

# COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 24 May 1988

Proposal for a  
COUNCIL DIRECTIVE

on the burden of proof in the area of equal pay  
and equal treatment for women and men

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(presented by the Commission)

# EXPLANATORY MEMORANDUM

## I. INTRODUCTION

1. Community law currently in force concerning the principle of equality consists of Article 119 of the Treaty and the three Council Directives implementing that principle: equal pay<sup>1</sup>, equal treatment<sup>2</sup> and statutory social security schemes<sup>3</sup>. Two more directives adopted in 1986 will enter into force in the future: occupational social security schemes<sup>4</sup> and the self-employed<sup>5</sup>.
2. Most national legal systems have a general rule in civil cases that complainants must prove their case on a balance of probabilities. If the respondent can provide an explanation which raises a doubt as to the validity of the complaint, the case falls because the persuasive burden remains on the complainant.
3. In sex discrimination cases this practice places the burden on the complainant to show that the alleged discrimination was unlawful. However, special problems of proof exist in such cases, because the relevant evidence is often in the hands of the respondent, and because of the widespread but unvoiced and often unconscious prejudice which distorts acts or decisions affecting women and persons with family responsibilities.

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<sup>1</sup> 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, O.J. No. L 45, 19.2.1975, p. 19

<sup>2</sup> 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, O.J. No.L 39, 14.2.1976, p. 40

<sup>3</sup> Council 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, O.J. No. L 6, 10.1.1979, p. 24

<sup>4</sup> 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 and self-employed workers, OJ No. L 225, 12.8.86, p.40

<sup>5</sup> Council Directive 86/613/EEC of 11 December 1986 on the implementation 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, OJ No. L 359, 19.12.86, p.56

4. Procedural problems encountered by complainants have been identified in all the Member States which have the effect of depriving the substantive rights provided by Community law of much of their force. The main such problem is that of the burden of proof, which is difficult and sometimes impossible in the normal course of events for an aggrieved complainant to establish. There are also closely related problems concerning the willingness of courts or tribunals to draw inferences from the evidence that is presented, which can give rise to difficulties for complainants wherever the burden of proof is placed, the obtaining of evidence by the courts and by the parties, and the understanding and the application of the concept of indirect discrimination.
5. The New Community Action Programme on the Promotion of Equal Opportunities for Women 1982-1985<sup>1</sup> noted that "workers, and female workers in particular, made little use of the arrangements for redress provided for by national law. The inflexibility of the procedures on the one hand, and the difficulty of assembling evidence of discrimination on the other, explain this reticence in part... The experience of some Member States with respect to the reversal of the burden of proof ... should likewise be brought to the attention of the other Member States." The Programme therefore provided that
  - workers should be encouraged "to avail themselves of little-used means of redress (including reversal of the burden of proof)"<sup>2</sup>;
  - and the Commission should conduct a comparative analysis of national procedures with a view to proposing Community action which would lead to improvements in legal redress.
6. This comparative analysis found that "the burden (of proof) placed on the complainant was a problem" and recommended "that the burden of proof should be formally altered in each Member State, so that the complainant has to show only that she has been less favourably treated and that the person more favourably treated was of the opposite sex. The burden would then shift to the alleged discriminator to show that his reason for the treatment was not the complainant's sex."<sup>3</sup>
7. The expert network on the application of the equality directives, which was created under the Action Programme, has confirmed in its Reports that a serious problem exists which has resulted in the failure by many applicants in establishing legitimate claims notwithstanding strong circumstantial evidence of discrimination.

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<sup>1</sup> Supplement 1/82 - Bull. EC.

<sup>2</sup> Action 2, Legal Redress in respect of equal treatment

<sup>3</sup> Corcoran and Donnelly, Comparative Analysis of the Provisions for Legal Redress in Member States of the EEC, V/564/84, Recommendation No. 5, p.80

8. The European Parliament called for action in this area in its Report of May 1984 on "The situation of Women in Europe", in which it specifically called upon the Commission "to submit proposals ... to reverse the rules on the burden of proof..."<sup>1</sup>.
9. The Medium Term Community Programme on Equal Opportunities for Women 1986-1990 noted the significance of the burden of proof with regard to legal redress and provided that the Commission would put forward "a Community legal instrument on the principle of the reversal of the burden of proof applying to all equal opportunities measures."<sup>2</sup> The Programme urged Member States to carry out "a review of the provisions relating to the burden of proof, to ensure that persons subject to discrimination will not be required to undertake a task which is often impossible."<sup>3</sup>
10. The Council, in its Second Resolution on the promotion of equal opportunities for women, supported the broad outlines of the Programme and called upon Member States to take action to "ensure effective application of existing equal treatment legislation, particularly through ... the examination of all aspects of the problems relating to the establishment of the burden of proof"<sup>4</sup>.
11. The Council subsequently, in its Resolution on an action programme on employment growth, expressed its commitment to take the decisions and measures necessary to achieve an increase in the equality of access to, and opportunity within, the labour market for women by the implementation of the Community's Medium Term Programme 1986-1990.<sup>5</sup>
12. The Economic and Social Committee recommended that there be a flexible directive on the burden of proof which would both "help to redress the continuing infringement of equal rights" and "encourage and stimulate good employment practices and modern personnel techniques"<sup>6</sup>. The Advisory Committee on Equal Opportunities for Women and Men felt that a Directive would be the most appropriate instrument to bring about a modification of the burden of proof, and that the elements set out in Section II of the proposal would be the most appropriate content of a Directive<sup>7</sup>.

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<sup>1</sup> Report of Inquiry No. 1 on "The Implementation of the First Two Directives", p. 43

<sup>2</sup> Supplement 3/86 - Bull. EC., §19.c

<sup>3</sup> *ibid.*, §18.b.4

<sup>4</sup> Council Resolution of 24 July 1986, OJ No. C 203 of 12.8.1986, p.2, §§4, 5

<sup>5</sup> Council Resolution of 22 December 1986, OJ No. C 340 of 31.12.1986, p.2, §2(f)

<sup>6</sup> Opinion of 24 April 1986 on Equal Opportunities for Women - Medium Term Community Programme - 1986-1990, §3.1.2

<sup>7</sup> Opinion of 15 May 1987

## II. Modification of the burden of proof in existing law

1. The modification of the burden of proof already exists in principle in national law on sex discrimination, employment protection, and more general areas. The major problem is its application in practice, with national courts having to apply unfamiliar concepts.
2. In principle, analysis of equal opportunities legislation necessarily involves some shifting of the burden between the parties. Once a complainant has established that discrimination has taken place, the burden should shift to the respondent to prove objective grounds not based on sex. However, particularly in the area of equal treatment, national courts and tribunals have not always found it possible to balance the burden between the parties in this way so as to make the legislation effective.
3. This is particularly the case with regard to indirect discrimination, which has not always been adequately understood in many national legal systems. However, the elements of a definition, including the requirement on the respondent to show objective justification for a facially neutral but discriminatory rule or condition, may now be derived from the jurisprudence of the Court of Justice<sup>1</sup>, from national legislation<sup>2</sup> and guidelines, and from statements by the Commission itself<sup>3</sup>.
4. In the area of employment protection, the burden of proof is often mixed between the parties. In maternity protection cases, the initial burden of proof is placed upon the employer in some jurisdictions, while in others the evidential burden passes to the employer once the employee has established a prima facie case. The legislation relating to unfair dismissal in most Member States places the burden of proving the presence of an admissible ground upon the employer. This is the result of the public administrative procedures involved in some jurisdictions, or because legal procedures in others place the burden specifically on the employer.
5. Community law on Consumer Protection and the consequent implementing national legislation, is another example of the shifting of the burden, this time of a complete reversal. The Product Liability Directive of 1985 places the legal burden on the respondent, the producer, to disprove liability for a defective product which has caused damage to a consumer<sup>4</sup>.

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<sup>1</sup> Case 96/80, *Jenkins v Kingsgate* [1981] ECR 911; Case 170/84, *Bilka-Kaufhaus v Weber von Hartz*, decision of 13 May 1986, as yet unreported; Case 30/85, *Teuling-Worms v Bestuur van de Bedrijfsvereniging voor de Chemie*, decision of 11 June 1987, as yet unreported

<sup>2</sup> Ireland, the Employment Equality Act 1977, section 2(c); Great Britain, the Sex Discrimination Act 1975, sections 1(1)(b) and 3(1)(b)

<sup>3</sup> Interim Report on the application of 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, COM(83) 793 final, pp.5-10

<sup>4</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ No. L 210, 7.8.85, p.29, article 1

### III COMMENTARY ON THE ARTICLES

The proposal for a directive comprises three sections - general provisions, substantive provisions relating to the burden of proof, the definition of indirect discrimination and the obtaining of evidence, and provisions regarding implementation. The wording of the proposal is closely based on existing directives, with a view to clarity and consistency.

The existing directives on equality have been adopted by the Council on various legal bases. Given that all these measures are to be covered by this proposal, it is necessary, essentially for technical reasons, to use Article 100 and Article 235 of the Treaty as the legal basis.

#### Section I, "General Provisions"

This Section deals with the purpose and the scope of the Directive.

##### Article 1 - purpose

This article states the purpose of the Directive. As envisaged in the Medium Term Community Programme on equal opportunities for women, this directive forms part of the policy aimed at achieving equal treatment by strengthening the effective application in practice of national legislation incorporating Community law.

The wording of paragraph 1 is closely based on Article 6 of Council Directive 76/207/EEC. Paragraph 2 sets out existing Community provisions which embody the principle of equality.

##### Article 2 - scope

The directive is intended to apply to all Community law on equality and thereby to national procedures for redress in all sectors, public and private, other than in the area of criminal procedure.

Paragraph 1 sets out where the directive does apply. Sub-paragraph (a) refers to existing Community law on equality, whilst sub-paragraph (b) applies this directive to any future instruments<sup>1</sup> which do not expressly exclude its application. Following the jurisprudence of the Court of Justice<sup>2</sup>, sub-paragraph (c) applies the directive to national procedures in both the public and private sectors.

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<sup>1</sup> e.g., the Proposal for a Council Directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes, COM(87) 494 final; amended Proposal for a Council Directive on parental leave and leave for family reasons, OJ C 333 of 9.12.83 p.6 and OJ C 316 of 27.11.84 p.7; amended Proposal for a Council Directive on voluntary part-time work, OJ C 62 of 12.3.82 p.7 and OJ C 18 of 22.1.83 p.5.

<sup>2</sup> Case 248/83, Commission of the European Communities v Federal Republic of Germany, decision of 21 May 1985, as yet unreported

Paragraph 2 states that the directive does not apply to criminal procedures, which are sometimes used to enforce national provisions on equality. A change in the burden of proof in criminal procedure would otherwise too easily impose criminal liability on individuals.

## **Section II, "Specific Provisions"**

This section deals with three specific issues - the modification of the burden of proof, including inferences to be drawn by courts or other competent authorities, procedures for obtaining evidence, and the elements of indirect discrimination.

### **Article 3 - the modification of the burden**

Normally the legal burden of proving a case rests on the complainant. A partial, subsidiary obligation to adduce certain evidence (the "evidential burden") may be imposed on the respondent in certain circumstances, or the legal burden itself may be passed to the respondent, in effect, a complete reversal of the legal burden.

The Commission has chosen in paragraph 1 to modify rather than to reverse the burden and require a mixed legal and evidential burden. The legal burden of persuasion remains with the complainant, but at a certain stage the evidential burden shifts to the respondent to prove that there was no discrimination. The wording of this provision is closely based on Article 6 of Council Directive 76/207/EEC.

The complainant is required to establish a rebuttable presumption of discrimination. At this point, the evidential burden shifts and the respondent is required to rebut the presumption by proving that the discrimination shown did not take place or was lawful, either by producing evidence of a legitimate, non-sex based reason, or by showing that the principle of equality did not apply.

Finally, paragraph 1 deals with the problem of inferences. Once a presumption of discrimination has been established, Member States are required to place the burden on the respondent of providing the ultimate evidence that there was no unlawful discrimination. This is done by giving the benefit of any doubt as to the proper interpretation of the facts to the complainant.

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Paragraph 2 provides a definition of what is required to establish a rebuttable presumption<sup>1</sup>. Firstly, the complainant must show that less favourable treatment has occurred on grounds of sex, for example, by proof by a woman complainant of a job application, rejection of that application and hiring of a man. Secondly, the complainant must show further elements which are sufficient for a court or other competent authority to hold that there has been unlawful discrimination, e.g., suitability for the post by way of possession of the minimum essential set of qualifications required to do the job. However, it is not necessary for a complainant to prove conclusively that unlawful discrimination did take place, as this would require her to prove more than she can reasonably be expected to have in her possession, i.e., to show that she was equally well or better qualified than the successful male candidate. In effect, the evidential burden on the complainant has been lightened.

With regard to the question of what evidence is required to discharge the evidential burden and rebut a presumption of discrimination, a respondent could adduce records, statements, recruitment and promotion statistics.

Paragraph 3 allows Member States to impose a complete reversal of the burden, as is already the case in certain jurisdictions. In this case, once the complainant has shown that less favourable treatment has occurred, the first step illustrated above, the legal burden passes to the respondent, who is obliged to prove positively and objectively that no discrimination has taken place.

#### Article 4 - procedures

This article sets out to ensure the existence of effective procedures for considering complaints and for obtaining and providing information. Paragraph (a) requires that courts or other competent authorities should have all the powers they require to consider complaints effectively. Paragraph (b) requires that all the information which is necessary for the presentation of a case may be obtained from the party who possesses it or who may reasonably be required to obtain it, that is, where obtaining such evidence would not cause that party an undue burden. It should be provided to the party who requires it, though the court or other competent authority retains the discretion not to pass on confidential information, disclosure of which would cause substantial damage to the interests of the disclosing party for reasons other than the litigation concerned, e.g., sensitive information, business secrets, etc. The "substantial damage" test is designed to ensure that the fact that information has been given in confidence should not, without more, justify withholding such information.

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<sup>1</sup> In civil law systems, a *praesumptio iuris tantum*; in common law systems, a *prima facie case*.



## **Article 5 - indirect discrimination**

Article 5 is intended to deal with the problem of indirect discrimination. It is an unfamiliar concept to many national lawyers and judges, and the absence of guidance on its meaning has discouraged legitimate claims from being presented by claimants or successfully pursued in national tribunals.

Following the jurisprudence of the Court of Justice<sup>1</sup>, paragraph 1 applies the concept of indirect discrimination to all Community measures concerning the principle of equality, including equal pay, and sets out for the first time a definition of indirect discrimination. The elements of this definition are based on the jurisprudence of the Court of Justice and national courts, national legislation and guidelines, and statements by the Commission noted above.

Paragraph 2 states for the avoidance of doubt that intent must be excluded from consideration in claims of indirect discrimination. This concept, by definition, necessarily contemplates neutral situations which unintentionally have a disproportionate impact on the members of one sex.

## **Section III, "Final Provisions"**

The final provisions contained in section III are for the most part taken from the Community Directives on equality.

**Article 6** is based on Article 8 of Directive 76/207/EEC. It aims to ensure that information on all the measures taken by the Member States to achieve the objectives of the Directive is made readily available to all persons directly concerned. In practice, it particularly concerns the definition of indirect discrimination.

**Article 7.1** is based on Article 9.1, first indent, of the same Directive. It gives Member States 3 years to comply with the provisions of the Directive. **Article 7.2** is based on Articles 3-5 of the same Directive, amended so as to apply to all measures on the principle of equality.

**Article 8** lays down the obligations of the Commission and the Member States to enable the Council to follow the progress achieved in the application of the proposed Directive and to ensure the regular review of Community law on equality.

**Article 9** does not call for any comments.

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<sup>1</sup> Case 96/80, *Jenkins v Kingsgate* [1981] ECR 911; Case 170/84, *Bilka-Kaufhaus v Weber von Hartz*, decision of 13 May 1986, as yet unreported

# COMPETITIVENESS AND EMPLOYMENT IMPACT STATEMENT

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## Proposal for a Council Directive on the Burden of Proof in the area of equal pay and equal treatment for women and men

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### I What is the main reason for introducing the measure?

The policy objective is social: this directive forms part of the policy aimed at achieving equal treatment by strengthening the effective application in practice of national legislation incorporating Community law.

The EC issue at stake is the effective application of Community law. Community law currently in force concerning the principle of equality consists of Article 119 of the Treaty and the three Council Directives implementing that principle: equal pay (75/117/EEC), equal treatment (76/207/EEC) and statutory social security schemes (79/7/EEC). Two more directives adopted in 1986 will enter into force in the future: occupational social security schemes (86/378/EEC) and the self-employed (86/613/EEC).

Procedural problems encountered by complainants have been identified in all the Member States which have the effect of depriving the substantive rights provided by Community law of much of their force. The main such problem is that of the burden of proof, which is difficult and sometimes impossible in the normal course of events for an aggrieved complainant with an arguable case to establish. There are also closely related problems concerning the willingness of courts or tribunals to draw inferences from the evidence that is presented, which can give rise to difficulties for complainants wherever the burden of proof is placed, the obtaining of evidence by the courts and by the parties, and the understanding and the application of the concept of indirect discrimination.

The result is that many applicants have failed to establish legitimate claims notwithstanding strong circumstantial evidence of discrimination. If the Directive were not introduced, this state of affairs would continue.

The Directive contains two main substantial elements, both linked to the problem of the burden of proof:

- the modification of the burden of proof : once the complainant has established a presumption of discrimination, the respondent is required to rebut it. The benefit of any doubt as to the proper interpretation of the facts is given to the complainant;
- a definition of the concept of indirect discrimination, to help the parties and the national courts and tribunals to better understand and apply this concept, particularly with regard to the evidence required of either party.

### II Features of the businesses in question

The Directive is intended to apply to all Community law on equality, existing and future, and thereby to national procedures for redress in all sectors, public and private. Thus central and local government, State undertakings and agencies, and large, medium and small undertakings are all affected by the Directive since they are all currently subject to the principle of equality established and guaranteed by existing law.

It does not however apply to the criminal procedures laid down by some Member states for failure to respect the principle of equality.

The Directive has no particular implications for any of the entities covered by it, though obviously it is hoped that the public sector will lead the way in carrying out the positive actions on equality that most effectively avoid litigation. It should neither encourage nor discourage the formation of new private undertakings.

### **III What obligations does this measure impose directly on businesses?**

The Directive imposes no new obligations on business or on government, it is intended to improve the application of existing provisions on equality. Businesses have to continue to comply with existing obligations.

Since the measure is designed to make legal procedures for breach of these obligations more effective, it is possible that litigation will be more likely where a business is in breach of its legal obligations. However:

1. the measure has been designed to discourage frivolous or vexatious litigation by insisting that complainants prove that there is an arguable case ("modification" of the burden). It is not enough to show only that there has been a difference of treatment on grounds of sex ("reversal" of the burden). Member States have or may introduce measures to further discourage frivolous or vexatious litigation, such as imposing increased costs on unsuccessful complainants who have been warned in pre-trial proceedings that they do not have an arguable case.
2. employers should consider introducing positive action programmes which would serve both to avoid litigation by improving compliance with legal obligations and also improve their competitiveness by heightening utilisation of their human resources. This was the approach taken by members of the Economic and Social Committee in their unanimous opinion in favour of a flexible directive on the burden of proof. The Committee felt that such a measure would both "help to redress the continuing infringement of equal rights" and "encourage and stimulate good employment practices and modern personnel techniques."

On balance, the measure should therefore reduce rather than increase administrative costs.

The proposal will not stop businesses from continuing with any current activity. If it did not go ahead, the present unsatisfactory situation would continue.

### **IV What indirect obligations are national, regional or local authorities likely to impose on businesses?**

Member States will be required to assure that the obligations of the Directive are transformed into national law, and national courts, tribunals and other competent authorities will be required to implement it.

However, the measure will not require any new obligations to be directly or indirectly imposed upon businesses by any national, regional or local authority.

**V Are there any special provisions in respect of SME's?**

There is no scope for exempting SME's from the proposal, since it relates to existing legal obligations which the Court of Justice has interpreted as fundamental and not subject to exemption (Case 165/82, Commission v UK, requiring the UK to repeal the exemption for SME's in national law as inconsistent with the Equal Treatment Directive).

SME's are likely to be stimulated by the proposal in the sense recommended by the ESC under III *supra*, in that they may be encouraged to become more competitive by way of better utilisation of their human resources, and by the creation of new jobs as outlined under VI(b) *infra*

**VI What is the likely effect on**

**(a) the competitiveness of businesses?**

Enhanced compliance, firstly, avoids extra costs of unnecessary litigation. Many organisations believe that better use of their human resources, particularly by way of positive action programmes concerning their female workforce, reinforce and improve competitiveness - see statements and programmes by BASF, Générale de Banque, IBM, Midland Bank, Thames Television, etc. Such programmes also lead to reduced turnover of staff, which can bring about significant savings in costs of recruitment and training of replacements.

**(b) employment?**

There is some evidence that more effective participation by women in the labour market creates extra jobs in a way that male participation does not - e.g., child care, education, the service industries. Many of these extra jobs are created in areas particularly suitable for SME's, particularly those in turn employing women.

**VII Have the relevant representative organisations been consulted?**

The Economic and Social Committee, which includes representatives of employers organisations, small business organisations and labour organisations, unanimously recommended the proposal of this measure in its opinion on the Medium Term Community Programme.

The measure was prepared after detailed consultation with members of the expert network on the application of the equality directives, which includes practicing and academic lawyers and lawyers representing labour and business organisations. These specialists recommended the specific provisions on the burden of proof, evidence and indirect discrimination which appear in the final proposal.

The Advisory Committee for Equal Opportunities for Women and Men, which includes representatives of the specialist equality agencies of the Member States, has been consulted and has expressed a favourable opinion on the Proposal.

Legal specialists from the Ministries of Labour and Justice of the Member States have been consulted. The final draft of the proposal has been amended to take account of the technical problems raised by national legal experts, who were on a technical level generally favourable to the measure.