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REPORT

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

I. INTRODUCTION

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

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

A very large majority of delegations 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 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 2009². Following the entry into force of the Lisbon Treaty on 1 December 2009, the proposal now falls under Article 19 of the Treaty on the Functioning of the European Union; thus unanimity in the Council is required, following the *consent* of the European Parliament.

II. THE COUNCIL'S WORK UNDER THE LUXEMBOURG PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal,³ focusing mainly on the issues related to the provisions concerning access to goods and services for persons with disabilities, and on the compatibility between these provisions and the UNCRPD. The Presidency's drafting suggestions⁴ were supported in general by the Commission and broadly welcomed by delegations as a step in the right direction. The main elements discussed included the following:

The Forthcoming Proposal for an Accessibility Act

Delegations appealed for more information regarding the timetable for the adoption of the Commission's proposal for an Accessibility Act which, it is expected, will contain detailed provisions aiming to ensure access for persons with disabilities to goods and services traded on the internal market. While unable to give a precise date at this stage, the Commission representative expressed the hope that the proposal would see the light of day before the end of the year. In this context, some delegations suggested that the accessibility provisions might, in due course, be carved out of the scope of the proposed Equal Treatment Directive and handled exclusively in the Accessibility Act. The Commission representative underlined the fact that the proposed Equal Treatment Directive and the forthcoming proposal for an Accessibility Act were complementary texts.

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

³ Meetings on 25 September and 5 November.

⁴ See 10598/15 and 13125/15.

"Accessibility achieved in a proportionate manner" (Recital 19b)

In its drafting suggestions, the Presidency had added a sentence in Recital 19b stating that "Accessibility should be considered to have been achieved in a proportionate manner if persons with disabilities are able, effectively and on an equal basis with others, to access the services that particular buildings, facilities, transport services and infrastructure are meant to supply or offer to the public, even if they cannot have access to the entire building, facility or infrastructure concerned." Several delegations expressed doubts regarding this new wording, particularly on the grounds of doubts regarding its compatibility with the UNCRPD, which does not refer to a disproportionate burden.

Universal Design (Article 4(8) and Recital 19d)

In its drafting suggestions, the Presidency revised the provisions concerning the universal design principle, adding a sentence to the recitals calling for research and development of universally designed goods and services and for the promotion of universal design in the development of standards and guidelines, so as to progressively ensure the accessibility of goods and services. The corresponding provision stating that Article 4 (*Accessibility for persons with disabilities*) "shall apply to the design and manufacture of goods, unless this would impose a disproportionate burden" was placed in square brackets pending further discussion. Certain delegations felt that this binding provision should in fact be aligned with the softer approach taken in the recitals, which was more in line with the approach taken in the UNCRPD, while others questioned the feasibility of applying the universal design principle to goods.

Detailed standards or specifications (Article 4(9) and Article 4a(4))

The draft Directive affirms the precedence to be granted to Union law that provides for detailed standards or specifications on accessibility in respect of particular goods or services. In its drafting suggestions, the Presidency had moved the relevant provision from Article 4b(3) to Article 4(9) and Article 4a(4), thus addressing "accessibility" and "reasonable accommodation" separately.

Some delegations supported the change, but also raised the question as to whether such a provision was needed with respect to reasonable accommodation. Others preferred the previous version of the text, where accessibility and reasonable accommodation were addressed together, pointing out that it was not always clear whether certain provisions contained in specific legislation should be defined as accessibility or reasonable accommodation (e.g. legislation requiring airlines to offer assistance to passengers with reduced mobility).

One delegation felt that Article 4(9) ought to refer to areas where the EU has *the competence* to draw up detailed standards or specifications, and not just to areas where the EU had already exercised its competences.

Implementation Calendar (Article 15)

The Presidency suggested that the Member States be required to inform the Commission of their timetable for the progressive implementation of the measures necessary to ensure sufficient housing for persons with disabilities. In addition, the Presidency proposed changes to the timetable for ensuring accessibility in respect of buildings, facilities, transport services and infrastructure. In particular, the Presidency suggested separating the five-year deadline for new entities from the (optional) 20-year-deadline for existing entities, and combining the latter with an obligation to ensure progressive implementation over the 20-year period and an obligation to send an action plan and a timetable to the Commission.

The Working Party broadly welcomed the increasing emphasis placed on progressive implementation. However, several delegations asked for the concrete obligations and reporting requirements to be clarified. The Commission representative stressed the need for separate provisions for new and existing buildings, facilities, transport services and infrastructure, and reminded delegations that it was in the Member States' own interest to draw up long-term plans for progressive implementation, the obligation to submit such plans being justified in the context of distant implementation deadlines.

The Commission representative recalled, moreover, that it was ultimately up to the Council to decide on the deadlines for implementing the various provisions contained in the Directive, including the deadline for ensuring accessibility in respect of housing.

Buildings and Sites of Cultural and Historical Importance

Certain delegations felt that the need to protect culturally and historically important buildings or sites should be recognised more strongly in the text and that an outright derogation from the accessibility requirements would be justified in some cases. However, the Commission representative expressed the view that causing damage to a historically important building would qualify as a disproportionate burden and therefore measures to render vulnerable buildings and sites accessible would not be required by the Directive.

Compatibility of the Draft Directive with the UNCRPD

Various Member States had, in their replies⁵ to the questionnaire circulated under the previous Presidency, stressed the need to ensure compatibility between the proposed Equal Treatment Directive and the UNCRPD. Based on a comparative table prepared by the Presidency, the Working Party discussed this aspect, focusing on the following main issues:⁶

Certain delegations recalled that the UNCRPD contained no *disproportionate burden* criterion and called for compatibility to be ensured. Thus accessibility should always be pursued, even if implementation would have to be gradual.

Certain delegations called for Article 4(8) to be aligned with the last sentence of Recital 19d, which is more in line with the corresponding universal design provisions in the UNCRPD. Certain delegations questioned the feasibility of applying the universal design principle to *goods*.

⁵ See 8333/1/15.

⁶ Also see "Universal Design" above.

One delegation felt that the provisions contained in Article 4(6) that referred to the common parts of buildings and the provisions contained in Article 4a(3) that referred to structural changes to dwellings, might be incompatible with the UNCRPD.

Recalling that the UNCRPD contained no implementation deadlines, one delegation wondered whether the draft Directive could also be made more flexible.

Commenting on the calls for closer compatibility between the UNCRPD and the draft Directive, the Commission representative reminded delegations that the EU legal order was autonomous in character, regardless of the fact that the EU and its Member States had signed and ratified the UNCRPD. Thus the basic principles and concepts of the UNCRPD would have to be respected by the Directive and a degree of alignment was required, but neither the scope of Directive nor its detailed provisions and implementation procedure would have to be slavishly copied from the UNCRPD. Thus, for example, the scope of the draft Directive was not determined by the UNCRPD but by the competences of the Union as defined in the Treaties, which in turn meant that it would be legally impossible to implement the entire UNCRPD by means of an EU Directive. Indeed, if the Member States decided to reject the proposed Directive, they would still be obliged to implement the UNCRPD. Conversely, the Directive could, if the Member States so decided, go further than the UNCRPD in certain ways--for example, by setting a deadline for implementation (as indeed has been requested by the UN Committee on the Rights of Persons with Disabilities).

The Commission representative emphasised, moreover, that the disproportionate burden criterion governing the concept of accessibility, which was not present in the UNCRPD, was nevertheless an important element of the draft Directive. In essence, the proposed Directive struck a balance between a binding approach (including implementation deadlines) and compensatory elements (including the concept of a disproportionate burden and the idea of progressive implementation).

III. OUTSTANDING ISSUES

Further discussion is also needed 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 are set out in docs. 12342/15 and 13773/15.

IV. CONCLUSION

Clear progress has been made under the Luxembourg Presidency, particularly on the provisions related to disability. Nevertheless, it is clear that there is still a need for further work before the required unanimity can be reached.
