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**NOTE**

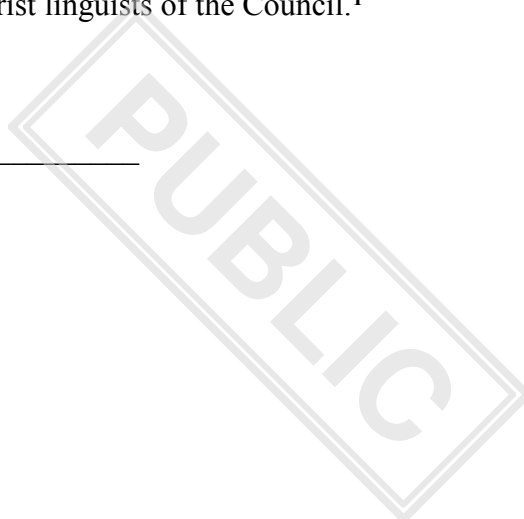
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From:	Presidency
To:	Delegations
No. prev. doc.:	16179/23
No. Cion doc.:	COM(2022) 688 final
Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU

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Following the first trilogue on the above proposal that took place on 28 November 2023 and further work at the technical level, the Presidency wishes to consult delegations with a view to preparing the second trilogue that is scheduled for 12 December 2023. To this end, delegations will be asked to provide their views on the compromise suggestions on the list of key points set out in the present note, which have been explored in discussions between the Presidency and the EP technical team. The specific wordings suggested are set out in the table that is to be found in document WK 16225/2023. The Presidency draws your attention to the fact that, as intense negotiations with the EP are still under way at the technical level, certain specific elements may still evolve. Revised wordings on a very limited number of the key points set out in this note may therefore be distributed by the Presidency in due course.

The changes in the draft compromise text in the third column of doc. WK 16225/2023 are indicated in relation to the general approach as improved by the jurist linguists of the Council.<sup>1</sup>



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<sup>1</sup> The text of the general approach as improved by the jurist linguists of the Council is set out in doc. 16179/23. (The original text of the general approach is set out in doc. 10038/23.)

## 1. Independence of equality bodies

The Council and EP both agree on the need to ensure the independence of equality bodies, but the EP prefers a far more prescriptive approach, including a binding provision whereby the “Member States shall ensure that equality bodies are not set up within a ministry, a government body or a body taking or seeking instructions from the government in order to preserve their nature as independent bodies”. A compromise wording that still allows the Member States to establish equality bodies within a ministry is suggested in **Rows 27 and 69**.

## 2. Resources

The co-legislators broadly agree that equality bodies should be provided with the resources necessary to perform their tasks, and that this is to be ensured in accordance with their national budgetary processes. However, the EP wishes for more binding rules on resources. A less prescriptive wording that respects national budgetary prerogatives is suggested in **Rows 29 and 74**.

## 3. “Alleged victim” or “persons who have experienced discrimination”

In its mandate, the EP introduced the concept of “persons who have experienced discrimination” instead of “victims” as proposed by the Commission, the logic being that any person should be entitled to assistance from the moment they experience discrimination (and not from the moment they are formally recognised as victims). Based on similar thinking, the Council mandate used the term “alleged victim”. The EP also strongly opposes the use of the term “alleged”, which would, in their opinion, contradict the existing aquis and create legal inconsistencies. A compromise wording based on a definition of “victim” for the purposes of this Directive is suggested in **Rows 32 and 82**. As a consequential change, the term “alleged victim” would then also be replaced with “victim” in all other parts of the text.

#### 4. Alternative dispute resolution

The EP prefers far more detailed and prescriptive provisions concerning alternative dispute resolution, including ensuring that persons who participate in such a process do not lose their chance to go to court due to the time that elapses during the search for an amicable resolution. The Council has affirmed the need for flexible wording, including a reference to “national law and practice”. A compromise wording is suggested in **Rows 34 and 89**.

#### 5. Litigation

In its mandate, the EP had foreseen stronger powers of litigation for equality bodies, including the right to initiate court proceedings where it has detected discrimination, but no individual complainant pursues the case, and the right to act in court proceedings dealing with collective redress actions. The Council mandate revised the choices available to Member States in conferring powers of litigation to equality bodies, in the light of the fact that the legal systems of the Member States vary greatly. The Council mandate also stipulates that equality bodies’ right to act in court proceedings is to be “*in accordance with national law and practice* on the admissibility of actions, including any rules on requiring the approval of the alleged victim”. The Council has no flexibility on this point. During the informal negotiations with the EP, a compromise has been explored, with a possible trade off which would consist of respecting the text of Article 9 as set out in the General Approach in exchange for including gender-inclusive language (see point 8 below) and amendments in Article 7 on alternative dispute resolutions, which are high priorities for the EP.

#### 6. The social partners

Both co-legislators have referred to the role of the social partners in their mandates, but the EP provisions were more far-reaching. A compromise wording is suggested in **Rows 26a, 31, 34 and 67c**.

## 7. Gender Mainstreaming

The EP has inserted language underlining the importance of gender mainstreaming, including a sweeping horizontal provision that is unacceptable to the Council. A compromise suggestion that links gender mainstreaming to the activities of equality bodies is set out in **Rows 50 and 79**.

## 8. Gender inclusive language: gender, gender identity, gender expression or sex characteristics

The EP has included in its mandate a new paragraph (2a) in Article 1, with the aim of ensuring that the principle of equal treatment applies to all persons in all their diversity, irrespective of their sex, gender, gender identity, gender expression or sex characteristics. The Presidency believes that it is not possible to introduce this clause under provisions on the scope of the directive, in the light of the legal basis (Article 157 TFEU). However, in the light of the high priority of this item for the EP and of the compromise explored on not introducing any changes into Article 9 (see point 5 above), the Presidency suggests to include, as a compromise, language in combination with the definition of victims in **Rows 32 and 82**, (here the Presidency underlines as precedents of similar language used in the aquis, for example, Directive 2011/95/EU or Directive 2012/29/EU), as a well as a new Recital 5a, that mirrors Recital 5 of Pay Transparency Directive (**Row 16a**).

## 9. Intersectional discrimination

The EP has included several references to multiple and intersectional discrimination throughout its mandate. As a compromise, the Presidency suggests a compromise wording that links the possibility of paying attention to intersectional discrimination in the activities of the equality bodies, within the scope of Directives 79/7/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC, in **Rows 26 and 79**.

## 10. Procedural safeguards and equality of arms principle

During the first trilogue, the Commission defended, the provision ensuring that the principle of *equality of arms* was respected in the context of equality bodies' right to act in court, and the Presidency and the EP agreed to try to reach a compromise on the matter at the technical level. According to the provisions contained in the original proposal, equality bodies would not be allowed to submit in proceedings evidence which the alleged perpetrator or any third party was legally bound to provide in previous investigations on the same case. Both the Council and the EP have deleted this provision in their mandates. Compromise wording is suggested in **Row 44**.

## 11. Transposition period

The EP has shortened the 18-month transposition deadline proposed by the Commission to 12 months, whereas the Council has lengthened it to 36 months. The Presidency asks the delegations whether they would be open to consider a 24-month transposition deadline, as a possible compromise. This compromise suggestion is set out in **Row 144**.

## 12. Monitoring

The EP insists on the need to establish the list of indicators referred in Article 16(1) (Row 131) by means of a **delegated act**. The Presidency has defended the need to adopt an implementing act, as foreseen in the general approach. The **negotiations on this point are currently ongoing**. In addition, the EP also tightened the first reporting deadline (from 5 to 3 years) and also increased the frequency of reporting (from 5 to 3 years) (Article 6(2) / Row 132). It also includes in Row 133, an index to be drawn by the Commission, on the situation of discrimination, the issuing of follow-up recommendations and other provisions, such as the possibility to send complaints to the Commission regarding the independent functioning of equality body. Compromise suggestions have been included in **Rows 131 and 133**.