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**UEAPME position paper on the European Commission proposal for a  
Council Directive on implementing the principle of equal treatment between  
persons irrespective of religion or belief, disability, age or sexual orientation  
COM (2008) 426**

### **Introduction**

The European Commission published on 2 July 2008 its proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM (2008) 426.

The proposal needs to be seen within the context of other recent legislative measures by the European Commission aimed at tackling discrimination based on a number of grounds<sup>1</sup>.

This proposed directive is aimed at horizontally extending the current EC legal framework on the four grounds of discrimination<sup>2</sup> to other areas outside employment, occupation and vocational training. Its scope focuses in particular on the provision of commercial goods and services.

### **I - General comments**

UEAPME fully recognises the importance of non-discrimination and is opposed to discrimination on all grounds. SMEs are socially responsible actors deeply embedded in their local communities and cannot afford to discriminate in any way.

Following the decline of manufacturing there has been a huge increase in services and the majority of new service providers are small companies. For SMEs the provision of goods and services therefore represents very significant markets and sectors of growth and they are obviously affected by this proposal.

However, UEAPME has always been and is still of the opinion that further legislation in this field runs contrary to the European Commission's efforts in simplifying legislation and better regulation and that the proposed legislative measures would in fact create additional burdens and possible uncertainties for SMEs.

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<sup>1</sup> The legal basis is Article 13 of the EC Treaty, empowering the Community to take action to deal with discrimination based on a new range of grounds, including racial or ethnic origin, religion or belief, age, disability and sexual orientation.

<sup>2</sup> religion or belief, disability, age or sexual orientation

From a business point of view it is unclear how the Directive can achieve its objectives in providing “legal certainty as to the rights and obligations of economic operators”. One of the main questions raised by this new proposal is the respect of the subsidiarity principle. So far there is no clearly defined articulation between the European level and national legislation in this proposal.

Moreover this new directive seems to be premature as the European Commission has recently launched infringement procedures against several Member States because of the insufficiently adapted implementation or the lack of implementation of the directive on non-discrimination in employment.

Furthermore recent rulings of the European Court of Justice show the high level of legal uncertainty of the European non-discrimination regulations already in place. The "Mangold" decision surprisingly stipulated anti-age discrimination to be a principle of primary European law directly applicable in all Member State law systems' thus leading to a revision of the German law on interim employment of elderly persons. However, in the recent Bartsch case (C-427/06) the ECJ seems to have revised its opinion on the legal quality of the anti-age discrimination principle stating that this is not part of European primary law.

Meanwhile, the ECJ ruling in the "Feryn" case shows the vast extent to which European non-discrimination regulations have been used on the basis of just verbal declarations of a Belgian entrepreneur on the difficulties that come along when employing migrant workers, which were classified as a direct discrimination even though no worker or job seeker complained.

## **II - Specific Comments on the various articles**

### **Article 1: Purpose**

The main objective of the directive is to combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment, outside the field of employment, which UEAPME can easily support.

### **Article 2: Concept of discrimination**

The concepts of direct, indirect discrimination as well as harassment are mostly in line with the definitions used in the previous Directives 2000/43/EC, 2000/78/EC, 2002/73/EC on non discrimination providing some exceptions based on the double test of a justified aim and proportionate way of reaching it, notably for insurance and banking services. Concerning the definition of "harassment" the same sentence as in Directive 2000/43 should be added: *"In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."*

Further exceptions should be authorised notably when it is about age for commercial activities like “theme parties” and/or special pricing for young people or elderly people.

### **Article 3: Scope**

Regarding the access to goods and services, the proposed text clearly specifies that professional or commercial activities are covered, but excludes transactions between private individuals acting in a private capacity.

#### **Article 4: Equal treatment of persons with disabilities**

UEAPME welcomes the efforts undertaken by the European Commission to take into consideration the specificities of small and medium sized companies and micro enterprises. However, this article on disabilities can lead to different interpretations and will create some legal uncertainties.

**Paragraph 1** - It is clear that providers of services and goods always need to take into account and anticipate the needs of their customers in order to remain competitive, particularly when creating new services. It is in the companies' own interest to do so and ensure a wide base of customers. Nowadays more and more companies are aware of the added value of diversity in terms of new clients and therefore are doing what is necessary to accommodate their requirements and needs.

Nevertheless, the term “*disproportionate burden*” leaves ambiguity as to what extent adjustments are required for service providers to ensure “*effective access to and supply of goods and services which are available to the public*”. Also, regarding paragraph 1, subparagraph a) it is not clear what constitutes making “*appropriate modifications or adjustments*” for already existing service provisions.

**Paragraph 2 and 3** - Again it is difficult to define taking into account “*the specific situation of small and medium sized and micro enterprises*” and it leaves for a vague interpretation.

Further there is another ambiguity between ensuring “*the effective access for a particular disabled person*” (paragraph 1) and at the same time using the “*reasonable accommodation*” concept (paragraph 3).

In order to strongly support and speed up adjustment for disabled people, financial incentives are welcome as long as they fully respect the European State Aid regulation.

The whole implementation of the directive regarding these aspects would very much depend on how narrowly Member States define the above issues, on their legal framework (e.g. how obligations and responsibilities are shared between owners of buildings and tenant entrepreneurs) and on how this is implemented at national, regional and local level.

Due to the difficulty to adapt equipment and services to this particular group of persons, UEAPME calls for a longer implementation timeframe, namely four years instead of two years.

#### **Article 5: Positive Action**

Here the proposed Directive rightly recalls that formal equality does not in itself lead to equality in practice. UEAPME has already previously recommended that support measures such as information and awareness raising campaigns are needed above all in order to change the attitudes of individuals and society at large. However positive actions should not lead to new types of discriminations.

### **Article 7: Defence of rights and Article 8: Burden of proof**

Both articles on enforcing the rights to non-discrimination and on the burden of proof are generally aimed at strengthening the protection of individuals.

Article 7, subparagraph 2 should be worded the same way as Art 7 subparagraph 2 of Directive 2000/43: "*Member States shall ensure that associations, organisations or other legal entities, which 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...*"

Whilst the intentions are honourable, again this particular shift of burden of proof poses an unforeseeable burden on providers of services. This "shift of burden" concept is of course not new and has already been used in other Directives based on Article 13 of the EC Treaty, such as the equality in employment (2000/78/EC) Directive.

In practice it means that every single activity of an enterprise would need to be documented. This would have a potentially detrimental economic impact, particularly on SMEs, who are faced with increased legal uncertainties and more bureaucracy.

The 2000/43 directive which is also a horizontal directive covering all areas shows the difficulty for the person or the organisation accused to prove their innocence.

### **Article 10: Dissemination of information**

The need for further information and awareness-raising cannot be emphasised strongly enough. Regardless of existing and further legislative initiatives there must be more information easily accessible and available.

### **Article 11: Dialogue with relevant stakeholders**

Promoting the dialogue between all stakeholders is vital and here the European Commission and Member States should be doing their utmost to facilitate the exchange of information.

Social partners also have a very important complementary role to play. For instance within the field of Anti-Discrimination and equality, the recent Framework of Action on Gender Equality concluded by social partners in 2005, is encouraging the promotion of equality in Member States and promotes best suitable practice.

### **Article 12: Bodies for the promotion of equal treatment**

The Directive leaves open whether Member States have one or more bodies at national level promoting equal treatment. However, in practice it should really be encouraged to have one more central body set-up, both in the interest of avoiding the duplication of administrative tasks and to ensure a more coordinated approach regarding cases of multiple discriminations.

### **Article 14: Sanctions**

Concerning sanctions Member States should have the possibility to fix upper limits to the level of payment of compensation to the victim.

### **III - Additional comments**

In the field of non discrimination, UEAPME is once again insisting on the fact there is no need for further legislation. What is needed is to tackle the roots of the cause.

For its part the Commission should have contributed with specific information and awareness raising campaigns through non-binding and supportive measures including financial incentives to foster adjustment of places for disabled persons in order to better promote the non-discrimination legal framework outside of employment. Steps to promote non-discrimination as such are already being taken in form of the EU wide “For Diversity Against Discrimination” campaign.

Furthermore an exchange of good practices between the Member States could be of great help in order to encourage a change of mindset, provide more education and sensitisation to overcome cultural barriers and to ultimately involve all individuals and all parts of society.

### **Conclusion**

- UEAPME is against a new horizontal non-discrimination directive outside of employment at European level. This would not be able to solve the underlying issues related to individuals and society at large with the first and foremost fundamental need to tackle a change of mindset and overcoming cultural barriers at Member State level.
- UEAPME still favours non-binding and supportive measures to promote non-discrimination matters.
- The Commission should rather contribute to increasing the information and awareness campaigns of issues involved at European and Member State level.
- Member States should focus on consolidating the implementation of the existing directives based on article 13 of the EC Treaty ensuring that the corresponding national laws offer a comprehensive framework to combat discrimination.
- Particularly in this area the subsidiarity principle needs to be strictly respected and the level of regulation required should be clearly defined as well as whether there is a real need for legislation at all.

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