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REPORT

From: Presidency
To: Permanent Representatives Committee / Council

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Subject: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation
- Progress Report

I. INTRODUCTION

On 2 July 2008, the Commission adopted a proposal for a Council Directive aiming to extend the protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation to areas outside employment. Complementing existing EC legislation¹ in this area, the proposed horizontal equal treatment Directive would prohibit discrimination on the above-mentioned grounds in the following areas: social protection, including social security and healthcare; education; and access to goods and services, including housing.

¹ In particular, Council Directives 2000/43/EC, 2000/78/EC and 2004/113/EC.

A large majority of delegations has welcomed the proposal in principle, many endorsing the fact that it aims to complete the existing legal framework by addressing all four grounds of discrimination through a horizontal approach.

Most delegations have affirmed the importance of promoting equal treatment as a shared social value within the EU. In particular, several delegations have underlined the significance of the proposal in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). However, some delegations would have preferred more ambitious provisions in regard to disability.

While emphasising the importance of the fight against discrimination, certain delegations have, in the past, questioned the need for the Commission's proposal, which they have seen as infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality. Two delegations have maintained general reservations. Certain other delegations continue to question the inclusion of social protection and education within the scope.

Certain delegations have also requested clarifications and expressed concerns relating, in particular, to the lack of legal certainty, the division of competences, and the practical, financial and legal impact of the proposal.

For the time being, all delegations have maintained general scrutiny reservations on the proposal. CZ, DK, MT and UK have maintained parliamentary scrutiny reservations. The Commission has affirmed its original proposal at this stage and maintained a scrutiny reservation on any changes thereto.

The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009². Following the entry into force of the Lisbon Treaty on 1 December 2009, the proposal now falls under Article 19 of the Treaty on the Functioning of the European Union; thus unanimity in the Council is required, following the *consent* of the European Parliament.

² See doc. A6-0149/2009. Ulrike Lunacek (AT/LIBE/Greens/European Free Alliance) has been appointed Rapporteur by the newly elected Parliament.

II. THE COUNCIL'S WORK UNDER THE SLOVAK PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal,³ focusing, in particular, on the interplay between the provisions on accessibility for persons with disabilities contained in the proposed Directive and in other EU legislation as well as in the proposed European Accessibility Act (EAA).⁴ The Working Party also examined the exception contained in the proposed horizontal equal treatment Directive that would authorise the offering of more favourable conditions of access to persons belonging to specific age groups and the implications of this exception for the provisions regulating the burden of proof. The discussions also touched upon the remit of the national Equality Bodies and the question of "universal design".

The Presidency's drafting suggestions⁵ were welcomed by delegations as a very helpful contribution to the negotiations. The discussions in the Working Party can be summed up as follows:

a) **Relationship between the provisions on accessibility for persons with disabilities contained in the proposed Directive and in other EU legislation**

Following a first discussion, the Presidency tabled three options for clarifying the interplay between the provisions on accessibility for persons with disabilities contained in the proposed Directive and in other EU legislation, including the proposed EAA.

³ Meetings took place on 7 July and 18 November.

⁴ Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services (14799/15).

⁵ See 10561/16 and 13060/16.

Option A⁶ would provide for *the automatic fulfilment* of the accessibility requirements of the Directive where other Union law provides for detailed standards or specifications on accessibility. In other words, economic operators that complied with sector-specific legislation would have a guarantee that they were also complying with the accessibility obligations contained in the proposed horizontal equal treatment Directive. However, should sectorial rules not be properly implemented, *a claimant* could still fall back on the horizontal Directive and bring a case of discrimination.

The Commission representative expressed the preliminary view that Option A might be the one that offered the right amount of flexibility and legal certainty.

In Option B,⁷ a recital and corresponding provisions would be included in the text stating that detailed standards or specifications provided for by Union law *should take precedence* over the proposed Directive, in accordance with the principle of *lex specialis derogat legi generali*.

Under Option C, a recital would be included in the Directive stating that Union law providing for detailed standards or specifications on accessibility or reasonable accommodation in respect of particular goods or services *should be taken into account* where a claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination.⁸ Under this approach, persons with disabilities would still be able to assert their rights under the proposed horizontal Directive if they felt that they had been discriminated against--for example, if more detailed sectorial legislation on accessibility had been poorly implemented.

⁶ Articles 4(9) and 4a(4) and Recital 19e.

⁷ Articles 4 and 4a and Recital 19e.

⁸ Recital 23a.

Delegations stressed the importance of ensuring the greatest possible legal certainty and asked for more time to examine the different options, each of which garnered some support. Certain delegations stressed, in particular, the importance of providing victims of alleged discrimination with means of redress.

The discussion showed that the specific interplay between the proposed Directive and sectorial legislation, particularly in the fields of *transport and communication*, still needs to be clarified.

b) Presumption of non-discrimination in the context of more favourable conditions of access offered to persons belonging to specific age groups

As a general rule, the proposed Directive provides for the sharing of the burden of proof: once *a claimant* establishes facts that create a presumption of discrimination, it is for *the respondent* to prove that there has been none (reversal of the burden of proof). However, the situation is more complicated when it comes to the exception allowing, for example, economic operators to offer more favourable conditions of access to persons belonging to specific age groups in order to promote their economic, cultural or social integration. It could be argued that, on the one hand, there has to be the possibility for reasonable exceptions allowing for more favourable treatment in specific and justified circumstances. On the other hand, such exceptions to the principle of equal treatment should not become irrefutable, either.

Searching for a way to balance these two considerations, the Presidency tabled two options.

Under Option I,⁹ offering more favourable conditions of access to persons belonging to certain age groups in order to promote their economic, cultural or social integration would be presumed to be non-discriminatory. Such a presumption also logically implies that *the claimant* should bear the burden of proof to rebut it if he or she considers the difference of treatment to be discriminatory.

In Option II, the presumption of non-discrimination would be deleted and, instead, the promotion of the economic, cultural or social integration of persons belonging to specific age groups would be defined as constituting a legitimate aim. The burden of proof would shift to *the respondent* under the abovementioned general rule of the sharing of the burden of proof. The courts would then be left to decide whether the means used to achieve the legitimate aim had been appropriate and necessary.

Each of the two options tabled received some support. A number of delegations preferred to maintain the general principle of the reversal of the burden of proof in all cases (i.e. it should always be for *the respondent* to prove that no discrimination had taken place, once the claimant had established facts creating a presumption of discrimination). Others stated that there should always be some means of assessing the appropriateness of preferential treatment offered to persons belonging to certain age groups.

One delegation expressed the view that economic operators should also be allowed to offer more favourable treatment to persons with disabilities.

⁹ Article 2(6) and 2(6-a) and Article 8; Recitals (14a) and (24a (new)).

c) **The remit of national Equality Bodies**¹⁰

A provision had been previously introduced into the text of the draft Directive extending the remit of the Equality Bodies to the effect that the "body or bodies" referred to in Article 12(3) should also have competence for the areas covered by Directive 2000/78/EC (employment and occupation). In its drafting suggestions, the Presidency clarified this provision by adding a mention of it to Article 1 and by adjusting the wording of Article 12(3). The Working Party supported the extension of the remit of the Equality Bodies to cover employment and occupation. However, certain delegations would prefer to introduce it by means of a separate amendment to 2000/78/EC.

d) **Reference to "Universal Design"**¹¹

The United Nations Convention on the Rights of Persons with Disabilities contains the notion of "universal design," meaning the design of products, environments, programmes and services to be usable by all people, to the greatest possible extent, without the need for adaptation or specialised design.

In its drafting suggestions, the Presidency introduced into the articles a "soft" obligation to "undertake or promote" research and development of universally designed goods and services. There was broad support for the inclusion of the notion of "universal design" in the text. However, certain delegations preferred to see this issue addressed in the recitals only.

¹⁰ Recital 27 and Articles 1 and 12(3).

¹¹ Article 4(8) and Recital 19d.

III. OUTSTANDING ISSUES

Further discussion is needed on the questions mentioned above, as well as on a number of other outstanding issues, including the following:

- the scope of the Directive, certain delegations being opposed to the inclusion of social protection and education therein;
- remaining aspects of the division of competences and subsidiarity; and
- legal certainty regarding the obligations that would be established by the Directive.

Further details of delegations' positions can be found in docs. 10916/16 and 14282/16.

IV. CONCLUSION

Tangible progress has been made under the Slovak Presidency on the issues discussed. Nevertheless, it is clear that there is still a need for further work and political discussions before the required unanimity can be reached in the Council.