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COMMISSION STAFF WORKING PAPER

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

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

Extended Impact Assessment

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Introduction

The Treaty of Amsterdam identified equality between men and women as a task for the Community and introduced the objective to eliminate inequalities in all fields of civil life and to promote equality between men and women.

Unequal treatment is not only violating a fundamental principle of the European Union, but it is also a limiting factor for economic growth and prosperity of national economy, e.g. through low female participation in the labour market.

Equal treatment is a prerequisite for the EU to succeed in reaching the objectives for sustainable economic development and growth as formulated at Lisbon and Gothenburg. They will more than ever before have to rely on a much higher proportion of women in the working population. This aim can only be achieved by creating a floor of equal rights granted to all, irrespective of gender.

Research has shown that discrimination based on sex as well as the lack of specific support for employees with family responsibilities is a significant internal barrier which inhibits the growth of female employment in the first place.

This proposal aims to update existing secondary legislation, bringing it in line with recent judgements of the European Court of Justice which have clarified and further developed the concept of equality. It also serves the need to guarantee a high level of legal certainty by putting together provisions of Directives linked by their subject into one single text, thus providing a text more easily accessible and more easily readable.

Evolution of the legislation on equal treatment between men and women

European legislation and decisions of the Court of Justice in the field of equal treatment have had a great impact in the past and were a major focus of interest within European social policy. They have grown to a substantial and important pillar within the framework of Citizen's individual rights in the European Union.

Equal treatment for men and women is fundamental for the social concept of the European Community. As early as 1978, Art. 119 EEC (Art. 141 EC) was described as a fundamental principle of law.¹ For the treaty of Rome, France had insisted on a rule on equal pay for men

¹ ECJ 15.6.1978 – C-149/77 (Defrenne III), ECR 1978, 1365 (1379); Bercusson, European labour Law, p. 169, Docksey, ILJ 1991, 258.

and women, existing in French law, to avoid a competitive disadvantage for French enterprises in relation to German and Italian Enterprises.² Since then it has been understood that the principle of equal treatment was not only relevant for providing a level playing field in competition but also for avoiding an overall economic damage by preventing women to make full use of their capacity for the sake of society by engaging in economic activities.

The principle of equal treatment has been considerably enforced by the ECJ. Art. 141 EC (ex. Art. 119 EEC) has been declared directly applicable in the horizontal relationship.³ The European legislator has considerably enlarged the principle of equal treatment enshrined in Art. 141 EC (ex. Art. 119 EEC) following a Council Decision about the action programme in social policy 1974.⁴

The secondary legislation on equal treatment between men and women in employment including the provisions in primary law, Art 141 EC, Art 137 EC, Art. 13 EC, Art. 3(2) EC are of outstanding importance. Including the vast number of judgements of the ECJ it has become a policy field that is as important as the rules on free movement. Since the seventies the Community has tried to develop the principle of equal pay to a general principle of equal treatment between men and women within its social policy, using Art. 100 seq. and 235 EEC as a basis for secondary law.⁵

The first equal treatment Directive adopted in 1975, deals with equal pay and clarifies the scope of ex. Art. 119⁶. One year later, in 1976, the Directive on equal treatment in employment followed.⁷ While Dir. 75/117 did not go beyond what was already granted by Art. 119 EEC, Dir. 76/207 went beyond ex. Art. 119 EEC. These two Directives and ex. Art. 119 EEC are forming the first *acquis* in the area of equal treatment of men and women. The following 6 Directives are dealing with health and safety, the reversal of the burden of proof, statutory and occupational social security, parental leave and self-employment.

To progressively implement the principle of equal treatment in social security, Directive 79/7 was adopted in 1979⁸ relating to statutory social security schemes.

Seven years later the Council Dir. 86/378 introduced the principle of equal treatment for men and women in occupational social security schemes. This Directive was amended in 1996 by Dir. 96/97 as a consequence of the court's decision in Barber.⁹ There the court held that benefits under occupational social security schemes and in principle all contributions (except for voluntary contributions and employer's contributions in funded defined benefit schemes and defined contribution schemes) paid into an occupational social security scheme had to be defined as pay in the sense of ex. Art. 119 EEC.

² Bercusson, European Labour law, p- 170

³ ECJ 8.4.1976 – C-43/75 Defrenne II, ECR 1976, 455(474).

⁴ OJ 1974 C 13/1 (2).

⁵ Van Overbeek, Handbuch der Gleichbehandlung von Männer und Frauen in der EG, 1995.

⁶ Council Directive of 10 February 1975 on the approximation of laws of the Member States relating to the application of the principle of equal pay for men and women

⁷ Council Directive 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.

⁸ Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment of men and women in matters of social security (OJ L 6, 10.01.1979)

⁹ ECJ 17.5.1990 –C-262/88 Barber, ECR 1990, I-1889 (1953).

In 1986 Dir. 86/613¹⁰ introduced the principle of equal treatment for self-employed men and women engaged in an activity including agriculture. It was intended to raise the status of and give access to benefits to self-employed women and those in family businesses and farming. Terminology for its key provisions was used however which made it effectively a recommendation.¹¹

A Directive on the protection of pregnant workers was adopted in 1992¹² as a health and safety measure. While it emphasised the work conditions and substances likely to be damaging to a worker who was pregnant or breast-feeding, it also included a statutory right to maternity leave of at least 14 weeks, time off for ante-natal examinations and protection against dismissal.

In 1995 the framework agreement on parental leave was concluded between the European level cross industry organisations: UNICE, CEEP and the ETUC. This was adopted and subsequently adopted as a Directive¹³. The text included a non-transferable leave for each parent for at least 3 month and a right to stay at home for “force majeure” especially when the child is sick, but payment for leave was left to the discretion of national governments. The Directive reflects that equal treatment should also mean applying measures to men and recognises the importance of fathers in child care.

In 1997 the burden of proof Directive was adopted.¹⁴ Like the Directive on occupational schemes, this Directive has not set substantially new law but has laid down the ECJ’s judicature as a formal act of law. The right to have access to judicial remedy (Art. 1) was already laid down in Dir. 75/117 and 76/207. The definition of indirect discrimination in Art. 2 para2 could already be found in previous judgements.¹⁵ As a novelty Art. 4 made clear that in cases of direct and indirect discrimination the complainant only had to establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, while it was for the respondent to prove that there was no breach of the principle of equal treatment.

In 2002 the equal treatment in employment Directive was substantially amended by Directive 2002/73.¹⁶ As new elements the Directive defines indirect discrimination in a broader way than Dir. 97/80, but in line with the two Directives based on Art. 13 EC, Dir. 2000/43 (race Directive) and Dir. 2000/78 (framework Directive). Furthermore harassment and sexual

¹⁰ Council Directive of 11 December 1986 on the application of the principle of equal treatment for men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, OJ L 359, 19.12.1986.

¹¹ Hoskyns, C (1996) Integrating Gender – Women Law and politics in the European Union. London, Ch. 8; Prechal S and Burrows N (1990) European Community law relating to gender discrimination, Aldershot: Dartmouth

¹² Council Directive 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 Art. 16(1) of Directive 89/391/EEC), OJ 348, 28.11.1992

¹³ Council Directive of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the TEUC, OJ L 145, 19.6.1996.

¹⁴ Council Directive of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 12, 20.1.1998

¹⁵ ECJ 31.3.1981 –C-96/80 Jenkins, ECR 1981, 911(925 seq); ECJ 13.5.1986 –C-170/84 Bilka, ECR 1986,1607(1625 seq); ECJ 4.6.1992 –C-360/90 Bötzel, ECR 1992, I-3589 (3611-3614)

¹⁶ Council Directive 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.

harassment are defined. The scope of the principle of non-discrimination is substantially enlarged by including harassment and sexual harassment as well as instruction to discriminate. Less favourable treatment of a woman related to pregnancy or maternity leave are defined as discrimination. Protection against victimisation (Art. 7), the right for associations, organisations or other legal entities to engage on behalf or in support of complainants with their approval in any judicial or administrative procedure is defined in Art.6. Bodies for the promotion, analysis, monitoring and support of equal treatment and their tasks are defined in Art. 8a. Art. 8b sec.1 describes an obligation for Member States to promote social dialogue with a view to fostering equal treatment. Provisions dealing with equality plans and the encouragement of social partners to promote equality between men and women are mere recommendations. The provisions on legal remedy in Art. 6 para 1 and the obligation to Member States to ensure the effective application of equal treatment provisions by compensation (as one possible kind of sanctions) without a prior upper limit (Art. 8 para 2) as well as the obligation for Member States to set up a sanctions regime (Art. 8d) in general is the result of Court's judicature.¹⁷ Other provisions like art. 2 (6) simply codify the Court's decisions in *Brown*, C-394/97, *Gillespie*, C-342/93, *Johnston*, C-222/84, *Kreil*, C-285/98, *Sirdar*, C-273/97. The Directive will have to be transposed until 5 October 2005. It may have a major impact from the innovative provisions described.

The European Court of Justice has from the beginning played an important role in contributing to diminish effectively discrimination of women in employment. It has to be kept in mind that the Court is one of the motors of integration besides the Commission, dynamically interpreting Community Law and thus developing naturally incomplete legal concepts of a relatively young Community Law to a coherent system of law¹⁸. The principles of supremacy of Community Law¹⁹, the direct effect of Directives under certain conditions²⁰ and the principle of state's liability in case of infringement of Community law²¹ are results of the Court's interpretative activity in developing general principles of Community Law, applicable to all fields of Community Policy²². In the field equal opportunities, the court has predominantly used the construction of direct and indirect discrimination in pursuing the aim of efficient application of equal treatment legislation²³ but has made clear that protection against sex discrimination relates also to men.²⁴ The ECJ case law has been an essential complement to the EC legislation on equal treatment, providing Member States with interpretation of EC law, thus leading to legislative changes in the Member States. More recent examples are the access of women to the military service in Austria and Germany and Greece, following ECJ judgements in *Kreil* and *Sirdar*. Portuguese and Finish social security law was amended in line with the *Barber* judgement. ECJ decisions have triggered several changes of § 611a of the German Civil Code, dealing with equal opportunities in access to employment.

¹⁷ ECJ Case C-180/95, *Draehmpaehl*, ECR 1997 I-2195. and C-271/91, *Marshall* ECR 1993, I-4367.

¹⁸ *Streinz*, *Europarecht*, 4th ed., Heidelberg 1999, para. 494

¹⁹ *Costa v ENEL*, C-6/64, [1964] ECR 585

²⁰ *Harz/Tradax*, C-79/83, [1984] ECR 1921 and *von Colson und Kamann*, C-14/83 [1984] ECR 1891 where the court held that effective compensation in case of discrimination in access to employment was to be awarded by national courts in pursuance of the "effet utile" principle, thus directly applying Dir. 76/207 that was transposed in Germany in a way as not providing effective compensation.

²¹ *Brasserie du Pecheur*, C-46/93 and C-48/93; *Francovich*, C-6/90 and C-9/90

²² *Streinz*, *Europarecht*, 4th ed., Heidelberg 1999, para. 374a

²³ Since ECJ, C-96/80, *Jenkins*; *Bilka/Weber von Hartz*, C-170/84; *Rinner-Kühn*, C-317/93; *Nimz/Hamburg*, C-184/89

²⁴ ECJ, C-450/93, *Kalanke*; ECJ C-409/95, *Helmut Marschall*

As a direct result of European equal treatment legislation new concepts in equality had been introduced in the Member States.

Direct discrimination cannot be justified by objective grounds, unless they are laid down in the Directive itself. Thus, a common practice of justifying questions about pregnancy and the refusal to employ women who were pregnant, had to be given up after the judgement in Dekker²⁵.

Discrimination on grounds of pregnancy is direct discrimination. A female employee cannot be refused employment because she is pregnant even if she cannot perform her duties during pregnancy. This was clarified by the Court in the Mahlburg judgement.²⁶

Indirect discrimination was introduced as a new concept, totally new to the UK and Greece and with far reaching consequences in most Member States by considerably enlarging the number of potential cases of sex discrimination.

The definition of sexual harassment as a form of discrimination was new for some Member States, in others, like Austria, Ireland, Luxembourg, Ireland and Finland it has been known before the adoption of Dir. 2002/73. In other Member States protection was provided through means of criminal law and civil law.

Night work for women was prohibited or restricted in a number of Member States who were party to ILO Conventions N° 4 and 89 concerning night work. Several rulings of the Court showed that the prohibition of night work for women was contrary to the principle of equal treatment between men and women as laid down in Dir. 76/207²⁷. Member States have adjusted their legislation respectively.

The equal pay principle was in a number of Member States expressly not applied to occupational schemes, such as in Ireland and the UK. In the Netherlands equal treatment was not applied to survivor's benefits for male employees and accession to the schemes by (married) women.²⁸ The Court's judgement in Barber²⁹ reflected clearly that in principle all considerations derived from occupational social security schemes and paid by the employer had to be regarded as pay in the sense of Art. 141 (ex Art. 119) of the Treaty. Therefore the principle of equal treatment had to be applied in all occupational social security schemes. This has led to new legislation in a number of Member States to conform with Community law.

In logical continuation of his Barber judicature the Court decided in a number of recent cases³⁰, that civil service retirement schemes (public sector schemes) are also covered by the concept of pay within the meaning of Article 141 (ex. Art. 119) of the EC-Treaty when derived from the employment relationship. This is particularly relevant for retirement age and for survivor's benefits, and specific old age advantages granted to persons looking after their children. Those Member States and Acceding Countries where retirement schemes for civil servants differentiate on grounds of sex will have to adapt their legislation in as far as their

²⁵ Decker, C-177/88

²⁶ Mahlburg, C- 207/98

²⁷ see Stoeckel, C-345/89; Levy, C-158/91; Office National, C-13/93; Habermann-Beltermann, C-421/92; Thibault, C-136/95.

²⁸ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p. 28.

²⁹ Barber, C-262/88.

³⁰ Niemi, C-351/00; Griesmar, C-366/99; Evrenopoulos, C-147/95; Beune, C-7/93

schemes meet the criteria as set out in the Court's judgements in Niemi, Beune, Griesmar and Evrenopoulos.

Influence of the current legislation on the socio-economic environment

It is undisputed that European equal treatment legislation has had an important and continually interacting impact on the framework for equal opportunities in the Member States. It had an important influence on the inclusion of equality principles in the new constitutions of Greece, Spain and Portugal, following dictatorship in the 1970s. While Member States had also developed own equal treatment legislation standards, the European provisions have been the stimulus to improve upon provisions in national legislation throughout, as is particularly true for maternity and parental leave provisions.

The next paragraphs will shed some light on what potential role an effective enforcement of equal treatment legislation can play in achieving European policy objectives.

- The European employment rate, without the rise in women's employment rate since the mid 1970s, would be some five percentage points or more below the current level³¹, leaving it some 11 percentage points short of the Lisbon target. While it is evident that other factors like a shift to service industries and an improved educational attainment among girls have also contributed to raise women's employment rate, equal treatment legislation has played and continues to play a crucial role in raising the employment rate, increasing the skill level of the working population, diversifying the skill base in terms of encouraging a higher representation of women in subjects where they are underrepresented, expanding women's role in higher level jobs and protecting women against loss of skill through pregnancy and childcare. At the same time it reduces the risk of poverty and social exclusion.
- The right to access the labour market provided by the principle of equal treatment can have a cumulative impact through its reinforcement of incentives to invest in education and training and to remain in or to return to the labour market after having children. Maternity legislation further reinforces the returner effect.
- Supporting women in work has become an essential means of realising returns from the high levels of investment currently being made by all Member States in education. Over the past thirty years, the gender gap in shares with tertiary level qualifications has been reversed. While for 55-64 year olds the gender gap is in favour of men in nearly all Member States, for the younger cohort, the reverse is the case in 10 Member States, with only five still recording slightly positive gaps in favour of men. The effect is not only to increase the skill level of the population but also to promote the employment rate. If women's educational attainment had not improved over the past twenty-five years the 2001 employment rate for women aged 25 to 64 of 59.4% can be estimated to have been 3.2 percentage points lower at 56.2%. This impact of education is also evident in the much higher rate of continuity of female employment for those with higher education even when the women are mothers. Between 1994 and 1998 in 11 EU Member States the share of women working continuously with higher education was 78% (without children) and 77% (with children) compared to rates of only 60% and 44% for women with low levels of education. There is also less variation at the member state level for higher educated women with children. Nevertheless, more variation

³¹ Economic expert's network, The socio-economic impact of EU legislation on equality for women and men, Manchester 2003, p.46. These figures were reached by calculating the EU employment rate assuming that in 2001, women were employed in the same relative proportion of current working-age population as they were in 1975. Using ELFS data and excluding the former East Germany, we reached a figure of 58.7% to compare with the actual EU employment rate for 2001 of 63.9%. By excluding the former East Germany we're likely to slightly underestimate the gap.

between Member States is apparent once employment patterns are desegregated by full- and part-time working. Continuing problems of gender inequality in the workplace and unequal division of domestic labour in the household, not offset by adequate provision of services, will lead to under-utilisation of investments in education and lower social returns.

- The consequence of women's increased qualifications has been a rise in entry into higher level professional and managerial jobs. The female share of higher level jobs has risen during the 1990s in ten out of fifteen Member States, with the other five recording virtually static levels. Education provides some protection against processes of segregation; higher educated women have lower segregation indices than lower educated women. There have been improvements in the private sector but most progress is in the public sector.
- Equal treatment legislation has contributed to greater continuity of women's employment by providing protection against dismissal on grounds of pregnancy and by providing for maternity and parental leave. Evaluations of women's employment position between different societal systems have indicated the importance of mechanisms that promote continuous access in promoting equal treatment. Quitting the labour market at childbirth can lead to long term 'scarring' effects and indeed loss of income that extends right through into retirement.
- Equal treatment legislation plays a significant role by providing a guarantee of access to the labour market and a right to non discrimination in work for pregnant women and for women returners; maternity leave removes the risk of job loss and protects the health of the mother; Equal pay increases choice over the domestic division of labour and facilitates the early formation of independent adult households on the basis of two full earners.

Equal treatment legislation has a particular impact on poverty and social exclusion. Women are at greater risk of poverty than men but this risk is much greater both absolutely and relatively for older people.

Even if it might appear under an employer's perspective that equal treatment legislation puts more obligations on the employers, under a long term perspective it contributes essentially to an improvement in industrial relations:

- Formalisation of family friendly policies -introduced in response to a need to make ad hoc arrangements to accommodate retention of a senior staff member- had promoted notions of fairness and equity and increased loyalty and commitment.
- Implementing an anti-sexual harassment policy may improve work climate, employers' reputations and women's job satisfaction and commitment. Two major EU comparative research projects have investigated the incidence and causes of sexual harassment and have revealed that 30 to 50% of female employees may have experienced some form of sexual harassment.
- Legislation that helps reconciling work-family arrangements plays a crucial role in influencing employer's practices and in shaping expectations among workers. At the organisation level, leave policies typically supplement national statutory entitlements, often negotiated as part of the collective bargaining machinery.

Equality legislation obviously brings about multiple benefits from an individual citizen's perspective:

It supports rights for citizens to be treated as individual, not according to stereotypes or group averages; sexual harassment legislation protects rights to privacy and dignity at the workplace; maternity leave supports individual rights to jobs and removes the presumption

that a woman once a mother would exit the labour market; equal pay enhances the scope for households to decide on different divisions of paid and non paid work and enhances women's opportunities to live independently.

1. WHAT PROBLEM IS THE PROPOSAL EXPECTED TO TACKLE?

Among the EU policies concerning the everyday life of European citizens equal treatment legislation has been one of the most visible and influential. Provisions on equal pay, equal access to work and the reversal of the burden of proof in discrimination cases are considered as mark stones in European social policy. Particularly in Member States with easy and ample access to labour courts, employees have made extensive use of their rights, clearly reflected in the number of preliminary rulings brought to the ECJ by all MS courts³². Equal opportunities legislation has led to numerous changes in national legal orders granting new individual rights with a positive effect predominantly on female employment. Public attention is high in this field of policy making because it is less abstract than others, rights are more easily understood and the topic is last not least emotionally occupied because equal treatment is a question of human rights, a question of individual justice. It is therefore important that citizens are better aware of equal treatment legislation and of their rights. Considerable efforts are necessary therefore to further develop equal opportunities rights where there are still deficits, either in material policy or in more technical fields like better readable and manageable legal texts.

After a long lasting process of development of legislation in the field of equal opportunities between men and women we are now confronted with some areas of concern that can be summarised under 4 headings, such as:

- There are difficulties in accessing legislation that is coherent in its definitions and that is presented in consolidated texts instead of basic and amending directives, difficult to read.
- Community law shaped by the European Court of Justice on the basis of a series of settled judicature is not reflected in legislation and contributes to legal uncertainty.
- The fact that the latest and broadest equal treatment Directive 2002/73 contains horizontal provisions on pay and occupational schemes, issues covered by specific directives.
- The achievement of socio-economic Community policy goals necessitates more easily accessible and more clearly readable legislation.

1.1 Difficulties in access to readable legislation

The acquis of secondary legislation on equal opportunities has developed over a period of more than 25 years. New Directives have been added and some have been updated, taking decisions of the ECJ into account as well as adding new policies. This has led to a situation where we have older Directives using definitions that have been updated in later Directives, like the definition of indirect discrimination. In the equal pay Directive 75/117 we find a definition of pay that differs from the broader definition in Art.141 of the treaty of Amsterdam. Fundamental amendments of Directives like the amendment of Dir. 76/207 through Dir. 2002/73 have brought along such a number of changes to the basic Directive that this has led to a text hardly readable. The same is true for the text of the basic Dir. 86/378 and its amendment Dir. 96/97 on occupational schemes. In fact, the majority of Directives dealing with equal treatment for men and women in employment form a coherent piece of law that will be better understood when it is tied together into a single piece of legislation, structured in chapters and paragraphs, based on uniform definitions as well as a uniform numbering of Articles of the EC treaty.

³² Hummer/Simma/Vedder, 3rd. ed. Baden-Baden 1999, page 24 Data taken from OJ 1997 C 332, p.198.

1.2 Legal uncertainty by lack of reflection of settled case law

The ECJ as the sole authoritative interpreter of Community Law has proved since the beginning of the European Economic Community to be an innovative policy maker, also developing Community law. Thus it was necessary in the past to adapt secondary legislation to judgements of the ECJ. One example is Dir. 96/97 amending Dir. 86/378 in the light of the Barber judgement, C-262/88.

There are two important elements which are not reflected in the directives.

In its judgement of 17 September 2002, case C-320/00, **Lawrence**, the European Court of Justice ruled that the principle of equal pay does not apply in situations where the differences identified in the pay conditions of workers performing equal work or work of equal value can not be attributed to a single source. Those situations do not come within the scope of Article 141 (1) EC.

The Court specified that there is nothing in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer but the pay conditions should have their origin to a common source fixing the working conditions including pay.

Consequently, the Court with the above Case law introduces a new element broader than the criterion of working in the same same establishment or the same service for the application of the principle of equal pay by comparison of work of equal value.

In its judgements C-7/93, **Beune**, 1994 [ECR] I-447; Evrenopoulos, C-147/95, 1997 [ECR] I-2057, C-366/99, **Griesmar**, 2001 [ECR], I-9383; and C-351/00, **Niemi**, 2002 [ECR] I-07007 the Court clarified that civil servant retirement schemes (public sector schemes) can also be covered by the concept of pay within the meaning of Art. 141 EC, when derived from the employment relationship.

1.3 Lack of clarity as regards the application of the new horizontal provisions contained in Dir. 2002/73 to other Directives.

Dir. 2002/73 has brought about a number of innovative changes, such as the obligatory creation of equality bodies, the recommendation to create equality plans and a right for NGO's to bring a complaint to court on behalf of employees with their consent. Furthermore new developments through the Amsterdam treaty, like Art. 141 sec. 4, were taken into account. Furthermore the court's judgements concerning sanctions and compensation in case of infringement of the right of access to employment were explicitly incorporated in that amending Directive.

The creation of a uniform text can reflect more clearly where horizontal provisions of Dir. 2002 /73 like those on equality bodies, equality plans, NGO's rights as well as provisions on sanctions and damages for the infringement of equality rights apply to issues addressed under equal pay and occupational schemes.

1.4 Reduction of still existing socio-economic disparities

Progress towards equal treatment has been significant, but the goals of equal treatment implicit in the legislation have still not been fully achieved yet.

There are still higher female to male unemployment rates in most EU countries, concentration of female employment in low paid part-time jobs, high rates of inactive women who want to work, and tendencies for women's participation to be more precarious than men's.

Women's productive potential is not sufficiently utilised. Under-utilisation can be roughly estimated on the basis of gender gaps in annual income in the private sector. While the gender gap in annual income from employment for the full-time employed can be estimated at 28.7% at the EU level (excluding Ireland), this widens to 38.9% if part-time workers are included. If we estimate the gap for the working age population as a whole- that is by including those not in employment, we have an estimate of under-utilisation (as measured by the earnings gap) of 56.7% at the EU level. Three main groups of countries emerge from this illustrative calculation: Finland, Denmark and Sweden have gender gaps of less than 36%; Belgium, Germany, France, Austria and Portugal have gender gaps close to 50% while the remaining countries- Luxembourg, UK, Netherlands, Greece, Spain and Italy have gaps of 57% or more³³.

1.5 As the situation might develop if nothing was done

The positive socio-economic effects of the already existing equal treatment legislation have been developed, but socio-economic disparities still exist.

Leaving the situation as it presently is would have the consequence of ongoing uncertainties as to what extend the horizontal provisions in Dir. 2002/73/EC apply to equal pay and occupational schemes as well as uncertainties through the lack of fundamental case law presently not reflected in the Directives as well as parallel definitions of indirect discrimination as they appear parallelly in older and more recent Directives.

Furthermore the conservation of the present not easily readable texts would continue to jeopardise the effective use and enforcement of equal treatment legislation. It should be born in mind that uncertainty about rights and obligations under legislation are also likely to increase litigation unnecessarily, an unwanted effect that ought to be avoided in the interest of employers, employees and governments. In addition, some of the socio-economic benefits identified, could not be sustained.

1.6 Who is affected

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

The working population who is principally affected by European employment legislation counts 167.599.000 (of which 14,8% are self-employed) in the 15 Member States and 29.300.000 (of which 12,6% are self-employed) in the 10 Acceding Countries³⁴. Through the integration of occupational social security, insurance companies providing structures for occupational social security schemes and employers contributing to such schemes are affected.

³³ Economic expert's network, The socio-economic impact of EU legislation on equality for women and men, Manchester 2003, p.153.

³⁴ Employment Report 2002 (the figures for Malta were not yet available and are based on an estimation)

The social and economic impact of the proposed recast Directive on the groups mentioned, i.e. to what degree they are affected by eventual new elements of law, will be dealt with under 4) below.

2. WHAT MAIN OBJECTIVE IS THE PROPOSAL EXPECTED TO REACH?

The principal objective to be reached with this proposal is to enhance transparency and clarity of equal treatment legislation and to facilitate the effective application of legislation by reinforcing the *acquis* and avoiding regression at the same time.

Putting together Directives linked by their subject make Community legislation clearer and more effective for the benefit of all citizens. This proposal for a Directive is to be seen in the context of the new legal and political environment which implies to present the Union as being more open, understandable and more relevant to daily life. The act of regrouping the provisions of the Directives on access to employment, equal pay, occupational social security and the burden of proof opens the chance to present a single coherent text, free of contradicting definitions, updated by taking into account recent developments in European case law. This allows to demonstrate that there is a concept of equal treatment legislation rather than erratic and inconsistent law making activity, thus making it easier for the citizen to look up his rights which, for simple practical reasons, can be better done in one single coherent text than in a number of individual texts that are not evidently related to one another.

To achieve more clarity and transparency of equal treatment legislation a single piece of legislation is needed with a clear structure that contributes to finding orientation and to understand the legal system of equal treatment more easily.

Equal treatment legislation needs to be perceived differently in terms of better visibility, thus contributing to better enforcement. An authoritative legal text, logically structured, is helpful for reaching that objective. Much of what has been achieved in equal treatment legislation was the result of decisions of the Court, often initiated by some activity of citizens who were aware of their rights under European law and either complained to the Commission or put arguments forward in national courts to encourage a preliminary reference procedure. The more citizens are aware of their rights, the more they can contribute to a more effective application of equal treatment legislation.

Overall more easily accessible and more clearly readable legislation could support the achievement of socio-economic Community policy goals for more and better jobs for women.

3. WHAT ARE THE MAIN POLICY OPTIONS AVAILABLE TO REACH THE OBJECTIVE?

Three possible policy options were identified. Further possible options were discarded at an early stage.

3.1 Simplification without any modernisation

The first option consists of a pure codification without any substantial changes, by putting together in two separate legal acts the provisions of two basic Directives with the provisions of their later amendments. It concerns the Directives in the area of access to employment, vocational training and promotion and working conditions (Directive 76/207/EEC as amended by Directive 2002/73/EC) and the Directives in the area of equal treatment between men and women in occupational social security schemes (Directive 86/378/EEC as amended by

Directive 96/97/EC). Moreover, a modification of Directive 97/80/EC as amended by Directive 98/52/EC on burden of proof could be proposed in order to align its provision on the definition of indirect discrimination with the latest definition contained in Directive 2002/73/EC.

This would be a merely technical exercise and no law making with the only result of creating more oversight and alignment of definitions. Such an exercise would have no social or economic impact at all.

3.2 Simplification, modernisation and improvement by amalgamating and amending selected Directives into a new and single recast Directive

The second option is a **recasting (refonte)** of equal treatment Directives by putting together all the Directives implementing the principle of equal pay between men and women within the meaning of Article 141 EC, i.e. Directive 75/117/EEC (equal pay for equal work or work of equal value), Directive 86/378/EEC as modified by Directive 96/97/EC (equality in occupational social security schemes) as well as the Directive 76/207/EEC on equal treatment between men and women relating to access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC, and the Directives on the burden of proof i.e. Directive 97/80/EC and Dir. 98/52/EC extending the burden of proof provisions to the UK.

This would go beyond a merely technical exercise applying the definitions of direct and indirect discrimination as well as harassment and sexual harassment in Dir. 2003/73 to all subjects covered by the new Directive. Equality bodies responsibility as well as the recommendation to draw up equality plans on plant level and NGO's right to bring a complaint to court on behalf of employees and also the rules on sanctions would be extended to occupational schemes. It would mean to update secondary legislation to reflect the principle of equal pay as defined by present case law of the ECJ and under Art. 141 EC. The concept of pay can be clarified in relation to occupational social security and the statutory pension entitlement of civil servants, as ruled by the ECJ in *Beune*, *Griesmar*, *Evrenopoulos* and *Niemi* cases.

3.3 Simplification modernisation and improvement by adding employment related provisions of the maternity Directive, Dir. 92/85 to policy option 3.2

The third option could be to extend option two³⁵ by adding some provisions of 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, which do not exclusively relate to health and safety aspects but also concern employment conditions.

This new and single recast Directive would then cover all maternity related employment rights, like the prohibition of dismissal, maintenance of payment and/or entitlement to an adequate allowance, night work, maternity leave, time off for ante-natal examinations.

3.4 Discarded options

At an early stage the possibility of including other Directives in the recasting exercise were discarded.

³⁵ i.e. the recasting of Directives 75/117/EEC, 76/207/EEC as amended by 2002/73/EC, 86/378/EEC as amended by 96/97/EC, and 97/80/EC.

3.4.1 *Parental Leave*

Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC constitutes a landmark for European labour law and industrial relations. It implements the first agreement concluded by the Social Partners under the Agreement on Social Policy.

The legal basis for this Directive was the Agreement on social policy, annexed to Protocol n°14 on social policy, annexed to the Maastricht Treaty (in particular Article 4, paragraph 2 thereof (which has now become Article 139 EC) and therefore would not be compatible with a recasting exercise based on article 141, para. 3 EC. For this reason, it was decided not to include Directive 96/34/EC in the current recasting exercise.

3.4.2 *Equal treatment for self-employed and their assisting spouses*

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 motherhood³⁶ concerns a specific category of persons and therefore would require a more specific approach.

It is important to note in this respect that some aspects of this Directive are currently also covered by the recent Directive 2002/73/EC modifying Directive 76/207/EEC, in particular the aspects relating to employment and working conditions, since the recent amendments according to its Article 1 point 3 apply to self-employed persons.

Bearing in mind the rather limited practical impact of this Directive the Commission will further consider and reflect on it in the future. The Directive was therefore not included in the current recasting exercise.

3.4.3 *Equal treatment in statutory social security schemes*

Directive 79/7/EEC on the progressive implementation of the principle of equal treatment between men and women in social security (statutory schemes) is a specific Directive, which needs a specific approach due to the statutory nature of the schemes. This Directive deals not only with social security but also with social assistance, insofar benefits of social assistance replace or complement social security schemes. Therefore, for technical reasons it could be preferable to integrate Directives within a topic specifically related to their content rather than covering all issues under the common umbrella of equal treatment.

4. WHAT ARE THE IMPACTS – POSITIVE AND NEGATIVE – EXPECTED FROM THE DIFFERENT OPTIONS ?

4.1 Policy option 1

Policy option 1, being a pure codification of existing legislation, would be no more than a technical exercise without adding anything new to the existing Community acquis. Since this would not lead to the creation of any new rights and obligations on Community level with the effect of Member States having to adapt their national legislation accordingly, there would be

³⁶ *Official Journal L 359 19.12.86 p.56,*

no socio-economic impact at all, because the legal situation on Community level as well as on national level would remain materially unchanged.

Nevertheless policy option one could have an indirect socio-economic impact in as far as it creates better accessible and better readable legislation. This could marginally improve the public perception of this sector of Community legislation and thus help the citizens to be better informed and make use of their rights more efficiently. It would however be purely speculative to expect any measurable effect in that sense.

Option 1 would however not contribute to more clarity and transparency in as far as it would not permit to integrate ECJ case law. Furthermore, uncertainty as to what extend the horizontal provisions of Dir. 2002/73/EC apply to pay and rights under occupational social security schemes would not be cured. The chance to create better accessible and better manageable legal texts and at the time effectively reducing their number would not be fully used. The aim of increasing the effectiveness of equality legislation by creating a coherent piece of law would not be achieved to the full possible extent.

4.2 Policy option 2

Legally speaking the principle consequence of policy option two would be the extension of the new provisions of Dir. 2002/73 on the newly integrated Directives on equal pay, occupational schemes and the burden of proof.

Under option two, Dir. 76/207 and Dir. 2002/73 will be codified and the same is true for Dir. 86/378 and the amending Dir. 96/97. Furthermore these 2 codified Directives will be merged with Dir. 75/117 on equal pay, and Dir. 97/80 on the burden of proof.

Dir. 2002/73/EC is to be implemented until 5 October 2005. According to its Art. 2 para 2 it is foreseen for the Commission within three years of entry into force of the Directive, to draw up a report to the European Parliament and the Council on the application of the Directive. It will be only then, i.e. in 2009, when the Commission will be able to evaluate Dir. 2002/73. It is therefore not the purpose of this impact assessment, to analyse the impact of Dir. 2002/73 in general.

The only purpose is to comment on the new expected impact under the envisaged changes in option 2. Broadly speaking, option 2, by leaving Dir. 2002/73 untouched without introducing new policies, will only add to more clarity, but it will not pose an additional financial burden on employers.

However, even without adding new policies, this rather technical exercise as such will have some effect, simply because innovative provisions of Dir. 2002/73 would cover also Dir. 75/117 on equal pay, the Directives on occupational social security and Dir. 97/80 on the reversal of the burden of proof, in a more visible way than it is the case now. The innovative changes would be:

- **Equality bodies**, to be installed under Art. 8a of Dir. 2002/73, will have additional responsibilities with regard to **occupational schemes**. With regard to pay they have already competencies under Art. 3 para.1 lit. c of the Directive.
- **The recommendation to set up equality plans** under Art. 8b para 3 and 4 Dir. 2002/73 would be extended to occupational schemes.
- **Sanctions** under Art.6 Dir. 2002/73 would apply to all aspects of the right to equal pay including discrimination in occupational pension schemes.

- **NGO's right to bring a complaint before the courts on behalf of employees** would be extended to all equal pay related questions including occupational schemes
- **The rules on the burden of proof** would be extended to occupational schemes
- **Definitions would be harmonised**

By providing for a more easily accessible and clearer legal text, up to date with case law and free of contradicting definitions, policy option 2 would contribute efficiently to the need of improving the position of women in the labour market.

4.2.1 *Clarifying the competence of equality bodies, Art. 8a Dir. 2002/73*

Art. 8a of the present Dir. 2002/73 requires the Member States to designate and make 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. A major task of these bodies under Dir. 2002/73/EC would be to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination. They are institutions that already exist in the majority of Member States like Denmark, UK, Ireland, Belgium, the Netherlands, Sweden, Finland and Austria³⁷ as well as in the acceding countries. Those Member States who have no equality bodies yet will have to implement them under Art. 13 Dir. 2000/43/EC (Race Directive) until 19 July 2003.

The effect of this recasting exercise therefore would not be to impose an additional obligation on Member States to create equality bodies, but to clarify that equality bodies will also have responsibility with regard to pay and occupational schemes.

Under option 2 the equality bodies to be established will be in charge of all issues mentioned under Dir. 2002/73. The present recasting will have the effect to explicitly enlarge the range of equality issues in question to all rights under occupational social security schemes and pay in the sense of Art. 141 para 2 EC. This is no material change, but a clarification, since pay issues already fall within the competence of future equality bodies. Pursuant to the judgements in Barber C-262/88, Neath C-152/91 and Coloroll C- 200/91, benefits and contributions of employees under occupational social security schemes are covered by the meaning of pay under Article 141EC and Barber C-262/88 periodical payment of occupational schemes is struck by Art. 141 EC and therefore also necessarily by Dir. 75/117, since it is in principle regarded as pay.

The Directives 86/378 and 96/97 on occupational social security remain materially unchanged. Therefore employer's contributions paid under funded defined-benefit schemes continue not be considered as pay pursuant to NEATH C-152/91, para. 32. Therefore this issue would not fall within equality body's competence.

The overall new impact from clarifying equality body's responsibility to equal pay and in particular to occupational schemes, would be little, first because they already have to exist under present law and also because their responsibilities do not include any hard core competencies. Providing assistance, conducting surveys, publishing reports and giving recommendations are soft instruments to promote equal opportunities. With regard to rights under occupational schemes however, through representative analysis and documentation, eventual inequalities might appear more clearly.

³⁷ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.78 seq. see Annex 1) of the legal expert's report.

The institution of equality bodies is meant to contribute to the overall goal to achieve equal treatment more under the long term sustainability aspect. Their activity can be expected to substantially improve the monitoring of the correct application of the legislation.

It is important that the economic impact of the implementation of these provisions on enterprises be monitored by the national authorities, with a view to providing the Commission with specific information. The Commission shall consider this information within the scope of the review of the operation of the Directive provided for in Art. 32 of the proposal.

4.2.2 *Clarifying the application of Equality Plans, Art. 8b, para 3 and 4 Dir. 2002/73*

Equality plans have been introduced in the Directive as a mere **recommendation**. Under Art. 8b para.3 Dir. 2002/73 Member States shall in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way. In the majority of Member States such plans do not yet exist. In Germany equality plans exist occasionally on plant level in the form of works council agreements. Experience from France shows that the impact of existing equality plans is small so far. On a voluntary basis however, equality plans are compulsory in Finland. Finland plans even to introduce sanctions against employers who fail to implement plans³⁸. Given the fact that equality plans are not compulsory under the Directive and have the quality of recommendations, their extension to occupational social security would therefore not have an economic effect in the Member States³⁹.

4.2.3 *The extension of Art, 6 and Art, 8d Dir. 2002/73 (remedies and enforcement of equality rights.)*

Art. 6 and Art. 8d summarise what the ECJ has stated in previous judgements⁴⁰. The need for enforcement of equality rights is a consequence of the principles developed by the ECJ in applying Dir. 76/207. Compensation for those who have been discriminated against in access to employment is the logical consequence of the “effet utile” principle. It is ultimately the principle of Community Solidarity in Art. 10 EC that obliges Member States to incorporate efficient sanctions and remedies into their legal systems. The consequence is that compensation must be more than symbolic⁴¹, the right does not depend on the employer’s guilt [verschuldensunabhängige Haftung]⁴², upper limits are in principle not tolerable⁴³, interest for compensation is to be paid⁴⁴. The ECJ has in fact developed a specific right to compensation as a fundamental right under Community law which is directly applicable before national courts following the principle of supremacy of Community law⁴⁵.

These principles have been developed with regard to access to employment and were extended to pay by Dir 2002/73 (Art. 3 para 1 lit.c). The recasting in its new Art. 4 refers to “pay” in the sense of Art. 141 EC, leaving no doubt that occupational schemes are comprised as well. This is no material change in law, but a clarification. Therefore the legal consequence will be that remedies for unequal pay will get an independent basis in secondary Community

³⁸ Economic expert's network, The socio-economic impact of EU legislation on equality for women and men, Manchester 2003, p. 233

³⁹ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.60 seq.

⁴⁰ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.56.

⁴¹ ECJv. Colson und Kamann/Nordrhein-Westfalen, 14/83

⁴² ECJ, Dekker/Stichting Vormingscentrum voor Jong Volwassenen, C-177/88

⁴³ ECJ Draehmpaehl/Urania, C-180/95

⁴⁴ ECJ Marshall II, C-271/91

⁴⁵ Norbert Reich, Bürgerrechte in der Europäischen Union, Baden-Baden 1999, page 229

law. This is however no new impact of the recasting but rather an impact of the already existing Dir. 2002/73. It will require the Member States to create explicit legislation on the material consequences in terms of compensation and sanctions for discrimination on sexual grounds in pay issues, including occupational schemes.

The abrogation of the present restriction in Art. 3 para. 1 lit. c of Dir. 2002/73 defining pay as provided for in Dir. 75/117/EEC will have no effect, since the Directive defined pay in no narrower sense than Art. 141 EC does. In case of infringement of the principle of equal pay, sanctions will have to be imposed. See also Art. 3 para, 1 lit. b Dir. 2002/73.

4.2.4 NGO's right to bring a complaint before court on behalf of employees. The Extension of Art. 6 para 3, Dir. 2002/73 (locus standi)(Art. 21 para.2 recast Directive)

Art. 6 para. 3 Dir. 2002/73 allows organisations “which have a legitimate interest in ensuring that the provisions of this Directive are complied with”, “to engage either on behalf of or in support of the complainants in judicial procedures provided for the enforcement of obligations under this Directive”. The recasting would allow these organisations to cover also cases of discrimination under occupational schemes. With respect to occupational schemes and pay, there would again be no new legal impact beyond the one under Dir. 2002/73, because these organisations will already be in charge of rights from occupational schemes under the aspect of pay. An impact might however come from the fact of clarity and greater visibility of pay and rights from occupational schemes falling within the competence of supporting NGOs. Relying on such support, it might be easier for complainants to launch a successful claim and it might also become more likely that such claims would be filed at all in the first place. Although, it should be noted that the impact of all legislation depends widely on to what extent employees are prepared to take cases to court and national courts are prepared to ask for necessary interpretation under the Art. 234 procedure.

With regard to occupational schemes no new economic effect can be expected because Dir. 2002/73 already covers pay and occupational schemes respectively and the recasting leaves unchanged all derogations contained in the existing Directives on occupational schemes. In nearly all Member States, there are no differences in retirement age or differential treatment with regard to survivor's benefits⁴⁶. Quite obviously therefore the express inclusion of occupational social security can hardly have any noticeable impact.

4.2.5. The extension of the rules on the reversal of the burden of proof to pay and occupational schemes.

The purpose of this exercise is not to analyse the impact of the provisions of the reversal of the burden of proof in general, because they have already been introduced under present legislation. Here we are concerned only about the impact of the application of those rules to pay and occupational schemes. It must be kept in mind that in occupational schemes the rules on the reversal of the burden of proof are already applied with regard to the pay aspect⁴⁷.

The present Directive 97/80 refers to Dir. 76/207 and consequently also to Dir. 2002/73, which covers pay as a principal working condition. With the implementation of Dir. 2002/73, expressly covering pay and being subject to Dir. 97/80, all Member States will have to

⁴⁶ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.71 seq.

⁴⁷ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.69 for Portugal and p. 70 for Sweden.

automatically adapt their provisions concerning occupational schemes, expressly introducing the reversal of the burden of proof. Therefore even under the existing Directives the burden of proof in an alleged discrimination in relation to payments as well as to access to occupational schemes lies with the employer⁴⁸.

For systematic reasons it is consequent therefore to expressly apply the burden of proof provisions to occupational schemes, and in particular to pensions. This has already been done in the majority of Member States. In Sweden the Equal opportunities act covers pay and foresees the reversal of the burden of proof, consequently also applied to occupational schemes. Similarly the reversal of the burden of proof has no new impact in Austria, Belgium, Denmark, the Netherlands, Finland, Italy, Ireland, Spain, France, Portugal⁴⁹. In the UK legislative changes might be needed, depending on to what extent discrimination under occupational schemes fall within the ambit of the sex discrimination act. In Germany an adaptation of the “Betriebsrentengesetz” would be necessary for the sake of clarity but with little practical effect because access to and use of occupational schemes would already be covered by § 611a sec.1 German Civil Code. In Greece, the Code of Civil Procedure might have to be amended. Therefore, in spite of legislative changes in certain Member States, little or no new socio-economic impact is to be expected.

4.3 Policy option 3

Under policy option 3 all maternity related employment rights, like the prohibition of dismissal, maintenance of payment and/or entitlement to an adequate allowance, night work, maternity leave, time off for ante-natal examinations was proposed to be included.

The socio-economic impact for policy option 3 would be the same as the impact described under policy option 2, but the integration of employment related maternity rights in the new recast Directive, might cause some confusion, since other maternity rights will remain in a separate legislative text.

4.3.1 *Clarifying the competence of equality bodies, Art. 8a - Dir. 2002/73*

Under option 3 equality bodies would be in charge of maternity related employment rights.

There would be no new impact in this legislative change, going beyond the rules already established under Dir. 2002/73/EC. Art. 2 para 7 (3) already defines less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC as discrimination within the meaning of Dir. 2002/73/EC. All maternity rights covered under option 3 are pregnancy related. Since equal treatment and discrimination are two sides of the same coin and pursuant to Art. 8a para 1 equality bodies are in charge for support of equal treatment, they will automatically be in charge of maternity related employment rights even without the recasting.

Under a more general aspect of what will be the impact of Dir. 2002/73/EC with regard to maternity rights, equality bodies could give some valuable support to women who are deprived of such rights by supporting their possible claims individually (Art. 8a para 2a) against the employer. Furthermore the pure fact that an independent third party, like equality

⁴⁸ The reversal of the burden of proof in cases of **indirect discrimination** had already been established in European case law, before the adoption of Dir. 97/80. See ECJ, **Brunnhofner**, C- 381/99, para. 20

⁴⁹ Legal expert's network., legal impact assessment of equality directives, Tilburg/Leeds 2003, p.68 seq.

bodies, are continuously monitoring the observance of laws protecting maternity rights might have a general preventive effect.

In economic terms equality bodies activities could have an effect in as far as they might contribute to a more efficient enforcement of maternity rights. In as far as maternity rights are a potential cost factor for the individual enterprise, their consequent enforcement could incur higher costs on enterprise level.

4.3.2 Clarifying Equality Plans, Art. 8b, para 3 and 4 Dir. 2002/73

The impact of extending equality plans to maternity rights would be no different from what it is in relation to the impact described under 4.2.2.

4.3.3 The extension of Art. 6 and Art. 8d Dir. 2002/73 (remedies and enforcement of equality rights.)

There would be no new impact, since Art.2 Para. 7 sec. 3 Dir. 2002/73 already provides a somewhat hidden definition of discrimination by saying that discrimination occurs in case of less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Dir. 92/85. This form of discrimination will have to be seen as discrimination in relation to “working conditions” in the sense of Art. 3 para.1 lit.c Dir. 2003/73 and therefore set off compensation under Art. 6 para. 2, Dir. 2002/73.

Art. 8d Dir. 2002/73 already foresees that Member States lay down rules on sanctions applicable to infringements of the national provisions adopted pursuant to Dir. 2002/73. Any economic effect would result from these provisions of Dir. 2002/73 and would be no new impact as a consequence of the recasting.

4.3.4 NGO's right to bring a complaint before court on behalf of employees. The Extension of Art. 6 para 3, Dir. 2002/73 (locus standi)

It is clear from Art. 2 para 7, subpara.3 of Dir. 2002/73 that the infringement of employment related maternity rights constitutes discrimination. Therefore respective NGOs even under the wording of Art. 6 para. 3 of the present Dir. 2002/73 would be in charge of supporting complainants in case of the infringement of maternity related employment rights. The recasting under option 3 would therefore bring about no new impact.

Generally speaking with regard to maternity rights the impact already to be expected under the present legislation without a recasting would be that relying on such support, it might be easier for complainants to launch a successful claim and it might also become more likely that such claims would be filed in the first place. Although, it should be noted that the impact of all legislation depends widely on to what extent employees are prepared to take cases to court and national courts are prepared to ask for necessary interpretation under the Art. 234 procedure.

Since it is not known what effect this provision might have with respect to the cases already covered under the present Dir. 2002/73, it can only be speculated that with respect to maternity rights litigation might become more probable where employees are informed about the possibility of relying on the help of organisations to support them. where such

organisations exist and have built up the infrastructure to give that support, their activities may have an impact in combating discrimination against pregnant women.⁵⁰

4.3.5 *The extension of the rules on the reversal of the burden of proof to employment related maternity rights.*

Taking into account that Art. 2 para. 7, sec. 3 Dir. 2002/73 defines less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Dir. 92/85 as a discrimination within Dir. 2002/73, the reversal of the burden of proof is already applicable to maternity rights under the present Dir. 2002/73. A woman will simply have to claim facts making discrimination likely and the employer will have to prove that such facts do not exist. Therefore no impact going beyond that under Dir. 2002/73 can be expected.

4.4 *The effect for the Acceding Countries*

Like in the Member States, a consolidation as under **option 1** would have no impact at all in the Acceding Countries.

The impact under **option 2** will not be significantly different for the Acceding Countries from what it is for the Member States. All Acceding Countries are well advanced in the transposition of the acquis. In all Acceding Countries there are already various institutions in place to dealing with equal opportunities in employment, such as i.e. equality committees, equality councils, gender equality commissioners, ombudsmen or plenipotentiaries for equal opportunities.

The socio-economic impact of the extension of equality body's competence to pay and occupational social security can be expected to be low. For the majority of Acceding Countries occupational schemes are a novelty and either don't exist at all or are confined to occupational schemes and play a marginal role.

The extension of the recommendation to draw up equality plans in relation to occupational social security and pay would have no new measurable socio-economic impact in the Acceding Countries.

The extension of art. 6 and Art. 8d Dir. 2002/73 (remedies and enforcement of equality rights) will have no particular new impact in the Acceding Countries since this simply clarifies that any considerations under occupational schemes, within the limits of existing derogations, are regarded as pay.

NGOs right pursuant to the extended Art. 6 para 3, Dir. 2002/73, to bring complaints before court on behalf of employees might have some effect in the Acceding Countries. In the majority of Acceding Countries there is some discrepancy between the equality as described by and required by law and the equality in practice. The effective use of Equality legislation in the Acceding Countries will depend to some extent from individuals preparedness to pursue their rights before courts and from the fact whether the structures for organisations to support such individuals will be in place. Since occupational social security schemes are not widely spread however, and since in all Acceding Countries strong efforts have been made towards

⁵⁰ Economic expert's network, The socio-economic impact of EU legislation on equality for women and men, Manchester 2003, p. 236 who claim that in Ireland discrimination against pregnant women continued.

the creation of equality bodies who are also in charge of providing assistance for individual complaints, it remains uncertain whether extensive use of NGOs support would be made.

The extension of the rules on the reversal of the burden of proof to occupational schemes and pay would have no new impact on the Acceding Countries for the same reasons that have been described in relation to the Member States with the difference that occupational schemes are still a rare phenomenon in the Acceding Countries.

The impact under **option 3** would be essentially the same for the Acceding Countries as it for the Member States.

4.5 Summary of the effects of the three proposed options

No policy change scenario.

In summary, if nothing was done, none of the aforementioned problem areas could be solved. The simultaneous existence of basic and amending directives would continue to be difficult to handle. We would continue to have different definitions in earlier and later Directives and we would not reduce the number of Directives and not simplify and clarify, nor modernise or improve legislation and enforce legal certainty, as foreseen in the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 24.1.2003 "updating and simplifying Community acquis".

Furthermore, if nothing was done, legal uncertainty particularly with a view to occupational pensions would continue, because the Directives would not reflect important and well settled case law. The scope of applicability of the new horizontal provisions in Dir. 2002/73 would remain unclear and the overall effectiveness of European equal treatment legislation would not be enhanced.

Policy option 1 codifies existing legislation and therefore would be an important step towards the creation of better readable and better accessible Directives. At the same time the number of Directives would be reduced and Dir. 97/80/EC would be modernised by aligning its provision of indirect discrimination.

This purely technical codification however would not bring about any material changes, nor would it integrate new judicature of the ECJ and it would give away the chance to substantially reduce the number of directives and at the same time to restructure related Directives in such a way that their relation to one another is clearly reflected in one single authoritative text. It would fall short of the possibilities to achieve a significant change towards the creation of a more modern, updated and user-friendly piece of legislation without any objective justification for such a restraint. In summary, no additional costs would arise for anybody.

Policy option 2 makes full use of the possibilities towards simplification, modernisation and improvement of the present acquis by combining 6 Directives to one comprehensive Directive dealing with the subjects it covers in different chapters and thus reflecting that there is one single piece of equal treatment legislation, covering issues that are linked to each other and combined under common principles and definitions. At the same time option 2 would include new and fundamental judgements of the ECJ and thus make it easier for the citizen to get better orientation about important issues of material law in the field of equal treatment. Policy option 2 combines the advantages of option one with the opportunity of significantly reducing the number of Directives, adjusting definitions and creating legal transparency without

creating new concepts of equality legislation. The Commission will consider the specific information given by the national authorities on the implementation of the Directive within the scope of the review of the operation of the Directive provided for in Article 32 of the proposal.

Policy option 3 would not significantly add to the benefits of policy option 2, because there is already protection against discrimination of pregnancy and maternity provided under Directive 2002/73/EC. At the same time the disintegration of pregnancy related maternity rights would cause technical difficulties both in relation to the legal bases which was ex. Art. 118A EC and in relation to the few remaining provisions of Dir. 92/85/EEC which would not form a coherent piece of legislation of its own. Policy option 3 would not add to more clarity for the citizen, because the pregnancy related employment law provisions belong systematically under the label of safety and health for pregnant workers because they are attuned to that particular situation.

Problem areas	Options solve problem areas							
	Yes (Y) / no (N) / partly (P) / negative effects (NE)							
	0		1		2		3	
Access to legislation, coherent consolidated texts, clear structure, oversight, legal certainty	N			P		Y		P NE
Integration of fundamental case law	N		N			Y		Y
Clarity in relation to the horizontal provisions in Dir. 2002/73	N		N			Y		Y
Enhancing effective application of European equal treatment legislation	N			P		Y		P NE

As the foregoing table shows, it is only option 2 that can solve all problem areas as indicated. Option 3 and option 1 solve some problem areas in full or partly. Negative effects could only be expected under option 3. The disintegration of employment related maternity rights could contribute to more confusion instead of providing for more clarification.

None of the 3 options will have the effect of creating any additional costs for the enterprises.

5. HOW WILL RESULTS AND IMPACTS BE MONITORED AND EVALUATED AFTER IMPLEMENTATION?

Due to the nature of this recasting exercise as primarily being an act of updating and simplification as well as improvement of accessibility and readability, the need for Member States to update their legislation beyond what will be necessary anyway in order to transpose Dir. 2002/73, will be very little. Where transposition is necessary, the Commission will carefully monitor the transposition process, to ensure that the desired objectives of the proposal are

achieved when it is implemented in national law. After the process of monitoring during the notification process, the Commission will use the existing methods for ensuring the coherent application of the directive, through monitoring complaints to the Commission.

The Member States shall communicate to the Commission the text of transposing provisions and a concordance table reflecting the correlation between those provisions and the Directive.

In transposing acts, Member States shall make a reference to this Directive on occasion of their official publication.

Within three years of entry into force of the Directive the Member States will provide the Commission all information necessary to draw up a report to the European Parliament and the Council on the application of this Directive.

6. STAKEHOLDER CONSULTATION

6.1 Web consultation and other informal meetings

In July 2003 The Commission launched a consultation on the Web⁵¹, aimed at inviting Member States, and other stakeholders (Social Partners, NGOs, Women's associations as well as individuals) to present their views on the Commission's initiative. The consultation was based on an Options Paper setting out the three options which could be pursued in the process of simplification, modernisation and improvement of legislation in the field of equal treatment between men and women. 30 answers were received from Member States, social partners, institutions dealing with equal treatment and NGOs⁵². The comments were throughout constructive. There was broad consent on the objective to simplify texts and to make them better readable and more easily accessible as well as on the need to update and harmonise definitions. In broad terms, the Governments who had responded as well as the stakeholders from industry, commerce and liberal professions pleaded for an approach that implied less change, while from the side of employees and NGO's more far reaching changes in the legislative Community framework were favoured.

A further informal meeting took place on 3 October 2003 with experts from Member States, Accessing Countries and EFTA Countries. The meeting was used to further explain the policy options and to have a more in depth discussion on these options. The Commission's initiative to clarify and simplify Community legislation, while preserving the *acquis*, was a common view. Pure codification was favoured by some participants but it seemed that others were more in favour of moderate changes through a recasting as the most efficient way to pursue the aim of simplification and improvement. The importance was stressed to preserve the present *acquis* fully while integrating only those judgements of the Court that were well established jurisprudence. Some Accessing Countries were also in favour of going beyond a pure codification. The employer's side expressed a preference for a simplification through a pure codification without any change to the current legislation. Some opinions, notably trade unions, supported a more far reaching approach.

⁵¹ http://europa.eu.int/comm/employment_social/news/2003/jul/consultation_en.html

⁵² list of responses is provided in the Annex 1

An informal exchange of views has also taken place with the social partners represented at EU level (UNICE, CEEP, UAPME, ETUC) on 7 October 2003., whereas ETUC was in favour of a new single recast directive without including the maternity directive.

The Commission's Advisory Committee on equal opportunities is preparing its opinion on this issue. It seems that the draft opinion oriented towards a new recast directive including the maternity directive (option 3) does not meet the agreement of some governments' representatives nor of the employers at European level.

Employers did not develop any arguments on possible costs for enterprises.

7. COMMISSION DRAFT PROPOSAL AND JUSTIFICATION

7.1 Defining the final proposal

In the light of the analysis of possible options for the improvement of the regulatory environment of the EC equal treatment legislation it appears that a new recast directive, would meet better the requirement for updating ,simplifying, modernising Community acquis in this area. The precise content of the final directive proposal, was then further refined and adjusted to meet the objectives of simplification.

Therefore it is proposed to present a directive that :

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

The main elements of the final proposal are structured into four titles as follows:

- **A title 1 contains general provisions** and specifies the objectives and the scope of the proposal. It is also an important part of this first title to provide uniform definitions covering all specific provisions contained in the following titles.
- **A title 2 with specific provisions** on equal treatment is divided into 3 chapters, one relating to equal pay for equal work or work of equal value, a second one on the implementation of the principle of equal treatment in occupational social security schemes and a third one on equal treatment for men and women as regards access to employment, including promotion, vocational training and working conditions.

(a) The chapter on equal pay for equal work or work of equal value builds on the present legislation and integrates as a new element the Court's Judgement in Lawrence, C- 320/00 to improve legal certainty by explicitly integrating elements of case law.

(b) The chapter on the implementation of the principle of equal treatment in occupational social security schemes integrates the provisions of Dir. 86/378/EEC as amended by Dir. 96/97/EC as they stand and integrates the case law in Beune, C-7/93, Evrenopoulos, C-366/99, Griesmar, C-206/00, and Niemi, C-351/00. This case law is now clearly reflected in the new proposed Directive.

(c) The chapter on equal treatment for men and women as regards access to employment, including promotion, vocational training and working conditions integrates the principal provisions of Dir. 76/207 as amended by Dir. 2002/73 as they stand.

- **A title 3 with horizontal provisions** contains not only the principal provisions of Directive 97/80/EC on the burden of proof, but also aligns its text with the recent Directive 2002/73/EC. This is done in three chapters.

(a) Chapter 1 on the burden of proof integrates the relevant provisions of Dir. 97/80 and abrogates the definition of indirect discrimination in Article 2 paragraph 2 of Directive 97/80/EC in order to align with the definition contained in Directive 2002/73/EC.

(b) Chapter 2 on remedies and enforcement integrates the new provisions on remedies and enforcement reflecting the case law of the Court introduced by Directive 2002/73/EC.

(c) Chapter 3 on bodies for the promotion of equal treatment - social dialogue contains the new provisions introduced by Directive 2002/73/EC, which are similar to the provisions existing in Directives based on Article 13, i.e. Directives 2000/43/EC and 2000/78/EC.

- **A title 4 with final provisions** containing standard provisions adapted to the present proposal for a Directive. Inter alia it contains a non-regression clause and the possibility for Member States to introduce or maintain more favourable measures.

7.2 Why was a more ambitious option not chosen?

A more ambitious approach would have been to include Dir. 92/85 on health and safety of pregnant workers, **as foreseen in option 3**. The legislation on equal treatment between men and women consists of several Directives. Most share the common purpose of equal treatment between men and women in matters of employment and occupation. However, 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 deals not only with discrimination at the work place but also with the protection of health and safety at the work place for this specific category of workers. Directive 92/85/EEC is an individual Directive within the meaning of Article 16 paragraph 1 of Directive 89/391/EEC (the framework Directive on health and safety at the workplace) based on the former Article 118A of the EC-Treaty. Thus it was decided not to include any provisions contained in Directive 92/85/EEC concerning issues exclusively related to health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding, in the current recasting exercise. Furthermore, during the consultation process, the further argument was put forward that Dir. 92/85 was well known by the stakeholders and that a division of this Directive into two parts could contribute more to confusion than it might clarify in the sense of the objective of the recasting.

7.3 The principles of subsidiarity and proportionality

The approach chosen meets the objective of simplification and modernisation described above and respects the principles of proportionality and subsidiarity as set out in Art. 5 EC.

Community law is in conformity with the principle of **proportionality**, when the means which it employs are **appropriate and necessary** to attain the objective sought. The main objective of the recasting is technical simplification and modernisation of already existing EC legislation and integration of case law. The new proposal is necessary and appropriate because it will provide a clearer, better readable and better accessible legal text, providing for legal certainty and coherence.

The principle of **subsidiarity** is also respected since the objectives of simplification, modernisation and improvement of the Community acquis in this area cannot better be achieved by the Member States, as it is necessary to assure a uniform legal framework of equal treatment legislation in all Member States.