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COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**Report on the application of Directive 2002/73/EC of the European Parliament and the
Council of 23 September 2002 amending Council Directive 76/207/EEC on the
implementation of the principle of equal treatment for men and women as regards
access to employment, vocational training and promotion, and working conditions**

REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

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1. INTRODUCTION

On 23 September 2002, on the basis of Article 141(3) of the EC Treaty, the European Parliament and the Council adopted Directive 2002/73/EC 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 conditions¹. Directive 2002/73/EC (hereafter 'the Directive') forms one of the key measures in current EC law on equality between men and women. It entered into force on 5 October 2002 and its provisions were to be transposed by the Member States by 5 October 2005. As of 15 August 2009 Directive 76/207/EEC (hereafter 'the amended Directive') will be formally repealed and replaced by the recast Directive 2006/54/EC². The recasting does not affect the deadlines for implementing Directive 2002/73/EC.

In accordance with Article 2(2) of Directive 2002/73/EC³, the Member States were to communicate to the Commission all the information necessary for it to draw up a report on the application of the Directive. This report is based on information received from the Member States, in particular in response to a questionnaire on the Directive's application prepared by the Commission departments and sent to all Member States in January 2009. Other sources include European Parliament resolutions⁴ and information gathered by the Commission when monitoring the Directive's implementation. The European social partners and the European Women's Lobby have also been consulted on the issues arising from the Directive.

The aim of this report is to flag up certain aspects that are particularly important or problematic and to identify good practice. It concentrates on transposition-related problems, the impact of the Directive, the enforcement of rights, and the role of equality bodies, the social partners and NGOs.

However, the report does not aim at giving an exhaustive appreciation of the legality of all national transposition measures. Consequently, it is without prejudice to any infringement

¹ OJ L 269, 5.10.2002, p. 15.

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, p. 23.

³ In the following parts of this report, all provisions referred to are those of the amended Directive 76/207/EEC, and not the amending Directive 2002/73/EC.

⁴ See in particular Resolution of 15 January 2009 on transposition and application of Directive 2002/73/EC, 2008/2039(INI).

procedure that the Commission decided or might decide to open in the future with regard to the way the Member States have transposed certain provisions of the Directive.

2. TRANSPOSITION AND INFRINGEMENT PROCEDURES

On the final date for transposition, nine Member States (AT, BE, DE, DK, ES, EL, FI, LU and NL) had still to notify national transposition measures. Infringement procedures for non-transposition were therefore initiated against those Member States under Article 226 EC. Two of those procedures (against Belgium and Luxembourg) were referred to the Court of Justice, which declared that, by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Directive 2002/73/EC, the two Member States had failed to fulfil their obligations under the Directive⁵. Both Belgium and Luxembourg have adopted new legislation following the Court's judgment and the procedures against them have been closed.

After checking the conformity with the Directive of legislation communicated to it by the Member States, the Commission, acting under Article 226 EC, opened 22 infringement cases against that number of Member States. Following several complaints from the public, the number of cases rose to 25. The infringement procedures provided the Commission with a tool for dialogue with the Member States, as a result of which the legislation in some Member States was brought into line with the Directive and the procedures were closed (at the time of writing of this report, the cases against CY and EL had been closed).

The high number of cases may be partly explained by the wide scope and relative complexity of the legislation. Despite the number of cases which remain open, most Member States have made remarkable progress in implementing Directive 2002/73/EC. As part of the infringement procedures the Member States have often amended their legislation so that they could achieve partial or quasi compliance with the provisions of the Directive, although it was not possible to close the infringement procedures. The problems of transposition identified concern various aspects of the Directive and vary according to the Member State, though some points recur more often than others, as outlined below.

3. THE IMPACT OF THE DIRECTIVE

Although EC legislation on gender equality in access to employment and working conditions has been in force for decades, the Directive is an important milestone in the development of that legislation and has brought standards in this field up to those of modern EC law prohibiting discrimination on other grounds⁶. Its impact on legislation in individual Member States depends on the development of gender equality law in the country concerned, although all Member States had to make some changes to national legislation to comply with it.

Article 1(la) of the amended Directive concerns the **gender mainstreaming** obligation, i.e. the requirement on Member States to take the objective of equality between men and women

⁵ Judgment of 17 July 2008 in Case C-543/07 *Commission v Belgium*; C-340/07 *Commission v Luxembourg* [2008] ECR I-43.

⁶ See Council Directive 2000/43/EC of 20 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22, and Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16.

actively into account when formulating and implementing laws, regulations, administrative provisions, policies and activities in areas which are within the material scope of that Directive. The Member States have met that obligation in various ways: some have made provision for it in legislation giving equality for men and women the status of a legal principle (DK, ES, FI, IT, PL, PT and SE); others have adopted strategic programmes (e.g. BG, CZ, EL, FI, LT, LV, PT, SE and SI), often elaborated on in more detailed periodical programmes; others again have adopted guidelines for implementing gender mainstreaming (AT), while some have provided for institutional solutions in the form of inter-ministerial bodies (CZ, DE and PT) or gender focal points in ministries and other authorities (BG and CZ). Some Member States (such as CZ, DK, EE, ES, LU and UK) have introduced an obligation to conduct an *ex ante* assessment of the consequences of envisaged legislation or policies on gender equality. The importance of implementing gender mainstreaming at local level was mentioned by BG, ES and FR, while mainstreaming training is provided in DE, EE and FI.

Directive 2002/73/EC **broadened the scope of Directive 76/207/EEC**, in particular by prohibiting discrimination in the conditions governing access to self-employment and membership of and involvement in workers' or employers' organisations or any organisations whose members carry on a particular profession, including access to the benefits such organisations provide (Article 3(1)(a) and (d)). The problems in transposing those provisions in some Member States have consisted mainly in a failure to include self-employment and membership of and involvement in workers' or employers' organisations among the areas covered by the prohibition on discrimination.

One important contribution the Directive has made to EC gender equality law has been to clarify the concept of discrimination by explicitly **defining** forms of discrimination (direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate) and to define the scope of protection more clearly (Article 2(2) and (4)). Most Member States needed to put in place or amend legislation in order to implement those provisions correctly. Unfortunately, transposition of these fundamental provisions has not gone entirely smoothly: one issue that came up frequently during monitoring of the Directive's implementation was that some national definitions of discrimination, and particularly of indirect discrimination, were narrower than the Directive definitions.

The **exceptions** from the principle of non-discrimination are also crucially important in terms of the scope of protection from discrimination. Under the amended Directive, indirect discrimination can be justified in certain situations (see Article 2(2)). Furthermore, in accordance with Article 2(6), a difference in treatment does not constitute discrimination if it is based on a genuine occupational requirement, provided that the objective sought is legitimate and the requirement is proportionate. Problems in transposing those provisions properly occurred in a number of Member States, where the wording of the exceptions was too broad and thus narrowed the scope of protection.

The Directive defines **harassment** and, for the first time in Community law, **sexual harassment** as forms of discrimination. One mistake in transposing those provisions in some Member States consisted in confining protection to relations between workers and their superiors, thus excluding co-workers or other third parties. Over time and as progress has been made in the infringement procedures, some Member States have corrected their definitions of these forms of discrimination.

The impact of these provisions also varied from one Member State to another. Legislation in some Member States already provided protection from harassment and/or sexual harassment

before the adoption of Directive 2002/73/EC: for example, gender-specific harassment was already an offence in DK, SE and UK. In AT, gender-specific harassment became an offence following the adoption of the Directive. Nonetheless, the transposition of the Directive gave those Member States the opportunity to improve legal clarity or otherwise step up the protection (for instance, AT increased compensation in such cases, while the UK adjusted the rules on evidence) and to give more visibility to the issue (in the UK, for example, both the legislation and the case-law now cover harassment and sexual harassment). In other Member States, in addition to raising awareness, the Directive has brought more profound legislative changes: for instance, legislation prohibiting harassment and/or sexual harassment was introduced for the first time in CY, CZ, ES, IT, PL and SK, and they were recognised as a form of discrimination in FI, FR and PT.

Many Member States underline people's lack of knowledge of harassment and sexual harassment and point out that raising awareness is still essential to fighting them. Special problems concern enforcement, since the victims are particularly vulnerable and rarely initiate judicial proceedings (most Member States quote a very low number of cases taken to court). NGOs, trade unions and equality bodies providing assistance to the victims and information to employers have a special role in improving the situation. As sexual harassment is often committed by co-workers, the employer's role in prevention is vital. Advisors appointed in companies (in BE and SI for instance) are one way of preventing it.

Less favourable treatment of a woman related to **pregnancy or maternity leave** also constitutes discrimination within the meaning of the amended Directive (Article 2(7)) and is still widespread in many Member States. In this area, the provision introducing the worker's right 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 have been entitled during her absence has had relatively the biggest impact. In BG, ES, FR and LT it led to new legislation, while its impact was smaller in other Member States, where it brought only minor amendments. When reporting on this point, several Member States and social partners underlined the need for better reconciliation of work and family life.

Article 2(8) allows for **positive action** in accordance with Article 141(4) EC with regard to areas covered by the material scope of the Directive. In this area, too, the situation varies widely among the Member States. While some have not made use of this possibility (such as CY, LU and LV), legislation in many explicitly allows for it (such as AT, BE, CZ, DE, DK, EE, EL, ES, FR, IT, MT, PT, RO, SE, SI and SK). Some Member States have adopted positive action at national level in specific areas (for example, it is compulsory in the federal public sector in BE; in DE it takes the form of quotas in the civil service at federal and *Land* level; in IT and NL there are positive action plans in the civil service; and in MT the taxes on women returning to the labour market are lower). In several Member States (AT, ES and FR) positive action is the subject of collective bargaining. In ES the authorities are required to provide for positive measures to redress inequality. In FI companies' equality plans refer to positive action, but in practice such cases are rare.

The most common examples of positive action include measures in education and training (as in CZ, ES, EL, PT and SE), measures for the integration of women in general and of women who have given birth and are returning to the labour market in particular (BG, CZ, ES and PL), other actions to facilitate women's professional and business activities (DE, EL), and encouragement given to members of the underrepresented sex to apply for certain jobs (DK, UK).

In some Member States such measures are monitored by the equality body (for example in SK). In SI the prior authorisation requirement for positive action has been abolished. The equality bodies in BE and the UK give advice on positive action. ES reported a potential difficulty relating to the degree to which positive action could be allowed without breaching the principle of equality.

4. PROVISIONS REGARDING THE ENFORCEMENT OF OBLIGATIONS AND THE PROTECTION OF RIGHTS

The conventional method for securing the enforcement of individual rights, namely by litigation, is less effective in securing compliance in the case of equality law than in other areas. The information provided by the Member States indicates that the number of cases of discrimination referred to the courts is low or very low in virtually all of them. The reasons include the lengthy time taken by proceedings, the formalities involved, the cost, and fear of victimisation. The Directive recognises the problem and includes a number of provisions to improve the enforcement of equality law by means of judicial and administrative proceedings.

The Member States must ensure that **judicial and/or administrative proceedings** to enforce obligations under the amended Directive (Article 6(1)) can be initiated by all persons who consider they have suffered as a result of a failure to apply the principle of equal treatment. In a few Member States it was unclear whether that obligation also applied after the labour relationship had ended, as required by that provision.

The amended Directive (Article 6(3)) makes it an obligation for the Member States to grant associations, organisations and other legal bodies with a legitimate interest in ensuring compliance with that Directive the possibility of engaging, either **on behalf or in support of the complainant** and with his or her approval, in any judicial or administrative proceedings provided for the enforcement of obligations under the Directive in accordance with criteria laid down by national law. Problems with regard to this obligation included reserving that right for an ombudsman or trade unions, to the exclusion of other organisations. The Commission also considered whether or not the criteria laid down by law in some Member States under which associations could engage in proceedings were overly restrictive. Legislation on this point has been amended in a number of Member States. The practical impact of this provision varies with the Member State. Non-profit organisations are particularly active in some (DE and FR), while the assistance is mainly provided by the equality body in others (BE, ES and SK) or by trade unions in many (CY, CZ, DK, NL, SE and SI).

The Directive provides for clearer provisions regarding **compensation or reparation** for loss or damage sustained by a person injured as a result of discrimination, which must be dissuasive and proportional and must not be subject to a prior upper limit (Article 6(2)). Setting an upper limit on compensation was an issue raised in a number of infringement procedures. As progress is made in the latter, this problem is gradually disappearing.

The amended Directive (Article 7) makes provision for protection from **victimisation**. A frequent error in transposing this provision in some Member States involved narrowing the scope of protection as compared with the Directive, for example by including the victim of discrimination but excluding any third parties assisting the victims.

The amended Directive (Article 8d) makes it an obligation to introduce effective, proportionate and dissuasive **sanctions** for infringements of national provisions adopted pursuant to it. Most Member States have fulfilled that obligation.

5. EQUALITY BODIES

In addition to measures to strengthen conventional methods of enforcement, the Directive provides for innovative ways of improving compliance and furthering equality, the obligation to set up equality bodies being the first worthy of mention. Article 8a requires the Member States to designate 'a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex', the competences of which must include providing independent assistance to victims of discrimination in pursuing their complaints of discrimination, conducting independent surveys concerning discrimination, and publishing independent reports and making recommendations on any issue relating to such discrimination.

In some Member States such bodies have existed for a long time, be it in the form of ombudsmen or commissions. In most Member States, however, they were established as a result of the adoption of the Directive. Equality bodies vary greatly across the EU in terms of competences, the way they function, their organisation and their human and financial resources.

Providing assistance to victims is a key task of equality bodies. Information from the Member States shows clearly that persons complaining of discrimination are more likely to turn to an equality body than to the courts, mainly on account of the specific expertise of the former, and because they are cost-free and access involves less red tape. The support provided by the equality bodies varies with the Member State: in some (DK, SE and SI) it extends to handling complaints in quasi-judicial proceedings with binding decisions, albeit subject to appeal in court. In others the equality bodies may conduct investigations on their own (CY, NL, SE and UK) or support the complainants before the courts and/or administrative authorities (AT, BG, ES, FR, SE and UK). In others again, their role is restricted to providing information (MT and PL).

Although the equality bodies were set up to promote gender equality, awareness of their work in society is not always satisfactory – witness the relatively small number of requests for assistance which they receive in some Member States. There is a need for better awareness of their existence and work, and particularly of the assistance they provide to victims. Telephone help-lines established by some equality bodies (in ES, SE and UK) and information campaigns may make accessing them easier.

In the Commission's view, equality bodies can only perform their tasks independently if they are also independent to some extent in terms of organisation and financial and human resources. The situation in the Member States varies greatly in this respect.

Although the Directive only lays down minimum requirements for equality bodies, these have not been met in some Member States. Over time and as progress has been made in the infringement procedures, the problems in this area have diminished significantly. On the other hand, the equality bodies in some Member States have wider competences than those provided for in the Directive, extending to such tasks as monitoring equality plans (ES, FI and SE), providing advice on and monitoring positive action, and training.

The Commission has decided to launch a study relating to equality bodies that will thoroughly explore issues such as their independence, accessibility, visibility and performance.

6. SOCIAL DIALOGUE, DIALOGUE WITH NGOs AND ROLE OF EMPLOYERS

The Directive seeks to foster equal treatment *inter alia* by involving the social partners in general and employers in particular in the social dialogue. Instruments such as collective agreements may help in the long run to create a work environment that is free of discrimination.

Since the new Article 8b(1) and (2) refer to national traditions and practice with regard to the obligations laid down, the social partners' practical involvement depends very much on the tradition in the Member State concerned and the extent to which social dialogue and collective bargaining have developed there. In the UK, for example, it is not common to conclude collective agreements, and dialogue with the social partners is promoted in other ways, such as through funding, research and guidance. In most Member States, however, social dialogue in general and collective bargaining in particular play a major role.

There are collective agreements on gender equality issues in AT, BE, DK, ES, FR, LT, LV, MT, NL, PT, SE and SI and they are compulsory in some of the latter (AT, ES and FR). In some Member States (BG, CZ, EL, ES, LV, PL, PT, RO, SK and SI), social dialogue takes place at national level and usually involves tripartite committees. Ways of promoting social dialogue other than through collective agreements typically include consulting the social partners on legislation and policy initiatives. In 2005 the European social partners concluded a framework agreement on gender equality⁷.

Under new Article 8b(3), the Member States are to encourage employers to promote equal treatment in a planned and systematic way in accordance with national law, collective agreements and practice. This happens, for example, by disseminating information in companies (as in BE and EE) or adopting equality plans (in ES, FI, NL and SE, in companies employing a given number of workers).

The amended Directive (Article 8c) also recognises the role of dialogue with NGOs. The main ways of engaging civil society organisations involve establishing advisory bodies (as in BG, CZ, EL, ES, PT and UK), consulting them on policy initiatives and legislation, providing financial support (as in BE, CZ, DE, EE, ES, FI, SE, SK and UK — in the latter, for the purpose in particular of providing assistance to victims), organising joint conferences and seminars, involving NGOs in the drafting of documents for national or international bodies or including their members in delegations to UN conferences (as in SE). Some Member States (AT, BG, EL and PL) stressed the role of the European Year of Equal Opportunities for All (2007) in establishing cooperation with NGOs and their participation in projects relating to that initiative. The role of NGOs in implementing projects funded by the Structural Funds was stressed by CZ, LT and PL.

⁷ Available at http://www.etuc.org/IMG/pdf/framework_of_actions_gender_equality_010305-2.pdf.

7. CONCLUSIONS

Considering the far-reaching changes to legislation required in a number of Member States and the substantial progress most Member States have made in implementing its provisions, the transposition of Directive 2002/73/EC can generally be regarded as satisfactory. However, an effort is still needed in a number of Member States to achieve full and correct transposition.

The Directive is an important milestone in the development of EC gender equality law in so far as it has modernised the rules on equal treatment of men and women in employment and related areas. Nonetheless, given the persistence of inequality and discrimination, it is important that EC and national gender-equality legislation be implemented and enforced carefully.

The role of the equality bodies, which not only monitor developments at national level and assist the victims of discrimination but also contribute to furthering equality in the long run through their many other activities, is particularly important here.

The involvement of all actors (the authorities, the social partners, NGOs, the equality bodies and society at large) is essential if awareness is to be raised and effective use made of the tools to eradicate discrimination that are provided for in the Directive.