



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.11.1999
COM(1999) 565 final

1999/0225 (CNS)

Proposal for a

COUNCIL DIRECTIVE

**ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT
IN EMPLOYMENT AND OCCUPATION**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

Article 13 of the Treaty establishing the European Community as modified by the Amsterdam Treaty puts an end to the long-term debate on Community competence in anti-discrimination issues. It provides for a solid platform for comprehensive anti-discrimination policies, legislative or otherwise, at Community level by conferring explicit and specific powers on the Council to combat a wide range of forms of discrimination.

Its text reads: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

This proposal forms part of a threefold Article 13 anti-discrimination package. This range of initiatives comprises two legislative proposals and an action programme. The other two elements of this package are a proposal for a directive dealing with discrimination based on race or ethnic origin which goes beyond the labour market and an Action Programme to support the efforts of the Member States to combat discrimination across the EU.

The aim of this proposal is the establishment of a general framework for the respect of the principle of equal treatment between persons irrespective of race or ethnic origin, religion or belief, disability, age, or sexual orientation within the European Union. The areas covered by the proposal are access to employment and occupation, promotion, vocational training, employment and working conditions and membership of certain bodies.

The discriminatory grounds covered by this proposal coincide with those laid down by Article 13 of the Treaty with the exception of the ground of sex. Such an exclusion has a twofold justification. First, the appropriate legal basis for Community legislation on equal opportunities and equal treatment of men and women in matters of occupation and employment is Article 141 of the Treaty. Secondly, Council Directives 76/207/EEC¹ and 86/613/EEC² have already established the principle of equality of treatment between men and women in this field.

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.

² Council Directive 86/613/EEC of 11 December 1986 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.

Although equal treatment on the grounds of sex is not covered as such by this Directive, it is nevertheless recognised that discrimination on the grounds of either race/ethnic origin, disability, age, religion/belief or sexual orientation may affect women and men differently. The structural inequalities linked to sex and gender roles of women and men are frequently even more important in the context of dual, triple or multiple discrimination on any of the grounds included in Article 13 of the Treaty. The necessity to apply a gender mainstreaming approach is a logical consequence of Articles 2 and 3 of the Treaty, which place equality between women and men among the explicit objectives of the Community, and obliges the Community in all its tasks to aim to eliminate inequalities and promote equality between women and men.

2. THE COMMUNITY SCOPE OF ANTI-DISCRIMINATION ISSUES

The fight against discrimination constitutes a major challenge for the European Union.

In spite of the fact that demographic trends make it essential to ensure that as high a percentage as possible of people of working age are in jobs, a recent survey³ of 11 European countries identified five sets of discriminatory measures in the employment field which particularly affect older people: loss of employment, discrimination in recruitment, exclusion from special unemployment measures, exclusion from training and discrimination at retirement.

Concrete examples of the above include, in particular, the establishment of maximum recruitment ages (other than those mentioned in Article 5(d)), the limitation of older workers' training rights concerning new technologies, the right to promotion, or dismissals of older workers within the context of restructuring.

Disability is clearly a major policy issue in Europe. One out of ten citizens in the European Union has a disability. Disability affects older people, ethnic minorities and lower socio-economic populations disproportionately.

Various official estimates suggest that people with disabilities are at least two to three times more likely to be unemployed and to remain unemployed for longer periods than the rest of the working population. A contributory factor to this situation is the prevalence of discrimination based on disability. Such discrimination would include *inter alia* the existence of inadequately adapted workplaces, workstations and work organisation design.

³ "Age discrimination against older workers in the European Community", published in 1993 by Eurolink Age.

In its Communication of 30 July 1996 setting out a new Community strategy on equality of opportunity for people with disabilities⁴, the Commission endorsed the international shift from a welfare approach to a human rights-based approach in this field. The new approach focuses on both prevention and removal of barriers that deny equality of access to people with disabilities in, *inter alia*, the labour market. A core element of the new approach is the elimination of such discrimination primarily through the reasonable accommodation of the needs and abilities of disabled people.

Discrimination on the basis of sexual orientation also occurs in various forms in the workplace. The problems of workplace discrimination arising from sexual orientation and the lack of legal protection at EU level were highlighted in a recent decision of the European Court of Justice⁵. Furthermore, two September 1999 judgements of the European Court of Human Rights outlawing the dismissals of members of the armed forces on grounds of their sexual orientation constitute clear evidence that discrimination on this ground exists. Two national surveys undertaken in the UK (1993) and Sweden (1997) show that 27% and 48% of respondents respectively had experienced harassment in the workplace on grounds of their sexual orientation. However, such cases are hard to prove and examples of discriminatory practices do not always come to the fore. This seems to be because employment is an area in which people may hide their sexual orientation for fear of discrimination and harassment.

The European Court of Justice has also stated that the right to non-discrimination on religious grounds is a fundamental right to be protected by Community law⁶. The European Foundation for the Improvement of Living and Working Conditions has identified examples of good practice in respecting the religious needs of employees in its 1997 European Compendium of Good Practice for the Prevention of Racism in the Workplace.

⁴ Communication of the Commission on Equality of Opportunity for People with Disabilities, COM(96) 406 final.

⁵ Case C 249/96, *Grant v Southwest Trains* [1998] ECR I-0621.

⁶ *Prais v EC Council*, Case 130/75 [1976] ECR 1589.

3. JUSTIFICATION FOR THE PROPOSAL

3.1. The principle of subsidiarity

The attribution to the European Community of explicit powers to combat discrimination by Article 13 does not in itself justify Community legislation in this field. In accordance with Article 5 of the Treaty, the Community must act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The prohibition of discrimination in the field of employment and occupation exists in the Member States, but its scope, contents and enforceability vary significantly. The essential question here is to what extent such a divergence puts at risk, within the scope of Community competence, the effectiveness of the fundamental principle of equality in employment.

3.1.1. The need to recognise the right of individuals to employment equality throughout the Community.

The Community Charter of the Fundamental Social Rights of Workers, referred to by both the Preamble of the Amsterdam Treaty and Article 136 of the Treaty, recognises the right of every individual to freely choose and engage in an occupation..." and declares that "in order to ensure equal treatment, it is important to combat every form of discrimination."

The mere recognition at Community level of the right of individuals to employment equality will send a clear message that the EU is fully committed to the realisation of the fundamental principle of equal opportunities for all citizens and will ensure a common set of minimum standards in this area. The adoption of Community law in this field will constitute an unequivocal statement of public policy leaving no doubts as to the stance which European society has adopted towards discriminatory practices.

Finally, the acknowledgement of the right to employment equality will strengthen the citizenship of the Union and, consequently, the rights and interests of the nationals of its Member States.

3.1.2. Employment equality and the Community employment strategy

The 1999 Employment Guidelines, while maintaining last year's four-pillar structure, add a mainstreaming approach to be followed by the Member States under all four pillars to the specific action under the Equal Opportunities pillar. Furthermore, the new guideline number 9 – a labour market open to all- is designed to make integration easier for people with disabilities, for people from ethnic minority groups and for many groups and individuals who experience difficulties in acquiring skills and access to the labour market.

The establishment of a broad Community framework on employment equality would not only have the effect of enhancing and strengthening the new employment guideline 9 but would help to consolidate the equal opportunities mainstreaming approach. One of the consequences of the 20 per cent gap in the employment of men and women is that women are over-represented among the unemployed ethnic and religious minorities, among disabled people and among the elderly. The establishment at Community level of a general principle of employment equality would help to achieve equality between women and men (Article 2 of the Treaty) and contribute to eliminate inequalities in all Community activities (Article 3(2) of the Treaty).

In the light of these factors, and in view of Article 5 of the Treaty and the Protocol on the application of the principles of subsidiarity and proportionality, notably point 5, the Commission believes that the objectives of a Community framework on employment equality can be better achieved by the Community.

3.2. The principle of proportionality

As has already been pointed out, anti-discrimination measures exist to some extent in all Member States. This makes it vital that the level, nature and focus of Community action should take account of the different national situations in so far as this is compatible with the aims and objectives of that Community action.

With this very much in mind, the Commission believes that the proposal for a Community framework directive on employment equality fully complies with the principle of proportionality.

First, the Commission has decided to follow a step-by-step approach, based on the successful precedent of Community legislation on sex equality. The principle of equal pay between women and men established in Article 141 (ex 119) has been progressively consolidated and expanded upon. A variety of secondary legislation has sought to produce, *inter alia*, a comprehensive right to non-discrimination between women and men in the workplace. All grounds of discrimination are apparent in employment and occupation matters. Employment and occupation also constitute people's main guarantee for social inclusion, for full participation in economic, cultural and social life and for the enjoyment of basic human rights and freedoms. For this reason, a horizontal proposal covering the area of employment and occupation is considered appropriate.

Secondly, the scope of the present proposal covers all discriminatory grounds referred to in Article 13 except sex and does not rank them in any way. This absence of a qualitative hierarchy among the discriminatory grounds is of particular importance in cases of multiple discrimination. Therefore, it is consistent with the structure and apparent purpose of Article 13.

Finally, the proposal aims at establishing a Community framework designed to establish general rules of protection against discrimination. The choice of a framework Directive reflects a desire to ensure flexibility for Member States in its implementation. The wording is sufficiently broad to accommodate the different circumstances of Member States, in particular their different policy preferences and priorities.

The Commission considers therefore, that the principle of proportionality referred to in Article 5 of the Treaty and in the provisions laid down by the Protocol on subsidiarity and proportionality annexed to the Treaty, notably points 6 and 7 of that Protocol are fully respected. The present instrument is in effect a framework Directive, establishing a limited number of requirements, which allows Member States considerable flexibility to both maintain existing and well established national arrangements and encourage, where possible, their implementation by collective agreements.

4. THE LEGAL BASIS

The proposed legal basis is Article 13 of the Treaty which explicitly provides the Community with specific powers to combat discrimination. The fact that the material scope of the provisions planned covers not only salaried employment but also self-employment and the liberal professions and that its scope *rationae personae* is not limited to persons excluded from the labour market, excludes recourse to Article 137 (2) of the Treaty.

5. EXPLANATION OF INDIVIDUAL ARTICLES OF THE PROPOSED COUNCIL DIRECTIVE

This proposal comprises three titles: general provisions, remedies and enforcement and miscellaneous provisions.

Chapter I: General Provisions

This Chapter deals with the purpose of the Directive and the concept of discrimination.

Article 1

Purpose

Article 1 sets out the purpose of the Directive: the establishment of a general framework within the European Community for the respect of the principle of equal treatment between person irrespective of race or ethnic origin, religion or belief, disability, age or sexual orientation. This Article identifies the areas covered by the proposal, namely access to employment and occupation, promotion, vocational training and employment conditions and membership of certain bodies.

The discriminatory grounds referred to in paragraph 1 coincide with those laid down by Article 13 of the Treaty, with the exception of the ground of sex. With regard to sexual orientation, a clear dividing line should be drawn between sexual orientation, which is covered by this proposal, and sexual behaviour, which is not. Furthermore, it should be underlined that this proposal does not affect marital status and therefore it does not impinge upon entitlements to benefits for married couples.

Article 2

Concept of discrimination

The definition of the principle of equal treatment contained in paragraph 1 is consistent with the definition provided by Article 2.1 of Directive 76/207/EEC of 9 February 1976. It covers both direct and indirect discrimination.

Unlike direct discrimination, which can be described as a difference of treatment on the grounds of a specific characteristic, indirect discrimination is much more difficult to discern. In the field of sex discrimination, the European Court of Justice has required statistical evidence to prove indirect discrimination. However, adequate statistics are not always available. For example, there may be too few persons in a firm who are affected by the provision in question or where the provision, criterion or practice has just been introduced, statistics may not yet be available.

The definition of indirect discrimination in paragraph 2(b) is inspired by the case-law of the European Court of Justice in cases involving the free movement of workers⁷.

According to this definition, an apparently neutral provision, criterion or practice will be regarded as indirectly discriminatory if it is intrinsically liable to adversely affect a person or persons on the grounds referred in Article 1. The "liability test" may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned. The emphasis on an objective justification in cases of indirect discrimination is put on two elements. Firstly, the aim of the provision, criterion or practice which establishes a difference of treatment must deserve protection and must be sufficiently substantial to justify it taking precedence over the principle of equal treatment. Secondly, the means employed to achieve that aim must be appropriate and necessary.

The definition of indirect discrimination should be construed in conjunction with the general rules on the burden of proof set out in Article 9.

The principle of equal treatment under Article 2 as applied in the context of disability entails an identification and removal of barriers in the way of persons with disabilities who, with reasonable accommodation, are able to perform the essential functions of a job. The concept has become central to the construction of modern legislation

⁷ *O'Flynn v Adjudication Officer*, Case C-237/94, judgment of 23 May 1996 [1996] ECR 2417.

combating disability-based discrimination⁸ and is also expressly recognised at an international level⁹.

Paragraph 3 deals with harassment. Such conduct can take different forms, ranging from spoken words and gestures to the production, display or circulation of written words, pictures or other material. This behaviour must be of a serious nature and create an overall disturbing or hostile working environment.

The most recent national legislation prohibiting discrimination at work - the Irish Employment Equality Act (1998) and the new Swedish anti-discrimination Acts (1999)¹⁰ - consider that harassment in the workplace violates the employee's integrity and constitutes discrimination.

The Directive states very clearly that such conduct should be deemed to be discrimination.

Paragraph 4 outlines the concept of reasonable accommodation. Essentially, the concept stems from the realisation that the achievement of equal treatment can only become a reality where some reasonable allowance is made for disability in order to enable the abilities of the individual concerned to be put to work. It does not create any obligations with respect to individuals who, even with reasonable accommodation, cannot perform the essential functions of any given job. The obligation is limited in two respects. First, it only pertains to what is reasonable. Secondly, it is limited if it would give rise to undue hardship.

This provision would supplement and reinforce the employer's obligation to adapt the workplace to disabled workers, as provided by framework Directive 89/391/EEC¹¹.

Article 3

Material scope

Article 3 sets out the scope "rationae materiae" of the directive and specifies the areas already identified in Article 1. In all cases these areas fall within the competence of the Community.

⁸ See, for example, the UK Disability Discrimination Act 1995, Swedish Act on discrimination of people with disabilities 1999; Ireland's Employment Equality Bill 1997 and the Draft law in the Netherlands on the Prohibition of Making an unjustifiable Distinction on the grounds of Handicap or Chronic Disease.

⁹ See, for example, the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities ('the Standard Rules') and the UN Committee on Economic, Cultural and Social Rights understanding of the notion of discrimination contained within the ICESCR (General Comment, 1994).

¹⁰ Ethnic Discrimination Act which replaces the Ethnic discrimination Act of 1994; Act on discrimination of people with disabilities; Act on discrimination on grounds of sexual orientation.

¹¹ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1.

Equality of treatment in respect of access to employed or self-employed activities (point a) involves the elimination of any discrimination arising from any provision which prevents access of individuals to all forms of employment and occupation. As regards promotion, equality of treatment consists in ensuring that advancement within the career structure is based on qualifications, ability and competence on the job, experience and any other objective criteria connected with the post in question.

Equal treatment in employment is dependent on equal treatment in training. As regards equality of access to vocational training, Article 3(b) of the Directive aims to eliminate all forms of discrimination which exist in vocational guidance, vocational training, advanced vocational training and retraining.

To pursue the aim of equality in employment, Article 3 aims to eliminate differences in treatment in employment and working conditions. Dismissals and pay are the most obvious examples and are expressly mentioned in point (c). It should be underlined that the exclusion of pay mentioned in Article 137 paragraph 6 of the EC Treaty only refers to directives adopted under this legal basis and therefore does not apply to Community action under Article 13.

Article 3(d) deals with membership of organisations of workers or employers or any other organisation whose members carry on a particular profession. The Article ensures that there is no discrimination concerning either the membership and involvement in those organisations or the benefits provided by these kinds of bodies.

Article 4

Genuine Occupational Qualifications

Article 4 allows justified differences of treatment when a characteristic constitutes a genuine occupational qualification for the job. The justification in these cases relates to the nature of the job concerned or the context in which it is carried out.

It is evident that in organisations which promote certain religious values, certain jobs or occupations need to be performed by employees who share the relevant religious opinion. Article 4(2) allows these organisations to require occupational qualifications which are necessary for the fulfilment of the duties attached to the relevant post.

Article 5

Justification of differences of treatment on grounds of age

Given that equal treatment is a fundamental principle, any difference in treatment which is based explicitly on one of the grounds specified in Article 1(1) should normally be regarded as discriminatory. The existing law of the Community and Member States tends to suggest that it is only in very exceptional circumstances that such a difference of treatment could be justified.

This Article provides a non-exhaustive list of differences of treatment on grounds of age which shall not constitute direct discrimination, provided that they are objectively justified. It is intended, both to limit the possibilities of claiming justification in cases of direct discrimination to exceptional situations concerning the ground of age, and to

ensure that this limited range of exceptions respects the principles of necessity, proportionality and legitimacy as laid down by the European Court of Justice as regards the notion of indirect discrimination. Therefore, Member States may allow differences of treatment on grounds of age other than those listed in Article 5, in accordance with their legal traditions and political priorities, provided that they are appropriate and necessary to attain a legitimate aim.

With respect to age, Article 5 does not exclude the application of the genuine occupational qualification justification.

Article 6

Positive action

Equal treatment by itself may not be enough if it does not lead to real equality. Equal treatment may also imply recognising special rights for specific groups of people. In the field of sex discrimination, Article 2 of the 1984 Recommendation¹² invites Member States to establish a framework of appropriate provisions designed to promote and facilitate the introduction of positive action measures. The need for positive action has already been addressed by the European Court of Justice both in the *Kalanke*¹³ and in the *Marshall* cases¹⁴.

Article 6 allows Member States to authorise legislative or administrative measures which are necessary to prevent and correct situations of existing inequalities. However, as positive action measures are a derogation from the principle of equality, they should be interpreted strictly, in the light of the current case-law on sex discrimination.

Positive actions may include, *inter alia*, measures intended to promote the professional integration of young people, or the flexible transition from employment to retirement, as laid down by agreements concluded by the social partners.

The Commission proposes a general wording for the definition of positive action measures based on that of Article 141(4) of the Treaty.

¹² Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women.

¹³ *Kalanke v Freie Hansestadt Bremen*, Case C-450/93 [1995] ECR I-3051.

¹⁴ *Marshall v Land Nordrhein-Westfalen*, Case C-409/95, judgment of 11 November 1997 [1997] ECR I-6363.

Article 7

Minimum requirements

This is a "non-regression" standard provision that affects Member States which have, or may wish to adopt, legislation providing for a higher level of protection than that guaranteed by the framework Directive. This means that the level of protection against discrimination already afforded by Member States should not be lowered when implementing the Community Directive.

Chapter II: Remedies and Enforcement

This title deals with the two main conditions for effective legislation against discrimination: the right of victims to an effective personal remedy against the person or body who has perpetrated the discrimination, and the existence of adequate mechanisms in each Member State to ensure adequate levels of enforcement.

Enforcement has proven particularly difficult in the case of sex discrimination. This was acknowledged by the Commission in its first annual report on equal opportunities¹⁵ which noted that "there remain a number of outstanding problems in the application of Community law: time limits, the effectiveness of legal remedies and sanctions, and access to justice are some of the problematic areas facing women and men seeking to enforce their rights".

Article 8

Defence of rights

Article 8 relates to enforcement procedures (access to justice) to enable the obligations deriving from this Directive to be enforced. In particular, it provides persons who consider themselves wronged with the possibility to pursue their claims through an administrative and/or judicial procedure to enforce their right to equal treatment, even after the employment relationship has ended¹⁶. National provisions on time limits for initiating action are not affected by this Article.

The right to legal protection is further reinforced by the possibility of allowing organisations to exercise such rights on behalf of a victim.

¹⁵ European Commission (1997) "Annual report for the Commission: Equal Opportunities for Women and Men in the European Union 1996" COM(96) 650, 12.2.1997.

¹⁶ See case C-185/97, *Cote*, judgment of 22 September 1998 [1998] ECR I-5199.

Article 9

Burden of Proof

Normally, the burden of proving a case rests on the plaintiff. However, obtaining evidence in discrimination and employment law cases, where the relevant information is often in the hands of the defendant, can be very problematic.

The wording of Article 9 is similar to that of Articles 3 and 4 of Council Directive 97/80/EC¹⁷. It sets out how the burden of proof shifts to the defendant in accordance with the European Court of Justice's case law¹⁸. The Commission proposes that the burden of proof reverts to the defendant once the plaintiff has established factual evidence of less favourable treatment caused by apparent discrimination.

Furthermore, paragraph 4 states that the shift of the burden of proof shall also be applicable to any action launched by associations, organisations or any other legal entities in defence of a victim.

Article 10

Victimisation

Effective legal protection must include protection against retaliation. Victims may be deterred from exercising their rights due to the risk of retaliation. Since fear of dismissal is generally one of the major obstacles to individual action, it is necessary to protect individuals against dismissal or other adverse treatment (for instance down-grading or any other coercive measure) due to such action.

Article 11

Dissemination of information

Article 11 provides for appropriate dissemination of information in this respect. Experience shows that individuals are often badly or insufficiently informed concerning non-discrimination issues. The principle of equal treatment needs to be fully understood and accepted as desirable for society, ensuring that decisions are taken on an objective basis, thereby promoting stability and social coherence. The more effective the system of public information and prevention is, the less need there will be for individual remedies.

¹⁷ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

¹⁸ In particular, *Danfoss*, Case C-109/88, judgment of 17 October 1989 [1989] ECR 3199, par. 16; *Enderby v Frenchay Health Authority*, Case C-127/92, judgment of 27 October 1993, [1993] ECR 5535, APRs. 13 and 14 and *Royal Copenhagen*, Case C-400/93, judgment of 31 May 1995 [1995] ECR 1275, par. 24.

Article 12

Social dialogue

The Commission remains very committed to strengthening the role of the social partners in the fight against discrimination. This is why the proposed Directive requires Member States to encourage social partners to contribute to the implementation of the principle of equality of treatment by adopting collective agreements laying down anti-discrimination provisions, which should, however, respect the minimum requirements laid down by the Directive.

Social partners can also have an important role to play in monitoring workplace practices. Possible measures could include the conclusion of agreements between social partners and the adoption of codes of conduct aimed at preventing discrimination.

Chapter III: Final provisions

The provisions contained in Chapter III are mainly standard provisions that appear in most Community Directives in the social field.

Article 13

Compliance

The wording of Article 13 is closely based on that of Articles 3, 4 and 5 of Directive 76/207/EEC. It concerns the compliance with the Directive by Member States. Equality of treatment involves the elimination of discrimination arising from any legal or administrative provisions, as well as from collective agreements or individual contracts of employment. Without questioning the general freedom of both sides of industry to negotiate agreements, it is clear that any provisions of a contract or agreement that are contrary to the principle of equality of treatment must be rendered null and void.

Article 14

Penalties

This is a standard provision providing penalties that are effective, proportionate with the infringement and dissuasive. In applying Community law, it is necessary, as in every legal system, on the one hand that those bearing obligations resulting from this law are dissuaded from infringing it and, on the other, that those who do not respect Community law are duly penalised. This provision does not oblige the Member States to introduce penal sanctions.

Member States are required to notify the legislative texts containing the sanctions, and any subsequent amendments, to the Commission.

Article 15

Implementation

It contains a specific date (31 December 2002) by which the Member States are required to have transposed the Directive into their national law.

Article 16

Report

This charges the Commission with drafting a report on the basis of information supplied by the Member States, to enable the Parliament and Council to monitor the operation of the Directive in practice.

Article 17

Entry into force

This allows the standard twenty-day period.

Article 18

Addressees

This is a standard provision and does not call for any comments.

6. APPLICATION TO THE EUROPEAN ECONOMIC AREA

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee.

Proposal for a

COUNCIL DIRECTIVE

**ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT
IN EMPLOYMENT AND OCCUPATION**

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Having regard to the opinion of the Committee of Regions⁴,

Whereas:

- (1) The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. In accordance with Article 6(2) of the Treaty on European Union, the Union should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms, as general principles of Community law.
- (2) Article 13 of the Treaty establishing the European Community empowers the Council to take appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation.

¹ OJ C
² OJ C
³ OJ C
⁴ OJ C

- (3) The principle of equal treatment on grounds of sex is well established by a considerable body of Community law, in particular 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 conditions⁵. The Treaty establishing the European Community empowers the Council to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
- (4) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, of which all Member States are signatories; whereas ILO Convention No 111 prohibits discrimination in the field of employment and occupation.
- (5) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.
- (6) The Treaty establishing the European Community includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the Treaty establishing the European Community, as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.
- (7) The 1999 Employment Guidelines agreed by the European Council at Vienna on 11 and 12 December 1998 stress the need to foster conditions for a more active participation in the labour market by formulating a coherent set of policies aimed at combating discrimination on grounds of disability and race or ethnic origin. The European Council Conclusions of Vienna emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
- (8) Employment and occupation are key elements in guaranteeing equal opportunities for all and strongly contribute to the full participation of citizens in economic, cultural and social life.
- (9) Discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Treaty establishing the European Community, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity, and the fostering of the free movement of persons.

⁵ OJ L 39, 14.2.1976, p. 40.

- (10) To this end any direct or indirect discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. Harassment which produces an intimidating, hostile, offensive or disturbing work environment in relation to any discriminatory ground should be deemed to be discrimination.
- (11) The provision of measures to accommodate the needs of disabled people at the workplace play an important role in combating discrimination on grounds of disability.
- (12) A difference of treatment may be justified where a characteristic related to a discriminatory ground constitutes a genuine occupational qualification.
- (13) The European Union in its Declaration on the status of churches and non-confessional organisations, attached to the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status which churches and religious associations or communities enjoy in the Member States under national law and that it equally respects the status of philosophical and non-confessional organisations.
- (14) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures providing for specific advantages to prevent, reduce or eliminate inequalities associated with the abovementioned discriminatory grounds.
- (15) The provisions of this Directive lay down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- (16) It is important to ensure that persons who have been subject to discrimination have adequate means of legal protection. Associations or legal entities must also be empowered to exercise the right of defence on behalf of any victim.
- (17) The effective implementation of the principle of equality requires adequate judicial protection in civil matters against victimisation and an adjustment of the general rules on the burden of proof.
- (18) Member States should provide adequate information on the provisions adopted pursuant to this Directive.
- (19) Member States should promote social dialogue between the social partners to address different forms of discrimination in the workplace and to combat them.

- (20) Member States should take the necessary measures to ensure that any laws, regulations, administrative provisions, collective agreements, internal rules of undertakings or rules governing independent occupations, professions, or trade organisations which are contrary to the principle of equal treatment should be declared null and void, or should be amended.
- (21) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
- (22) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty establishing the European Community, the objectives of this Directive, namely the creation, within the Community, of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I: GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment as regards access to employment and occupation, including promotion, vocational training, employment conditions and membership of certain organisations, of all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever between persons on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where, on any of the grounds referred to in Article 1, one person is treated less favourably than another is, has been or would be treated.

- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or persons to whom any of the grounds referred to in Article 1 applies, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.
- 3. Harassment of a person related to any of the discriminatory grounds and areas referred to in Article 1 which has the purpose or effect of creating an intimidating, hostile, offensive or disturbing environment, shall be deemed to be discrimination within the meaning of paragraph 1.
- 4. In order to guarantee compliance with the principle of equal treatment for persons with disabilities, reasonable accommodation shall be provided, where needed, to enable such persons to have access to, participate in, or advance in employment, unless this requirement creates an undue hardship.

Article 3

Material scope

This Directive shall apply to:

- (a) conditions for access to employment, self-employment and occupation, including selection criteria and recruitment conditions, whatever the sector or 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;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any other organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Article 4

Genuine occupational qualifications

- 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational qualification.

2. Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.

Article 5

Justification of differences of treatment on grounds of age

Notwithstanding point (a) of Article 2(2), the following differences of treatment, in particular, shall not constitute direct discrimination on grounds of age, if they are objectively and reasonably justified by a legitimate aim and are appropriate and necessary to the achievement of that aim:

- (a) the prohibition on access to employment or the provision of special working conditions to ensure the protection of young people and older workers;
- (b) the fixing of a minimum age as a condition of eligibility for retirement or invalidity benefits;
- (c) the fixing of different ages for employees or groups or categories of employees for entitlement to retirement or invalidity benefits on grounds of physical or mental occupational requirements;
- (d) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement;
- (e) the establishment of requirements concerning the length of professional experience;
- (f) the establishment of age limits which are appropriate and necessary for the pursuit of legitimate labour market objectives.

Article 6

Positive action

This Directive shall be without prejudice to the right of the Member States to maintain or adopt measures intended to prevent or compensate for disadvantages concerning persons to whom any of the discriminatory grounds referred to in Article 1 apply.

Article 7

Minimum requirements

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.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 8

Defence of rights

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

Article 9

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. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures, unless otherwise provided by the Member States.
4. Paragraphs 1, 2 and 3 shall apply to any legal proceedings commenced in accordance with Article 8(2).

Article 10

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees 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.

Article 11

Dissemination of information

1. Member States shall ensure that adequate information on the provisions adopted pursuant to this Directive is provided to vocational training and educational bodies and is adequately disseminated within the workplace.
2. Member States shall ensure that competent public authorities are informed by appropriate means as regards all national measures taken pursuant to this Directive.

Article 12

Social dialogue

1. Member States shall take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.
2. Member States shall encourage the two sides of the industry to conclude, at the appropriate level, including at undertaking level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect this Directive and the relevant national implementing measures.

CHAPTER III: FINAL PROVISIONS

Article 13

Compliance

Member States shall take the 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 collective agreements, individual contracts of employment, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations, are declared null and void or are amended.

Article 14

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by the date specified in Article 15 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002. They shall forthwith inform the Commission thereof.

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

Article 16

Report

Member States shall communicate to the Commission, within two years of the date mentioned in Article 15, 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.

Article 17

Entry into force

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

Article 18

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council
The President*

ANNEX

IMPACT ASSESSMENT FORM

IMPACT OF THE PROPOSAL ON COMPANIES AND IN PARTICULAR ON SMALL AND MEDIUM SIZED ENTERPRISES (SMEs)

Title of the proposal:

Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation

Reference: 99012

Proposal

1. *Taking account of the principle of subsidiarity, why is Community legislation necessary in this field and what are its principal objectives?*

The European Union is founded on the principles of human rights and fundamental freedoms. Its commitment in this field has been reinforced by the Treaty of Amsterdam, in particular through amendments to Articles 6, 7 of the TEU and the introduction of Article 13 of the TEC. The latter provides a specific power to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

As noted in the Explanatory Memorandum, most Member States have included provisions governing the rights to equality and non-discrimination in their constitutional and/or legal order. However, the scope and the enforceability of such provisions – and the ease of access to redress – vary greatly from one Member State to another. European legislation is required to ensure a common minimum level of legal protection, including rights to redress, for the fundamental right not to be discriminated against in the field of employment and occupation on any of the grounds mentioned in Article 13.

European legislation must, of course, respect the limits of the powers conferred on the Community by the Treaty. The proposed Directive therefore lays down general principles, providing a common minimum level of protection within the limits of Community competence, while allowing Member States to maintain a higher standard of protection in accordance with their particular national social and legal context.

The choice of a Directive strikes a balance between the need for European intervention and the need to respect the differences between the existing Constitutions, laws and legal procedures of the Member States. It sets common goals to be achieved while allowing the flexibility needed by the different Member States to achieve them. The legislative intervention is therefore limited to a number of general principles that do not go beyond a minimum level of protection.

The aim of the proposal is the establishment of a general framework for the respect of the principle of equal treatment between persons irrespective of race or ethnic origin, religion or belief, disability, age or sexual orientation within the European Union. The areas covered by the proposal, are access to employment and occupation, promotion, vocational training and employment and working conditions and membership of workers' and employers' organisations and professional bodies.

Impact on enterprises

2. *Who will be affected by the proposal?*

All enterprises will be subject to the national legislation required by the Directive.

3. *What steps will enterprises have to take to comply with the proposal?*

Enterprises will need to ensure that decisions on recruitment, promotion, access to training, working conditions including dismissals and pay and membership of workers' and employers' organisations and professional bodies are taken in conformity with the principle of equal treatment on the grounds mentioned in point 1. In principle, this is already the case in all Member States. The Directive will therefore reinforce existing requirements rather than introduce entirely new provisions.

Member States must ensure that reasonable accommodation is provided where needed to enable disabled people to have access to, participate in, or advance in employment. Therefore, public and private employers will be primarily responsible for providing reasonable accommodation.

Reasonable accommodation involves the carrying out of modifications or adjustments to the employment process and to the workplace environment, unless doing so would impose an 'undue hardship' on employers. The concept of undue hardship provides for a fair balance between the legitimate demands of people with disabilities for a meaningful equal treatment and the costs to society and business which this could imply. Reasonable accommodation also includes many adaptations which are frequently available to any worker to address special needs and to enhance productivity (such as a computer with voice control).

4. *What economic effects is the proposal likely to have?*

In the field of employment, legislation protecting individuals from discrimination on arbitrary grounds has three main effects. First, it contributes to securing social participation and avoiding social exclusion by ensuring that people have the opportunity to fulfil their potential in economic terms, thus being able to provide for themselves and their dependants to best effect and to reduce their dependence on the state. Second, it ensures that enterprises have at their disposal the best qualified employees, thus contributing to the competitiveness and the strength of the firm and of the economy more widely. Third, it requires employers to justify their decisions about matters such as recruitment, promotion, access to training and other working conditions.

This proposal, by limiting discrimination in employment and occupation, will lead to greater economic and social participation and a reduction in social exclusion. This will have direct benefits for economic growth by reducing public expenditure on social security and assistance, by improving the purchasing power of individual households and by promoting the competitiveness of companies by ensuring that they make the best use of all the resources available in the labour market.

(a) *What will be the impact*

– on employment?

The Directive will contribute to a labour market open to all, as required by the European Employment Strategy. As a result, it will contribute to the improvement of the quality of employment and, in the medium term, may be expected to lead to increased levels of employment resulting from the improved competitiveness of European companies.

– on investment and the creation of new businesses?

The Directive will ease the conditions for access to employment and occupation, salaried employment, self-employment and liberal professions.

– on the competitive position of companies?

The Directive is important for competition purposes to ensure that all operators are placed on an equal footing. As noted above, the Directive will strengthen the competitiveness of European companies by ensuring that they have at their disposal a wider pool of skills and resources than at present and that use is made of those skills without distinction.

(b) *Do any new administrative procedures have to be put in place?*

Companies will need to be able to justify decisions on subjects such as recruitment, promotion, access to training and other working conditions, to show that they have not been made on a discriminatory basis. This is already the case in about half of the Member States. It will be in the interest of companies to keep limited records on these decisions where this is not currently existing practice.

(c) *Costs and benefits in quantitative and/or qualitative terms?*

Some limited short-term costs will fall on companies, both in terms of the training required for decision-makers within the company on the implementation of the principle of equal treatment where this is not already done, and in terms of contesting complaints about discrimination. Adaptation to the new requirements in those Member States where equivalent provisions to combat different forms of discrimination do not yet exist will be eased by the familiarity of companies with the Community framework for equal opportunities between women and men, which has been in existence for over twenty years.

In the medium term, companies will benefit from the increased commitment of employees and from increased competitiveness flowing from an improved use of resources (see above).

The evaluation of the economic impact of existing requirements to accommodate people with disabilities highlights several positive effects, including substantial reductions in absenteeism and concomitant savings to employers who invested in work environment improvements. An important effect of the requirement to accommodate is the increased awareness of the importance of the work environment for the company and a realisation that it is economically profitable to invest in better work environments and better work organisation.

(d) *What costs will flow from the Directive?*

The Directive fixes a flexible, general framework for the implementation of the principle of equal treatment and it will be for the Member States and the social partners to fix the precise means of putting this into practice. The costs however will be limited (see above).

US 1995 data, based upon ongoing surveys with employers highlights that employers who have made accommodations says that 18 percent of these involved no costs to them, with an additional 50 percent between USD 1 and 500. Just 5 percent were greater than USD 5 000. The mean cost of accommodation was USD 992 while the median cost was USD 200. The same employers also estimated the money their companies saved averaged 27 times the costs of what they spent in providing accommodations. The savings include in particular being able to hire or retain a qualified employee, elimination of the cost of training of a new employee, savings in insurance costs, increase in the worker's productivity.

(e) *What will companies be required to do in terms of monitoring and evaluation?*

The Directive does not directly require companies to monitor and evaluate their compliance with the Directive. However, it would be in the interest of companies to keep records of decisions about recruitment, promotion, access to training and other working conditions to show that they were taken without discrimination. Larger companies may wish to carry out more structured monitoring to ensure that the principle of equal treatment is applied at all levels.

5. *Does the proposal contain measures to take account of the specific situation of small and medium sized enterprises (reduced or different requirements etc.)?*

The proposal makes no distinction based on company size, given that discrimination exists across all companies, regardless of the number of employees. However, the Directive lays down only minimum standards based on a flexible framework of principles. It is therefore open to the

Member States and the social partners to vary the requirements on firms of different sizes, while respecting the requirements of the Directive.

Small and medium enterprises appear to be less well equipped to respond to the job accommodation needs of workers with disabilities. Consequently, many of the existing legal measures which require reasonable accommodation do not apply to firms with fewer than a set number of employees.

This is why the proposal states that Member States will be entitled to provide for exemptions from this requirement if there is a reasonable and objective justification, including circumstances where reasonable accommodation would give rise to an undue hardship. To this regard, the effect of the accommodation on the business should be examined in the context of the firm's financial resources, its workforce, the expenses involved and the availability of extra funding for the costs of compliance.

Consultation

6. *List of the organisations which have been consulted and presentation of the principal elements of their position*

The Commission has consulted the representative organisations of the European level social partners¹ and the European Platform of social non-governmental organisations.

All the organisations consulted recognised the importance of the issue and the need for a legislative approach. However, there were different points of view on some elements of the proposal.

The NGO and trade union representatives welcomed the proposal, but Platform members regretted the limitation of the scope of the Directive to employment and occupation. They insisted on the maintenance of the provisions on the burden of proof and on representative actions, believing these to be essential to the defence of the rights of the victims of discrimination.

Representatives of the employer organisations expressed doubts, however, about the shifting of the burden of proof, believing that this would create difficulties for employers by encouraging frivolous claims. The Commission notes that the proposed provision is based on that already adopted at Community level, and already implemented by many Member States, with regard to discrimination on grounds of sex (Council Directive 97/80/EC on the Burden of Proof in Sex Discrimination Cases) and that identical rules have already been applied without apparent difficulty to cases of race

¹ In conformity with the Commission Communications on the implementation of the Social Protocol (COM(93) 600 of 14 December 1993) and on adapting and promoting the Social Dialogue (COM(1998) 322 final, of 20 May 1998).

discrimination in some Member States. The Commission believes, therefore, that the employers concerns on this point are not founded.