



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5.11.2003  
COM(2003) 657 final

2003/0265(CNS)

Proposal for a

**COUNCIL DIRECTIVE**

**implementing the principle of equal treatment between women and men in  
the access to and supply of goods and services**

(presented by the Commission)

{SEC (2003) 1213 }

## EXPLANATORY MEMORANDUM

### I. INTRODUCTION

In its Social Policy Agenda published in June 2000<sup>1</sup>, the Commission announced its intention to present a proposal for a directive to prohibit sex discrimination outside of the labour market. At the European Council in Nice in 2000, Heads of State and Government called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life. The proposal was to be based on Article 13 of the European Community Treaty, which confers on the Council the power to take appropriate action to combat discrimination based, among other grounds, on sex.

This proposal is the first step of the Commission's response to the European Council's request.

### II. CONTEXT

Equal treatment between women and men and non-discrimination on grounds of sex are fundamental principles of Community law. The European Union's approach to equality has developed considerably over time, so that the original emphasis on equal pay<sup>2</sup> and on avoiding distortions of competition between Member States has been replaced by a concern for equality as a fundamental right. This is demonstrated by the attention given to equality in the Treaty establishing the European Community, in the European Union Charter of Fundamental Rights and, most recently, in the draft Constitutional Treaty which resulted from the Convention on the Future of Europe.

Article 2 of the European Community Treaty enshrines the promotion of equality between men and women as one of the Community's essential tasks. Article 3(2) EC requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities. Article 13 EC confers on the Council the power to adopt appropriate action to combat discrimination on a number of grounds, including sex.

The European Union Charter of Fundamental Rights reinforces this approach by prohibiting all forms of discrimination, including those based on sex<sup>3</sup> and by requiring that equality between men and women must be ensured in all areas<sup>4</sup>.

The Convention on the Future of Europe has proposed to the Intergovernmental Conference to incorporate the Charter in the future Constitutional Treaty and to make the promotion of equality of men and women an objective of the Union as a whole<sup>5</sup>.

The Community has adopted a series of legal measures to combat sex discrimination, beginning in 1975 with the Council Directive on equal pay for men and women<sup>6</sup> and

---

<sup>1</sup> COM(2000)0379 final.

<sup>2</sup> Article 119 of the Treaty of Rome

<sup>3</sup> Article 21 of the Charter of Fundamental Rights signed and proclaimed in Nice on 7<sup>th</sup> December 2000

<sup>4</sup> Article 23 of the Charter of Fundamental Rights signed and proclaimed in Nice on 7<sup>th</sup> December 2000

<sup>5</sup> Part I, Article 3 of the Draft Treaty establishing a Constitution for Europe, presented to the European Council on 20 June 2003 .

continuing up to the amendments to the Council Directive on equal treatment as regards access to employment adopted in 2002<sup>7</sup>. All of these measures have so far dealt with equal treatment in employment, occupation, vocational training and related areas.

The Council has also adopted two legislative instruments based on Article 13 EC in the form of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>8</sup> and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in occupation and employment<sup>9</sup>. The first directive prohibits racial discrimination in employment, social protection, including social security and health care, social advantages, education and access to goods and services, including housing. The second prohibits discrimination on grounds of religion and belief, disability, age and sexual orientation in the labour market in a similar way (with the exception of rules on statutory social security) to existing Community law on equal treatment between men and women.

Legislation at European level to prohibit sex discrimination in the labour market is comprehensive and well established<sup>10</sup>. It has shown its worth over thirty years and has played a significant role in contributing to the changing attitudes to the roles of men and women in European society. Community law has previously been limited to the employment field as a

---

<sup>6</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 (Official Journal L 045 19.02.75 p.19)

<sup>7</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal L 269 , 05/10/2002 P. 0015 – 0020)

<sup>8</sup> Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial and ethnic origin (OJ L 180 of 19.7.2000 p.0022-0026).

<sup>9</sup> Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000 p. 0016-0022).

<sup>10</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, *OJ L 45 of 19.2.1975*; 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, *OJ L 39 of 14.2.1976* as amended by Directive 2002/73 of the European Parliament and of the Council, *OJ L269 of 5.10.2002*; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of equal treatment for men and women in matters of social security, *OJ L 6 of 10.1.1979*; 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, *OJ L 225 of 12.8.1986 as amended by Council Directive 96/97/EC of 20 December 1996, OJ L 46 of 17.2.1997*; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, *OJ L 359 of 19.12.1986*; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, *OJ L 348 of 28.11.1992*; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 145 19.06.96 p.4) ;Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 010 16.01.98 p.24); Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex Official Journal L 014 20.01.98 p.6; Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, *Official Journal L 205 22.07.98 p.66*

consequence of the limits imposed by the legal base. Yet it is clear that sex discrimination takes place not only in the labour market, but also in many other areas of everyday life, and as such it acts as a barrier to the equality of men and women which the Treaty requires the Community to promote. If Community action can help to promote equal treatment in areas outside the labour market, in the context of a Europe which is close to its citizens and where the principle of equality for all is established in every national constitution, Community action to promote equal treatment between women and men cannot be limited only to the world of work. For that reason, in its Communication of 7 June 2000 setting out a Community framework strategy on gender equality (2001-2005)<sup>11</sup>, the Commission undertook to present a proposal for a Directive based on Article 13 of the EC Treaty implementing the principle of equal treatment between men and women in matters other than employment and occupation. The European Council subsequently called on the Commission, in December 2000, to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.

It is thus as a result of a real moral and legal obligation, aimed at consolidating the concept and the reality of a Europe of citizens that the European Commission presents its first proposal for a Directive aimed at establishing equal treatment between men and women in an area outside of the labour market.

### **III. LEGAL BASE**

The proposal is based on Article 13(1) of the Treaty establishing the European Community, the legal basis introduced for the first time by the Amsterdam Treaty. Article 13(1) EC empowers the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This legal base has already been used on two occasions for the adoption of similar proposals to combat discrimination. The first of these directives is notable for its prohibition of (racial and ethnic) discrimination in areas outside the field of employment, including in the access to and supply of goods and services.

Article 13 EC must be read in the light of the provisions contained in Articles 2 and 3(2) of the EC Treaty, which require the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

The proposal does not cover areas falling within the scope of Article 141 of the EC Treaty and does not call into question the existing body of legislation implementing the principle of equal treatment for men and women.

### **IV. MOTIVATION, OBJECTIVES AND OVERVIEW OF THE PROPOSED DIRECTIVE**

Since the Commission proposed the idea of a Directive to deal with discrimination outside of the labour market in the Social Policy Agenda published in 2000, and the subsequent support for the principle from the European Council, it has held discussions on the various issues which might be covered in such a Directive. The public hearing held in the European Parliament on 10 September 2003, and which dealt in particular with the application of the

---

<sup>11</sup> COM(2000)0335 final.

principle of equal treatment to the fields of insurance and the media, was a particularly important contribution to the debate.

Despite the progress made towards equality over the last thirty years, many stakeholders who have been consulted by, or who have brought their views to the attention of, the Commission, argue that discrimination based on sex continues to occur in many areas of life inside and outside of employment. The representation of the sexes in the media and advertising, for example, poses serious questions about the protection of the dignity of men and women. Some stakeholders, in particular in the European Parliament and the women's movement, have raised issues related to taxation systems which may act as disincentives to one sex or the other to earn income from employment or other sources and have argued in favour of the complete individualisation of taxation. They have also pointed to practices in the field of education, where girls or boys continue to be discouraged from pursuing non-traditional paths.

Other stakeholders present different views, however. Representatives of the media argue, for example, that an attempt to regulate the content of the media would constitute an infringement of media freedoms. Some Governments, in written contributions to the Commission about a possible directive or in discussion in national Parliaments, maintain that systems of taxation based on family units do not constitute discrimination based on sex and that to change them could lead to families being worse off. Governments have also cited the changing trends in education, with the percentage of girls following scientific courses, for example, steadily increasing.

As regards taxation, the Commission holds the view that, as a result of the direct effect and material scope of Article 141 EC, existing Community law requires the taxation of income from employment to respect the principle of equal treatment. Member States are therefore already obliged to ensure that their tax system does not discriminate against members of one sex or the other. It is therefore not necessary for the Community to intervene further to regulate the taxation of employment income.

The commitment of all the stakeholders to the achievement of equality in practice in these areas is not in doubt, but there are differences between them about the path which should be followed. The debate on these questions is far from over. The Commission will need to continue its contacts with the stakeholders on these questions if a consensus is to be reached on all of these aspects. It has concluded therefore that it should not now make proposals which would deal with the areas of education, taxation or the content of the media.

The Commission has noted much greater consensus however on the need for regulation in the field of access to goods and services. Just as when dealing with equal treatment irrespective of racial or ethnic origin in the context of the Council Directive on Racial Discrimination, there is little evidence of the existence of consistent discriminatory practices in the area of the access to or supply of goods and services – companies do not in general instruct their employees to treat men and women differently. Discrimination is much more likely to occur in the context of the spontaneous behaviour of individuals, either by withholding a good or a service or providing it on less favourable terms and conditions to members of one sex than the other. Discrimination based on sex in access to goods and services can act as a barrier to social and economic integration, especially in access to finance, but also more widely. Decisions on loans to small companies or to individuals, for example, which are based on or influenced by the sex of the applicant are not only contrary to the basic principle of equal treatment, but are in practice extremely damaging to the ability of large sections of society to provide for themselves and for others. The exclusion of individuals from access to the goods or services of their choice is at best

damaging to their self-esteem and may lead in the worst cases to compounding social exclusion. The Commission proposes, therefore, that the Member States should prohibit discrimination in the access to and supply of goods and services. Such a prohibition would enable the victims of discrimination to challenge acts of discrimination and, in cases where discrimination is proven, to receive appropriate compensation. The sanctions applied in such cases should be sufficiently dissuasive so as to contribute to the prevention of future discrimination.

These rules must however be pragmatic. Just as in the case of the Council Directive on Racial Discrimination, the rules should apply to goods and services which are available to the public. Nor should they be taken to prohibit differences which are related to goods or services intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex, for which women and men are not in a comparable situation. The Directive should not apply to the enjoyment of services provided by private clubs which are open to the members of only one sex.

### **Insurance**

An exception to the general absence of differential rules based on sex is found in the context of insurance. It is common for insurance to be offered on different terms to women and to men. Actuarial factors are broken down by sex in order to evaluate the risk of insuring men and women separately in various parts of the insurance market, but especially in life, health and car insurance and in the calculation of annuities. The factors taken into consideration include variations in average life expectancy, but also different patterns of behaviour (particularly in car insurance) and consumption (in health insurance).

However, insurance companies in different Member States use a wide variety of tables which are updated more or less regularly and which, in certain cases, lead to different results for men and women. In France, for example, it is common practice to apply unisex tariffs for men and women in private health insurance. The same is true in the United Kingdom (though sex differences are applied in critical illness insurance). In Germany, however, insurers differentiate between men and women. Similar differences of approach arise in the areas of term life insurance and pensions annuities, where insurers in France use unisex tables, whereas others tend to calculate contributions and annuity payments on the basis of tables showing life expectancy according to sex. In the area of car insurance, insurers in some Member States apply a strong differentiation in the rates applied to (especially young) men and women (e.g. the United Kingdom and Ireland), whereas others (in e.g. Sweden) do not. Both approaches are therefore possible without affecting the financial viability of the companies.

Studies show that sex is not the main determining factor for life expectancy. Other factors have been shown to be more relevant, such as marital status, socio-economic factors, employment/unemployment, regional area, smoking and nutrition habits. Lifestyle can be seen as a multidimensional factor which has a significantly higher impact on individuals' life expectancy than sex. Studies which have tried to remove lifestyle, social class and environmental factors from the equation have shown that the difference in average life expectancy between men and women lies between zero and two years with the conclusion that the growing gap in life expectancy witnessed in the general population in some Member States cannot be attributed to biological differences. Sex is at the very best a proxy for other indicators of life expectancy. The inference which can be drawn from such studies is that the practice of insurers to use sex as a determining factor in the evaluation of risk is based on ease of use rather than real value as a guide to life expectancy. Commentators have noted that insurers are more likely to pool together the healthy and the unhealthy than men and women.

In this context, some stakeholders – especially in the women's movement and in the European Parliament, though some insurance experts also agree – argue that different actuarial calculations for determining premiums, benefits and annuities for insurance products related to life expectancy must be considered as sex discrimination as sex is not the dominant factor in determining life expectancy.

The Commission notes that contributions to and benefits from state pensions and health insurance do not take account of differences in life expectancy. Such schemes mutualise the risks related to sex, preferring to share the costs of the longer life expectancy of women between both sexes. In the case of statutory schemes, membership is usually compulsory, and so it is always possible to predict the balance of men and women in the scheme.

The insurance industry argues that private insurance cannot be compared to statutory insurance, in particular because it has little control over the balance of men and women in the schemes. It points out that the prices and benefits it fixes for men and women reflect the real risk the insurance companies carry for each of the insurance products they offer, and that to interfere in that calculation would result in an artificial distortion of the market, whereby some products would no longer be economically viable, because the risk would be out of proportion to the income generated. This could be the case, for example, of health insurance and annuities insurance for men, and life and car insurance for women, as members of the sex which was required to pay a premium which was proportionately higher than their personal risk would be discouraged from taking out the insurance, while members of the sex which paid a lower rate than would be required by their real level of risk would be encouraged to take it out, creating a situation where the insurance company may not be able to meet its underwriting liabilities. The industry argues moreover that the tables it uses reflect the reality of the life expectancy of women and men, that they are regularly updated and that a public supervisory authority generally approves them.

The Commission believes that these concerns are not justified. First, the French Federation of Insurance Companies reports, for example, that the introduction of sex-neutral actuarial factors did not lead to a major change in the market for annuities in France. Second, the concerns are based on a static view of the market which does not reflect reality. As described above, sex is used by insurers as a proxy for other factors and progressive insurance companies are in the process of developing new and more accurate means of predicting risk. As they do so, and as a consequence of competition, they will be able to reduce the importance of sex in their calculations and base their prices on sex-neutral criteria. The products they and other financial service providers offer will therefore adapt to the new environment to ensure that the range of offers to consumers remains broad and attractive.

### **The Commission's conclusion**

Insurance companies enjoy freedom to set their tariffs within the limits of Community law as laid down in the Treaty and in the various Council and European Parliament Directives on life and non-life insurance. All insurance is based on the pooling of risk and the solidarity which is created between the insured. Currently, insurers decide for themselves how they wish to define the pool of risk. Many have concluded that men and women should be divided into separate pools and that the risks they face should not be shared.

However, equal treatment for women and men is a fundamental right and the Commission believes that the freedom to set tariffs must be subject to that right. The separation of men and women into different pools leads to an unjustified difference of treatment and a resulting disadvantage for one sex or the other. The practice must be judged to be discriminatory and

the legislator should therefore take action to prohibit it. An equivalent situation was at one time frequently found in the field of employment: in the past, it was not uncommon for employers to argue that they were reluctant to employ women of child-bearing age as there was a risk that they would be absent from work for periods of maternity leave, thus increasing their exposure to risks and resulting costs. While this is statistically true, it is clearly morally unacceptable as a reason for a difference of treatment of women and men in the labour market and the legislator has acted to prohibit such behaviour. The same argument holds true in the field of insurance.

The Commission concludes therefore that differences of treatment based on actuarial factors directly related to sex are not compatible with the principle of equal treatment and should be abolished. This position is in line with the ruling of the European Court of Justice in *Coloroll*<sup>12</sup>, to the effect that different contributions for men and women to an occupational pension scheme are discriminatory.

The Commission's view is reinforced by the trend in Member States to replace or supplement state provision in the field of pensions by private insurance, and especially by annuity-based pensions. In many cases, Governments are encouraging the move to private provision through tax incentives or equivalent arrangements. The legislator has decided that, in the case of statutory social insurance, the principle of equal treatment must be respected. However, the move towards private provision is undermining this principle: sex-neutrality in state social insurance schemes is being gradually replaced by sex differentiation in the private market, in both the second and third pillars of pension provision. This is all the more important because arrangements which compensate (in the main) women for various disadvantages they face on the labour market – such as recognition of periods of absence from the labour market for reasons of child care, or survivor's benefits – are less common or less generous in second and third pillar schemes. Moreover, self-employed workers frequently have no option but to resort to the private market for pension coverage. The numbers of people in self-employment – and among them the proportion of women – are steadily increasing.

As the European Court of Justice made clear in the *Defrenne II* case<sup>13</sup>, the proper implementation of equal treatment requires not only that the law should conform to the principle but that rules found in collective agreements and private contracts should also be brought into line. The developments in the nature of pension provision make action to require the equal treatment of women and men in the private provision of pensions all the more urgent and a necessary corollary of action in the state sector.

The Commission recognises however that the current widespread use of such factors cannot be changed overnight without causing disruption and turbulence in the market. The Commission accepts, therefore, that it may be necessary for insurance companies to continue to take account of actuarial factors based on sex in certain cases during a transitional period.

It is also clear that it is difficult for individual insurance companies to move to sex-neutral pricing in the face of competition from other companies, as the members of the sex which benefits from the change will tend to move disproportionately to that company, while those who are disadvantaged will tend to leave it, thus leaving the company with a portfolio of risks which it is not able to cover without a general increase in premiums. A move to sex-neutral pricing must therefore be co-ordinated across the Union in order to avoid potentially

---

<sup>12</sup> Case C-200/91

<sup>13</sup> Case C-43/75



damaging distortions of competition. A directive, with a sufficiently long period of transposition, allows such co-ordination to take place and enables the Member States and the insurance companies to make the necessary adjustments to their legislation and practices. In particular, it allows the space for the industry and public authorities to work together to improve the reliability of the lifestyle and other criteria which have a more significant impact than sex on life expectancy. The use of other such criteria will enable a more accurate evaluation of risk by insurers than is currently the case with the industry's over-reliance on sex.

The Commission is also concerned that men and women as consumers have little information as to how these factors are taken into account by insurance companies and the impact that they have on the level of premiums or contributions they are required to pay in return for a certain level of benefit. This appears to be especially true in the field of annuities and is particularly important in the situation where, in many Member States, pensions insurance is moving away from defined benefit schemes and towards defined contribution schemes<sup>14</sup>. The Commission believes that this lack of transparency may act as an impediment to the right of equal treatment for men and women.

The Commission proposes therefore that Member States should have an option to apply the principle of equal treatment to the use of actuarial factors following a transitional period which should last for a further six years beyond the end of the general transposition period of two years, giving a total of eight years for insurance companies to adapt their practices following the date of entry into force of the Directive. To aid transparency in the market, the Member States should during this period compile, publish and regularly update comprehensive mortality and life expectancy tables for their populations on which insurance companies may draw. In accordance with the Council and European Parliament Directives on life and non-life insurance, insurance companies may be required to notify the use of any sex-based tables they apply to the competent authority of their home Member State.

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

The European Union has long promoted the case for intervention in the area of equal treatment for men and women in the field of employment. More recently, it decided that protection against discrimination on grounds of racial and ethnic origin should be extended to areas outside of the labour market, to education, social protection, healthcare, social advantages and the access to and supply of goods and services available to the public, including housing. In that context, the Union agreed that the Member States acting alone could not sufficiently achieve a common high level of protection against discrimination and that the objective could be better achieved by the Community.

In dealing with the question of sex discrimination in access to goods and services, similar arguments apply with respect to subsidiarity. Just as with the Directive on Racial Discrimination, the proposal addresses a serious inequality which is faced by millions of European citizens in their everyday lives. The precise scale of discrimination is difficult to measure. This is in part because, by definition, no record of complaints of sex discrimination are kept in Member States which have no specific legislation in the field – discrimination as an unlawful act about which it is possible to complain only exists once it is prohibited.

---

<sup>14</sup> In a defined contribution scheme, the insured person is required or encouraged to invest a capital sum in an annuity as a source of retirement income.

However it is clear from the experience of existing independent bodies promoting equal treatment for men and women in the Member States that, where they deal with questions linked to goods and services, they are faced with a wide variety of cases<sup>15</sup>. In a Eurobarometer survey carried out in 2002, people saying that they had personally experienced discrimination on grounds of sex in the area of goods and services made up just under one quarter of the discrimination reported in this area on all grounds covered by the survey<sup>16</sup>. In Member States where legislation does exist, it can be seen that complaints in this area make up a significant proportion of those dealt with by the specialised bodies concerned. In Ireland, for example, approximately 25% of the cases of sex discrimination cases dealt with so far in 2003 by the Office for the Director of Equality Investigations have concerned goods and services (with the remaining 75% concerning various aspects of employment). In the Netherlands, complaints about unequal treatment based on sex in the area of goods and services made up just over 10% of the cases dealt with by the Equal Treatment Commission in 2002. It is clear, therefore, that European legislation in this field will meet a previously unmet need in Member States which do not presently have specific legislation on equal treatment in access to goods and services.

In the case of the sex-based actuarial factors, it is clear that the differences are widespread across large parts of the European Union and that their impact is significant. Without intervention by the Union, the impact of these differential rules will increase as a result of the trend in Member States to move from state provision to private provision in pensions and related areas. These inequalities can be addressed comprehensively only by European action for the following reasons.

The right to equal treatment is fundamental to the conception of the European Union. To ensure that this right is protected at a common minimum level across the Union requires co-ordinated action. As has been seen in the case of earlier action by the Community dealing with specific problems of discrimination, this can best be achieved by the co-ordination of the legal protections provided in each Member State.

Some Member States have already applied the principle of equal treatment to access to goods and services in their national legislation, but this is done in widely differing ways. Given the disparities and certain gaps in protection under national laws on equal treatment for men and women in the access to and supply of goods and services, the proposed Directive will ensure a common and effective application of the principle of equal treatment throughout the entire territory of the European Economic Area (see below). It lays down general principles for common protection against sex discrimination to be enjoyed by citizens all over the Union, reinforcing and supplementing the protections which currently exist in the Member States, either by widening the material scope of such protections or by providing or strengthening access to redress. In doing so, it will reinforce the fundamental values on which the Union is founded – equality for men and women, liberty, democracy, the respect for human rights and fundamental freedoms and the rule of law. And it will help to strengthen economic and social

---

<sup>15</sup> For example: Refusal to provide mortgages to pregnant women.; refusal to allow a woman's name to be put first on joint accounts (with resulting discrimination in entitlement to benefits such as share options, which are frequently restricted to the first named member); refusal to offer loans to people working part-time (indirectly discriminatory in the light of standing ECJ case-law as the majority of part-time workers are women; requirement for a woman to have a guarantor for a loan, where a man with a similar credit rating would not face a similar requirement; sexual harassment by landlords; different treatment of men and women in insurance schemes.

<sup>16</sup> Other grounds included racial and ethnic origin, religion and belief, disability, age and sexual orientation.

cohesion by ensuring that people in all Member States enjoy a basic level of protection against sex discrimination, with comparable rights to redress. By laying down minimum requirements, the proposal leaves the Member States a wide margin of manoeuvre for the purposes of attaining its goal and in particular allows those with a higher or wider level of protection for citizens to maintain those levels. A Directive, which leaves sufficient flexibility to the Member States as to how to provide this protection in practice, is the appropriate instrument, as in the earlier cases.

As noted earlier in this Explanatory Memorandum, it is difficult for individual companies to move towards unisex insurance rates in certain markets without exposing themselves to the risks of a disproportionate movement of members of one sex or the other either away from or to their products, thus creating imbalance. The same is true for individual Member States in the context of the single market in insurance, where a move by a single Member State to require unisex tariffs could expose its insurers to undercutting in part of its market by businesses in other Member States. To avoid this risk, it is necessary to co-ordinate a move towards a unisex approach across the Union. Community legislation laying down broad objectives but leaving the precise implementation to Member States is the best way to achieve the full implementation of the principle of equal treatment while avoiding the risks of distortion of competition.

However, European Union action should go no further than is required to meet the objective to be achieved. Not only should the Union restrict itself to agreeing general principles, it should apply those principles only to areas where it is convinced that problems need to be resolved and that they can be resolved by the action proposed. In this case, the Commission has decided to propose a Directive with a clear focus on one area – goods and services – where there is evidence of the existence of discrimination and where previous Community action (especially Council Directive 2000/43/EC) has shown that a legal response is appropriate. The Commission has decided not to tackle other areas where either the evidence was less clear-cut or where it was not apparent that the difficulties could be resolved through legislative means.

## **VI COMMENTARY ON THE ARTICLES**

### **Structure**

The structure of the proposed Directive reflects that of the already adopted directives based on Article 13 EC, notably Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. It comprises four Chapters:

- Chapter I – General provisions
- Chapter II – Remedies and enforcement
- Chapter III – Bodies for the promotion of equal treatment
- Chapter IV – Final provisions.

## **General principles**

The proposed Directive includes definitions of the concepts of direct and indirect discrimination, harassment and sexual harassment (identical to the definitions recently adopted in Council Directive 2002/73<sup>17</sup> amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions).

Further, the maintenance and adoption of specific measures by Member States in a specific area should also be allowed to overcome the weight of accumulated disadvantages linked to sex suffered by women or men.

## **Material scope of the Directive**

The proposal for a Directive implements the principle of equal treatment between women and men in the field of the access to and supply of goods and services which are available to the public, including housing. In this respect, the Directive takes the same approach to the area as Council Directive 2000/43/EC. The motivation for the coverage of this area is set out above.

## **Remedies and enforcement**

The proposed approach is consistent with that taken in Council Directive 2000/43/EC on Racial Discrimination and in Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC, notably:

- judicial and/or administrative procedures providing for adequate penalties
- the burden of proof placed on the respondent
- protection of victims and witnesses against risks of retaliation
- promotion of dialogue with non-governmental organisations.

## **Chapter I: General provisions**

This Chapter is made up of five articles.

### ***Article 1***

This article sets out the subject matter and scope of the Directive: laying down a framework for combating discrimination based on sex in the access to and the supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

The article requires Member States to take the necessary measures to implement the principle of equal treatment between women and men, in the area of the access to and supply of goods and services available to the public, including housing. The Directive does not apply to

---

<sup>17</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269 of 5.10.2002 p. 0015-0020

transactions which are carried out in a purely private context, such as, for example, the renting of a holiday home to a family member or the letting of a room in a private house. In this way, the concept of goods and services has the same meaning as in Council Directive 2000/43/EC and should be restricted to those which are normally provided for remuneration.

The concept of goods and services available to the public could therefore include:

- access to premises into which the public are permitted to enter;
- all types of housing, including rented accommodation and accommodation in hotels;
- services such as banking, insurance and other financial services;
- transport; and
- the services of any profession or trade.

Certain goods and services are specifically designed for use by members of one sex (for example, single-sex sessions in a swimming pool or private membership clubs). In other cases, the same skills may be practised differently depending on whether the customer is a man or a woman. This directive should not interfere with such differences, where men and women are not in a comparable situation. To avoid inappropriate interpretations of the prohibition of discrimination, the article makes clear that the directive does not preclude differences of treatment when they are based on goods or services which are intended exclusively or primarily for members of one sex or the other or on skills which are practised differently for one sex or the other.

To avoid conflict with other fundamental freedoms such as the freedom and plurality of the media, Article 1 makes clear that it does therefore not apply to the content of media and advertising. Nor does the Directive apply to education, which is to a large extent already covered by existing Community law.

## ***Article 2***

Paragraph 1 defines the concepts of direct discrimination, indirect discrimination, harassment based on sex and sexual harassment. The definitions are drawn from existing Community law and do not depart from previously agreed approaches in any way. The concepts of direct and indirect discrimination and sex-based and sexual harassment are, *mutatis mutandis*, identical to those contained in the already adopted Directives 2000/43/EC and 2000/78/EC and Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC.

Harassment on grounds of sex and sexual harassment do not occur solely in the workplace, but can also occur in other areas of an individual's life, including in the context of providing goods and services. As in Directive 76/207/EEC, the two concepts are defined separately, because they are distinct phenomena. Harassment based on sex consists of unfavourable treatment of a person related to their sex, though it need not be of a sexual nature (an example might be male employee constantly making disparaging remarks about women customers). Sexual harassment consists of unwanted physical, verbal or non-verbal conduct of a sexual nature. Examples in this area might include harassment by landlords of tenants; or by company buyers of salespeople, where, for example, sexual favours may be demanded in return for the award of contracts.

Paragraph 2 indicates that incitement to discrimination is deemed to be discrimination as such. A similar provision is already to be found in the existing Directives 2000/43/EC and 2000/78/EC based on Article 13 EC and the 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. The Commission proposes the use of the term 'incitement', rather than 'instruction' in the English text, in order to align the meanings of the language versions.

### *Article 3*

This article explains the meaning of the application of the principle of equal treatment. For this purpose, it uses the same terms as Council Directive 2002/73/EC amending Directive 76/207/EC. It specifies that the principle of equal treatment between men and women shall mean that there shall be no direct discrimination based on sex, including unfavourable treatment of women for reasons of pregnancy and maternity, nor indirect discrimination based on sex. In this context, as in the earlier Directive, harassment and sexual harassment are also to be considered discrimination based on sex.

### *Article 4*

This article makes clear that the principle of equal treatment shall apply to the use of sex-based actuarial factors in the calculation of premiums and benefits in the insurance and related industries. In this case, the Directive applies only to new business which is entered into following the transposition date.

In addition, to avoid unduly sudden adaptations of the market in insurance, the article allows the Member States the option of an extended period for the transposition of provisions relating to actuarial factors. If the Member States use this option, they shall inform the Commission and shall promote transparency in the market by compiling, publishing and updating comprehensive tables on the life expectancy of men and women.

### *Article 5*

Following the model of Council Directive 2000/43/EC, paragraph 2 of this article confirms that the Member States may maintain or introduce specific measures to compensate for certain disadvantages accumulated by individuals of either sex in the field of goods and services. Such measures must be shown to be necessary, focused on overcoming a specific disadvantage and must be limited in time, being in force no longer than is necessary to deal with the problem identified. For example, women have traditionally had greater problems than men starting businesses as the result of a range of factors, including the difficulty of raising venture capital and gaining support for the development of business ideas. While the application of the principle of equal treatment is likely to help with this situation, it is unlikely to be sufficient on its own to overcome the accumulated disadvantage faced by women in this area. One response to this situation has been the establishment of specific loans for women entrepreneurs, at special rates or conditions, and the provision of extra business support and advice services for women entrepreneurs. This framework of support then encourages other investors to contribute their own funds and so to help overcome the historical difficulties related to sex. Special services for women entrepreneurs exist in a number of Member States and in at least one, special banks or lending facilities exist specifically for this purpose. The Commission believes that this Directive should not prohibit the possibility for such measures in Member States and therefore that it is necessary to include an option for Member States to provide for this derogation from the principle of equal treatment.

This article is necessary to avoid the unintended effect of prohibiting positive actions in the field of access to goods and services which, as in the case of those mentioned above, already exist. The absence of this article would also prevent responses to new needs for positive action which may arise in future.

### ***Article 6***

Paragraphs 1 and 2 are standard provisions. Paragraph 1 makes clear that Member States may have legislation providing for a higher level of protection than that guaranteed by the Directive. Paragraph 2 provides that there should be no lowering of the level of protection against discrimination already afforded by Member States when implementing the Directive.

## **Chapter II: Remedies and enforcement**

This Chapter has four Articles and deals with two main conditions for effective legislation against discrimination: the right of victims to a personal remedy against the person or body who has perpetrated the discrimination, and the existence of an appropriate mechanism in each Member State to ensure adequate levels of enforcement. It uses provisions identical to those in the earlier Directives based on Article 13.

### ***Article 7***

Article 7 relates to procedures (access to justice) which enable the obligations deriving from the Directive to be enforced. In particular, it provides people who believe they have been the victim of discrimination with the possibility to pursue their claims through an administrative and/or judicial procedure to enforce their right to equal treatment.

As with the earlier Directives on discrimination, the right to challenge discriminatory behaviour should extend to situations in which the relationship between the parties has ended. The Directive should not however have retroactive effect, applying to such relationships only from the date of its entry into force. National 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.

### ***Article 8***

This Article is a standard provision in Community discrimination law. The wording is based on Article 4 of Council Directive 97/80/EC<sup>18</sup> on the burden of proof in sex discrimination cases and the equivalent articles found in the earlier Article 13 Directives, notably Directive 2000/43/EC. The Commission proposes that the burden of proof should revert to the respondent once the plaintiff has established facts before the court or other body from which it may be presumed that discrimination has taken place. As in the earlier Directives and in order to comply with the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms, this shift in the burden of proof does not apply to situations where the criminal law is used to prosecute allegations of discrimination.

---

<sup>18</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14 of 20.1.1998.

As in its earlier proposals, the Commission has not included the provision inserted by the Council in previous directives to the effect that Member States need not apply the shift of the burden of proof to proceedings in which it is for the court or competent body to investigate the facts of the case. The Commission notes that there is considerable confusion about the meaning of this provision and believes that its inclusion would undermine the legal certainty of the article as a whole.

#### ***Article 9***

Effective legal protection for victims and witnesses of sex-based discrimination must be available in the event of any retaliation by a provider of a good or a service. Victims and witnesses could be deterred from exercising their rights due to the risk of reprisals in certain circumstances.

#### ***Article 10***

This provision aims to promote dialogue between relevant public authorities and non-governmental organisations which have a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment. A similar provision is contained in Community legislation dealing with racial discrimination.

### **Chapter III: Bodies for the promotion of equal treatment – Article 11**

This Chapter consists of a sole article which deals with charging bodies at national level with the promotion of equal treatment in the fields covered by the Directive. It replicates the provisions of Directive 2000/43/EC in as far as they deal with access to and supply of goods and services, and builds on the equivalent provision in Directive 2002/73/EC, where the Member States are required to designate bodies to promote equal treatment for women and men in the labour market. It provides for a framework applicable to bodies at national level which would act independently to promote the principle of equal treatment. Member States may decide that these bodies would be the same as those provided for in the labour market field under Council Directive 2002/73/EC and, as in that case, that they should be established at regional or local level provided that their whole territory is covered by such arrangements.

The proposal for a Directive lays down a number of requirements for such bodies in the Member States. The latter may take decisions on the structure and operation of such bodies in accordance with their legal traditions and policy choices.

### **Chapter IV: Final provisions**

The four Articles of Chapter V are standard provisions which appear in many Community directives.

#### ***Article 12***

This article is a classic provision, contained in all previous Community instruments on discrimination, which concerns compliance with the Directive by the Member States. Equal treatment involves the elimination of discrimination arising from any laws, regulations or administrative provision and the Directive therefore requires the Member States to abolish any such provisions. As with earlier legislation, the Directive also requires that any provisions contrary to the principle of equal treatment must be rendered null and void or amended, or must be capable of being so rendered if they are challenged.



### ***Article 13***

This article is a standard provision dealing with sanctions for breach of the principle of equal treatment. Equivalent provisions are found in the earlier Directives based on Article 13.

### ***Article 14***

This article is a standard provision on the need for transparency, bringing information on the provisions in the field covered by the Directive to relevant persons.

### ***Article 15***

This provision sets out the procedures for monitoring and reporting on the implementation of the principle of equal treatment. The reporting procedures require:

- a report following the transposition of the directive but before the expiry of the transitional period foreseen for the phasing out of the use of sex-based actuarial factors in insurance etc; and
- a second report two years after the end of the transitional period for sex-based actuarial factors; and
- continuing monitoring, with reports every five years thereafter.

The impact of the Directive will therefore be carefully assessed and any adjustments which are required to the legal framework will be able to be proposed in a timely manner.

### ***Article 16***

This provision sets out the procedures for the implementation of the Directive. The Commission proposes that the Member States should in general have a period of two years within which to transpose the Directive into national law (see also Article 4 above).

In line with recently agreed practice, the article requires the Member States to notify the text of the provisions adopted in transposition of the Directive, along with a correlation table between those provisions and the Directive.

### ***Article 17***

This provision concerns the date of the Directive's entry into force.

### ***Article 18***

This provision makes clear that the Directive is addressed to the Member States.

## **VII. APPLICATION TO THE EUROPEAN ECONOMIC AREA**

This text is 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**

**implementing the principle of equal treatment between women and men in  
the access to and supply of goods and services**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13(1) thereof,

Having regard to the proposal from the Commission<sup>19</sup>,

Having regard to the opinion of the European Parliament<sup>20</sup>,

Having regard to the opinion of the Committee of the Regions<sup>21</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>22</sup>,

Whereas:

- (1) In accordance with Article 6 of the Treaty on European Union, the 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 the Member States, and respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law.
- (2) 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, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

---

<sup>19</sup> OJ  
<sup>20</sup> OJ  
<sup>21</sup> OJ  
<sup>22</sup> OJ

- (3) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.
- (4) Article 2 of the Treaty establishing the European Community provides that promoting such equality one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and actively to promote equality between men and women in all its activities.
- (5) The Commission announced its intention to propose a directive on sex discrimination outside of the labour market in its Communication on the Social Policy Agenda<sup>23</sup>. Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005)<sup>24</sup> covering all Community policies and aimed at promoting equality for women and men by adjusting these policies and implementing practical measures to improve the situation of women and men in society.
- (6) The European Council at its meeting in Nice in December 2000 called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.
- (7) The Community has adopted a range of legal instruments to prevent and combat sex discrimination in the labour market. These instruments have proved the value of legislation in the fight against discrimination.
- (8) Discrimination based on sex and harassment also take place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of women and men into economic and social life.
- (9) Problems are particularly apparent in the area of goods and services. Discrimination based on sex, should therefore be prevented and eliminated in this area. As in the case of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment irrespective of racial and ethnic origin<sup>25</sup>, this objective can be achieved by means of Community legislation.
- (10) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Services should be taken to be those which are normally provided for remuneration.
- (11) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context and the freedom and pluralism of the media. The prohibition of discrimination should therefore apply to access to and supply of goods and services which are available to the public. It should not apply to the content of media or advertising

---

<sup>23</sup> COM(2000)379 final.

<sup>24</sup> Council Decision of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005) OJ L 17, 19.1.2001.

<sup>25</sup> Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial and ethnic origin (OJ L 180 of 19.7.2000 p.0022-0026).

- (12) The principle of equal treatment should not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods or services are intended exclusively or primarily for the members of one sex, such as private membership clubs, or to skills which are practised differently for each sex.
- (13) The use of actuarial factors related to sex is widespread in the provision of insurance services, even when such differences do not necessarily reflect objective differences. Consequently, in order to ensure equal treatment between men and women, the use of actuarial factors related to sex should be eliminated. To avoid a sudden readjustment of the market, the prohibition of the use of such factors should apply only to new contracts concluded after the date of transposition of this Directive and should be phased in over a sufficiently long period. The Directive should not therefore apply to the use of such factors in contracts concluded for the first time before that date.
- (14) Where this transitional period is used by Member States, the use of actuarial factors related to sex when calculating premiums and benefits accruing from insurance and other financial services should be sufficiently transparent for the consumer. To this end, the Member States should compile, publish and regularly update tables of actuarial data for the guidance of insurance companies.
- (15) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
- (16) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.
- (17) The rules on the burden of proof should be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof should shift back to the defendant when evidence of such discrimination is brought.
- (18) Member States should take the necessary measures to ensure that all laws, regulations and administrative provisions at variance with the principle of equal treatment are rendered null and void or amended.
- (19) Member States should engage in dialogue with non-governmental organisations to address and combat different expressions of discrimination based on sex.
- (20) Protection against discrimination based on sex should itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims. The body or bodies may be the same as those designated in the area of the labour market in accordance with Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EC on the

implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions<sup>26</sup>.

- (21) This Directive lays down minimum requirements, thus giving the Member States the option of maintaining or introducing 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.
- (22) Member States should provide for effective, proportionate and dissuasive sanctions in cases of breaches of the obligations under this Directive.
- (23) Since the objectives of the proposed action, namely to ensure a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level by putting in place a common legal framework, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

## **CHAPTER I - GENERAL PROVISIONS**

### *Article 1*

#### **Subject Matter and Scope**

1. This Directive lays down a framework for combating discrimination based on sex in access to and the supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.
2. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons in relation to the access to and the supply of goods and services which are available to the public, including housing, as regards both the public and private sectors, including public bodies.
3. This Directive does not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods or services are intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex.
4. This Directive shall not apply to education nor to the content of media and advertising, in particular advertising and television advertising as defined in Article 1(b) of Council Directive 89/552/EEC.

---

<sup>26</sup> OJ L269, 5.10.2002, p.15.

## *Article 2*

### **Definitions**

1. For the purposes of this Directive, the following definitions shall apply:
  - (a) direct discrimination occurs where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;
  - (b) indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
  - (c) harassment occurs where unwanted conduct related to the sex of a person is exhibited with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
  - (d) sexual harassment occurs where unwanted physical, verbal or non-verbal conduct of a sexual nature is exhibited with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
2. Incitement to direct or indirect discrimination on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.

## *Article 3*

### **Principle of equal treatment**

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that
  - (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;
  - (b) there shall be no indirect discrimination based on sex.
2. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

## *Article 4*

### **Actuarial factors**

1. Member States shall ensure that the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services is prohibited in all new contracts concluded after [date referred to in Article 16(1)] at the latest.

2. Member States may defer implementation of the measures necessary to comply with paragraph 1 until [six years after date referred to in paragraph 1] at the latest.

In that case, the Member States concerned shall immediately inform the Commission. They shall compile, publish and regularly update comprehensive tables on the mortality and life expectancy of women and men.

#### *Article 5*

#### **Positive action**

The principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

#### *Article 6*

#### **Minimum requirements**

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between women and men 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 7*

#### **Defence of rights**

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

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation shall not be restricted by the fixing of a prior upper limit.

3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate

interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

4. Paragraphs 1 and 3 are without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

#### *Article 8*

##### **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.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(3).

#### *Article 9*

##### **Victimisation**

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

#### *Article 10*

##### **Dialogue with non-governmental organisations**

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



## **CHAPTER III**

### **BODIES FOR THE PROMOTION OF EQUAL TREATMENT**

#### *Article 11*

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies with responsibility at national level with the defence of human rights or the safeguard of individuals' rights, or bodies with responsibility for implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

- (a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 7(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- (b) conducting independent surveys concerning discrimination;
- (c) publishing independent reports and making recommendations on any issue relating to such discrimination.

## **CHAPTER IV**

### **FINAL PROVISIONS**

#### *Article 12*

#### **Compliance**

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this directive, and in particular 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 included in individual or collective contracts or agreements, internal rules of undertakings, and rules governing profit-making or non-profit-making associations are, or may be declared, null and void or are amended.

### *Article 13*

#### **Penalties**

The 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 16(1) at the latest and shall notify it without delay of any subsequent amendment affecting them.

### *Article 14*

#### **Transparency**

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

### *Article 15*

#### **Reports**

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by [five years after the date of entry into force ] at the latest, and every five years thereafter.

The Commission shall draw up a summary report which it shall submit to the European Parliament and to the Council. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

2. The Commission's report shall take into account the viewpoints of industry and relevant non-governmental organisations.

### *Article 16*

#### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [two years after the date of entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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

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

*Article 17*

**Entry into force**

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

*Article 18*

**Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council  
The President*