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EUROPEAN COMMISSION'S PROPOSAL FOR A RECAST DIRECTIVE ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL OPPORTUNITIES AND EQUAL TREATMENT OF MEN AND WOMEN IN MATTERS OF EMPLOYMENT AND OCCUPATION

UNICE POSITION PAPER

I./ Introduction

1. On 21 April 2004, the European Commission adopted a proposal for a Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (so-called recast Directive). The aim of this proposal is to merge most of the existing Directives in this field[1]. The European Commission also proposes to introduce new changes in these texts, which are partly based on European Court of Justice (ECJ) jurisprudence.

2. UNICE considers the existing legislation on equal treatment between men and women provides a sufficiently strong legal framework to promote gender equality. In order to achieve equal treatment between women and men in practice, priority should be given to clarifying and informing relevant stakeholders about existing rights and obligations stemming from European legislation and not creating new legal obligations.

3. UNICE is strongly committed to promoting gender equality on the labour market and believes that exchanging and promoting good practices in this field is a concrete way of achieving progress. To that end, UNICE has been engaged in a social dialogue since January 2004.

4. European employers fully support the objective of consolidating and bringing more legal clarity to the existing texts, and of simplifying the existing rules. However, they fear that the Commission's current proposal will result in increased legal uncertainty for all users, including enterprises.

5. After careful analysis of the Commission's proposal, UNICE notes that substantial changes to the current legislation are proposed, not only in the paragraphs where ECJ jurisprudence is incorporated. UNICE has serious doubts about the added value of these changes and believes that the proposed Directive is very unclear and raises numerous interpretation questions.

6. European employers also have strong reservations about specific elements of the proposal, in particular concerning:
   - the Commission's interpretation of ECJ court rulings on the principle of equal pay for work of equal value (Article 4)
   - the extension of concepts and definitions existing in some particular Directives to the area of occupational social security schemes (articles 1; 17; 18; 19 and 21)

[1] i.e. the Directives implementing the principle of equal pay (75/117/EEC and 86/378/EEC as modified by 96/97/EC), the Directives on equal treatment relating to access employment, vocational training and promoting, and working conditions (76/207/EEC as amended by 2002/73/EC), the Directives on occupational social security schemes (86/378/EEC as amended by 96/97/EC) and the Directive on the burden of proof (97/80/EC)

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- the implementation of the principle of equal treatment in contracts and collective agreements (Article 24)
- the information about rights and obligations stemming from the recast Directive (Article 30)

II./ Comments

On the timing of the recast exercise

7. European employers have concerns regarding the timing of the Commission's proposal. Changing existing legal provisions would be counterproductive at a time where current Member States are still implementing Directive 73/2002 amending Directive 76/207 into national legislation. It would also put an unnecessary burden on new Member States where attention should focus on effectively implementing the existing legal acquis.

On the changes proposed by the Commission to existing legal provisions

8. After careful analysis of the proposed text, UNICE notes that substantial changes to the current legislation are proposed. New drafting proposals are made which are not sufficiently justified by the Commission.

9. Firstly, employers believe that including case law in the new text is unnecessary and will not make the rules easier to understand. UNICE believes that it is important to leave space for case law to change over time and that the proposal to codify ECJ decisions cuts across those judicial systems which have a common law and precedent approach to legal rights.

   In some cases the Commission introduces concepts stemming from individual ECJ judgments, which seek solutions in specific situations and are not well-established principles of the jurisprudence. There is a real risk in attempting to generalise ECJ cases, thereby omitting the context in which these judgments are made, and also a risk of unbalanced legislation being introduced by the selective codification of some but not other ECJ judgments. For example, important ECJ cases are not referred to in the fields of job evaluation and job classification[2], concerning time limits in the context of varying employment relationships and enforcement of claims and rights[3] and on the limited scope of possible positive action[4].

   In other cases the Commission interprets jurisprudence in a misleading way. For example, regarding the definition of equal pay (explanatory statement page 10), the Commission, after having listed the kind of payments the ECJ includes in the definition of pay falling within the scope of Article 141, concludes "It would appear therefore that any direct payments supplementing a basic wage are covered. This would appear to include shift premia, overtime and all forms of merit and performance pay". Employers recall that there is no ECJ ruling on this specific issue and cannot agree with the Commission's interpretation.

10. Secondly, the Commission introduces new drafting proposals which are unjustified and lead to confusion. For example, this is the case of the proposal to replace throughout the text the words "salaried" or "paid" workers by the words "employed" workers.

[2] In particular *Enderby -v- Frenchay Health Authority and Secretary of State for Health (C-127/92)*
[3] In particular *Preston -v- Wolverhampton Healthcase NHS Trust The Secretary of State for Health; Fletcher -v- Midland Bank plc (C-78/98)*
[4] In particular *Kalanke v Freie Hansestadt Breman (C- 450/93)* and *Marschall v Land Nordrhein-Westfalen (C-409/95)*

11. Thirdly, concepts and definitions existing in some particular Directives are extended to all areas concerned by the recast Directive, without any justification. It is for example proposed to extend the rules on remedies, compensation and the burden of proof to the area of occupational social security schemes. Employers believe that additional burden for employers with regard to the management of occupational social security schemes should be strictly avoided as it would hamper the development of second and third pillar pension schemes, and would ultimately be counterproductive for both employers and employees.

12. The result is that the proposed Directive is very unclear. The new proposed text raises numerous interpretation questions. UNICE therefore fears that the new text will imply increased legal uncertainty for all users including enterprises and may lead to many unjustified court cases.

13. In order to avoid as much as much possible creating legal uncertainty, UNICE makes proposals for amendments, which are summarised in a table at annex, notably on:
    - the Commission's interpretation of ECJ court rulings on the principle of equal pay for work of equal value (Article 4)
    - the extension of concepts and definitions existing in some particular Directives to the area of occupational social security schemes (articles 1; 17; 18; 19 and 21)
    - the implementation of the principle of equal treatment in contracts and collective agreements (Article 24)
    - the information about rights and obligations stemming from the recast Directive (Article 30)

On the consultation of social partners

14. The open consultation procedure which took place in 2003 with respect to the Commission's options paper "Simplification and improvement of legislation in the area of equal treatment between men and women" cannot be regarded as Treaty-based consultation in accordance with Article 138 of the Treaty. The Commission has failed to comply with the provisions of the Treaty as social partners should have been formally consulted on all new elements included in the Commission's proposal. This failure can in no way constitute a precedent for how to organise consultations of social partners on proposals based on Article 141 of the Treaty.

III./ Conclusion

15. Without questioning the principle of equal treatment, nor the Commission proposal's objective of consolidation, UNICE has serious doubts about the added value of the changes introduced in the proposal, which the Commission fails to demonstrate in a satisfactory manner.

16. UNICE also has strong reservations about specific elements of the proposal and make drafting proposals in this respect (see table at annex).

17. Lastly, 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.

18. UNICE very much hopes that its comments and drafting proposals will be fully taken into account in the ongoing debate on this important issue.

ANNEX: SPECIFIC COMMENTS

COMMISSION'S PROPOSALS	UNICE PROPOSALS FOR AMENDMENTS	COMMENT/ JUSTIFICATION
TITLE		
Title of the proposed Directive (p33)		
Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation	delete the words "equal opportunities and"	There is no justification for adding "equal opportunities" compared with previous Directives
RECITALS		
Recital 8 (p35)		
8. The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty constitutes an important aspect of the principle of equal treatment between men and women. It is therefore appropriate to make further provision for its implementation	delete the word "further" from the last sentence	The aim of the recast directive is not to introduce new provisions to the existing equal treatment legislation
Recital 9 (p35)		
9. It is well-established that the principle of equal pay is not limited to situations in which men and women work for the same employer. According to the judgments of the Court of Justice in Case C-320/00: *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*[5] and Case C-256/01: *Debra Allonby v Acccrington & Rossendale College, Education Lecturing Services and The Secretary of State for Education and Employment*[6], there must nevertheless be a single source to which any	delete the first sentence of the paragraph "It is well-established that the principle of equal pay is not limited to situations in which men and women work for the same employer" In the rest of the text, change the words "must nevertheless be a single source" by "must be a single employer"	The Commission summarises the ECJ jurisprudence in an unclear manner. The ECJ has always considered that a necessary condition for comparing pay situations of women and men is that they work for the same employer. See also comments with regard to Article 4

[5] [2002] ECR I-7325.
[6] Judgment of 13.1.2004.

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differences identified in pay conditions can be attributed since otherwise there is no body which is responsible for any inequality and which could restore equal treatment		
Recital 19 (p41)		
19. ⌦ For reasons of clarity, it is also appropriate to make express provision for ⌫ ~~The Court of Justice has recognised~~ the protection of ⌦ the ⌫ employment rights of women~~,~~ ⌦ on maternity leave and ⌫ in particular their right to return to the same or an equivalent ~~job,~~ ⌦ post and to suffer no detriment in their terms and conditions as a result of taking such leave. ⌫~~with no less favourable working conditions, as well as to benefit from any improvement in working conditions to which they would be entitled during their absence.~~	align the text of the recital on the text of Article 15(2) i.e.: 19. ⌦ For reasons of clarity, it is also appropriate to make express provision for ⌫ ~~The Court of Justice has recognised~~ the protection of ⌦ the ⌫ employment rights of women~~,~~ ⌦ on maternity leave and ⌫ in particular their right to return to their job or to an equivalent post on terms and conditions which are no less favourable to them and to benefit from any improvement in working conditions to which they would ⌦ have been ⌫ ~~be~~ entitled during their absence.	Inconsistency between Recital 19 and Article 15(2), which could lead to misinterpretations and legal uncertainty
Recital 22 (p42)		
22. ⌦ The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As ⌫ ~~Whereas~~ the Court of Justice ~~of the European Communities~~ has ~~therefore~~ held ⌦ , ⌫ ~~that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively,~~ ⌦ provision should therefore be made to ensure that ⌫ the burden of proof ~~must shift~~ ⌦ shifts ⌫ back to the respondent when ⌦ there is a prima facie case ⌫ ~~evidence~~ of ~~such~~ discrimination ⌦ , ⌫ ~~is brought.~~	align the text of the recital on the text of Article 19 (1) i.e.: 22. ⌦ The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As ⌫ ~~Whereas~~ the Court of Justice ~~of the European Communities~~ has ~~therefore~~ held ⌦ , ⌫ ~~that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively,~~	Inconsistency between Recital 22 and Article 19, which could lead to misinterpretations and legal uncertainty

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~~Whereas Member States need not apply the rules on the burden of proof to~~ ⌦ except in relation to ⌫ proceedings in which it is for the court or other competent body to investigate the facts. ~~of the case.;~~ ~~whereas the procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.~~ ⌦ It is however necessary to clarify that ⌫ ~~Whereas~~ the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination ⌦ remains ⌫ ~~is~~ a matter for ⌦ the relevant ⌫ national ~~judicial or other competent bodies,~~ ⌦ body ⌫ in accordance with national law or practice. ~~Whereas~~ ⌦ Further, ⌫ it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.	⌦ provision should therefore be made to ensure that ⌫ when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment, ⌦ except in relation to ⌫ proceedings in which it is for the court or other competent body to investigate the facts. ~~of the case.;~~ ~~whereas the procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.~~ ⌦ It is however necessary to clarify that ⌫ ~~Whereas~~ the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination ⌦ remains ⌫ ~~is~~ a matter for ⌦ the relevant ⌫ national ~~judicial or other competent bodies,~~ ⌦ body ⌫ in accordance with national law or practice. ~~Whereas~~ ⌦ Further, ⌫ it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.	

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Recital 25 (p45)		
25. ⌦ It has been clearly established by the ⌫ ~~The~~ Court of Justice ~~has ruled~~ that~~,~~ in order to be effective, the principle of equal treatment implies that~~, whenever it is breached,~~ the compensation awarded ⌦ for any breach ⌫ ~~to the employee discriminated against~~ must be adequate in relation to the damage sustained. It ⌦is therefore appropriate to exclude the ⌫ ~~has furthermore specified that~~ fixing ⌦ of any ⌫ ~~a~~ prior upper limit ⌦ for such ⌫ ~~may preclude effective~~ compensation. ~~and that excluding an award of interest to compensate for the loss sustained is not allowed[7].~~	align the text of the recital on the text of Article 18 i.e.: 25. ⌦ Member States have the obligation to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination ⌦ on grounds of sex ⌫ ~~contrary to Article 3~~, in a way which is dissuasive and proportionate to the damage suffered ⌦ . ⌫ ~~; such~~ ⌦ Such ⌫ compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his ~~/her~~ job application into consideration.	Inconsistency between Recital 25 and Article 18, which allows an exception to the principle of exclusion of prior upper limits for compensation in case of job applications. It is important to recall this exception to ensure legal certainty
Recital 29 (p46)		
29. The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.	delete recital 29	There should not be "substantive" changes in this Directive. New transposition in national law should not be necessary, either for the text of the consolidated Directive (stemming from former Directives) or for ECJ jurisprudence, which apply directly in Member States' legal orders

[7] ~~Case C-180/95, Drachmpachl, [1997] ECR I-2195, Case C-271/91, Marshall [1993] ECR I-4367~~

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TITLE 1 – General Provisions		
Article 1 (p47)		
1. The purpose of this Directive is to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. To that end it contains provisions to implement the principle of equal treatment in relation to: …	- delete “equal opportunities and”	- There is no justification for adding “equal opportunities” compared with previous Directives
c) occupational security schemes	- specify more precisely the extent to which the principle of equal treatment should be applied to occupational security schemes	- The Commission proposes to extend concepts and definitions existing in some particular Directives to all areas concerned by the recast Directive. This is problematic in particular with regard to occupational security schemes. It is essential to avoid creating additional burdens for employers with regard to the management of occupational social security schemes. Indeed, this would hamper the development for example of second and third pillar pension schemes, and would ultimately be counterproductive for both employers and employees. To avoid this, occupational security schemes should be taken out of the scope of the following articles: – Article 17 on remedies – Article 18 on compensation – Article 19 on burden of proof – Article 21 on equal treatment bodies (See also these articles)

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TITLE 2 – Specific Provisions		
Article 4 (p51)		
4. ⌦ For ⌫ the same work or for work to which equal value is attributed, ~~the elimination of~~ all discrimination on grounds of sex with regard to all aspects and conditions of remuneration ⇨ attributable to a single source ⇦ ⌦ shall be eliminated ⌫.	the article 4 should be amended and the mention "attributable to a single source" changed to "attributable to the same employer"	In its jurisprudence the ECJ has not moved away from the condition of having the same employer in order to be able to compare pay between two persons. The ECJ has never indicated what could be another source than being the same employer. The drafting proposed by the Commission is unclear and must be changed so as to avoid confusion and to avoid the necessity of changing existing national legislation in this regard.
Article 6 (2) (p52)		
6(2). This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer in that they are directly related to the period of service and their amount is calculated by reference to the public servant's final salary. The fact that such a scheme forms part of a general statutory scheme is without prejudice in this respect.	redraft article 6 (2)	This new paragraph is very unclear and must be redrafted so as to avoid confusion in the implementation
Article 15 (1) (p59)		
15. ⌦ 1. ⌫ Less favourable treatment of a woman related to pregnancy or maternity leave ~~within the meaning of Directive 92/85/EEC~~ shall constitute discrimination within the meaning of this Directive.	Reinstate "within the meaning of Directive 92/85/EEC"	The notion of maternity leave is not defined elsewhere in the proposal for a recast Directive. Reference to the original text is necessary to ensure legal certainty.
Article 17 (2 & 3) (p60)		
17.~~3.~~ ⌦ 2. ⌫ Member States shall ensure that associations, organisations or other legal entities which	- Occupational security schemes should be explicitly taken out of the scope of this	- The Commission does not justify why it proposes that organisations may engage,

COMMISSION'S PROPOSALS	UNICE PROPOSALS FOR AMENDMENTS	COMMENT/ JUSTIFICATION
have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainants, with his ~~or her~~ approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive. ~~4.~~ ⌦ 3. ⌫ Paragraphs 1 and ~~3~~ ⌦ 2 ⌫ are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.	article - The paragraph should be modified as follows: "⌦ 3. ⌫ Paragraphs 1 and ~~3~~ ⌦ 2 ⌫ are without prejudice to national rules relating to procedures and time limits for bringing actions as regards the principle of equal treatment."	either on behalf or in support of the complainant, in any judicial and/or administrative procedure in the field of occupational security schemes. - Some national legislation requires anyone who wishes to bring a complaint under discrimination legislation to have first sought to resolve matters by internal procedures, for example through the use of a grievance procedure. The new Directive should not limit national legislation in this respect.
Article 18 (p61)		
~~2.~~ Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination ⌦ on grounds of sex ⌫ ~~contrary to Article 3~~, in a way which is dissuasive and proportionate to the damage suffered ⌦ . ⌫ ~~; such~~ ⌦ Such ⌫ compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his ~~/her~~ job application into consideration	Occupational security schemes should be explicitly taken out of the scope of this article	The Commission does not justify why it proposes that compensation or reparation be extended to occupational security schemes. This proposal goes far beyond existing legislation and jurisprudence of the ECJ. Such a proposal cannot be made without having assessed precisely the consequences this may have in particular on second pillar social security schemes.

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Article 19 (1) (p61)		
1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.	Occupational security schemes should be explicitly taken out of the scope of this article	The Commission's proposal to extend the given rules to occupational security schemes is not justified. In matters relating to occupational security schemes, the reversal of the burden of proof is an unnecessary instrument as jurisprudence show that litigious cases in this field concern the interpretation of written contract clauses, which are easily available to both parties.
Article 21 (p62)		
1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies ~~charged~~ ⌦ with responsibility ⌫ at national level ~~with~~ ⌦ for ⌫ the defence of human rights or the safeguard of individuals' rights. 2. Member States shall ensure that the competences of these bodies include: (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article ~~6(3)~~ ⌦ 17 (2) ⌫, providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination (c) publishing independent reports and making recommendations on any issue relating to such discrimination.	Occupational security schemes should be explicitly taken out of the scope of this article	The Commission's proposal to extend the given rules to occupational security schemes is not justified. Before proposing an extension of the rules, the Commission should assess the impact of the work of the agencies on the promotion, analysis, monitoring and support of equal treatment. Such an extension will also create additional administrative burden which should be avoided.

COMMISSION'S PROPOSALS	UNICE PROPOSALS FOR AMENDMENTS	COMMENT/ JUSTIFICATION
TITLE 3 – Horizontal Provisions		
Article 24 (b) (p64)		
(b) ~~any~~ provisions contrary to the principle of equal treatment ~~which are included~~ in contracts or collective agreements, ⌦ wage scales, wage agreements, staff rules of undertakings, ⌫ internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations ⌦, individual contracts of employment or any other arrangements⌫ shall be, or may be declared, null and void or are amended~~.~~ ⌦ ; ⌫	The wording of article 7(a) of Directive 86/378 should be used i.e. "provisions contrary to the principle of equal treatment in legally compulsory collective agreements, staff rules of undertakings or any other arrangements relating to occupational schemes are null and void, or may be declared null and void or amended"	The wording proposed is confusing. The exact wording of article 7(a) of Directive 86/378 should therefore be used.
Article 30 (p68)		
Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all appropriate means ⌦, for example at the workplace ⌫.	The words "for example at the workplace" should be deleted	The adaptation of the former text by adding "for example at the workplace" is not justified and leads to uncertainty with regard to the responsibility of employers