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COMMISSION STAFF WORKING PAPER

"Proposal for a Council Directive implementing the principle of equal treatment for men and women in the access to and supply of goods and services"

Extended Impact Assessment

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Extended Impact Assessment

1. PROBLEM IDENTIFICATION

The European Union is founded on the principle of equality. Articles 21 and 23 of the Charter of Fundamental Rights prohibit discrimination based on sex and enshrine the right to equality for men and women in all areas. Article 2 of the Treaty establishing the European Community defines the promotion of equality between men and women as one of the Community's essential tasks. Article 3(2) EC requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

There is already a very substantial body of Community legislation on equal treatment for men and women in the fields of employment and occupation¹. No Community action has been taken so far to prohibit sex discrimination in areas outside of the labour market, in contrast to the action adopted in 2000 to prohibit racial discrimination in a wide range of areas outside employment, including in access to all goods and services available to the public.

¹ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *OJ L 45 of 19.2.1975*; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ L 39 of 14.2.1976* as amended by Directive 2002/73 of the European Parliament and of the Council, *OJ L 269 of 5.10.2002*; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of equal treatment for men and women in matters of social security, *OJ L 6 of 10.1.1979*; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *OJ L 225 of 12.8.1986 as amended by Council Directive 96/97/EC of 20 December 1996, OJ L 46 of 17.2.1997*; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, *OJ L 359 of 19.12.1986*; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, *OJ L 348 of 28.11.1992*; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (*OJ L 010 16.01.98 p.24*); Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (*OJ L 010 16.01.98 p.24*); Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex *Official Journal L 014 20.01.98 p.6*; Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, *Official Journal L 205 22.07.98 p.66*.

Generally speaking, a broad principle of equality for men and women is already included in most of the Member States' constitutions and/or laws. The table below sets out the current requirements concerning equal treatment in the area of goods and services in the existing Member States.

**Coverage of national legislation dealing with equality in the field of goods and services:
Summary overview**

| Member State | Goods and Services in general | Financial Services | Private Insurance | Housing |
|---------------------|--|---|--|---|
| BE | Act of 25 February 2003 | Act of 25 February 2003 | Act of 25 February 2003 | Act of 25 February 2003 |
| DA | Gender Equality Act Section 2 | Gender Equality Act Section 2 | Gender Equality Act Section 2 | Gender Equality Act |
| DE | Some limited obligations derived from Civil Code | No, with exception of financial services provided by public authorities | No | Constitutional requirement applies where housing provided by public authorities |
| EL | Article 4(2) Constitution | Article 4(2) Constitution | Article 4(2) Constitution | Article 4(2) Constitution |
| ES | No specific legislation (general equality clause in Articles 9(2) and 14 Constitution) | Article 9(2) of Constitution applies to services provided by public authorities | No specific legislation | Article 9(2) of Constitution applies to services provided by public authorities |
| FI | Equality Act, Sections 7, 20 and 21 | Equality Act, Sections 7, 20 and 21 | Equality Act, Sections 7, 20 and 21 | Equality Act, Sections 7, 20 and 21 |
| FR | No specific legislation (general clause in Constitution) | No specific legislation (general clause in Constitution) | Code des Assurances allows use of sex-based actuarial factors | - Constitution - Civil Code (articles 1752 and 832) -Law 6 July 1989 (article 14) |
| IR | Equal Status Act 2000 and the Intoxicating Liquor Act 2003 | Equal Status Act 2000 | Equal Status Act 2000: Exceptions for sex-based actuarial factors and other relevant | Equal Status Act 2000 (some limited exceptions) |

| | | | | |
|-----------|--|---|---|---|
| | | | commercial factors | |
| IT | Article 3 of the Constitution | Article 3 of the Constitution | Article 3 of the Constitution | Article 3 of the Constitution |
| LU | Articles 454, 455 and 456 Criminal Code (since 1997) | Articles 454, 455 and 456 Criminal Code (since 1997) | Articles 454, 455 and 456 Criminal Code (since 1997) | Articles 454, 455 and 456 Criminal Code (since 1997) |
| NL | Equal Treatment Act (Algemene Wet gelijke behandeling) | Equal Treatment Act (Algemene Wet gelijke behandeling) | Equal Treatment Act: Exceptions for sex-based actuarial factors | Equal Treatment Act (Algemene Wet gelijke behandeling) |
| ÖS | Act on E-Commerce, 2001 (combating harassment on grounds of sex) | No, with the exception of company pensions (§8 Company Pensions Act 2000 refers to principle of equality) | No | Constitutional requirement applies where housing provided by public authorities |
| PT | Constitution (general provision) | Constitution (general provision) | Constitution (general provision) | Law No 107/99 and Decree-Law No 323/2000 applicable in cases of domestic violence against women |
| SW | No | No | No | No |
| UK | Sex Discrimination Act 1975 | Sex Discrimination Act 1975 | Sex Discrimination Act 1975: Exceptions for sex-based actuarial factors | Sex Discrimination Act 1975 |

Source: EU Network of legal Experts on Equality Legislation, 2003

As in the field of racial discrimination, there is little evidence of discriminatory legal rules or standing practices applying in the field of goods and services any more than in the field of employment – providers of goods and services are not in the habit of instructing their employees to treat men and women differently. However, there is considerable evidence of discriminatory behaviour related to sex. Evidence points particularly to differences of

treatment in the area of access to services, and especially financial services. Examples include²:

- Refusal to provide a mortgage to pregnant women.
- Refusal to allow a woman's name to be put first on joint accounts (with resulting discrimination in entitlement to benefits such as share options, which are frequently restricted to the first named member).
- Refusal to offer loans to people working part-time (indirectly discriminatory as the majority of part-time workers are women).
- Requirement for a woman to have a guarantor for a loan, where a man with a similar credit rating would not face a similar requirement.
- Local authorities or housing associations providing bungalow/sheltered accommodation to women at age 60 but men at age 65.
- Sexual harassment by landlords.
- Refusal by insurance companies to honour claims for loss of earnings through sickness to women over 60 but to men only over 65.

Discriminatory practices do exist however in the field of insurance, where it is common for companies to treat women and men differently for the purposes of motor insurance, health insurance, and various forms of life insurance (including pension annuities) – see below.

The scale of the problem of sex discrimination in the area of goods and services is difficult to assess. This is in part because, by definition, no record of complaints of sex discrimination are kept in Member States which have no specific legislation in the field – discrimination as an unlawful act only exists once it is prohibited. In a Eurobarometer survey carried out in 2002, people saying that they had personally experienced discrimination on grounds of sex in the area of goods and services made up just under one quarter of the discrimination reported in this area on all grounds covered by the survey³. In Member States where legislation does exist, it can be seen that complaints in this area make up a significant proportion of those dealt with by the specialised bodies concerned. In Ireland, for example, the proportion of sex discrimination cases dealt with so far in 2003 by the Office for the Director of Equality Investigations concerning goods and services represents approximately 25% (with the remaining 75% concerning employment). In the Netherlands, complaints about unequal treatment based on sex in the area of goods and services made up just over 10% of the cases dealt with by the Equal Treatment Commission in 2002. It is clear, therefore, that European legislation in this field will meet a previously unmet need in Member States which do not presently have specific legislation on equal treatment in access to goods and services.

Insurance

At present, insurance companies in the majority of Member States take gender into account when assessing the risks associated with certain products. This is especially true of motor, health and life insurance, including pension annuities. Gender is generally not taken into account in areas such as householders', civil liability, aviation/maritime or other similar types of insurance. The

² These examples are drawn from the Equal Opportunities Commission of Great Britain and the Irish Equality Tribunal – Office for the Director of Equality Investigations

³ Other grounds included racial and ethnic origin, religion and belief, disability, age and sexual orientation.

degree to which gender differences are taken into account for different products varies from one Member State to another in relation to different products. In France, in the area of life products, gender is not taken into account and unisex tables are used.

Motor insurance: the current situation

Insurers report differences in the risks associated with insuring men and women as drivers (though in some Member States it is the vehicle, not the driver, which is insured). The French Federation of Insurance Companies (FFSA) reports that women’s claims in terms of frequency and cost are equal to half those for men for those under 25 and over 70 years old. One British motor insurer presents slightly different figures, reporting that men under the age of 30 have a claims frequency over 10% worse than women of the same age, while their average cost per claim is almost 25% higher. However, the risk associated with people over 60 is higher for women than for men.

In contrast with this situation, the Irish Insurance Federation reports that the relative claims costs for young drivers (17 to 24) are less than twice what they are for the 36 to 40 age group. (*Source: Irish Insurance Federation Factfile, 1998*). Premiums for the younger group are much higher than for older customers, and this is particularly the case for young men.

The difference in premiums reported by the British insurer quoted above is as follows:

Premiums for Motor Insurance for women compared to men

| Age | Men | Women |
|-----|-----|-------|
| 20 | 100 | 52 |
| 22 | 100 | 88 |
| 25 | 100 | 89 |
| 29 | 100 | 91 |
| 35 | 100 | 97 |
| 45 | 100 | 99 |
| 60 | 100 | 102 |
| 65 | 100 | 104 |
| 70 | 100 | 105 |
| 79 | 100 | 104 |

Source: Major British insurance company quoted in a submission by the Comité Européen des Assurances

However, in some Member States (such as Sweden), insurers make no distinction between women and men when calculating premiums for motor insurance. The Commission notes that the Comité Européen des Assurances reports that the same is true for some individual companies even in Member States where this is not the general practice.

Health Insurance: the current situation

In general, insurers use gender as a guide to risk in the provision of supplementary health insurance (sometimes known as private medical insurance). The markets for this type of insurance vary greatly across the European Union depending on the level and type of coverage provided by the statutory systems in place.

In Germany, detailed figures provided by the Verband der Privaten Krankenversicherung (PKV - Association of Private Health Insurance) show that the costs attributed by their member organisations for various aspects of medical insurance vary with gender. The Association argues that overall, claims from women incur approximately 40% higher expenditure than claims from men, of which 10% can be attributed to medical benefits relating to pregnancy and childbirth. Costs incurred for hospital treatment are higher for women up to the age of 55, while costs for outpatient treatment are higher for women than men through to the age of 75. Consumption of medication is higher up to the age of 65 for women and the cost of dental treatment is higher for women up to the age of 70. In the higher age groups, however, costs are lower for women than men.

Germany: Consumption by women as a percentage of consumption by men

| Age | Medication and dressings | | Dentistry | | Out-patient Treatment | | In-patient treatment | |
|-----|--------------------------|-------|-----------|-------|-----------------------|-------|----------------------|-------|
| | Men | Women | Men | Women | Men | Women | Men | Women |
| 15 | 100 | 91.3 | 100 | 99.4 | 100 | 115 | 100 | 142.9 |
| 25 | 100 | 128.3 | 100 | 123.2 | 100 | 208.7 | 100 | 165.4 |
| 35 | 100 | 139.4 | 100 | 112.3 | 100 | 207.7 | 100 | 249.8 |
| 45 | 100 | 114.4 | 100 | 113.8 | 100 | 143.4 | 100 | 117.3 |
| 55 | 100 | 114.6 | 100 | 116.9 | 100 | 137.6 | 100 | 97.4 |
| 65 | 100 | 99.8 | 100 | 106.2 | 100 | 115.6 | 100 | 78.7 |
| 75 | 100 | 84.4 | 100 | 98.1 | 100 | 98.9 | 100 | 80.5 |
| 85 | 100 | 87.4 | 100 | 81.0 | 100 | 102.2 | 100 | 93.5 |

Source: Verband der Privaten Krankenversicherung; Base: Records of the member companies of the association (i.e. people with private health insurance and not the general population)

German figures also reveal different patterns of stays in hospital for men and women who are covered by health insurance. The PKV reports the following experience of its member companies (note: the patterns of time spent in hospital for people with private health insurance is likely to be different from that of the general population).

Germany: Days spent in hospital per insured person per year

| Age | Days in hospital | | Days in hospital from the 8 th day | | Days in hospital from the 43 rd day | |
|-----|------------------|-------|---|-------|--|-------|
| | Men | Women | Men | Women | Men | Women |
| 15 | 0.5 | 0.82 | N/A | N/A | N/A | N/A |
| 25 | 0.72 | 1.35 | 7.18 | 11.19 | 1.62 | 1.5 |
| 35 | 0.7 | 1.68 | 12.13 | 12.73 | 1.62 | 2.07 |
| 45 | 1.14 | 1.37 | 15.05 | 15.78 | 2.68 | 3.31 |
| 55 | 2.18 | 2.26 | 19.95 | 19.68 | 5.93 | 6.96 |
| 65 | 3.83 | 3.19 | 27.52 | 25.18 | 5.75 | 1.04 |
| 75 | 7.29 | 6.54 | N/A | N/A | N/A | N/A |
| 85 | 11.24 | 10.81 | N/A | N/A | N/A | N/A |

Source: Verband der Privaten Krankenversicherung

The French Federation of Insurance Companies (FFSA) reports that in France the practices of health insurers are very varied. Insurers do not have the option of terminating the contract and so they calculate the premiums so that they can cover an individual throughout his/her life, taking into account the elements which may affect the level of benefits, some of which may be different for women and for men. Generally speaking, however, the health expenses of women are reported to be greater than those of men. Nevertheless, the differences in usage of health care by women and men are not necessarily reflected in the application of different rates according to sex.

Some insurers in France pursue a rating policy which differentiates between men and women for some contracts. As in the German case above, this tends to result in higher premiums for women in the younger age bands, with the balance tipping the other way with increasing age.

Other insurers however do not apply any difference in premiums between men and women. In this case, contracts are rated on the basis of mixed sample groups, based on the principle of solidarity between the sexes.

French insurers also offer group health insurance. Group contracts, whether compulsory or optional, are subject to overall group rating, with the result that the premium is the same for all members of the group irrespective of sex. The groups may be, for example, the managerial staff (or entire workforce) of a company, the members of a federation etc. To determine the premium to be applied, insurers have the option of basing their calculations on national studies, supplemented by corrective coefficients in order to take into account the balance of sexes and average age in the group. The result is then applied uniformly to all insured people in the group, whatever their sex. Other insurers adopt their own methods which are based on similar principles and so result in no difference in premiums for men and women.

In the United Kingdom, health insurance is divided into separate products, in particular private medical insurance and critical illness insurance. There is no consumer demand for the coverage of normal care related to pregnancy and childbirth in the UK. However, typical complications such as multiple births and C-sections are usually covered. Despite this, the Association of British Insurers reports that "gender is largely irrelevant to the cost of the product". They conclude that "[Private Medical Insurance] is a competitive market and as a result women need pay no more than men for PMI".

Sex-based factors are taken into account in critical illness insurance, however, with the result that premiums for men and women differ and that they vary with age: older men tend to pay more than older women, as in the example from Germany above.

United Kingdom: Price of Critical Illness Insurance: costs for women as a percentage of costs for men (best and worst prices available on the market)

| Age | Men | Women | Men | Women |
|-----|------------|------------|-------------|-------------|
| | Best price | Best price | Worst price | Worst price |
| 25 | 100 | 100 | 100 | 111.4 |
| 35 | 100 | 87.6 | 100 | 105.5 |
| 45 | 100 | 80.07 | 100 | 84.55 |

Source: Health Insurance, Issue 68, (July 2003) – Critical Illness Cover Survey

Life Insurance: the current situation

For the purposes of this proposal, life insurance can be split into two parts: term life insurance (that is insurance against the risk of death); and pension annuities, which provide regular payments for life on the basis of the investment of a capital sum. In the context of term life insurance, insurers take account of a number of factors when calculating the likely mortality of an individual in order to fix the premium in relation to the insured sum. In the context of pension annuities, the sex of the insured person tends to be the principal (and in some cases sole) criterion in determining the monthly payment which can be derived from a certain level of contribution.

It is to be noted, however, that not all insurers in all Member States use sex-based actuarial factors in their calculations of the level of risk.

In France, the conditions under which insurers must draw up their rates in the field of life insurance are governed by Article A335-1 of the Insurance Code. In application of this article, two types of tables may be used by insurers:

1. prescribed tables drawn up on the basis of data published by the National Institute of Statistics and Economic Studies (INSEE) and confirmed by Government decree.
2. experiential tables drawn up by the insurance company itself and certified by an approved independent actuary.

In practice, insurers use the prescribed tables under the first option for drawing up their rates. These tables, of which there are three, are unisex and are used equally for men and for women. The first table, (TD 88-90) was drawn up on the basis of male mortality and is used by insurers

for term life insurance for members of both sexes. The second (TV 88-90) was drawn up on the basis of female mortality and is used for endowment insurance for members of both sexes. The third (TPRV 93) was drawn up on the basis of female mortality and is a predictive table used for life annuity contracts. The first two tables are based on INSEE observations for the years 1988-1990 and were approved by decree on 27 April 1993.

The French Federation of Insurance Companies (FFSA) reports that it does not appear that the publication of these unisex tables in 1993 has been the cause of a shift in the balance of men and women in the insurance schemes nor the departure of members of one sex or the other towards other financial formulae.

The FFSA reports that experiential tables are rarely used by French insurers, but that if they were used, sex-based actuarial factors could be included. However, in the case of annuities, the rate applied may not be lower than the one applicable had the INSEE tables been used as the basis for the calculation.

The Association of British Insurers (ABI) argues that, in the context of pension annuities, gender-based annuity rates reflect the actual mortality experience of the annuitant population and that gender remains the most significant factor (after age) in determining life expectancy. They note that in pooling risks, annuity providers need to reflect the relative risk an annuitant poses to the insurance pool. In applying different annuity rates, British insurers point out that men and women will receive (on average) the same income, though spread over a different number of years due to the greater life expectancy of women.

The mortality and life expectancy tables used by insurers in Member States vary considerably. A large number of tables exist in each country giving the expected results for men and women at different ages. By way of example, the table below reproduces the mortality rates applied in 9 Member States for the 1960 cohort at age 60 for men and women for pure endowment insurance and life annuity insurance.

| Mortality of 1960 Age Group at age 60 | | |
|--|------------|--------------|
| Country (and name of table where available) | Men | Women |
| AT (AVÖ1996R) | 5.75 | 2.17 |
| BE (MR) | 9.21 | 4.60 |
| DE (DAV 94R) | 5.42 | 1.95 |
| ES (PERM2000P) | 6.0 | 1.85 |
| FR (TPG93) (annuity insurance) | 3.02 | 3.02 |
| FR (TV88-90) (pure endowment insurance) | 5.72 | 5.72 |
| GB (RMC92) | 8.40 | 5.15 |

| | | |
|-----------------------|------|------|
| IT (RG48) | 3.98 | 1.43 |
| NL (dil98 m/f) | 6.8 | 3.23 |
| PT (GKF80) | 8.1 | 8.1 |

Source: Comité Européen des Assurances, December 2002

On the basis of this information, it is apparent that insurance companies apply a wide spread of mortality rates across the Member States for both men and women (the spread would be even greater if figures for Switzerland were included). This is because insurers use different assumptions about the future mortality rates of different generations (some work on the basis that mortality rates will continue to fall across all ages, others do not build this into their calculations) and because the basis for the observations varies greatly in terms of how recent the information is – the Comité Européen des Assurances notes, for example, that the table used by Portugal shows high values throughout because they are using an out of date Swiss table as the basis.

It is to be noted that insurers in France and Portugal apply single rates to both women and men.

A similar situation is found when looking at mortality rates for whole life insurance:

| Mortality at age 60 | | |
|--|------------|---------------|
| Country (and name of table where available) | Men | Women |
| AT (ÖstT-M/F) | 15.45 | 6.56 |
| BE (MK) | 18.23 | 10.09 |
| DE (DAV 94T) | 17.62 | 8.2 |
| DK (G82-M) | 15.48 | Not available |
| FR (TD88-90) | 15.65 | 15.65 |
| GB (AM92) | 8.02 | 4.83 |
| GB (TM92) | 7.75 | 5.05 |
| GR (EAE-1990) | 11.73 | 5.46 |
| IT (TCM non-smoker) | 10.17 | 4.95 |
| IT (TCM smoker) | 17.11 | 6.83 |
| PT (GKM80) | 16.09 | 16.09 |

Source: Comité Européen des Assurances, December 2002

Again it can be seen that the tables used vary by over 100% between insurers using the lowest and highest rates, while France and Portugal again use a single rate (in this case the male rate is applied to both sexes).

In conclusion, the problem identified can be summarised as follows:

- There is evidence of sex discrimination in the field of goods and services against which no (or extremely limited) protection is provided in the majority of Member States;
- Differences of treatment of women and men exist in the insurance sector which either disadvantage members of one sex in terms of access to the insurance cover provided or which lead to disadvantage in the level of benefits paid out, jeopardising the social inclusion of those disadvantaged.

2. OBJECTIVE OF THE PROPOSAL

The overall policy objective is to provide women and men across the Union with a common set of minimum standards of protection against sex discrimination in access to goods and services. As has already been done in this field in the case of racial discrimination, the Directive will provide people who believe that they have been treated unfairly with a means to seek redress and compensation for loss.

The main aims of the proposal are:

- to implement the principle of equal treatment for men and women in the access to and supply of goods and services, in line with the protections already provided on grounds of racial and ethnic origin;
- to extend the Community definitions of direct and indirect discrimination based on sex, harassment, sexual harassment and gender mainstreaming with a view to achieving such equal treatment;
- to provide for a minimum level of protection and rights to redress for people who believe they have suffered discrimination;
- to ensure appropriate mechanisms for supporting victims and monitoring equal treatment in society.

3. POLICY OPTIONS

The policy options for dealing with inequalities between women and men in the access to goods and services considered in the framework of this exercise were:

- Option 1 – do nothing
- Option 2 – reliance on incentive measures and soft law (e.g. Community Action Programme for Equality between Women and Men)
- Option 3 – limited legislative intervention in the field of goods and services
- Option 4 – broader legislative intervention in the fields of goods and services, education, taxation, social assistance, stereotyping in the media.

Option 1 – Do nothing

Failing to act to protect rights to equal treatment in this field – the so-called zero option – would leave the situation as it currently stands, with unjustified inequalities being faced by millions of citizens across a wide range of situations. Moreover, the trends in the field of social protection, where responsibility for insurance against certain risks is increasingly being transferred from the state to the private sector, will lead to an increase in inequalities. In many cases, Governments are encouraging the move to private provision through tax incentives or equivalent arrangements. The legislator has decided that, in the case of statutory social insurance, the principle of equal treatment must be respected. However, the move towards private provision is undermining this principle: sex-neutrality in state social insurance schemes is being gradually replaced by sex differentiation in the private market, in both the second and third pillars of pension provision. This is all the more important because arrangements which compensate (in the main) women for various disadvantages they face on the labour market – such as recognition of periods of absence from the labour market for reasons of child care, or survivor's benefits – are less common or less generous in second and third pillar schemes. Moreover, self-employed workers frequently have no option but to resort to the private market for pension coverage. The numbers of people in self-employment – and among them the proportion of women – are steadily increasing.

There is no evidence that the situation is improving without intervention, nor any reason to believe that this will change. It should be recalled that this view is shared by the Heads of State and Government as expressed at the Nice European Council. A failure to respond to the instructions of the European Council and to make use of the new powers provided by the Amsterdam Treaty is not an option which the Commission could or should support.

This option has therefore been rejected.

Option 2 – reliance on incentive measures

Other policy approaches – such as non-binding action through soft-law or through incentive measures – have been tested at European level over the past thirty years (various resolutions and recommendations of the Council, Community Action Programmes on Equality between women and men since the 1970s). These initiatives have clearly contributed to a general development in the climate of equal opportunities in Europe. However, they have not proved adequate to secure equal treatment for women and men in areas outside employment, despite sustained efforts. The Commission has concluded therefore that this option would bring little benefit over and above Option 1 and has therefore rejected it.

Option 3 – Targeted legislative intervention

The logic of the rejection of the previous two options leads to the conclusion that some form of legislative intervention is required. The European Union has long promoted the case for intervention in the area of equal treatment for men and women in the field of employment. Recent intergovernmental conferences concluded that the Treaty powers needed to be strengthened in this regard to enable further reaching action.

Targeted legislative intervention would focus on one area – access to goods and services – where there is clear evidence of differences of treatment which disadvantage one sex or the other and would deal directly with the discrimination identified both by encouraging preventive action by providers of goods and services and by enabling victims of discrimination to challenge unfair practices. At the same time it would allow for flexibility by

enabling the courts in each Member State to interpret the general principle of equal treatment in line with its own traditions and practices and the framework of case-law of the European Court of Justice.

In the case of certain services, Community action is necessary to overcome the risk of distortions resulting from Member States acting in isolation. As noted in the Explanatory Memorandum, it is difficult for individual companies to move towards unisex insurance rates, for example, without a potential distortion of competition putting them at a disadvantage. The same is true for individual Member States in the context of the single market in insurance, where a move by a single Member State to require unisex tariffs could expose its insurers to undercutting by businesses in other Member States. To avoid this risk, it is necessary to co-ordinate a move towards a unisex approach across the Union. Community legislation laying down broad objectives but leaving the precise implementation to Member States is the best way to achieve the full implementation of the principle of equal treatment while avoiding the risks of undercutting.

As noted above, some Member States have already applied the principle of equal treatment to access to goods and services in their national legislation, but this is done in widely differing ways. Given the disparities and certain gaps in protection under national laws on equal treatment for men and women in the access to and supply of goods and services, the proposed Directive would ensure a common and effective application of the principle of equal treatment.

The right to equal treatment is fundamental to the conception of the European Union. To ensure that this right is protected at a common minimum level across the Union requires co-ordinated action. As has been seen in the case of earlier action by the Community dealing with specific problems of discrimination, this can best be achieved by the co-ordination of the legal protections provided in each Member State. A Directive, which leaves sufficient flexibility to the Member States as to how to provide this protection in practice, is the appropriate instrument, as in the earlier cases.

However, European Union action should go no further than is required to meet the objective to be achieved. Not only should the Union restrict itself to agreeing general principles, it should apply those principles only to areas where it is convinced that problems need to be resolved and that they can be resolved by the action proposed. In this case, the Commission has decided to propose a Directive with a clear focus on one area – goods and services – where there is evidence of the existence of discrimination and where previous Community action (especially Council Directive 2000/43/EC⁴) has shown that a legal response is appropriate.

Option 3 would therefore provide an effective, uniform level of protection throughout the whole of the European Union. The choice of a directive strikes a balance between the need for European intervention and the need to respect the differences between the existing constitutions, laws and legal procedures of the Member States. The Directive sets common goals while allowing for the flexibility needed by the different Member States to achieve them.

It should be noted in conclusion that the Union decided in 2000 that protection against discrimination on grounds of racial and ethnic origin should be extended to areas outside of

⁴ Council Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial and ethnic origin (OJ L180, 19 July 2000)

the labour market, to education, social protection, healthcare, social advantages and the access to and supply of goods and services, including housing. In that context, the Union agreed that the Member States acting alone could not sufficiently achieve a common high level of protection against discrimination and that the objective could be better achieved by the Community. Option 3 would be coherent with the approach already taken in that field.

In examining this option, different possibilities concerning the entry into force of the requirement for the insurance sector have been considered (either immediate or phased application). This is covered under the description of the impact of the options below.

Option 4 – wider legislative action

Consideration has also been given to the possibility of wider legislative action, covering fields such as taxation, education and the media. Consultation with the stakeholders, examination of the legal possibilities offered by the Treaty and respect for subsidiarity has led the Commission to conclude that the evidence was less clear-cut or that it was not apparent that the difficulties could be resolved through legislative means. The Commission has decided therefore that other means would be more appropriate to deal with these issues. The Commission intends, for example, to continue its contacts with the media industries to explore how far voluntary action to contribute to reducing and eliminating damaging sex stereotyping from the media and advertising.

4. IMPACT OF THE OPTIONS

Option 1 – Do nothing

As described above, while this option would have no effect on providers of goods and services and therefore no compliance costs, it would be likely to have a negative effect on levels of equality, particularly in the context of the protection of citizens against certain risks associated with health and old age as states begin to transfer responsibility for certain aspects of social protection from the state to the private sector.

Option 2 – Incentive measures

This option would have an impact on the Community budget in terms of the human and financial resources necessary to include action with Governments and insurance companies within, for example, the Community Action Programme for Equality between men and Women. It is likely also that supporting measures would be necessary at the level of the Member States in order to maximise the impact of incentive measures. However, in view of the limited impact of previous incentive action in this area, the Commission has concluded that the resources necessary would not achieve the required results in terms of the necessary changes in behaviour.

The Commission notes however that certain incentive measures would be a necessary and desirable complement to a legislative intervention (see below).

Option 3 – Targeted legislative intervention

The main impact of this option would be to prevent and combat sex discrimination in the field of goods and services. This would act as a political signal of the standards expected by the European Union. Such signals have a significant medium-term impact in changing behaviours and attitudes, as has already been seen in the case of sex discrimination in employment and

other fields of discrimination (e.g. race, disability, sexual orientation). By laying down general principles for common protection against sex discrimination to be enjoyed by citizens all over the Union, the proposal would reinforce and supplement the protections which currently exist in the Member States, either by widening the material scope of such protections or by providing or strengthening access to redress. In doing so, it would reinforce the fundamental values on which the Union is founded – equality for men and women, liberty, democracy, the respect for human rights and fundamental freedoms and the rule of law. It would help to strengthen economic and social cohesion by ensuring that people in all Member States enjoy a basic level of protection against sex discrimination, with comparable rights to redress. By laying down minimum requirements, the proposal would leave the Member States a wide margin of manoeuvre for the purposes of attaining its goal and in particular allows those with a higher or wider level of protection for citizens to maintain those levels.

In the shorter-term, by providing the victims of discrimination with a means of redress, the directive would lead to changes of behaviour by providers of goods and services to avoid accusations of discrimination. This would consist, in the best cases, of the evaluation of current practices and procedures in order to discrimination-proof their activities or simpler changes in behaviour following complaints against providers themselves or against their peers. This pattern has already been seen in the employment field as far as legislation on sex discrimination is concerned and more widely in the field of racial discrimination.

Such changes in behaviour would lead to a more equitable sharing of opportunities between women and men and the fuller participation of individuals in all areas of economic and social life. This would lead not only to an improvement in the living and working conditions of citizens but also to a more efficient use of human capital, thus contributing to wealth creation as a whole.

As noted above, some Member States already have legislation dealing with equal treatment between women and men in the field of goods and services. In some cases, therefore, the Directive will simply reinforce existing requirements rather than introduce completely new rules. Providers of goods and services will have to ensure that decisions in fields covered by the Directive are consistent with the principle of equality between women and men. In these Member States, compliance costs will be minimal.

Greater adjustments may be required by public and private enterprises in Member States which currently provide no or limited protection against sex discrimination in the area of goods and services, in particular to ensure that staff do not practice discrimination. This may involve awareness-raising and training activity and adjustments to record-keeping systems to ensure that the information necessary to defend allegations of discrimination is available. In addition, companies which are required to defend cases will have costs related to the legal or administrative process involved. **Such costs should however be marginal and in the main transitional**, in particular as all companies are already required by Community law to undertake such activities in the field of racial and ethnic discrimination: only minor adjustments to existing systems should therefore be required.

The general costs which may be faced by public and private sectors as a consequence of this option may be considered not to be significant in comparison to the potential gains (though see below for more detailed discussion of the impact on the insurance sector). No major side-effects in the non-insurance sectors have been raised during the consultations carried out in preparation for this proposal (see section 6 for list of those consulted).

Impact in the field of insurance

The principal long-term impact in the field of insurance will mirror that in the wider area of goods and services as a whole, by creating a system in which men and women are treated equally and in which they mutualise their risks. By basing insurance cover on solidarity between women and men rather than treating them as separate groups responsible for their own risks, the proposal will contribute to creating a more equal vision of society.

On a practical level, the ability to secure motor, life and health insurance is fundamental to full participation in other aspects of social and economic life. The directive will open up possibilities to people who are currently discouraged from taking out insurance because of the difference in cost (or benefit) for men and women. This can have benefits in terms of social inclusion, but also more widely as society benefits from the full participation and contribution of individuals who are currently not contributing to the full extent possible.

The potential impact on different branches of insurance is set out below. Representatives of insurance companies have so far not been able to calculate the precise impact in terms of short and long term costs and benefits to the industry (or ultimately to consumers), though they indicate that it is likely that prices for the different types of insurance would need to settle at a figure somewhere above the average of the current prices for women and men, so as to provide a sufficient safety margin against the risk of having an imbalance of risks in the scheme. These costs would be passed on directly to consumers in the form of premiums.

In Member States where they have not already done so (see above), insurers will have to phase out the use of sex-based actuarial factors in the provision of car insurance, health insurance and various types of life insurance, including the provision of pension annuities. The directive takes a flexible approach to this issue by allowing Member States the option of a long transitional period within which insurance companies may adjust to the new requirements. Insurers will be able to choose either to apply a simple unisex rate for their products, pitching the premium at a level which protects them against having a predominance of members of one sex in the scheme, or to invest in the development of alternative means of assessing risk through factors independent of gender (as is already happening in some Member States). The development of these new means of assessing risks – and the competition engendered between insurers in the process – will entail some transitional costs but will lead in the longer run to a wider range of more competitively priced products for consumers.

The different branches of insurance are considered in more detail below.

Motor Insurance

A requirement to remove gender as a factor in the calculation of premiums over a period of time implies adjustments by insurance companies in most Member States. Representatives of the insurance companies argue that, for customers aged between 35 and 65 years, the result of removing gender as a rating factor would be a small increase in prices, to compensate for the loss of accuracy in prediction of risk. They suggest also that in order to avoid "anti-selection" by younger male drivers and underwriting volatility, insurers would need to choose a rate which is higher than the average of the current rates for younger men and women. The insurers argue that this could lead to greater difficulty for younger women in obtaining insurance and therefore hamper their access to the labour market.

This is however a view based on an entirely static model of the insurance market and does not take into account the development of more sophisticated models of calculating risk. It is likely

that competition between insurance companies would continue to maintain downward pressure on prices. Companies may decide, for example, to respect the principle of equal treatment by putting more weight on other factors and in particular on the claims record of the insured person, so that responsibility for an accident had a greater impact on future premiums.

Health Insurance

The Association of Private Health Insurers (PKV) in Germany argues that the obligation to levy gender neutral contributions would have serious repercussions for the sector. It recalls that, in Germany, private health insurance forms part of the social security system and that it provides health cover for approximately 10% of the population, for whom private cover constitutes an alternative to membership of a statutory health insurance scheme. In order to guarantee a level of security comparable to that of the state system, the legislator has determined that private health insurance contracts cannot be terminated by the insurer. Contributions must therefore be calculated so as to be able to ensure that the contract can be fulfilled throughout the lifetime of the insured person, based on the principle of equivalence between expected future contributions and expected future benefits. For this purpose, insurers calculate the likely extent of future health expenditure on the basis of statistics compiled on projected claims within each age group. The contributions then correspond to the risk defined at the time the contracts are concluded, the insured person being assessed on the basis of gender, age and state of health. The contributions are calculated by spreading the increased health costs due to age over the entire lifetime of the contracts in such a way that increases in contributions cannot be imposed solely as a result of the insured person becoming older. As a result, contributions from younger people are levied at a higher rate than would be required to cover the corresponding risks so as to create reserves for old age and to finance expenditure in the higher age groups which are no longer covered by risk-related contributions. Insurers argue that, as a result of the higher life expectancy of women, old age reserves for women have to be built up to a higher level.

In this way, each age group of insured persons is responsible for itself. The industry argues that this is important because, unlike in the state system, there is no guarantee that future customers will always be forthcoming.

German health insurers conclude that different premiums are required from women and men to cover their different patterns of consumption. They note that theoretically, the greater demand placed on insurers by women could be covered by levying equal contributions from men and women in the form of gender neutral premiums. However, they note that, in the worst case scenario, the imposition of gender neutral premiums would result in the contributions from women being too low in comparison to the risk factors involved and that, to break even, insurers would have to insure at least as many men as women. They go on to suggest that companies would be encouraged to insure more men than women, since men's average contributions when measured against the corresponding risk factors would result in surpluses. This argument cannot be accepted as such practices would be unlawful as they would be in contradiction with the principle of equal treatment laid down by the draft Directive.

Finally, German insurers argue that if there were to be a change to a system of gender neutral pricing, the financial stability of the companies and the fulfilment of their obligations to insured persons would be threatened. They suggest that this approach would provide no safeguard for a demographically changing future, leaving future generations with a disproportionate burden of expenditure on a much larger number of old people. They argue that the single premium method of financing described above, involving the creation of old-age reserves, guarantees that each generation is responsible for its own additional age-related costs. The Commission notes however that the size of the reserve which is calculated to be necessary for each generation is

based on the experience of insurers with previous generations and that in certain cases solidarity between generations is required in order to meet unforeseen costs.

However, examination of the data provided by the insurance federations shows that differences in premiums for women and men are not universal. Insurers in different Member States use gender in different ways to calculate differences in prices, with some having no difficulty in applying a gender neutral approach. Even where gender differences are applied, the effect may vary for the same product in terms of their impact on women and men. For example, the cost of critical illness insurance for 35-year olds in the United Kingdom can be more expensive for either women or for men, depending on the insurer (see table above).

Moreover, the argument of the German health insurers that a departure from sex-based calculations would affect the stability of health insurance companies and constitute a threat to the sustained fulfilment of their obligation to insured persons cannot be accepted. The use of gender neutral calculations does not prevent the insurers from continuing to use the single premium method, with each generation creating its own reserves for old age. The difference from the current system would simply be that the reserves would be built up by members of both sexes for members of both sexes, instead of separate reserves being established for women and men.

The Commission concludes therefore that the differences applied are not necessary to the proper functioning of the market in health insurance. The removal of the differences in Member States where they currently exist will require some adjustment by the companies concerned in terms of the calculation of levels of risk, but, given the long transitional period foreseen by the draft Directive, the adjustment will be possible without disruption to the continuity or quality of cover provided.

Life Insurance

The variety of actuarial data on mortality and life expectancy used by insurance companies across the Union shows that no single approach is necessary for the insurance market to function effectively. In some cases it is clear that the data is outdated and provides at best an approximate guide to real mortality rates. As shown in the tables above, a unisex approach is already taken in France and Portugal.

Insurers which are currently applying different sex-based actuarial factors to the calculations of their premiums and annuities argue that, as in the case of motor and health insurance, to remove gender from the equation would entail a less accurate calculation of levels of risk and therefore that companies would need to raise average prices in order to provide a safety margin against having a higher proportion of the members of one sex in their scheme. In the case of annuities, they maintain that the likely effect of gender neutrality would be to drive down annuity rates for men without significantly improving the income women would receive. They suggest therefore that gender neutral rates would have a negative impact on pensioner income taken as a whole. As many older women depend on income from their husband's annuity, insurers argue that these women would also suffer.

In contrast to this, the French Federation of Insurance Companies (FFSA) notes that it does not appear that the introduction of unisex tables in France was the cause of a massive departure of men or women towards other contractual formulae. Moreover, the view of companies currently using a gender-based approach is based on a static view of the market (in the same way as for other the forms of insurance above). While it is possible that, without other adjustments in the market, annuity schemes might become less attractive to (some) men, encouraging them to look at other forms of saving for retirement, it is more likely that financial markets will adjust overall

to accommodate the new environment, developing new financial products which are equally attractive to both sexes and which are not dependent on calculations based on gender. For this reason, the Commission is proposing a long transitional period within which the change may take place.

Accompanying measures

In the light of the concerns expressed by insurance companies about the proposed changes and the historical inertia in this field which they reflect, the Commission judges that it would be advisable to foresee certain accompanying measures to prepare both companies and consumers for the change. These could consist of targeted awareness-raising campaigns to explain the motivation and potential impact of the application of the principle of equal treatment. This could in part be done through the Community Action Programme for Equality between Men and Women, but would need to be supplemented by actions at national level, perhaps in co-operation with the bodies for the promotion of equal treatment which are provided for in the Directive.

Option 4 – Wider legislative action

This option would have the same impact as option 3, but with additional impacts in the areas of education, taxation and the media. These impacts would fall principally on public authorities in the first two cases and on the media and advertising industries in the third, requiring an assessment of their conformity with the principle of equal treatment and consequent adaptations of their approaches. In the light of the fact that the impacts in these areas are uncertain, in particular as it is not clear whether certain practices in the field of taxation and the media could be classed as discrimination under Community law, the Commission concludes at this stage that wider action is not desirable. No detailed assessment of the impacts in these areas could therefore be presented here.

Conclusion

In summary, the main positive and negative impacts of the various options can be presented as follows:

| Option | Positive impacts | Negative Impacts |
|---|--|--|
| Option 1 – No action | None | Gradual deterioration of equality of treatment as a result of trend to shift responsibility for aspects of social protection from the state to the private sector. |
| Option 2 – Incentive measures | At best extremely limited – no evidence that previous incentive measures on their own have brought practical changes in this field | Costs to Community and national budgets associated with spending programmes in support of equality |
| Option 3 – Targeted legislative intervention | Significant shift in behaviours and, longer term, attitudes towards men and women. Sharing of certain risks leading to more equal vision of society, | Limited transitional costs for all providers of goods and services in adjusting to new requirements (adapting from approach already applicable for |

| | | |
|--|--|---|
| | <p>underpinning the values of the European Union.</p> <p>Establishment of mechanisms enabling victims of discrimination to challenge the behaviour and, as a result, introduction of preventive policies by providers of goods and services.</p> <p>In insurance, the development of a wider range of more competitive products for consumers which more accurately reflect levels of risk faced by insured persons.</p> | <p>racial discrimination).</p> <p>Specific costs for providers of insurance, ultimately passed on to consumers, in developing unisex actuarial tables and new ways of calculating risk independent of sex.</p> <p>Some costs associated with the need for accompanying measures to raise awareness about the motivation for and impact of the proposal.</p> |
| Option 4 – Wider legislative intervention | <p>As for Option 3, but also positive impacts in terms of the representation of men and women in the media and advertising, wider ability of citizens to challenge potentially discriminatory action.</p> | <p>Uncertain, but potentially significant, in particular in the fields of taxation and media.</p> |

In conclusion, the Commission believes that Options 1 and 2 should be discarded as they will not achieve the required objective. Option 4 should also be discarded as its impacts are uncertain and as there are questions about its viability. Option 3 presents both a viable route and one in which benefits outweigh costs as long as a sufficient period is foreseen in order to allow time for adjustment by the insurance market.

5. MONITORING AND TRANSITIONAL ARRANGEMENTS

The initiative will be monitored on the basis of the reports foreseen in Article 14 of the Directive. The Directive requires Member States to notify the Commission of the transposition into national law within two years of the date of entry into force and on the application of the Directive within five years and every five years thereafter. The Commission will, on that basis, report to the Council and the European Parliament and make any adjustments it deems to be necessary in the light of experience.

The transitional period before the application of the principle of equal treatment to the use of actuarial factors based on sex in the insurance sector will allow a gradual adaptation of the market and the development by the industry of new ways of assessing risk. This will avoid an abrupt impact on the market which would be likely to result in a rapid (though limited) increase in premiums for some consumers. The transitional period will allow the operation of competition between companies to avoid this effect.

The transitional arrangements would also allow the possibility of accompanying measures to be carried out at the level of the Union and of the Member States to prepare business and consumers for the change.

6. PREPARATORY STEPS

Consultations carried out

The Commission has consulted widely in advance of making these proposals. The views of the consulted parties are to a great extent covered above in the presentation of the impacts of the proposal.

In summary, it has received the following comments and opinions:

Advisory Committee on Equal Opportunities for Women and Men, 2002

This is a statutory committee established by Commission Decision⁵ for the purposes of consultation on issues related to equality for women and men. Its members include:

- Representatives of the Member States (ministries or government departments responsible for promoting equal opportunities);
- Representatives of national committees or bodies set up by official decision, having specific responsibility for equal opportunities between women and men through representation of the sectors concerned;
- representatives of the European industry organisations (UNICE, UEAPME, CEEP) and trades unions (ETUC, EUROCADRES, CEC);
- representatives of the European Women's Lobby (as observers).

The Advisory Committee's opinion of 20 February 2002 strongly recommends that the Commission should propose a Directive with a broad material scope (participation in decision-making, goods, facilities and services, health, education and training, violence against women, sexual harassment, commercial advertising and media, membership of associations). The Directive should follow the structure of the earlier discrimination directives in the areas of sex etc and should, in addition, require Member States to submit action plans on equality to the Commission, containing concrete objectives supported by the collection of statistics segregated by sex and age. The Directive should also oblige all public authorities actively to promote gender equality in all sectors of society (through activities in the areas of preparing legislation, budgeting, policymaking, implementation of programmes and research. The requirement for gender equality should not stand in the way of positive action to compensate for disadvantages linked to sex.

European Parliament

A public hearing in the Committee on Women's Rights of the European Parliament on 10 September 2003 allowed an open discussion of the issues concerning possible proposals for a directive, focusing in particular on the coverage of the insurance industry and the media. The hearing took evidence from the European Federation for Retirement Provision, the European Social Insurance Partners Association, the Retirement Income Reform Campaign, the Comité Européen de Assurances, the European Publishers' Council, the European Women's Lobby and from individual experts in the field of insurance and the use of sex-based actuarial factors.

⁵ Commission Decision 82/43/EEC as amended by Commission Decision 95/420/EC

The Committee concluded that it was in favour of a Directive to combat sex discrimination outside of the labour market. It noted the view that insurers use gender as a factor in the calculation of risk because it is easy to manage and that the majority of speakers believed that the principle of equal treatment should and could apply to the provision of insurance. The Committee also noted a demand for greater transparency in the fixing of tariffs. The Committee noted different opinions on the need to cover the media – the rapporteur was not opposed to methods based on self-regulation, but believed that this should take place within a legal framework laid down in the Directive.

Non-Governmental Organisations

European Women Lawyers Association (EWLA)

The EWLA also expressed strong support for the proposal in its submission of 5 September 2003, calling for a directive to prohibit sex discrimination in the fields of goods and services, social protection (including health care), social advantages, education, taxation and the media, including advertising.

European Women's Lobby (EWL)

The EWL statement of 9 July 2003 makes clear the Lobby's strong support for a directive covering the areas of goods and services, including insurance, social assistance, including health care and social advantages, education, taxation, media and advertising.

Association des Femmes de l'Europe Méridionale (AFEM)

The AFEM statement of 7 September 2003 supports the broad lines taken by the European Women's Lobby and the EWLA above.

Fédération Européenne des Retraités et Personnes Agées (FERPA)

An opinion of the FERPA issued on 8 September 2003 supports the line of the EWL.

Insurance Industry

Detailed discussions have been held with representatives of the Comité Européen des Assurances, the Association of British Insurers, the Fédération Française des Assurances and the Gesamtverband der Deutschen Versicherungswirtschaft (28 August 2003). A separate discussion was also held with the GDV on 16 September 2003. Written submissions have been received from these organisations, as well as from some individual companies.

The views of these organisations are set out above.

Media Organisations

Contacts with representative organisations of the media and advertising industries showed strong concerns about possible conflicts between the principle of equal treatment, were it to be laid down in Community law for the content of media and advertising, and freedom of expression. This view was put forward by the European Publishers' Council, the European Newspaper Publishers' Association, the Association of Commercial Television in Europe, the UK Advertising Association and others.

Future consultations

The Commission intends to continue its contacts with media and advertising organisations with a view to establishing how far voluntary measures by the industry can contribute to the objective of equal treatment.