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REPORT

on the 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

(COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

Committee on Women's Rights and Equal Opportunities

Rapporteur: Christa Prets

Draftsperson (*):

Angelika Niebler, Committee on Legal Affairs and the Internal Market

(*) Enhanced cooperation between committees - Rule 162a

PE 337.825

EN

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Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 19 December 2003 the Council consulted Parliament, pursuant to Article 13 (1) of the EC Treaty, on the proposal for a Council directive on implementing the principle of equal treatment between women and men in the access to and supply of goods and services (COM(2003) 657 – 2003/0265(CNS)).

At the sitting of 12 January 2004 the President of Parliament announced that he had referred the proposal to the Committee on Women's Rights and Equal Opportunities as the committee responsible and the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Committee on Economic and Monetary Affairs, Committee on Legal Affairs and the Internal Market and to the Committee on Industry, External Trade, Research and Energy for their opinions (C5-0654/2003).

At the sitting of 11 March 2004 the President announced that the Committee on Legal Affairs and the Internal Market, which had been asked for its opinion, would be involved in drawing up the report under Rule 162a.

At the sitting of 29 January 2004 the President of Parliament announced that he had also referred the proposal to the Committee on Employment and Social Affairs for its opinion.

The Committee on Women's Rights and Equal Opportunities had appointed Christa Prets rapporteur at its meeting of 10 September 2002.

The committee considered the Commission proposal and draft report at its meetings of 4 December 2003, 18 February 2004 and 16 March 2004.

At the last meeting it adopted the draft legislative resolution by 29 votes in favour and 3 votes against.

The following were present for the vote: Anna Karamanou (Chairperson), Marianne Eriksson (1st Vice-Chairperson), Olga Zrihen Zaari (2nd Vice-Chairperson), Christa Prets (rapporteur), Uma Aaltonen, María Antonia Avilés Perea, Regina Bastos, Maria Berger, Johanna L.A. Boogerd-Quaak, Hiltrud Breyer, Lone Dybkjær, Geneviève Fraisse, Marie-Hélène Gillig, Lissy Gröner, Christopher Heaton-Harris (for Amalia Sartori pursuant to Rule 153(2)), Roger Helmer (for Thomas Mann pursuant to Rule 153(2)), María Izquierdo Rojo, Hans Karlsson, Rodi Kratsa-Tsagaropoulou, Astrid Lulling, Maria Martens, Winfried Menrad, Elena Ornella Paciotti, Doris Pack (for Christa Klauf pursuant to Rule^o153(2)), Olle Schmidt, Miet Smet, Patsy Sörensen, Joke Swiebel, Felekna Uca, Elena Valenciano Martínez-Orozco, Anne E.M. Van Lancker, Theresa Villiers (for James L.C. Provan pursuant to Rule 153(2)) and Sabine Zissener.

The opinions of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on Employment and Social Affairs are attached. The Committee on Economic and Monetary Affairs decided on 24 February 2004 not to deliver an opinion.

The report was tabled on 16 March 2004.

DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council directive on implementing the principle of equal treatment between women and men in the access to and supply of goods and services (COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2003) 657)¹,
 - having regard to Article 13 (1) of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0654/2003),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Women's Rights and Equal Opportunities and the opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on Employment and Social Affairs (A5-0155/2004),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Asks the Council to consult Parliament again if it intends to amend the Commission proposal substantially;
 5. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1

Title

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

proposal for a Council directive implementing ***equality of*** women and men in the access to and supply of goods and services

¹ Not yet published in OJ.

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout the text)

Justification

In line with the Committee's recommendation and amendments to the Convention and the future Article 2 on European values in the Constitutional Treaty, where values like democracy, liberties, human rights etc. are changed from principles to rights. This should of course also include equality between men and women.

Amendment 2
Recital 2 a (new)

(2a) Within the civil rights tradition, the right to equal treatment belongs to a person in his or her capacity as an individual and not in his or her capacity as a member of a racial, sexual, religious or ethnic group. As women and men constitute the two halves of humanity, women are not a minority group and should not be seen or treated as such.

Justification

The fundamental right to equal treatment of men and women is an individual right enjoyed by men and women as individuals and not as members of a group. However, the insurance tradition analyses risks, premiums and benefit schedules in terms of groups. Therefore, insurance companies aim to preserve equality between groups and not between individuals and think in terms of an average man and an average woman.

Amendment 3
Recital 2 b (new)

(2b) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms.

(See amendment to Recital 11. It reinstates partly the content of Recital (4) in Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnical origin)

Justification

The content of the proposed Recital states the reasons on which this Act is based and therefore, it should be placed together with the proposed Recitals 1 to 4, and not under

Recital 11 as it was proposed by the Commission text. In contrast, Recitals 9 to 22 state the reasoning in relation to the specific provisions of this Directive.

Amendment 4
Recital 9

(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, this objective can be achieved by means of Community legislation.

(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, this objective can be **better** achieved by means of Community legislation.

Justification

For the sake of coherence with the principles of subsidiarity and proportionality.

Amendment 5
Recital 10

(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.

(10) Such legislation **should implement the principle of individual rights to equality of women and men. It** should prohibit discrimination based on sex **and achieve de facto equality of women and men** in the access to and supply of **all publicly available** goods and services. Services should be taken to be those which are normally provided for remuneration. **Goods should be taken to have an economic value.**

Justification

The Treaty's approach to the principle of equality of women and men is not only a general anti-discrimination approach, but furthermore, a proactive, substantive equality approach, pursuant to articles 2 and 3(2) of the EC Treaty. In addition, a more precise definition of the goods and services that are covered by this Directive has been introduced, in order to describe in greater detail the general philosophy of this Act.

Amendment 6
Recital 10 a (new)

(10a) This Directive should not apply to education nor to the content of media and advertising.

(See amendment and justification to Recital 11)

Justification

This new Recital tends to clarify and complete the scope of this Directive, alongside Recital 10. In contrast with the formulation of Recital 11 as proposed by the Commission text, this new Recital does not exclude a priori that the content of media and advertising is covered by future legislation.

Amendment 7
Recital 11

(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. *deleted*

(Part of the content of this Recital has been repositioned under Recital 2 b (new). See also amendment to Recital 10 a (new))

Justification

A specific reference to the freedom and the pluralism of the media and advertising in this Recital may give the erroneous impression that this freedom is unlimited and therefore precludes the application of the principle of equality to the media and advertising sectors, since it states that the prohibition of discrimination should not apply to the content of media and advertising. It is therefore more appropriate to introduce a new Recital, like Recital 10 a (new), to simply mention that the content of media and advertising is outside the scope of this Directive.

Amendment 8
Recital 11 a (new)

(11a) Differentiation in premiums or benefits for insurance products based on

sex (including the risks of pregnancy) is discriminatory since sex constitutes a factor that may not be influenced and is only contributed to a group on the basis of statistical assumptions; different pricing in relation to differences in risk profile should be attributable to behaviour and choices of individual persons.

Justification

This new recital gives a general guideline for which behaviour of insurance companies should be considered to be discriminatory.

Amendment 9
Recital 12

(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. **deleted**

(See amendment to Article 1 paragraph 3)

Justification

If men and women who are treated differently "are not in a comparable situation", it is "per se" not a case of discrimination. It is therefore superfluous to make such reference. Furthermore, the words used and the examples mentioned are vague, which may lead to significant confusion as to the scope of this Directive. Secondly, in accordance with the settled case law of the European Court of Justice regarding the objective justifications of indirect sex discrimination, the Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, only justifies a difference of treatment in the field of employment. However, the Directive makes no exceptions regarding the access to and supply of goods and services in general. Finally, private membership clubs, which per definition are of a private character, are not within the scope of this Directive, which only covers those goods and services that are available to the public. Therefore, it is pointless to expressly make such reference in this Recital.

Amendment 10
Recital 14 a (new)

(14a) In view of disparities between Member States and the consequent risk of

distortion of competition during this transitional period, Member States should annually submit a report to the Commission on the progress made to eliminate the use of actuarial factors related to sex. This constant supervision by the European Commission, which should inform the European Parliament and the Council, alongside full transparency in the use of these factors, should limit the distortion of competition during the transitional period.

Justification

The Commission, the European Parliament and the Council should be regularly informed about the progress made by the Member States in overcoming the existing difficulties to implement the measures necessary to comply with Article 4 paragraph 1. This supervision at European level, alongside full transparency in the use of actuarial factors related to sex in the calculation of premiums and benefits, may ensure non-distortion of competition.

Amendment 11 Article 1, paragraph 1

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***.

1. This Directive lays down a framework for combating discrimination ***and achieving equality on the ground of*** sex in ***the*** access to and supply of goods and services, with a view to putting into effect in the Member States the principle of ***equality of women and men***.

Justification

This proposal is based on Article 13 (1) of the EC Treaty, which has to be read in the light of the provisions contained in articles 2 and 3 (2) of the EC Treaty. Therefore, the Treaty's approach to the principle of equality between women and men is not only an anti-discrimination approach, but furthermore, a proactive, substantive equality approach, pursuant to articles 2 and 3 (2) of the EC Treaty. In addition, in accordance with these provisions, it is more appropriate to refer to the principle of "equality of women and men" rather than to the principle of "equal treatment between women and men", which concerns employment and occupation (article 141 of the EC Treaty).

Amendment 12 Article 1, paragraph 2

2. Within the limits of the powers conferred upon the Community, this

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.

Directive shall apply to all persons in relation to the access to and the supply of **all** goods and services which are available to the public, as regards both the public and private sectors, including public bodies.

Justification

It enables to better clarify the scope of this Directive by stating expressly that all goods and services, provided that they are available to the public, are covered by this Act. Therefore, it is pointless to single out a specific category of services.

Amendment 13
Article 1, paragraph 3

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. *deleted*

Justification

This amendment is justified on the same grounds as the amendment to Recital 12.

Amendment 14
Article 1, paragraph 4

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.**

4. This Directive shall not apply to education nor to the content of media and advertising, **except for the advertising of the terms and conditions on which access to goods is granted and services are supplied.**

Justification

It would illogical to prohibit discrimination in relation to access to goods and the supply of services but to allow advertising implying that such discrimination is permitted.

Amendment 15
Article 1, paragraph 4 a (new)

(4a) This Directive shall not prejudice the application of Community law in the field of employment, in particular those laid down in the Community provisions in force relating to occupational pensions schemes and social security or social assistance matters.

Justification

Article 141(3) of EC Treaty constitutes the appropriate legal basis to implement the principle of equal treatment of women and men in the field of employment.

Amendment 16
Article 2, paragraph 1, point (d)

(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;

(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 or offensive environment ***either within or outside the workplace;***

Justification

It should be made clear in the definition of the directive that sexual harassment can occur both within and outside the workplace.

Amendment 17
Article 2, paragraph 2

2. Incitement to direct or indirect discrimination on grounds of sex shall be deemed to be discrimination within the meaning of this Directive. ***deleted***

Justification

The content of the proposed paragraph does not constitute a definition as such and therefore, it should be repositioned under Article 3 paragraph 2 that states what is also deemed to be a case of discrimination.

Amendment 18
Article 3, Title

Principle of equal treatment

Equality

Justification

In line with the Committee's recommendation and amendments to the Convention and the future Article 2 on European values in the Constitutional Treaty, where values like democracy, liberties, human rights etc. are changed from principles to rights. This should of course also include equality between men and women.

Amendment 19
Article 3, paragraph 1, points a) and b)

(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.

(a) there shall be no direct discrimination based on sex, including less favourable treatment for reasons of pregnancy, maternity and ***paternity***;

(b) there shall be no indirect discrimination based on sex, ***in particular on grounds of family or marital status, or for reasons of reconciling of family and working life.***

Justification

These additions are inspired by Directive 2002/73 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, and are consistent with the case-law of the European Court of Justice.

Amendment 20
Article 3, paragraph 2 a (new)

(2a) Incitement to direct or indirect discrimination on grounds of sex shall also be deemed to be discrimination within the meaning of this Directive.

Justification

This amendment is justified on the same ground as the amendment to Article 2, paragraph 2.

Amendment 21
Article 4, paragraph 1

1. Member States shall ensure that the use of sex as a factor in the calculation of

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.

premiums and benefits for the purpose of insurance and **other** financial services is prohibited in all new contracts concluded after [date referred to in Article 16(1)] at the latest

Justification

All services are covered by this Act and a fortiori all financial services are within its scope. It is therefore more appropriate to refer to other financial services.

Amendment 22 Article 4, paragraph 2

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.

2. In case of difficulties encountered in implementing the measures necessary to comply with paragraph 1, Member States may **decide to** defer implementation of **these measures for a period up to [four 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.

In that case, the Member States concerned shall immediately inform the Commission. **In addition, they shall regularly submit a report to the Commission on the progress made in overcoming those difficulties.** They shall **also annually** update and publish comprehensive tables on the mortality and life expectancy of women and men.

The Commission shall forward all the above-mentioned information to the European Parliament and the Council.

Justification

The Commission, alongside the European Parliament and the Council, should be regularly informed about the progress made by the Member States in overcoming the existing difficulties to implement the measures necessary to comply with paragraph 1, given the longer transition period offered to the Member States to comply with the said paragraph.

Amendment 23 Article 5

The principle of **equal treatment** shall not prevent any Member State from maintaining or adopting specific measures

With a view to ensuring full equality in practice, the principle of **equality of women and men** shall not prevent any

to prevent or compensate for disadvantages linked to sex.

Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.

(See Article 6 of Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)

Justification

Article 3(2) of the EC Treaty requires the elimination of inequalities and the promotion of gender equality, which cannot be achieved without positive action.

Amendment 24 Article 6, paragraph 1

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.

1. Member States **shall** maintain provisions, or may introduce **new 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.

Justification

More favourable provisions should be maintained.

Amendment 25 Article 7, paragraph 2

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.

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and **effective** compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination 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 **or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the lapse of time until actual payment of the capital sum awarded.**

(Reinstates partly Article 6(2) of Directive 2002/73 amending Council Directive 76/107/EEC on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions.)

Justification

In order to be consistent with Recital 18 and Article 6(2) of Directive 2002/73 and with the case-law of the European Court of Justice. Thus, compensation may not be restricted by a fixed upper limit or by excluding an award of interest to compensate for any time lapse until the compensation is actually paid.

Amendment 26 Article 9

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**.

Member States shall introduce into their national legal systems such measures as are necessary to protect **any** persons, **including persons other than the victims**, from any adverse treatment or adverse consequence, **including an unilateral resiliation of the contract by the provider of a good or service**, as a reaction to a complaint or to a legal **proceeding, or to any other action in support thereof**, aimed at enforcing compliance with the principle of **equality of women and men**.

Justification

This article has been amended to be in accordance with the Explanatory memorandum, where it is rightly stated that effective legal protection against retaliation by a provider of a good or a service, should not only be limited to the victims of sex-based discrimination but also to any other third party willing to give support thereof. In addition, plaintiffs should be entitled to maintaining their rights to the goods and services if so they wish.

Amendment 27 Article 10

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**.

Member States shall engage in **regular** dialogue with appropriate non-governmental organisations **and with the social partners** 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 **equality**.

Justification

The proposal is based on Article 13(1) of the EC Treaty which must be interpreted in conjunction with Articles 2 and 3(2) of the EC Treaty. The Union is there committed to the principle of equality; the principle of equal treatment is laid down in Article 141 of the EC Treaty. On that understanding of the social partnership, the scope of representation of the social partners is not confined to the world of work. The social partners can contribute to inner-city development.

Amendment 28 Article 11, paragraph 1

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.

1. Member States shall designate and make the necessary arrangements for **an independent** body or bodies for the promotion, analysis, monitoring and support of **equality of women and men and for combating** discrimination on the grounds of sex. These bodies may form part of **independent** 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.

Justification

It is essential that these bodies are independent in order to implement effectively their competences.

Amendment 29 Article 11, paragraph 2

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;

2. Member States shall ensure that **sufficient human and financial resources are available for** the bodies referred to in paragraph 1, **to implement effectively their competences, which shall** include:

a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 7(3), **to engage in legal proceedings whenever necessary to combat discrimination and** providing independent assistance to

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports *and* making recommendations on any issue relating to such discrimination.

victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) ***producing statistics broken down by gender***, publishing independent reports, making recommendations on any issue relating to such discrimination *and reviewing legislation and policy for their impact on equality of women and men*.

Justification

These bodies should be entitled to foreseeable resources commensurate with their competences and responsibilities that would allow them to implement these competences effectively and independently. Given that these bodies may also deal with the defence of human rights in general, the additional competences tend to avoid gender equality being lost or diluted in competition with the various other interests of such joint equality bodies.

Amendment 30

Article 12, introduction

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:

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected within the scope of this directive, and in particular that:

Amendment 31

Article 12, point (b)

(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.

(b) any provisions contrary to the principle of equal treatment included in 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.

Justification

The reference to individual or collective agreements should be scrapped as the directive's scope expressly refers to fields outside employment and careers.

Amendment 32
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.

Sanctions

The Member States shall lay down the rules on ***sanctions*** applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are ***applied***. The ***sanctions, which may comprise the payment of compensation to the victim***, 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.

Justification

This amendment brings the text of the current proposal in line with article 15 of the Racial Discrimination Directive and article 8d of Directive 2002/73/EC.

Amendment 33
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.

Dissemination of information

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, ***in particular to the consumers and to the providers of goods and services***, by all appropriate means throughout their territory.

Justification

Member States should seek to make society in general, and consumers and providers of goods and services in particular, more aware with regard to fostering equality and combating discrimination on grounds of sex. The title has been changed for the sake of greater clarity and consistency with previous Directives.

Amendment 34
Article 15, paragraph 1

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.

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, ***including an assessment of the effects, performance and effectiveness of the measures taken***, by [**three** years after the date of entry into force] at the latest, and every **three** years thereafter.

Based on the information received, the Commission shall draw up a summary report which it shall submit to the European Parliament and to the Council ***by [four years after the date of entry into force] at the latest, and every four years thereafter***. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

Justification

Member States should carry out an assessment of the impact of the measures taken to implement this Directive. This ex-post evaluation will help increasing the transparency and appreciation of the measures taken and it would provide an important input by informing decision-makers of the consequences of these measures. In this respect, the Parliament and the Council should be regularly informed by the Commission about the reports submitted by the Member States.

EXPLANATORY STATEMENT

1. Setting the scene

This long-time awaited proposal was already announced in the Commission's Social Policy Agenda in June 2000. At the European Council in Nice, the Heads of State and Government called on the Commission to adopt a proposal for a directive on promoting gender equality in areas other than employment.

Since the end of 2000, the Committee on Women's Rights and Equal Opportunities has repeatedly requested the Commission to present a proposal for a directive that outlaws sex discrimination in areas other than employment. However, strong resistance from several interest groups, especially from the insurance and media industries, and different views within the Commission made it very difficult to proceed.

This Committee has reiterated its support to Commissioner Diamantopoulou in her efforts to fight sex discrimination in order to guarantee gender equality in all areas of economic, social and political life. In this respect, this Committee and your Rapporteur organised a public hearing on 10 September 2003, in order to raise public awareness for the need of this directive.

Finally, the proposal was adopted on 5 November 2003. However, due to the strong resistance against it, its scope has been watered down covering only the access to and supply of goods and services, leaving outside other areas such as the content of media and advertising, education and decision-making processes.

The Rapporteur very much regrets that the above-mentioned areas, where discrimination is particularly apparent, have not been covered by this Act. While a framework and comprehensive directive to combat and prohibit sex discrimination in all areas outside the workplace would have been highly desirable, your Rapporteur bears in mind the difficulties that the Commission has overcome to adopt this proposal and that it constitutes a first step in the Commission's response to the European Council's request.

Against this background, your Rapporteur supports the Commission in its effort to combat sex discrimination and encourages the Commission to shortly adopt further proposals to fully combat sex discrimination and ensure the facto equality in areas other than employment.

2. Amendments

Your Rapporteur seeks to clarify the scope of this proposal, to comply with the settled case-law of the European Court of Justice and to reinstate certain mechanisms that have already been introduced by previous Directives aiming at combating discrimination.¹

¹ Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnical origin, OJ L 180 of 19.7.2000; Directive 2002/73 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

2.1. The subject matter and the scope of the proposal

This proposal is undoubtedly based on Article 13 of the EC Treaty, which has to be read in the light of articles 2 and 3 of the Treaty. These articles require the Community not only to combat sex discrimination but also to eliminate inequalities and to promote gender equality in all its activities. Therefore, the Treaty's approach to the principle of equality of women and men is not only a general anti-discrimination approach, but furthermore, a proactive, substantive equality approach. Your Rapporteur therefore proposes to modify the title and all the references to this principle in accordance with this approach.

The proposal covers all goods and services provided that they are available to the public, as regards both the public and private sectors. The Treaty and the settled case-law of the European Court of Justice provide a clear definition of goods and services. According to the first paragraph of Article 50 of the EC Treaty, services are to be considered "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons.¹

It is settled case law that medical or healthcare activities fall within the scope of Article 50 of the Treaty, and therefore it is indisputably covered by this proposal.²

It is also settled case law that social security rules cannot exclude application of Articles 49 and 50 of the Treaty.³ However, social security and social assistance are excluded from the scope of this Directive, since Council Directive 79/7/EEC of 19 December 1978⁴ on the progressive implementation of the principle of equal treatment for men and women in matters of social security, already covers these areas.

Given that the case law of the European Court of Justice provides with a clear definition of goods and services, your Rapporteur considers pointless to single out any specific categories to this regard.

It is also well established by the European Court of Justice, that when men and women are treated differently but they are not in a comparable situation, it does not constitute a case of discrimination and therefore, it is "per se" not covered by the mooted directive. Furthermore, the European Court of Justice has developed a consistent jurisprudence regarding the objective justifications in the case of indirect sex discrimination. Therefore, the exceptions specified by the Commission in Article 1 paragraph 3 are superfluous.

Media and advertising as service sectors are clearly within the scope of this proposal, although the content of media and advertising has regrettably been excluded, where discrimination is a fact we are exposed to in everyday life.

Education, as a service sector, has been clearly exempted from its scope. Considering that every EU Member State has full responsibility for the organisation of their own education

¹ See Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473

² See supra case *Smits and Peerbooms*

³ See Cases C-279/80 *Webb* [1981] ECR 3305 and C-158/96 *R. Kohll v Union des Caisses de Maladie* [1998] ECR I-1931

⁴ OJ L 6 of 10.1.1979

systems, that private primary and secondary education are exempted from the scope of this proposal and that access to all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, is already covered by Directive 2002/73.

For the sake of greater clarification, your Rapporteur has explicitly indicated that this Directive would not prejudice the application of existing legislation in the employment field, including those provisions relating to occupational pension schemes and to social security matters.

The case law of the European Court of Justice states that the use of actuarial factors differing according to sex in funded defined benefit occupational schemes did not fall within the scope of ex article 119 of the EC Treaty.¹ Since these Court rulings, a new paragraph 3 in article 141 has been introduced by the Amsterdam Treaty. Therefore, this paragraph that ensures the application of the principle of equal treatment between women and men in matters of employment, would constitute the appropriate legal basis to deal with any sort of sex discrimination in the employment field.

Your Rapporteur expects that the Commission reviews the existing directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes² in the framework of the simplification and improvement of the legislation in the area of equal treatment between men and women based on article 141(3), in order to eliminate sex discrimination in occupational pension schemes and to avoid any legal vacuum.

2.2. Mechanism to ensure the implementation of de facto equality

Despite affirmation of the principle of equal treatment between men and women by Community law, enforcement of this principle has proved extremely difficult in practice. For this reason, the proposal includes certain provisions that constitute a series of mechanisms to ensure effective remedies in the event of discrimination. All these mechanisms have already been included in previous directives.³ For the sake of coherence with these directives and with the case law of the European Court of Justice, certain amendments have been introduced to Articles 3, 5, 7 and 13.⁴

2.3. The insurance sector

a) Calculations of contributions

As regards the insurance sector, the proposal is not opposed to a calculation of contributions according to risk but only against the inclusion of gender as a factor in this calculation.

¹ .Case C-152/91 Neath v Hugh Steeper Ltd [1993] ECR I-6953; and Case C-200/91 Coloroll Pension Trustees Limited v. Russell and Others [1994] ECR I-4389

² 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 12.08.86, amended by Council Directive 96/97/EC of 20 December 1996, OJ L 046 of 17.2.1997

³ See supra, footnote in page 19.

⁴ See Cases C- 14/83 Von Colson und Kamann [1984] ECR 1891, Case C-450/93, Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3069, Case C-409/95, Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363

The use of the "gender" factor , just like "race", as a basis for the calculation of rates constitutes discrimination since these factors are beyond the control of individual concerned.

The calculations of insurance companies only take account of the statistical link between factor and risk. There is, however, an important difference between a statistical and a causal link. Statistically, life expectancy varies according to gender. It is, however, untenable to portray this as a causal link. One could just as well use "family situation" as a determining factor for calculating life expectancy since there is a significant statistical link in this case also. The choice of the "gender" factor is thus arbitrarily used for the calculation of risk simply because it is easy and cheap.

Furthermore, life expectancy, generally taken as a gender-specific factor for the calculation of contributions, depends to a far greater extent on an individual's lifestyle than on their gender (e.g. smoking, alcohol consumption, stress factors, health awareness). Therefore, contributions must be calculated on the basis on these more objective criteria.

b) The principle of equality of women and men

The fundamental right to equal treatment of men and women is an individual right enjoyed by men and women as individuals and not as members of a group. Moreover, the right to equal treatment, as a fundamental right, has precedence over the right to contractual freedom. The European Court of Justice has clearly maintained that the principle of equality between women and men is one of the fundamental human rights which the Court has a duty to ensure.¹

Therefore, the achievement of the principle of equality of women and men guaranteed by the Treaty, inevitably requires insurance companies to make some adjustments to their own calculation systems.

Furthermore, the shift in old-age provision from the first to the second and third pillar is forcing individuals to join company and private schemes. If the state no longer guarantees full provision through the (gender-neutral) statutory pension, then it must ensure that there is no gender-based discrimination in private schemes either.

¹ See Case C-185/97 Coote v Granada Hospitality [1998] ECR I-5199

23 February 2004

OPINION OF THE COMMITTEE ON CITIZENS' FREEDOMS AND RIGHTS, JUSTICE AND HOME AFFAIRS

for the Committee on Women's Rights and Equal Opportunities

on the proposal for a Council directive on implementing the principle of equal treatment between women and men in the access to and supply of goods and services (COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

Draftswoman: Joke Swiebel

PROCEDURE

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Joke Swiebel draftswoman at its meeting of 25 November 2003.

It considered the draft opinion at its meetings of 18 February and 19 February 2004.

At the last meeting it adopted the following amendments by 27 votes to 1, with 1 abstention.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairwoman), Joke Swiebel (draftswoman), Mary Elizabeth Banotti, Christian Ulrik von Boetticher, Kathalijne Maria Buitenweg (for Alima Boumediene-Thiery), Michael Cashman, Carmen Cerdeira Morterero, Gérard M.J. Deprez, Koenraad Dillen, Adeline Hazan, Marie-Thérèse Hermange (for Charlotte Cederschiöld), Sylvia-Yvonne Kaufmann (for Ilka Schröder), Margot Keßler, Timothy Kirkhope, Eva Klamt, Ole Krarup, Luís Marinho (for Ozan Ceyhun), Marjo Matikainen-Kallström (for Carlos Coelho), Erik Meijer (for Giuseppe Di Lello Finuoli pursuant to Rule 153(2)), Elena Ornella Paciotti, Paolo Pastorelli (for Giacomo Santini), Hubert Pirker, Bernd Posselt, Olle Schmidt (for Baroness Ludford), Ole Sørensen (for Bill Newton Dunn), Patsy Sørensen, Anna Terrón i Cusí and Maurizio Turco.

SHORT JUSTIFICATION

The right to equal treatment and protection against discrimination is a fundamental human right which lies at the very heart of the European Union. Existing European legislation on equal treatment relating to the various grounds on which discrimination is prohibited in the Treaties, differs in the level of protection provided¹. This is the so-called ‘equality hierarchy’², i.e. EU anti-discrimination law itself discriminates between the various grounds of discrimination, mainly in the material scope of the ban on discrimination, the permitted exceptions and the enforcement mechanisms required. As a result, different groups enjoy a different standard of legal protection against discrimination. Such a hierarchy of discrimination sends the wrong political message, i.e. that some animals are more equal than others. What is more, it has created a hotchpotch of rules which adversely affects not only the quality of legislation and the administration of justice but also its transparency for citizens.

The European Parliament has repeatedly criticised this state of affairs³ and urged for a comprehensive anti-discrimination policy that affords an equal degree of protection from discrimination on different grounds.

The current proposal for a Directive "Implementing the principle of equal treatment between women and men in the access to and supply of goods and services"⁴ seeks to implement the principle of equal treatment between men and women in the access to and supply of goods and services. This subject matter falls fully within the powers and responsibilities of the Parliament’s Committee on Women’s Rights and Equal Opportunities. In the broader framework of anti-discrimination measures, however, it is only one piece of the jig-saw puzzle. The Parliament’s Committee on Citizen’s Freedoms and Rights, Justice and Home Affairs has to consider the proposed new legislation from another perspective, i.e. bearing in mind the coherence of anti-discrimination legislation in general and Parliament’s position that the ‘equality hierarchy’ mentioned above must come to an end.

Differences in material scope are the most salient features of the present equality hierarchy in EU anti-discrimination law. The table below summarizes the existing state of play, including - **in bold** - the present proposal. Looking at this table, it becomes clear at a glance, that by adding the area of goods and services to the fields in which sex discrimination is forbidden, the existing imbalance will be corrected only in a very marginal sense.

Commissioner Diamantopoulou had to withdraw previous drafts of her proposal that had included advertising and media as well as taxation, finding the limits of Community competencies and political realities on her way.⁵ No explanation whatsoever is given why the present proposal does not contain an ‘upgrading’ of protection against sex discrimination to

¹ for an overview of relevant EU anti-discrimination law see:

http://europa.eu.int/comm/employment_social/fundamental_rights/legis/legln_en.htm, and

http://europa.eu.int/comm/employment_social/equ_opp/rights_en.html#dir.

² Mark Bell, *Anti-Discrimination Law and the European Union*, Oxford (Oxford University Press) 2002, p.52-53 and 211-213, as well as Linda Senden, ‘Hiërarchie van gelijkheid in het communautaire recht’, *Nemesis, tijdschrift voor vrouw en recht*, 19(2003) 5-6 (november), p. 144-151.

³ (a) Resolution adopted on 5 October 2000, OJ C 178, 22.6.2001, p. 184, (b) Resolution adopted on 15 January 2003, T5-0012/2003, (c) Resolution adopted on 4 September 2003, T5-0376/2003 (d) Report adopted on 14 January 2004, T5-0023/2004.

⁴ COM (2003) 657

⁵ See a.o. Financial Times, June 24, 2003, page 1.

the level of protection against racial discrimination by covering the same areas as the Racial Discrimination Directive 2000/43/EC¹. It gives the impression that the baby had to be thrown out with the bathwater.

	sex-discrimination	discrimination based on racial or ethnic origin	discrimination based on religion or belief, disability, age and sexual orientation
employment	x	x	x
vocational training	x	x	x
employment conditions	x	x	x
workers organisations	x	x	x
social security	x	x	0
social protection	0	x	0
health care	0	x	0
social advantages	0	x	0
education	0	x	0
goods and services, including housing	x (new draft Directive)	x	0

On 5 October 2000, when adopting its position on what became the Framework Directive – that outlaws discrimination in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation – the European Parliament asked the Commission and the Council to extend the scope of anti-discrimination legislation for all grounds mentioned in Article 13 of the Treaty establishing the European Community to at least the scope as defined in the Racial Discrimination Directive. Besides, the European Parliament demanded this to be done within *three years* as of the adoption of that Directive, i.e. before 27 November 2003².

The Commission replied³ that "it is impossible to refer to this time-frame in a directive, but the implementation of the action plan will help us to see how we can move forward with the other amendments". Anyhow, we may conclude that the idea of developing a coherent policy with an equal scope and level of protection for all grounds did not get any further. Reason enough for your rapporteur to ask the European Parliament again to include a broad scope - comparable to the Racial Discrimination Directive - in the current proposal, however in a more direct way (see amendments 1-5, 7). This is even more important, because the Commission in its work programme 2004 announced the publication of a Green Paper in spring 2004, in which they will ask stakeholders for their views on how to develop a coherent anti-discrimination policy and alternatives for moving forward⁴.

¹ OJ L 180, 19.7.2000, p. 22.

² Amendments 19 and 35 of Report A5-0264/2000, *Equal treatment in employment and occupation*, Official Journal, 22.6.2001, C 178/158.

³

<http://www3.europarl.ep.ec/omk/omnsapir.so/debatsL5?FILE=20001004EN&LANGUE=EN&LEVEL=TOC2&CHAP=8>

⁴ Reference 2004/EMPL/010, <http://europa.eu.int/eur-lex/en/com/pdf/2003/act0645en01/2.pdf>, page 26.

The most relevant differences with respect to the level of protection between the two Article 13-Directives of 2000 and the current acquis on equal treatment of women and men have been repaired by way of Directive 2002/73/EC. As far as that is not the case, the European Parliament is asking to do so right now (amendments 6 and 8). Therefore, your rapporteur has compared the underlying proposal with the Racial Discrimination Directive.

AMENDMENTS

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs calls on the Committee on Women's Rights and Equal Opportunities, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1 Recital 10

(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.

(10) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services, ***as well as in the area of social protection, including healthcare, social advantages and education.*** Services should be taken to be those which are normally provided for remuneration.

Amendment 2 Article 1, paragraph 1

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.

1. This Directive lays down a framework for combating discrimination based on sex in

- a.*** access to and the supply of goods and services;
- b.*** ***social protection, including healthcare;***
- c.*** ***social advantages;***
- d.*** ***education;***

¹ Not yet published in OJ.

with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Amendment 3
Article 1, paragraph 2

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.

2. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons as regards both the public and private sectors, including public bodies.

Amendment 4
Article 1, paragraph 4

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.

4. This Directive shall not apply 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.

Amendment 5
Article 4

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*.

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 *in relation to* financial services is *allowed and does not constitute discrimination*:

- *where a difference of treatment is based on an objective characteristic related to sex,*
- *where, by reasons of the nature of the particular goods or service concerned or of the context in which they are priced or provided, such a characteristic derives from statistical data which reflect differences in the underlying risks.*

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.

Justification

The use of gender as a risk factor by the insurance industry is objective and based on statistical data. The exclusion of gender would have a number of unintended and undesirable consequences. In particular in relation to motor insurance this would lead to higher premiums for young women drivers and lower premiums for young male drivers and negative consequences for overall road safety. In relation to personal pensions differences between men and women are objectively justified on the basis of women's longer life expectancy. Excluding gender would lead to lower overall retirement income.

Amendment 6
Article 5

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.

With a view to ensuring full equality in practice, 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.

Justification

This amendment brings the text of the current proposal in line with article 5 of the Racial Discrimination Directive.

Amendment 7
Article 12

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:

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected within the scope of this directive, and in particular that:

Amendment 8
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.

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 **applied**. The penalties, **which may comprise the payment of compensation to the victim**, 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.

Justification

This amendment brings the text of the current proposal in line with article 15 of the Racial Discrimination Directive and article 8d of Directive 2002/73/EC.

Amendment 9
Article 15, point 1, paragraph 2

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 it report with proposals to modify the Directive.

The Commission shall draw up a summary report, **based on the 5-yearly Communication by Member States**, which it shall submit to the European Parliament and to the Council. Where appropriate, the Commission shall accompany it report with proposals to modify the Directive.

24 February 2004

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Women's Rights and Equal Opportunities

on the proposal for a Council directive on implementing the principle of equal treatment between women and men in the access to and supply of goods and services (COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

Draftswoman: Angelika Niebler

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Angelika Niebler draftswoman at its meeting of 1 December 2003.

It considered the draft opinion at its meetings of 27 January 2004, 19 February 2004 and 24 February 2004.

At the last meeting it adopted the following amendments by 17 votes to 10.

The following were present for the vote: Willi Rothley (vice-chairman), Bill Miller (vice-chairman), Angelika Niebler (draftswoman), Uma Aaltonen, Paolo Bartolozzi, Maria Berger, Charlotte Cederschiöld (for Bert Doorn), Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Lord Inglewood, Hans Karlsson (for Fiorella Ghilardotti), Kurt Lechner, Klaus-Heiner Lehne, Sir Neil MacCormick, Arlene McCarthy, Manuel Medina Ortega, Elena Ornella Paciotti (for François Zimeray), Anne-Marie Schaffner, Karin Scheele (for Carlos Candal to Rule^o 153(2)), Marianne L.P. Thyssen, Ian Twinn (for Stefano Zappalà), Diana Wallis, Rainer Wieland and Joachim Wuermeling.

SHORT JUSTIFICATION

1. The Commission's proposal

The Commission's proposal, based on Article 13 of the Treaty, concerns implementation of the principle of equal treatment between women and men in the access to and supply of goods and services. It does not apply to transactions carried out in a purely private context, or to media and advertising.

The Commission proposal to combat any form of gender-based discrimination in areas beyond the domain of employment deserves full support. With particular regard to the legal basis and the proposal's content, however, the draftswoman takes the view that improvements are required.

2. Legal basis

The legal basis for the Commission's proposal raises some doubts. There clearly arises a conflict between Article 13 and Article 95 of the Treaty. This conflict involves the choice of legislative procedure for the adoption of the proposed measure. As the recourse to a dual legal basis is excluded, it is necessary to determine which of the two provisions are appropriate. This is important in view of the Parliament's involvement in the legislative process. The Parliament cannot accept to withdraw its powers under the co-decision procedure in the matters concerning internal market on the basis of the fight against sex discrimination.

Article 13 of the Treaty authorises the Council to take appropriate action to combat discrimination in specific areas. However, it should be 'without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community (...)'. While it is justified to adopt certain measures based on Article 13, it seems to be too far-reaching to allow it as a single legal basis for the measures that concern the functioning of the internal market.

According to the established case-law of the European Court of Justice, the choice of legal basis may not depend on an institution's conviction as to the objective pursued but must be based on objective factors which include in particular the aim and content of the measure. The proposal will ultimately aim at the improvement of conditions for the receipt and supply of goods and services within the internal market, involving substantial modification of rules applicable to goods and services and having impact on the functioning of internal market and its operators. This is apparent from recitals, Article 4 and examples of application of the proposal provided in the Commission's explanatory statement with particular attention paid to financial services sector.

As to its content, the directive interferes extensively in the contractual relations between private individuals. But contractual freedom is an elementary legal principle of all the Member States' legal systems. So any changes to that principle come within the terms of reference of the Committee on Legal Affairs and the Internal Market.

3. Insurance schemes

The Commission says that there is little evidence of the existence of consistent discriminatory practices in the area of the access to or supply of goods and services. Discrimination is much more likely to occur spontaneously and is difficult to attribute to a particular area of services.

The Commission thinks this is not the case in the insurance industry. Depending on the type of insurance, in some Member States the gender of the insured person is considered as an actuarial factor when calculating the premium.

It is questionable whether this attitude on the part of insurers is always one of deliberate discrimination or the result of objective arguments. Insurance companies face the problem of finding appropriate calculation criteria to distribute the risk equitably and suitably in the interest of insurers. If we accept the Commission's arguments we could also regard such criteria as age, profession or residence as essentially discriminatory, in addition to gender. Significantly, the Commission acknowledges in Article 1(3) of the proposal that gender-specific differences may be involved in the case of goods and services. For this reason gender-specific factors should be permitted for the calculation of premiums and services in the field of insurance if this is justified on objective grounds.

4. Access to the courts

There is no question that, to deal with overt and covert forms of discrimination, effective legal assistance must be available to the victims of discrimination. The Member States should provide suitable machinery in their legal systems to ensure that the law is properly enforced against those instigating discriminatory behaviour.

At the same time it is a generally recognised principle in the civil law systems of the Member States that persons who invoke a fact that is in their favour must demonstrate this in a court of law. Only when this is not possible because of the nature of the matter can there exceptionally be a reversal of the burden of proof. So an allegation of discrimination should not mean that the prevailing rules on the burden of proof can automatically be set aside.

Detailed aspects and the conditions for participation by relevant associations, organisations and other legal persons in court or administrative proceedings on behalf of a victim of discrimination are important matters of national procedural law. So the detailed provisions for participation of such associations and institutions should be settled by the Member States.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Women's Rights and Equal Opportunities, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Title

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.

Proposal for a **EUROPEAN PARLIAMENT AND COUNCIL** DIRECTIVE implementing the principle of equal treatment between women and men in the access to and supply of goods and services.

Justification

Follows from amendment 2 of the draftsman.

Amendment 2

Citation

THE COUNCIL OF THE EUROPEAN UNION

THE EUROPEAN PARLIAMENT AND 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 Treaty establishing the European Community and in particular **Article 95(1)** thereof,

Having regard to the proposal from the Commission,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Committee of the Regions,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the European Economic and Social Committee,

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

Justification

The legal basis for the Commission's proposal raises doubts. If the aim and content of this proposal is to be accepted, there clearly arises a conflict between Article 13 and Article 95 of the Treaty and the proposal should be better based on the latter one. This conflict involves the choice of legislative procedure for the adoption of the proposed measure. As the recourse to a

¹ OJ C ... / Not yet published in OJ.

dual legal basis is in such event excluded, it is necessary to determine which of the two provisions are appropriate. This is important in view of the Parliament's involvement in the legislative process of the Community. The Parliament cannot accept to withdraw its powers under the co-decision procedure in matters concerning the internal market using the fight against sex discrimination as a justification. As the fight against sex discrimination is one of the tasks of the Community, it should in any event be pursued in the exercise of all the Community's activities (Article 2 and 3(2) of the EC Treaty).

According to the established case-law of the ECJ, the choice of legal basis may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which include in particular the aim and content of the measure.

The proposal has a dual objective. It contributes to equal treatment of women and men in the access to and supply of goods and services. However, it will ultimately aim at the improvement of conditions for the receipt and supply of goods and services within the internal market, involving substantial modification of rules applicable to goods and services and having an impact on the functioning of internal market and its operators. This is apparent from the examples of application of the proposal provided in the Commission's explanatory statement with particular attention given to the financial services sector, recitals 13 and 14, as well as from Article 4 of the proposal on the actuarial factors in insurance. By means of harmonisation of rules applicable to actuarial factors, the proposal will have an impact on the financial services sector with the greatest effect on the insurance sector. The Commission admits that a move towards sex-neutral pricing in the insurance sector will be difficult for individual insurance companies in the face of competition from other companies. The Commission also states that it would create difficulties 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'. In order to avoid the above risks, the Commission proposes an eight-year period of transposition to avoid 'damaging distortions of competition'. At the same time, the Commission presents a cautious approach to other fields, excluding for instance media and advertising from the scope of the proposed directive.

The proposal aims at such harmonisation of laws, regulations and administrative provisions in the Member States as will implement the principle of equal treatment of women and men. This harmonisation will be particularly evident in the insurance sector. Such actions should be regarded as resulting in the potential alterations in the functioning of internal market and market operators.

For the above reasons, it is proposed that the current proposal should be based on Article 95 of the Treaty.

Amendment 3
Recital 4 a (new)

Equality between men and women depends on equal treatment in identical conditions. If the circumstances differ it should be permissible to take them into proper account.

Justification

Equality between men and women depends on equal treatment in identical conditions. If the circumstances differ it should be permissible to take them into proper account.

Amendment 4
Recital 9

(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, this objective can be achieved by means of Community legislation.

(9) Discrimination based on sex should **also** be prevented and eliminated **in the area of goods and services**. 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, this objective can be achieved by means of Community legislation.

Justification

To argue that problems are particularly apparent in the area of goods and services contradicts the Commission's conclusion that 'there is little evidence of the existence of consistent discriminatory practices' in this area. So this comment should be deleted from the recitals.

Amendment 5
Recital 10 a (new)

(10a) The Directive must take account of the principle of private autonomy. That principle ensures that the parties to a contract commit themselves freely and are as a matter of principle free to determine the substance of their contractual relations.

Justification

The principle of contractual autonomy is an essential pillar of our social system. The directive must take that principle into account.

Amendment 6
Recital 11 a (new)

(11a) While prohibiting discrimination based on gender, it is important to recognise that insurance underwriting on

the basis of sex does not represent gender discrimination. The underwriting process is objective and verifiable and takes into account a wide range of factors – including gender which is an extremely important factor in the prediction of the potential risk that an individual represents.

Justification

Insurance underwriting on the basis of sex does not represent gender discrimination. The underwriting process is objective and verifiable and takes into account a wide range of factors – including gender which is an important factor in the prediction of the potential risk that an individual represents. Removing gender as a rating factor would make risk assessments less precise with negative consequences for the consumer in terms of price and choice.

Amendment 7

Recital 12

(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.

(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, ***or if there are other criteria for differentiation.***

Justification

For the sake of completeness there must be provision for the fact that differences can also arise because goods and services have to be adapted to the different needs and requirements of men and women, or must be drawn up and provided in a different way and on different bases.

Amendment 8

Recital 13

(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***

(13) The use of actuarial factors related to sex is widespread in the provision of insurance services, ***in the supply of goods or services, the use of sex as a criterion in the differentiation of prices does not constitute discrimination on the grounds***

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.

of sex if this differentiation is legitimate and justified on objective grounds and if this requirement is proportionate, e.g. reflecting differences in the underlying costs or expenses. In the case of insurance products, differentiation in premiums, contributions or benefits is legitimate if this differentiation is based on sound and accepted insurance principles e.g. based on actuarial factors and statistical data reflecting differences in the underlying risks.

Amendment 9

Recital 14

(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.

deleted

Justification

Recital 14 is linked with Recital 13 and thus should be deleted.

Amendment 10

Recital 15

(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.*

(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, *relevant* associations, organisations and other legal entities should also be empowered to engage in proceedings, either on behalf or in support of any victim, *in so far as there is provision for this in the procedural law of the Member State concerned.*

Justification

Detailed aspects and the conditions for participation by relevant associations, organisations and other legal persons in court or administrative proceedings on behalf of a victim of discrimination are important matters of national procedural law. So the detailed provisions for participation of such associations and institutions should be settled by the Member States.

Amendment 11

Recital 17

(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. ***deleted***

Justification

It is a generally recognised principle in the civil law systems of the Member States that persons who invoke a fact that is in their favour must demonstrate this in a court of law. Only when this is not possible because of the nature of the matter can there exceptionally be a reversal of the burden of proof. So an allegation of discrimination should not mean that the prevailing rules on the burden of proof can automatically be set aside.

Amendment 12

Article 1, paragraph 3

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.

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 ***or where there are other objective distinguishing criteria.***

Justification

The price of goods and services must be calculated in response to the realistic circumstances. Here a number of factors come into play and are not exclusively determined by the target group of the product concerned. An equally determining factor is whether they are demanded and purchased uniquely by women or men, thus requiring a different investment by the supplier and obliging the latter to base the price calculation on differing premises.

Amendment 13
Article 1, paragraph 4

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.

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. ***Nor shall it apply to the use of objective and verifiable actuarial factors related to sex in the provision of insurance services.***

Justification

When insurance underwriting takes appropriate account of sex, this does not represent gender discrimination. The underwriting process is objective and verifiable and takes into account a wide range of factors – including gender which is an important factor in the prediction of the potential risk that an individual represents. Removing gender as a rating factor would make risk assessments less precise with negative consequences for the consumer in terms of price and choice.

Amendment 14
Article 3, paragraph 1 (b a) (new)

(ba) a distinction on the grounds of objective criteria shall not conflict with the principle of equal treatment of men and women.

Justification

It must be made clear that not every distinction between men and women automatically infringes the principle of equal treatment. Rather the issue to consider is whether objective criteria justify differentiation.

Amendment 15
Article 4, paragraph 1 and 2

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.***

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 ***in relation to financial services is allowed and does not constitute discrimination:***

-where a difference of treatment is based on an objective characteristic related to gender,

-where, by reasons of the nature of the particular goods or service concerned or of the context in which they are priced or provided, such a characteristic derives from statistical data which reflect differences in the underlying risks.

1a. (new) Member States shall ensure that, no later than with effect from [the date referred to in Article 16(1)], the costs of pregnancy or maternity are calculated irrespective of gender in the case of premiums and services in the field of insurance and related financial services.

2. The supervisory authorities shall ensure that factual, transparent and objectively required differentiation is guaranteed in accordance with the provisions of paragraph 1.

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.

Amendment 16
Article 7, paragraph 3

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.

3. Member States shall ensure that **relevant** 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 ***in so far as there is provision for this in the procedural law of the Member State concerned.***

Justification

Detailed aspects and the conditions for participation by relevant associations, organisations and other legal persons in court or administrative proceedings on behalf of a victim of

discrimination are important matters of national procedural law. So the detailed provisions for participation of such associations and institutions should be settled by the Member States.

Amendment 17
Article 8, paragraph 1

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. *deleted*

Justification

It is a generally recognised principle in the civil law systems of the Member States that persons who invoke a fact that is in their favour must demonstrate this in a court of law. Only when this is not possible because of the nature of the matter can there exceptionally be a reversal of the burden of proof. So an allegation of discrimination should not mean that the prevailing rules on the burden of proof can automatically be set aside.

Amendment 18
Article 12 (b)

(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.

(b) 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 **may be amended in this regard.**

Justification

Retaining this provision could in practice cause considerable legal uncertainty and constitute interference in independent collective bargaining. So questionable provisions should not be declared null and void at first sight. Rather there must be an opportunity to amend the questionable provision at a later date in the light of the principle of equal treatment, in so far as this is necessary and feasible.

15 March 2004

OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY

for the Committee on Women's Rights and Equal Opportunities

on the 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
(COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

Draftsman: Luis Berenguer Fuster

PROCEDURE

The Committee on Industry, External Trade, Research and Energy appointed Roger Helmer draftsman at its meeting of 21 January 2004.

It considered the draft opinion at its meetings of 23 February 2004 and 8 March 2004.

Prior to taking the final vote, Roger Helmer stated that given the fact that the amendments adopted had changed his initial position on the subject, he therefore could not continue as draftsman. The Committee then appointed its chairman, Luis Berenguer Fuster, draftsman.

At the last meeting it adopted the following amendments by 16 votes to 13, with 1 abstention.

The following were present for the vote: Luis Berenguer Fuster, chairman, Peter Michael Mombaur, vice-chairman, Claude Turmes, vice-chairman, Sir Robert Atkins, Danielle Auroi (for Nuala Ahern), Guido Bodrato, Giles Bryan Chichester, Marie-Françoise Duthu, Francesco Fiori (for Concepció Ferrer), Norbert Glante, Michel Hansenne, Roger Helmer, Bashir Khanbhai, Bernd Lange (for Hans Karlsson), Werner Langen, Rolf Linkohr, Eryl Margaret McNally, Hans-Peter Martin (for Daniela Raschhofer), Ana Miranda de Lage, Bill Newton Dunn (for Colette Flesch), Angelika Niebler, John Purvis, Bernhard Rapkay (for Mechthild Rothe), Imelda Mary Read, Christian Foldberg Røvsing, Esko Olavi Seppänen, W.G. van Velzen, Alejo Vidal-Quadras Roca, Myrsini Zorba and Olga Zrihen Zaari.

SHORT JUSTIFICATION

The proposed directive aims at prohibiting discrimination between men and women in the access to goods and services intended for the general public. It rightly bases itself on a plethora of charters and declarations on the equality of the sexes to which most Member States are signatories. What the proposal does not take into account, however, is the fact that discrimination on the basis of sex is also prohibited in all Member State constitutions. Thereby, the proposed directive is not only superfluous, but it also goes against the principle of subsidiarity.

While your draftsman finds the aims of the proposed directive wholly admirable, he is also concerned with the broadness with which it has been drafted. It must be noted that in its current form the directive would outlaw certain commercial practices which are based on sound economic principles, which are rarely considered objectionable, and which can work to the advantage of either sex depending on the nature of the business.

The Committee on Industry, External Trade, Research and Energy will wish to take note that, in particular, long-standing commercial promotions are threatened by the proposed directive. It is, for example, normal practice that bars, clubs and restaurants will often offer free entry or cheaper drinks to women to encourage an equal balance of men and women. Likewise, dating agencies, which are dependent on balanced ratios of men to women, may offer cheaper rates for whichever sex is under-represented on their books. Such promotions must be allowed to continue, and an amendment has been proposed for this purpose.

Your draftsman firmly believes that the freedom of business practices in Europe must be protected, and that any limitation in this freedom must be overwhelmingly well-founded. The Commission has yet to present evidence that the problem is widespread enough to justify a horizontal limitation of normal business practices, a measure which will put European service providers at a disadvantage on the increasingly international European market for these services.

AMENDMENTS

The Committee on Industry, External Trade, Research and Energy calls on the Committee on Women's Rights and Equal Opportunities, as the committee responsible, to incorporate the following amendments in its report:

<u>Text proposed by the Commission¹</u>	<u>Amendments by Parliament</u>
	Amendment 1 Recital 12
<i>(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</i>	<i>deleted</i>

¹ OJ C ... / Not yet published in OJ.

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.

Justification

Differences in treatment between men and women who are 'are not in a comparable situation' do not constitute discrimination. It is therefore superfluous to mention them. Moreover the terms used and examples quoted are vague and are therefore liable to cause confusion as regards the directive's scope. Secondly, in accordance with consistent rulings of the Court of Justice of the European Communities with regard to objective justification for indirect sexual discrimination, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin authorises differences in treatment solely in the field of employment. However, this directive allows for no exceptions as regards access to and supply of goods and services in general. Lastly, private membership clubs, which by definition are private, do not fall within the scope of the directive in question, which only covers goods and services available to the public. It is therefore unnecessary to include this specific reference in the recital.

Amendment 2 Recital 12 a (new)

12a. The principle of equal treatment shall not hinder incentives or promotions offered to one sex only for sound commercial reasons, for example to achieve an even balance in male/female participation in those industries where commercial viability is dependent on such a balance.

Justification

It is important to protect current promotions where equal treatment of women and men in pricing might disadvantage businesses.

Amendment 3 Article 1, paragraph 2

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

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 ***all*** goods and services which are available

the public, **including housing**, as regards both the public and private sectors, including public bodies.

to the public as regards both the public and private sectors, including public bodies.

Justification

This is to clarify the directive's scope by clearly indicating that all goods and services are covered by this act, provided they are available to the public. It is therefore unnecessary to isolate a specific category of services.

Amendment 4
Article 1, subparagraph 3

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. **deleted**

Justification

See Amendment 1 to recital 12.

Amendment 5
Article 4, paragraph 1

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.

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 **other** financial services is prohibited in all new contracts concluded after [date referred to in Article 16(1)] at the latest.

Justification

All services are covered by this Act and a fortiori all financial services are within its scope. It is therefore more appropriate to refer to other financial services.

Amendment 6
Article 4, paragraph 2

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.

2. ***In case of difficulties encountered in implementing*** the measures necessary to comply with paragraph 1, Member States may ***decide to*** defer implementation of ***these measures*** [until **four** years after date referred to in paragraph 1] at the latest.

In that case, the Member States concerned shall immediately inform the Commission. ***In addition, they shall regularly submit a report to the Commission on the progress made in overcoming those difficulties.*** They shall publish and ***also annually*** update comprehensive tables on the mortality and life expectancy of women and men.

The Commission shall forward all the above-mentioned information to the European Parliament and the Council.

Justification

The Commission, as well as the European Parliament and the Council, should be regularly informed of the progress made by Member States in overcoming the difficulties encountered in implementing the measures necessary to comply with paragraph 1, given the longer transition period which Member States have for complying.

Amendment 7
Article 11, paragraph 2, point (a)

(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;

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 7(3), ***to engage in legal proceedings whenever necessary to combat discrimination*** and providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

Justification

To enable them to carry out their work of promotion, analysis, support and monitoring of equal treatment more effectively, these bodies should also be authorised to engage in legal proceedings with a view to combating discrimination.

Amendment 8 Article 15, paragraph 1

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.

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, ***including an assessment of the effects, performance and effectiveness of the measures taken***, by [**three** years after the date of entry into force] at the latest, and every **three** years thereafter.

Based on the information received, the Commission shall draw up a summary report which it shall submit to the European Parliament and to the Council ***by [four years after the date of entry into force] at the latest, and every four years thereafter***. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

Justification

Member States should carry out an assessment of the impact of the measures taken to implement this Directive. This ex-post evaluation will help to increase transparency and to examine the measures taken and will provide an important input by informing decision-makers of the consequences of these measures. In this respect, Parliament and the Council should be regularly informed by the Commission about the reports submitted by the Member States.

17 February 2004

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on Women's Rights and Equal Opportunities

on the 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
(COM(2003) 657 – C5-0654/2003 – 2003/0265(CNS))

Draftsperson: Elspeth Attwooll

PROCEDURE

The Committee on Employment and Social Affairs appointed Elspeth Attwooll draftsman at its meeting of 14 January 2004.

It considered the draft opinion at its meeting of 17 February 2004.

At the meeting it adopted the following amendments by 25 votes to 1, with no abstentions.

The following were present for the vote: Marie-Hélène Gillig, acting chairperson; Winfried Menrad, vice-chairperson; Elspeth Attwooll, draftsperson; Jan Andersson, Regina Bastos, Johanna L.A. Boogerd-Quaak (for Anne André-Léonard), Alejandro Cercas, Proinsias De Rossa, Harald Ettl, Jillian Evans, Carlo Fatuzzo, Roger Helmer, Marie-Thérèse Hermange, Stephen Hughes, Karin Jöns, Jean Lambert, Elizabeth Lynne, Toine Manders (for Marco Formentini), Thomas Mann, Mario Mantovani, Ria G.H.C. Oomen-Ruijten (for Luigi Cocilovo), Manuel Pérez Álvarez, Lennart Sacrédeus, Herman Schmid, Helle Thorning-Schmidt, Anne E.M. Van Lancker and Barbara Weiler.

SHORT JUSTIFICATION

Despite regrets that the proposal is much more limited in scope than originally anticipated, it is to be seen as a valuable step on the road to gender equality.

Accordingly, the amendments submitted by the Committee on Employment and Social Affairs concentrate on improving the effectiveness of the Directive in its own terms and do not seek to widen its ambit or introduce considerations to do with positive action.

Issues to do with social assistance and advertising are, however, brought in where these relate directly to access to goods or the supply of services. In relation to the former, there are examples of differential treatment between men and woman. One is the assumption that where there is even a limited amount of cohabitation, the man is affording the woman financial support and her benefit is reduced or removed accordingly. Equally, a woman may be required to provide different proofs of her situation from a man. Such situations should be covered by the Directive.

Similarly, whilst it is accepted that the proposal does not cover, for example, the ways in which women (and men) are portrayed by the media, there is one aspect of advertising that must logically fall within its scope. If there is to be equality of treatment in relation to access to goods and supply of services there has to be equality in the terms and conditions on which there are offered. Advertisements should not be allowed to state, or even imply, otherwise, except in the limited circumstances covered by Recital 12 and Article 1(3).

An amendment proposed to Article 1(3), but not ultimately passed by the Committee, provided a much tighter formulation which would still allow for the exceptions that the Commission envisages, such as single sex swimming sessions or private clubs. Whatever one's political judgment of their desirability, it does seem appropriate that their existence is not precluded at European level, with the decision left to Member States.

Other amendments, variously to Articles 3(1)(a), 7(2), 9 and 13 are also intended mainly to clarify the text but also introduce a better balance.

No amendments have been proposed to Article 4 on actuarial factors. It is thought more appropriate to leave issues to do with timing to the lead committee. It seems clear, however, that its thrust is something that should be supported by the Committee on Employment and Social Affairs, applying the principle of inter-gender solidarity as it does that of intergenerational solidarity. Given the comparative poverty experienced by women of pensionable age, the change will be particularly important in the context of the purchase of annuities.

This proposal only begins to address the many respects in which differential treatment, particularly of women, has led to social exclusion. It is hoped that others will follow.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on Women's Rights and Equal Opportunities, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1
Recital 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.***

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.

Justification

The point about media is made earlier in the Recital. Also, there are circumstances in which the Directive should cover advertising.

Amendment 2
Recital 11 a (new)

(11a) Differentiation in premiums or benefits for insurance products based on sex (including the risks of pregnancy) and other factors that may not be influenced and are only contributed to a group on the basis of statistical assumptions, are discriminatory.

Justification

This new Recital gives a general guideline for which behaviour of insurance companies should be considered to be discriminatory.

¹ Not yet published in OJ.

Amendment 3
Article 1, paragraph 2

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.

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 **all** goods and services which are available to the public, including housing, as regards both the public and private sectors, including public bodies.

Justification

The scope of the proposal for a directive will be better conveyed by clarifying that all publicly accessible goods and services are covered. It does not appear appropriate to specify particular areas of application.

Amendment 4
Article 1, paragraph 4

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.**

4. This Directive shall not apply to education, nor to the content of media **except for the advertising of terms and conditions for access to goods and the supply of services.**

Justification

It would illogical to prohibit discrimination in relation to access to goods and the supply of services but to allow advertising implying that such discrimination is permitted.

Amendment 5
Article 2, paragraph 1, point (d)

(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;

(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 or offensive environment **either within or outside the workplace;**

Justification

It should be made clear in the definition of the directive that sexual harassment can occur both within and outside the workplace.

Amendment 6

Article 3, paragraph 1, point (a)

(a) there shall be no direct discrimination based on sex, including less favourable treatment **of women** for reasons of pregnancy and maternity;

(a) there shall be no direct discrimination based on sex, including less favourable treatment **in particular on grounds of family or marital status or** for reasons of pregnancy and maternity, **paternity or reconciling of work and family life**;

Justification

The prohibition of discrimination in this context should be even handed between men and women. It is also important that the grounds of discrimination should be indicative rather than exhaustive.

Amendment 7

Article 7, paragraph 2

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.

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and **effective** compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination 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.

Justification

There is clearly a word missing from the Commission text. The term effective is consonant with other Directives and case law.

Amendment 8
Article 9

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.

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 **or to support for such a complaint or legal proceedings.**

Justification

This reinforces the protection for witnesses, bringing the wording better into line with Recital 17.

Amendment 9
Article 10

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**.

Member States shall engage in **regular** dialogue with appropriate non-governmental organisations **and with the social partners** 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 **equality**.

Justification

The proposal is based on Article 13(1) of the EC Treaty which must be interpreted in conjunction with Articles 2 and 3(2) of the EC Treaty. The Union is there committed to the principle of equality; the principle of equal treatment is laid down in Article 141 of the EC Treaty.

On that understanding of the social partnership, the scope of representation of the social partners is not confined to the world of work. The social partners can contribute to inner-city development.

Amendment 10
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.

Sanctions

The Member States shall lay down the rules on ***sanctions*** applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The ***sanctions*** 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.

Justification

The term “sanctions” is more consonant with other directives and with case law.