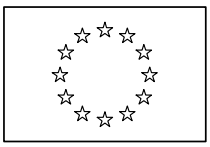

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.8.2005
COM(2005) 380 final

2004/0084 (COD)

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast version)

(presented by the Commission pursuant to Article 250 (2) of the EC Treaty

2004/0084 (COD)

Amended proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast version)

1. BACKGROUND

The Commission adopted, on 21 April 2004, a proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal treatment of men and women in matters of employment and occupation (recast version)[1]. The specific legal base is Article 141(3) EC requiring the co-decision procedure.

The objective of the proposal is to contribute to legal certainty and clarity in the implementation of the principle of equal treatment between men and women in the area of employment and occupation, by bringing together in a single text the main provisions existing in this field, as well as certain developments arising out of well-settled case-law of the European Court of Justice.

This simplification and streamlining of the Community acquis will facilitate the accessibility and readability of Community legislation both for legal practitioners and the general public and is, as such, an important step in the work on better regulation.

The proposal merges the following six existing Directives on equal treatment of men and women in the field of employment into one single coherent instrument:

- Directive 75/117 on equal pay;
- Directive 76/207 as amended by Directive 2002/73 on equal treatment as regards access to employment, vocational training and promotion, and working conditions;
- Directive 86/378 as amended by Directive 96/97 on equal treatment in occupational security schemes;
- Directive 97/80 on the burden of proof in cases of discrimination based on sex.

The proposal is not simply an exercise of consolidation. Some substantive amendments have been introduced. These changes constitute a cautious approach to updating and modernising Community law. For example, the text incorporates some well-established case law of the European Court of Justice with a view to clarifying

[1] COM (2004) 279 final.

key concepts of equal treatment law. Furthermore, the scope of some horizontal provisions contained in the most recent Directives – for example on the burden of proof – has been explicitly made applicable to the area of occupational social security schemes. In practice, the jurisprudence of the Court has already extended these provisions to the principal features of occupational schemes. The principal value of the proposal in that respect is thus to clarify the legal situation.

At its December 2004 session, the European Economic and Social Committee issued its Opinion on the proposal[2]. At its plenary session of 6 July 2005, the European Parliament adopted 98 amendments to the Commission's proposal (the numbers of the amendments extend to 108 but ten amendments within that range were withdrawn, superseded by other amendments or rejected by the European Parliament).

2. EXAMINATION OF THE AMENDMENTS

The Commission accepts entirely, subject to reformulations or in spirit the amendments 1, 2, 4, 6, 8, 9, 11, 14 - 23, 25 - 28, 31 - 35, 37 - 43, 45, 47 - 52, 54, 55 - 62, 64 - 66, 68 - 70, 74, 75, 77 - 80, 82, 83, 85, 87, 88 - 93, 101 and 106 - 108.

The Commission accepts in part amendments 5, 24, 71 - 73, 76, 81, 84 and 102 - 105.

It cannot accept amendments 3, 12, 13, 29, 30, 36, 53, 63, 67, 86 and 100.

2.1. Amendments accepted or accepted in spirit by the Commission

2.1.1 Amendments 27, 28, 33, 37, 39, 41 - 43, 48 - 52, 57 - 60, 62, 64 - 66, 68, 74, 75, 78 - 80, 82, 85, 87, 89 – 93

These amendments add titles for the individual Articles and change the heading of Title III, Chapter 1 with a view to making the Directive more easily readable. This is entirely acceptable with a need for reformulation only with regard to very few of the titles. To be more precise and concise as well as consistent with the wording used throughout the Directive Article 8 is to be called "*Examples of discrimination*", Article 9 "*Implementation as regards self-employed persons*", and Article 10 is to be renamed "*Possibility of deferral as regards self-employed persons*". For greater clarity, Article 15 should be callled "*Return from maternity leave*" and Article 20 "*Scope of the rule on the burden of proof*". Finally, titles have to be introduced for provisions where that was omitted by the European Parliament, i.e. for Articles 5a ("*Personal scope*"), 28a ("*Relationship with other Community and national provisions*") and 30 ("*Dissemination of information*").

2.1.2 Amendment 1

This modification is intended to avoid the potential misunderstanding that specific further amendments going beyond the recasting exercise are already envisaged. The amendment can be accepted subject to a reformulation that completes the

[2] OJ C 157, 28.6.2005, p.83.

clarification by stating in addition in the same sentence that "*further amendments are made*" instead of "*are to be made*".

2.1.3 Amendments 2 and 32

The reintroduction of recital 4 of Directive 2002/73 quoting the Treaty provisions on gender equality at the end of recital 2 as well as the replacement of the term "*equal treatment*" by "*equality*" and the reference to the case-law of the Court of Justice can be accepted as they stand.

The new language in the last sentence of the recital and in Article 2 is intended to spell out that less favourable treatment on the grounds of gender reassignment is covered and prohibited by this Directive. The Commission endorses the initiative of drawing attention to the fact that the discrimination of transsexuals is discrimination on the grounds of sex prohibited by the Directive according to the case-law of the Court of Justice. It has to be taken into consideration, however, that unlike in other cases of discrimination on the grounds of sex one does not compare members of one sex with members of the other sex. This type of discrimination does not always fit neatly into the general framework of sex-based discrimination. It raises special problems that may require special solutions. In particular, it is doubtful if the wording of amendment 2 covering those "*undergoing* gender reassignment" would adequately deal with the specific discrimination of transsexuals. It would not take into account the fact that in some cases no discrimination can exist before the conditions for the recognition of the new sex are met and that in other cases it may not even be necessary to have begun reassignment and adverse treatment based on a mere declaration of such an intention would have to be considered a sex-based discrimination. Accordingly, in the context of amendment 32 it is not equally clear as in other forms of sex-based discrimination what actually amounts to discrimination, especially in those cases that are related to the recognition of a reassignment.

For those reasons, instead of these two amendments which the Commission can accept in spirit it is preferable to include a separate recital following current recital 2 that is specifically dedicated to this issue and clarifies that the discrimination of transsexuals falls within the scope of this Directive. This lends a higher profile to the issue than just adding a sentence to a long and very general recital. It also avoids the potential ambiguities inherent in the language used in the amendment and the Article as set out above. The new recital, quoting what the Court of Justice held in the judgment P v S (Case 13/94) reads:

"*The Court has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of rights which it seeks to safeguard it also applies to discrimination arising from the gender reassignment of a person*"

2.1.4 Amendment 4

This amendment is intended to clarify the language and put a special emphasis on the prohibition of harassment and sexual harassment which have to be subject to dissuasive and proportionate sanctions. It can be accepted subject to the removal of **t**he terms "*before the courts*" at the very end of the recital since sanctions do not

necessarily have to be imposed by courts; their application can fall within the responsibility of administrative authorities, for example.

2.1.5 Amendment 6

It is the purpose of this amendment to bring this recital closer to the language of recital 16 of Directive 2002/73 with a view to emphasising the crucial role of the Court of Justice with regard to the interpretation of the principle of equal pay. The Commission can accept the amendment subject to the following reformulation that better responds to this intention:

"*The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the jurisprudence of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the acquis communautaire, including the case-law of the Court, concerning sex discrimination. It is therefore appropriate to make further provision for its implementation*"

2.1.6 Amendment 8

The amendment correctly summarises the jurisprudence of the Court of Justice on the criteria for the assessment of whether or not work is of equal value and adds to the clarification of the meaning of the Directive. It is therefore acceptable to the Commission.

2.1.7 Amendments 9, 38

These amendments delete the reference to the concept of a "single source" to which pay differences can be attributed as developed by the Court of Justice, on the basis of the argument that the cases decided concerned specific circumstances that cannot be generalised and that the Court of Justice, unlike in the language of the proposal, used this concept only as a negative criterion to exclude the application of the principle of equal pay in the absence of a single source. The Commission is convinced that the initial proposal accurately summarises settled case-law but it can accept both amendments as they stand based on the consideration that the Court of Justice will continue to apply and further refine its case-law in that respect in the future whether or not this aspect is explicitly mentioned in the Directive. The new language replacing the general term 'discrimination' by a more precise reference to "*direct and indirect*" discrimination is also acceptable.

2.1.8 Amendment 11

The amendment aims at retaining in a recital the illustrative examples for admissible unequal levels of benefits in defined-contribution schemes funded by capital accumulation that are currently provided in an Annex to Directive 96/97. This modification adds to the transparency and comprehensibility of the legislation on the complicated issue of occupational social security and can therefore be accepted, provided that it is made unequivocally clear that one is dealing with examples by adding the clause "*by way of example*" at the beginning ("*By way of example, in the case of ...*").

2.1.9 Amendments 14, 15

These amendments are intended to reinsert recital 5 of Directive 96/97 and recital 7 of Directive 2002/73. These changes contribute to the clarity of the Directive and are thus acceptable for the Commission.

2.1.10 Amendment 16

This amendment reintroducing recital 15 of Directive 2002/73 is acceptable in principle but two minor corrections have to be made to bring the wording into line with that of Directive 2002/73. The terms "*by Member States*" need to be removed and "*objective*" needs to be replaced by "*object*".

2.1.11 Amendment 17

The first part of the amendment reproduces parts of Article 141 (4) EC Treaty which can be accepted subject to correctly quoting the Treaty by mentioning full equality in practice in working "*life*" instead of using the narrower term of working "*conditions*". The new last sentence is the reintroduction of the text of recital 14 of Directive 2002/73 which can be accepted as it stands.

2.1.12 Amendment 18

The first part of the amendment, stating that the Court of Justice has held pregnancy and maternity protection measures to be a means to achieve substantive gender equality is in line with ECJ case-law and can thus be accepted. As in the rest of the recital, however, which addresses the principle of equal treatment without spelling out that the Directive is concerned with the equal treatment of men and women one should remove the term "*gender*" and simply refer to "*substantive equality*".

The change in the last sentence is unacceptable in the wording proposed since parental leave is unrelated to the specific protection of the biological condition of women and maternity protection measures which can by definition only apply to women. Parental leave is available for men as well. The clarification that this Directive is without prejudice to the parental leave Directive can be accepted but it has to be added in a separate new last sentence as follows:

"*This Directive is further without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave*".

2.1.13 Amendment 19

The amendment is intended to reintroduce the final part of recital 12 of Directive 2002/73 which essentially reproduces the text of Article 15 (2) infine. This adds to the clarity and the consistency of the language used throughout the Directive. It can be accepted as it stands.

2.1.14 Amendments 20, 21

Amendment 20 repeats recital 13 of Directive 2002/73 relating to the explanation of the legal situation concerning paternity leave and amendment 21 inserts a new recital essentially extending the same considerations to adoption leave. The Commission

can accept in spirit both amendments that are closely interrelated due to the fact that paternity and adoption leave are jointly dealt with in Article 16. In order to avoid a cumbersome repetition, to streamline the text and clarify the language with regard to adoptions, the two recitals are to be merged by adding the following text at the end of recital 19a whilst deleting its current last sentence:

"*Similar considerations apply to the granting by Member States to women and men of an individual and non-transferable right to leave subsequent upon the adoption of a child. 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 to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive*."

2.1.15 Amendment 22

This amendment contains a clarifying additional reference to the "*national*" character of the bodies investigating cases of alleged discrimination dealt with in the recital, in conformity with mention being already made of "*national*" bodies in the following sentence. It is acceptable to the Commission.

2.1.16 Amendment 23

This amendment re-introduces the second sentence of recital 17 of Directive 2002/73. It makes the significant clarification not explicitly spelt out by the text of the corresponding Article 25 that employees defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection against adverse treatment. It can therefore be accepted as it stands.

2.1.17 Amendment 25

This amendment is aimed at introducing a new recital accurately highlighting the importance of the collection, analysis and publication of gender-specific data for a better understanding of equal treatment issues. It can thus be accepted without any changes to the wording.

2.1.18 Amendment 26

This new recital calls upon Member States and social partners to do more to promote awareness of the inequality in remuneration and the changing of attitudes with a view to giving fresh impetus to the battle against the gender pay gap by non-legislative means. The Commission can endorse that statement and accept the amendment as it stands.

2.1.19 Amendment 31

It is the purpose of this amendment to move the clarification that less favourable treatment of a woman related to pregnancy or maternity leave constitutes discrimination on the grounds of sex from Article 15 to where it belongs as an element of the definition of discrimination. It can therefore be accepted subject to the corresponding deletion of Article 15 (1) omitted by the European Parliament**.**

2.1.20 Amendments 34, 40

These amendments move the text of Article 3 (1) from a horizontal section back to the chapter on occupational social security schemes where it originates (Directive 96/97) This relocation can be accepted since the wording of this provision is tailor-made to the specific area of occupational schemes and does not imply a value added outside that realm. No other equal treatment Directive comprises a provision on the personal scope and no problems related to this issue have been raised which proves that such a clarification is apparently not necessary elsewhere. The new Article 5a has to be given a heading ("*Personal scope*") as the other provisions.

In the light of the deletion of Article 3 (1), however, the remaining paragraphs 2 and 3, typical "without prejudice" clauses, do not merit such a prominent place in the Directive on their own any more and have to be moved to a general horizontal provisions towards the end of the Directive where one usually expects this type of clause. The new Article 28a is the appropriate place for such a provision (see point *2.2.5* below**).**

2.1.21 Amendments 35, 56

These amendments move the text of Article 14 of the proposal from the chapter on access to employment etc. to the horizontally applicable new Article 3a under the title "*Positive action*". Apart from the use of the word "shall" instead of "may", they are in line with both Article 141 (4) EC Treaty that applies to working life in general and the comparable equal treatment and anti-discrimination Directives 2004/113, 2000/43 and 2000/78 which include a horizontal provision on positive action. Therefore the Commission can accept this modification, subject to replacing "shall" with "may".

2.1.22 Amendments 45, 47

These amendments are intended to remove the reference to point (i) in Article 8 (1) (d) and (k). They rectify a technical mistake in the initial proposal. After the split of the old Article 6 (1) (i) of Directive 96/97 into two points – Article 8 (1) (i) and (j) of the recast proposal – point (i) does not allow any derogation from the principle of equal treatment any more and can thus no longer be referred to as an exception in the context of Article 8 (1) (d) and (k). The amendments are thus acceptable as they stand.

2.1.23 Amendment 54

The objective of this amendment to make clear by a reference to Article 141 of the Treaty that there are no different notions of pay in this Directive and in the EC Treaty and that therefore the recast will not imply any changes to the principle of equal pay or invalidate the Court's case-law or parts of it in that respect can be accepted in principle. But in that case the additional self-reference to "*this Directive*" becomes superfluous and rather confusing and thus needs to be removed. The text has to be reformulated to read as follows:

"*…as well as pay as provided for in Article 141 of the Treaty*".

2.1.24 Amendment 55

This amendment, together with amendment 88 (see point *2.1.29* below) is intended to move the paragraph that imposes on Member States the obligation to report on the assessment of exceptions to the principle of equal treatment based on sex being a genuine and determining occupational requirement to Article 31. This relocation is justified as that latter provision generally deals with periodical reports by Member States on the implementation of the Directive. It can therefore be entirely accepted.

2.1.25 Amendment 61

The amendment is intended to delete a reference to possible recourse to other competent bodies prior to judicial and/or administrative procedures. It further newly introduces mediation and arbitration in addition to the notion of conciliation already in the text as other forms of amicably settling disputes.

The Commission can subscribe to the objective of clarifying the text and removing redundancies in principle subject to a reformulation. The deleted terms "*after possible recourse to other competent authorities*" were originally an element of the guarantee of access to judicial review (" … to pursue their claims by judicial process after possible recourse to other competent authorities") in Directives 76/207, 79/7 and 86/378. This reference was then replaced by a more general formulation used in Directives 2000/43, 2000/78, 2002/73 and 2004/113 which guarantees the availability of "*judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive*". The combination of these two approaches is redundant and the deletion of one of these elements thus justified. But the reference to judicial *and/or* administrative procedures is unfortunately worded in that it tends to create the wrong impression that Member States have a choice between granting access to one or the other or both and could thus restrict judicial review on the grounds of the possibility to launch an administrative complaints procedure. Therefore, the deletion should extend to this ambiguous wording whilst keeping the more precise formulation removed by the amendment. Furthermore, no value added is brought about by going into more detail as regards the different types of efforts to find an amicable solution. This would also imply the introduction of an unnecessary discrepancy as compared to other Directives in this field. The text as reworded thus reads as follows:

"*Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available ...*"

2.1.26 Amendments 69, 70

These amendments broaden the reference to the workplace to include issues related to access to employment, vocational training and promotion. They also add a reference to research being based on gender-specific data. The latter element highlights again the importance of comparable gender-specific data in that it specifies the existing notion of research as one of the potential activities of the social partners which are to be encouraged by Member States. It can be accepted as it

stands. The broadened reference to workplace practices is acceptable subject to the following reformulation that improves the unclear structure of the sentence:

"*... through the monitoring of practices in the workplace, in access to employment, in vocational training and promotion at work as well as through the monitoring of collective agreements ...*"

2.1.27 Amendment 77

The purpose to clarify the reference to "*schemes*" – a notion that was sufficiently precise in Directive 96/97 exclusively dealing with occupational social security schemes but is slightly vague in this broader Directive – can be accepted in spirit but the text as suggested is redundant and potentially confusing since "*occupational schemes*" and "*social security schemes*" have an identical meaning in the context of this subparagraph that exclusively applies to occupational social security schemes. The text has to be reworded as follows:

"*occupational social security schemes containing ...*".

2.1.28 Amendment 83

The text of this amendment introducing the standard clause on the possibility for Member States to go beyond the minimum standards laid down in a Directive can be accepted as it stands but subject to the reversal of the order of the two paragraphs in order to stay consistent with all other comparable equal treatment and anti-discrimination Directives. This means that Member States may, for example, go beyond the minimum standards set for the burden of proof rule.

2.1.29 Amendment 88

The move of the obligation to report on the assessment of exceptions to the principle of equal treatment based on sex being a genuine and determining occupational requirement from Article 13 to Article 31 can be endorsed (see point *2.1.24* above). It is also acceptable in principle to newly introduce, as suggested, the same rhythm for this individual element of review as for the general reporting mechanism pursuant to Article 31 (2). To bring out this integration more clearly and avoid duplications the last two sentences of Article 31 (2a) are to be reworded as follows:

"*They shall notify the Commission of the results of this assessment in their reports pursuant to paragraph 2. The Commission shall include this aspect in the reports to be adopted and published pursuant to paragraph 2*".

2.1.30 Amendment 101

This amendment is intended to introduce a political appeal to Member States and social partners that responds to calls to give a new impulse to the issues of equal pay and parental leave as well as the availability of care facilities. The Commission can endorse this initiative and accept the amendment in its entirety.

2.1.31 Amendments 106

This amendment aims at inserting a new paragraph to make clear that, as in every recast, the obligation to transpose only extends to those provisions that imply a substantive modification as compared to the predecessor Directives. The Commission can accept this clarification, subject to amending the wording in line with recital 29.

2.1.32 Amendment 107

The new recital suggested in this amendment, taken together with the deletion of the reference to correlation tables in Article 33 (1) by amendment 105 (see point *2.2.6* below), accurately reflects the legal situation under the inter-institutional agreement on better law-making whereby Member States are encouraged to supply correlation tables with the transposing legislation without being legally obliged to do so. It is therefore acceptable for the Commission.

2.1.33 Amendment 108

This amendment restricts the language of this paragraph aimed at integrating ECJ case-law to the criterion that was referred to as being solely decisive by the Court of Justice in all its decisions on the matter in question. The deleted text was of further assistance in the cases decided but it may be considered overly restrictive in some respects, particularly with regard to the calculation of the pension by reference to the *last* salary. The amendment preserves the essence of the Court's jurisprudence by requiring that the benefits are paid by reason of the employment relationship but leaves sufficient flexibility to the Court of Justice to develop the criteria further if necessary. It can therefore be accepted as it stands.

2.2. Amendment partially acceptable to the Commission

2.2.1 Amendment 5

The clarification at the end of the recital that harassment also occurs in the context of access to employment, vocational training and promotion is in line with several other amendments accepted by the Commission (e.g. point *2.1.26*).

The highlighting of ethnic minority women as a particularly vulnerable group, however, cannot be accepted. Although this is undoubtedly a possible scenario for multiple discrimination, the reference to this group as such does not imply any value added and raises the question why other situations of multiple discrimination are not mentioned.

2.2.2 Amendment 24

The new last sentence on the exceptional admissibility of prior upper limits on compensation is acceptable as it brings the text of the recital into line with the wording of the corresponding Article 18 and with the case-law of the Court of Justice.

The new language on the relationship between compensation and sanctions is rejected. This proposal confuses compensation (awarded to the victim individually)

with sanctions (deterrence and penalisation of discrimination by the Member States). Two different provisions (Articles 18 and 26) deal with these two different issues. It would be misleading to create the impression - as does the amendment - that compensation is not itself obligatory and that Member States have a choice of whether or not they want to guarantee full compensation for damages. Article 18 does not leave them such a choice.

2.2.3 Amendments 71, 72, 73, 81, 102

These amendments have in common the objective of transforming the obligation of Member States to *encourage* certain measures to be taken either by the social partners (promote equality between women and men, conclude agreements laying down anti-discrimination rules) or by employers (planned and systematic promotion of equality, prevention of discrimination) into an obligation to *ensure* that such measures are taken.. This modification cannot be endorsed as it would amount to considerable substantive changes going beyond what can be reasonably done within the framework of a recasting exercise. Besides, all the provisions in question were newly introduced by Directive 2002/73 which only enters into application in October 2005 and should be given an opportunity to apply in practice before the regime is changed. As far as the social partners are concerned these amendments are hardly reconcilable with the fundamental principle of the autonomy of social partners. Therefore, the terminology "*ensure that*" in amendments 71, 72 and 81 and "*shall be required*" in amendment 73 cannot be accepted. Only with regard to amendment 73 this particular modification can partly be endorsed to the extent that the language is assimilated to those of the neighbouring paragraphs. Article 22 (4) should thus read:

"*To this end employers shall be encouraged … .*

Such information should include…"

The rest of the new language in the second sub-paragraph of Article 22 (4) introduced by amendment 73 can be accepted; it adds some more detail and precision to the description of the information whose supply would be desirable but is not mandatory.

With regard to amendment 71 the added reference to the promotion of flexible working arrangements can be accepted as an important field in which social partners are encouraged to take action.

Concerning amendment 72, the language broadening the reference to the workplace can be accepted in principle but it should be worded in the same way as in parallel cases (see, e.g. points *2.1.26, 2.2.1*), i.e. "*in the workplace, in access to employment, vocational training and promotion at work*". The new last sentence creating an obligation for Member States to conduct awareness-raising campaigns is rejected since such a new obligation exceeds the scope of a recast and is furthermore outside the context of this provision.

Out of amendments 81 and 102 the use of the term "*effective*" can be taken on board as well as the enlarged reference to the workplace, the latter again subject to the same reformulation as indicated above for amendment 72 ("*in the workplace, in access to employment, vocational training and promotion at work*").

2.2.4 Amendment 76

The new section incorporating "*individual and collective*" into the text is acceptable as it contributes to the clarification and streamlining of the wording. A broad reference to individual and collective contracts and agreements makes redundant the reference to some other items in the original text that are clearly covered by these terms and can thus be deleted.

The reference to "*full-time or part-time employment*" and "*job titles*" does not serve any purpose in what is a list of types of legal sources which can be at the origin of discrimination and can therefore not be accepted.

The deletion of the words "*or may be*" at the end of Article 24 (b) has to be rejected. The suggested wording departs from the established language in the predecessor or parallel Directives (2002/73, 2000/43, 2000/78). The difference between "*shall be*" and "*may be*" is that some provisions are to be declared as being invalid *ex officio* whilst others require an initiative to be taken by a complainant. Provisions of individual contracts in breach of the principle of equal treatment will escape the attention of courts and other authorities unless a victim of discrimination lodges a complaint or brings court action. It is sufficient and in fact the only realistic scenario to give citizens the opportunity ("*may be*") to have such provisions invalidated. The amendment would impose the obligation, impossible to honour, on Member States to detect and declare the nullity of all discriminatory provisions including in all individual contracts of their own motion.

In the light of the above Article 24 (b) should read as follows:

"*provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;*"

2.2.5 Amendment 84

The new review clause of the parental leave Directive in paragraph 2 cannot be accepted by the Commission. This modification would imply a substantive change to the parental leave Directive which does not form part of the recasting exercise and which contains a different provision on its review. It would also give rise to difficulties concerning the specific role of the social partners in the review procedure pursuant to Articles 138 and 139 of the Treaty.

Paragraph 1 of this new provision partially moves Article 3 (3) of the proposal to the horizontal provisions at the end of the Directive where one would usually expect this type of "without prejudice" clause. The Commission can accept this relocation in principle but extends this reasoning to the rest of Article 3 (2) and (3) which no longer deserve the same prominent place in the Directive as a consequence of the deletion of Article 3 (1) (see point *2.1.20* above).

As a result of the above considerations, Article 28a should read as follows:

"*Relationship with Community and national provisions*

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

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC."

2.2.6 Amendments 103, 104, 105

These amendments set the deadlines for transposition, communication by Member States of the information necessary for the Commission to draw up a report and for a review of the operation of the Directive. These deadlines have to be considered together as they are closely interrelated and represent the different steps of the transposition and review mechanism. It can be accepted to keep the period for transposition to two years (amendment 105) given the limited number of modifications that need to be transposed as a result of this recast. It is not sufficient, however, to allow only one further year for Member States to report on the application of the Directive. In a period that short it will not be possible to collect practical experience to the extent that is indispensable with a view to drawing up a report that can make a significant contribution; the presentation of the reports is to be pushed back by one year. Therefore Article 31 (1) (amendment 103) has to read "*By four years after the date of entry into force of this Directive …*" and the period until a review pursuant to Article 32 (amendment 104) needs to be extended accordingly ("*By six years after the date of entry into force of this Directive …*"). As far as the wording of the provisions in question is concerned, it needs to be taken into account that concrete dates will be inserted after the formal adoption of the Directive. To make that clear the date should be left blank in the text of the Articles (e.g. "*By …, the Member States shall communicate…*" in the case of amendment 103) and accompanied by the footnote "*two/four/six years after the date of the entry into force of this Directive*" respectively.

The text adopted by the European Parliament in amendment 105 deletes the reference to correlation tables from Article 33 (1) without this being clearly indicated in the text as the wording of the initial proposal is not correctly reproduced. The Commission can accept this modification in connection with the introduction of a new recital 31 (see point *2.1.32* above).

2.3. Amendments not acceptable to the Commission

2.3.1 Amendment 3

This amendment is intended to add the right to parental leave to the recital recalling the provisions of the Charter of Fundamental Rights of the European Union dealing with gender equality (Articles 21 and 23). Apart from the fact that the suggested additional text makes reference to a matter which is not dealt with in this Directive it is out of place in this recital which essentially paraphrases the material provisions of the Charter of Fundamental Rights. Those Articles, however, make no mention of parental leave and no such wrong impression should be created. Therefore the amendment is not acceptable.

2.3.2 Amendments 12, 13, 100

It is the express purpose of recitals 12 and 13 to align the rules governing information on the use of sex-based actuarial factors in occupational systems of social security with those adopted for private insurance contracts in Directive 2004/113. But the legal situation on the permissibility of such factors is not identical in those two areas. Unlike in Directive 2004/113 (that only permits the use of sex-based actuarial factors on the condition of the existence of relevant and accurate statistical data which has to be compiled, published and regularly updated) there are no obligations corresponding to these recitals in the enacting terms. Amendments aiming at introducing the same regime or even outright prohibiting the use of sex-based actuarial factors were rejected by the European Parliament. As a consequence, the recitals at issue here do not serve any purpose. The same must be said for amendment 100 which recognises the value of the rules of Directive 2004/113 on the use of data but is unrelated to the content of this Directive. These amendments can thus not be accepted.

2.3.3 Amendment 29

The reasoning underpinning the deletion of the reference to non-verbal conduct in the definition of sexual harassment that there is no difference between non-verbal and physical conduct cannot be accepted. Physical conduct could be interpreted as requiring physical contact not including, for examples, gestures. The current definition is the result of negotiations with the EP on Directive 2002/73 and consistent with that of Directive 2004/113 and should be retained.

2.3.4 Amendment 30

This amendment that aims to newly introduce a definition of the term "*promotion at work*" is not acceptable. This term has not given rise to any difficulties as to its interpretation. It is superfluous and would not imply any value added to define concepts that are self-explanatory such as this one and the other areas to which Directive 76/207 applies and for which no definition exists or has been suggested (*'access to employment'*, *'vocational training*' and '*working conditions*').

2.3.5 Amendment 36

The amendment is intended to transform the possibility of taking measures of positive action as defined in Article 141 (4) EC Treaty into an obligation of Member States and adds specific examples of areas where such measures are to be taken as well as new language replacing the reference to "*working life*".

Article 141 (4) EC Treaty makes it very clear that positive measures are admissible but not mandatory. Where primary law stipulates a discretionary power of Member States, secondary law based on the same Article cannot impose obligations going beyond the Treaty text. Such a far-reaching substantive change would also go beyond what can be done within the framework of a recasting exercise.

As concerns the references to childcare the scope of application of this Directive limited to employment and occupation excludes the field of childcare except in the relatively few cases where the employer offers childcare facilities. Even in those

cases the promotion of affordable childcare and care for other dependent persons does not qualify as a positive measure as defined in Article 141 (4) as long as no preferential access is given specifically to members of one sex. Keeping this modification would thus imply a risk of confusion as to the meaning of positive action.

As regards the new wording at the end it is not advisable to introduce new terminology in an Article that only points to the Treaty which uses different language. Unlike the term "*workplace*" which was complemented in several places in the Directive (see points *2.1.26, 2.2.*1) the reference to "*working life*" of Article 141 (4) is sufficiently broad not to require further clarifying terminology.

As a result, the wording of Article 14 of the initial proposal should be moved to a new Article 3a (see point *2.1.21* above) without any changes to its wording.

2.3.6 Amendment 53

The amendment adds new language intended to refine the description on the scope of the principle of equal treatment with regard to access to employment and promotion. The new terminology has no value added; it would amount to duplication as well as to an overburdened and confusing wording of the paragraph. It is therefore not acceptable to the Commission.

2.3.7 Amendment 63

The amendment newly introduces the term "*remedies*" in the provision on compensation and reparation and adds a reference to these remedies having to be available "*in the event of breaches of the obligations under this Directive*". The new text does not add anything and the language is rather unclear and redundant. The reference to this rule applying in the event of breaches of the Directive is unnecessary as the text already refers to compensation for the loss and damage sustained "*as a result of discrimination on grounds of sex*". The use of the term "*remedies*" and the mention being made of compensation and reparation as examples for such remedies would further create the wrong impression that Member States could introduce other remedies than compensation or reparation although these are indispensable. The problem is comparable to the one set out in some detail with regard to amendment 24 (see point *2.2.2* above).

2.3.8 Amendment 67

The objective of this amendment is to add the exchange of data with European bodies such as Gender Institute to the tasks of equality bodies. It is not advisable to make reference to the European Institute for Gender Equality, the only imaginable corresponding European body that comes to mind, as this institution does not yet exist and its final shape and form is unknown at this stage.

2.3.9 Amendment 86

The broadening of the reference to the "*workplace*" that can be endorsed in several other amendments (see, e.g. points *2.1.26, 2.2.1*) cannot be accepted for Article 30. In this specific context the workplace is mentioned as a place in which the national

legislation transposing the Directive has to be made available to inform workers about their rights. Access to employment and vocational training and promotion cannot be situated in space, information cannot be disseminated there.

3. CONCLUSION

By virtue of Article 250(2) of the EC Treaty, the Commission amends its proposal as described above.