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## **REPORT**

From:	Presidency
To:	Permanent Representatives Committee / Council
No. prev. doc.:	9332/16 SOC 342 ANTIDISCRIM 29 JAI 475 MI 368 FREMP 86
No. Cion doc.:	11531/08 SOC 411 JAI 368 MI 246
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 legislation<sup>1</sup> in this area, the proposed 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.

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<sup>1</sup> 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. One delegation has maintained a general reservation. 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, PL 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 2009<sup>2</sup>. 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.

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<sup>2</sup> 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 DUTCH PRESIDENCY**

The Working Party on Social Questions continued its examination of the proposal,<sup>3</sup> focusing on the interplay between the proposed Directive and the proposed European Accessibility Act (EAA)<sup>4</sup> and a number of other issues. The Presidency's drafting suggestions<sup>5</sup> were broadly welcomed by the Commission and delegations as a step in the right direction. The discussion can be summed up as follows:

### **a) The Equal Treatment Directive and the EAA**

The Commission recalled that the two proposals were separate instruments and that each had its own legal basis. Based on Article 19 TFEU, the proposed Equal Treatment Directive would prohibit discrimination including by providing for accessibility and reasonable accommodation for persons with disabilities, in line with existing legislation such as the Directive 2000/78/EC. Based on Article 114 TFEU, the proposed EAA would facilitate the trading of accessible products and services in the internal market and thus help implement the UNCRPD in an efficient way by introducing harmonised accessibility standards. In other words, both proposals addressed the issue of accessibility, but in different ways: the Equal Treatment Directive would establish a general principle of non-discrimination that would be applicable to the very broad range of goods and services included within its scope, whereas the EAA would lay down detailed accessibility requirements for a closed list of specific goods and services.

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<sup>3</sup> Meetings on 15 April and 24 May.

<sup>4</sup> 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).

<sup>5</sup> See 7550/16 and 8319/16.

The Commission recalled that, according to the current draft resulting from the work in the Council under successive Presidencies, Article 4 (accessibility) and Article 4a (reasonable accommodation) would "not apply where Union law provides for detailed standards or specifications on accessibility in respect of particular goods or services" and that the EAA would constitute precisely such a Union law; the accessibility provisions of the Equal Treatment Directive would thus not apply to the goods and services covered by the EAA. For example, e-commerce was covered by the EAA and therefore did not fall under the Equal Treatment Directive, whereas a physical shop would not be covered by the EAA but would fall within the scope of the Equal Treatment Directive.

The Commission stated, moreover, that the exclusion of *lex specialis* set out in the current text of Article 4(9) and Article 4a(4) was worded in general terms--an approach that was more dynamic and future-proof than a list of cross-references to existing EU standards or specifications.

In any event, appealing for progress in the negotiations, Cion emphasised that, in the light of the clear separation of the two proposals, each could be negotiated independently, without waiting for agreement on the other.

In its drafting suggestions, the Presidency inserted a new recital explaining that detailed standards or specifications on accessibility or reasonable accommodation provided for by EU law should take precedence over the Equal Treatment Directive, whose provisions on accessibility or reasonable accommodation respectively should not apply in such cases (Recital 19e). However, certain delegations expressed the concern that this risked undermining the protection against discrimination. The Presidency concluded that more discussion was needed.

One delegation also asked whether Article 4(9) would apply in cases where the EU had competence in relation to detailed technical standards regarding particular goods or services and had already exercised that competence--but not in such a way that the detailed rules dealt with accessibility issues. According to the delegation in question, this could create legal uncertainty by imposing an obligation on Member States to adopt their own accessibility rules in areas of EU competence.

The Commission acknowledged that there was a need for further discussion on the interplay between the Equal Treatment Directive and the EAA, including as regards the scope of the Directive and in relation to the notion of "a disproportionate burden," which is included in both proposals.

**b) Burden of proof (Article 8(6))**

As a general rule, the proposed Directive provides that a claimant need not prove that discrimination has taken place: it is for the respondent to prove that there has been none (reversal of the burden of proof). In its drafting suggestions, the Presidency clarified Article 8 to the effect that the reversal of the burden of proof would not apply to the rebuttal of the presumption referred to in Article 2(6)(b). In other words, a claimant wishing to challenge a difference of treatment that is presumed under this Directive to be non-discriminatory, would have to prove the presumption to be wrong. However, certain delegations expressed doubts, warning that the approach suggested risked making the exceptions refutable.

**c) Reference to recent Case Law (Recital 12a)**

The Presidency had introduced a reference to Case C-83/14 as example from recent case law of discrimination by association. One delegation was unable to support this addition as it concerned discrimination on the grounds of ethnic or racial origin rather than the grounds referred to in the proposed Directive. However, the Commission welcomed the reference to Case C-83/14, as it clarified the notion of discrimination by association: the Court of Justice of the EU had found in that case that a person who had suffered discrimination because she lived in a predominantly Roma neighbourhood was entitled to protection under Directive 2000/43/EC even though she neither identified herself nor was perceived as being Roma. Thus the Directive in question offered protection against *discrimination on the basis of a particular ground*: instead of merely protecting a particular ethnic group, it also protected a person *associated* with that group.

**d) The remit of Equality Bodies (Recital 27 and Article 12(3))**

The Presidency had amended Recital 27 and Article 12(3) to the effect that the equality 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). The Commission and certain delegations supported this suggestion. However, certain delegations, while agreeing with the aim of the amendment, felt that the suggested change would be tantamount to amending Directive 2000/78/EC.

**e) Reference to "Universal Design" (Recital 2)**

In its drafting suggestions, the Presidency had introduced a reference to the fact that the UNCRPD offered a definition of "universal design." Some delegations had misgivings about the change.

## **f) Reporting Period (Article 16)**

The Presidency also suggested extending the deadline by which the member States were to report on the application of the Directive from one to *two years* after implementation. The Commission suggested revisiting the reporting calendar at the end of the negotiations.

## **III. OUTSTANDING ISSUES**

Further discussion is needed on the questions mentioned above, including on the disability provisions and the interplay between the Equal Treatment Directive and the EAA, as well as on a number of other outstanding issues, including the following:

- the overall scope, certain delegations being opposed to the inclusion of social protection and education within the scope;
- 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. 7957/16 and 9332/1/16 REV 1.<sup>6</sup>

## **IV. CONCLUSION**

Clear progress has been made under the Dutch Presidency on the issues discussed. Nevertheless, it is clear that there is still a need for further work before the required unanimity can be reached.

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<sup>6</sup> A consolidated text is available in doc. 9729/16.