

## Options Paper

### Simplification and improvement of legislation in the area of equal treatment between men and women

#### **1. INTRODUCTION**

Equal treatment between men and women is a fundamental principle of the European Union. The provisions of primary legislation set out in the Treaty of Rome stated this and since then, subsequent amendments of the treaties have reinforced this principle. The Treaty of Amsterdam identified equality between men and women as a task, for the Community and further, introduced the aim, in all activities, to eliminate inequalities and to promote equality between men and women.

The Charter of fundamental rights of the European Union signed in Nice the 7<sup>th</sup> December 2000 in Article 23, also recognises equality between men and women as a fundamental principle.

The European Union pursues a dual approach to the achievement of this objective, based on gender mainstreaming and specific measures. Secondary legislation is an important specific measure, which has been used to deliver rights for citizens.

Significant progress has already been accomplished in terms of secondary legislation. At present there is a far reaching acquis in the area of equal treatment between men and women which has to be maintained and on which any further development should be built.

Currently there are a considerable number of separate legislative acts, including amendments, in force (see for further details annex I and II).

#### **2. OBJECTIVE**

The current situation concerning the Community binding legislation in the area of equal treatment could be summarised as follows:

The principle of equal treatment has developed from an isolated provision on equal pay in the Treaty of Rome (ex-article 119 of the EC Treaty), to a very important and well established acquis in the area of equality between men and women – a feature that sets Europe to the fore internationally. Nowadays, Article 2 EC recognises equality of men and women as a fundamental principle and one of the objectives and tasks of the Community. Moreover, under Article 3(2) a specific mission is conferred to the Community i.e. to mainstream the gender dimension in all its activities.

The Amsterdam Treaty has indeed increased significantly primary law and the European Union's ability to take action in the area of equal opportunities and equal treatment between men and women by giving to the Community legislator specific legal bases (articles 13, 137, 141 EC).

The existing Directives have laid the legal ground for radical changes in national legislation, attitudes and practices, while the European Court of Justice, by its case law, has helped to clarify and further develop the concept of equality. In addition to this legislative framework, Recommendations, Resolutions, other Communications and the Community (financial) programmes promote equality between men and women in broader areas of policy.

Based on different legal bases (see annex I), the existing Directives (with their amendments) provide a strong legislative environment. There is no doubt, however, that they need to be updated in order to guarantee a high level of legal clarity and certainty across an enlarged Union and to be simplified in order to be more readable.

The recent modification of Directive 76/207/EEC by Directive 2002/73/EC also demonstrated the real need to update the existing Directives (some of which are more than twenty years old) in order to take into account developments of the Treaty (equality between men and women was considerably enhanced after the Treaty of Amsterdam), the case law of the Court (which considerably developed the principle of equality), and the adoption of similar legislation (Directives based on Article 13 EC).

In this context, the legislation on equal treatment between men and women has been identified as a priority policy area for simplification, modernisation and improvement.

The general aim of simplifying and improving the legislative environment is to ensure, in the interests of men and women, that Community legislation is more attuned to the problem posed, to the challenge of enlargement and to technical and local conditions. This aim is particularly relevant in the case of equality legislation as individual men and women are directly concerned and need to have their individual rights clearly set out<sup>1</sup>.

A further objective of simplification is the reduction of the number of legislative acts in order to bring relevant texts into a single text, thus avoiding any contradictions, duplications or ambiguities. The ultimate goal is to ensure a high level of legal certainty across the EU and to make the equality legislation more accessible to citizens.

### **3. PURPOSE OF THIS OPTIONS PAPER**

In order to improve the participation of all interested parties (other Community Institutions, Member States, Social Partners and NGOs, women's associations) this Options Paper has been prepared. It sets out a number of possible approaches which could be followed in the simplification and improvement of the legislation in the area of equal treatment between men and women. Further options could also be considered and contributions in this respect would also be welcomed.

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<sup>1</sup>Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 24.1.2003 "Updating and symplifying the Community acquis", COM (2002) 379.

Comments and contributions are invited, to be submitted to [empl-equality-consultation@cec.eu.int](mailto:empl-equality-consultation@cec.eu.int) before 24. September 2003.

The Commission will consider the contributions received.

#### **4. APPROACH**

There are a number of approaches, which could be used for a simplification exercise.

##### ***a) Consolidation of the legislation on equal treatment between men and women:***

Consolidation is a rather mechanical process, which integrates (in a single, non legally-binding text) the provisions of the basic act governing a particular matter together with all subsequent amendments to it, without any examination or alteration of the text itself.

As is the case for codification, no fundamental changes to the substance or form of existing legislation are involved. Consolidation brings benefits to citizens, administrations and business in the form of a more accessible, transparent legislative framework, and has the advantages that costly or time-consuming preparatory work is minimised, no legal process is necessary, and the cost and delay of publishing in the Official Journal is avoided. However, unlike codification, consolidation does not result in a legally-binding text.

##### ***b) Codification of the legislation on equal treatment between men and women:***

Codification seeks to clarify the law by bringing together, in a coherent and comprehensive new single legal act, all the provisions of the basic act together with all subsequent amendments. This process renders the law simpler by establishing a single authoritative text, (which requires the official adoption by the Community legislator and its publication at the Official Journal), notably by deleting obsolete or overlapping provisions; by harmonising terminology and definitions used; and by correcting errors without substantive change. Codification brings major benefits by providing legally secure texts that are far more readily understood by users whilst maintaining the substance of the legislation. It also cuts back on the volume of the secondary Community legislation.

The codification implies a simplified and accelerated procedure of adoption of the new legal authoritative act by the Council and the European Parliament. Moreover, the *acquis* is entirely maintained but not developed.

##### ***c) Recast of the legislation on equal treatment between men and women:***

Existing secondary legislation may also be recasted.

A recast is a new legal act which incorporates in a single text both the amendments it makes to the previous act and the provisions of that previous act which remain unchanged, the new legal act replacing and repealing the previous act. The new legal act therefore amounts to a codification of the pre-existing basic act and all its amendments, but at the same time it provides the possibility for changes to the existing law, which is not possible in the case of a codification.

## 5. LEGAL BASIS

Article 141 EC provides for equal treatment between men and women in matters of employment and occupation:

*Article 141 EC (ex Article 119 of the EC Treaty)*

*"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*

*2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*

*Equal pay without discrimination based on sex means:*

*(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*

*(b) that pay for work at time rates shall be the same for the same job.*

*3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*

*4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."*

It is therefore proposed to use as principal legal base Article 141 paragraph 3 EC for the currently envisaged exercise of simplification and improvement of the legislation in the area of equal treatment between men and women. Different options can be distinguished in this respect.

## 6. SCOPE OF THE SIMPLIFICATION AND IMPROVEMENT

### 6.1 Option 1

**This option consists of putting together in two separate legal acts the provisions of the basic Directives with the provisions of the Directives amending these. It concerns the Directives in the area of access to employment, vocational training and promotion and working conditions<sup>2</sup> and the Directives in the area of equal treatment between men and women in occupational social security schemes<sup>3</sup>.**

**Moreover, a modification of the Directive on burden of proof<sup>4</sup> could be proposed in order to align its provision on the definition of indirect discrimination with the latest definition contained in Directive 2002/73/EC.**

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<sup>2</sup> Directive 76/207/EEC as amended by Directive 2002/73/EC

<sup>3</sup> Directive 86/378/EEC as amended by Directive 96/97/EC

<sup>4</sup> Directive 97/80/EC

Consequently, this approach would consist firstly of re-grouping in two new legal acts, respectively all the provisions of the following Directives together with their subsequent amendments:

a) the text of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions :

- with the text of the European Parliament and Council Directive 2002/73/EC which considerably amends it;

b) the text of 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 :

- with amendments introduced by Council Directive 96/97/EC of 20 December 1996(*Post-Barber Directive*) on equality between men and women in occupational social security schemes; and secondly

c) an amendment of Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex and in particular of its Article 2 paragraph 2 concerning the definition of indirect discrimination. This definition should be aligned with the latest definition retained in the recent Directive 2002/73/EC ( see Article 1 point 2).

### **Option 1- Advantages**

- Significant cleaning up of the texts, reduction of the number of Equality Directives and greater readability of the legal texts concerned.

- Member States are not required to amend their domestic legislation as the content of the Directives concerned by this re-grouping would remain unchanged.

-The Community acquis remains unchanged and adoption of Directives, at least as a) and b) are concerned (codification of Directives), will be done by simplified and accelerated procedure.

### **Option 1- Disadvantages**

- Just a simplification of the acquis communautaire in the field of the equal treatment legislation with no material development at this stage.

## **6.2. Option 2**

**This option consists of putting together all the Directives implementing the principle of equal pay between men and women within the meaning of Article 141 EC<sup>5</sup>, as well as the Directives on equal treatment between men and women relating to access to employment, vocational training and promotion, and working conditions<sup>6</sup> and the Directive on the burden of proof<sup>7</sup> .**

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<sup>5</sup> Directive 75/117/EEC, Directive 86/378/EEC as modified by Directive 96/97/EC

<sup>6</sup> Directive 76/207/EEC as amended by Directive 2002/73/EC

<sup>7</sup> Directive 97/80/EC

There is a strong commonality across these Directives in that they implement the principle of equal treatment in closely related fields of employment and occupation. They deal in particular with areas such as access to employment, vocational training and promotion, equal pay and working conditions, including effective measures to implement the principle of equal treatment. Thus these Directives could be considered together for inclusion in a recasting exercise under in principle the same legal base i.e Article 141(3) EC. A recasted text would bring together the provisions of the above Directives in a single text, by re-iterating common principles and merging common provisions to the extent possible (e.g. definitions, judicial protection, sanctions, equality bodies) and by grouping relevant provisions in separate chapters for each area (e.g. access to employment, equal pay, equal treatment, etc.). The original Directives would be abrogated and replaced by this new, single –recasted- Directive without any prejudice to the existing *acquis communautaire*, which should be maintained.

### **Possible impact of such an exercise:**

The impact of regrouping the provisions from these existing Directives into a new single text would include:

#### **Definitions**

The definitions contained in the recently adopted Directive 2002/73/EEC of direct and indirect discrimination, harassment and sexual harassment would apply generally.

#### **Equal pay**

The secondary legislation would be aligned with the concept of 'equal pay' as provided for in the Treaty and as interpreted by the European Court of Justice. Article 141 paragraph 1 EC provides for equal pay for male and female workers for equal work or work of equal value. According to paragraph 2 of this Article:

*"pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.*

*Equal pay without discrimination based on sex means:*

*(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*

*(b) that pay for work at time rates shall be the same for the same job"*

Secondary legislation concerning the application of the principle of equal treatment already covering 'pay' as a result of the amendments resulting from Directive 2002/73/EC, Directive 75/117/EEC on equal pay, however, does not yet reflect the present case law of the ECJ. The abrogation of Directive 75/117/EEC and its replacement by a new, single recasted Directive would clarify the contents of the principle of equal pay, since the new Directive would fully reflect the interpretation of pay provided for by the Treaty and its interpretation by the ECJ.

#### **Occupational social security schemes**

Incorporating the provisions of Directive 86/378/EEC as amended by Directive 96/97/EC in the recasted text would furthermore clarify the implementation of the equal treatment principle without changing the current legal position, and would bring together all measures relating to equal pay in a single text.

It should be recalled, that the scope of pay has been clarified by numerous ECJ- rulings, in particular in relation to occupational schemes. In its judgment of 17 May 1990 (Case 262/88 Barber)<sup>8</sup> the Court confirmed its earlier case law (Case 170/84 Bilka), leaving no room for doubt: benefits and employee contributions under the terms of an occupational pension scheme fall within the concept of pay within the meaning of the former Article 119 (currently, with modification Article 141 EC) of the EC-Treaty concerning equal pay.

Discrimination between men and women in occupational social security schemes is therefore prohibited, not only when the age of entitlement to a pension is established, but also when an occupational pension is offered by way of compensation for dismissal on economic grounds (the facts of Case 262/88, Barber). By its subsequent judgments the Court clarified the application of the principle of equal pay in the area of occupational schemes, in particular which schemes fell within the concept of pay of the relevant article in the Treaty<sup>9</sup>. This case law was reflected in the additional Protocol annexed to the Maastricht Treaty which provides that *"For the purposes of Article 119, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990 (date of the Barber judgment), except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law"*.

In subsequent judgments the Court further clarified (cases *Beune*, *Evrenopoulos*, *Griesmar*, *Mouflin* and *Niemi*<sup>10</sup>) that civil service retirement schemes (public sector schemes) are also covered by the concept of pay in the meaning of the former Article 119 of the EC-Treaty when derived from the employment relationship. This is particularly relevant for retirement age and for survivor's benefits, and specific old age advantages granted to persons looking after their children. This latest Case-law could be also clearly reflected in the text of the new recasting Directive.

### **Burden of proof**

The most important, practical impact of the recasting exercise would be the abrogation of definition of indirect discrimination in Article 2 paragraph 2 of Directive 97/80/EC in order to align with the definition contained in Directive 2002/73/EC.

### **Option 2- Advantages**

- This option concerns Directives which are strictly linked by their subject and could be recasted under the same legal base
- Moreover, this would lead to a clear complete and precise text on the principle of equal treatment including equal pay which reflects and integrates the Case law of the Court.

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<sup>8</sup> ECR 1990, p.I 1889.

<sup>9</sup> Judgments of the Court of 6<sup>th</sup> October 1993, C-109/91 Ten Oever, ecr 1993 p. I-4879, of 14<sup>th</sup> December 1993, C-110/91 Moroni, ECR I-6591 of 22<sup>nd</sup> December 1993, C-152/91 Neath, ECR I-6953, or 8<sup>th</sup> September 1994, C-200/91 Coloroll, ECR 1994 p. I-4389. Judgments of 28<sup>th</sup> September 1994, C-57/93 Vroege ECR 1994 p.I-541 and C-128-93 Fisscher ECR 1994, P.I-4583 and judgments of 11<sup>th</sup> December 1997, C-246/96 Magorrian ECR 1997 p. I-07153 and of 16<sup>th</sup> May 2000 in case C-78/98 Preston ECR 2000 p. I-03201.

<sup>10</sup> Judgments of the Court of 28<sup>th</sup> September 1994. Case C-7/93 Beune, ECR 1994 page I-447 or 17<sup>th</sup> April in case 147/95 Evrenopoulos ECR p. I-02057 of 29<sup>th</sup> November 2001, case C-366/99 Griesmar ECR p. I-09383, of 13<sup>th</sup> December 2001 case C-206/00. ECR 2001 I-0201 Henri Mouflin and more recently in judgment of 12<sup>th</sup> September 2002 in C-351/00 Niemi ECR 2002 p. I-07007.

- Further, an updated and modernised text would reassure the public that Community legislation is attuned to the real problems posed and guarantee legal certainty and clarity by avoiding more than one piece of legislation.

### **Option 2– Disadvantages**

- This exercise would not cover all the existing acquis in the area of equal treatment between men and women and therefore would not achieve total simplification as a number of separate pieces of legislation would remain.

## **6.3 Option 3**

**A third option could be to combine option two<sup>11</sup> together with the provisions of the maternity Directive<sup>12</sup> which do not exclusively relate to health and safety aspects but also concern employment conditions.**

Indeed, on closer examination, it appears that some provisions of the maternity Directive, such as Articles 7, 9, 10, 11 and 12, do not exclusively concern health and safety issues at work of pregnant workers but also relate to employment rights of pregnant workers and workers who have recently given birth or are breastfeeding. The maintenance of those rights linked to the employment contract for maternity reasons, including the prohibition of dismissal and maintenance of payment and/or entitlement to an adequate allowance are employment conditions specifically granted to workers during and after maternity leave, and could therefore be treated in the same text as all other provisions related to employment and occupation (i.e. the envisaged result of option 2).

Consequently, the relevant original provisions in Directive 92/85/EEC would have to be abrogated or to be modified or restricted to matters related to health and safety.

### **Option 3 – Advantages**

- all employment and occupation conditions would be treated in a single text.
- the specific protection of workers for maternity reasons would be considered as a specific treatment of a specific category of workers in a specific situation
- clarification of the link between Directive 92/85/EEC and 76/207/EEC as amended by Directive 2002/73/EC.

### **Option 3 – Disadvantages**

- some articles provided in Directive 92/85/EEC are interrelated to each other, therefore, the "extraction" of a number of provisions from Directive 92/85/CEE could lead to certain technical difficulties. For instance, Article 11 of the Directive 92/85/EEC explicitly refers to articles 5, 6 and 7 of the same Directive for the sake of its meaning.

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<sup>11</sup> i.e. the recasting of Directives 75/117/EEC, 76/207/EEC as amended by 2002/73/EC, 86/378/EEC as amended by 96/97/EC, and 97/80/EC.

<sup>12</sup> Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

## **7. LEGISLATION WHICH WOULD NOT BE INCLUDED**

### **a) *Maternity Leave***

The legislation on equal treatment between men and women consists of several Directives. Most share the common purpose of equal treatment between men and women in matters of employment and occupation. However, Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding deals not only with discrimination at the work place but also with the protection of health and safety at the work place for this specific category of workers. Directive 92/85/EEC is an individual Directive within the meaning of Article 16 paragraph 1 of Directive 89/391/EEC (the framework Directive on health and safety at the workplace) based on the former Article 118A of the EC-Treaty. Thus it is proposed not to include in the current recasting exercise any provision contained in Directive 92/85/EEC insofar it concerns issues exclusively related to health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding.

### **b) *Parental Leave***

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

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

### **c) *Equal treatment for self-employed and their assisting spouses***

Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood<sup>13</sup> concerns a specific category of persons and therefore would require a more specific approach.

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

Bearing in mind the rather limited practical impact of this Directive the Commission will further consider and reflect on it in the future.

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<sup>13</sup> *Official Journal L 359 19.12.86 p.56,*

#### **d) Equal treatment in statutory social security schemes**

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

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## ANNEX I

### *List of Directives concerned*

1. Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women , *Official Journal L 045 19.02.75 p.19*  
Legal base : ex-Article 100 EC-Treaty
2. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Official Journal L 039 14.02.76 p.40*  
Legal base: ex-Article 235 EC-Treaty
3. Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions  
*Official Journal L 269 , 05/10/2002 P. 0015 – 0020*  
Legal base : Article 141(3) EC
4. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security  
*Official Journal L 006 10.01.79 p.24*  
Legal base : ex-Article 235 EC-Treaty
5. 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  
*Official Journal L 225 12.08.86 p.40*  
Legal base: ex-Articles 100 and 235 EC-Treaty
6. Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes  
*Official Journal L046 12.02.97 p.11*  
Legal base : ex-Article 100 EC-Treaty
7. Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood  
*Official Journal L 359 19.12.86 p.56*  
Legal base: ex-Articles 100 and 235 EC-Treaty
8. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)  
*Official Journal L 348 28.11.92 p.1*  
Legal base : ex-Article 118 A EC-Treaty

9. Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC  
*Official Journal L 145 , 19/06/1996 p. 4 - 9.*  
Legal base : Agreement on social policy, annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 4 (2) thereof.
10. Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (*OJ L 010 16.01.98 p.24*)  
Legal base : ex-Article 100 EC-Treaty
11. Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex  
*Official Journal L 014 20.01.98 p.6*  
Legal base : Agreement on social policy, annexed to the Protocol (No 14) on social policy, annexed to the Treaty establishing the European Community, and in particular Article 2 (2) thereof
12. Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland,  
*Official Journal L 205 22.07.98 p.66*  
Legal base : ex-Article 100 EC-Treaty

*ANNEX II*

Title	Modification / Amendment	Content	Comments
<p>Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the <u>application of the principle of equal pay for men and women</u> <i>Official Journal L 045 19.02.75 p.19 ,</i></p>		<p>This Directive clarifies the scope of Article 141 (ex Article 119) of the Treaty by eliminating any direct or indirect discrimination on the basis of sex in all aspects of equal pay. It introduced the notion of equal pay for equal work or work for <i>equal value</i> which is now in the Treaty. It specifically mentions that, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and be drawn up so as to exclude any discrimination on the basis of sex</p>	<p>It is important to note that since the 8 of April 1976 (date of the Defrenne II judgment),<sup>1</sup> the European Court of Justice declared that Article 119 (new Article 141) on equal pay is a provision of <u>direct</u> effect</p>
<p>Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of <u>equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions</u> <i>Official Journal L 039 14.02.76 p.40</i></p>	<p>Amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 <i>Official Journal L 269 , 05/10/2002 P. 0015 – 0020</i></p>	<p>This Directive is the basic Directive in the area of employment and occupation and aims, according to its article 1 paragraph 1, to put into effect the principle of equal treatment for men and women as regards access to employment, including promotion and to vocational training, and as regards the working conditions and, on the conditions referred to in paragraph 2, social security (for which according to paragraph 2 the Council will adopt provisions defining its substance, its scope and the arrangements for its application).</p> <p>According to this Directive the principle of equal treatment shall mean that there shall be no discrimination whatsoever on ground of sex either directly or indirectly by reference in particular to marital or family status.</p> <p>The Directive contains in article 2 paragraphs 2, 3 and 4, derogations to the principle of equal treatment</p>	<p>The recent modification by Directive 2002/73/EC reflects the case law of the ECJ, and takes into account the new provisions of the Treaty as well as the provisions of similar legislation adopted on the basis of Article 13 EC.</p> <p>The recent amendments introduce inter alia definitions of direct indirect discrimination, harassment and sexual harassment and preventive measures against these situations, equality bodies, equality plans at company level, and reinforces the legal protection against victims of discrimination.</p>

<sup>1</sup> Judgement of 8 April 1976. Case C-43/75 , ECR. 1976 P.455

		(respectively access to specific activities, protection of pregnancy and maternity, and measures to promote equal opportunities), which have been interpreted by the Court of justice very strictly.	
Council Directive 97/80/EC of 15 December 1997 on the <u>burden of proof in cases 66) of discrimination based on sex</u> Official Journal L 014 20.01.98 p.6 ,	Amended by Directive 98/52/EC (Official Journal L 205 22.07.98 p.), amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC.	<p>This Directive adopted on the basis of the Agreement on Social policy annexed to the Protocol on Social policy annexed to the EC Treaty aims to make more effective the measures taken by Member States in order to enable all persons who consider them selves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other bodies.</p> <p>This Directive by taking into account the Case law of the Court<sup>7</sup> defines indirect discrimination (on the basis of a statistical element) i.e."where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."</p> <p>The Directive establishes that before a court or other competent authority it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.</p> <p>The Directive according to its Article 3(1)a) shall apply to the situations covered by Article 119 (new 141) of the Treaty, and by Directives 75/117/EEC<sup>7</sup>76/207/EEC, and insofar as discrimination based on sex is concerned , 92/85/EEC and 96/34/EC.</p>	The adoption of Directive 2002/73/EC amending Directive 76/207/EEC introduced a new definition of indirect discrimination without the statistical element in the text in accordance with the definition of Directives adopted on the basis of Article 13 EC. There was a specific request of Member States to the Commission to propose a modified proposal of Directive 97/80/EC in order to adapt its definition on indirect discrimination. A declaration on this subject of the Commission was included in the minutes of the Council of Social affairs of June 2001.
Council Directive 79/7/EEC of 19		Th aim of this Directive is the progressive implementation of the	The Court has interpreted the derogations to the principle of

<sup>7</sup> Judgement of 27 October 1993 in C-127/92 Enderby, ECR 1993 p. I-5535, see also judgement of 17 October 1989 in C-109/88 Danfoss , ECR 1989 p.3199.w

<p>December 1978 on the progressive implementation of the <u>principle of equal treatment for men and women in matters of social security</u> <i>Official Journal L 006 10.01.79 p.24 ,</i></p>		<p>principle of equal treatment in the social security field and other elements of social protection by eliminating discrimination on grounds of sex by reference in particular to marital or family status. It concerns the statutory schemes of social security and social assistance schemes insofar as benefits under these schemes supplement or replace benefits payable under social security schemes. The Directive excludes from its scope survivor's benefits and family benefits and Member States are authorised to exclude from its scope some areas: the most known being the retirement age and advantages in respect of old age pension schemes granted to persons who have brought up children.</p>	<p>equal treatment very strictly and considered that the specific schemes of the public sector<sup>2</sup> should not be included in the scope of this Directive but covered by Article EC (ex Article 119 EC-Treaty). Therefore the same treatment should be extended to men and women as far as retirement age and survivor's benefits are concerned.</p>
<p>Council Directive 86/378/EEC of 24 July 1986 on the implementation of the <u>principle of equal treatment for men and women in occupational social security schemes</u> <i>Official Journal L 225 12.08.86 p.40),</i></p>	<p>Amended by Council Directive 96/97/EC of 20 December 1996 <i>Official Journal L046 12.02.97 p.11</i></p>	<p>The aim of this Directive is to implement the principle of equal treatment between men and women in occupational social security schemes.</p> <p>This Directive contained derogations to the principle of equal treatment under its Article 9 relating to</p> <ul style="list-style-type: none"> <li>➤ retirement age,</li> <li>➤ survivor's benefits</li> </ul> <p>and under its Article 6 permitted different actuarial calculations for men and women in funded schemes (based on capitalisation) in order to take into account the long life expectancy of women.</p> <p>These derogations became obsolete after the judgment of the Court of 17 May 1990 in C-282/88 Barber<sup>3</sup>.</p>	<p>It is important to note that the right to join an occupational pension scheme according to Directive 96/97/EC and the case law of the ECJ IS NOT SUBJECT to the time limits of the additional Protocol to the former Article 119 of the EC-Treaty, and theoretically employees could claim their affiliation since the 8 April 1976, date that ex-Article 119 EC-Treaty (currently, with modification, Article 141 EC) was declared of direct application.<sup>5</sup></p> <p>Moreover, the derogations to the principle of equal treatment are still valid for occupational social security</p>

<sup>2</sup> *Judgements of the Court of 28 September 1994. Case C-7/93 Beune, ECR 1994 page I-447, of 17 April 1997 in Case 147/95 Evrenopoulos ECR p. I-02057 of 29 November 2001, Case C-366/99 Griesmar ECR p. I-09383, of 13 December 2001 Case C-206/00. ECR 2001 I-10201. Henri Mouflin and more recently in judgement of 12 September 2002 in C-351/00 Niemi* <sup>E CR 2002 p. I-07007</sup>

<sup>3</sup> ECR 1990, p. I 1889.

		<p>In this judgment and the subsequent interpreting judgments the Court held that benefits and contributions under these schemes should be considered as pay within the meaning of Article 119 of the Treaty. The Court however considered that contributions of employers should not be considered as pay within the meaning of this Article<sup>4</sup>.</p> <p>Moreover, the Court held that the direct effect of Article 119 of the treaty may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May1990, except in the case of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law.</p> <p>This Case law of the Court is reflected in Directive 96/97/EC, which is of purely declaratory nature in the sence that it reflects the Case-law of the Court and aims to ensure legal certainty and clarity. This is also reflected in the additional Protocol to article 141( ex 119) signed in Maastricht.</p>	<p>schemes of self-employed persons which are not affected by the Case law in Barber and the subsequent judgments.</p>
<p>Council Directive 86/613/EEC of 11 December 1986 on the application of the <u>principle of equal treatment between men and women engaged in an activity, including</u></p>		<p>The aim of this Directive is to eliminate discrimination for self-employed persons including in agriculture and to protect self-employed women during pregnancy and motherhood. It concerns principally assisting spouses</p>	<p>This Directive has a rather limited practical impact. Several of its provision are currently also covered by the recent Directive 2002/73/EC modifying Directive 76/207/EEC, in particular the aspects relating to employment and working conditions, since the recent</p>

<sup>4</sup> Judgement of 28 September 1994, C-200/91 Coloroll, ECR 1994 p..I - 4389

<sup>5</sup> Judgements of 28 september 1994, C-57/93 Vroege ECR 1994 p.I-4541 and C-128-93 Fisscher ECR 1994 P. I-4583 and judgements of 11 December 1997,C-246/96 Magorrian ECR 1997 p. I-07153 and of 16th May 2000 in case C-78/98 Preston ECR. 2000 p. I-03201

<p><u>agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood</u> <i>Official Journal L 359 19.12.86 p.56</i></p>			<p>amendments apply also for acces to employment to self-employed persons (Article 1 point 3).</p>
<p>Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the <u>safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding</u> (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) <i>Official Journal L 348 28.11.92 p.1</i></p>		<p>The aim of this Directive is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. The Directive establishes minimum standards and inter alia according to its Article 8 provides for a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.</p>	<p>This Directive is a specific, individual Directive of the framework Directive 89/391/EEC on health and safety at work, but according to the case law of the ECJ<sup>6</sup> its interpretation (at least as far as working conditions are concerned) takes place in the light of Directive 76/207/EEC (as amended by Directive 2002/73/EC).</p> <p>Following the Commission's first implementation report (1999) the European Parliament insisted in 2000 that the Commission explores on the basis of the possibilities offered by the new Treaty, the question of a possible revision of Directive 92/85/EEC.</p> <p>It is important to note that some of the concerns of the EP have been met in Directive 2002/73/EC modifying Directive 76/207/EEC which integrates the Case law on pregnancy and maternity.</p>

<sup>6</sup> Case C-411/96, judgment 27 October 1998.

<p>Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC <i>Official Journal L 145, 19/06/1996 p. 4 – 9.</i></p>	<p>Amended by Directive 97/75/EC (<i>OJ L 010 16.01.98 p.24</i>) of 15 December 1997, <i>amending and extending , to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC.</i></p>	<p>The purpose of this Directive is to put into effect the first framework agreement of social partners(ETUC,UNICE,CEEP) concluded at European level under the Agreement on social policy annexed to the Protocol on social Policy of the Maastricht Treaty. The agreement of Social partners lays down minimum requirements designated to facilitate the reconciliation of parental and professional responsibilities for working parents. It provides inter alia for an individual , in principle non transferable right to parental leave on the grounds of the birth or adoption of a child, for at least three months until a given age up to 8 years to be defined by Member States and/or management and labour.</p>	<p>This framework agreement constitutes a landmark for European labour law and industrial relations. It implements the first agreement concluded by the Social Partners under the Agreement on Social Policy.</p> <p>The legal base for this Directive was the Agreement on social policy, annexed to Protocol n°14 on social policy, annexed to the Maastricht Treaty (in particular Article 4, paragraph 2 thereof (which has now become Article 139 EC).</p>