

**COMMISSION'S PROPOSAL FOR A DIRECTIVE IMPLEMENTING THE PRINCIPLE OF
EQUAL TREATMENT BETWEEN MEN AND WOMEN IN THE ACCESS TO AND SUPPLY
OF GOODS AND SERVICES**

UNICE's position

Summary

1. UNICE has noted the Commission proposal based on Article 13 of the Treaty for a directive implementing the principle of equal treatment between men and women in access to and supply of goods and services adopted on 5 November 2003.
2. UNICE is deeply concerned by the possible implications of a Community Directive as currently proposed by the Commission. It fears that such a Directive would generate additional costs for enterprises without improving equal treatment between men and women in access to and supply of goods and services.
3. Firstly, UNICE believes that the Commission gives only little evidence on existing discrimination cases in the access to and supply of goods and services. The adoption of a Community Directive does not seem the most suitable instrument nor for the less compelling one for service providers.
4. Secondly, Employers are concerned about the possible impact of the proposed Directive in the insurance sector. UNICE believes that it is justified for insurance companies to take into account the differences in life expectancy of women and men among other factors such as health status, risk experience, etc., in order to be able to assess the individual risk they support for the insured person. This cannot be assimilated to neither direct nor indirect discrimination based on sex.
5. Moreover, banning in a general way the use of sex-differentiated factors in actuarial calculations could have severe adverse consequences. The proposal of the Commission to interfere in the calculation of prices and benefits would result in an artificial distortion of the market and would put insurance provider in a difficult economic position. It could also have negative consequences for the consumers.
6. European employers very much hope that these elements will be received positively when the entering into further discussions on this proposal.

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1. UNICE is committed to equality of treatment and opportunities between men and women for reasons of both equity and economic efficiency. It recognises that the European Union has played a major role in promoting equal opportunities in Europe, by setting up a comprehensive legal framework and promoting exchanges of information and good practices in many areas.
2. UNICE has noted the new Commission proposal based on Article 13 of the Treaty for a directive implementing the principle of equal treatment between men and women in access to and supply of goods and services (adopted on 5 November 2003).
3. With this proposal for a Directive, the Commission intends in particular
 - to place a ban on individual discriminatory behaviours that could occur when giving access to or supplying goods and services. The realisation of this aim will be accompanied by a reversal of the burden of proof, which eases the introduction of court cases by people believing they have been discriminated against;
 - to prohibit the use of actuarial factors directly related to sex in the insurance sector. A transition period is foreseen by the Commission to transpose this prohibition into national law.

On the general provisions

4. In the proposal's explanatory memorandum, the Commission rightly points out that it is crucial to find the right path in order to achieve equality in practice in each area. For this reason it excludes certain areas from the scope of the proposal (e.g. media, education).
5. Unfortunately, concerning the supply of and access to goods and services in general, the Commission neither gives tangible evidence on the existence and nature of discrimination cases nor gives convincing arguments explaining why a directive would be the adequate tool to reach its goal.
6. Firstly, the Commission points out that concerning the access to and supply of goods and services, there is in general no discriminatory rule or consistent practice but that discrimination mostly stems from spontaneous behaviour of individuals. However, the Commission does not refer to studies or any source giving details or precise information on the extent and the nature of those discrimination cases. Moreover, the Commission seeks at the same time to allow some practices, i.e. services that could still be provided for one sex only (Article 1(3)) without giving sufficient explanation. Finally, although the Commission is right in making a distinction between the supply of goods and services to the public and

"purely private" transactions, in practice, because of their very unclear nature, this distinction brings even more confusion to the debate.

7. Secondly, the Commission does not explain why a Community directive would be the most suitable instrument to change such individual behaviours in practice. It is true that the recognition of such behaviours as direct or indirect discriminations linked to the reversal of the burden of proof would make it easier to challenge them before court (Articles 2 and 8). However, it should be kept in mind that allowing a general reversal of the burden of proof is not a neutral decision. It obliges the incriminated service provider to justify objectively its decision through means (expert evidence, statistics, etc.), which can be very difficult in practice to gather together. It may also result in an increase in unjustified court cases.
8. UNICE therefore fails to see the justification for a Community directive regarding in general the access to and supply of goods and services and believes that more targeted tools (e.g. opinion campaigns, etc.) aiming at the prevention of possible adverse individual behaviours would be more suitable.

On the specific provisions concerning the insurance sector

9. The Commission identifies only one area where differentiated rules based on sex exist, i.e. the insurance sector. The Commission believes that the way insurance companies use the sex factor among other actuarial standards results in unjustified difference of treatment between women and men and therefore proposes to prohibit the use of the sex variable for all types of insurance products (Article 4).
10. UNICE would like to insist on the fact that life expectancy is different between women and men and therefore that it is justified for insurance companies to take into account this fact among others such as health status, risk experience, etc. For some types of insurances such as for those resulting in the payment of annuities, it is essential to take into account the life expectancy of the persons insured.
11. Indeed, the correlation between the risk borne by the insurer on the one hand and on the other hand the price demanded from the insured person and the paid benefits and/or annuities is the central element of all insurance products.
12. European employers also believe that the Commission cannot affirm that "sex is used at the very best as a proxy for other indicators of life expectancy" (explanatory memorandum page 6) or that tables used by insurance companies do not reflect in an accurate way the differences in life expectancy between women and men without even quoting a source/study backing its views. Indeed, insurance companies have a logical interest in development of the most accurate means of predicting risks. Concerning especially life, health, car insurance and other insurances paid in annual instalments, it lies at the heart of their preoccupations to calculate the real risk they bear for their clients (individual risk assessment).
13. Furthermore, the fact of using a sex factor among other actuarial standards cannot be assimilated to discrimination. Taking into account the life expectancy of the persons insured does not result per se in direct discrimination based on sex, as men and women in comparable situations i.e. implying similar risks are treated the same way. Neither does it result in indirect discrimination between women and men as the fact of taking into account life expectancy in the actuarial calculation is justified by the need to evaluate the real risk borne by the insurer.

14. However, a general ban on the use of sex differentiated factors in the actuarial calculations could have severe adverse consequences.
15. UNICE is deeply concerned that the Commission regards as unjustified the concerns of the insurance industry regarding the risk that interference in the calculation of prices and benefits results in an artificial distortion of the market. Neither the possibility of a transition period (Article 4(2)) nor the fact that sex-neutral pricing would be imposed similarly across Europe can alter this concern.
16. In addition, the impossibility of breaking down risks by sex could lead to higher insurance prices for both sexes, due to the fact that the economically stronger persons will redirect their risk savings from the insurance sector to other sectors (banking; investment companies, etc.) and to a more difficult economic situation for the sector, notably compared with competitors outside Europe. Moreover, insurance companies would have to support the heavy administrative burden linked to the need to defend their actuarial decisions before court, which stem from the principle of burden of proof reversal in discrimination cases.
17. The proposals made by the Commission to use in a more extensive way other factors linked to “lifestyle” or “marital status” of the persons insured cannot be regarded as satisfactory (explanatory memorandum page 6). First of all, data serving to calculate actuarial risk must be susceptible to being collected in a reliable way and to be the basis for comparisons between persons. This must also be done in consistency with data protection rules, which forbid the collection and use of some types of personal data. Secondly, in some countries, e.g. Germany, the status of a married person is put under special constitutional protection so that it could not be the subject of objective comparisons.
18. Unisex actuarial standards can result from companies’ policies as part of their business and marketing strategies but cannot be made obligatory for the entire European insurance sector.
19. UNICE recognises that it is both in companies’ and consumers’ interest that actuarial standards reflect as much as possible the real risk taken by the insurer for the insured persons. This is even more important at a time when private insurance schemes are increasingly supplementing or replacing state provision for pensions. However, instruments already exist to control the way actuarial standards are established, updated and supervised in Europe. The Commission did not take this sufficiently into account.
20. For these reasons, UNICE believes that prohibiting the use of sex as an actuarial standard in the insurance sector through a Community Directive will not serve the aim set by the Commission of implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Conclusion

21. UNICE fails to see the justification for a Community Directive regarding in general the access to and supply of goods and services.
22. The Commission alleges that discrimination stems from spontaneous behaviour of individuals but gives no tangible evidence on these cases. Moreover, it proposes the adoption of a Community Directive while looking neither for the most suitable instrument nor for the less compelling one for service providers.

23. Furthermore, UNICE is deeply concerned by the possible implications of a Community Directive in the insurance sector as proposed by the Commission.
24. UNICE would like to insist on the fact that it is justified for insurance companies to take into account the differences in life expectancy of women and men among other factors such as health status, risk experience, etc., in order to be able to assess the individual risk they support for the insured person. This cannot be assimilated to neither direct nor indirect discrimination based on sex.
25. Moreover, banning in a general way the use of sex-differentiated factors in actuarial calculations could have severe adverse consequences. Firstly, the proposal of the Commission to interfere in the calculation of prices and benefits would result in an artificial distortion of the market and would put insurance provider in a difficult economic position. Secondly, it could have negative consequences for the consumers such as higher insurance costs, collection of sensitive personal data, etc.
26. For these reasons, European employers fear that the current proposal of the Commission will generate additional costs for enterprises without improving equal treatment between men and women in access to and supply of goods and services.
