to present a directive that:

- provides a single coherent text on the basis of consolidated Directives, clearly structured into different chapters with horizontal and specific provisions, and coherent definitions. The text reflects the relationship between different aspects of equal treatment and demonstrates how these are linked to each other, following common principles.
- reflects clearly settled caselaw and thus contributes to legal certainty and clarity.
- reflects clearly the application of the horizontal provisions of Directive 2002/73/EC and the Directive on the reversal of the burden of proof in cases of discrimination on grounds of sex to equal pay and occupational social security schemes.
- provides the necessary support to accelerate the effective implementation of equal treatment in order to reach Community socio-economic policy goals.

This proposal reflects the option consisting of amalgamating all the Directives implementing the principle of equal pay between men and women (including equal treatment in occupational social security schemes), as well as the Directives on equal treatment between men and women relating to access to employment, vocational training and promotion, and working conditions and the Directive on the burden of proof.

This proposal serves several purposes: firstly it takes the form of a single instrument in the interests of reader-friendliness and clarity; it streamlines the implementation of the principle of equal treatment between men and women relating to work and occupation; finally it improves the acquis in these areas by integrating the caselaw of the Court.

### **3. THE MEASURES LAID DOWN IN THE PROPOSAL FOR A DIRECTIVE**

From a general point of view, the current proposal for a European Parliament and Council Directive aims to implement the principle of equal treatment in matters covered by previous Directives regrouped in one text. To this end the purpose of the proposal is:

- to ensure the implementation and application of the principle of equal opportunities and equal treatment of men and women in matters regarding access to employment, vocational training and promotion, and working conditions, including the principle of equal pay for equal work or work of equal value, and
- to ensure that the measures taken by the Member States to implement the principles of equal pay and of equal treatment are made more effective, in order to enable all persons who consider themselves wronged, because these principles have not been applied to them, to have their rights established/asserted by judicial process after possible recourse to other competent bodies.

#### **The principal innovations of the current proposal are the following:**

- integration of the caselaw of the ECJ concerning in particular:

- equal pay attributable to a single source – Lawrence as well as Allonby judgments<sup>4</sup> - (see Article 4 of current proposal and recital 9);
- equal treatment and public servants pension schemes – caselaw of the Court in Beune, Evrenopoulos and Niemi judgments<sup>5</sup> – (see Article 6(2) of current proposal and recital 12);
- clarification of the extension of the protection of pregnant workers to all working conditions and not only to the right to return to their previous job or to an equivalent post - modifications introduced by Directive 2002/73/EC by its Article 1 point 2 paragraph 7 replacing Article 2 of Directive 76/207/EEC in line with the ECJ caselaw – (see Article 15(1) and (2) of current proposal);
- application of definitions contained in Directive 2002/73/EC to all areas covered by the present proposal (see Article 2 of current proposal and recital 5);
- extension of the rules on the burden of proof to all areas falling within the material scope of the proposal– guaranteeing the effectiveness of the principle of equal treatment (as seen by analogy in respect of non-discrimination in the Article 13 Directives) – (see Article 20 of current proposal);
- extension of provisions on defence of rights by associations having a legitimate interest, introduced by Directive 2002/73/EC, to other areas covered by the present proposal - in line with changes made by Directive 2002/73/EC– (see Article 17 (2) of current proposal);
- extension of the provision clarifying the question of national rules on time limits for the bringing of claims, to all other areas covered by the present proposal - in line with Article 6 of Directive 76/207/EEC as amended by Directive 2002/73/EC– (see Article 17 (3) of current proposal);
- extension of the caselaw on sanctions/penalties to all areas covered by the present proposal - in line with changes made by Directive 2002/73/EC - (see Articles 18 and 26 of current proposal);
- extension of rules on bodies for the promotion of equal treatment as well as provisions on social dialogue to all other areas covered by the present proposal - in line with changes made by Directive 2002/73/EC - (see Articles 21 to 23 of current proposal);
- extension of gender mainstreaming obligation to the other areas of equal treatment covered by the present proposal - in line with Article 3 (2) EC and in conformity with Article 1 (1a) of Directive 76/207/EEC, as inserted by Directive 2002/73/EC by its Article 1 point 1 - (see Article 29 of current proposal);
- introduction of a re-examination clause – this is a standard clause - (see Article 32 of current proposal).

The proposal is structured in five titles as follows.

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<sup>4</sup> Judgments of the Court of 17 September 2002. A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd. Case C-320/00. European Court Reports 2002 Page I-07325 and Allonby, C-256/01

<sup>5</sup> Judgments of the Court of 28 September 1994 Case C-7/93 Beune ECR 1994 page I-4471; 17 April 1997 Case C-147/95 Evrenopoulos, ECR 1997 p I-2057; and 12 September 2002 Case C-351/00 Niemi, ECR 2002 p. I-07007

## **TITLE I GENERAL PROVISIONS**

The aim of the proposal is specified in this title i.e. to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

This title also provides for the application of the definitions (direct and indirect discrimination and harassment and sexual harassment) contained in Directive 2002/73/EC to the matters covered by the other Directives regrouped in the proposal. It also contains the definition of pay contained in Article 141(2) EC as well as the definition of occupational social security schemes contained in Directive 86/378/EEC as modified by Directive 96/97/EC.

This proposal for a Directive as far as the personal scope is concerned applies to the entire working population and to persons claiming under them.

## **TITLE II SPECIFIC PROVISIONS**

This title consists of three chapters, one on the principle of equal pay for equal work or work of equal value, a second on the principle of equal treatment in occupational social security schemes and a third on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

### **Chapter 1 Principle of equal pay**

This chapter corresponds to the principal provisions of Directive 75/117/EEC. It also incorporates recent caselaw of the Court of Justice.<sup>6</sup> It is important to note that since 8 April 1976 (date of the *Defrenne II* judgement)<sup>7</sup> the European Court of Justice has declared that ex-Article 119 of the EC Treaty (new Article 141 EC) on equal pay is a provision with direct effect. The Court has, since 1970 (since its judgement in *Defrenne I*)<sup>8</sup>, developed its caselaw on equal pay by clarifying the scope of ex-Article 119 of the EC Treaty as well as of Directive 75/117/EEC.

In this context it appears that, at present, secondary legislation concerning the application of the principle of equal pay, i.e. Directive 75/117/EEC on equal pay, does not fully reflect the recent caselaw of the ECJ. The repeal of Directive 75/117/EEC and its replacement by a new single recast Directive on the basis of the present proposal, would clarify the contents of the principle of equal pay, since the new Directive would fully reflect the interpretation of pay provided for by the Treaty and its interpretation by the ECJ. This is achieved by integrating the Allonby judgement<sup>9</sup> as well as Lawrence<sup>10</sup> in Article 4 of this Directive. Furthermore the notion of pay in relation to public servants pension schemes as reflected in the cases Niemi<sup>11</sup> and Beune<sup>12</sup> is codified in Article 6 of the present Directive.

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<sup>6</sup> Judgments of the Court of 17 September 2002. A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd. Case C-320/00. European Court Reports 2002 Page I-07325 and Allonby, C-256/01

<sup>7</sup> Judgment of 8 April 1976. Case C-43/75, ECR. 1976 P.455

<sup>8</sup> Judgment of 25 May 1971, in C-80/70 Defrenne v Belgian State ECR 1971 P.445

<sup>9</sup> Judgement of 13.01.2004

<sup>10</sup> (2002) ECR I-7325

<sup>11</sup> (2002) ECR I-7007

<sup>12</sup> (2002) ECR I-4471

It is important to note that Article 1 point 3 paragraph 1 subparagraph (c) of Directive 2002/73/EC already provides that the application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to inter alia pay as provided for in Directive 75/117/EEC.

This caselaw which is already part of the Community acquis could be summarised as follows:

### **- Work of equal value**

The Court has specified that Article 141(1) lays down the principle that equal work or work of equal value must be remunerated in the same way, whether it is performed by a man or a woman. To be applicable, it presupposes therefore that male and female workers are in comparable situations.

In this context the principle of equal pay laid down in ex-Article 119 of the EC Treaty does not preclude the making of a lump-sum payment exclusively to female workers who take maternity leave where that payment is designed to offset the occupational disadvantages which arise for those workers as a result of their being away from work<sup>13</sup> because their particular situation due to maternity cannot be compared with that of male workers.

The Court has held on several occasions that the determination of equal value involves a comparison of the work of the female worker and her male comparator by reference to the demands made upon the workers in carrying out the tasks such as skill, effort and responsibility, or the work undertaken and the nature of the tasks involved in the work to be performed.

The Court has developed the criteria of comparability with regard to the principle of equal pay for men and women. According to the Court<sup>14</sup>

- Article 141 EC and Directive 75/117/EEC apply to piece-work pay schemes in which pay depends entirely or in large measure on the individual output of each worker.

- The principle of equal pay for men and women set out in Article 141 EC and Article 1 of Directive 75/117 means that the mere finding that in a piece-work pay scheme the average pay of a group of workers consisting predominantly of women, carrying out one type of work is appreciably lower than the average pay of a group of workers consisting predominantly of men, carrying out another type of work to which equal value is attributed does not suffice to establish that there is discrimination with regard to pay. However where, in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned, it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay, the employer may have to bear the burden of proving that the differences found are not due to sex discrimination.

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<sup>13</sup> Judgment of the Court of 16 September 1999 in Case C-218/98, Oumar Dabo Abdoulaye and Others v Régie nationale des usines Renault SA. , ECR 1999 I p. 5723

<sup>14</sup> Judgment of the Court of 31 May 1995, in Case C-400/93 Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S., ECR 1995 I p.1275



- For the purposes of the comparison to be made, with regard to the principle of equal pay for men and women, between the average pay of two groups of workers paid by the piece, the national Court must satisfy itself that the two groups each encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned.

The Court has also held that "in cases of actual discrimination falling within the scope of the direct application of Article 119, comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service"<sup>15</sup>.

More recently<sup>16</sup>, however, the Court has specified that "there is, in this connection, nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer". The Court has held that the principle established by that Article may be invoked before national Courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (see, inter alia, Defrenne II, paragraph 40; Case 129/79 Macarthy [1980] ECR 1275, paragraph 10; and Case 96/80 Jenkins [1981] ECR 911, paragraph 17). However, where, the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision.

Consequently, the Court with the above caselaw has introduced a new element broader than the same establishment or the same service for the comparison of work of equal value, that of single source. When the differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source, they do not come within the scope of Article 141(1) EC<sup>17</sup>. The current proposal codifies this caselaw.

### **- Job evaluation and job classification**

Directive 75/117/EEC in its Article 1 provides that "In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on the grounds of sex".

The Court by its caselaw especially in its judgement in Case C-237/85, Gisela Rumler v. Dato Druck GmbH, has laid down three guiding principles following from paragraph 2 of Article 1 of Directive 75/117/EEC on the question of job classification, as follows;

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<sup>15</sup> Judgment in C-129/79, McCarthy Ltd v. Wendy Smith, ECR 1980 P.1275, Judgment of the Court of 30 March 2000. Jämställhetsombudsmannen v Örebro läns landsting. Comparison of a midwife's pay with that of a clinical technician – taking into account a supplement and a reduction in working time for inconvenient working hours. Case C-236/98. ECR 2000 I p. 2189

<sup>16</sup> Judgment of the Court of 17 September 2002. A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd. Case C-320/00. ECR. 2002 I p.7325

<sup>17</sup> recently confirmed in Allonby, C-256/01

- a) "The criteria governing pay rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman.
- b) The use of values reflecting the average performance of workers of the one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex contrary to the Directive.
- c) In order for a job classification system not to be discriminatory as a whole it must, insofar as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show a particular aptitude.

These guiding principles set out that in the context of a dispute a job classification system under Article 1 paragraph 2 of Directive 75/117/EEC must according to the caselaw of the Court be formal, analytical, factor based and non discriminatory.

More recently the Court in its judgment<sup>18</sup> of 26 June 2001 *Brunnhofer*, clarified its caselaw on job classification and on work of equal value:

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 141 of the EC Treaty and Article 1 of Directive 75/117/EEC, since this fact is only one indication amongst others that this criterion is met;
- a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and are in conformity with the principle of proportionality;
- in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sexes for the same job or work of equal value cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.

### **Definition of Pay for the purposes of Article 141(2)**

The Court has repeatedly held that the concept of pay within the meaning of the second paragraph of ex-Article 119 of the EC Treaty encompasses all benefits in cash or in kind, present or future, provided they are paid, albeit indirectly by the employer to the worker in connection with his employment.<sup>19</sup>

Individual pay supplements to basic pay (*Handels v Danfoss*)<sup>20</sup> and increments based on seniority (*Nimz*)<sup>21</sup> in addition to basic and minimum pay fall within the scope of ex-Article 119 of the EC Treaty. In the judgment of 4 June 1992 (*Bötel*)<sup>22</sup>, it was held that time off with

<sup>18</sup> Judgement of 26 June 2001, in Case C-381/99, *Brunnhofer*, ECR I 2001 p. 4961,

<sup>19</sup> Judgement of 17 May 1990, C-262/88, *Barber*, ECR. 1990 P.1889

<sup>20</sup> Judgement of 17 October 1989, C-109/88, *Danfoss*. ECR. 1989 P.3199

<sup>21</sup> C-184/89, *Nimz v. Freie und Hansestadt Hamburg*, ECR 1991, p.322

<sup>22</sup> C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v Bötel*

pay for a part-time employee undertaking Works Council training, constituted pay. Supplements to "heads of households" are included in the concept of pay (European Commission v. Luxembourg).<sup>23</sup> Benefits calculated in monetary terms, such as sick pay allowances constitute pay (Rinner-Kuhn).<sup>24</sup> In addition the monetary calculation for time off to pursue works council training has been found to constitute pay (Bötel). Pensions, travel facilities obtainable on retirement and severance schemes have all been found to constitute pay (Garland, Barber<sup>25</sup>). It would appear therefore that any direct payments supplementing a basic wage are covered. This would appear to include shift premia, overtime and all forms of merit and performance pay.

The application of ex-Article 119 to social security schemes was at the heart of the reference for a preliminary ruling in Case 80/70 Defrenne v Belgian State<sup>26</sup>. In its judgment in that case, the Court of Justice clarified its position, excluding statutory social security schemes from the concept of "any other consideration" of ex-Article 119 (new Article 141(2)). The Court, following the conclusions of the Advocate-General, ruled that the concept of consideration paid directly or indirectly, in cash or in kind, could not encompass benefits of statutory social security schemes without any element of agreement within the enterprise or the occupational branch concerned, and obligatorily applicable to general categories of workers. The Court noted that, for the funding of these schemes, workers, employers, and public authorities contribute to an extent determined less by the employment relationship between workers and employers than by considerations of social policy. For these reasons, the Court concluded that "any other consideration" could not be regarded as encompassing benefits of statutory social security schemes. On the other hand, however, this line of reasoning means that specific schemes such as company occupational schemes are included, as it is precisely these which are not directly governed by law. They involve an element of agreement within the enterprise or the branch, they are not compulsory for general categories of workers but only for those categories covered in the enterprise or the branch, and are financed by employers or workers who contribute directly, depending on the schemes' funding requirements and not on considerations of social policy.

In 1986 in Case 170/84 Bilka-Kaufhaus v Weber<sup>27</sup>, the Court confirmed the implicit ruling given in the above-mentioned Defrenne I judgment<sup>28</sup>, namely that only benefits deriving from a statutory social security scheme were outside the scope of ex-Article 119 of the EC Treaty. The Court accordingly ruled that an occupational pension scheme funded by the employer constitutes pay for the purposes of ex-Article 119 of the EC Treaty.

In its judgment of 17 May 1990 (Case 262/88 Barber) and its subsequent judgements (see below) the Court confirms its earlier caselaw in 170/84 Bilka, i.e. that benefits under occupational schemes for paid workers fall within the concept of pay within the meaning of ex-Article 119 of the EC Treaty.

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<sup>23</sup> C-58/81 ECR p.2175

<sup>24</sup> C-171/88, Rinner-Kuhn v Spezial-Gebäudereinigung ECR.1989 p.2743

<sup>25</sup> C-262/88 Barber, ECR 1990, p.I 1889

<sup>26</sup> C-80/70, Defrenne I ECR 1971 p. 455.

<sup>27</sup> C-170/84, ECR 1986, p. 1607

<sup>28</sup> ECR 1971, p. 445, Case 80/70 Defrenne v Belgian State ("Defrenne I").

The fact that payments to employees are not governed by the contract of employment does not remove them from the scope of pay in ex-Article 119 of the EC Treaty. Gratuities paid at the discretion of an employer are encompassed (Garland)<sup>29</sup>. Thus pay, whether under a contract, statutory or collective provisions or on a voluntary basis is covered.

## **Chapter 2 Principle of equal treatment in occupational social security schemes**

This chapter incorporates the principal provisions of Directive 86/378/EEC as amended by Directive 96/97/EC and furthermore clarifies the implementation of the equal treatment principle in occupational social security schemes without changing the current legal position. It also integrates more recent caselaw.<sup>30</sup>

### **- Equal pay and occupational social security schemes**

As already indicated, the scope of "pay" has been clarified by numerous ECJ rulings, in particular in relation to occupational social security schemes.

In its judgment of 17 May 1990 (Case 262/88 Barber)<sup>31</sup> the Court confirmed its earlier judgement (Case 170/84 Bilka), leaving no room for doubt: benefits and employee contributions under the terms of an occupational pension scheme fall within the concept of pay within the meaning of ex-Article 119 (currently, with modification Article 141 EC) of the EC Treaty concerning equal pay. The Court confirmed what it implicitly said in its judgment of 25 May 1971 in Case C-80/70 Defrenne I<sup>32</sup> i.e. benefits granted under a pension scheme, which essentially relates to the employment of the person concerned, form part of the pay received by that person and come within the scope of ex-Article 119 of the EC Treaty.<sup>33</sup>

Discrimination between men and women in occupational social security schemes is therefore prohibited, not only when the age of entitlement to a pension is established, but also when an occupational pension is offered by way of compensation for dismissal on economic grounds (the facts of Case 262/88, Barber). Nevertheless the Court did, when handing down the Barber judgment, leave some doubt as to the (retroactive) effects in time of application of Article 119 of the Treaty on occupational social security schemes.

The caselaw of the Court in the area of application of ex-Article 119 in occupational social security schemes could be summarised as follows:

The Court, in its judgments of 6 October 1993 (Ten Oever), 14 December 1993 (Moroni), 22 December 1993 (Neath) and six judgments of 28 September 1994 confirmed the interpretation of the retroactive effect of the application of the principle of equal treatment

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<sup>29</sup> C-12/81, Eileen Garland v British Rail Engineering Ltd, ECR 1982, p.359

<sup>30</sup> Judgments of the Court of 28th September 1994, Case C-7/93 Beune, ECR 1994 page I-4471 of 17th April 1997 in case 147/95 Evrenopoulos ECR p. I-02057, of 29th November 2001, case C-366/99 Griesmar ECR p. I-09383, of 13th December 2001 case C-206/00. ECR 2001 I-0201 Henri Mouflin and more recently in judgment of 12th September 2002 in C-351/00 Niemi ECR 2002 p. I-07007

<sup>31</sup> ECR 1990, p.I 1889

<sup>32</sup> ECR 1971 P.445

<sup>33</sup> See, in particular, to that effect, Case 170/84 Bilka v Weber von Hartz [1986] ECR 1607, paragraph 22; Barber, paragraph 28; Beune, paragraph 46; and more recently in Joined Cases C-234/96 and C-235/96 Deutsche Telekom v Vick and Conze [2000] ECR I-799, paragraph 32.

between men and women in occupational schemes for paid workers<sup>34</sup> in conformity with the additional Protocol to ex-Article 119.

In Case C-109/91 "Ten Oever" (judgment of 6 October 1993), the Court confirmed that ex-Article 119 applies to survivors' benefits provided by an occupational social security scheme with effect from 17 May 1990 and discrimination between men and women is no longer permitted from that date as regards the granting of such benefits.

In Case C-110/91 "Moroni" (judgment of 14 December 1993), the Court confirmed that ex-Article 119 of the EC Treaty applies to all types of occupational schemes and, consequently, the age of entitlement to an old-age or retirement pension pursuant to such schemes must be the same for both sexes with effect from 17 May 1990.

In Case C-152/91 "Neath" (judgment of 22 December 1993) and Case C-200/91 "Coloroll" (judgment of 28 September 1994), the Court specified that employees' contributions to an occupational social security scheme must be the same for both sexes since they constitute an element of pay within the meaning of ex-Article 119 of the EC Treaty. On the other hand, employers' contributions to such schemes may differ according to sex in so far as they are based on objective actuarial calculations, which take account of the longer life expectancy of women.

By its judgements in these cases the Court has clarified the application of the principle of equal pay in the area of occupational schemes, in particular which schemes fall within the concept of pay of the relevant article in the Treaty<sup>35</sup>.

Before the Court's judgments, the Heads of State and Government meeting in Maastricht signed a supplementary protocol to ex-Article 119 of the EC Treaty which is intended to limit the effects in time of ex-Article 119 of the EC Treaty in connection with occupational schemes. This Protocol is still annexed to Article 141 after the successive modifications of the Treaty (by the Amsterdam and Nice Treaties).

According to this Protocol:

"For the purposes of ex-Article 119, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990 (date of the Barber judgment), except in the case of

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<sup>34</sup> Judgments of the Court of 6th October 1993, C-109/91 Ten Oever, ECR 1993 p.I-4879, of 14th December 1993, C-110/91 Moroni, ECR I-6591, of 22nd December 1993, C-152/91 Neath, ECR I-6953, of 28th September 1994, C-200/91 Coloroll, ECR 1994 p. I-4389. Judgments of 28th September 1994, C-57/93 Vroege ECR 1994 p.I-4541 and C-128-93 Fisscher ECR 1994, P.I-4583 and more recently, judgments of 11th December 1997, C-246/96 Magorrian ECR 1997 p. I-07153 and of 16th May 2000 in case C-78/98 Preston ECR 2000 p. I-03201.

<sup>35</sup> Judgments of the Court of 6th October 1993, C-109/91 Ten Oever, ECR 1993 p. I-4879, of 14th December 1993, C-110/91 Moroni, ECR I-6591, of 22nd December 1993, C-152/91 Neath, ECR I-6953, of 28th September 1994, C-200/91 Coloroll, ECR 1994 p.I-4389. Judgments of 28th September 1994, C-57/93 Vroege ECR 1994 p.I-4541 and C-128-93 Fisscher ECR 1994, P.I-4583, Judgment, of the Court of 28th September 1994. Case C-7/93. Beune, ECR 1994 page I-4471 and more recently judgments of 11th December 1997, C-246/96 Magorrian ECR 1997 p. I-07153 and of 16th May 2000 in case C-78/98 Preston ECR 2000 p. I-03201, judgement of 25 May 2000 in Case C-50/99. Jean-Marie Podesta v Caisse de retraite par répartition des ingénieurs cadres & assimilés (CRICA) and Others. ECR 2000 Page I-04039

workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law".

Directive 96/97/EC amending Directive 86/378/EC, adopted by the Council on the basis of a proposal of the Commission reflects the caselaw of the Court and the additional protocol to ex-Article 119 and aimed for reasons of legal certainty and clarity to make secondary legislation, i.e. Directive 86/378/EEC conform with ex-Article 119 of the EC Treaty, as interpreted by the Court of Justice.

With regard to, in particular, the problem of taking account of actuarial factors differing according to sex for the calculation of contributions and benefits under occupational schemes, it should be borne in mind that the Commission, in its proposal of 23 April 1983 (COM (83) 217 final), which was the forerunner to Directive 86/378/EEC, gave a non-exhaustive list, in Article 6, of certain provisions contrary to the principle of equal treatment. The main problem with this Directive stemmed from this Article, and particularly paragraphs (h) and (i).

Directive 86/378/EEC provided that schemes may take account of actuarial calculation factors, which differ according to sex in respect of employers' contributions and benefits designated as contribution-defined. At first sight, the exceptions relate to schemes entailing defined contributions, but it has to be said that the adopted text was not very clear and, in the course of consultations, involving government experts, pension funds and the social partners, aimed at amending Directive 86/378, all the parties were agreed that the text needed to be clarified.

The situation surrounding the provisions of Article 6(h) and (i) of Directive 86/378/EEC has been clarified by the caselaw of the Court, and more particularly by the above-mentioned judgements of 22 December 1993 (Case C-152/91 Neath) and 28 September 1994 (Case C-200/91 Coloroll). According to the Court, the use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of ex-Article 119 of the EC Treaty as far as employers' contributions are concerned.

The Court has pointed out that this conclusion necessarily extends to specific aspects of the questions referred to it for a preliminary ruling in the Neath and Coloroll cases, namely the capitalisation of part of the periodic pension and the transfer of pension rights, whose value can only be determined in terms of the funding arrangements.

The Court has gone on to point out that employees' contributions, in a contributory occupational scheme, must be the same for both sexes. Its conclusion is based on the idea that, in the context of occupational pensions, ex-Article 119 covers only what is promised by the employer, i.e. the periodic benefits accruing from the pension to be received once the retirement age has been attained. The employer's contributions thus do not fall within the scope of ex-Article 119 nor do the sums transferred from one pension fund to another following a change of job.

These factors are clearly related to the "funding" of a pension scheme and are not, according to the Court's line of reasoning, covered by ex-Article 119. What is less clear is whether this line of reasoning also excludes from the scope of ex-Article 119 the capital sum, which some schemes provide in return for relinquishing one's claim to part of the normal pension. The Court clearly considers that capital formation of this type is excluded from the scope of ex-Article 119 (point 33 in the grounds for the Neath judgement). Nevertheless, it must be noted

that the capitalised sum merely represents a substitute for part of the normal pension and that the Court's line of reasoning applies only to defined-benefit schemes.

It follows from the above that the provisions of Article 6(h) and (i) of Directive 86/378, as adopted by the Council of Ministers in 1986, remain consistent with ex-Article 119 of the EC Treaty. There was, however, a need for certain adjustments to help clarify matters, e.g. by making a distinction between defined-contribution schemes (where the employer promises a contribution) and defined-benefit schemes (where the employer's promise is the final benefit).<sup>36</sup> As far as the employer's contributions are concerned, the Court has ruled expressly on the amount to be paid in the context of defined-benefit schemes where, according to the Court, this amount may vary according to sex to take account of differing actuarial calculation factors.

On the other hand, the Court has not ruled on the amount of such contributions in defined-contribution schemes.

In its judgment of 9 November 1993 in Case C-132/92 *Birds Eye Walls*,<sup>37</sup> the Court held that differences in employers' contributions under such schemes (defined contribution schemes) may be permitted on condition that the aim is to achieve equal pensions for both sexes.

On 28 September 1994, in addition to the judgement in Case C-200/91 *Coloroll*, the Court further clarified, in five other judgements, the scope of ex-Article 119 of the EC Treaty and its application in connection with occupational social security schemes.

The judgment in Case 200/91 *Coloroll*, in addition to the issue of actuarial factors, confirms the main principles laid down in previous judgments of the Court (*Ten Oever*, *Moroni*, *Neath*), providing further clarification in certain areas such as the fact that ex-Article 119 of the EC Treaty may be relied on by both employees and their dependants against trustees (administrators of occupational schemes) who are bound to observe the principle of equal treatment (employer's and trustees' respective obligations).

In its judgments in Cases 408/92 *Smith* and 28/93 *Van den Akker*, the Court considers that ex-Article 119 of the EC Treaty must be interpreted as precluding an employer from making the retirement age equal by raising the age for women to that for men in relation to periods of service completed between 17 May 1990 (date of the *Barber* judgment) and the date on which the new measures, in order to comply with the *Barber* judgment, come into force.

Therefore, as regards periods of service completed between 17 May 1990 and the date of entry into force of the rule by which the scheme imposes a uniform retirement age, ex-Article 119 does not allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements as those enjoyed by female employees.

On the other hand, as regards periods of service completed after the date of entry into force of the measures effectively establishing equal treatment, ex-Article 119 does not prevent the raising of the retirement age for women to that for men. As regards periods of service prior to

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<sup>36</sup> Directive 96/97/EC Article 1 point 3 replacing article 6 of Directive 86/378/EEC see in particular h) and i)

<sup>37</sup> *Birds Eye Walls Ltd. v Friedel M. Roberts*. ECR 1993 I p. 5579

17 May 1990, Community law imposed no obligation which would justify retroactive reduction of the advantages which women enjoyed.<sup>38</sup>

The judgments in Case C-57/93 *Vroege* and Case C-128/93 *Fisscher* concern the right of part-time workers to join an occupational pension scheme. The Court, confirming its previous caselaw (Case C-170/84 *Bilka*), considered that the exclusion of part-time workers from membership of an occupational scheme may constitute indirect discrimination against women prohibited by ex-Article 119 of the EC Treaty if there is no objective justification for such exclusion. The limitation of the effects in time of the *Barber* judgment of 17 May 1990 as well as Protocol No 2 concerning ex-Article 119 of the EC Treaty do not apply to the right to join an occupational pension scheme, which continues to be governed by the *Bilka* judgment of 13 May 1985. Since the latter judgment included no limitation in time, the direct effect of ex-Article 119 can be relied upon in order retroactively to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done as from 8 April 1976, the date of the *Defrenne II* judgment in which the Court held for the first time that ex-Article 119 has direct effect. The Court clarified more recently in judgments of 11th December 1997 in case C-246/96, *Magorrian*, and of 16th May 2000 in case C-78/98 *Preston*, its caselaw concerning the situation of part-time workers.

The fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

National rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for such actions than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

In its judgment in Case C-7/93 *Beune*, the Court sets out the criteria according to which ex-Article 119 EC Treaty applies in connection with certain schemes for civil servants. In subsequent judgements (judgements in cases *Evrenopoulos*, *Griesmar*, *Mouflin* and *Niemi*<sup>39</sup>) the Court further clarified its judgement of 28 September 1994 in case *Beune*, that civil service retirement schemes (public sector schemes) are also covered by the concept of pay within the meaning of the former Article 119 of the EC Treaty when derived from the employment relationship.

The Court has held<sup>40</sup> that in order to establish that a civil service retirement scheme falls within the scope of Article 141 EC (ex-Article 119 of the EC Treaty) the fact that the pension benefit is linked to the employment relationship and, as a result, is paid by the State in its capacity as employer, that criterion cannot be regarded as exclusive, in as much as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work (*Beune*, paragraph 44, and *Griesmar*, paragraph 29).

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<sup>38</sup> Judgement of 25 May 2000 in Case C-50/99. *Jean-Marie Podesta v Caisse de retraite par répartition des ingénieurs cadres & assimilés (CRICA) and Others*. ECR 2000 Page I-04039

<sup>39</sup> Judgments of the Court of 28th September 1994. Case C-7/93 *Beune*, ECR 1994 page I-4471, of 17th April 1997 in case 147/95 *Evrenopoulos* ECR p. I-02057, of 29th November 2001, case C-366/99 *Griesmar* ECR p.I-09383, of 13th December 2001 case C-206/00. ECR 2001 I-0201 *Henri Mouflin* and more recently in judgment of 12th September 2002 in C-351/00 *Niemi* ECR 2002 p. I-07007.

<sup>40</sup> *Idem* as 42



However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary. The pension paid by the public employer is in that case entirely comparable to that paid by a private employer to his former employees (Beune, paragraph 45, Griesmar, paragraph 30, and Niemi paragraph 47).

These judgements are particularly relevant for retirement age, survivor's benefits and specific old age advantages granted to persons looking after their children.

This latest caselaw is also now clearly reflected in the text of the new recasting proposed Directive.

The Court has also clarified in its judgement of 25 May 2000 in Case C-50/99, *Jean-Marie Podesta v Caisse de retraite par répartition des ingénieurs cadres & assimilés*, that ex-Article 119 of the EC Treaty applies to private inter-occupational supplementary retirement pension schemes based on defined contributions run on a pay-as-you-go basis to the extent that the purpose of those schemes is to supplement or replace the benefits provided by statutory social security schemes and where the pension is paid to the worker by reason of the employment relationship between him and his former employer, whether membership of such schemes is compulsory or optional.<sup>41</sup> Consequently ex-Article 119 of the EC Treaty, which lays down the principle of equal pay for men and women, is applicable to the AGIRC and ARRCO (the Association Générale des Institutions de Retraite des Cadres (AGIRC) and the Association des Régimes de Retraite Complémentaire (ARRCO)) supplementary retirement pension schemes in France and prohibits them from discriminating between men and women in respect of the age at which they are entitled to a survivor's pension following the death of their spouse.

The Court also confirmed in the same judgment that according to its settled case-law, the equal treatment in the matter of occupational pensions required by ex-Article 119 of the EC Treaty may be relied on in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, the date of the Barber judgement (see, to that effect, Case C-28/93 *Van Den Akker and Others*<sup>42</sup>, paragraph 12). It follows that occupational pension schemes were required to achieve equal treatment as from 17 May 1990 (*Van Den Akker and Others*, paragraph 14). Article 141 EC (ex-Article 119 of the EC Treaty) applies to supplementary retirement pension schemes, such as AGIRC and ARRCO and precludes those schemes from discriminating, as from 17 May 1990, between men and women in respect of the age at which their spouses are entitled to a survivor's pension following the death of those employees.

### **-Occupational schemes for self-employed workers**

It is important to note that the caselaw in Barber and the subsequent judgements does not affect the situation of self-employed workers, who are included in the personal scope of Directive 86/378/EC. Therefore, the present Directive, as previously Directive 96/97/EC, does not introduce any changes for the situation of self-employed workers.

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<sup>41</sup> Judgment of 25 May 2000 in Case C-50/99. *Jean-Marie Podesta v Caisse de retraite par répartition des ingénieurs cadres & assimilés (CRICA) and Others*. ECR 2000 Page I-04039

<sup>42</sup> ECR 1994-I p.4527

These workers are covered by Directive 86/378/EEC but in a very limited way and insofar as occupational social security schemes are organised on a collective basis (e.g. sectoral schemes in France). Individual schemes for self-employed are explicitly excluded from the scope of Directive 86/378/EEC as amended by Directive 96/97/EC (Article 2(2) a) and b) of Directive 86/378/EEC, as replaced by Article 1 point 1 paragraph 2 of Directive 96/97/EC). According to these provisions individual contracts of self-employed workers and schemes for self-employed workers having only one member are excluded. Moreover, according to Article 4 of Directive 86/378/EEC family allowances are concerned insofar as they are attributed to employed persons, while according to Article 9 a) and b) of the Directive as amended by Article 1 point 5 of Directive 96/97/EC, Member States may defer compulsory application of the principle of equal treatment with regard to determination of pensionable age and for survivor's benefits for self-employed workers. The only provision which is of a relative importance for self-employed workers is Article 9 c) as amended by Article 1 point 5 of Directive 96/97/EC, which provides for equal contributions for men and women to an occupational scheme for self-employed workers (collective scheme) from the 31st July 1999 (thirteen years after the notification of Directive 86/378/EEC). Consequently from the 1st August 1999 occupational social security schemes have to apply unisex actuarial calculations for contributions of self-employed persons in these schemes.

### **Chapter 3 The principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions**

Directive 2002/73/EC of the European Parliament and of the Council amending Directive 76/207/EEC assures legal clarity and certainty by codifying numerous rulings from the European Court of Justice on the original Directive.

This chapter corresponds to the principal provisions of Directive 76/207/EEC, as amended by Directive 2002/73/EC, in relation to the elimination of discrimination (direct or indirect) on the basis of sex. This chapter includes the provisions on the extent to which derogations from the principle of equal treatment are permitted in the case of a job that by its very nature requires a person of a specific sex.

Moreover, as with Directive 2002/73/EC, this proposal reiterates the principle contained in Article 141(4) EC which states that "with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

In addition, this chapter contains the provisions of Directive 2002/73/EC on the reinforcement of the protection of mothers on maternity leave and clarifies the links with Directive 92/85/EC.<sup>43</sup> It also includes the provisions from Directive 2002/73/EC in relation to the protection of fathers and mothers on paternity leave and/or adoption leave in the case of the Member States which recognise such rights.

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<sup>43</sup> 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) Official Journal L 348 28.11.92 p.1

## **TITLE III HORIZONTAL PROVISIONS**

### **Chapter 1 Defence of rights**

#### **Section 1: Remedies**

This chapter contains the new provisions on remedies and enforcement, introduced by Directive 2002/73/EC. These provisions reflect the caselaw of the Court. It concerns:

- reinforcement of the protection (a) of victims of discrimination even after the end of the employment relationship<sup>44</sup> and (b) against any adverse treatment;
- the integration of the caselaw of the Court on the question of upper limits<sup>45</sup> (which are permitted only in certain exceptional cases) in cases of compensation or reparation.

These provisions will, in the context of the present proposal, have horizontal application and will cover not only matters relating to access to employment, vocational training and promotion and working conditions but also matters relating to pay, including occupational social security schemes which also constitute important aspects of the implementation of the principle of equal treatment in matters of work and occupation.

#### **Section 2: Burden of proof**

This chapter contains not only the principal provisions of Directive 97/80/EC on the burden of proof, but also aligns its text with the recently adopted Directive 2002/73/EC. The main impact of this proposal will be to ensure the effectiveness of the principle of equal treatment by extending the rules on the burden of proof to the area of occupational social security schemes.

It is important to note that as some aspects of occupational social security schemes (benefits and contributions of employees) are pay within the meaning of ex-Article 119 of the EC Treaty, Directive 97/80/EC on the burden of proof already implicitly covered these aspects since under its Article 3(1)(a) the Directive applies to "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". Directive 97/80/EC, despite the initial proposal of the Commission<sup>46</sup> and the opinion of the European Parliament<sup>47</sup>, did not finally include in its scope Directives 86/378/EEC and 96/97/EC relating to equal treatment between men and women in occupational social security schemes. The reasons put forward previously for this exclusion no longer seem relevant as the Directives based on Article 13 EC contain similar provisions on the burden of proof. However, during the negotiations for the adoption of Directive 97/80 there was a Common declaration of the Council and of the Commission relating to Article 3(1)(a) as follows:<sup>48</sup>

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<sup>44</sup> Case C-185/97, Goote, ECR.1998 I p.5199

<sup>45</sup> Cases C-180/95 Draehmpaehl, ECR 1997 I p.2195 and C-271/31 Marshal ECR 1993 I P.4367

<sup>46</sup> OJ C 332, 7.11.1996, p.11 and OJ C 185 18.6.1997 p.21

<sup>47</sup> Opinion of the European Parliament of 10 April 1997 (OJ C 132, 28. 4. 1997, p.215), Common Position of the Council of 24 July 1997 (OJ C 307, 8. 10. 1997, p. 6) and Decision of the European Parliament of 6 November 1997 (OJ C 358, 24. 11. 1997).

<sup>48</sup> SN 157/2/97(SOC) REV 2 of 27 June 1997

*"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 report, due account will be taken of the rulings of the Court in all areas of social policy looked at which have a bearing on the general principle of non discrimination. "*

The present proposal, by putting together in a single text provisions on occupational social security schemes and those relating to the burden of proof, will also make effective the application of the principle of equal treatment in this field and will respond to this declaration and the previous request of the European Parliament.

Another important, practical impact of the current proposal in this context will be the repeal of the definition of indirect discrimination in Article 2 paragraph 2 of Directive 97/80/EC in order to align it with the definition contained in Directive 2002/73/EC. It should be recalled, in this respect, that the adoption of Directive 2002/73/EC amending Directive 76/207/EEC introduced a new definition of indirect discrimination without the statistical element in the text in accordance with the definition in the Directives adopted on the basis of Article 13 EC. In this regard it should be noted that during the negotiations for the adoption of Directive 2002/73/EC amending Directive 76/207/EEC there were declarations of both the Commission and the Council in June 2001<sup>49</sup>, when the Common position was adopted, on the need to align the definition of indirect discrimination contained in Directive 97/80/EC as amended by 98/52/EC, with the definition adopted in the Common position and later in Directive 2002/73/EC.<sup>50</sup> The present proposal therefore responds to these declarations. It follows up on the specific request by Member States to the Commission to propose a modified proposal of Directive 97/80/EC in order to adapt its definition on indirect discrimination. A declaration of the Commission on this subject was included in the minutes of the Council of Social affairs of June 2001. Thus, this exercise regrouping Directives 2002/73/EC with Directive 97/80/EC, also responds to the above declarations and seeks to improve the effectiveness of the principle of equal treatment as interpreted by the Court of Justice.<sup>51</sup>

## **Chapter 2 Bodies for the promotion of equal treatment - social dialogue**

As with the previous chapter, this chapter contains the new provisions introduced by Directive 2002/73/EC, which are similar to the provisions existing in the Directives based on Article 13 i.e. Directives 2000/43/EC and 2000/78/EC. It concerns:

-The designation by the Member States of bodies and the role of these bodies i.e. the promotion of equal treatment, the follow up of Community legislation and the provision of support to victims of discrimination.

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<sup>49</sup> 9588/01, SOC 233, CODEC 519 of 6 June 2001

<sup>50</sup> Commission statement to the minutes (Re amending Directive 97/80/EC) "In the light of the amendment to the definition of indirect discrimination, the Commission will propose an appropriate amendment to Directive 97/80/EC as amended by Directive 98/52/EC, as expeditiously as possible." Council statement to the minutes (Re Commission statement on amending Directive 97/80/EC) "The Council acknowledges the Commission's intention to make a proposal to amend Directive 97/80/EC in the light of the amendment to the definition of indirect discrimination."

<sup>51</sup> Judgement of 26 June 2001, in Case C-381/99, Brunnhofer, ECR I 2001 p.4961, Judgement of 27 October 1993 in C-127/92 Enderby, ECR 1993 p. I-5535, see also judgment of 17 October 1989 in C-109/88 Danfoss, ECR 1989 p.3199.

-The reinforcement of the role of social partners and of NGOs in the promotion of the principle of equal treatment.

As with the previous chapter, these provisions will, in the context of the present proposal, now have horizontal application and will cover not only matters relating to access to employment, vocational training and promotion and working conditions, but also matters relating to pay, including occupational social security schemes.

It is reasonable to expect that bodies established for equal treatment between men and women in relation to access to employment, vocational training and promotion and working conditions should also cover other aspects of working conditions such as pay and occupational social security schemes. The extension of the scope of such bodies in line with the current proposal will not impose a significant burden on Member States.

#### **TITLE IV IMPLEMENTATION**

This part contains the horizontal provisions in relation to the implementation of the Directive. It requires Member States to ensure any provisions contrary to the principle of equal pay or equal treatment (for example laws, collective agreements, individual contracts, etc.) are abolished or are declared null and void or amended as appropriate. It also provides for the protection of employees, including employees who are employees' representatives, from victimisation.

It requires Member States to provide a system of effective, proportionate and dissuasive sanctions to be applied in case of infringement of rights granted under this Directive in order to guarantee full practical effect (*effet utile*) of this Directive. Member States are also required to notify the Commission of the provisions adopted in this area

It requires Member States to encourage employers and those responsible for vocational training to proactively develop adequate measures for preventing sex discrimination and in particular harassment and sexual harassment at the workplace.

It contains a standard non-regression clause.

The proposal for a Directive contains a provision similar to that in Directive 2002/73/EC on the obligation of Member States to take actively into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions and activities in the areas referred to in the scope of the Directive.

Furthermore the proposal obliges Member States to ensure that the Directive together with the transposing national provisions are brought to the attention of all persons concerned.

#### **TITLE V FINAL PROVISIONS**

This part contains standard provisions adapted to the present proposal for a Directive.

A standard clause on the transposition of the Directive requires the Member States to fulfil some information requirements, such as regularly communicating transposing national laws and collective agreements as well as appropriate correlation tables to the Commission. Another standard clause taken from Article 2 of Directive 2002/73/EC requires Member States to give a reference to this Directive in transposing laws.

It also contains an Article on Directives regrouped in the present proposal, which should be repealed once the new Directive becomes applicable in the Member States.

There is also the "standard review clause" (Article 32) providing that the Commission shall, no later than 30 June 2008, review the operation of this Directive with a view of presenting, if need be, the necessary modifications.

It also integrates the specific provision contained in Directive 2002/73/EC on regular reports every four years to the Commission by which Member States should inform the Commission on positive action measures taken under Article 141(4) of the EC Treaty and in accordance with Declaration 28 (priority given to positive action measures for women).

#### **4. LEGAL BASE**

The proposal for a Directive is based on Article 141(3) EC which empowers the Community to adopt measures to ensure the application of the principle of equal treatment of men and women in matters of employment and occupation. Since all the areas covered by the original Directives 75/117/EEC, 86/378/EEC, as amended by Directive 96/97/EEC, 76/207/EEC as amended by Directive 2002/73/EC and 97/80/EC, as amended by 98/52/EC fall within the legal category of "matters of employment and occupation", the recast Directive, amalgamating the Directives mentioned, can be put on the same legal basis.

Legislation ensuring equal treatment between men and women in the area of employment and occupation adopted under and/or covered by Article 141 EC should, for all areas covered, use the same concepts as those used in the legislation adopted recently such as Directive 2002/73/EC amending Directive 76/207/EEC, as well as in similar legislation adopted under Article 13 EC, to combat discrimination on grounds other than sex, insofar as the latter also concerns the area of employment, in order to ensure legal and political coherence between pieces of legislation, which have similar objectives. It is therefore necessary to ensure coherence between secondary legislation on identical issues, such as the concept of indirect discrimination or the need for Member States to have bodies for the promotion of equal treatment, in broader areas of employment and occupation and not only for matters covered by Directive 2002/73/EC, amending Directive 76/207/EEC.

#### **5. JUSTIFICATION WITH REGARD TO SUBSIDIARITY AND PROPORTIONALITY.**

The use of a Community legislative instrument is in keeping with the principle of subsidiarity. The recasting of existing directives in the area of equal opportunities and equal treatment of men and women in matters of employment and occupation will help ensure that these principles are uniformly and effectively applied at national level. Moreover there is a requirement to ensure coherence at Community level of legislation implementing the principle of equal treatment. In the case of sex discrimination this can best be achieved through the recasting of existing legislation.

The content of the proposed instrument also complies with the principle of proportionality, as it gives Member States the greatest possible latitude in determining how the effective application of the principle of equal treatment in this respect is to be applied.

The Community legislation will have no direct impact on enterprises' operations and will not impose any administrative or legal constraints which could hinder the creation and development of SMEs.

## **6. COMMENTARY ON THE ARTICLES**

There was a need to make some linguistic corrections to the Finnish, Italian, Portuguese and Swedish versions of the texts of the recast directives in order to ensure consistency with other linguistic versions.

### **TITLE I**

#### **General provisions**

##### **Article 1**

This Article defines the purposes of the Directive.

The Directive covers the matters addressed in Directives 76/207/EEC as amended by Directive 2002/73/EC, (relating to access to employment, vocational training and promotion, and working conditions), and also by Directives 75/117/EEC (equal pay) and 86/378/EEC as amended by Directive 96/97/EC (occupational social security schemes).

The purpose of the Directive is furthermore to clarify the existing links between Directives 76/207/EEC as amended and 92/85/EEC on matters relating to maternity and pregnancy covered by these Directives. It provides clear and consistent definitions, updates the text through integration of settled caselaw and provides for a clearly structured legal text.

This Directive is also designed to ensure the effective application of the principle of equal treatment, including notably the extension of the rules on the reversal of the burden of proof to all areas falling within its material scope .

##### **Article 2**

This Article defines the concepts of direct and indirect discrimination, harassment based on sex and sexual harassment. The definitions are identical to those contained in the already adopted Directive 2002/73/EC.

It also reproduces the definition of "*pay*" as contained in Article 141 EC as well as the definition of "*occupational social security schemes*" contained in Article 2 of Directive 86/378/EEC as amended by Article 1 point 1 paragraph 1 of Directive 96/97/EC.

##### **Article 3**

This Article defines the personal scope of the Directive in identical terms to those used in Directive 96/97/EC.

Paragraph 2 contains a standard formulation which exists in all Directives relating to equal treatment between men and women. It reflects the well established principle that measures for the protection of women during pregnancy and maternity are a permitted exception to the principle of equal treatment. It incorporates a text appearing in Article 1, paragraph 2, of

Directive 2002/73/EC which has a horizontal effect for the Directives (see also Article 5(2) of Directive 86/378/EEC).

Paragraph 3 includes the adapted first sentence of the fourth subparagraph of Article 2(7) of Directive 76/207/EEC as amended by paragraph 2 of Article 1 of Directive 2002/73/EC<sup>52</sup>.

## **TITLE II**

### **Specific provisions**

#### **Chapter 1**

#### **Principle of equal pay**

##### **Article 4**

This Article corresponds to the principal Article of Directive 75/117/EEC on equal pay, slightly adapted to take into account the recent caselaw of the Court in particular its Judgement of 17 September 2002 in the Case C-320/00 A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.<sup>53</sup> as well as the Judgement of 13 January 2004 in the Case Debra Allonby v. Accrington / Rossendale College, C-256/01<sup>54</sup>. According to this caselaw the Court has introduced a new element broader than the same establishment or the same service for the comparison of work of equal value, that of a single source. The Court has specified that "there is, in this context nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer".

Therefore, the principle of equal pay for men and women, implies that remuneration for the same work or work of equal value need not necessarily be paid by one and the same employer, but must originate from a single source to which any differences identified in pay conditions can be attributed. In the absence of a single source there would be no body which was responsible for any inequality and which could restore equal treatment.

As far as the question of job classification is concerned the text of the present proposal remains unchanged by comparison with the text of Article 1 of Directive 75/117/EEC.

#### **Chapter 2**

#### **Principal of equal treatment in occupational social security schemes**

##### **Article 5**

This Article corresponds to the first paragraph of Article 5 of Directive 86/378/EC, which was not modified by Directive 96/97/EC. It provides for the application of the principle of equal treatment in occupational social security schemes within the limits as set out in Article 6.

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<sup>52</sup> OJ L 348, 28.11.1992, p.1

<sup>53</sup> ECR. 2002 I p.7325

<sup>54</sup> not published in print yet.



## Article 6

The first paragraph of this Article integrates unchanged Article 4 of Directive 86/378/EEC relating to the material scope of this chapter in relation to occupational schemes and risks covered.

The second paragraph is a new provision reflecting the caselaw of the Court of Justice on the application of the present Article 141(1) and (2) EC to specific schemes for public servants.<sup>55</sup>

By codifying this caselaw, the Directive clarifies that it also applies to social security schemes concerning a particular category of public servants, if the benefits concerned are paid by reason of the employment relationship, are directly related to the period of service completed and the amount is calculated by reference to the last salary. The fact that a particular scheme for a particular category of public servants and other staff recruited by the State is part of a general, harmonised framework of a statutory scheme is without prejudice in this respect (see in particular judgements in *Beune* and *Niemi*).

## Article 7

This provision incorporates, without changes, Article 2, paragraphs 2 and 3, of Directive 86/378/EEC as amended by Article 1, paragraph 1, of Directive 96/97/EC.

As with the previous directives:

- (a) individual contracts for self-employed workers (*since these contracts are in principle private*);
- (b) schemes for self-employed workers having only one member (*as for the previous point these contracts are in principle private*);
- (c) insurance contracts to which the employer is not a party, in the case of salaried workers are not covered by the current proposal.

Points (d) and (e) concern private arrangements, between the insured person and the scheme, which do not fall within the meaning of occupational social security scheme as defined in Article 2 of the present proposal.

The second paragraph reflects the caselaw of the Court in its judgement of 9 November 1993 in Case C-132/92 *Birds Eye Walls*,<sup>56</sup> on "*bridging pensions*" and is taken unchanged from Article 2(3) of Directive 86/378/EEC as inserted by Article 1, paragraph 1, of Directive 96/97/EC.

## Article 8

This Article corresponds to Article 6 of Directive 86/378/EEC as amended by Article 1(3) of Directive 96/97/EC in order to take into account the caselaw of the Court in *Neath* and *Coloroll* and contains a non-exhaustive list of provisions which are contrary to the principle of equal treatment.

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<sup>55</sup> Judgments of the Court of 28th September 1994. Case C-7/93 *Beune*, ECR 1994 page I-4471 or 17<sup>th</sup> April 1997 in case 147/95 *Evrenopoulos* ECR p.I-02057 of 29th November 2001, case C-366/99 *Griesmar* ECR p I-09383, of 13th December 2001 case C-206/00. ECR 2001 I-0201 *Henri Mouflin* and more recently in judgment of 12th September 2002 in C-351/00 *Niemi* ECR 2002 p. I-07007.

<sup>56</sup> *Birds Eye Walls Ltd. v Friedel M. Roberts*. ECR 1993 I p. 5579

The original Article is slightly modified in that point h of paragraph 1 does not make reference to the annex contained in Directive 96/97/EC amending Directive 86/378/EEC. This annex gives examples of certain elements in the case of funded defined-benefit schemes, which may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

These examples are as follows:

- conversion into a capital sum of part of a periodic pension,
- transfer of pension rights,
- a reversionary pension payable to a dependant in return for the surrender of part of a pension,
- a reduced pension where the worker opts to take early retirement.

#### Article 9

This Article corresponds to Article 8 of Directive 86/378/EEC, as amended by Article 1(4) of Directive 96/97/EC, concerning the application of the Directive to occupational schemes for self-employed workers. These provisions were not affected by the caselaw of the Court in Barber and the subsequent judgements.

Provisions contrary to the principle of equal treatment in occupational schemes for self-employed must be revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EC as amended by Directive 96/97/EC became applicable in their territory.

The Directive does not preclude rights and obligations relating to a period of membership of an occupational scheme for self-employed workers prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

#### Article 10

This Article corresponds to Article 9 of Directive 86/378/EEC as amended by Article 1(5) of Directive 96/97/EC. It concerns the derogations in relation to the application of the Directive to occupational schemes for self-employed workers which, as with the previous Article, were not affected by the caselaw of the Court in Barber and the subsequent judgements. These derogations concern the determination of a pensionable age, the right to survivor's benefits and the equalisation of contributions to an occupational social security scheme for self-employed workers. Point (c) of the former Article 9 of Directive 86/378/EEC as amended by Directive 96/97/EC (paragraph 5 of Article 1), contains a transitional period for the equalisation of contributions of self-employed persons.

#### Article 11

This Article corresponds to Article 2 of Directive 96/97/EC.

Paragraphs 1 and 2 of this Article reflect the caselaw of the Court on the retrospective application of current Article 141(1) and (2) (ex Article 119) in occupational social security schemes which is integrated in Directive 96/97/EC. Paragraph 3 reflects the application of the Directive in Member States, which were former contracting parties to the agreement on the European Economic Area.

There is however a new paragraph 4, specifying that for other Member States whose accession took place after the date of 17 May 1990, the date of 17 May 1990 in the above mentioned paragraphs 1 and 2 will be replaced by the date that Article 141(1) and (2) (ex Article 119) became applicable in their territory (in order to cover the situation of acceding countries).

#### Article 12

This Article corresponds to Article 9a of Directive 86/378/EEC (which has been inserted by Article 1 of Directive 96/97/EC) on flexible retirement. Accordingly, a flexible pensionable age under the same conditions for men and women will not be deemed incompatible with this Directive.

### **Chapter 3**

#### **The principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions**

#### Article 13

The first paragraph of this Article corresponds to Article 3, paragraph 1, of Directive 76/207/EEC as amended by Article 1, paragraph 3, of Directive 2002/73/EC. This new Article corresponds to similar formulations contained in Directives based on Article 13 EC i.e. 2000/43/EC<sup>57</sup> and 2000/78/EC<sup>58</sup>.

The second paragraph of this Article corresponds to Article 2, paragraph 6, of Directive 76/207/EEC as amended by Article 1, paragraph 2, of Directive 2002/73/EC. It concerns the extent to which derogations from the principle of equal treatment are permitted in the case of a job that by its very nature requires a person of a specific sex, and is in conformity with the caselaw of the Court on this subject<sup>59</sup>.

The third paragraph corresponds to Article 9 (2) of Directive 76/207/EEC which refers to the exclusion clause in Article 2 (6) of Directive 76/207/EEC as amended by Article 1, paragraph 2, 6 of Directive 2002/73/EC.

#### Article 14

This Article corresponds to Article 2, paragraph 8, of Directive 76/207/EEC as amended by Article 1, paragraph 2, of Directive 2002/73/EC and relates to the possibility under Article 141 (4) EC of Member States maintaining or adopting measures with a view to ensuring full equality in practice between men and women in working life.

#### Article 15

This Article reflects the caselaw of the Court on maternity and pregnancy (see in particular, Case 184/83 Hofmann v. Barmer Ersatzkasse [1984] ECR 3047, paragraph 25, Case C-421/92 Habermann-Beltermann [1994] ECR I-1657, paragraph 21, and Case C-32/93 Webb v EMO

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<sup>57</sup> OJ L 18019 July 2000 p.22

<sup>58</sup> OJ.L 303 2 December 2000 p.16

<sup>59</sup> Judgment of 15 May 1986 in Case C-222/84 Johnston; judgment of 26 October 1999, Sirdar, [1999] ECR I-0000 and judgment of 11 January 2000 in Case C-285/98 Kreil [2000] ECR I-0000.

Air Cargo [1994] ECR I-3567, paragraph 20). It clarifies the links between Directive 92/85/EEC and the present proposal for a Directive in relation to matters dealt with in this chapter and covered by Article 2, paragraph 7, second and third indents, of Directive 76/207/EEC as amended by Article 1, paragraph 2, of Directive 2002/73/EC, as established by the caselaw.

The proposal in the first paragraph, which specifies that "Less favourable treatment of a woman related to pregnancy or maternity leave shall constitute discrimination within the meaning of this Directive.", reflects the third indent of Article 2 (7) of Directive 76/207/EEC, as inserted by paragraph 2 of Article 1 of Directive 2002/73/EC.

The second paragraph corresponds to the second indent of Article 2(7) of Directive 76/207/EEC, as inserted by paragraph 2 of Article 1 of Directive 2002/73/EC, and integrates unchanged the text of that provision which reflects the caselaw of the Court on the right of a woman on maternity leave, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

### Article 16

This Article integrates unchanged the second part of the fourth indent of Article 2 (7) of Directive 76/207/EEC as inserted by paragraph 2 of Article 1 of Directive 2002/73/EC, which specifies that this Directive is also without prejudice to the right of Member States to recognise distinct rights **to paternity and/or adoption leave**. Those Member States which recognise such rights are required to take the necessary measures to protect working men and women against dismissal due to exercising those rights and to ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

This paragraph on paternity and adoption leave was introduced by both the European Parliament and the Council during the negotiations for the adoption of Directive 2002/73/EC.

## **TITLE III**

### **Horizontal Provisions**

#### **Chapter 1**

#### **Defence of Rights**

##### ***Section 1***

##### ***Remedies***

### Article 17

This Article corresponds to (Article 6 (1), (3) and (4) of Directive 76/207/EEC, as amended by Article 1, paragraph 5, of Directive 2002/73/EC, adapted in order to also cover equal pay.

In conformity with the caselaw of the Court <sup>60</sup>, paragraph 3 specifies that the previous paragraphs are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment. This corresponds to paragraph 4 of Article 6 of Directive 76/207/EEC, introduced by Article 1, paragraph 5, of Directive 2002/73/EC.

#### Article 18

This Article corresponds to Article 6 (2) of Directive 76/207/EEC as amended by Article 1, paragraph 5, of Directive 2002/73/EC, and relates to compensation in case of infringement of the principle of equal treatment in accordance with the caselaw of the Court.

### **Section 2**

#### ***Burden of proof***

#### Article 19

This Article corresponds to the principal Article of Directive 97/80/EC on the burden of proof, i.e. Article 4.

#### Article 20

This Article corresponds to Article 3 of Directive 97/80/EC relating to the scope of that Directive. This Article is also slightly adapted in order to cover all situations covered by the present proposal for a Directive (see supra).

The exception relating to criminal procedures (Article 3 (2) of Directive 97/80) is reflected in paragraph 2.

## **Chapter 2**

### **Bodies for the promotion of equal treatment – social dialogue**

#### Article 21

This Article concerns the establishment, role and competencies of equality bodies already provided for under Article 8a of Directive 76/207/EEC (introduced by Article 1, paragraph 7, of Directive 2002/73/EC). This provision will apply under the present proposal to all matters covered by the Directives forming part of the present recast.

#### Article 22

This Article concerns the obligation on Member States, in accordance with national traditions and practice, to promote social dialogue and to encourage equality plans at the workplace.

This Article corresponds to Article 8b of Directive 76/207/EEC (introduced by Article 1, paragraph 7, of Directive 2002/73/EC) and will apply to all matters covered by the present proposal for a Directive.

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<sup>60</sup> Judgement of 16th May 2000 in case C-78/98 Preston ECR 2000 p. I-03201.

### Article 23

This Article concerns the obligation on Member States to encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment. This provision which already exists in Directive 76/207/EEC (Article 8c, introduced by Article 1, paragraph 7, of Directive 2002/73/EC), should legitimately have a horizontal effect and apply to all matters covered by the present proposal. A similar Article also exists in the recently adopted Directives based on Article 13 EC (Directive 2000/43/EC and 2000/78/EC).

## **TITLE IV**

### **Implementation**

### Article 24

This Article is a classic provision, contained in Article 3 (2) of Directive 76/207/EEC as amended by paragraph 3 of Article 1 of Directive 2002/73/EC, which concerns compliance with the Directive by the Member States. Equal treatment involves the elimination of discrimination arising from any laws, regulations or administrative provision and the Directive therefore requires the Member States to abolish any such provisions. As with earlier legislation, the Directive also requires that any provisions contrary to the principle of equal treatment must be rendered null and void or amended, or must be capable of being so rendered if they are challenged.

### Article 25

This provision comes from Directive 2002/73/EC and applies horizontally to all situations within the material scope of the Directive (Article 1, paragraph 6, replacing Article 7 of Directive 76/207/EEC). It concerns the obligation of Member States to introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principles of equal treatment.

### Article 26

This Article is a standard provision dealing with sanctions for breach of the principle of equal treatment. Equivalent provisions are found in Article 8d of Directive 76/207/EEC, introduced by Article 1, paragraph 7, of Directive 2002/73/EC. Article 26 regroups all the provisions relating to sanctions and makes them applicable to the matters covered by this Directive.

### Article 27

This Article comes from Article 2 (5) of Directive 76/207/EEC, as inserted by Article 1, paragraph 2, of Directive 2002/73/EC, recommending that Member States shall encourage the taking of preventive measures against sex discrimination, harassment and sexual harassment.

### Article 28

This is again a standard provision which provides that there should be no lowering of the level of protection against discrimination on grounds of sex already afforded by Member States when implementing the Directive.

### Article 29

This Article concerning gender mainstreaming reflects the spirit of Article 3(2) EC and is identical to Article 1(1a) of Directive 76/207/EEC as inserted by Article 1, paragraph 1, of Directive 2002/73/EC. This provision has horizontal effect and will apply to matters covered by all the Directives forming part of the present recast.

### Article 30

This provision comes from Directive 97/80/EC (Article 5) as well as Directive 75/117/EEC (Article 7) and concerns the obligation of Member States to take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of persons concerned by all appropriate means, for example at the workplace. This important provision has a horizontal effect and will apply to all matters covered by the present proposal for a Directive.

## **TITLE V**

### **Final provisions**

#### Article 31

Paragraph 1 requires Member states to report to the Commission on implementation of the Directive by .....at the latest, to enable the Commission to draw up a report to the European Parliament and the Council.

Paragraph 2 corresponds, to the provision contained in Article 2, paragraph 3, of Directive 2002/73/EC on reporting every four years on measures taken by Member States pursuant to Article 141(4) EC.

#### Article 32

The Article provides for a possible revision of the Directive and exists in other Directives in similar terms. The impact of the Directive will be carefully assessed by the Commission and any adjustments deemed necessary may then be proposed as appropriate.

#### Article 33

Paragraph 1 of this Article specifies the date for transposition of this Directive by the Member States. In line with recently agreed practice, it also requires the Member States to notify the text of the provisions adopted in transposing the Directive

Paragraph 2 is a standard provision requiring provisions adopted to implement the Directive to include a reference to this Directive or to be accompanied by such a reference. This paragraph also includes a further provision requiring such reference to include a statement

that references in existing laws, regulations and administrative provisions to Directives repealed by this Directive shall be construed as references to this Directive.

Article 34

This Article concerns the repeal of the Directives forming part of the present recast once this Directive has been adopted by the Council and the European Parliament. This provision is without prejudice to the obligations on the Member States relating to the time-limits for transposition into national law and the application dates of the existing Directives.

Article 35

This is a standard Article specifying that the Directive shall enter into force on the [twentieth] day following that its publication in the Official Journal of the European Union.

Article 36

This is a standard Article specifying that the Directive is addressed to the Member States.



Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation**

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<sup>61</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>62</sup>,

Having regard to the opinion of the Committee of the Regions<sup>63</sup>,

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

Whereas:

↓ new

(1) 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<sup>64</sup>, and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes<sup>65</sup> have been substantially amended. 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<sup>66</sup> and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex<sup>67</sup> also contain provisions which have as their purpose the implementation of the principle of equal treatment between men and women. Since further amendments are to be made to these Directives, they should be recast in the interests of clarity and in order to bring together in a single text the main provisions existing in this field as well as certain

<sup>61</sup> OJ C , , p.

<sup>62</sup> OJ C , , p. .

<sup>63</sup> OJ C , , p. .

<sup>64</sup> OJ L 39, 14.2.1976, p. 40, Directive as amended by Directive 2002/73/EC (OJ L 269, 5.10.2002, p.15).

<sup>65</sup> OJ L 225, 12.8.1986, p. 40, Directive as amended by Directive 96/97/EC (OJ L 46, 17.2.1997, p. 20).

<sup>66</sup> OJ L 45, 19.2.1975, p. 19.

<sup>67</sup> OJ L 14, 20.1.1998, p. 6, Directive as amended by Directive 98/52/EC (OJ L 205, 22.7.1998, p. 66).

developments arising out of the caselaw of the Court of Justice of the European Communities.

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↓ 2002/73/EC, Recital 4(adapted)  
(adapted)

- (2) Equality ~~is~~ treatment ~~of~~ between ~~women~~ ~~and~~ men ~~and~~ men ~~and~~ women ~~is~~ a fundamental principle, ~~of~~ of Community law which according ~~to~~ ~~under~~ Article ~~s~~ ~~2~~ and Article 3(2) of the EC Treaty the Community must ~~and the case-law of the Court of Justice. These Treaty provisions proclaim equality between women and men as a 'task' and an 'aim' of the Community and impose a positive obligation to 'promote' it in all its activities.~~
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↓ 2002/73/EC, Recital 5  
(adapted)

- (3) Article 141 ~~(3)~~ ~~of the Treaty, and in particular paragraph 3, addresses~~ ~~now~~ provides a ~~specifically~~ ~~legal~~ base for the adoption of Community measures to ensure the application of the principle of ~~equal~~ equal opportunities and equal treatment ~~of men and women~~ in matters of employment and occupation ~~, including the principle of equal pay for equal work and work of equal value~~ .
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↓ 2002/73/EC, Recital 3  
(adapted)

- (4) ~~Articles 21 and 23 of~~ ~~This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union~~ ~~also~~ prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay ~~.~~
- 

↓ new

- (5) For reasons of coherence, it is necessary to provide a single definition of direct and indirect discrimination.
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↓ 97/80/EC, Recital 19 (adapted)

~~Whereas it is all the more difficult to prove discrimination when it is indirect, it is therefore important to define indirect discrimination.~~

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↓ 2002/73/EC, (adapted)	Recital	8
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- (6) Harassment related to the sex of a person and sexual harassment are contrary to the principle of equal treatment between ~~women~~ ☒ men ☒ and ☒ women ☒ ~~men; it is~~ ☒ and should ☒ therefore ~~appropriate to define such concepts and to prohibit such forms of~~ ☒ be deemed to constitute ☒ discrimination ☒ on grounds of sex for the purposes of this Directive ☒ . ~~To this end it must be emphasised that these~~ ☒ These ☒ forms of discrimination occur not only in the workplace, but also in the context of access to employment and vocational training; ~~during employment and occupation.~~

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↓ 2002/73/EC, (adapted)	Recital	9
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- (7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of ~~sexual~~ discrimination ☒ on grounds of sex ☒ and, in particular, to take preventive measures against harassment and sexual harassment in the workplace, in accordance with national legislation and practice.

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↓ new
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- (8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty constitutes an important aspect of the principle of equal treatment between men and women. It is therefore appropriate to make further provision for its implementation.

- (9) It is well-established that the principle of equal pay is not limited to situations in which men and women work for the same employer. According to the judgments of the Court of Justice in Case C-320/00: *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*<sup>68</sup> and Case C-256/01: *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services and The Secretary of State for Education and Employment*<sup>69</sup>, there must nevertheless be a single source to which any differences identified in pay conditions can be attributed since otherwise there is no body which is responsible for any inequality and which could restore equal treatment.

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<sup>68</sup> [2002] ECR I-7325.

<sup>69</sup> Judgment of 13.1.2004.

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↓ 86/378/EEC, (adapted)	Recital	1
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~~Whereas the Treaty provides that each Member State shall ensure the application of the principle that men and women should receive equal pay for equal work; whereas «pay» should be taken to mean the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, from his employer in respect of his employment;~~

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↓ 86/378/EEC, (adapted)	Recital	2
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~~Whereas, although the principle of equal pay does indeed apply directly in cases where discrimination can be determined solely on the basis of the criteria of equal treatment and equal pay, there are also situations in which implementation of this principle implies the adoption of additional measures which more clearly define its scope.~~

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↓ 75/117/EEC, (adapted)	Recital	1
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~~Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market;~~

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↓ 75/117/EEC, (adapted)	Recital	2
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~~Whereas it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions;~~

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↓ 75/117/EEC, (adapted)	Recital	3
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~~Whereas the Council resolution of 21 January 1974<sup>70</sup> concerning a social action programme, aimed at making it possible to harmonise living and working conditions while the improvement is being maintained and at achieving a balanced social and economic development of the Community, recognised that priority should be given to action taken on behalf of women as regards access to employment and vocational training and advancement, and as regards working conditions, including pay;~~

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<sup>70</sup> OJ No C 13, 12.2.1974, p. 1.

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↓ 75/117/EEC, (adapted)	Recital	4
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~~Whereas it is desirable to reinforce the basic laws by standards aimed at facilitating the practical application of the principle of equality in such a way that all employees in the Community can be protected in these matters;~~

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↓ 75/117/EEC, (adapted)	Recital	5
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~~Whereas differences continue to exist in the various Member States despite the efforts made to apply the resolution of the conference of the Member States of 30 December 1961 on equal pay for men and women and whereas, therefore, the national provisions should be approximated as regards application of the principle of equal pay;~~

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↴ new
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(10) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

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↓ 86/378/EEC, (adapted)	Recital	3
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~~Whereas, Article 1(2) of 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<sup>71</sup> provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application; whereas the Council adopted to this end Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security<sup>72</sup>.~~

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↓ 86/378/EEC, (adapted)	Recital	4
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~~Whereas Article 3 (3) of Directive 79/7/EEC provides that, with a view to ensuring implementation of the principle of equal treatment in occupational schemes, the~~

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<sup>71</sup> OJ No L 39, 14. 2. 1976, p. 40.

<sup>72</sup> OJ No L 6, 10. 1. 1979, p. 24.

~~Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application;~~

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↓ 86/378/EEC, Recital 5  
(adapted)

~~Whereas the principle of equal treatment should be implemented in occupational social security schemes which provide protection against the risks specified in Article 3 (1) of Directive 79/7/EEC as well as those which provide employees with any other consideration in cash or in kind within the meaning of the Treaty;~~

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↓ 86/378/EEC, Recital 6  
(adapted)

~~Whereas implementation of the principle of equal treatment does not prejudice the provisions relating to the protection of women by reason of maternity;~~

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↓ 96/97/EC, Recital 2 (adapted)

(11) In its judgement of ~~17 May 1990~~, in Case C-262/88: *Barber v. Guardian Royal Exchange Assurance Group*<sup>73</sup>, the Court of Justice ~~of the European Communities~~ ~~acknowledges~~  determined  that all forms of occupational pension constitute an element of pay within the meaning of Article  141  ~~119~~ of the Treaty.

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↓ new

(12) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Case C-7/93: *Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune*<sup>74</sup> and Case C-351/00: *Pirkko Niemi*<sup>75</sup>, this condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to this effect.

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<sup>73</sup> 1990 ECR I-1889

<sup>74</sup> [1994] ECR I-4471.

<sup>75</sup> [2002] ECR I-7007.

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↓ 96/97/EC, Recital 10 (adapted)

- (13) ~~Moreover in its judgements in Case C-152/91 and Case C-200/91, the~~ The Court of Justice has confirmed ~~that~~ whilst the contributions of male and female workers to a defined-benefit pension scheme ~~must be the same, since they~~ are covered by Article 141 ~~119~~ of the Treaty, whereas any inequality in ~~of~~ employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not to be assessed in the light of that same provision.
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↓ 96/97/EC, Recital 4 (adapted)

- (14) ~~Whereas in accordance with Protocol 2 concerning Article 119 of the Treaty annexed to the Treaty establishing the European Community,~~ It is well-established that benefits payable under occupational social security schemes ~~shall~~ are not to be considered as remuneration ~~if and in so far~~ insofar as they are attributable to periods of employment prior to 17<sup>th</sup> May 1990, except in the case of workers or those claiming under them who, ~~have before that date,~~ initiated legal proceedings or ~~raised~~ brought an equivalent claim under the applicable national law, before that date. It is therefore necessary to limit the implementation of the principle of equal treatment accordingly .
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↓ 2002/73/EC, Recital 11 (adapted)

- (15) Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those ~~The occupational activities that Member States may exclude from the scope of Directive 76/207/EEC should be restricted to those~~ which necessitate the employment of a person of ~~one~~ a particular sex by reason of ~~the~~ their nature ~~of the particular occupational activities concerned~~ or the context in which they are carried out, provided that the objective sought is legitimate, and subject to and complies with the principle of proportionality ~~as laid down by the case-law of the Court of Justice~~<sup>76</sup>.
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↓ 76/207/EEC, Recital 1 (adapted)

~~Whereas the Council, in its resolution of 21 January 1974 concerning a social action programme<sup>77</sup>, included among the priorities action for the purpose of achieving~~

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<sup>76</sup> Case C-222/84 Johnston, [1986] ECR 1651, Case C-273/97 Sirdar [1999] ECR I-7403 and Case C-285/98 Kreil [2000] ECR I-69

<sup>77</sup> OJ No C 13, 12. 2. 1974, p. 1.

~~equality between men and women as regards access to employment and vocational training and promotion and as regards working conditions, including pay;~~

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↓ 76/207/EEC, Recital 2  
(adapted)

~~Whereas, with regard to pay, the Council adopted on 10 February 1975 Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women<sup>78</sup>;~~

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↓ 76/207/EEC, Recital 3  
(adapted)

~~Whereas Community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions also appears to be necessary; whereas, equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered; whereas the Treaty does not confer the necessary specific powers for this purpose;~~

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↓ 76/207/EEC, Recital 4  
(adapted)

~~Whereas the definition and progressive implementation of the principle of equal treatment in matters of social security should be ensured by means of subsequent instruments;~~

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↓ 2002/73/EC, Recital 14  
(adapted)

(16) ~~Member States may, under~~ ☒ In accordance with ☒ Article 141(4) of the Treaty, ☒ the principle of equal treatment does not prevent Member States from maintaining ☒ ~~maintain~~ or ☒ adopting ☒ ~~adopt~~ measures providing for specific advantages, in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. ~~Given the current situation, and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.~~

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<sup>78</sup> OJ No L 45, 19. 2. 1975, p. 19.



- (17) ~~It is clear from the caselaw of the Court of Justice that 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. It has moreover consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination on grounds of sex. Such treatment should therefore be expressly included in this Directive.~~
- (18) ~~The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity. This Directive is therefore without prejudice to 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>79</sup> (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), which 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 preamble to Directive 92/85/EEC provides that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not involve treating women who are on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.~~
- (19) ~~For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women, on maternity leave and in particular their right to return to the same or an equivalent job post and to suffer no detriment in their terms and conditions as a result of taking such leave. with no less favourable working conditions, as well as to benefit from any improvement in working conditions to which they would be entitled during their absence.~~

- (20) The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.
- (21) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

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<sup>79</sup> OJ L 348, 28.11.1992, p. 1.

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↓ 97/80/EC, Recitals 13, 14 16 & 18 (adapted)

- (22) ☒ The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As ☒ ~~Whereas the Court of Justice of the European Communities has therefore held ☒ , ☒ that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively,~~ ☒ provision should therefore be made to ensure that ☒ the burden of proof ~~must shift~~ ☒ shifts ☒ back to the respondent when ☒ there is a prima facie case ☒ evidence of such discrimination ☒ , ☒ is brought. ~~Whereas Member States need not apply the rules on the burden of proof to ☒ except in relation to ☒ proceedings in which it is for the court or other competent body to investigate the facts. of the case, whereas the procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate. ☒ It is however necessary to clarify that ☒ Whereas the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination ☒ remains ☒ is a matter for ☒ the relevant ☒ national judicial or other competent bodies, ☒ body ☒ in accordance with national law or practice. Whereas ☒ Further, ☒ it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.~~
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↓ 97/80/EC, Recital 1 (adapted)

~~Whereas, on the basis of the Protocol on social policy annexed to the Treaty, the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter called «the Member States»), wishing to implement the 1989 Social Charter, have concluded an Agreement on social policy;~~

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↓ 97/80/EC, Recital 2 (adapted)

~~Whereas the Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs;~~

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↓ 97/80/EC, Recital 3 (adapted)

~~Whereas paragraph 16 of the Community Charter of the Fundamental Social Rights of Workers on 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»;~~

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↓ 97/80/EC, Recital 4 (adapted)

~~Whereas, in accordance with Article 3(2) of the Agreement on social policy, the Commission has consulted management and labour at Community level on the possible direction of Community action on the burden of proof in cases of discrimination based on sex;~~

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↓ 97/80/EC, Recital 5 (adapted)

~~Whereas the Commission, considering Community action advisable after such consultation, once again consulted management and labour on the content of the proposal contemplated in accordance with Article 3(3) of the same Agreement; whereas the latter have sent their opinions to the Commission;~~

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↓ 97/80/EC, Recital 6 (adapted)

~~Whereas, after the second round of consultation, neither management nor labour have informed the Commission of their wish to initiate the process — possibly leading to an agreement — provided for in Article 4 of the same Agreement;~~

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↓ 97/80/EC, Recital 7 (adapted)

~~Whereas, in accordance with Article 1 of the Agreement, the Community and the Member States have set themselves the objective, inter alia, of improving living and working conditions; whereas effective implementation of the principle of equal treatment for men and women would contribute to the achievement of that aim;~~

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↓ 97/80/EC, Recital 8 (adapted)

~~Whereas the principle of equal treatment was stated in Article 119 of the Treaty, 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<sup>80</sup> 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<sup>81</sup>;~~

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↓ 97/80/EC, Recitals 9 (adapted)

~~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~~

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<sup>80</sup> OJL 45, 19. 2. 1975, p. 19.

<sup>81</sup> OJL 39, 14. 2. 1976, p. 40.

~~workers who have recently given birth or are breastfeeding also contributes to the effective implementation of the principle of equal treatment for men and women; whereas that Directive should not work to the detriment of the aforementioned Directives on equal treatment; whereas therefore, female workers covered by that Directive should likewise benefit from the adaptation of the rules on the burden of proof.~~

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↓ 97/80/EC, Recital 10 (adapted)

~~Whereas Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC<sup>82</sup>, is also based on the principle of equal treatment for men and women.~~

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↓ 97/80/EC, Recital 11 (adapted)

~~Whereas the references to 'judicial process' and 'court' cover mechanisms by means of which disputes may be submitted for examination and decision to independent bodies which may hand down decisions that are binding on the parties to those disputes.~~

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↓ 97/80/EC, Recital 12 (adapted)

~~Whereas the expression 'out of court procedures' means in particular procedures such as conciliation and mediation.~~

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↓ 97/80/EC, Recital 15 (adapted)

~~Whereas it is necessary to take account of the specific features of certain Member States' legal systems, inter alia where an inference of discrimination is drawn if the respondent fails to produce evidence that satisfies the court or other competent authority that there has been no breach of the principle of equal treatment.~~

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↓ 97/80/EC, Recital 17 (adapted)

~~Whereas, plaintiffs could 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 were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.~~

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<sup>82</sup>

OJ L 145, 19.6.1996, p.4

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↓ 2002/73/EC, (adapted)	Recital	20
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- (23) ~~Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective~~ ☒ With a view to further improving the ☒ level of protection ☒ offered by this Directive ☒, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of ☒ a complainant ☒ ~~any victim~~, without prejudice to national rules of procedure concerning representation and defence ~~before the courts~~.

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↓ 2002/73/EC, (adapted)	Recital	17
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- (24) ~~The Court of Justice has ruled that, having~~ ☒ Having ☒ regard to the fundamental nature of the right to effective judicial ☒ legal ☒ protection, ~~employees enjoy~~ ☒ it is appropriate to ensure that workers continue to enjoy ☒ such protection even after the ~~employment~~ relationship ☒ giving rise to an alleged breach of the principle of equal treatment ☒ has ended<sup>83</sup>. ~~An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.~~

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↓ 2002/73/EC, (adapted)	Recital	18
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- (25) ☒ It has been clearly established by the ☒ ~~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 ☒ for any breach ☒ ~~to the employee discriminated against~~ must be adequate in relation to the damage sustained. It ☒ is therefore appropriate to exclude the ☒ ~~has furthermore specified that~~ fixing ☒ of any ☒ ~~a~~ prior upper limit ☒ for such ☒ ~~may preclude effective~~ compensation. ~~and that excluding an award of interest to compensate for the loss sustained is not allowed~~<sup>84</sup>.

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↓ 2002/73/EC, (adapted)	Recital	21
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- (26) ☒ In order to enhance the effective implementation of the principle of equal treatment, ☒ Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations. ~~to address different forms of discrimination based on sex in the workplace and to combat them.~~

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<sup>83</sup> ~~Case C-185/97 Coote [1998] ECR I-5199~~

<sup>84</sup> ~~Case C-180/95, Drachmpachl, [1997] ECR I-2195, Case C-271/91, Marshall [1993] ECR I-4367~~

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↓ 2002/73/EC, Recital 22  
(adapted)

- (27) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under ~~⊗~~ this ~~⊗~~ Directive ~~76/207/EEC~~.

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↓ 2002/73/EC, Recital 23  
(adapted)

- (28) ~~In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, ⊗ Since ⊗ the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the ⊗ at ⊗ Community= ⊗ level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ⊗. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary ⊗ in order to achieve those objectives ⊗. for that purpose.~~

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↓ 97/80/EC, Recital 20 (adapted)

~~Whereas the aim of adequately adapting the rules on the burden of proof has not been achieved satisfactorily in all Member States and, in accordance with the principle of subsidiarity stated in Article 3b of the Treaty and with that of proportionality, that 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,~~

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↓ new

- (29) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.
- (30) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex 1, Part B,

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↓ new

HAVE ADOPTED THIS DIRECTIVE:

## TITLE I

### GENERAL PROVISIONS

#### *Article 1*

The purpose of this Directive is to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

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↓ 76/207/EEC (adapted)

#### ~~*Article 1*~~

~~1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and on the conditions referred to in paragraph 2, social security. This principle is referred to hereinafter as the 'principle of equal treatment'.~~

~~2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.~~

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↓ 86/378/EEC (adapted)

~~Article 1~~

~~The object of this Directive is to implement, in occupational social security schemes, the principle of equal treatment for men and women, hereinafter referred to as «the principle of equal treatment».~~

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↓ 97/80/EC (adapted)

~~Article 1~~

~~Aim~~

~~The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.~~

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↓ 2002/73/EC, Article 1 pt. 2 (adapted)

Article 2

2. 1. For the purposes of this Directive, the following definitions shall apply:

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↓ 2002/73/EC, Article 1 pt. 2 (adapted)

(a) - direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; ;

(b) - indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary; ;



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↓ 97/80/EC, Article 2(2)  
(adapted)

- ~~For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination 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,~~
- 

↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

☒ (c) ☒ - harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; ☒ ; ☒

☒ (d) ☒ - sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment; ☒ ; ☒

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↓ new

(e) pay: the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment from his employer;

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↓ 96/97/EC, Article 1 pt. 1  
(adapted)

☒ (f) ☒ ~~1. «occupational social security schemes» means~~ ☒ : ☒ schemes not governed by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

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↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

3. ☒ 2. For the purposes of this Directive, discrimination includes: ☒

☒ (a) ☒ harassment and sexual harassment ~~within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.~~ ☒ , as well as

any less favourable treatment based on a person's rejection of or submission to such conduct;  
~~☒~~

~~A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.~~

~~- 4. An ☒ (b) ☒ instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.~~

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↓ 96/97/EC, Article 1 pt. 2 (adapted)
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### Article 3

☒ 1. ☒ This Directive shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, ☒ and ☒ to retired and disabled workers ☒ , ☒ and to those claiming under them, in accordance with national law and/or practice.

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↓ 2002/73/EC, Article 1 pt. 2 (adapted)
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~~☒~~ ☒ 2. ☒ This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

☒ 3. ☒ This Directive shall ~~also~~ be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC<sup>85</sup> and of 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)<sup>86</sup>.

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↓ 86/378/EEC, Article 5(2) (adapted)
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~~The principle of equal treatment shall not prejudice the provisions relating to the protection of women by reason of maternity.~~

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<sup>85</sup> OJ L 145, 19.6.1996, p. 4.

<sup>86</sup> OJ L 348, 28.11.1992, p. 1.

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↓ 75/117/EEC, Article 1(adapted)  
(adapted)  
⇒ new

## ⊗ TITLE II ⊗

### ⊗ SPECIFIC PROVISIONS ⊗

#### ⊗ Chapter 1 ⊗

#### ⊗ Principle of equal pay ⊗

##### *Article 4*

~~The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called «principle of equal pay», means, for~~ ⊗ For ⊗ the same work or for work to which equal value is attributed, ~~the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration~~ ⇒ attributable to a single source ⇐ ⊗ shall be eliminated ⊗.

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↓ 75/117/EEC, Article 1  
(adapted)

In particular, where a job classification system is used for determining pay, it ~~must~~ ⊗ shall ⊗ be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

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↓ 86/378/EEC (adapted)

#### ⊗ Chapter 2 ⊗

#### ⊗ Principle of equal treatment in occupational social security schemes ⊗

##### *Article 5*

~~1. Under the conditions laid down in the following provisions,~~ ⊗ Without prejudice to Article 4, ⊗ the principle of equal treatment implies that there shall be no ⊗ direct or indirect ⊗ discrimination on the ~~basis~~ ⊗ grounds ⊗ of sex ⊗ in occupational social security schemes, in particular ~~either directly or indirectly, by reference in particular to marital or family status, especially~~ as regards:

- ⊗ (a) ⊗ the scope of the ⊗ such ⊗ schemes and the conditions of access to them;

- ☒(b) ☒ the obligation to contribute and the calculation of contributions;
- ☒(c) ☒ the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

↓ 86/378/EEC, Article 4 (adapted)
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*Article 6*

☒ 1. ☒ This ~~Directive~~ ☒ Chapter ☒ ~~shall apply~~ ☒ applies ☒ to:

(a) occupational schemes which provide protection against the following risks:

- ☒ (i) ☒ sickness,
- ☒ (ii) ☒ invalidity,
- ☒ (iii) ☒ old age, including early retirement,
- ☒ (iv) ☒ industrial accidents and occupational diseases,
- ☒ (v) ☒ unemployment;

(b) occupational schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits ~~are accorded to employed persons and thus~~ constitute a consideration paid by the employer to the worker by reason of the latter's employment.

↓ new
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2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer in that they are directly related to the period of service and their amount is calculated by reference to the public servant's final salary. The fact that such a scheme forms part of a general statutory scheme is without prejudice in this respect.

↓ 96/97/EC, Article 1 pt. 1 (adapted)
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~~☒~~ *Article 7* ~~☒~~

~~☒~~ 1. ☒ This ~~Directive~~ ☒ Chapter ☒ does not apply to:

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↓ 96/97/EC, Article 1 pt. 1

- (a) individual contracts for self-employed workers;
- (b) schemes for self-employed workers having only one member;

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↓ 96/97/EC, Article 1 pt. 1  
(adapted)  
⇒ new

- (c) insurance contracts to which the employer is not a party, in the case of ~~salaries~~  
⇒ employed ⇐ workers;
- (d) optional provisions of occupational schemes offered to participants individually to guarantee them:
  - ⊗ (i) ⊗ either additional benefits, ~~or,~~
  - ⊗ (ii) or ⊗ a choice of date on which the normal benefits for self-employed workers will start, or a choice between several benefits;
- (e) occupational schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

3 ⊗ 2. ⊗ This ~~Directive~~ ⊗ Chapter ⊗ does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

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↓ 96/97/EC, Article 1 pt. 3  
(adapted)

Article ~~6~~ ⊗ 8 ⊗

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, ~~in particular by reference to marital or family status,~~ for:

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↓ 96/97/EC, Article 1 pt. 3

- (a) determining the persons who may participate in an occupational scheme;

- (b) fixing the compulsory or optional nature of participation in an occupational scheme;
  - (c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;
- 

↓ 96/97/EC, Article 1 pt. 3  
(adapted)

- (d) laying down different rules, except as provided for in points (h) ☒, ☒ and (i) ☒ and (j) ☒, for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;
- 

↓ 96/97/EC, Article 1 pt. 3

- (e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;
  - (f) fixing different retirement ages;
  - (g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;
- 

↓ 96/97/EC, Article 1 pt. 3  
(adapted)

- (h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes—~~in ☒~~; in ☒ the case of funded defined-benefit schemes, certain elements ~~(examples of which are annexed)~~ may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;
- 

↓ 96/97/EC, Article 1 pt. 3

- (i) setting different levels for workers' contributions;
- 

↓ 96/97/EC, Article 1 pt. 3  
(adapted)

- ☒ (j) ☒ setting different levels for employers' contributions, except:

- (i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,
- (ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) , and (i) and (j) , as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Directive Chapter is left to the discretion of the scheme's management bodies, the latter must shall comply with the principle of equal treatment.

↓ 96/97/EC, Article 1 pt. 4  
(adapted)  
⇒ new

*Article 9*

1. Member States shall take the necessary steps to ensure that the provisions of occupational schemes for self-employed workers contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC as amended by Directive 96/97/EC became applicable in their territory .

2. This Chapter Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme for self-employed workers prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

↓ 96/97/EC, Article 1 pt. 5  
(adapted)  
⇒ new

*Article 10*

As regards occupational schemes for self-employed workers, Member States may defer compulsory application of the principle of equal treatment with regard to:

- (a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:

- (i) either until the date on which such equality is achieved in statutory schemes,
  - (ii) or, at the latest, until such equality is prescribed by a directive;
- (b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;
- (c) the application of ~~the first subparagraph of point (i) of Article 8(1)(i)~~ in relation to the use ~~to take account of the different~~ of actuarial calculation factors, ~~at the latest~~ until 1 January 1999  $\Rightarrow$  or for Member States whose accession took place after that date until the date that Directive 86/378/EEC as amended by Directive 96/97/EC became applicable in their territory  $\Leftarrow$ .

↓ 96/97/EC, Article 2 (adapted)

### *Article 11*

1. Any measure implementing this Chapter ~~Directive~~, as regards ~~paid~~ employed workers, ~~must~~ shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures ~~must~~ shall apply retroactively to 8 April 1976 and ~~must~~ shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article ~~119~~ 141 of the Treaty became applicable on their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or ~~raise~~ raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of Community law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and who were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 ~~of this Article~~ is replaced by 1 January 1994.

↓ new

4. For other Member States whose accession took place after 17 May 1990 the date of 17 May 1990 in paragraph 1 and 2 is replaced by the date on which Article 141 of the Treaty became applicable in their territory.



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↓ 96/97/EC, Article 1 pt. 6  
(adapted)

Article ~~9a~~ 12

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Directive Chapter .

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↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

### Chapter 3

#### The principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions

~~Article 2~~

~~1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.~~

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↓ 97/80/EC, Article 2(1)  
(adapted)

#### Definitions

~~1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.~~

---

↓ 2002/73/EC, Article 1 pt. 3  
(adapted)

Article ~~3~~ 13

~~1. Application of the principle of equal treatment means that there~~ There shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

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↓ 2002/73/EC, Article 1 pt. 3

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
  - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- 

↓ 2002/73/EC, Article 1 pt. 3  
(adapted)

- (c) employment and working conditions, including dismissals, as well as pay as provided for in ~~⊗~~ this ~~⊗~~ Directive ~~75/117/EEC~~;
- 

↓ 2002/73/EC, Article 1 pt. 3

- (d) 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.
- 

↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

~~⊗~~ ~~⊗~~ 2. ~~⊗~~ Member States may provide, as regards access to employment including the training leading thereto, 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 and determining occupational requirement, provided that ~~the~~ ~~⊗~~ its ~~⊗~~ objective is legitimate and the requirement is proportionate.

---

↓ 76/207/EEC, Article 9(2)  
(adapted)

~~⊗~~ ~~⊗~~ 3. ~~⊗~~ Member States shall periodically assess the occupational activities referred to ~~⊗~~ in paragraph 2 ~~⊗~~ ~~Article 2(2)~~ in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.

---

↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

⊗ Article 14 ⊗

⊗ Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women ⊗, in working life ⊗.

---

↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

⊗ Article 15 ⊗

⊗ 1. ⊗ Less favourable treatment of a woman related to pregnancy or maternity leave ~~within the meaning of Directive 92/85/EEC~~ shall constitute discrimination within the meaning of this Directive.

⊗ 2. ⊗ A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would ⊗ have been ⊗ ~~be~~ entitled during her absence.

---

↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

⊗ Article 16 ⊗

⊗ This Directive ⊗ ~~It is also~~ without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

---

↓ 2002/73/EC, Article 1 pt. 5  
(adapted)

⊗ TITLE III ⊗

⊗ HORIZONTAL PROVISIONS ⊗

⊗ Chapter 1 ⊗

⊗ Defence of rights ⊗

⊗ Section 1 ⊗

⊗ Remedies ⊗

Article ~~6~~ ⊗ 17 ⊗

1. Member States shall ensure that ⊗ ,after possible recourse to other competent authorities, ⊗ judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

~~3~~ ⊗ 2. ⊗ Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants, with his ~~or her~~ approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

~~4~~ ⊗ 3. ⊗ Paragraphs 1 and ~~3~~ ⊗ 2 ⊗ are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.

---

↓ 75/117/EEC (adapted)

~~Article 2~~

~~Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay to pursue their claims by judicial process after possible recourse to other competent authorities.~~

---

↓ 86/378/EEC (adapted)

~~Article 10~~

~~Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves injured by failure to apply the principle of equal treatment to pursue their claims before the courts, possibly after bringing the matters before other competent authorities.~~

---

↓ 2002/73/EC, Article 1 pt. 5  
(adapted)

⊗ Article 18 ⊗

~~2.~~ Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination ⊗ on grounds of sex ⊗ ~~contrary to Article 3~~, in a way which is dissuasive and proportionate to the damage suffered ⊗ . ⊗ ~~such~~ ⊗ Such ⊗ compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his ~~her~~ job application into consideration.

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↓ 97/80/EC, Article 4 (adapted)

⊗ Section 2 ⊗

⊗ Burden of proof ⊗

Article 19

**Burden of proof**

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. ~~This Directive~~ ⊗ Paragraph 1 ⊗ shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

---

↓ 97/80/EC, Article 4

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

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↓ 97/80/EC, Article 3 (adapted)

*Article 20*

**Scope**

1. ~~This Directive~~ ☒ Article 19 ☒ shall ☒ also ☒ apply to:

- (a) the situations covered by Article ~~119~~ ☒ 141 ☒ of the Treaty ~~and by Directives 75/117/EEC, 76/207/EEC~~ and, insofar as discrimination based on sex is concerned, ☒ by Directives ☒ 92/85/EEC and 96/34/EC;
- 

↓ 97/80/EC, Article 3

- (b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.
- 

↓ 97/80/EC, Article 3 (adapted)

2. This ~~Directive~~ ☒ Chapter ☒ shall not apply to criminal procedures, unless otherwise provided by the Member States.

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↓ 2002/73/EC, Article 1 pt. 7 (adapted)

☒ **Chapter 2** ☒

☒ **Bodies for the promotion of equal treatment – social dialogue** ☒

*Article ~~20~~ ☒ 21 ☒*

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies ~~charged~~

with responsibility at national level with for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article ~~6(3)~~ 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

---

↓ 2002/73/EC, Article 1 pt. 7

- (b) conducting independent surveys concerning discrimination;
- (c) publishing independent reports and making recommendations on any issue relating to such discrimination.

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↓ 2002/73/EC, Article 1 pt. 7  
(adapted)

*Article ~~8b~~ 22*

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1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners 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.

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↓ 2002/73/EC, Article 1 pt. 7  
(adapted)

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the ~~minimum requirements laid down by~~ provisions of this Directive and the relevant national implementing measures.

---

↓ 2002/73/EC, Article 1 pt. 7

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.

4. To this end, employers should be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include statistics on proportions of men and women at different levels of the organisation and possible measures to improve the situation in co-operation with employees' representatives.

---

↓ 2002/73/EC, Article 1 pt. 7  
(adapted)

*Article ~~22~~ 23*

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.

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↓ 2002/73/EC, Article 1 pt. 3  
(adapted)

## ⊠ TITLE IV ⊠

### ⊠ IMPLEMENTATION ⊠

*⊠ Article 24 ⊠*

~~2. To that end,~~ Member States shall take ~~the~~ all necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) ~~any~~ provisions contrary to the principle of equal treatment ~~which are included~~ in contracts or collective agreements, ⊠ wage scales, wage agreements, staff rules of undertakings, ⊠ internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations ⊠, individual contracts of employment or any other arrangements ⊠ shall be, or may be declared, null and void or are amended ⊠ ; ⊠



---

↓ 86/378/EEC (adapted)

~~Article 7~~

~~Member States shall take all necessary steps to ensure that:~~

~~(a) provisions contrary to the principle of equal treatment in legally compulsory collective agreements, staff rules of undertakings or any other arrangements relating to occupational schemes are null and void, or may be declared null and void or amended;~~

~~(b)  (c)~~  schemes containing such provisions may not be approved or extended by administrative measures.

---

↓ 75/117/EEC (adapted)

~~Article 3~~

~~Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.~~

---

↓ 75/117/EEC (adapted)

~~Article 4~~

~~Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts or employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.~~

---

↓ 75/117/EEC (adapted)

~~Article 6~~

~~Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.~~

---

↓ 2002/73/EC, Article 1 pt. 6  
(adapted)

*Article ~~7~~ 25*

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

---

↓ 86/378/EEC (adapted)

~~Article 11~~

~~Member States shall take all the necessary steps to protect worker against dismissal where this constitutes a response on the part of the employer to a complaint made at undertaking level or to the institution of legal proceedings aimed at enforcing compliance with the principle of equal treatment.~~

---

↓ 75/117/EEC (adapted)

~~Article 5~~

~~Member States shall take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal pay.~~

---

↓ 2002/73/EC, Article 1 pt. 7  
(adapted)  
⇒ new

*Article ~~8~~ 26*

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by ~~5 October 2005~~ ⇒ the date specified in Article 33 ⇐ at the latest and shall notify it without delay of any subsequent amendment affecting them.

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↓ 2002/73/EC, Article 1 pt. 2  
(adapted)

⊗ Article 27 ⊗

~~5.~~ Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.

---

↓ 97/80/EC, Article 6 (adapted)

Article ⊗ 28 ⊗

**~~Non-Regression~~**

Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the ~~general~~ level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the ~~minimum requirements~~ ⊗ provisions ⊗ of this Directive are complied with.

---

↓ 2002/73/EC, Article 1 pt. 7  
(adapted)

~~Article 8e~~

~~1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.~~

~~2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.~~

---

↓ 2002/73/EC Article 1 pt. 1  
(adapted)

⊗ Article 29 ⊗

~~1a.~~ Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in ~~paragraph 1~~ ⊗ this Directive ⊗.

---

↓ 97/80/EC, Article 5 (adapted)

Article ⊗ 30 ⊗

**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 the persons concerned by all appropriate means ⊗, for example at the workplace ⊗.

---

↓ 76/207/EEC (adapted)

~~Article 8~~

~~Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.~~

---

↓ 75/117/EEC (adapted)

~~Article 7~~

~~Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of employees by all appropriate means, for example at their place of employment.~~

---

↓ 2002/73/EC, Article 2 (adapted)
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## ⊠ TITLE V ⊠

### ⊠ FINAL PROVISIONS ⊠

#### *Article ⊠ 31 ⊠*

~~2~~ ⊠ 1. By ..... at the latest, the ⊠ ~~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~~ ⊠ 2. ⊠ Without prejudice to paragraph ~~2~~ ⊠ 1 ⊠, Member States shall communicate to the Commission, every four years, the texts of ~~laws, regulations and administrative provisions~~ any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration N° 28 annexed to the Final Act of the Treaty of Amsterdam.

---

↓ 97/80/EC, Article 7 (adapted)
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~~The Member States shall communicate to the Commission, within two 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.~~

---

↓ 96/97/EC, Article 3 pt. 2 (adapted)
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~~(2) Member States shall communicate to the Commission, at the latest two years after the entry into force of this Directive, all information necessary to enable the Commission to draw up a report on the application of this Directive.~~

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↓ 86/378/EEC, Article 12 (adapted)
---------------------------------------

~~2. Member States shall communicate to the Commission at the latest five years after notification of this Directive all information necessary to enable the Commission to draw up a report on the application of this Directive for submission to the Council.~~

---

↓ 76/207/EEC (adapted)

~~Article 10~~

~~Within two years following expiry of the 30 month period laid down in the first subparagraph of Article 9(1), Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.~~

---

↓ 75/117/EEC (adapted)

~~Article 9~~

~~Within two years of the expiry of the one year period referred to in Article 8, Member States shall forward all necessary information to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council.~~

---

↓ new

Article 32

By 30 June 2008 at the latest, the Commission shall review the operation of this Directive and if appropriate, propose any amendments it deems necessary.

---

↓ new

Article 33

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...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 be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive

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↓ 97/80/EC (adapted)

~~Article 7~~

**Implementation**

~~The Member States shall bring into force the laws, regulations and administrative provisions necessary for them to comply with this Directive by 1 January 2001. They shall immediately inform the Commission thereof.~~

~~When the Member States adopt those measures they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by the Member States.~~

---

↓ 98/52/EC, Article 2 (adapted)

~~As regards the United Kingdom of Great Britain and Northern Ireland, the date of 1 January 2001 in paragraph 1 shall be replaced by 22 July 2001.~~

---

↓ 86/378/EEC (adapted)

~~Article 12~~

~~1. Member States shall bring into force such laws, regulations and administrative provisions as are necessary in order to comply with this Directive at the latest three years after notification thereof<sup>87</sup>. They shall immediately inform the Commission thereof.~~

---

↓ 76/207/EEC (adapted)

~~Article 9~~

~~1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within 30 months of its notification and shall immediately inform the Commission thereof.~~

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<sup>87</sup> This Directive was notified to the Member States on 30 July 1986.

~~However, as regards the first part of Article 3(2)(c) and the first part of Article 5(2)(c), Member States shall carry out a first examination and if necessary a first revision of the laws, regulations and administrative provisions referred to therein within four years of notification of this Directive.~~

~~3. Member States shall also communicate to the Commission the texts of laws, regulations and administrative provisions which they adopt in the field covered by this Directive.~~

---

↓ 75/117/EEC (adapted)

#### ~~Article 8~~

~~1. Member States shall put into force the laws, regulations and administrative provisions necessary in order to comply with this Directive within one year of its notification and shall immediately inform the Commission thereof.~~

~~2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.~~

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↓ new

#### Article 34

1. Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC, as amended by the Directives in Annex 1, Part A, are repealed with effect from the date set out in the first paragraph of Article 33 of this Directive, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex 1, Part B.

2. References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex 2.

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↓ new

#### Article 35

This Directive shall enter into force on the [twentieth] day following that of its publication in the *Official Journal of the European Union*.





*Article 36*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

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↓ 96/97/EC, Article 1 pt. 7 (adapted)
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~~ANNEX~~

~~Examples of elements which may be unequal, in respect of funded defined benefit schemes, as referred to in Article 6 (h):~~

~~conversion into a capital sum of part of a periodic pension;~~

~~transfer of pension rights;~~

~~a reversionary pension payable to a dependant in return for the surrender of part of a pension;~~

~~a reduced pension where the worker opts to take early retirement~~



## **ANNEX 1**

### **Part A**

#### **Repealed Directives with their successive amendments (referred to in Article 34(1))**

Council Directive 75/117/EEC	OJ L 45, 19.2.1975
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Council Directive 76/207/EEC	OJ L 39, 14.2.1976
Directive 2002/73/EC of the European Parliament and of the Council	OJ L 269, 2.10.2002

Council Directive 86/378/EEC	OJ L 225, 12.8.1986
Directive 96/97/EC	OJ L 46, 17.2.1997

Council Directive 97/80/EC	OJ L 14, 20.1.1998
Directive 98/52/EC	OJ L 205, 22.7.1998

### **Part B**

#### **List of time-limits for transposition into national law and application dates (referred to in Article 34(1))**

Directive	Time-limit transposition	for	Date of application
Directive 75/117/EEC	19.2.1976		
Directive 76/207/EEC	14.8.1978		
Directive 86/378/EEC	1.1.1993		
Directive 96/97/EC	1.7.1997		17.5.1990 in relation to paid workers, except for those workers or those claiming under them who had before that date initiated legal proceeding or raised an equivalent

		<p>claim under national law.</p> <p>Article 8 of Directive 86/378/EEC as amended by Directive 96/97/EC - 1.1.1993 at the latest.</p> <p>Article 6(1)(i) , first indent of Directive 86/378/EEC as inserted by Directive 96/97/EC -1.1.1999 at the latest.</p>
Directive 97/80/EC	1.1.2001	As regards the United Kingdom of Great Britain and Northern Ireland 22.7.2001
Directive 98/52/EC	22.7.2001	
Directive 2002/73/EC	5.10.2005	

**ANNEX 2**  
**Correlation Table**

Directive 75/117	Directive 76/207	Directive 86/378	Directive 97/80	This Directive
-	Article 1 (1)	Article 1	Article 1	Article 1
-	Article 1(2)	-	-	-
-	Article 2(2), first indent	-	-	Article 2(1), first indent
-	Article 2(2), second indent	-	Article 2(2)	Article 2(1), second indent
-	Article 2(2), third and fourth indents	-	-	Article 2(1), third and fourth indents
-	-	-	-	Article 2(1), fifth indent
-	-	Article 2(1)	-	Article 2(1), sixth indent
-	Article 2(3) & (4)	-	-	Article 2(2)
-	-	Article 3	-	Article 3(1)
-	Article 2(7), first subparagraph	Article 5(2)	-	Article 3(2)
-	Article 2(7), fourth subparagraph, first sentence	-	-	Article 3(3)
Article 1	-	-	-	Article 4
-	-	Article 5(1)	-	Article 5
-	-	Article 4	-	Article 6(1)
-	-	-	-	Article 6(2)
		Article		Article 7(1)

		2(2)		
-	-	Article 2(3)	-	Article 7(2)
-	-	Article 6	-	Article 8
-	-	Article 8	-	Article 9
-	-	Article 9	-	Article 10
-	-	-	-	Article 11
-	-	Article 9a	-	Article 12
-	Articles 2(1) & 3(1)	-	Article 2(1)	Article 13(1)
-	Article 2(6)	-	-	Article 13(2)
-	Article 9(2)	-	-	Article 13(3)
-	Article 2(8)	-	-	Article 14
-	Article 2(7), third subparagraph	-	-	Article 15(1)
-	Article 2(7), second subparagraph	-	-	Article 15(2)
-	Article 2(7), fourth subparagraph, second and third sentence	-	-	Article 16
Article 2	Article 6(1)	Article 10	-	Article 17(1)
-	Article 6(3)	-	-	Article 17(2)
-	Article 6(4)	-	-	Article 17(3)
-	Article 6(2)	-	-	Article 18
-	-	-	Article 4	Article 19

-	-	-	Article 3	Article 20
-	Article 8a	-	-	Article 21
-	Article 8b	-	-	Article 22
-	Article 8c	-	-	Article 23
Articles 3 & 6	Article 3 (2)(a)	-	-	Article 24(a)
Article 4	Article 3 (2)(b)	Article 7(a)	-	Article 24(b)
-	-	Article 7(b)	-	Article 24(c)
Article 5	Article 7	Article 11	-	Article 25
Article 6	-	-	-	-
-	Article 8d	-	-	Article 26
	Article 2(5)			Article 27
-	Article 8e (1)	-	-	-
-	Article 8e (2)	-	Article 6	Article 28
-	Article 1 (1a)	-	-	Article 29
Article 7	Article 8	-	Article 5	Article 30
Article 9	Article 10	Article 12(2)	Article 7, fourth subparagraph	Article 31
-	-	-	-	Article 32
Article 8	Article 9(1), first subparagraph and 9(2) & (3)	Article 12(1)	Article 7, first, second and third subparagraphs	Article 33
-	Article 9(1), second subparagraph	-	-	-
-	-	-	-	Article 34
-	-	-	-	Article 35

-	-	-	-	Article 36
-	-	Annex	-	-