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PROPOSAL FOR A DIRECTIVE AMENDING DIRECTIVE 76/207

**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
[COM (2000) 334 final]**

UNICE POSITION PAPER

Introduction

1. UNICE has noted the proposal for a European Parliament and Council directive amending directive 76/207 on implementation of the principle of equal treatment, adopted by the European Commission on 7 June 2000.
2. First of all, UNICE would like to recall that it fully supports equal treatment between men and women. It considers that much progress has already been made in this area. In this regard, the European Union has played a major role in fostering equal opportunity for men and women in Europe. It has instituted the necessary legal framework to guarantee the principle of equal treatment. In addition, the European Court of Justice has reached a large number of interpretative decisions clarifying how to implement this principle in individual cases.
3. The Commission proposal, based on article 141 of the Treaty, seeks in particular to:
 - incorporate in the directive the main elements flowing on from ECJ case law;
 - include a provision which deems sexual harassment to be sex discrimination;
 - align the provisions of directive 76/207 on those in the Commission proposals based on article 13.
4. Without in any way questioning the principle of equal treatment, UNICE has serious doubts about the added value of this proposal, which the Commission fails to demonstrate in a satisfactory manner. UNICE also has strong reservations about specific elements of the proposal. Finally, UNICE is highly critical of the fact that the Commission has not formally consulted the social partners on the content and direction of its proposal, as provided for in article 138 of the Treaty.

I - The Commission has failed to comply with the provisions of the Treaty on consultation of the social partners

5. Article 138.2 of the Treaty's social chapter provides that "*before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action*". UNICE insists that Article 141, which forms part of the social chapter, requires formal consultation of the social partners in accordance with Article 138 of the Treaty. UNICE considers that it would be contrary both to the letter and the spirit of the Treaty not to consult the social partners formally on a text that deals with equal treatment in the workplace.

6. The informal consultation procedure referred to in point 6 of the annex to the Commission proposal cannot be regarded as Treaty-based consultation. UNICE considers that this regrettable confusion can in no way constitute a precedent as to how to organise consultations of social partners on proposals based on Article 141 of the Treaty.

II - The Commission fails to provide satisfactory justification for its proposal to amend directive 76/207

7. In UNICE's view, the arguments advanced by the Commission to justify its proposal to amend directive 76/207 are inadequate on at least three counts.

Codification of European Court of Justice (ECJ) case law

8. The European Commission cannot use codification of ECJ case law as justification. It is the normal role of the ECJ to clarify how legal principles guaranteed at EU level should be applied in individual cases. In addition, ECJ case law, which is by nature evolutionary, is in any event directly applicable in Member States' legal orders.

Sexual harassment as sex discrimination

9. UNICE recognises the importance of preventing sexual harassment at work. However, UNICE does not consider that a **specific** instrument at European level is the appropriate means to tackle sexual harassment. UNICE considers that the problem of sexual harassment should be tackled at national level in order to take account of the laws, collective agreements and practices in place.

In addition, UNICE does not share the European Commission's opinion that that the problem of sexual harassment has been "*largely ignored by legislators, at both national and Community level*". On this subject, UNICE considers that the preventive aspects are already covered at European level by directive 89/391/EC¹ that gives the employer general responsibility to ensure worker safety and health in all work-related aspects. Regarding the punitive aspects, UNICE points out that there are legislative provisions in all Member States to combat sexual harassment.

10. Moreover, UNICE opposes inclusion of a provision which deems sexual harassment to be discrimination between men and women. Sexual harassment and equal treatment at work are two problems that are different by nature and require different solutions.

Alignment of directive 76/207 on proposals based on article 13²

11. The Commission proposes inclusion in directive 76/207 of a definition of indirect discrimination in order to align it on the Commission's proposals based on article 13. UNICE recalls that this definition is already included in article 2 of directive 97/80 on the burden of proof³ whose scope happens to cover directive 76/207 (see article 3 of directive 97/80). UNICE therefore fails to see the added value of the proposed amendment of directive 76/207 on this particular point.

¹ Council directive 89/391 on implementation of measures designed to promote an improvement in the safety and health of workers at work

² Proposal for a directive on creation of general framework for equal treatment in the areas of employment and work [COM (1999) 565 final] and directive 2000/43 on implementation of the principle of equal treatment without distinction by race or ethnic origin (29 June 2000)

³ Council directive 97/80 on the burden of proof in sex discrimination cases

III - The content of the proposal for a directive poses both legal and practical problems for companies

Article 1.2 (sexual harassment)

12. Notwithstanding its comments on the principle of equating sexual harassment with sex discrimination (see points 9 and 10), UNICE believes that the definition of sexual harassment proposed by the Commission is not clear and may result in great legal uncertainty and unlimited responsibility for the employer. For example, while an employer has an obligation to maintain a safe working environment, free from sexual harassment, the employer's liability cannot be invoked when, despite preventive measures, an employee falls victim to sexual harassment by a work colleague.

However, if such an article were to be retained, the definition of the notion of sexual harassment should be left to Member States to fit in with existing legislation, collective agreements and practice and make it possible to distinguish between different responsibilities, depending on the parties involved.

Article 1.3 b (derogations from the principle of equal treatment)

13. UNICE considers that this question is already covered adequately in article 2.2 of directive 76/207 and by ECJ case law which is anyhow directly applicable in Member States' legal orders (see point 8).

Article 1.3 c (protection of women who have given birth)

14. In UNICE's view, the right which the Commission proposes to give women who have given birth, whereby they would be able to go back to the same or an equivalent position after maternity leave without any changes in their working conditions, poses both legal and practical problems.
15. From the legal angle, UNICE points out that the ECJ case law⁴ to which the Commission refers to justify inclusion of this provision does not in any way address the question of the right for women to return to the same or an equivalent position as envisaged by the Commission. They respectively deal with the application to fathers of a national law for the protection of mothers ("*Mutterschutzgesetz*"), with night work for women, and with the dismissal of a pregnant woman. In addition, UNICE recalls that protection of pregnant women is already covered by a European directive⁵ for which the Commission fails to establish the existence of any particular shortcomings in the legislation of Member States.
16. Incorporation of this right also poses real practical problems, in particular in the case of long-term maternity leave (e.g. in combination with parental leave). During this period, it is not unusual to see changes in the way in which work is organised or in the conditions applicable to all its employees, notably further to signature of collective agreements. UNICE therefore considers that this right needs to be qualified to take account of such situations.

⁴Case 184/83: Hofmann v. Barmer Ersatzkasse, case 421/92 Habermann-Beltermann and case 32/93 Webb v. EMO Air Cargo.

⁵ Council directive 92/85/EC of 19 October 1992 on implementation of measures designed to promote an improvement in the safety and health of pregnant workers and new or breast-feeding mothers at work

Article 1.4 (involvement in an organisation of workers or of employers)

17. UNICE considers that the question of involvement in an organisation of workers or employers falls outside the scope of directive 76/207 which is limited to access to employment, vocational training and promotion, and working conditions.

Article 1.5 (legal protection)

18. It is UNICE's view that the existing article 6 of directive 76/207 deals satisfactorily with the question of legal protection for persons who believe they have suffered through violation of the principle of equal treatment. Hence, UNICE opposes the Commission's wish to extend legal protection "*even after the employment relationship has ended*". This would create legal uncertainty as well as an additional administrative burden for companies insofar as they would be required to keep documents relating to all decisions in the field of human resources. In order to increase legal security for companies, UNICE strongly believes it necessary to stipulate that this provision does not prejudice national rules regarding time limits for appeals linked to the principle of equal treatment.
19. Moreover, UNICE opposes the Commission's proposal to place a ban on setting upper limits for compensation. This provision contradicts the rules in force in some Member States. It would be more appropriate to make reference to "*real and effective judicial protection, [which] has a clear deterrent effect on the employer and [which] must in any event be adequate in relation to the damage sustained*", as set out by the Commission in paragraph 45 of the explanatory memorandum.

Article 1.6 (independent bodies)

20. UNICE is opposed to the independent bodies which the Commission wants to establish at national level to promote equal treatment and which would be able to pursue complaints from individual victims of discrimination. Furthermore, the possibility for associations or organisations to institute proceedings must be without prejudice to national rules and procedures for representation and defence before jurisdictions.

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