

Procedure file

Basic information		
SYN - Cooperation procedure (historic)	1996/0196(SYN)	Procedure completed
Equality men-women, discrimination based on sex: burden of proof		
Subject 4.10.04 Gender equality		

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	FEMM Women's Rights		26/11/1996
		PSE GHILARDOTTI Fiorella	
	Former committee responsible		26/11/1996
	FEMM Women's Rights	PSE GHILARDOTTI Fiorella	
	Former committee for opinion		17/12/1996
ECON Economic and Monetary Affairs, Industrial Policy	PPE CASSIDY Bryan M.D.		
JURI Legal Affairs, Citizens' Rights		19/12/1996	
	PPE FONTAINE Nicole		
Council of the European Union	Council configuration	Meeting	Date
	Social Affairs	2060	15/12/1997
	Budget	2026	24/07/1997
	Social Affairs	2015	27/06/1997
	Social Affairs	1999	17/04/1997
	Social Affairs	1974	02/12/1996
	Social Affairs	1948	24/09/1996
	Social Affairs	1892	05/12/1995

Key events			
05/12/1995	Debate in Council	1892	
17/07/1996	Legislative proposal published	COM(1996)0340	Summary
24/09/1996	Debate in Council	1948	
23/10/1996	Committee referral announced in Parliament		
	Debate in Council		

02/12/1996		1974	
20/03/1997	Vote in committee		Summary
20/03/1997	Committee report tabled for plenary, 1st reading/single reading	A4-0115/1997	
09/04/1997	Debate in Parliament		Summary
10/04/1997	Decision by Parliament	T4-0168/1997	Summary
17/04/1997	Debate in Council	1999	
14/05/1997	Modified legislative proposal published	COM(1997)0202	Summary
10/07/1997	Council position published	09569/1997	Summary
18/09/1997	Committee referral announced in Parliament, 2nd reading		
20/10/1997	Vote in committee, 2nd reading		Summary
20/10/1997	Committee recommendation tabled for plenary, 2nd reading	A4-0326/1997	
05/11/1997	Debate in Parliament		Summary
06/11/1997	Decision by Parliament, 2nd reading	T4-0531/1997	Summary
15/12/1997	Act adopted by Council after consultation of Parliament		
15/12/1997	End of procedure in Parliament		
20/01/1998	Final act published in Official Journal		

Technical information

Procedure reference	1996/0196(SYN)
Procedure type	SYN - Cooperation procedure (historic)
Procedure subtype	Legislation
Legal basis	EC before Amsterdam E 002-p2
Stage reached in procedure	Procedure completed
Committee dossier	FEMM/4/09219

Documentation gateway

Legislative proposal	COM(1996)0340 OJ C 332 07.11.1996, p. 0011	17/07/1996	EC	Summary
Economic and Social Committee: opinion, report	CES0236/1997 OJ C 133 28.04.1997, p. 0034	26/02/1997	ESC	Summary
Committee report tabled for plenary, 1st reading/single reading	A4-0115/1997 OJ C 132 28.04.1997, p. 0007	20/03/1997	EP	
Text adopted by Parliament, 1st reading/single reading	T4-0168/1997 OJ C 132 28.04.1997, p. 0128-0215	10/04/1997	EP	Summary
Modified legislative proposal	COM(1997)0202 OJ C 185 18.06.1997, p. 0021	14/05/1997	EC	Summary

Council position	09569/1997 OJ C 307 08.10.1997, p. 0006	10/07/1997	CSL	Summary
Commission communication on Council's position	SEC(1997)1443	03/09/1997	EC	Summary
Committee recommendation tabled for plenary, 2nd reading	A4-0326/1997 OJ C 358 24.11.1997, p. 0003	20/10/1997	EP	
Text adopted by Parliament, 2nd reading	T4-0531/1997 OJ C 358 24.11.1997, p. 0011-0025	06/11/1997	EP	Summary

Final act

[Directive 1997/80](#)
[OJ L 014 20.01.1998, p. 0006](#) Summary

Equality men-women, discrimination based on sex: burden of proof

OBJECTIVE: The proposal for a Council directive seeks to adjust the balance of the burden of proof in favour of persons liable to suffer discrimination on the grounds of sex, in accordance with the case law of the Court of Justice. SUBSTANCE: The Commission proposes that the burden of proof be transferred to the defendant in cases where the plaintiff has established a fact or facts from which less favourable treatment amounting to apparent discrimination may be presumed to exist (cf. Royal Copenhagen judgment of 31 May 1995). The defendant must then prove that there has been no violation of the principle of equal treatment, particularly by proving that the difference of treatment is based on objectively justifiable reasons unconnected with sex (cf. Enderby judgment of 27 October 1993). Once the discrimination has prima facie been established, Member States are asked to place on the defendant the burden of providing conclusive proof that the difference of treatment was not illegal. This is done by according the defendant the benefit of the doubt concerning the exact interpretation of the facts. Since this is a directive establishing minimum requirements, the proposal authorises Member States which wish to do so to impose a complete reversal of the burden of proof. The Commission also included a definition of the principle of equal treatment, as 'the absence of any discrimination based on sex, either directly or indirectly, particularly by reference to marital or family status'. A definition is also proposed, for the first time, of the notion of indirect discrimination. Such discrimination is held to exist 'where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex, by reference in particular to marital or family status'. Finally, the proposal includes an information requirement, namely that measures taken pursuant to the directive must be brought to the attention of all relevant persons by all appropriate means, for example at their place of employment. ?

Equality men-women, discrimination based on sex: burden of proof

The Committee broadly welcomes the Commission initiative. It also shares the Commission's view that Community action is needed to uphold and enforce the principle of equal treatment. The Committee does not, however, agree with the Commission that the proposed arrangement will not impose any administrative constraints on the creation, maintenance and development of SMEs. It trusts that the Commission will take appropriate action to ensure that this fact is taken into consideration in its programmes designed to establish, maintain and promote SMEs. Although the Commission clearly states in the recitals to the draft directive that its intention in Article 4(1) is not to reverse the burden of proof, the actual wording of the directive does not wholly bear this out. The Committee proposes that, to make it easier for the principle of equal treatment to be enforced in law, a clear rule must be established that, as a matter of principle, the plaintiff continues to bear the burden of proof, but that it is enough for the plaintiff to make out a credible case for his or her claim that discrimination based on sex has taken place. This means that, unlike the situation in certain Member States, the courts need not have virtually watertight proof that sex discrimination has taken place - which in practice would make it inordinately difficult to take proceedings in these cases. Rather, there need only be overwhelming probability, in the light of all the facts of the case. In other words, sex discrimination may be deemed to have occurred where there are well-founded indications that a person has been treated improperly. This removes the plaintiff's difficulty in having to supply absolute proof of discrimination before the courts. In each case, therefore, it is up to the courts in each individual Member State, acting in line with national provisions, to pass judgement on the claims made. The Economic and Social Committee feels this to be a balanced arrangement - particularly since it makes it easier for the plaintiff to furnish proof while at the same time clearly giving the defending employer the opportunity to demonstrate that there has been no discrimination on the grounds of sex. ?

Equality men-women, discrimination based on sex: burden of proof

By approving the report by Fiorella GHILDOTTI (PES, I) amending the proposal for a directive on the burden of proof in cases of sex discrimination, the Committee hopes to reduce the number of infringements of the principle of equal treatment.

Equality men-women, discrimination based on sex: burden of proof

The key amendments cited by the rapporteur included the amendment to Article 2, which introduced for the first time the definition of indirect discrimination in accordance with the Court of Justice's Bilka judgment (Case 170/84 [1986] ECR I 1607), and the amendments to Article 4 which highlighted one of the fundamental elements in shifting the burden of proof, namely transparency, and which referred to the Danfoss?

judgment (Case 109/88 [1989] ECR I-3199). Commissioner Flynn said that the Commission was prepared to accept most of the amendments, particularly those updating the text of the base proposal, those strengthening the definition of indirect discrimination, those on the implementation date (1 January 2000 instead of 1 January 2001) and the principle of a final report on the application of the directive.

Equality men-women, discrimination based on sex: burden of proof

In adopting the report by Mrs Ghilardotti (PSE, I), the European Parliament approved the proposal for a Council Directive on the burden of proof in cases of discrimination based on sex. The proposal, adopted under the Social Protocol procedure (i.e. by 14 Member States) includes the following amendments: - tightening the definition of 'indirect discrimination' so that it is applied uniformly in all Member States. Thus 'indirect discrimination' exists where 'an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex...unless the aim pursued corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State, in itself completely unrelated to gender' - provision on the sharing of the burden of proof: persons who consider themselves wronged by failure to apply to them the principle of equal treatment must establish facts from which direct or indirect discrimination may be presumed to exist; it shall be for the respondent to prove that there has been no contravention of the principle of equal treatment; - greater transparency of procedures: persons wishing to establish a case for the presumption of discrimination must have access to all the necessary information on which to base their case; - provision for follow-up to the directive: the Commission must inform the Council and Parliament of the progress made in the application of the directive on the basis of information provided by the Member States with effect from 1 January 2002 and thereafter every three years; - provision for the directive to be transposed into Member States' law at an earlier date (1 January 2000 instead of 1 January 2001). At the same time Parliament calls for the Directive not to prevent the maintenance or adoption of measures to protect women, particularly as regards pregnancy, maternity, childbirth and breast-feeding, or those providing for specific advantages in order to make it easier for women to pursue a vocational activity. Moreover, the directive must on no account be used to justify a failure by the Member States to take positive action. ?

Equality men-women, discrimination based on sex: burden of proof

In its amended proposal, the European Commission took over 12 of the 20 amendments adopted by Parliament at its first reading. These amendments were aimed mainly at strengthening the main provisions of its original proposal in terms of: - the definition of the concept of 'indirect discrimination': the criteria which determined whether or not indirect discrimination existed were defined more clearly; - the scope of the Directive: the amended proposal updated the original proposal and took into account Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC; - the adjustment of the burden of proof: the amended proposal made more apparent the link with the concept of indirect discrimination and the circumstances in which an adjustment of the burden of proof can occur. The amended proposal also highlighted those elements aimed at safeguarding the level of protection in Member States where a higher level of protection in this field was provided for: the Directive should under no circumstances be sufficient ground for justifying an absence of positive action measures on the part of the Member States. The amended proposal also took over Parliament's amendments seeking to shorten the time-limit for the implementation of this Directive: 1 January 2000 instead of 1 January 2001. It also included the amendment on the drawing-up of a report on the application of the Directive after it was implemented. ?

Equality men-women, discrimination based on sex: burden of proof

The Council's common position differed significantly from the Commission's proposal and took over only a few of the amendment adopted by the European Parliament at first reading. The main amendments adopted by the Council related to the following points: - the need to take account of the specific features of some of the Member States' legal systems in connection with the burden of proof: the Council provided a derogation from the principle laid down in the directive on the burden on proof because of administrative procedures linked to the legal systems in certain Member States. This derogation was aimed mainly at satisfying the British delegation, which, since the conclusion of the Treaty of Amsterdam, was able to take part in discussions on social policy with due regard for the provisions of the Social Protocol; - the definition of 'indirect discrimination': the Council's definition differed from that proposed by the Commission and therefore from that used by the Court in its judgments on equal treatment. However, the Council did refer in its definition to an 'apparently neutral criterion or practice' which affected 'a substantially higher proportion of the members of one sex'. Similarly, the Council was less precise than the Commission in its definition of the 'facts' which defined the existence of discrimination; - the reference to marital or family status: the Council deleted all references to marital status or family circumstances as a basis for discrimination; - the scope (reference to specific directives): like the European Parliament, the Council added the reference to the Directive on parental leave, but it excluded all references to Directives 79/7/EEC, 86/378/EEC and 86/613/EEC on social security. Moreover, it limited references to Directives 92/85/EEC and 96/24/EC on pregnant women and parental leave in cases of discrimination based on sex. Similarly, the Council did not agree with the Commission's suggestion seeking the inclusion of situations covered by any measures adopted in future; - the benefit of the doubt: the Council did not specify that the plaintiff would benefit from any doubt that might subsist (as specified in the original proposal); - the procedures: the Council deleted the Commission's article on information to the parties to a dispute; - reference to positive action: the Council did not include the specific reference to the measures for positive action referred to in the Commission's amended proposal; - date of implementation: the time limit suggested by the European Parliament for the implementation of the directive in Member States (1 January 2000) was not approved by the Council. It decided instead to retain the initial date suggested by the Commission (1 January 2001); - report on implementation: the Council took over the European Parliament's amendment on the drawing-up of a report on the application of the directive two years after its implementation. However, it did not deem it necessary to repeat this exercise every three years. As regards Parliament's amendments, the Council only took over those concerning parental leave and the report on implementation. Finally, the Council called for the report on implementation to also consider the question of the scope of the directive, particularly as regards the application of the principle of non-discrimination in Community social legislation. ?

Equality men-women, discrimination based on sex: burden of proof

In its assessment of the Council's common position on the directive concerning the burden of proof in cases of discrimination based on sex, the Commission stated that it had reservations on the following two points: (1) the definition of indirect discrimination: the common position used a definition which did not take into consideration all the elements of the rulings of the European Court of Justice. The definition set out in the Commission's original proposal contained all the elements which had consistently recurred in the judgments of the Court. The Commission regarded it as difficult to accept only some of these elements, each of them being justified by the inclusion of the others. It believed that it was the way in which they tied in with each other that gave the definition its coherence. Consequently, the Commission expressed a reservation as regards the Council's definition; (2) the scope of the directive: the Council had refused to extend the scope of this directive to cover the directives applying the principle of equal treatment in connection with social security schemes. The Commission had difficulties in accepting this approach. The shifting of the burden of proof was justified, according to the rulings of the Court, where it was necessary in order not to deprive workers who had been discriminated against of the means effectively to enforce the principle of equal treatment. The Commission considered that the principle laid down by the Court was a general one which should be applied in all directives aimed at upholding the principle of equal treatment between the sexes. The Commission regretted, moreover, the fact that the Council had only taken over a small number of the amendments adopted by the European Parliament, at first reading. ?

Equality men-women, discrimination based on sex: burden of proof

In its common position, the Council adopted in full only two of the European Parliament's first-reading amendments and made major changes to the Commission proposal. Mrs Fiorella Ghilardotti (PSE, I), rapporteur on the burden of proof in cases of discrimination based on sex, proposes ten amendments for second reading concerning aspects of the proposal which she regards as fundamental. Bearing in mind the scope of the Directive, she reintroduces the reference to three directives on equal treatment: Directives 79/7/EEC (social security), 86/378/EEC (occupational social security schemes) and 86/613/EEC (self-employed workers). The rapporteur suggests a new, clearer definition of 'indirect discrimination' which also takes account of the points made by the Court. On the burden of proof, she calls for Article 4(1) to state that the plaintiff should benefit from any doubt that might remain. Finally, concerning procedure, she proposes an Article 4a to ensure that Member States include in their own legal systems procedures to make the legislation effective and to provide a more level playing field between plaintiff and defendant in terms of access to information. The rapporteur also calls for the deletion of Recitals 15 and 16, which she believes leave too much leeway for Member States to do nothing to bring about a shift in the burden of proof. ?

Equality men-women, discrimination based on sex: burden of proof

The rapporteur was delighted that the United Kingdom had decided to participate in the directive on the reversal of the burden of proof in cases of sexual discrimination. Regretting that the Council had not taken over Parliament's amendments, Mrs Ghilardotti had decided to re-table at second reading those amendments which she regarded as fundamental. Commissioner Flynn criticised the Council's position with regard to defining the concept of discrimination. The four elements cited by the Court of Justice and included in the base proposal had not been fully taken over in the common position. As regards the scope of the directive, he considered that shifting the burden of proof was a general principle which should be applied to all social legislation. The Commissioner said that the Commission could accept the amendments which strengthened the central provisions of the common position, namely Amendments Nos 1, 2, 5, 6 and 8. However, he rejected Amendments Nos 3, 4, 7, 9 and 10 and also Amendments Nos 11 and 12, which contradicted Amendments Nos 1 and 6.

Equality men-women, discrimination based on sex: burden of proof

In adopting the recommendation for second reading by Mrs Fiorella GHILARDOTTI (PSE, I), the European Parliament approved the Council's common position on the burden of proof in cases of discrimination based on sex, tabling again some of the amendments adopted at first reading relating to: - the reference to three directives on equal treatment, namely Directives 79/7/EEC (social security), 86/378/EEC (occupational social security schemes) and 86/613/EEC (self-employed workers); - the definition of indirect discrimination: Parliament proposed a new wording of this definition which took account of the points highlighted by the Court; - the procedure: Parliament proposed that the Member States should include in their own legal systems procedures to make the legislation effective and to provide a more level playing field between plaintiff and defendant in terms of access to information. Finally, Parliament called on the Member States to inform the Commission of the progress made in implementing the directive by 1 January 2002 and then every three years. ?

Equality men-women, discrimination based on sex: burden of proof

OBJECTIVE: the directive aims to reverse the burden of proof in cases of discrimination based on sex, which means that where discrimination is alleged, it would be the responsibility of the employer to prove otherwise. **COMMUNITY MEASURE:** Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex. **CONTENT:** the directive aims to improve the efficiency of national measures that allow persons who consider themselves wronged by failure to apply to them the principle of equal treatment to have their rights asserted by judicial process. In applying the principles established by the courts, consideration is to be given to the specific nature of the legal systems in each of the Member States. The directive applies to both direct and indirect discrimination. For the purposes of applying the directive, indirect discrimination is deemed to have occurred 'where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex unless that provision, criterion or practice is appropriate or necessary and can be justified by objective factors unrelated to sex'. The directive applies in particular: 1) to situations covered by Article 119 of the Treaty establishing the European Communities and by the directives on equal pay and access to employment (Directives 75/117/EEC and 76/207/EEC) and, insofar as discrimination based on sex is concerned, by the directives on the health and safety of pregnant workers (92/85/EEC) and parental leave (96/34/EC); 2) in the context of any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in point 1. As regards the burden of proof, the directive establishes the following system: 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 (in other words, the employer) to prove that there has been no breach of the principle of equal treatment. However, provision is made for the

Member States to be exempt, in some cases, from having to comply with this principle due to administrative procedures linked to their internal legal systems. Implementation of this directive shall under no circumstances be sufficient grounds for a reduction in the general level of protection of workers in the areas to which it applies. A report is to be drawn up by the Commission on the application of this directive two years after its implementation and forwarded to the European Parliament and to the Council. ENTRY INTO FORCE: The Member States must adopt the measures necessary for them to comply with this directive by 1 January 2001. ?