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REPORT

From:	Presidency
To:	Permanent Representatives Committee / Council
No. prev. doc.:	13394/21
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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 horizontal equal treatment 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 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 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). 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. 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.

Two delegations have maintained general reservations on the proposal as such.

For the time being, all delegations have maintained general scrutiny reservations on the text.

CZ and DK have maintained parliamentary scrutiny reservations. While supporting the search for a compromise, 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 on 2 April 2009² under the Consultation Procedure. 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.

² See doc. A6-0149/2009. Alice Kuhnke (SE/ Greens/European Free Alliance) has been appointed Rapporteur by the current Parliament.

II. THE COUNCIL'S WORK UNDER THE SLOVENIAN PRESIDENCY

A new, comprehensive compromise proposal having been discussed in May,³ the Slovenian Presidency tabled a steering note⁴ containing a set of questions that focused on three main outstanding issues, namely: 1) *subsidiarity*; 2) *the disability provisions (implementation costs and consistency with UNCRPD)*; and 3) *legal certainty*. Delegations addressed these issues in an informal meeting of the members of the Working Party on Social Questions.⁵ The discussion can be summed up⁶ as follows:

1. **Subsidiarity (in particular, Articles 2(8) and 3(1-2) and Recital 16)**

- a) **Is there the right balance between subsidiarity and protection against discrimination through EU law?**
- b) **Is there the right balance between protection against discrimination on the one hand and the protection of rights such as respect for private and family life, freedom of association and the freedom of the press on the other?**

A number of delegations felt that the latest text broadly speaking struck the right balance between subsidiarity and other considerations (namely, EU-level protection against discrimination and the protection of rights such as respect for private and family life, freedom of association and freedom of the press). However, certain delegations also saw a need for further fine-tuning of the text.

Other delegations had concerns over subsidiarity and legal certainty, and affirmed the need to protect the competences of the Member States, including in sectors such as education.

³ Doc. 8549/21. See also docs. 9108/21 and 9109/21.

⁴ Doc. 12398/21

⁵ 27 October 2021. Due to the special circumstances arising from the Covid pandemic, the meeting was held in virtual form.

⁶ For further details, see 13394/21.

Meanwhile, certain other delegations felt that the text had been watered down too much, weakening the protection it offered, and potentially opening the door for discrimination in areas such as marital and family law.

One delegation also wished to see the concept of intersectionality reintroduced into the text.

Supporting the current text as a basis for further discussion, the Commission representative affirmed the importance of respecting the principle of subsidiarity – to be treated in the recitals of the proposal – as well as the role of the Court of Justice of the European Union (CJEU). Responding to comments by delegations, the Commission representative explained that:

- all *commercial* activities were covered by the Directive in the context of the sharing economy;
- the Directive was only intended to ensure equal *access* to education, without encroaching on national competences; and
- the Directive could only cover the discrimination grounds covered in Article 19 TFEU.

2. Implementation costs (in particular, Article 15 and Recitals 19ca, cb and cc)

- a) Can you support the provisions that grant the Member States the right to request a temporary exemption from the requirement to provide reasonable accommodation? How would you wish to see these provisions fine-tuned?**

b) Could you provide examples of the concrete situations you would wish to see covered, bearing in mind the fact that the absence of an undue or disproportionate burden is already included in the concept of reasonable accommodation?

Some delegations were, in a spirit of compromise, ready to consider the idea of a temporary exemption from the requirement to provide reasonable accommodation to persons with disabilities. However, issues requiring further discussion include the need to set out the applicable criteria and the compatibility of the Directive with the UNCRPD. As a possible alternative to an outright temporary exemption, one delegation suggested the idea of temporarily suspending the applicable penalties. Another delegation raised the possibility of limiting the exemption to new goods and services only.

A number of other delegations were unable to support the suggested temporary exemption, as it was likely to weaken the protection against discrimination for persons with disabilities. In this context, certain delegations expressed the view that the concept of a disproportionate burden was a sufficient safeguard against excessively onerous obligations. They stressed that, in the UNCRPD, the principle of reasonable accommodation was applicable to specific situations and based on an analysis of the disproportionate burden at a particular moment, and recalled that the provisions contained in the draft Directive had already been weakened during previous discussions (e.g. through the removal of primary obligations in the area of infrastructure).

One delegation warned against competitive advantages that could result if exemptions were granted in certain Member States while others maintained stricter rules.

Several delegations saw a need for further analysis and clarification of the suggested exemption clause.

Acknowledging delegations' concerns regarding the economic cost of implementing the disability provisions contained in the Directive, the Commission representative stressed that, were an exemption to be considered as the basis of a compromise, it should be subject to clear conditions to be applied by the Member States.

Several delegations regretted the removal of the concept of "accessibility" from the text, as this weakened the protection granted to persons with disabilities, both the concept of "reasonable accommodation" *and* the notion of "accessibility" being included in the UNCRPD. Several delegations also regretted the removal from the text of the concept of "universal design", which would have provided a wider approach to equal treatment for persons with disabilities.

Supporting the current text as a basis for further work, the Commission representative recalled that the original proposal did not include any detailed accessibility provisions, and that the key aim was to ensure that access to the different material areas covered by the Directive was non-discriminatory.

c) Are you satisfied with the consistency between the current text and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)?

Several delegations felt that the text was, broadly speaking, sufficiently consistent with the UNCRPD. However, several others were not convinced, fearing legal uncertainty and warning against any negation or weakening of the provisions of the UN instrument.

The Commission representative pointed out that the UNCRPD applied in any case and that the proposed Directive would make a contribution to its implementation, without however constituting implementing legislation per se.

3. Legal certainty (in particular, Article 2(7 and 7a))

Can you support the provisions concerning permitted differences of treatment in the provision of insurance, banking and other financial services based on “age” or on a “health condition that may be linked to a person’s disability”? If not, what should be changed to accommodate your concerns?

Several delegations supported the current text as a basis for further discussion, subject to any necessary fine-tuning and clarifications. One delegation urged the importance of distinguishing clearly between “disability” and a “health condition.” Another delegation took the view that a difference in treatment based on a person’s “age or health condition that may be linked to a person’s disability” was likely to be incompatible with the UNCRPD. Others affirmed the legitimacy of taking age and health into account, for example, when calculating insurance premiums, and stressed the importance of ensuring the objective and reasonable nature of differences in treatment. In this context, one delegation also stressed the need to address the use of Artificial Intelligence in decision-making by service providers.

III. CONCLUSION

While certain progress has been made during the discussions based on the latest text, there is clearly a need for extensive further work before the required unanimity can be reached in the Council.