



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 3 April 2014**

**8504/14**

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**Interinstitutional File:  
2008/0140 (CNS)**

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**LIMITE**

**SOC 246  
EGC 8  
JAI 209  
MI 335  
FREMP 57**

**NOTE**

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from	The Presidency
to	The Working Party on Social Questions
on	11 April 2014

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No. prev. doc.	16684/13 SOC 976 EGC 28 JAI 1043 MI 1069 FREMP 193 + COR 1
No. Cion prop. :	11531/08 SOC 411 JAI 368 MI 246

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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
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Delegations will find attached a set of drafting suggestions prepared by the Presidency concerning Articles 2(1-2), 2(6), 2(6a), 2(7a), 2(8), 3(a-e) and 5(1-2) and Recitals 12, 12a, 14, 14a and 17.

Changes in relation to the previous version (16684/13) are indicated as follows: new text is in **bold** or **bold underlined** and deletions are marked "[...]".

## **Presidency Drafting Suggestions**

### **Articles**

#### *Article 2*

##### *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.
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 [...] with persons of a certain religion or belief, persons with a disability, persons of a given age, or persons of a certain sexual orientation..

3.

4.

5.

- 6. (a) Differences of treatment on grounds of age shall not constitute discrimination, if they are objectively justified by a legitimate aim, [...] if the means of achieving that aim are appropriate and necessary. Differences of treatment where more favourable conditions of access, **including preferential charges, fees or rates** are offered to persons [...] **belonging to specific age groups**, in order to promote their economic, cultural or social integration, are presumed to be non-discriminatory **for the purpose of this Directive**.

(b) [...]

- 6a. **The principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt more favourable provisions for persons with disabilities as regards conditions for access within the scope of Article 3 to social protection, including social security, social assistance and healthcare, education and certain goods or services which are available to the public, in order to promote their economic, cultural or social integration, or to cater for the particular needs of such persons.**

In the provision of financial services,

- 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 relevant and reliable statistical data;
- proportionate differences in treatment on the grounds of disability do not constitute discrimination for the purposes of this Directive, if the 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 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 information to customers and relevant judicial and complaints bodies on the reasons explaining those differences of treatment

7a. [...]

8. 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 and the prevention of criminal offences, for the protection of minors, and for the protection of health and safety and **for the protection of the rights and freedoms of others. This Directive** does not limit the competence of Member States nor extend that of the Union in these areas.

## *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.

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

- (b)

- (c) access to education.

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.

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;
  - (b) the organisation of Member States' social protection systems, 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 [...] disability [...] or 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 and decisions related to the provision of education for people with special needs;**
  - (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.

#### *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.
2. [...]

## Recitals

- (12) 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) 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<sup>1</sup>. Such discrimination occurs, inter alia, when a person is treated less favourably, or harassed, because of **an** association which that person has [...] with persons of a particular religion or belief, disability, age or sexual orientation. It is therefore appropriate to provide explicitly for protection against such discrimination in this Directive.
- (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** evidence.
- (14a) Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively justified by a legitimate aim, **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 should enjoy a legal presumption of not being discriminatory. **Any such differences in treatment should nevertheless be appropriate and necessary.** Consequently, **regarding those favourable conditions of access**, the rule on the shared burden of proof should not apply, and a plaintiff, who considers such a difference of treatment to be discriminatory, should bear the entire burden of proof, including with regard to any alleged lack of objective justification.

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<sup>1</sup> Case C-303/06, Coleman v. Attridge, judgment of 17 July 2008.

- (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 laid down in national law which, in a democratic society, are necessary for the protection of the rights and freedoms of others.**

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