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OUTCOME OF PROCEEDINGS

from : The Working Party on Social Questions

on : 18 July 2008

No. Cion prop. : 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

I. INTRODUCTION

At its meeting on 18 July 2008, the Working Party on Social Questions began its examination of the above proposal. The aim of the proposed Directive is to extend the protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation to areas outside employment, complementing the EC legislation that already exists in this area (in particular, Council Directives 2000/43/EC, 2000/78/EC and 2004/113/EC).

All delegations have general scrutiny reservations on the proposal at this stage. DK, FR, MT and PL entered parliamentary scrutiny reservations. CY entered a linguistic scrutiny reservation.

II. THE COMMISSION'S INTRODUCTION

Introducing the proposal, the Commission representative recalled the broad political context of the “Renewed Social Agenda” package adopted by the Commission on 2 July 2008, including the Commission Staff Working Document containing the Impact Assessment¹ and the Commission Communication on "Non-discrimination and equal opportunities: a renewed commitment"², particularly Section 2 thereof, entitled "Strengthening the Fight Against Discrimination". She also reminded delegations of the accompanying Commission Staff Working Document on "Community Instruments and Policies for Roma Inclusion"³. She highlighted, in addition, the recent Commission Communication on the application of Directive 2000/78/EC⁴.

The Commission representative noted, moreover, that the Commission had adopted a Decision setting up a Non-Discrimination Governmental Expert Group⁵, and reminded delegations that the Member States would be invited to nominate members to this body in the near future. She explained that the Expert Group would discuss a range of pertinent issues, including mainstreaming, positive action, data collection and multiple discrimination.

Underlining the importance of continuity, subsidiarity and proportionality in the new proposal, the Commission representative made a number of observations, emphasising that:

- The proposal did not amend the existing anti-discrimination Directives, and drew on existing concepts and terminology, the new elements being contained in Articles 2-4.
- The proposed “Bodies for the Promotion of Equal Treatment” (Article 12) followed on from the equality bodies already established in Council Directives 2000/43/EC and 2004/113/EC, although no such bodies were established in Directive 2000/78/EC.

¹ Doc. 11531/08 ADD 1. A summary appears in doc. 11531/08 ADD 2.

² Doc. 11530/08.

³ Doc. 11530/08 ADD 1 + COR 1.

⁴ Doc. 11047/08 REV 1.

⁵ Doc. 11454/08.

- The scope of the proposal was restricted to transactions that were public in nature; it was up to the Member States to determine their own policies in regard to the private sphere.
- The proposal set out minimum standards and the Member States could decide to introduce stricter provisions, some having in fact already done so.
- For the sake of clarity, the text explicitly recalled that the Directive was without prejudice to certain issues such as marital or family status and reproductive rights; the content of teaching and the organisation of educational systems, including special education; and national legislation ensuring the secular nature of the state or concerning the status and activities of religious organisations based on religion or belief.

As regards the horizontal nature of the proposal, which addresses several different discrimination grounds within a single Directive, the Commission representative stressed that the intention was not to treat all groups in the same way, and that specific provisions were provided as appropriate, for example, in regard to disability and age⁶.

III. GENERAL COMMENTS

Delegations gave their preliminary reactions, pending closer examination of the text. A large majority of delegations (**DELETED**) welcomed the proposal in principle, many endorsing the fact that it aimed to complete the existing legal framework by addressing all four grounds of discrimination through a horizontal approach.

Some delegations (**DELETED**) would have preferred more ambitious provisions, particularly in regard to disability.

⁶ Offering editorial comments, the Commission representative also explained that the reference contained in footnote 5 would be completed once the relevant proposal had been adopted, and that Recital 19 should be divided into two separate Recitals.

While emphasising the importance of the fight against discrimination, **DELETED** put forward the view that more experience with the implementation of existing Community law was needed before further legislation was adopted at the Community level. This delegation questioned the timeliness and the need for the Commission's new proposal, which it saw as infringing on national competence for certain issues.

Several delegations (**DELETED**) underlined the importance of legal certainty and of avoiding cases having to be brought before the European Court of Justice (ECJ; see also comments on Article 4 below). Certain delegations (**DELETED**) also expressed the view that it would have been preferable if the ongoing infringement proceedings relating to the implementation of existing Directives had been concluded before the submission of the current proposal.

Noting that the issue of *education* was not currently included in the scope of Directive 2004/113, the Commission representative explained that proposing amendments to that Directive would have been premature, given that the implementation deadline had only just expired (on 21 December 2007), and the Commission was due to draw up a report in 2010 (see Directive 2004/113/EC, Article 16(1)). Although not in disagreement with the Commission's approach, **DELETED** nevertheless saw a need to explicitly explain this decision and how Directive 2004/113/EC would eventually be aligned with the present proposal.

DELETED underlined the importance of clear provisions on *gender mainstreaming*; **DELETED** also raised the issue of *multiple discrimination*. The Commission representative pointed to the provisions contained in Article 3(4) and Recital 13, as well as to the Impact Assessment and the Communication on "Non-discrimination and equal opportunities: a renewed commitment"; she also reiterated that the nascent Non-Discrimination Governmental Expert Group would offer a valuable forum for addressing these and other issues that could also be addressed by non-legislative means (see Section II above).

IV. DISCUSSION ON ARTICLES 2, 3 AND 4

Article 2

The Commission representative informed delegations that the ECJ had on 17 July 2008 given its judgement in Case 303/06 ("Coleman"), which had possible implications for the current proposal, particularly in regard to the question of *discrimination by association*. She also recalled that the United Nations Convention on the Rights of Persons with Disabilities, which entered into force at the beginning of May, had been signed by twenty-six Member States.⁷

DELETED pointed out that the definition of "harassment" in Article 2(3) differed from the corresponding provision in Article 2(3) of Directive 2000/78/EC, which specifies that "the concept of harassment may be defined in accordance with the *national laws and practice* of the Member States". The Commission representative explained that the definition of "harassment" was different in this respect in the various anti-discrimination Directives (cf. Article 2(c) of Directive 2004/113/EC), and that there had been no need to mention national laws and practice here, given that the implementation of the existing Directives had been unproblematic in respect of "harassment".

DELETED raised the question as to whether "denial of reasonable accommodation" (Article 2(5)) constituted direct or indirect discrimination; the Commission representative explained that either could arise in such cases. **DELETED** pointed out that "denial of reasonable accommodation" (Article 2(5)), defined as discrimination in the proposed Directive, was not so defined in Directive 2000/78/EC (see Article 5); **DELETED** expressed the view that this could lead to a discrepancy between the provisions that applied within and outside the labour market. The Commission representative explained that the current proposal deliberately went further than Directive 2000/78/EC, defining the denial of reasonable accommodation as discrimination, in line with the UN Convention on the Rights of Persons with Disabilities.

⁷ Note from the Council Secretariat: all the Member States have now signed the Convention.

Certain delegations (**DELETED**) saw a need to clarify the provisions in regard to age (Article 2(6)).

DELETED asked for clarification in regard to the definition of “financial services” in Article 2(7), pointing out that Recital 15 referred to “insurance, banking *and other* financial services”. The Commission representative indicated that the current wording had been chosen with a view to completeness.

Responding to a question from **DELETED** concerning the appropriate source of “relevant and accurate statistical or actuarial data” (Article 2(7); cf. Article 5(2) of Directive 2004/113/EC), the Commission representative explained that insurance companies and banks were in possession of such data, and that the proposed Directive envisaged the appropriate use thereof for products where it was reasonable to consider age and disability when assessing risk and setting prices. In this context, **DELETED** having also requested clarification of the “key factor in the assessment of risk” (Article 2(7)), the Commission representative underlined the importance of a link between the data and the product in question. **DELETED** urged the need to publish such data, in the interest of avoiding discrimination; the Commission representative stated that although the proposal did not require publication of the data, companies would nevertheless be compelled to reveal it in cases where such data was evoked.

Responding to a question from **DELETED** concerning the envisaged “dialogue with the insurance and banking industry” (see doc. 11531/08, “Explanatory Memorandum”, p. 5), the Commission representative explained that the Commission would take the lead, with a view to setting up an exchange of good practices at the European level.

Article 3

Responding to a question from **DELETED** regarding the slight difference in wording between Article 3(1) and the corresponding provisions in Directive 2000/43/EC, the Commission representative explained that there was no intention to change the meaning.

DELETED requested clarification of the concept of "social advantages" (see Article 3(1)(b)); the Commission representative undertook to provide a list of ECJ cases that clarified this concept.

Alluding to Case 263/86 ("Humbel"), which had established a distinction between "education" and "a service", **DELETED** raised the question as to the limit of Community competence in the area of education (Article 3(1)(c)). Pointing to the Impact Assessment accompanying the proposal, the Commission representative recalled that evidence existed of harassment, discrimination and bullying in schools, which were detrimental to pupils' academic performance. She added, moreover, that the Member States remained responsible for the content of teaching and the organisation of their educational systems (see Article 3(3)). **DELETED** raised the question as to whether EC legislation was the appropriate means to tackle bullying.

As regards the reference to "Access to and supply of goods and other services which are available to the public, including housing" in Article 3(1)(d), **DELETED** alluded to the problems that have risen in the implementation of the corresponding provisions in Directive 2000/43/EC (Article 3(1)(h)), particularly in respect of drawing the line between the private and public sphere. **DELETED** entered a reservation. **DELETED** also requested clarification of the definition of "a professional or commercial activity". The Commission representative gave the example of a person who advertised a room for rent in his or her house, and was thus making housing publicly available, yet was nevertheless not engaged in a professional activity; such a case would therefore not fall within the scope of the Directive. The Commission representative explained, moreover, that only regular, income-generating activities that accounted for a significant portion of a person's revenues would be considered "professional or commercial" in nature. Responding to **DELETED**, she explained, moreover, that the prohibition of discrimination should go hand in hand with respect for other fundamental rights and freedoms, as stated in Recital 17; thus membership of private clubs was a matter of the right to the freedom of association.

Regarding the reference to "housing" in Article 3(1)(d), **DELETED** raised the question as to who would be liable for the costs of any necessary physical adjustments for disabled persons. The Commission representative stated that the person letting or owning a given property would be responsible, depending on the circumstances specific to each case. She underlined that the aim of the Directive was to prohibit the refusal of housing to individuals on discriminatory grounds.

Responding to **DELETED**, who had requested clarification of the reference to "services of general economic interest" in Recital 11, as opposed to simply "services" in Article 3(1)(d), the Commission representative explained that *all services* were covered by the Directive, and that the wording of Recital 11 could be clarified, if necessary.

DELETED asked for the meaning of Article 3(2) to be clarified; this delegation alluded to Case C-267/06 ("Maruko"), pointing out that the ECJ had in that instance ruled that marital status did fall within the scope of Directive 2000/78/EC. **DELETED** also asked the Commission to clarify the meaning of Article 3(2). The Commission Representative explained that Article 3(2) of the proposal aimed to provide legal certainty to the effect that the Directive was without prejudice to national laws on who can marry and on marital status. Thus the Directive did not oblige Member States, for example, to recognise registered same-sex partnerships. However, where such partnerships were recognised by a Member State, they must be treated in the same way as heterosexual marriage in all areas included within the scope, and also in keeping with the relevant case law.

Responding to **DELETED**, the Commission representative confirmed that the issue of adoption, being a matter of family law, fell outside the scope of the Directive (see Article 3(2)).

Regarding Article 3(3), **DELETED** underscored the importance of safeguarding the principle, fundamental in French society, of the secular nature of the state, particularly in regard to education.

Article 4

A large number of delegations (**DELETED**) saw a need to clarify the terms of this Article. While acknowledging that further fine-tuning might be necessary, the Commission representative explained that the terminology in Article 4 was drawn from existing Community legislation and from the UN Convention on the Rights of Persons with Disabilities.

Responding to a question from **DELETED** concerning Article 4(1), the Commission representative explained that the Article – being part of a Directive – was addressed to the Member States.

Responding to the observation by **DELETED** that the scope as defined in Article 3 was not reflected in Article 4(1)(a) (the specific reference to "social security" is missing), the Commission representative explained that Article 3 defined the scope for the Directive as a whole, and that Article 4 could be reworded, if necessary.

Responding to **DELETED** concerning Article 4(1)(a), the Commission representative explained that “effective access” meant “actual, real access”.

Responding to a question from **DELETED** concerning Article 4(1)(a), the Commission representative explained that the duty to anticipate the needs of disabled people would require more from large-scale entities (e.g. supermarkets) as compared with small operators (e.g. village shops).

Responding to **DELETED**, the Commission representative explained that Article 4(1)(a) and 4(1)(b) were linked and should not be seen as alternative options. If nothing was done by anticipation (Article 4(1)(a)), providing “reasonable accommodation” (Article 4(1)(b)) would in many cases pose a disproportionate burden. Responding to **DELETED**, the Commission representative explained that the right to equal access envisaged under the proposed provisions was subject to certain provisos: in meeting the needs of persons with disabilities,

operators would not be expected to shoulder a disproportionate burden or to offer an entirely new service in the context of general accessibility. However, alternative products or services *could* in certain cases be offered in the context of reasonable accommodation. Thus, for example, providing a restaurant menu in Braille, or reading the menu to a visually impaired customer, were examples of "reasonable accommodation". On the other hand, a bookshop would not be expected to provide a Braille edition of a commercially available book, as this would amount to offering an alternative product, and was therefore not required under the provisions of the Directive.

Alluding to Article 4(3), **DELETED** requested clarification of the implications of these provisions in the context of national legislation that provides for different accessibility requirements for large and small hotels, new and old buildings, etc.

Responding to **DELETED**, the Commission representative confirmed that public transport was indeed included within the scope of the proposed Directive.

V. DISCUSSION ON THE REMAINDER OF THE TEXT

Article 1

DELETED expressed the view that Article 1, in referring to “the principle of equal treatment other than in the field of employment and occupation”, departed from the more appropriate wording in Article 1 of Directive 2004/113/EC, which referred to “access to and supply of goods and services”; the Commission representative explained that Article 1 was modelled on the corresponding Articles in Directives 2000/43/EC and 2000/78/EC.

Article 7

DELETED requested clarification as to why the wording of Article 7(2) differed from the corresponding provision in Article 7(2) of Directive 2000/43/EC, which defines the "legitimate interest" of "associations, organisations and other legal entities" supporting claimants "in accordance with the criteria laid down by [...] national law". The Commission representative stated that there was no intention to change the provisions in this regard; she undertook to provide further information.

DELETED drew attention to a potential discrepancy between Article 7(2) and Recital 23; the Commission representative agreed that the word "including" could be deleted from Recital 23, as the intention was that "associations, organisations and other legal entities" could only engage in proceedings "on behalf of or in support of" claimants, and not independently.

Article 8

Responding to a question from **DELETED**, the Commission representative confirmed that the burden of proof would fall upon the respondent in all the forms of discrimination mentioned in Article 2, including indirect discrimination.

Article 10

DELETED requested clarification as to why the wording of Article 10 differed from the corresponding provision in Article 10 of Directive 2000/43/EC. The Commission representative stated that there was no intention to make any substantive change to the provisions; she undertook to provide further information.

Article 12

DELETED requested clarification of the reference to the "Paris Principles" in Recital 28; the Commission representative explained that these principles developed at the level of the UN would be applicable to the Equality Bodies (see UN General Assembly Resolution 48/134 of 1993).

VI. CONCLUSION

The Chair noted the broadly positive views expressed by delegations, subject to the general scrutiny reservations that were maintained at this stage. He noted, moreover, that numerous delegations had indicated that they were in the process of drawing up national legislation largely in tune with the proposed Directive.

Regarding Article 3, the Chair concluded that *the concept of "a professional or commercial activity"*; the issue of *the relationship between national family law and the provisions of the Directive*, and the issue of *education* required further attention. He invited the Commission to submit supporting explanations in writing.

As regards Article 4, the Chair concluded that the intention of the provisions set out in Article 4 had been clarified during the discussion and that rewording was required, to ensure clarity.

The Chair informed delegations that the next two meetings of the Working Party were provisionally scheduled for 10 and 15 September 2008, subject to official confirmation. He reminded delegations, moreover, that an orientation debate at the EPSCO Council on 2 October 2008 was foreseen.

The Chair invited delegations to submit written comments and compromise suggestions, particularly in regard to Article 2, 3 and 4.

Delegations are also invited to submit any comments of a linguistic nature to the Council Secretariat in writing.⁸

⁸ **DELETED** pointed out a discrepancy between the EN and FR versions of Article 2(7).