

ARTICLE 13 EC: THE EUROPEAN COMMISSION'S PROPOSAL FOR A HORIZONTAL EMPLOYMENT DIRECTIVE

Ph. D. research student Anna Sobkiewicz

Catholic University of Leuven, Belgium

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*Recenzavo Lietuvos teisės universiteto Teisės fakulteto Darbo teisės ir socialinės saugos katedros vedėja prof. dr. **Genovaitė Dambrauskienė** ir šios katedros doc. dr. **Rasa Macijauskienė***

Abstract

As a result of the Treaty of Amsterdam [1], the amended EC Treaty now contains a general provision dealing with discrimination, Article 13 in the Treaty's re-numbered version (former Article 6a EC). The provision gives the Community the competence to adopt measures to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In November 1999, the European Commission presented a "proposal for a Council directive establishing a general framework directive for equal treatment in employment and occupation" accompanied by two additional proposals concerning an anti-racism directive and Community Action Programme to combat discrimination, 2001-2006.

Naturally, Article 13 already heralded a shift away from the focus on nationality and sexual discrimination, which previously characterised EU social law. The terms of the new treaty article indicate a more horizontal approach - where different grounds of discrimination are dealt with by common measures. This is reflected in the Commission's explanatory memorandum to the proposed directive establishing a general framework for equal treatment in employment and occupation: "the scope of the present proposal covers all of the discriminatory grounds referred to in Article 13 except sex and does not rank them in any way. This absence of a qualitative hierarchy among the discriminatory grounds is of particular importance in cases of multiple discrimination" (COM (1999) 565, p. 6).

In brief, the proposed general framework directive on equal treatment in employment essentially seeks to extend further the existing protection in EU law against sex and nationality discrimination. Therefore, discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation is forbidden. Employment is defined widely; it includes all types of vocational training, self-employment and participation in employee/employer organisations (Article 3). The proposal moves significantly beyond the 1976 Equal Treatment Directive [2], however, in its express prohibition of direct and indirect discrimination, and the inclusion of harassment within the definition of unlawful discrimination (Article 2). There is provision for positive action measures (Article 6), as well as allowance for a shift in the burden of proof in action to enforce the equal treatment principle (Article 9). Member States are under an obligation to establish "adequate sanctions" for a breach of the directive, and in particular such sanctions must be "effective, proportionate and dissuasive" (Article 14).

One might expect that the proposal for the "horizontal" directive would take a non-hierarchical approach and not distinguished between the various named grounds. However, in spite of the Commission's claims to the contrary, an examination of the proposal reveals that four of the seven covered grounds receive special attention in the text, and that articles provide for a specific extensions or limitations of the proposed directive with regard to these grounds. These grounds are the following: disability in Article 2(4), religion and belief in Article 4(2) and age in Article 5.

Disability

Article 2 of the proposed directive specifies that the concept of discrimination covers not only direct and indirect discrimination, but also harassment, and, in the case of persons with disabilities, the obligation, in Article 2(4), to provide "reasonable accommodation":

In order to guarantee respect of the principle of equal treatment for persons with disabilities, reasonable accommodation shall be provided, ~where needed, to enable such persons to have access to, participate in, or advance in employment, unless this requirement creates an undue hardship.

A concept of discrimination against persons with disabilities which encompasses a failure to make "reasonable accommodation" essentially provides for the identification of barriers to the participation of individuals with a disability in the labour market and imposes an obligation on employers to adapt the work place or rhythm to ensure that an individual with a disability can participate on an equal basis. The obligation to provide an accommodation is limited by the requirement that this must not be excessively expensive or difficult for the employer. The concept recognises that disability can sometimes affect an individual's ability to perform tasks in a conventional way and that adaptations are required to provide for equality of opportunity and eliminate discrimination.

The adoption of the proposed directive, and the recognition as discrimination of a failure to make a reasonable accommodation, would result in a significant extension of the "Community" concept of discrimination, and would have an important impact in the Member States. At present only three Member States, namely the United Kingdom, Ireland and Sweden, have legislation which recognises as a separate form of discrimination the failure to make a reasonable accommodation or adjustment to meet the needs of a (potential) worker with a disability. In all the three countries the relevant legislation has been adopted in the past few years.

However reasonable accommodation discrimination can also be regarded as an element of direct discrimination (employer aware of the need to make an accommodation to meet the needs of a disabled individual, but refuses to make the accommodation) or indirect discrimination (employer aware that the organisation of the workplace is likely to exclude certain persons with a disability, but fails to make adaptations to remove barriers). The former approach is adopted by the relevant Swedish legislation only.

One could argue that the Commission would also have been wiser to seek an expansion of the European Court's current definition of direct or indirect discrimination, rather than seeking to develop an additional "European" form of discrimination in the proposal. The former would arguably have been easier to integrate into existing case law. Finally, one can question the Commission's decision to limit the protection from reasonable accommodation discrimination to persons with disabilities.

It is submitted that, in so far as the other groups experience reasonable accommodation discrimination, this provision does place persons with disabilities in a more favourable position. Reasonable accommodation discrimination certainly affects followers of some religions and, arguable, older people. For example, a report by Eurolink Age refers to training schemes which use teaching methods designed for young people and which are unsuited to older workers with years of experience [3]. However, in adopting this approach the Commission has followed the lead of the three aforementioned Member States, which only recognise failure to make reasonable accommodation as a form of discrimination affecting persons with disabilities. Furthermore, it is undoubtedly true that persons with disabilities experience reasonable accommodation discrimination to a greater extent and more often than the other groups covered by the proposed directive.

Age and specific exclusions

Article 5 of the proposed directive refers to a number of differences in treatment on the grounds of age, which "shall not constitute direct discrimination". From a purely legalistic point of view this statement is flawed, as the differences in treatment referred to clearly do

constitute direct discrimination. It would have been more accurate to specify that the differences in treatment are permitted forms of direct discrimination. Some of the permitted forms of discrimination are uncontroversial, such as the exclusion from the scope of the directive of "the fixing of a minimum age as a condition of eligibility for retirement... benefits".

Having said that, it is not completely clear that access to retirement benefits is actually covered by Article 1 of the proposal, which sets out the purpose of a directive. In this article reference is only made to "employment and occupation, including promotion, vocational training, employment conditions and membership of certain organisation". Other exceptions named in Article 5 are somewhat more controversial. The article, for example, permits the fixing of a maximum age for recruitment.

Eurolink Age, in a 1993 report, identified discrimination against older workers in relation to recruitment as a major problem and noted age discrimination in recruitment starts from age 40 onwards in most countries. Undoubtedly the broadest exception is found in Article 5(f), which allows for "the establishment of age limits which are appropriate and necessary to pursue legitimate labour market objectives". This provision had the potential to cover many discriminatory employment practices and, in the absence of any guidance as to what is meant by "legitimate labour market objectives", the limits of this exception are uncertain.

In so far as the exclusions covered by Article 5 are excessively broad and open-ended one can argue that the proposed directive does provide a lower level of protection against discrimination directed at this group. The directive, if adopted will overlook some forms of discrimination against older people, and this must surely amount to a ranking within the seven covered grounds, which is not to the benefit of older workers.

Religion and belief

The proposed directive contains a "genuine occupational qualification" exception. This is found in Article 4(1) and the provision is expressed to cover "any of the discriminatory grounds referred to in Article 1". Given that all seven grounds are covered by the genuine occupational qualification exception, it is surprising to find in Article 4(2) a provision, which deals expressly with religion and belief. The paragraph reads:

Member States may provide, in the case of...organisations, which pursue... the aim of ideological guidance in the field of religion of belief with respect to education, information and the expression of opinions..., a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination...

Such exclusion seems to fall soundly within the scope of Article 4(1). It therefore seems unnecessary and can be regarded as an example of poor drafting. One can only imagine that the provision was inserted in the proposal to reassure those Member States, such as Ireland, where the church is responsible for the education of a large part of the school-age population.

In fact the genuine occupational qualification clause of the proposal contained in Article 4 is worded in very broad terms and can arguably cover all of the exceptions provided for to the prohibition of direct discrimination under most of the national non-discrimination legislation. The provision reads:

Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine occupational qualification.

The reference in particular to "the context" in which activities are carried out seems to be broad enough to cover numerous exceptions. One could argue that this reference covers, for example, the employment of persons with disabilities in sheltered workshops, the employment of a Muslim teacher to provide education in an exclusively Muslim school, even where that education is provided in the language of the EU Member State, and the employment of a homosexual to provide AIDS-prevention advice to gay men. Such a broadly

worded exception could therefore provide Member States with the scope to maintain or adopt exceptions to the non-discrimination principle where this is seen as necessary.

Conclusions

The draft directive, in its present format, favours persons with disabilities in that only this group is protected from an additional fourth form of discrimination, namely discrimination in the form of a failure to make a reasonable accommodation. On the other hand, any directive adopted on the basis of this proposal would provide for a lower level of protection for older people as a result of the exclusions set out in Article 5.

However, differences in levels of protection in the proposal pale into insignificance when compared to the protection that will be provided for victims of race or ethnic origin discrimination by the relevant group specific proposal/directive. This proposal, in particular, goes far beyond employment and covers many other areas. The real question therefore, is whether the Commission intends to propose other group specific non-discrimination directives providing greater degrees of protection than that found in the horizontal proposal. Commissioner Diamantopoulou has already informed the European disability NGOs (the European Disability Forum) that the Commission will shortly commence work on a disability specific directive. It seems doubtful that some or all of the remaining four grounds mentioned in Article 13 (religion or belief, age, and sexual orientation) will, as a result of limited work capacity of the Commission and, in particular, lack of agreement amongst the member States, be the subject of similar group-specific proposals. It is therefore likely that the future will only bring differing levels of protection for the eight “equally important” grounds mentioned in Article 13.



LITERATURE

1. **Treaty** of Amsterdam amending the treaty on European Union, the treaties establishing the European Communities and certain related acts
2. **Council** Directive 76/207/EEC of 9 February 1976 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 Official Journal L 039, 14/02/1976 p. 0040 – 0042 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexap!prod!CELEXnumdoc&lg=EN&numdoc=31976L020&model=guichett
3. **Drury E.** “Age Discrimination Against Older Workers in the European Community – A Comparative Analyses”, Eurolink Age, 1993.



Europos bendrijų sutarties 13 straipsnis: Europos Komisijos pasiūlymas dėl horizontalios įdarbinimo direktyvos

Doktorantė Anna Sobkiewicz

Liuveno katalikiškasis universitetas, Belgija

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