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REPORT

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| From: | General Secretariat of the Council |
| To: | Permanent Representatives Committee / Council |
| No. prev. doc.: | 12677/18 |
| No. Cion doc.: | 11531/08 SOC 411 JAI 368 MI 246 - COM(2008) 426 final |
| 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 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. Certain 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.

Two delegations have maintained a general reservation on the proposal as such.

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

CZ, DK, MT 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 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. Ulrike Lunacek (AT/LIBE/Greens/European Free Alliance) has been appointed Rapporteur by the current Parliament.

II. THE COUNCIL'S WORK UNDER THE AUSTRIAN PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal,³ based on Presidency drafting suggestions⁴ focusing on several issues including multiple discrimination, the disability provisions, discrimination by assumption and penalties. The delegations were also invited to indicate any footnotes that could be removed from the annotated consolidated text.

a) Multiple discrimination (Articles 2(2) and 2(3-a) and Recital 12ab)

The draft Directive contains provisions on multiple discrimination, which can occur even when a situation would not give rise to discrimination if the grounds were taken separately. However, the Presidency has suggested removing discrimination grounds covered in other Directives (sex and racial or ethnic origin⁵) from the provisions, so that in this Directive multiple discrimination would only be covered with respect to the grounds mentioned in its scope. Certain delegations regretted this narrowing of the concept of multiple discrimination. Others reiterated their doubts regarding the inclusion of the notion of multiple discrimination in the text. However, the Working Party broadly agreed with the inclusion of multiple discrimination on the basis suggested by the Presidency.

b) Disability provisions

The Presidency fine-tuned the disability provisions; the changes suggested were broadly supported by the Working Party. However, a number of aspects require further examination.

(i) Proportionate differences of treatment on the grounds of disability (Article 2(7)(b) and Recital 15a)

³ Meetings took place on 25 July and 1 October.

⁴ Docs. 10530/18 and 12077/18.

⁵ These grounds are recognized in Directive 2004/113/EC and Directive 2000/43/EC.

The Presidency has sought to clarify the extent of the exemption allowing for proportionate differences of treatment on the grounds of disability by distinguishing between *disability* and *a health condition*.

Certain delegations were unable to accept the suggested wording and preferred the formulation used in the previous version of the text on the grounds that "disability" and "health condition" should be treated as separate criteria and not mixed together.

(ii) Reasonable accommodation (Article 4a and Recital 20ab)

The Presidency had sought to clarify the notion of "reasonable accommodation" in relation to the UNCRPD.

One delegation felt that including the concept of "reasonable accommodation" in the text caused legal uncertainty as it was not defined and preferred to see the term removed altogether.

(iii) Accessibility and reasonable accommodation (Article 4b and Recital 19b)

The Presidency has sought to clarify the text by adding new examples illustrating the criteria for assessing the concept of *a disproportionate burden*. Several delegations saw a need for further clarification and work on the text. Certain delegations had doubts about the inclusion of an extensive open list of examples, while others felt that the examples given might be better placed in the recitals. Others also suggested aligning the wording with the corresponding provisions in the European Accessibility Act.⁶

(iv) Recitals

The Presidency has also suggested revising a number of recitals, especially with a view to aligning the text with the UNCRPD.

⁶ Inter-institutional file 2015/0278(COD).

(c) **Discrimination by assumption (Recital 12)**

The Presidency has added a recital explaining the discrimination by assumption, "which occurs when a person is treated less favourably or harassed because of a religion or belief, disability, age or sexual orientation which he or she is perceived to have," regardless of whether or not the assumption about the person concerned is correct. One delegation felt that this matter was best left to the courts and should not be included in the Directive.

(d) **Penalties (Article 14 and Recital 29)**

The Presidency has replaced the term "sanctions" with the term "penalties" in line with established drafting practice.

Further details of delegations' positions can be found in docs. 11105/18⁷ and 12677/18.

III. CONCLUSION

Tangible progress has been made under the Austrian Presidency on the issues discussed. Despite the broad support for the objectives of the proposed Directive, technical work and extensive further political discussions will be needed before the required unanimity can be reached in the Council.

⁷ See also docs. 12955/18 and 12956/18 (to be distributed in due course).