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NOTE

From:	General Secretariat of the Council
On:	11 December 2014
To:	Council (EPSCO)
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

I. INTRODUCTION

Delegations will find attached a footnoted consolidated text. This document provides an overview of the discussions that have taken place in the Working Party on Social Questions, up to and including the meeting on 17 November 2014,[1] as well as the discussion in Coreper on 26 November 2014.

Delegations' general positions and the major outstanding issues are briefly summarised below, and further information is contained in the footnotes to the text.

[1] For further information, see docs. 15377/14 and 15612/14.

II. DELEGATIONS' GENERAL POSITIONS

A large majority of delegations (BE, BG, CZ, DK, EE, IE, EL, ES, FR, IT, CY, LU, HU, MT, NL, AT, PL, PT, SI, SK, FI, SE, UK) have 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 UN Convention on the Rights of Persons with Disabilities (UNCRPD)[2]. BE, FI, NL SK, SI, BG, HU and Cion have stressed the need to maintain consistency with the UNCRPD. ES, AT, PT and SI would have preferred more ambitious provisions in regard to disability.

DE has maintained a general reservation and expressed various concerns.

DE has questioned the existence of an adequate legal basis, and taken the view that the proposal violated the subsidiarity principle. DE has stressed, moreover, that a sufficient impact assessment and cost-benefit analysis had not been carried out. DE has also emphasised the burden that the proposed measures would impose on businesses (especially SMEs) and underlined the lack of legal certainty as a critical issue.

DE has taken the view that the issues covered in the proposal could be better regulated at the national level and therefore regarded the proposal as infringing on national competence.

[2] See docs. 15533/09 + ADD 1 and 15540/09. The UNCRPD came into force with respect to the EU in January 2011. See also "Code of Conduct between the Council, the Member States and the Commission" (OJ C 340, 15.12.2010, p. 11).

MT, similarly, has expressed concerns regarding the legal clarity and certainty of the proposal, and called for a clear delineation of national competences and respect for the principles of subsidiarity and proportionality to be ensured. However, the MT government is also currently reviewing its position on the proposal.

NL has stated that it supports the proposal provided that solutions can be found to its concerns, particularly in respect of the financial implications and the need for legal certainty. IE has also seen a need for deeper impact assessments.

III. MAJOR OUTSTANDING ISSUES AND STATE OF PLAY

Although progress has recently been made, in particular, in the discussions on the scope of the Directive and on the concept of "access," the Working Party has recognised the need for further discussion, with a view to resolving the outstanding questions, which include the following:

1) Remaining issues related to the scope, the division of competences and the issue of subsidiarity; areas where clarification is required include housing, information and communication technology (ICT), education, social security, transportation and the physical/built environment.

2) The disability provisions, including accessibility and reasonable accommodation for persons with disabilities.

3) The implementation calendar.

4) The need to ensure legal certainty in the Directive as a whole.

5) The overall financial and practical impact of the proposal, including on SMEs.

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

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[3].

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[3] The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009 (doc. A6-0149/2009). Kathalijne Maria Buitenweg (Group of the Greens / European Free Alliance) served as Rapporteur. The new EP Rapporteur is Ulrike Lunacek (AT/LIBE/Greens/European Free Alliance).

ANNEX

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 COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 19(1) thereof,

Having regard to the proposal from the Commission[4],

Having regard to the consent of the European Parliament[5],

Whereas:

(1) In accordance with Article 2 of the Treaty on European Union, the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, values which are common to all the Member States. In accordance with Article 6 of the Treaty on European Union, the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, and fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

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4 OJ C , , p. .
5 OJ C , , p. .

(2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which [all] Member States are signatories. In particular, the UN Convention on the Rights of Persons with Disabilities includes the denial of reasonable accommodation in its definition of discrimination. [6]

(3) This Directive respects the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights of the European Union. Article 10 of the Charter recognises the right to freedom of thought, conscience and religion; Article 21 prohibits discrimination, including on grounds of religion or belief, disability, age or sexual orientation; and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.

(4) The European Years of Persons with Disabilities in 2003, of Equal Opportunities for All in 2007, and of Intercultural Dialogue in 2008 have highlighted the persistence of discrimination but also the benefits of diversity.

(5) The European Council, in Brussels on 14 December 2007, invited Member States to strengthen efforts to prevent and combat discrimination inside and outside the labour market[7].

(6) The European Parliament has called for the extension of the protection of discrimination in European Union law[8].

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[6] BE: add "and the definition of universal design."

[7] Presidency conclusions of the Brussels European Council of 14 December 2007, point 50.

[8] Resolution of 20 May 2008 P6_TA-PROV (2008)0212.

(7) The European Commission has affirmed in its Communication 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe'[9] that, in societies where each individual is regarded as being of equal worth, no artificial barriers or discrimination of any kind should hold people back in exploiting these opportunities. Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living, and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of abolishing of obstacles to the free movement of persons, goods and services between Member States.

(8) Existing European Union legislation includes three legal instruments[10] adopted on the basis of Article 13(1) of the EC Treaty, which aim to prevent and combat discrimination on grounds of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation. These instruments have demonstrated the value of legislation in the fight against discrimination. In particular, Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. However, the degree and the form of protection against discrimination on these grounds beyond the areas of employment varies between the different Member States. The purpose of this Directive is, therefore, in respect of the aforementioned grounds, to extend the degree and the form of protections in those three legal instruments beyond the areas of employment into the specific areas set out in Article 3 of this Directive.

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9 COM (2008) 412.

10 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22), Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16) and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37.

(9) Therefore, EU legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including access to social protection, access to education and access to and supply of goods and services, including housing. Services should be taken to be those within the meaning of Article 57 of the Treaty on the Functioning of the European Union.

(10) Directive 2000/78/EC prohibits discrimination in access to vocational training; it is necessary to complete this protection by extending the prohibition of discrimination to education which is not considered vocational training.

(11)

(12)[11] Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation to persons with disabilities. Discrimination within the meaning of this Directive includes direct discrimination or harassment based on assumptions about a person's religion or belief, disability, age or sexual orientation.

(12a)[12] Discrimination is also understood to include discrimination due to association with a discriminatory ground, as confirmed by the Court of Justice in Case C-303/06[13]. Such discrimination occurs, inter alia, when a person is treated less favorably, or harassed, because of an association which that person has,[14] with persons of a particular religion or belief, disability, age or sexual orientation. [15] It is therefore appropriate to provide explicitly for protection against such discrimination in this Directive.

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11 IT: scrutiny reservation.
12 IT: scrutiny reservation.
13 Case C-303/06, Coleman v. Attridge, judgment of 17 July 2008.
14 FI, SE, AT, NL, BG, HU, IE and HR: reinsert "or is perceived to have." Cion: flexible.
15 MT: add "or organisations promoting the rights of persons of a particular religion or belief, disability, age or sexual orientation."

(12b) Harassment is contrary to the principle of equal treatment, since victims of harassment cannot enjoy, on an equal basis with others, access to social protection, education and goods and services. Harassment can take different forms, including unwanted verbal, physical, or other non-verbal conduct. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise so serious in nature that it has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

(13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the European Union should, in accordance with Article 8 of the Treaty on the Functioning of the European Union, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.[16]

In the preparation or review of the laws, regulations and administrative provisions necessary to comply with this Directive, Member States should take account of the differential impact on men and women.

(14) The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the national judicial or other competent bodies in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical and/or scientific[17] evidence.

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[16] UK: scrutiny reservation.

[17] MT: use same language in articles.

(14a) Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In this context, differences of treatment where more favourable conditions of access are offered to persons belonging to specific age groups, in order to promote their economic, cultural or social integration[18] should enjoy a legal presumption of not being discriminatory.[19]

(15)[20] Risk factors related to age are used in the provision of insurance, banking and other financial services, to assess the individual risk and to determine premiums and benefits. In certain[21] financial services, persons of different ages are not in a comparable situation for the assessment of risk. Proportionate differences of treatment on the grounds of age therefore do not constitute discrimination if the person's age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and[22] relevant and reliable statistical data. [23] Age limits and age bands in financial services can be proportionate differences of treatment on grounds of age if they are set in a reasonable manner.

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18 AT: prefer "inclusion" throughout the text.

19 HU: plaintiff who considers favourable conditions of access to be discriminatory should bear burden of proof.

20 CZ: scrutiny reservation (on account of excessive detail).

21 UK pointed out that the term "certain" was missing in Article 2(7).

22 MT: replace 'and' with 'or'. MT: reservation.

23 SK suggested: " actuarial principles**,** relevant and reliable statistical data **or relevant and reliable medical knowledge**." AT suggested adding "…where such data are not available or sufficient, on…"

(15a) Risk factors related to disability, and in particular to a disability's underlying health condition, are used in the provision of insurance, banking and other financial services, to assess the individual risk and to determine premiums and benefits. In certain financial services, persons with a disability are not in a comparable situation for the assessment of risk with that of persons without such a disability. Proportionate differences of treatment on the grounds of disability therefore do not constitute discrimination if the[24] disability is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data or relevant and reliable medical knowledge.

(15b) Customers and relevant judicial and complaints bodies should have the right to be informed, upon request, about the reasons explaining differences of treatment on the grounds of age or disability in financial services. The information provided should be useful and understandable to a general public and it should explain differences in individual risk for the service in question. Providers of financial services should, however, not be obliged to disclose commercially sensitive data. [25]

(16)

(17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms in line with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the protection of private and family life, freedom of religion, freedom of association, freedom of expression, freedom of the press and freedom of information. This Directive [should not prejudice measures][26] laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the prevention of crime for the protection of health and for the protection of the rights and freedoms of others. [27]

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[24] AT: scrutiny reservation. AT: add: "…health condition underlying his or her…"

[25] AT: add: "This information is to be made available to consumers and relevant judicial and complaints bodies by appropriate means."

[26] MT: doubts over this wording.

[27] AT: delete reference to the "rights and freedoms of others." AT and NL: scrutiny reservations on the last sentence of Recital 17.

(17a) This Directive covers the application of the principle of equal treatment in the fields of access to social protection, access to education and access to and supply of goods and services within the limits of the competences of the European Union.[28] The concept of 'access' [in this context should be defined more specifically for each field. This concept][29] does not include the determination, in accordance with national law or practice, of whether a person is eligible to receive social protection or education, since the Member States are responsible for the organisation and content of their social protection and educational systems, and therefore also for the definition of who is entitled to receive social protection or education.[30]

(17b) Social protection, within the meaning of this Directive, includes social security, social assistance, social housing and health care. Consequently, this Directive applies with regard to rights and benefits which are derived from general or special social security, social assistance and healthcare schemes, which are statutory or provided either directly by the State, or by private parties in so far as the provision of those benefits by the latter is funded by the State. In this context, the Directive applies with regard to benefits in cash, benefits in kind and services, irrespective of whether the schemes involved are contributory or non-contributory. The abovementioned schemes include, for example, the branches of social security defined by Regulation 883/2004/EC on the coordination of social security systems[31], as well as schemes providing for benefits or services granted for reasons related to the lack of financial resources or risk of social exclusion.

(17c)

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28 MT: scrutiny reservation.

29 SK: delete words in square brackets. Cion saw possible merit in this idea.

30 BE, MT, IE, NL and SK: reservations. These delegations preferred defining "access" in the articles. (See 16134/13.)

31 OJ L 166, 30.4.2004, p.1.

(17d) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. The Directive only covers the access to and supply of goods and services, including housing, which are available to the public and which are offered outside the context of private and family life

(17e) This Directive does not alter the division of competences between the European Union and the Member States in the areas of[32] education and social protection. It is also without prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.

(17f)[33] The exclusive competence of Member States with regard to the organisation of their social protection systems includes decisions on the setting up, financing and management of such systems and competent institutions as well as on the substance and delivery of benefits and health services and the conditions of eligibility, and it also covers decisions to adjust those conditions in order to ensure the sustainability of public finances. In particular Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities. [34]

(17g) The exclusive competence of Member States with regard to the organisation of their educational systems and the content of teaching and of educational activities, including the provision of special needs education, includes the setting up and management of educational institutions, the development of curricula and other educational activities and the definition of examination processes. In particular Member States retain the possibility to set age limits in the area of education.

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32 DK warned against giving the impression that the Directive might alter the division of competences between the EU and its Member States in areas other than those mentioned here. Cion recalled that the division of competences could only be altered through the Treaties, and, if this wording would be kept, it should at least include a reference to "as defined by the Treaties".

33 NL: clarify wording.

34 MT requested that the following sentence be kept in the text: 'The Member States also retain their competences in respect of the definition and organisation of their social housing services, including the management or allocation of such services and determining the conditions of eligibility.'

(17h) This Directive does not apply to matters covered by family law[35] including marital status and adoption, and the legal benefits dependent thereon, and to laws on[36] reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.

(17i)

(18)

(19) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations.

(19a) Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

(19b) Measures to ensure accessibility for persons with disabilities, on an equal basis with others, to the areas covered by this Directive play an important part in ensuring full equality in practice. Such measures should comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers. They should not impose a disproportionate burden.

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[35] MT: add 'and public policy related thereto'.
[36] MT: delete 'to laws on'.

(19c) Such measures should aim at achieving accessibility including with regard to, inter alia, the physical environment, transportation, information and communication technology and systems, and services, within the scope of the Directive as defined in Article 3. The fact that access might not always be possible to achieve in full equality with others may not be presented as a justification for not adopting all measures to increase as far as possible accessibility to persons with disabilities.

(19d) Improvement of accessibility can be provided by a variety of means, including application of the "universal design" principle. According to the United Nations Convention on the Rights of Persons with Disabilities, "universal design" means 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. "Universal design" should not exclude assistive devices for particular groups of persons with disabilities where this is needed.[37]

(20) Legal requirements[38] and standards on accessibility hav**e** been established at European level in some areas while Article 7 of Council Regulation 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [39] requires that accessibility for disabled persons is one of the criteria to be observed in defining operations co-financed by the Funds.

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[37] Article 2 of the UNCRPD.
[38] Regulation (EC) No. 1107/2006 and Regulation (EC) No. 1371/2007.
[39] OJ L 347, 20.12.2013, p. 320.

(20-aa)[40] Member States **are** encouraged[41] to adopt innovative measures to secure the accessibility of cultural infrastructure and cultural activities for people with disabilities, the need for such measures having been emphasised by the Council.[42] Such measures may be inspired by the principle of universal design[43] and Member States' best practices.

(20-a) In addition to general anticipatory measures to ensure accessibility, measures to provide reasonable accommodation in individual cases play an important part in ensuring full equality in practice for persons with disabilities in the areas covered by this Directive. In the context of a contractual or other relationship of long duration between the provider and the person with a disability, structural alteration to premises or equipment could be deemed a reasonable accommodation. Reasonable accommodation can include adjusting or modifying the provider's usual policies, procedures and practices, adapting conditions of access and providing specific assistance, taking into account the particular needs of a person with a disability, with a view to achieving an equal outcome.

(20-b)[44] Member States **are** encouraged to develop and implement innovative measures[45] to ensure reasonable accommodation.

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40 CY: reservation. BG: scrutiny reservation.

41 HU, CY and NL: questioned the inclusion of this non-binding provision in the recitals. HU, BE and MT asked why the provision covered culture only. Cion: non-binding provisions can be included in the recitals, but best to cover all sectors.

42 Council resolution of 5 May 2003 on equal opportunities for pupils and students with disabilities in education and training, OJ C 134, 7.6.2003, p. 6.

43 Cion suggested "design for all" as an expression more commonly used in the EU (See also Recital 19d.)

44 CY: reservation.

45 FI preferred "all relevant measures."

(20aa)[46] In the provision of housing, the provider should not, in order to comply with the reasonable accommodation provisions set out in this Directive, be required to make structural alterations[47] to the premises or to pay for such alterations. In accordance with national law and practice, a provider should accept such alterations, if they are funded otherwise-and do not impose disproportionate burden of some other kind.

(20b) In assessing whether measures to ensure accessibility or reasonable accommodation would impose a disproportionate burden, account should be taken of a number of factors including, inter alia, the size, resources and nature of the organisation or enterprise, as well as the estimated costs of such measures. A disproportionate burden could arise, for example, where significant structural alterations would be required in order to provide access to movable or immovable property which is protected under national rules on account of its historical, cultural, artistic or architectural value.

(20c) The principle of accessibility is established in the United Nations Convention on the Rights of Persons with Disabilities. The principles of reasonable accommodation and disproportionate burden are established in Directive 2000/78/EC[48] and the United Nations Convention on the Rights of Persons with Disabilities.

(21) The prohibition of discrimination should be without prejudice to the maintenance or adoption by Member States of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation. Such measures may include support for organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the economic, cultural or social integration, of those persons, or catering for their particular needs.

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46 NL: scrutiny reservation.
47 FI: scrutiny reservation.
48 OJ L 303, 2.12.2000, p.16.

(22) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(23) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(24) The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(25) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(26) In its resolution on the Follow-up of the European Year of Equal Opportunities for All (2007), the Council called for the full association of civil society, including organisations representing people at risk of discrimination, the social partners and stakeholders in the design of policies and programmes aimed at preventing discrimination and promoting equality and equal opportunities, both at European and national levels.

(27) Experience in applying Directives 2000/43/EC[49] and 2004/113/EC[50] show that protection against discrimination on the grounds covered by this Directive would be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.

(28)[51] Periodic reporting and monitoring of progress made, including by collecting statistical data, should be considered for the purposes of the present Directive.[52]

(29) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(30) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty on European Union, the objective of this Directive, namely ensuring a common level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the European Union. This Directive does not go beyond what is necessary in order to achieve those objectives.

(31) In accordance with paragraph 34 of the interinstitutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interest of the European Union, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.

HAS ADOPTED THIS DIRECTIVE:

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49 OJ L 180, 19.7.2000, p. 22.
50 OJ L 373, 21.12.2004, p. 37.
51 ES: scrutiny reservation.
52 FI, ES and NL asked for the obligations to be clarified.

CHAPTER I
GENERAL PROVISIONS

Article 1

Purpose

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, [53] or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment within the scope of Article 3.

Article 2[54]

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no discrimination on any of the grounds referred to in Article 1.

   For the purposes of this Directive, discrimination means:

   (i) direct discrimination;
   (ii) indirect discrimination;
   (iii) harassment;
   (iv) direct discrimination and harassment by association;
   (v) denial of reasonable accommodation for persons with disabilities; and
   (vi) instruction to discriminate against persons on any of the grounds referred to in Article 1.

[53] UK: exclude minors (persons under 18) from the scope.
[54] IT: scrutiny reservation on Article 2 and Recitals 12 and 12a.

2. For the purposes of paragraph 1, the following definitions apply:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) harassment shall be taken to occur where unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States;

(d) denial of reasonable accommodation for persons with disabilities shall be taken to occur where there is a failure to comply with Article 4a of the present Directive;

(e) direct discrimination or harassment by association shall be taken to occur where a person is discriminated against or harassed due to an association which that person has[55] with persons of a certain religion or belief, persons with a disability, persons of a given age, or persons of a certain sexual orientation.[56]

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[55] BG, HU, AT, HR and IE: reinsert "or is perceived to have."

[56] LV: text goes beyond the situation addressed in Case C-303/06; allegations of discrimination by association are extremely hard to prove.

3.

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5.

6.[57] (a) Notwithstanding paragraphs 1 and 2, differences of treatment on grounds of age shall not constitute discrimination, if they are objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Differences of treatment where more favorable conditions of access are offered to persons belonging to specific age groups in order to promote their economic, cultural or social integration,[58] are presumed to be non-discriminatory for the purpose of this Directive.[59]

6a.[60] Notwithstanding paragraphs 1 and 2, this Directive shall not preclude differences of treatment consisting in more favourable provisions for persons with disabilities as regards conditions of access to the areas set out in Article 3 which are adopted in order to promote their economic, cultural or social integration,[61] or to cater for the particular needs of such persons.[62]

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57 IE: allow commercial actors to continue to offer preferential pricing for certain age groups for commercial reasons. BE and UK: scrutiny reservations. See 9368/14.

58 AT: prefer "inclusion."

59 EL: also exempt preferential pricing for persons with disabilities.

60 NL: this provision would fit better in Article 5. NL: scrutiny reservation. IE made a written contribution (13511/14).

61 AT: prefer "inclusion."

62 EL: also exempt preferential pricing for persons with disabilities.

7.[63] In the provision of financial services,

a) proportionate differences in treatment on the grounds of age do not constitute discrimination for the purposes of this Directive, if age is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and[64] relevant and reliable statistical data;

b) proportionate differences in treatment on the grounds of disability do not constitute discrimination for the purposes of this Directive, if the disability[65] is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and[66] relevant and reliable statistical data or on relevant and reliable medical knowledge.

Providers of financial services who decide to apply proportionate differences of treatment on the grounds of age or disability shall, upon request, provide[67] information to customers and relevant judicial and complaints bodies on the reasons explaining those differences of treatment.

8.[68] This Directive shall be without prejudice to measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the prevention of crime, for the protection of minors, and for the protection of health and safety and for the protection of the rights and freedoms of others.[69] This Directive does not limit the competence of Member States nor extend that of the Union in these areas. [70]

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63 AT: scrutiny reservation on Article 2(7).
64 MT: replace "and" with "or."
65 AT: add "…health condition underlying his or her…" AT: scrutiny reservation.
66 MT: change "and" to a comma.
67 AT: add "clear and comprehensible"
68 AT: scrutiny reservation.
69 AT: delete reference to the "rights and freedoms of others. " SE: add "including the freedom of expression and freedom of the press."
70 FI and Cion: prefer previous wording (see doc. 12458/2/12 REV 2).

Article 3

Scope

1. Within the limits of the competences conferred upon the European Union and within the limits set out in paragraph 2, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) access to social protection, including social security, social assistance, social housing and healthcare.[71]

Access under this point shall include the process of seeking information, applying, registration and similar activities[72] as well as the actual provision of social protection measures.

(b)

(c) access to education.[73]

Access under this point shall include the process of seeking information, applying, registration and similar activities as well as the actual admission to and participation in educational activities;

(d) access to and supply of goods and other services, including housing, which are available to the public and which are offered outside the context of private and family life.[74]

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71 BE and MT: reservations on the inclusion of "social protection" within the scope. PT, MT, BE and UK saw a need to improve the legal certainty of the provisions concerning access to social protection, MT, BE and UK citing the need to draw a clear distinction between access and eligibility, in particular. BE underlined the importance of safeguarding national competences in this area. FI called for sufficiently detailed provisions to be drawn up.

72 BE: delete "and similar activities".

73 DE, EE, MT and UK: reservations on the inclusion of "education" within the scope. BE, DK and NL: scrutiny reservations. IE: no final position.

74 NL: Directive should not apply to "decisions on requirements for attending special education and the provision of special funding for children who attend mainstream education".

Access under this point shall include the process of seeking information, applying, registration, ordering, booking, renting, purchasing and similar activities as well as the actual provision and enjoyment of the goods and services in question.

2. Notwithstanding paragraph 1, this Directive does not apply to:

(a) matters covered by family law, including marital status and adoption, as well as laws on reproductive rights;[75]

(b) the organization of Member States' social protection systems,[76] including decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and services and on conditions of eligibility for these benefits and services, such as decisions related to the setting of age limits;

(c)

(d) the content of teaching and of educational activities, and the organisation and funding of the Member States' educational systems, including decisions on the setting up and management of educational institutions, the development of curricula and other educational activities, the definition of examination processes, and conditions of eligibility, such as decisions setting age limits;[77]

(e) differences of treatment based on a person's religion or belief in respect of admission to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice.[78]

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[75] MT prefers: "matters covered by family law and public policy related thereto including marital status, adoption and reproductive rights. "

[76] BE saw a need to improve the text. BE: add "calculation of level of benefits" to the exemption. BE: reservation.

[77] BE: scrutiny reservation.

[78] FR: queried this wording.

3.

3a. This Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols and does not limit the exclusive competence of Member States in these matters.

4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief and does not limit the exclusive competence of Member States in these matters.

5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4[79]

Accessibility for persons with disabilities

1. Member States shall take the necessary and appropriate measures to ensure accessibility[80] for persons with disabilities, on an equal basis with others, within the areas set out in Article 3. These measures should not impose a disproportionate burden.

[79] FR: reservation.

[80] NL: distinguish clearly between "accessibility" (Article 4) and "structural alterations" in the context of "reasonable accommodation" (Article 4a(3) and Recital 20b, second sentence). BG and HU: concerns regarding the financial implications.

1a.[81] Accessibility includes general anticipatory measures[82] to ensure the effective implementation of the principle of equal treatment for persons with disabilities in the areas set out in Article 3.

2. Such measures shall comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers in the areas covered in this Directive.

3.

4.

5.

6. Paragraphs 1, 1a and 2 shall apply to housing only as regards the common parts[83] of buildings with more than one housing unit. This paragraph shall be without prejudice to Article 4(7) and Article 4a.

7. Member States shall progressively[84] take the necessary measures to ensure that sufficient housing is accessible for people with disabilities.[85]

8.[86] This Article shall apply also to the design and manufacture of goods,[87] unless this would impose a disproportionate burden.

9.

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81 AT: restore the words "on an equal basis with others."
82 MT and BG: give examples.
83 AT: scrutiny reservation.
84 MT: ensure consistency with Article 15. Cion recognised the pertinence of this remark.
85 AT: scrutiny reservation.
86 SE: reservation. NL: scrutiny reservation.
87 Expressing concern over the inclusion of the design and manufacture of goods within the scope, IE, PL, FI and MT asked for clarification. FI and MT expressed a preference for the wording used in the UNCRPD. Cion: the design and manufacture of goods should be included, but the relevant measures can never entail a disproportionate burden.

Article 4a[88]

Reasonable accommodation for persons with disabilities

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3.[89]

2. For the purpose of paragraph 1, reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate[90] burden, where needed in a particular case, to accommodate the needs of a person with a disability so as to allow that person access on an equal basis with others to the specific social protection measure, educational activity,[91] good or service concerned.[92]

3. In the provision of housing, paragraphs 1 and 2 shall not require the provider to make structural alterations[93] to the premises or to pay for them. In accordance with national law and practice, a provider shall accept such alterations if they are funded otherwise[94] and do not impose a disproportionate burden of some other kind.[95]

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88 FR: reservation.

89 HU: scrutiny reservation.

90 SI, NL, SK and BE have called for consistency with the UNCRPD; Cion has explained that, while the two instruments should not contradict each other, they need not contain identical wording.

91 AT: clarify this term.

92 SK, ES and FR: scrutiny reservations.

93 CZ, LV and FI: clarify "structural alterations." CZ and HU expressed concern about cost implications.

94 BE: scrutiny reservation. SE had concerns over the word “shall”, Sweden having no legislation concerning situations in which alterations should be made.

95 CZ and PL: clarify "of some other kind." NL and SK: delete “a disproportionate burden of some other kind”. BE: delete “of some other kind.”

Article 4b[96]

Provisions common to[97] *accessibility and reasonable accommodation*

1. For the purposes of assessing whether measures necessary to comply with Articles 4 and 4a would impose a disproportionate burden, account shall be taken, in particular, of:

a) the size, resources and nature of the organisation or enterprise;

aa) the negative impact[98] on the[99] person with a disability of not providing the measure;

b) the estimated cost;

c)[100] the estimated benefit for persons with disabilities generally, taking into account the frequency and duration of use of the relevant goods and services and the frequency and the duration of the relationship with the seller or provider;[101]

d) the life span of infrastructures and objects which are used to provide a service; [102]

e) the historical, cultural, artistic or architectural value of the movable or immovable property in question; [103] and

f) the safety and practicability of the measures in question.

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96 BE and FR: reservations. AT: scrutiny reservation.
97 BE: prefer separate articles for the two concepts.
98 DK: who will assess the impact? NL had concerns regarding this formulation.
99 Cion: possibly add "specific."
100 AT and FR: does "frequency and duration" apply to individuals or to persons with disabilities in general? UK: "proportionality" is as important as "duration."
101 FR: scrutiny reservation.
102 This criterion may be appropriate only to accessibility.
103 AT: reservation.

The burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

2.

3. Articles 4, 4a and 4b shall not apply where[104] European Union law provides for detailed standards or specifications on the accessibility or reasonable accommodation regarding particular goods or services.

Article 5

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

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104 FR suggested "…the law of the European Union or national law…" Cion saw possible merit in this suggestion, provided the final drafting ensures that the objectives of the Directive were met.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. 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, [105] either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 shall be without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

[105] IE: reservation. IE suggested adding: "as the Member States so determine and in accordance with the criteria laid down by their national law". DE and IT also supported a reference to national law. DE: reservation on the creation of *individual rights* in this context.

Article 8

Burden of proof

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[106] that there has been no breach of the prohibition of discrimination.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to claimants.

3. Paragraph 1 shall not apply to criminal procedures.

4. Member States need not apply paragraph 1 to proceedings in which the court or other competent body investigates the facts of the case.

5. Paragraphs 1, 2, 3 and 4 shall also apply to any legal proceedings commenced in accordance with Article 7(2).

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106 CZ, DE, LU and NL expressed concern in respect of the reversal of the burden of proof. Cion affirmed this provision. NL and UK pointed out that a mention should also be made in Article 8 of *the reversal* of the burden of proof that is provided for in Recital 14a for cases where "more favourable conditions of access are offered to persons of a given age, in order to promote their economic, cultural or social integration." Cion acknowledged that clarification would be useful.

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings[107] aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

Article 11

Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

[107] IE recalled that "legal proceedings" was used in Directives 2000/78/EC and 2004/113/EC.

Article 12

Bodies for the Promotion of Equal treatment

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguarding 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 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

   (b) conducting independent surveys concerning discrimination, and

   (c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER III
FINAL PROVISIONS

Article 13
Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected within the scope of this Directive and in particular that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14
Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Sanctions may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.

Article 14a

Gender mainstreaming

In accordance with Article 8 of the Treaty on the Functioning of the European Union, the Member States shall, when implementing this Directive, take into account the aim of eliminating inequalities, and of promoting equality, between men and women.

Article 15[108]

Implementation

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by …. at the latest [4[109] years after adoption]. They shall forthwith inform the Commission thereof and shall communicate to the Commission the text of those provisions.

   When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

[108] MT and FI asked for the link between the implementation date and the dates in Article 15(2) to be clarified. DK and PL: reservations. PL, DE and LV favoured an incremental approach (progressive realisation). MT: scrutiny reservation.

[109] MT called for a longer period. DK and HU: longer periods might advance the discussion. EL suggested flexible deadlines. Cion: a single, realistic date is better.

2. Member States may establish that the obligation to ensure accessibility as set out in Article 4 has to be complied with by, at the latest, [5[110] years after adoption] regarding new buildings, [111] facilities, transport services[112] and infrastructure, [113] and by [20[114] years after adoption] regarding existing[115] buildings, facilities, transport services[116] and infrastructure.

3. Member States[117] shall inform the Commission at the latest by the date set down in paragraph 1 of the timetable adopted. Member States shall also communicate to the Commission by the same date an action plan laying down the steps to be taken and the timetable for achieving the gradual implementation of Article 4. They shall report on progress every two years starting from this date.

4.[118] Member States shall collect data, as appropriate,[119] and monitor and evaluate the effectiveness of relevant measures. This could be done by means of measures such as setting baselines or measurable targets or by collecting relevant qualitative or quantitative data, in line with applicable national and Union law, particularly regarding the protection of personal data.

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110 BE: delete separate five-year deadline for new buildings. BE: reservation. EE: need longer period. LV suggested 10 years. BG suggested 20 or 25 years for *all* buildings.

111 MT and EE: define "new" and "existing" buildings. IT: Member States should be free to define "new buildings".

112 FI and LV: clarify the scope of the term "transport services."

113 FI and MT: clarify practical and financial implications in the field of transport. Cion would prefer to keep the previous version providing that the 5 years period also applies to “existing buildings, facilities and infrastructure undergoing significant renovation."

114 FR: reservation with respect to inter-urban transport and road infrastructure. LT called for a longer deadline.

115 LU suggested examining whether the reference to "all other existing buildings, facilities and infrastructure" in Article 15(2) was conducive to unanimity at the Council level.

116 BE, CZ, DE and HU expressed doubts regarding the feasibility of adapting existing vehicles. UK expressed the view that the provisions ought to apply to transport services, not vehicles.

117 Cion: restore the words "wishing to use any of these additional periods."

118 SK: clarify data to be collected. ES and NL: scrutiny reservation.

119 Cion: delete "as appropriate", if the intention is to make the provision enforceable.

Article 16

Report

1. Member States shall communicate to the Commission, by …. at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of national equality bodies and relevant stakeholders, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 17

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 18

Addressees

This Directive is addressed to the Member States.