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OPINION OF THE LEGAL SERVICE*

to : Social Questions Working Party of 6 November 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

- EC Competence
- Scope of Article 13 EC
- Subsidiarity and proportionality

Introduction

1. During the discussions of the Social Questions Working Group on 15 September 2008, the question has been raised as to whether the scope of the proposed draft Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation could be adequately encompassed within Article 13 (1) of the EC Treaty. This opinion aims to respond to that question.

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I. Community competence and legal basis

2. According to settled case-law, the choice of the legal basis for a Community measure must be based on objective factors which are amenable to judicial review, including in particular the aim and content of the measure¹. It is therefore necessary to examine these in more detail.

II. AIM AND CONTENT OF THE PROPOSAL

3. Pursuant to Article 1 of the proposal, the Directive's purpose is to lay down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.
4. According to the Commission, the proposal aims to establish a framework for the prohibition of discrimination on the above-mentioned grounds, thus providing for a uniform minimum level of protection within the European Union for people who may suffer discrimination. It aims, furthermore, to complete the existing EC legal framework under which the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation currently only applies to employment, occupation and vocational training². At present, legal protection from discrimination outside employment only covers sex and racial and ethnic origin³. Moreover, Directive 2004/113/EC⁴ implements the principle of equal treatment between men and women in the access to and supply of goods and services.

¹ See for example Case C-440/05, *Commission v. Council*, [2007] ECR I-9097, paragraph 61.

² Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16.

³ Directive 2000/43/EC already implements the principle of equal treatment between persons irrespective of racial or ethnic origin in employment and vocational training as well as in social protection, social advantages, education and access to goods and services. Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p.22

⁴ Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373 of 21.12.2004, p.37.

5. Article 3 of the proposal establishes the scope of the Directive in the following terms:

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) Social protection, including social security and healthcare;

(b) Social advantages;

(c) Education;

(d) Access to and supply of goods and other services which are available to the public, including housing. [...]

6. Article 4 of the proposal provides that, in relation to persons with disabilities, in order to guarantee compliance with the principle of equal treatment, effective non-discriminatory accessibility shall be provided by anticipation, to the extent that such measures do not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto. Further to this obligation, where needed in a particular case, reasonable accommodation shall be provided unless this would impose a disproportionate burden.

III. THE SCOPE OF ARTICLE 13 EC

7. Article 13 (1) EC is enshrined in part one of the Treaty, entitled Principles. It reads as follows:

Article 13

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. [...]

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VI. PRINCIPLE OF SUBSIDIARITY

56. Pursuant to the second sub-paragraph of Article 5 of the EC Treaty, in areas which do not fall within its exclusive competence, the Community is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

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VII. PRINCIPLE OF PROPORTIONALITY

63. The principle of proportionality, as enshrined in the third subparagraph of Article 5 of the EC Treaty, requires that any action by the Community shall not go beyond what is necessary to achieve its objective. In particular, the question of less restrictive alternatives has to be considered. Proportionality refers to both the extent and intensity of Community action and aims to avoid excessive Community legislation. When there is a choice between several appropriate measures *"recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"*⁵.
64. It emerges from the impact assessment that the Commission has assessed five alternative policy options, varying from no Community action to a multi-ground directive. According to the findings of the Commission, mere guidance would not offer legal certainty and would therefore not be as effective as the adoption of legally binding measures. The Commission has chosen the instrument of a multi-ground Directive.
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⁵ Case C-310/04, *Spain v Council* [2006] ECR I-7285, paragraph 97. For an extensive analysis of the case law on proportionality, see the opinion of the Legal Service in Doc. 13457/06 JUR 370 TELECOM 89 COMPET 255 MI 172 CONSOM 88 CODEC 1019 and Opinion in Doc 13841/08, JUR 348 SAN 211 SOC 563 MI 348 CODEC 1264.

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