

COMMISSION PROPOSAL FOR A DIRECTIVE ON “IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RELIGION OR BELIEF, DISABILITY, AGE, OR SEXUAL ORIENTATION”

Summary

BUSINESSEUROPE considers discrimination in and outside the labour market as unacceptable and reconfirms its commitment to the fight against discrimination. In accordance with this commitment, more and more companies are developing initiatives aiming to promote diversity at the work place.

Since the adoption of the Amsterdam Treaty and the subsequent inclusion of the Article 13 in the Treaties, the European Union has developed a set of directives in the field of equal opportunities. BUSINESSEUROPE believes that existing EU legal protection against discrimination is adequate.

BUSINESSEUROPE has strong concerns about the draft directive. It does not respect the subsidiarity and proportionality principles. The need for such additional legislation in the field of discrimination has not been evidenced by the European Commission and the EU's policy efforts must be geared towards awareness raising activities and the exchange of good practices at European level.

A stronger focus on non-discrimination under Open Methods of Coordination in the field of employment and social inclusion and social protection would therefore have been more appropriate to take advantage of the diversity of practices which exist at the EU level.

In addition, providing more and better information on rights and obligations under the current EU legislative framework on non-discrimination is a prerequisite for a more effective fight against discrimination. Member States should therefore do more to disseminate information to all stakeholders on existing legislation in the field of non-discrimination.

While supporting the exclusion of financial services from the scope of the directive, BUSINESSEUROPE is concerned that the proposal will raise costs, enhance red tape and increase legal uncertainty for companies. The proposal also seems counter to the EU's better regulation agenda and will negatively affect the EU's efforts to become more competitive.

I. Introduction

1. On 2 July, the European Commission published, as part of its renewed social agenda, a proposal for a Council directive on “implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”. The draft directive was published together with and in the framework of the communication “Non-discrimination and equal opportunities: A renewed commitment”.

2. The draft directive aims at implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside the labour market.

II. General comments

3. BUSINESSEUROPE considers discrimination in and outside the labour market as unacceptable and reconfirms its commitment to the fight against discrimination.

4. A growing number of companies very much value the promotion of diversity at the work place as a means to attract and better respond to an increasingly diversified customer base. In addition, providing access to goods and services to the largest number of customers is an economic interest for companies. Promoting diversity makes business sense for companies.

5. The existing EU legislative framework on non-discrimination is comprehensive enough and provides victims with sufficient legal protection when discrimination occurs.

6. While it acknowledges that more must be done in order to achieve progress in the field of non-discrimination, BUSINESSEUROPE has strong concerns with the European Commission’s proposal for a new directive on non-discrimination.

7. BUSINESSEUROPE believes that the only suitable approach to non-discrimination is one that allows for specific solutions meeting the needs of individuals while taking into account the needs and constraints of other stakeholders and in particular companies. BUSINESSEUROPE therefore wonders about the appropriateness of a horizontal approach covering all types of discrimination. It is our view that the different types of discrimination correspond to different problems and therefore call for differentiated solutions.

8. The draft directive ignores the principle of subsidiarity enshrined in article 5.2 of the EC Treaty as it regulates matters which are purely national without any cross-border dimension. Considering that existing EU legislation in the field of non-discrimination provides a comprehensive framework to protect victims, the EU should focus its action on the prevention of discrimination. To that end, it should step up its efforts to disseminate information on existing legal obligations, to promote and exchange good practice at European level and to raise the awareness of discriminatory phenomena among all publics. Self-regulation or a stronger focus on non-discrimination under Open Methods of Coordination in the field of employment and social inclusion and social protection should therefore have been preferred to new legislation.

9. The proposal for a directive also goes beyond what is necessary to achieve its aims and therefore does not respect the proportionality principle enshrined in article 5.3 of the EC Treaty. The fact that many Member States have decided to go beyond existing obligations resulting from other anti-discrimination directives is no justification for EU legislation going beyond the setting of minimum requirements at EU level. Existing national rules and exemptions in the field of religion or belief, disability, age, and sexual orientation should not be challenged by the draft directive.

10. By increasing red tape and bureaucracy for companies, the Commission proposal regrettably does not match the broader orientations taken in the renewed social agenda. Whereas BUSINESSEUROPE shares the view of the European Commission that the social agenda needs to be fully coherent with and reinforce the Lisbon strategy for growth and jobs, the proposal undermines the EU's goal of becoming more competitive.

11. In addition, BUSINESSEUROPE strongly disagrees with the European Commission that there is inadequate protection against discrimination at European level. Between 2000 and 2006, the Council of the European Union adopted no fewer than five equal treatment directives: the racial equality directive 2000/43/EC, the employment equality directive 2000/78/EC, the gender employment equality directive 2002/73/EC, the gender equality outside employment directive 2004/113/EC and the gender equality recast directive 2006/54/EC. These directives already create a complicated web of regulation. The proposal will therefore result in unnecessary regulation and bureaucracy and aggravate the legal uncertainty that a continuous renewal of legislation in the field of non-discrimination entails for companies.

12. BUSINESSEUROPE is very much concerned that the Commission's impact assessment study was only published after adoption of the draft directive. Such practice is contradictory to "better regulation" policies and improved governance at EU level. Stakeholders should be given the opportunity to address shortcomings related to the consultation process or the analysis in general prior to publication.

13. As evidenced in recent ECJ case law in the field of non-discrimination¹, BUSINESSEUROPE is concerned that the European Court of Justice's method of interpretation of existing discrimination rules at EU level can lead to the widening of the concept of discrimination as set out in discrimination directives. Many of the provisions of the draft directive do not provide the legal certainty that companies need for delivering products and services effectively. It is essential that the definitions of "discrimination" present in existing EU directives are interpreted restrictively and do not entail for companies new, unforeseen and disproportionate obligations.

14. BUSINESSEUROPE took note of the broader approach to non-discrimination taken by the Commission in its communication "non-discrimination and equal opportunities: A renewed commitment".

¹ Case C-13-05, "Chacon Navas", judgement of 11 July 2006 on a definition of "disability"; Case C-303-06 "Coleman", judgement of 17 July 2008 on "discrimination by association"

15. While BE welcomes the adoption in recent years of diversity charters, notably in France, Germany and Belgium, it would oppose the development of an EU diversity charter. The Commission should therefore refrain from undertaking such action as it would impose on the Member States a single blueprint which would not allow taking into account their country-specific context. Moreover, BUSINESSEUROPE is convinced that the exemplary nature of a voluntary approach is the most appropriate way to arrive at effective diversity charters which can be used as practical instruments by companies.

16. The concept of “positive action” should remain clearly distinct from the concept of positive discrimination and should not be defined at European level. In full respect of the subsidiarity principle, it should be left to the Member States to define the concept of positive action on the basis of their own cultural and social make-up.

III. Specific comments

Article 1 – Purpose

17. In order to ensure legal certainty, the concept of religion should be described more clearly, notably to address the question of sects. Moreover, BUSINESSEUROPE believes that belief should be interpreted restrictively, for instance so as not to cover political opinions. A broad interpretation of belief outside the scope of religion would mean in practice that any decision not to enter into contractual relationships with a third party could be challenged even though it is based on legitimate differences of views.

Article 2 – Concept of discrimination

18. The concept of discrimination builds upon the concept already retained in previous directives. It would be in line with this general approach to leave the concept of harassment - article 2.3 - to be defined by the member states as it stands for example in directives 2000/43/EC and 2000/78/EC. Moreover, BUSINESSEUROPE is concerned with the widening of discrimination to the “denial of reasonable accommodation”, which will lead to a high volume of case law in the Member States and is in particular problematic for small businesses. As the “denial of reasonable accommodation” was not included in the concept of discrimination included in directives 2000/43/EC and 2000/78/EC, BUSINESSEUROPE asks for the deletion of article 2.5.

19. In addition, following recent case law of the European Court of Justice, BUSINESSEUROPE calls for more clarity on what can be considered as discrimination under article 2. A new paragraph should be added to indicate that direct discrimination, indirect discrimination and harassment should be interpreted strictly so as to create legal certainty for companies.

20. BUSINESSEUROPE welcomes the exemption of financial services from the scope of the directive with regard to age and disability, which constitute an objective factor in the assessment of risk based on relevant and accurate actuarial or statistical data. It is however important to specify in article 2.7 that in addition to actuarial or statistical data,

other sources of information such as medical experience, should be allowed for risk assessment. Furthermore, the possibility to allow differences in treatment in the provision of financial services should not be left to the discretion of Member States.

21. It is important to ensure that justifications for differentiated treatment which have been developed in national implementing laws under existing EU directives are not affected by this draft directive.

Article 3 – Scope

22. Regarding sub-paragraph (d) on “access to and supply of goods and other services which are available to the public, including housing”, BUSINESSEUROPE urges the Council and the European Parliament to delete the wording stipulating that this sub-paragraph “shall apply to individuals only insofar as they are performing a professional or commercial activity”. Extending the scope of the directive to commercial activities of professionals would be a breach of the contractual freedom of individuals. Individuals’ transactions should be fully excluded from the scope of the directive, whether commercial or not. The text of directive 2000/43/EC on access to goods and services should be kept unchanged.

Article 4 – Equal treatment of persons with disabilities

23. The fact that the Commission needs to address persons with disabilities in a separate article illustrates the inappropriateness of a horizontal directive to effectively cover different types of discrimination.

24. BUSINESSEUROPE is very much concerned with the need to provide for non-discriminatory access to persons with disability with anticipation. This is a form of positive discrimination that BUSINESSEUROPE does not welcome. In fact, it overlaps with the need to provide reasonable accommodation, which can create legal uncertainties when the directive is implemented at national level. The Council and the European Parliament should therefore delete article 4.1 a).

25. Reasonable accommodation will without any doubt bring high costs for companies. It might therefore be needed to exempt existing buildings in which the provision of reasonable accommodation was not compulsory at the date of construction from the scope of the directive. The specific situation of SMEs should also be considered.

26. The concept of “disproportionate burden” is not clearly defined and therefore presents high risks for wrong interpretations at national level and legal uncertainties. BUSINESSEUROPE calls on the EP and the Council to leave it to the Member States to define what is a “disproportionate burden” in full consideration of the diversity of national contexts in this regard.

Article 8 - Burden of proof

27. BUSINESSEUROPE is very much concerned about the implications that the reversal of the burden of proof has had on companies in terms of costs, bureaucracy and human resources management in the framework of directives 2000/43/EC and

2000/78/EC. Reversing the burden of proof is even more problematic in the context of a directive regarding access to goods and services as customer relationships follow very different patterns from the employer-employee relationship, which was at the heart of directive 2000/78/EC. Specific challenges linked to keeping elements of proof in a customer relationship must be acknowledged in the directive. Account must also be taken of the limited administrative capacities of SMEs.

Article 11 – Dialogue with relevant stakeholders

28. Contrary to other anti-discrimination directives, the Commission proposal only refers to non-governmental organisations. In view of the role of the social partners in the field of equal opportunities, social partners need to be mentioned in this article.

Article 14 – Sanctions

29. Contrary to previous anti-discrimination directives, the Commission proposal requires that compensation “may not be restricted by the fixing of a prior upper limit”. Prohibiting an upper limit of compensation is not justifiable in order to ensure the effectiveness of sanctions and it also goes against the principle of subsidiarity. BUSINESSEUROPE calls on the EP and the Council to leave it up to the Member States to define the appropriate level of effective, proportionate and dissuasive sanctions as well as a prior upper limit of compensation.

Article 15 – Implementation

30. The transposition of previous directives has shown how important it is to leave enough time to Member States to implement directives in the field of non-discrimination. There is no reason why the transposition deadline should be shortened to two years as suggested by the European Commission. BUSINESSEUROPE therefore calls for the maintenance of a three-year transposition period as was the case with existing directives. In addition, the possibility to extend the transposition deadline for three additional years in the case of age and disability must also be offered to Member States as was the case in directive 2000/78/EC.

IV. Conclusion

31. While supporting the fight against discrimination, BUSINESSEUROPE has strong concerns regarding the draft directive on “implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation”. The proposal will raise costs, enhance red tape and increase legal uncertainty for companies. It therefore seems counter to the EU’s better regulation agenda and will negatively affect the EU’s efforts to become more competitive.

32. BUSINESSEUROPE strongly believes that the proposal for a directive does not respect the subsidiarity and proportionality principles. The need for such additional legislation in the field of discrimination has not been evidenced by the European Commission and the EU’s policy efforts must be geared towards awareness raising activities and the exchange of good practices at European level. A stronger focus on



non-discrimination under Open Methods of Coordination in the field of employment and social inclusion and social protection would therefore have been more appropriate to take advantage of the diversity of practices which exist at the EU level.

33. Providing more and better information on rights and obligations under the current EU legislative framework on non-discrimination is a prerequisite for a more effective fight against discrimination. Member States should therefore do more to disseminate information to all stakeholders on existing legislation in the field of non-discrimination.