

**DIRECTIVE 2002/73/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 23 September 2002**

**amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment
for men and women as regards access to employment, vocational training and promotion, and
working conditions**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and, in particular, Article 141(3) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the Opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾, in the light of the joint text approved by the Conciliation Committee on 19 April 2002,

Whereas:

- (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
- (2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.
- (3) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (4) Equality between women and men is a fundamental principle, under Article 2 and Article 3(2) of the EC Treaty and the case-law of the Court of Justice. These

Treaty provisions proclaim equality between women and men as a 'task' and an 'aim' of the Community and impose a positive obligation to 'promote' it in all its activities.

- (5) Article 141 of the Treaty, and in particular paragraph 3, addresses specifically equal opportunities and equal treatment of men and women in matters of employment and occupation.
- (6) Council Directive 76/207/EEC ⁽⁴⁾ does not define the concepts of direct or indirect discrimination. On the basis of Article 13 of the Treaty, the Council has adopted Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ⁽⁵⁾ and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ⁽⁶⁾ which define direct and indirect discrimination. Thus it is appropriate to insert definitions consistent with these Directives in respect of sex.
- (7) This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests. Measures within the meaning of Article 141(4) of the Treaty may include membership or the continuation of the activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment between women and men.
- (8) Harassment related to the sex of a person and sexual harassment are contrary to the principle of equal treatment between women and men; it is therefore appropriate to define such concepts and to prohibit such forms of discrimination. To this end it must be emphasised that these forms of discrimination occur not only in the workplace, but also in the context of access to employment and vocational training, during employment and occupation.
- (9) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of sexual discrimination and, in

⁽¹⁾ OJ C 337 E, 28.11.2000, p. 204 and OJ C 270 E, 25.9.2001, p. 9.

⁽²⁾ OJ C 123, 25.4.2001, p. 81.

⁽³⁾ Opinion of the European Parliament of 31 May 2001 (OJ C 47, 21.2.2002, p. 19), Council Common Position of 23 July 2001 (OJ C 307, 31.10.2001, p. 5) and Decision of the European Parliament of 24 October 2001 (OJ C 112 E, 9.5.2002, p. 14). Decision of the European Parliament of 12 June 2002 and Council Decision of 13 June 2002.

⁽⁴⁾ OJ L 39, 14.2.1976, p. 40.

⁽⁵⁾ OJ L 180, 19.7.2000, p. 22.

⁽⁶⁾ OJ L 303, 2.12.2000, p. 16.

particular, to take preventive measures against harassment and sexual harassment in the workplace, in accordance with national legislation and practice.

- (10) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence. According to the case-law of the Court of Justice ⁽¹⁾, discrimination involves the application of different rules to a comparable situation or the application of the same rule to different situations.
- (11) The occupational activities that Member States may exclude from the scope of Directive 76/207/EEC should be restricted to those which necessitate the employment of a person of one sex by reason of the nature of the particular occupational activities concerned, provided that the objective sought is legitimate, and subject to the principle of proportionality as laid down by the case-law of the Court of Justice ⁽²⁾.
- (12) The Court of Justice has consistently recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during and after pregnancy. It has moreover consistently ruled that any unfavourable treatment of women related to pregnancy or maternity constitutes direct sex discrimination. This Directive is therefore without prejudice to 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 ⁽³⁾ (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), which aims to ensure the protection of the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding. The preamble to Directive 92/85/EEC provides that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not involve treating women who are on the labour market unfavourably nor work to the detriment of Directives concerning equal treatment for men and women. The Court of Justice has recognised the protection of employment rights of women, in particular their right to return to the same or an equivalent job, with no less favourable working conditions, as well as to benefit from any improvement in working

conditions to which they would be entitled during their absence.

- (13) In the Resolution of the Council and of the Ministers for Employment and Social Policy meeting within the Council of 29 June 2000 on the balanced participation of women and men in family and working life ⁽⁴⁾, Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and untransferable right to paternity leave, while maintaining their rights relating to employment. In this context, it is important to stress that it is for the Member States to determine whether or not to grant such a right and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.
- (14) Member States may, under Article 141(4) of the Treaty, maintain or adopt 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. Given the current situation, and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.
- (15) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between women and men.
- (16) The principle of equal pay for men and women is already firmly established by Article 141 of the Treaty and 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 ⁽⁵⁾ and is consistently upheld by the case-law of the Court of Justice; the principle constitutes an essential and indispensable part of the *acquis communautaire* concerning sex discrimination.
- (17) The Court of Justice has ruled that, having regard to the fundamental nature of the right to effective judicial protection, employees enjoy such protection even after the employment relationship has ended ⁽⁶⁾. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.

⁽¹⁾ Case C-394/96 *Brown*, [1998] ECR I-4185, Case C-342/93 *Gillespie*, [1996] ECR I-475.

⁽²⁾ Case C-222/84 *Johnston*, [1986] ECR 1651, Case C-273/97 *Sirdar* [1999] ECR I-7403 and Case C-285/98 *Kreil* [2000] ECR I-69.

⁽³⁾ OJ L 348, 28.11.1992, p. 1.

⁽⁴⁾ OJ C 218, 31.7.2000, p. 5.

⁽⁵⁾ OJ L 45, 19.2.1975, p. 19.

⁽⁶⁾ Case C-185/97 *Coote* [1998] ECR I-5199.

- (18) The Court of Justice has ruled that, in order to be effective, the principle of equal treatment implies that, whenever it is breached, the compensation awarded to the employee discriminated against must be adequate in relation to the damage sustained. It has furthermore specified that fixing a prior upper limit may preclude effective compensation and that excluding an award of interest to compensate for the loss sustained is not allowed ⁽¹⁾.
- (19) According to the case-law of the Court of Justice, national rules relating to time limits for bringing actions are admissible provided that they are not less favourable than time limits for similar actions of a domestic nature and that they do not render the exercise of rights conferred by the Community law impossible in practice.
- (20) 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.
- (21) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination based on sex in the workplace and to combat them.
- (22) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under Directive 76/207/EEC.
- (23) In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary for that purpose.
- (24) Directive 76/207/EEC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 76/207/EEC is hereby amended as follows:

1. in Article 1, the following paragraph shall be inserted:
 - '1a. Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative

⁽¹⁾ Case C-180/95, Draehmpaehl, [1997] ECR I-2195, Case C-271/91, Marshall [1993] ECR I-4367.

provisions, policies and activities in the areas referred to in paragraph 1.;

2. Article 2 shall be replaced by the following:

'Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. For the purposes of this Directive, the following definitions shall apply:
 - direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,
 - indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,
 - harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,
 - sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

4. An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.

5. Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment at the workplace.

6. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

7. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.

This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (*) and of 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 (**). It is also without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

8. Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.

(*) OJ L 145, 19.6.1996, p. 4.

(**) OJ L 348, 28.11.1992, p. 1.;

3. Article 3 shall be replaced by the following:

'Article 3

1. Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals, as well as pay as provided for in Directive 75/117/EEC;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. To that end, Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations shall be, or may be declared, null and void or are amended.;

4. Articles 4 and 5 shall be deleted;

5. Article 6 shall be replaced by the following:

'Article 6

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

2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and 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 contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

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, either on behalf or in support of the complainants, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

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

6. Article 7 shall be replaced by the following:

'Article 7

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.';

7. the following Articles shall be inserted:

'Article 8a

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 charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 6(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
- (b) conducting independent surveys concerning discrimination;
- (c) publishing independent reports and making recommendations on any issue relating to such discrimination.

Article 8b

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between women and men and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in the workplace in a planned and systematic way.

4. To this end, employers should be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include statistics on proportions of men and women at different levels of the organisation and possible measures to improve the situation in cooperation with employees' representatives.

Article 8c

Member States shall encourage 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.

Article 8d

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, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 8e

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.'

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 5 October 2005 at the latest or shall ensure, by that date at the latest, that management and labour introduce the requisite provisions by way of agreement. Member States shall take all necessary steps to enable them at all times to guarantee the results imposed by this Directive. They shall immediately inform the Commission thereof.

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

2. The Member States shall communicate to the Commission, within three years of the entry into force of this Directive, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

3. Without prejudice to paragraph 2, Member States shall communicate to the Commission, every four years, the texts of laws, regulations and administrative provisions of any

measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 23 September 2002.

For the European Parliament

The President

P. COX

For the Council

The President

M. FISCHER BOEL
