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Equality and Sex Discrimination In the European Union—Is Shifting the Burden of Proof the Answer?

I. Introduction

While the development of the European Union (hereinafter "EU") has its roots in economic goals, the scope of the European Union has been expanded to encompass many areas ranging from the economy to social policy. In furtherance of social policy goals, the founding treaty of the European Union included the principle of equality, which includes equality between men and women in employment. This general principle has been furthered by passage of a number of directives, including the Equal Pay for Equal Work Directive and the Equal Treatment Directive.

Despite the principle of equality established in the Treaty of the European Union and subsequent directives, sex discrimination

2. Id. at 3-8.
is a continuing problem in the European Union.\(^5\) The European Commission has proposed a directive which will shift the burden of proof in sex discrimination cases to the employer if certain conditions are satisfied.\(^6\) The directive has been proposed in order to enable those employees who may have been victims of sex discrimination to pursue a case which previously may not have been successful because of the difficulties involved in proving sex discrimination.\(^7\) The directive defines direct and indirect discrimination and applies to both of these types of discrimination.\(^8\) In addition, the directive will advance the goals of Article 119 of the Maastricht Treaty\(^9\), the Equal Pay for Equal Work Directive\(^10\) and the Equal Treatment Directive.\(^11\)

Part II of this comment will review the history and development of the European Union and presents a general overview of the EU's legislative process. Following this overview, Part III will discuss the present status of discrimination law in the European Union, focusing on the Equal Treatment Directive, the Equal Pay Directive, and the European Court of Justice case law which has led to the proposed directive on the shifting of the burden of proof in sex discrimination cases. Part IV details the history and evolution of the proposed directive. Finally, Part V will analyze the directive and its effectiveness in combating sex discrimination in the European Union.

II. Development and Power of the European Union

A. History of the European Union

Today's European Union has come into existence after a number of evolutions beginning with the European Economic

\(^5\) Steiner, supra note 1, at 3-8.
\(^7\) Proposed Directive on the Burden of Proof, supra note 6, at 3.
\(^8\) Amended Proposed Directive on the Burden of Proof, supra note 6, at 3.
\(^9\) Steiner, supra note 1, at 251-255.
\(^10\) Equal Pay Directive, supra note 3.
\(^11\) Equal Treatment Directive, supra note 4; Proposed Directive on the Burden of Proof, supra note 6, at 3.
Community (hereinafter "EEC"). The EEC was created in 1957 with the signing of the Treaty of Rome. The original EEC was composed of six member states, including France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The United Kingdom, the Republic of Ireland and Denmark joined in 1973, followed by Greece in 1979, and Spain and Portugal in 1986. The EEC was founded with the goal of advancing the economy of the member states through the creation and regulation of a common market.

The goal of the EEC continued to develop and expand toward creating a more cohesive European Community. These changes led to the adoption of a new treaty which created the European Union. The Treaty of the European Union was signed in 1991 and has come to be known as the Maastricht Treaty. With the signing of this treaty, the European Community came to be known as the European Union. This new treaty signified not only a name change, but a change in philosophy as well. The new European Union would continue to foster economic growth, but in addition, would advance social policy within the member states. The current European Union consists of fifteen member states, which include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

B. The Legislative Process in the European Union

There are three main branches of the European Union involved in the legislative process: the European Commission, the Council of the European Union and the European Parliament.
1. The European Commission.—The European Commission (hereinafter “Commission”) serves three main roles: a) initiating proposals for legislation, b) guarding the Treaties and c) managing and executing Union policies.\textsuperscript{25}

   a. Initiating Legislation.—The Commission is responsible for initiating all legislation in the European Union.\textsuperscript{26} Without a proposal from the Commission, there can be no Community Law.\textsuperscript{27} When proposing legislation, the Commission must adhere to three objectives: legislation, consultation and subsidiarity.\textsuperscript{28} Once the Commission has completed a proposal, it is sent to the Council and Parliament for further evaluation and possible passage into law.\textsuperscript{29} Cooperation between all three branches is required in order for a proposal to become law.\textsuperscript{30}

   b. Guarding the Treaties.—The European Commission is responsible for ensuring correct application of European Union law in the member states.\textsuperscript{31} If violation or infringement of treaty law occurs, the Commission may bring charges in front of the European Court of Justice, and in certain circumstances, may fine the infringer.\textsuperscript{32}

   c. Managing and Executing Union Policy.—A wide range of duties falls under this heading, including managing the European Union’s annual budget.\textsuperscript{33} In addition, the Commission may make rules giving more detail to Council legislation, introduce temporary preventative measures to protect the Community, and negotiate trade or cooperation agreements with other countries.\textsuperscript{34}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{25} Id.
\item \textsuperscript{26} The European Commission (visited Nov. 4, 1997) <http://www.europa.eu.int/inst/en/com.htm#intro>.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id. The first objective of the European Commission is to legislate a proposal which is in the best interest of the European Union as a whole, not solely in the interest of an individual member state or sector. Id. The second objective—consultation—means that the Commission does not act alone when making a proposal for legislation.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} The European Commission (visited Nov. 4, 1997) <http://www.europa.eu.int/inst/en/com.htm#intro>.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\end{itemize}
\end{footnotesize}
2. *The Council of the European Union*.—The Council of the European Union (hereinafter "European Council"), also known as the Council of Ministers, acts as both a supranational and intergovernmental organization. The European Council sets political objectives for the European Union, coordinates national policies and resolves differences between institutions. The European Council also provides a forum where the member states may legislate for the European Union.

   a. Decision Making.—The Treaty of the European Union bases the European Union's activities on three "pillars" and establishes that any decisions must be made either unanimously or by a qualified majority. After examining a proposal submitted by the Commission, the European Council may adopt, amend or ignore the proposal.

Pillar One covers a wide range of Community activity, including agriculture, transport, the environment, energy and research and development. Of these areas only taxation, industry, culture, regional and social funds, and research and development remain subject to unanimity. For Pillar Two (Common Foreign and Security Policy), and Pillar Three (Justice and Home Affairs), the Council acts as decision-maker and promoter of the initiatives. These pillars also require unanimity, except in cases of a joint action, which may be decided by a qualified majority.

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
41. *Id.*
42. *Id.* The Common Foreign and Security Policy defines and implements external policy covering all foreign and security aspects. *Id.*
43. *Id.* Justice and Home Affairs addresses the free movement of persons, asylum and immigration policy, and international crime, including but not limited to terrorism and drug trafficking. *Id.*
44. *Id.*
46. *Id.*
b. Types of Legislation.—Community Law may be adopted either by the Council alone or by both the Council and the European Parliament in a co-decisional procedure.\textsuperscript{47} Community Law may be divided into two main categories: Primary and Secondary.\textsuperscript{48} Primary Law consists of treaties and protocols.\textsuperscript{49} Secondary Law contains four forms of Community Law: regulations, directives, decisions and recommendations/opinions.\textsuperscript{50} Each of these forms varies in its degree of power and applicability.\textsuperscript{51}

3. The European Parliament.—The European Parliament (hereinafter “Parliament”) has three primary powers: the power to legislate, the power of the purse and the power to supervise the executive.\textsuperscript{52}

a. The Power to Legislate.—Under the Treaty of Rome, the Commission had the power to initiate legislation and the European Council had the power to enact legislation, but was required to consult with Parliament prior to enacting any legislation.\textsuperscript{53} If the European Council failed to consult with Parliament, the law would become void.\textsuperscript{54} This decision-making power has since been expanded to create equality between Parliament and European Council in a number of areas.\textsuperscript{55}

b. Execution of Legislative Power.—The Parliament may execute its powers in four different ways—consultation, coopera-

\textsuperscript{47} Id.
\textsuperscript{48} STEINER, supra note 1, at 255.
\textsuperscript{50} Id.
\textsuperscript{51} Id. Regulations are seen as the most powerful type of Community Law, because they are directly applied and do not require national action for implementation. Id. The next most powerful type of Community Law are directives. The objectives of directives are binding on the member states, but implementation is left to the national authority. Id. The member states have the power to decide the form and means of achieving the objectives of directives. Id. Decisions may be addressed to any or all member states or to individuals and are binding only upon those to whom they are addressed. Id. Recommendations and opinions are suggestions of the Council and have no binding force.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
tion, co-decision, and assent—depending upon the type of propos-
al. Consultation requires a single reading of a Commission proposal by Parliament prior to the European Council's adoption of the proposal. Under the cooperation procedure, Parliament may reject the proposal at the second reading if it believes its opinions were not sufficiently taken into account by the European Council. The European Council may overturn Parliament's rejection only by a unanimous decision. Under the co-decisional procedure, Parliament equally shares the decision-making power with the European Council on certain subjects. If Parliament decides to reject the proposal, it cannot be adopted by the European Council. The assent procedure requires Parliament's approval for the accession of new member states or international agreements.

C. Interpretation and Enforcement of the Laws of the European Union

The European Court of Justice (hereinafter "The Court") was created to interpret and enforce the laws of the European Union (hereinafter "Community Law"). One function of The Court is to ensure proper observation of the law in the interpretation and application of the Treaties and other Community Law. The Court is also responsible for uniform interpretation and application of the Community Law. The Court may decide cases brought by the member states, community institutions, corporations and individuals.

56. Id.
58. Id.
59. Id.
60. Id. The co-decisional procedure applies to the free movement of workers, the establishment of the internal market, research and development, the environment, consumer protection, education, culture and health. Id.
61. Id. In order to prevent the proposal from being halted by Parliament, a conciliation committee may be convened in order to try to reach a compromise before Parliament enters a decision. Id.
64. Id.
65. Id.
66. Id.
The European Court of Justice was divided into two divisions in 1989 in order to facilitate interpretation of Community Law and to protect the interests of the European Community. The Court of First Instance has jurisdiction over actions brought by individuals and companies against decisions of Community institutions and agencies. The judgment of The Court of First Instance may only be appealed to the Court of Justice of the European Communities on a point of law. In addition to appeals, two types of cases—direct actions and preliminary rulings—may be brought directly before The Court of Justice of the European Communities.

III. The Present Status of Discrimination Law in the European Union

Since the inception of the European Economic Community and continuing with the European Union, sex discrimination in employment has been prohibited. The European Union has taken two routes in order to further the goal of eliminating sex discrimination in employment: legislation and case law. As the legislation and case law have developed, discrimination has been broken down into two categories: direct discrimination and indirect discrimination.

A. Categories of Discrimination: Direct v. Indirect

Direct discrimination can be described as "stereotypical discrimination." It involves the situation where the actions taken by the employer towards the employee are clearly based on sex. This type of discrimination is often easier for a claimant to establish. While the proposed directive will apply to direct discrimination, it is not the directive's main focus.

Indirect discrimination occurs when there is a difference in treatment between one group of workers and another which affects

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67. Id.
69. Id. Questions of fact are not eligible for appeal. Id.
70. Id. Direct actions may be brought by the Commission, community institutions or member states. Id. Preliminary rulings may be requested by courts in the member states for clarification on Community Law. Id.
72. Id.
73. STEINER, supra note 1, at 255.
74. Amended Proposed Directive on the Burden of Proof, supra note 6, at 1.
one sex disproportionately. An employer may avoid charges of indirect discrimination if the employer can objectively justify the conduct based on criteria other than sex. The proposed directive gives a detailed definition of indirect discrimination which will assist in providing a clear legal basis for future sex discrimination cases.

B. Legislation

Legislation is both broader and more consistent than case law in prohibiting sex discrimination. Legislation often provides guidance in the form of explicit definitions and processes for the member states to follow when implementing the legislation. In addition, in contrast to case law, legislation is applicable to all situations and is not limited by the facts of the case.

There have been several legislative acts regulating sex discrimination in the European Union beginning with the Treaty of Rome and continuing with the Equal Treatment Directive and the Equal Pay Directive. The Proposed Directive on the Burden of Proof in Sex Discrimination cases seeks to continue this process.

1. Treaty of Rome.—In 1957 the Treaty of Rome was signed, thereby establishing the European Economic Community. The Treaty of Rome defines discrimination as “unequal treatment in situations that are identical or comparable,” but does not consider objectively justified treatment as discrimination. The Treaty of Rome prohibits discrimination based on nationality and prohibits rules inhibiting the free movement of goods or workers. In addition, Article 119 of the Treaty of Rome establishes the general principle of equal pay for equal work for both men and

75. Id. at 7; STEINER, supra note 1, at 267.
76. Amended Proposed Directive on the Burden of Proof, supra note 6, at 7.
77. Id.
81. Martinez Shively, supra note 71, at 1148 n.12.
82. STEINER, supra note 1, at 3.
83. Martinez Shively, supra note 71, at 1148 n.90.
84. Id.
women.\footnote{85} Under Article 119, “pay” includes wages or salary, in cash or in kind, provided by the employer and received by the worker.\footnote{86} These general principles have been extended through the Equal Treatment Directive and the Equal Pay Directive.\footnote{87}

2. The Equal Treatment Directive.\footnote{88}—Although not implemented under Article 119 of the Treaty of Rome, the Equal Treatment Directive was enacted in order to further the general principle of equal pay for equal work.\footnote{89} This principle of equal treatment prohibits both direct and indirect discrimination based on sex.\footnote{90} A number of areas are explicitly prohibited by the directive, including discrimination on the grounds of marital or family status\footnote{91} and discrimination in access to employment or promotion.\footnote{92} For example, the directive bars the use of sex as a factor for selection to a position.\footnote{93} The directive also grants women protection from having their employment terminated on the basis of their gender.\footnote{94}

While the principles of this directive may seem far-reaching, discrimination in the areas listed above may be allowed where sex constitutes a determinative factor in the occupational activity or training by reason of the nature or context of such activity.\footnote{95} This exception excludes from the Equal Treatment Directive any treatment based on the protection of women.\footnote{96}

Despite the broad nature of this directive, it applies only to direct discrimination and has been narrowly interpreted by the courts.\footnote{97} The directive is also limited to enforcement only against the member states (as an entity or an employer) and not against

\begin{footnotes}
\footnote{85} Id. at 1106.
\footnote{86} Id.
\footnote{87} See Equal Treatment Directive, supra note 4; see also Equal Pay Directive, supra note 3.
\footnote{88} See Equal Treatment Directive, supra note 4.
\footnote{89} Martinez Shively, supra note 71, at 1108. In order for this principle to be applied, there needed to be equality in employment.
\footnote{90} See Equal Treatment Directive, supra note 4.
\footnote{91} Id. art. 2(1).
\footnote{92} Id. art. 3(1).
\footnote{93} Id.
\footnote{94} Id. art. 5(1).
\footnote{95} Equal Treatment Directive, supra note 4, art. 2(2).
\footnote{96} Id. art. 2(3).
\footnote{97} STEINER, supra note 1, at 265. The Equal Treatment Directive is addressed to all member states and provides that member states shall introduce measures into their national legal systems which are necessary to carry out the provisions of this Directive. Equal Treatment Directive, supra note 4, art. 6.
\end{footnotes}
private employers. In addition, the Equal Treatment Directive does not contain any criminal provisions and leaves any remedies for violation of the directive to the courts. Because of the limitations of this directive, discrimination in the European Union continues. The new Proposal on the Burden of Proof hopes to eliminate some of this discrimination by making it easier for the claimant to establish a prima facie case of discrimination by requiring the employer to prove that the actions taken were based on objective criteria and not the sex of the worker.

3. The Equal Pay Directive.—The Equal Pay Directive was enacted in order to implement and supplement Article 119, and is applicable to all member states. This "principle of equal pay" eliminates discrimination on the grounds of sex for the same work or work of equal value with regards to all conditions of remuneration. The directive states that pay based on job classification systems must be based on the same criteria for men and women. In order to implement this directive, the member states shall institute procedures into the national legal system which will enable employees who believe they have been discriminated against in the area of equal pay to pursue their claims by judicial process. Any laws, regulations, administrative procedures, collective agreements, wage scales or other instruments regulating pay which are contrary to the principle of equal pay will be abolished or declared null and void. Collective agreements or wage scales may be amended in order to comply with the principle of equal pay.

Despite the Equal Pay Directive and the Equal Treatment Directive, discrimination on the grounds of sex is still prevalent in

98. STEINER, supra note 1, at 267; Martinez Shively, supra note 71, at 1148, n.100. A directive which may be invoked against the state is horizontally effective whereas a directive that may be invoked against a private individual is vertically effective. STEINER, supra note 1, at 267. A directive may be either horizontally or vertically effective or both, depending upon the language of the directive and the court's interpretation. Id. at 267-268.
99. Martinez Shively, supra note 71, at 1112.
100. Amended Proposed Directive on the Burden of Proof, supra note 6, at 8.
102. STEINER, supra note 1, at 257.
104. Id. art. 1
105. Id.
106. Id. art. 2.
107. Id. art. 3, 4.

C. Case Law of the European Court of Justice

There have been several cases before the European Court of Justice which have addressed the issues behind sex discrimination in the European Union. These cases have involved subjects such as the burden of proof and indirect discrimination.

The issue of indirect discrimination was first addressed by the European Court of Justice in 1989 in Case 109/88, Union of Clerical & Commercial Employees v. Danish Employer’s Ass’n ex parte Danfoss A/S, 1989 E.C.R. 3199. The case was brought under the context of equal pay and involved a claim by employees that the employer’s pay practices were discriminatory based upon sex. The court distinguished between direct and indirect discrimination stating that direct discrimination exists where pay for the same work or work of equal value is unequal based on reasons relating to sex. In such cases of direct discrimination, the plaintiff must prove that men and women are paid different wages for equal work of equal value by specifically comparing the pay of two employees of different sexes. However, in this case, the employer’s pay system lacked transparency, making proof by the plaintiff using the comparison method virtually impossible.

The Court then went on to differentiate direct discrimination from indirect discrimination. Indirect discrimination exists if “the unequal treatment is based on neutral criteria or such procedures which are normally complied with by the members of one sex and

112. Id.
113. Id.
114. Id.
115. Transparency is based on “the principle that the citizens’ access to documents will be constrained only by the need to protect certain public and private interests.” The European Commission (visited Nov. 4, 1997) <http://www.europa.eu.int/inst/en/com.htm#intro>.
thus work to the disadvantage of the group of persons affected."\textsuperscript{117} However, an employer may escape the charge of discrimination if the employer presents compelling justification that is not based on sex for the use of the criteria applied.\textsuperscript{118} In order to assure the effectiveness of the principle of equal pay, the Court established a presumption of discrimination when the plaintiff presents proof of a lower average wage for women within a representative group of employees.\textsuperscript{119} The Court was cautious to limit the effects of this presumption of discrimination by stating that the average wage for men and women does not always have to be equal if the difference in wages results from neutral criteria.\textsuperscript{120}

In 1993 Case 127/92, Enderby v. Frenchay Health Auth., 1993 E.C.R. I-5535 came before the European Court of Justice.\textsuperscript{121} This case also involved interpretation of the principle of equal pay. However, the pay system at issue in this case was transparent.\textsuperscript{122} A charge of discrimination was brought by a speech therapist claiming that members of this predominantly female profession were paid less than members of a comparable profession, pharmacists, which was predominantly male.\textsuperscript{123}

The law is clear that in sex discrimination cases, the burden of proof lies with the plaintiff.\textsuperscript{124} However, the case law of the European Court of Justice does recognize that this burden may shift to the employer in order to prevent the alleged victims of discrimination from being deprived of the protection of the principle of equal pay.\textsuperscript{125} The Court found that if the pay of the speech therapists is significantly lower than that of the pharmacists and the former profession is predominantly female and the latter profession is predominantly male, a prima facie case of discrimination exists.\textsuperscript{126} The Court held that "[w]here there is a prima facie case of discrimination, it is for the employer to show that there are

\begin{itemize}
\item\textsuperscript{117} Id.
\item\textsuperscript{118} Id.
\item\textsuperscript{119} Id.
\item\textsuperscript{120} Id.
\item Id.
\item Id. In reaching its decision, the Court acted under the presumption that the jobs of speech therapists and pharmacists were jobs of equal value, thereby falling under the Equal Pay Directive. Id.
\item Id. § 13; see Danfoss, 1989 E.C.R. 3199 (1989).
\item Enderby, 1993 E.C.R. I-5535; 1 C.M.L.R. 8, § 16 (1994).
\end{itemize}
objective reasons for the difference in pay.\textsuperscript{127} The Court went on to state that the principle of equal pay could not be enforced without shifting the burden of proving non-discrimination to the employer.\textsuperscript{128}

The European Court of Justice continued to support the shifting of the burden of proof in discrimination cases in Case C-400/93, Specialarbejderforbundet i. Danmark v. Dansk Industri \textit{acting for} Royal Copenhagen A/S, 1995 All ER (EC) 577.\textsuperscript{129} Again, the issue of discrimination arose in the context of the principle of equal pay where the pay scheme was not wholly transparent. The facts of the case centered around two groups of employees engaged in piece work.\textsuperscript{130} The Court concluded that in a piece work pay scheme, prima facie discrimination is not established by a mere finding of a difference in the average pay of two groups.\textsuperscript{131} Therefore, the burden of proof would remain with the plaintiff and would not shift to the employer.\textsuperscript{132} However, if the piece work pay scheme contains an output factor for rate of pay along with a fixed rate of pay, because of the inability to determine what factors are used to calculate the variable element, the burden may shift to the employer to prove that the differences in pay are not due to discrimination.\textsuperscript{133} The employer still has the opportunity to explain the differences in the pay scheme and to disprove the charge of discrimination if the conduct was based on objectively justified factors unrelated to discrimination.\textsuperscript{134}

IV. Proposed Directive on the Burden of Proof In Sex Discrimination Cases

The subject of discrimination based on sex has been a recurring issue since the formation of the European Economic Community and the European Union.\textsuperscript{135} A number of legislative

\begin{flushleft}
\textsuperscript{127} Id. ¶ 18.

\textsuperscript{128} Id.

\textsuperscript{129} Case C-400/93, Specialarbejderforbundet i. Danmark v. Dansk Industri \textit{acting for} Royal Copenhagen A/S, 1995 All ER (EC) 577 (1995) [hereinafter Royal Copenhagen].

\textsuperscript{130} Id.

\textsuperscript{131} Id. ¶¶ 22, 25.

\textsuperscript{132} Id. ¶ 24.

\textsuperscript{133} Id. ¶ 26.

\textsuperscript{134} Royal Copenhagen, 1995 ER (EC) 577 (1995). The actual determination of whether discrimination occurred and if the facts were sufficient to sustain a shifting in the burden of proof was left to the national court. Id.

\textsuperscript{135} Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on the Burden of Proof in Cases of Discrimination Based on
measures have been taken towards eliminating sex discrimination in the member states, including the Equal Treatment Directive and the Equal Pay Directive.\textsuperscript{136}

A. \textit{Evolution of the Proposed Directive}

The issue of the burden of proof in sex discrimination cases is not a new one to the European Commission.\textsuperscript{137} In 1988 the Commission submitted a proposal for a directive in the areas of equal pay and equal treatment.\textsuperscript{138} The Commission chose to proceed with this proposal under Articles 100 and 235 of the Treaty of Rome, which require unanimity for passage of a directive.\textsuperscript{139} After several failed attempts to reach unanimity from the member states, the Commission decided to pursue other avenues in order to achieve passage of the directive.\textsuperscript{140}

In order to avoid the requirement of unanimity, the original proposal by the Commission was submitted based on Article 2(2) of Protocol (N° 14) on social policy, which is annexed to the EC Treaty.\textsuperscript{141} The original proposed directive was adopted by the Commission on July 17, 1996,\textsuperscript{142} following two consultations with the trade unions, employers and public enterprises that are covered by the Social Protocol of the Maastricht Treaty.\textsuperscript{143}

As part of the legislative process of the European Union, the original proposed directive was submitted for review and commentary.\textsuperscript{144} The Economic and Social Committee of the European Union issued an opinion on the proposed directive on February, 13, 1997.\textsuperscript{145} The Economic and Social Committee backed the original
proposed directive,\textsuperscript{146} but did suggest some changes, including new wording regarding the burden of proof in order to achieve maximum clarity.\textsuperscript{147}

After proposal by the European Commission, the directive was approved by the European Parliament, subject to twenty amendments.\textsuperscript{148} The amendments by Parliament and the changes recommended by the Economic and Social Committee resulted in the amended proposed directive.\textsuperscript{149} After presentation of the amended proposed directive, the European Council issued its Common Position on July 24, 1997.\textsuperscript{150} The amended proposed directive was presented to the European Parliament for a second reading and the Final Directive has subsequently been approved by the European Council.\textsuperscript{151}

B. The Amended Proposed Directive

The amended proposed directive, adopted by the European Commission on May 14, 1994,\textsuperscript{152} has the same goals as the original proposed directive. These goals are to aid in the application of the principle of equal treatment by enabling the plaintiff to shift the burden of proof in sex discrimination cases and to ensure the implementation of this new procedure by the member states.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 34, 35.
\item \textsuperscript{147} \textit{Id.} at 36. Although some changes were made in Article 4 regarding the burden of proof, the suggestions of the Economic and Social Committee regarding rewording Article 4 were not implemented in the Amended Proposal. Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 8.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Equal Treatment for Women and Men} (visited Nov. 4, 1997) <http://c10913-.htm at europa.eu.int>.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{See} Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6.
\item \textsuperscript{153} \textit{See} Proposed Directive on the Burden of Proof, \textit{supra}, note 6. Article 1 of the Amended Proposed Directive states:
\begin{quote}
The aim of this Directive is to ensure that measures taken by the Member States in the application of the principle of equal treatment in order to enable all persons, who considered themselves wronged by failure to apply to them the principle of equal treatment, to pursue their claims by judicial process after the possible recourse to other competent authorities, are made more effective.
\end{quote}
\begin{flushright}
\end{flushright}
\end{itemize}
1. **Scope and Implementation.**—The amended proposed directive will apply to situations arising under Article 119 of the EC Treaty, the Equal Pay Directive, the Equal Treatment Directive and directives on equal access to employment, health and safety of pregnant workers and parental leave. 154 In addition to these specific areas, the scope of the proposed directive extends to any Community measure adopted in the future which relates to the principle of equal treatment, provided that application of this directive is not expressly excluded. 155 Unlike some of the other directives, this proposed directive will apply to any civil or administrative procedures in both the public and private sector. 156 The amended proposed directive is addressed to the member states, including the United Kingdom. 157 If passed by the European Parliament, the amended proposed directive must be implemented by the member states by January 1, 2001. 158 Implementation requires the member states to enact any laws, statutes, regulations or procedures necessary to enforce the directive and to inform the European Commission when this process is com-

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Article 3 states:

Scope - 1. This Directive shall apply to: (a) the situations envisaged by Article 119 of the Treaty and Directives 75/117/EEC, 76/207/EEC, 79/7/EEC, 86/378/EEC, 86/613/EEC and 92/85/EEC. (b) the situations envisaged by any Community measure adopted in the future relating to the principle of equal treatment which does not expressly exclude its application; (c) any civil or administrative procedure concerning public or private sectors which provides for means of redress under national law in pursuance of the measures referred to in points (a) and (b). 2. This Directive shall not apply to criminal procedures, unless otherwise provided for by the Member States.

Id.

156. Id.

157. Id. at 10; EU Ministers Back New Rules to Ease Sex Discrimination Suits, supra note 80. The current proposed directive will also apply to the United Kingdom, although Great Britain previously had an "opt-out" from the social chapter of the Maastricht Treaty. EU Ministers Back New Rules to Ease Sex Discrimination Suits, supra note 80. The new Prime Minister of Labor has agreed to join the social chapter in an effort to join the EU in ending discrimination and to end the United Kingdom's isolation in the area of equal opportunity. Id.

158. Amended Proposed Directive on the Burden of Proof, supra note 6, at 10; Social Affairs Council: Political Agreement on Burden of Proof, supra note 154.
plete. In addition, the member states must regularly submit progress reports to the European Commission.

2. The Burden of Proof.—At the center of the current proposed directive is Article 4, which addresses the burden of proof. Under current law, the plaintiff must conclusively prove that discrimination has occurred in order to succeed on a claim of sex discrimination. With the shift in the burden of proof under the amended proposed directive, once the plaintiff establishes a presumption of discrimination, the burden will shift to the employer. This presumption can be established from any facts presented by the plaintiff and the plaintiff may benefit from any

160. The Amended Proposed Directive states:

   Implementation - Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2001. They shall immediately inform the Commission thereof. When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States. Not more than two years after the date of implementation of this Directive, and every three years thereafter, Member States shall transmit information to the Commission with respect to progress made in the application of this Directive and trends in the use of provision contained therein, to enable the Commission to draw up a report for the Council and European Parliament every three years.

Id.

160. Id. at 10.

161. Id. at 8. Article 4 states:

   1. Member states shall take such measures as are necessary in accordance with their national judicial systems: (a) to ensure that where person who consider themselves wronged by failure to apply to them the principle of equal treatment as defined in Article 2 establish, before a court or other competent authority, a fact or fact from which discrimination may be presumed to exist, it shall be for the respondent to prove that there has been no contravention of the principle of equal treatment. The plaintiff shall benefit from any doubt that might remain; (b) to ensure that it is for the defendant, when it applies a system or a decision lacking transparency, to prove that the apparent discrimination is due to objective factors unrelated to any discrimination based on sex;
   2. This Directive does not prevent Member States from introducing evidentiary rules which are more favourable to the plaintiff.

Id.


remaining doubt once the facts are presented.164 Once the presumption of discrimination has been established, the burden shifts to the defendant to prove that the employer's conduct was based on objective factors other than sex.165 The directive does not reverse the burden of proof in sex discrimination cases, as reversal of the burden of proof would require the employer to prove the conduct was based on objective factors from the start of the lawsuit.166 The Commission's objective is to further the application of the equal treatment directive by making it easier to bring discrimination claims which will lead to a larger, more consistent body of case law.167

3. *Indirect Discrimination.*—The current proposed directive is applicable to both direct and indirect discrimination.168 Indirect discrimination is defined in this legislation in order to create consistency within the case law of the European Court of Justice.169 Indirect discrimination exists where an apparently neutral criterion or practice by the employer creates a disproportionate disadvantage to members of one sex.170 If the plaintiff charges discrimination based on indirect discrimination and can establish the presumption of discrimination, the burden will shift to the employer to show that the practice is objectively justified.171
C. The Final Directive

On December 15, 1997, the European Council adopted Council Directive 97/80/EC on the Burden of Proof in Cases of Sex Discrimination [hereinafter "Final Directive"]. While there have been some changes in the language of the directive, the substance of the directive has remained the same.

As with the amended proposed directive, the aim of the final directive is to enable those who believe that the principle of equal treatment has not been properly applied to pursue judicial recourse. As in the amended proposed directive, the final directive prohibits both direct discrimination and indirect discrimination. The final directive also defines indirect discrimination, but the definition is more direct than the version contained in the amended proposed directive.

objectively justified. SACHA PRECHAL & NOREEN BURROWS, GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY 3-5 (1990). Factors the court will consider in determining if an act by the employer is objectively justified include whether the employer was acting to protect other interests and whether the means are reasonably proportionate to the attainment of the objective. Id. at 4.

173. Id.
174. Id.
175. Id. Article 1 of the final directive states:
The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

Id.
176. Id.
177. See Final Directive, supra note 110. Article 2 of the final directive provides:
Definitions
1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.
2. For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Id.
The final directive retains the shift in the burden of proof from
the plaintiff to the employer.\textsuperscript{178} Under the final version, the
burden will shift when the plaintiff has presented facts "from which
it may be presumed that there has been direct or indirect discrimi-
nation".\textsuperscript{179} However, the final version contains an exception to
the shifting of the burden of proof for those proceedings in which
the court is to investigate the facts of the case.\textsuperscript{180}

V. Effectiveness of the Directive

The goal of the final directive is clear: to adjust the burden of
proof in sex discrimination cases, thereby ensuring that the
principle of equal treatment is made more effective and judicial
review is made available to all those who believe the principle has
not been properly applied.\textsuperscript{181} In addition, the final directive
defines indirect discrimination with the goal of creating a unified
body of case law.\textsuperscript{182} However, the question remains as to whether the directive will be able to achieve these goals.

A. Amendments by the European Council

The European Council issued its Common Position on the
amended proposed directive on July 24, 1997.\textsuperscript{183} While the
European Council supported the objective of the amended
proposed directive, a number of amendments have been made
which may inhibit the effectiveness of the directive.\textsuperscript{184}

The first amendment to the proposed directive is to limit the
scope to only those directives listed\textsuperscript{185} as far as discrimination
based on sex is concerned and to eliminate the applicability of the
directive to any future directives regarding the principle of equal
treatment. The Council reasoned that any future application of the directive regarding the burden of proof should be decided on a case by cases basis. The limitation of applicability to only those directives listed may create future hurdles for plaintiffs to surmount by first requiring the plaintiff to go to court to determine if the amended proposed directive would be applicable to the future situations and then to proceed with the discrimination claim. This additional step may serve as a deterrent from pursuing a sex discrimination claim to those who have suffered from discrimination—something that the directive is supposed to eliminate.

The European Council also added a recital which has been included in the final directive. This recital provides an exception to shifting the burden of proof in order to take into account some special features of the member states' legal systems. Under this provision member states need not shift the burden of proof in proceedings in which the court or other competent body is to investigate the facts of the case. In these types of proceedings, which are of limited number, the parties are no longer responsible for providing proof of discrimination. This recital may have been necessary to gain passage of the directive. However, it appears that some plaintiffs will not be afforded the benefit of the burden-shifting even if the presumption of discrimination is proven by the court's investigation because of the ability of the member states to be exempted from the burden shifting provision. With respect to this limited number of plaintiffs, the goal of the directive to enable those who have been discriminated against to bring claims under the principle of equal treatment would be defeated.

In addition to allowing member states to be exempted from the burden-shifting provision, the European Council has deleted the provision which provided that the plaintiff would benefit from any doubt which remains after all evidence is submitted. Most

186. See id.
187. See id.
188. Amended Proposed Directive on the Burden of Proof, supra note 6, at 1.
190. Id.; European Council Common Position, supra note 150.
191. See European Council Common Position, supra note 150. This recital is limited to certain administrative procedures in some member states where the investigation becomes the responsibility of the court after a complaint is filed and the parties become exempt from proving the facts. Id.
192. Id.
193. Id.
delegations consider allowing the plaintiff to benefit from any doubt as a criminal law concept, and the final directive is not applicable to criminal cases.\textsuperscript{194} Under the directive, the Court retains the power to rule on whether the evidence provides sufficient proof and if the plaintiff should benefit from any remaining doubt; the benefit of the doubt is not automatically given in favor of the plaintiff.\textsuperscript{195} Although it is reasonable to leave this power with the Court, some plaintiffs may be seriously disadvantaged if they do not receive the benefit of the doubt, because lack of the benefit may prevent the burden from shifting to the employer. These plaintiffs will then be left in the same position they were in prior to the directive, with no available remedy when the principle of equal treatment has been breached.

The European Council’s Common Position included all the essential concepts of the definition of indirect discrimination, even though the European Council did depart from the Commission’s definition of the concept.\textsuperscript{196} The new definition by the European Council helps to clarify the concept of indirect discrimination, which continues to be defined as an apparently neutral provision, criterion or practice which disadvantages members of one sex unless the provision can be objectively justified based on factors unrelated to sex.\textsuperscript{197}

\textbf{B. Indirect Discrimination}

Inclusion of both direct and indirect discrimination in the directive is a step forward in eliminating discrimination based on sex because many member states previously did not recognize indirect discrimination.\textsuperscript{198} Because the directive will apply to both direct and indirect discrimination, a clear definition of indirect discrimination will enable the member states, as well as the

\begin{itemize}
\item \textsuperscript{194} See Final Directive, \textit{supra} note 110; see also Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 7; and European Council Common Position, \textit{supra} note 150.
\item \textsuperscript{195} European Council Common Position, \textit{supra} note 150.
\item \textsuperscript{196} \textit{Id}.
\item \textsuperscript{197} \textit{Id}. Indirect discrimination is said to exist “where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the numbers of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.” \textit{Id}. Compare Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 7 with European Council Common Position, \textit{supra} note 150.
\item \textsuperscript{198} PRECHAL, \textit{supra} note 171, at 3-5.
\end{itemize}
European Court of Justice to apply the directive uniformly.\textsuperscript{199} In addition, the revised definition presented by the European Council provides a clearer explanation of the concept of indirect discrimination which will help aid the application of the directive.\textsuperscript{200}

\subsection*{C. The Burden of Proof}

Discrimination based on sex continues to be a problem in the European Union despite Article 119 of the Treaty and a number of other directives aimed at the promotion of equality.\textsuperscript{201} The primary reason for the continuation of discrimination is the difficulty placed on the plaintiff of proving that discrimination exists.\textsuperscript{202} The final directive aims to remedy this problem by allowing the burden to shift to the employer when the plaintiff presents a presumption of discrimination.\textsuperscript{203} Currently, a majority of the member states have incomplete or conflicting case law regarding the shifting or reversal of the burden of proof in sex discrimination cases.\textsuperscript{204} However, for a number of member states this portion of the directive will prove to be unnecessary, as they already have legislation which reverses the burden of proof in sex discrimination cases.\textsuperscript{205}

While the shifting of the burden of proof will make it easier for some plaintiffs to bring claims and possibly to succeed, others may continue to be discouraged from bringing claims if they believe they cannot present enough facts to create the presumption required. The directive only states that a presumption \textit{may} be created by facts presented by the plaintiff, but does not define or describe what facts may be considered sufficient to create the presumption and thereby establish a prima facie case of discrimination.\textsuperscript{206}

The European Court of Justice has suggested through case law that the burden will shift in cases involving the principle of equal

\begin{thebibliography}{99}
\bibitem{199} Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 1, 7.
\bibitem{200} European Council Common Position, \textit{supra} note 150.
\bibitem{201} \textit{Id}.
\bibitem{202} \textit{Id}.
\bibitem{203} Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 8; European Council Common Position, \textit{supra} note 150.
\bibitem{204} \textit{Applying the Social Protocol to Sexual Discrimination}, EUR. SOC. POL'Y, July 13, 1995, at 54.
\bibitem{205} \textit{Id}. As of 1995, Austria, France, Germany, Italy, Finland, Spain and Sweden have laws which reverse the burden of proof in sex discrimination cases. \textit{Id}.
\bibitem{206} Amended Proposed Directive on the Burden of Proof, \textit{supra} note 6, at 8.
\end{thebibliography}
pay for equal work when the pay system is not wholly transparent. Only time will tell, as the case law of the Member States and the European Court of Justice develops, what amount or type of facts will prove to be sufficient to create a prima facie case of discrimination and shift the burden of proof to the employer in other factual situations. On the positive side, the proposed directive will encourage more victims of sex discrimination to pursue their claims by easing their burden of proving discrimination. This lighter burden may act as a deterrent to those employers currently using or contemplating the use of discriminatory methods by causing them to fear possible repercussions, such as litigation or possible fines.

While shifting the burden of proof will benefit the plaintiff, the employer is not without recourse. After the burden of proof has shifted to the employer, the employer may defeat the charge of discrimination by objectively justifying the actions taken or methods used, and by showing that they were based on criteria other than sex. Although the employer is given the opportunity to “objectively justify” the actions, the proposed directive does not define objective justification nor does it provide any indication of what facts may be sufficient to sustain a finding that the employer’s actions were objectively justified.

VI. Conclusion

Sex discrimination in the European Union continues to be a problem despite various legislation designed to foster equality and to eliminate discrimination. The final directive to shift the burden of proof in sex discrimination cases is yet another legislative step towards this goal.

The final directive is applicable to both direct and indirect discrimination and provides a comprehensive definition of indirect discrimination. This definition will aid the courts of the member states and the European Court of Justice in applying the new directive. In addition to the definition of indirect discrimination, the final directive will allow the burden of proof to be shifted to the employer if the plaintiff is able to establish a presumption of discrimination based on the facts presented. Even with this shift in

208. Amended Proposed Directive on the Burden of Proof, supra note 6, at 8.
209. Id.
the burden of proof, the employer may avoid charges of discrimination if the conduct was objectively justified.

Despite the vague terminology used in the final directive, many victims of sex discrimination will now have access to judicial review of their cases and hopefully future discriminatory conduct will be discouraged. While the final directive to shift the burden of proof will serve as another treatment of the disease known as sex discrimination, it is far from being a cure.

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