



Union of Industrial and Employers' Confederations of Europe  
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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**UNICE POSITION PAPER  
ON  
IMPLEMENTATION OF ARTICLE 13 OF THE AMSTERDAM TREATY  
[COM (99) 565, 566, 567]**

**SUMMARY**

UNICE would like to reaffirm employers' attachment to the goal of combating discrimination. Discrimination is not limited to the world of work but extends to all spheres of society. It is in the interest and the responsibility of all to combat it. Hence, UNICE supports the objective underlying the European Commission's proposals. However, it would like to stress the following elements.

- Any EU measure must limit itself to providing a general framework which leaves Member States sufficient margin to take account of their own specific legal situations.
- Bearing in mind the partial overlap between the two proposed directives, UNICE calls for racial and ethnic discrimination in employment to be covered by a single directive, to avoid legal uncertainties.
- UNICE wonders about the pertinence of a horizontal approach to non-discrimination in employment. The different types of discrimination correspond to different problems and require a differentiated approach. Thus, age-related questions are more a matter for labour-market policies than for anti-discrimination policy. Similarly, application of the concept of indirect discrimination to disability raises real application problems.
- The concept of harassment should not be assimilated with the concept of discrimination.
- Combination of a wide horizontal approach and reversal of the burden of proof implies a profound modification of Member States' legal systems and may result in a proliferation of court cases, thereby undermining the "European social model" which, unlike the American system, is characterised by both individual and collective protection of workers' rights.

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**ON**  
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**INTRODUCTION**

1. UNICE has noted the European Commission's proposals for implementation of article 13 of the Amsterdam Treaty which gives the EU powers to combat discrimination based on gender, race or ethnic origin, religion or belief, disability, age or sexual orientation. These proposals comprise two proposals for directives - one on equal treatment in employment and occupation, and the other on equal treatment irrespective of racial or ethnic origin - plus an EU action programme against discrimination.
2. First of all, UNICE would like to reaffirm employers' attachment to the objective of combating discrimination. Discrimination is not limited to the world of work but extends to all spheres of society, and it is in the interest, and the responsibility, of all to combat discrimination and its negative effects. Hence, UNICE supports the objective underlying the Commission's proposals. However, UNICE considers that the proposed directives would pose a fair number of practical application problems in companies and open the door to many legal uncertainties. In addition, the Commission proposals could place a question mark over the role of the social partners in labour-market regulation through collective negotiations.

**I - GENERAL APPROACH TAKEN BY THE COMMISSION**

3. It should be borne in mind that there are a range of instruments to combat discrimination. On that subject, the Commission rightly recalls the existence of anti-discrimination legislation in all Member States.

These legislations reflect the existence of different national legal systems and any EU measure must take account of this diversity. Hence, UNICE is supportive of an approach which is limited to defining a general anti-discrimination framework at European level with a view to enabling Member States to adopt a differentiated approach which takes account of their respective situations while meeting the general objective of combating discrimination.

4. Anti-discrimination is a very important but also highly complex subject which requires close attention. Thus, UNICE reacts favourably to the EU anti-discrimination action programme, one of whose objectives is to develop an understanding of the questions linked to discrimination and to evaluate existing policies and practices. Awareness of discrimination phenomena varies. Racial and ethnic discrimination has been the subject of close study and is therefore better understood than other types of discrimination, e.g. linked to age or disability.
5. Without wishing to challenge the objectives of anti-discrimination, UNICE wonders about the pertinence of a horizontal approach covering all types of discrimination. The different types of discrimination correspond to different problems and call for differentiated solutions.

In particular, in UNICE's view, questions linked to age and disability fall more within the ambit of labour market policies. Incidentally, they are contained in the guidelines for employment in the framework of the European employment strategy and in the priorities of the European Social Fund.

As for gender-based discrimination UNICE shares the view of the Commission that it should not be covered in the proposals for implementation of article 13 insofar as the legislative framework is already in place at EU level.

6. Unlike the US system which is based almost exclusively on individual rights and a general ban on discrimination, the European social model is characterised by protection of workers' rights which is both individual (through highly developed labour legislation) and collective (through collective bargaining). The social partners, according to existing practices at national level, play an important role in labour market regulation (e.g. definition of criteria for collective dismissals, action in favour of young people or older workers). A general ban on discrimination would considerably reduce the scope for the social partners to incorporate socially justified elements of positive differentiation between particular categories of workers.

## **II - PROPOSAL FOR A DIRECTIVE ON EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION AND PROPOSAL FOR A DIRECTIVE ON EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RACIAL OR ETHNIC ORIGIN**

### **A/ Common elements between the two draft directives**

*Partial overlap between the two proposals creates legal uncertainties*

7. The two proposals for directives cover racial and ethnic discrimination in employment. This may create legal uncertainties linked to coverage by two instruments of the same material scope. For reasons of legal certainty, UNICE calls for this theme to be covered by one directive only.

*Definition of the concept of discrimination is unclear and legally inexact*

8. In UNICE's view, the formulation of the concept of discrimination (article 2.1 of the draft employment directive) fails to take account of the case law of the European Court of Justice which has established<sup>1</sup> that differences of treatment can be justified on objective grounds.
9. The definition of direct discrimination (article 2.2) also poses two problems. First of all, it does not specify whom a person who regards himself as a victim of discrimination should be compared with. Yet, discrimination necessarily implies comparison with a person in a comparable situation. Then, the formulation "*is, has been or would be*" creates great legal uncertainty for companies insofar as this could lead to condemnation for future discrimination (i.e. the victim has not yet suffered prejudice).
10. Directive 97/80/EC<sup>2</sup> defines indirect discrimination by specifying that a practice is discriminatory when it affects a markedly higher proportion of persons belonging to a group. UNICE opposes the definition proposed by the Commission (article 2.2) which would extend the definition of indirect discrimination to a "*practice [which] is liable to adversely affect a person or persons*".

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<sup>1</sup> Decision in *Bilka-Kaufhaus GmbH vs Karin Weber von Hartz* (case 170/84)

<sup>2</sup> Directive 97/80/EC on reversal of the burden of proof in sex discrimination cases

By so doing, the Commission extends the intrinsic probability test, used by the European Court of Justice in cases of indirect discrimination linked to free movement of workers<sup>3</sup>, to the types of discrimination covered by the draft directives. Yet, the intrinsic probability test only applies when one group of persons (in this case migrant workers) is compared with another group (nationals). UNICE fails to see how the concept of indirect discrimination can apply, for instance where age or disability is concerned.

11. Concerning harassment (article 2.3), UNICE considers that a worker's dignity should be respected and protected at all times. However, the notion of harassment is distinct from the notion of discrimination. Hence, UNICE rejects the Commission's proposal to merge the notions of harassment and discrimination.

#### *Legal procedures may impose heavy costs for companies*

12. UNICE is concerned by the question of reversal of the burden of proof in the discrimination cases covered by the proposed directives. Combination of a wide horizontal approach and reversal of the burden of proof implies a profound modification of Member States' legal systems and could lead to a proliferation of court cases without any real base. In addition to the financial risks for companies involved with such cases, companies would have great difficulty in justifying that a given practice is not "potentially discriminatory".

In addition, in order to have elements of proof in the event that action is taken against them, employers will have to retain documents relating to each decision concerning human resource management, which would create a heavy administrative burden and additional costs for companies, in particular SMEs. For UNICE, this would run counter to the objective of administrative simplification sought elsewhere, at both European and national level.

#### *Minimum requirements*

13. As explained in point 3, any EU measure must take account of the diversity of national traditions and legal systems. This is important in relation to the non-regression clause in the two proposed directives. There is a contradiction between the objective of harmonising national legislation and establishing a non-regression clause. The safeguard clause relating to the level of protection should be formulated in such a way as to enable Member States "*to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the minimum requirements of this Directive are complied with.*"

#### **B/ Proposed employment directive**

14. UNICE reiterates its objections to the Commission's horizontal approach which seeks to cover all types of discrimination in a single legislative instrument. If the objective of non-discrimination needs to be pursued for all types, problems and consequently solutions vary from one type to the next. UNICE considers that a differentiated approach, underpinned by a good analysis of the discriminatory phenomena in question, would better serve the legitimate objectives pursued by the employment directive.

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<sup>3</sup> Decision in O'Flynn vs Adjudication Officer (case 237/94)

<sup>4</sup> Text of article 6 of directive 97/80/EC

*Concept of religion or belief needs to be clarified*

15. In order to ensure legal certainty to the various interested parties, it would be useful to define the concept of religion more clearly (notably to address the question of sects) and the concept of belief (does it mean philosophical and/or political beliefs?). In addition, the directive should provide waivers for cases where a firm operates in sensitive areas (e.g. animal rights activist working in a pharmaceutical laboratory).

*Questions linked to age and disability are more closely related to labour market policies than to discrimination*

16. UNICE wonders about the pertinence of addressing age through a discrimination-based approach. First of all, age discrimination is very difficult to define and the proposed directive does not solve the question of comparable worker. If the plaintiff is forty years old, should the reference worker be younger or older? And by how much? Then, the non-exhaustive list given in article 5 does not protect the employer against the risk that each management decision will be challenged. For instance, bonuses based on seniority could be regarded as discrimination. In addition, the solutions negotiated by the social partners in a collective dismissal procedure might have bigger effects on certain age categories. In this framework, voluntary codes of conduct could be more effective instruments.

These problems demonstrate the difficulty of dealing with age through an approach based on discrimination. In UNICE's view, the question of age is more closely related to labour market policies and is conditional on demographic developments in the EU, where the share of older persons is increasing to the detriment of younger categories of the population due to a slowdown in the birth rate.

Member States and the social partners implement labour market policies at the appropriate level in order to increase the employment rate and reduce unemployment in Europe by introducing elements of differentiation which favour one or other category of younger or older worker depending on the situation in each country, sector or company. In this case, does a measure favourable to one of these groups (e.g. part-time work arrangements for older workers approaching retirement) discriminate against other workers?

17. UNICE supports the goal of combating discrimination based on disability. However, the Commission's approach based on discrimination poses a problem of legal uncertainty linked to the absence of indications on what constitutes handicap. In addition, UNICE wonders about application of the concept of indirect discrimination to disability. Indirect discrimination, as defined in directive 97/80/EC<sup>5</sup>, exists only when it is proved that a provision affects a group of persons disproportionately and cannot apply to individual comparisons. Yet, disabled persons are not a homogeneous group, each situation being individual in nature.

Concerning article 2.4, which provides for reasonable accommodation to facilitate employment of disabled persons, UNICE recalls that the annex to Council directive 89/654/EEC<sup>6</sup> already provides that workplaces should be organised in such a way as to take account of disabled workers. It therefore considers that the employment directive should limit itself to including a reference to the health and safety directive.

While recognising the need to eradicate discrimination against disabled persons, UNICE considers that the best way to combat this phenomenon is to pursue active labour market policies to promote inclusion of disabled people in the ordinary world of work.

<sup>5</sup> Article 2 of directive 97/80/EC on the burden of proof on cases of discrimination based on sex

<sup>6</sup> Directive 89/654/EEC on minimum health and safety conditions at work within the meaning of article 16.1 of directive 89/391/EEC

It is also essential to change mentalities and attitudes through information and awareness actions. On this point, UNICE would like to recall the work carried out by the European social partners to promote employment of disabled persons. They published a compendium of good practice in employment of disabled persons and adopted a joint statement in June 1999.

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**C/ Proposal for a racism directive**

18. On the substance, UNICE welcomes the objectives targeted by the proposed racism directive. However, as indicated in point 7, UNICE considers that the partial overlap between the two draft directives creates legal uncertainties and some confusion as to the content of the racism directive. Either the employment aspects contained in the racism directive should be deleted (article 3 a), b), c), d), article 4, article 11) or racism should be removed from the first directive.
19. Concerning the independent bodies (article 12), UNICE considers that they should be put in place under the responsibility of Member States, in line with national practices in force.

**III - PROPOSAL FOR AN EU ACTION PROGRAMME TO COMBAT DISCRIMINATION**

20. As pointed out above, UNICE supports the proposal for an EU action programme. The programme, which seeks to improve knowledge of discriminatory phenomena and to promote awareness, should help mentalities and attitudes to evolve. In this regard, it is important to ensure complementarity between this programme and the EQUAL Community initiative.
21. In UNICE's view, collection of statistics can help to improve knowledge of discriminatory phenomena. However, it is important not to reduce policies to combat discrimination to collecting statistics or producing indicators and benchmarks. The problems are highly complex and linked to a large number of factors. Establishment of indicators or benchmarks at European level would clash with the heterogeneity of existing national statistics. For UNICE, the main aim must be to promote exchange of information and good practice at European level and raise the awareness of discriminatory phenomena among all publics.
22. UNICE welcomes creation of a committee charged with implementing the programme. However, it considers that the European social partners should be associated in this committee's work with observer status.

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