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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. prev. doc.:	16298/23
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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 *- Analysis of the final compromise text with a view to agreement*

I. INTRODUCTION

1. On 7 December 2022, the Commission submitted to the Council a 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.

2. The European Economic and Social Committee adopted its opinion on 22 March 2023.[1]

3. The European Data Protection Supervisor issued its opinion on 2 February 2023.[2]

4. The Council reached a general approach on the proposal on 7 June 2023.

5. The European Parliament voted to start inter-institutional negotiations on 23 November 2023.

6. The first trilogue took place on 23 November 2023. At the second and closing trilogue, on 12 December, the negotiating teams of the Council and the Parliament reached a provisional agreement, the main elements of which are outlined below.

II. MAIN ELEMENTS OF THE PROVISIONAL AGREEMENT

The basis of the compromise is the Council's general approach, the co-legislators having agreed to focus the negotiation on a limited list of key points. Only limited changes were made to the Council's text. The main elements of the provisional agreement are as follows:

1. Independence of equality bodies (Article 3 and Recital 16)

The Council and EP both agreed on the need to ensure the independence of equality bodies, but the EP would have preferred a far more prescriptive approach, including a provision prohibiting the setting up of equality bodies within a ministry. The compromise wording retains some of the EP's language on ensuring independence from external influence, in exchange for allowing the Member States to continue to establish equality bodies within a ministry. The compromise strikes a balance between the need to take measures to ensure that equality bodies are independent and the need to acknowledge that, as public bodies, they are subject to the applicable legal framework.

[1] Doc. 8910/23.
[2] Doc. 6296/23.

2. Resources (Article 4 and Recital 18)

The co-legislators broadly agreed that equality bodies should be provided with the resources necessary to perform their tasks, and that this should be ensured in accordance with their national budgetary processes. However, the EP wished for more binding rules on resources. A less prescriptive wording that respects national budgetary prerogatives was agreed.

3. "Alleged victim" or "persons who have experienced discrimination" (Article 6 and Recital 21)

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". A compromise wording based on a definition of "victim" for the purposes of this Directive was agreed. As a consequential change, the term "alleged victim" is replaced with "victim" throughout the text.

4. Alternative dispute resolution (Article 7 and Recital 23)

The EP would have preferred 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 affirmed the need for flexible wording, including a reference to "national law and practice". As a compromise, while retaining the flexibility required by the Council, the compromise text also explicitly states in the operative part that alternative dispute resolution can take different forms, such as mediation or conciliation, and that access to court should not be hampered for parties to such processes. The EP accepted a clarification in the last sentence of the article to the effect that Member States can use different means to ensure that the limitation period is sufficient--for example, suspending the existing limitation period while the parties engage in an alternative dispute process.

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5. Litigation (Article 9 and Recitals 28-34)

The EP would have preferred to provide for stronger powers of litigation for equality bodies by means of a binding list that, in addition to the powers already foreseen in the Commission proposal, would include the right to initiate court proceedings where an equality body 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, for its part, 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 and stipulated 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 compromise agreed retains the text of Article 9 precisely as set out in the General Approach in exchange for including gender-inclusive language in Article 6 and changes to Article 7 on alternative dispute resolutions.

6. The social partners (Article 2 and Recitals 15a, 20 and 23)

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 was reached, including a provision whereby the Directive "is without prejudice to the rights and prerogatives of the social partners according to national law and practice, including with regard to collective agreements, and representation and defence in court" (Article 2(2)).

7. Gender Mainstreaming (Article 5 and Recital 39)

The EP wished to underline the importance of gender mainstreaming, including by introducing a sweeping horizontal provision that is unacceptable to the Council. A much more focused compromise suggestion that respects the scope of the Directive and links gender mainstreaming to the activities of equality bodies was agreed.

8. Gender inclusive language: gender, gender identity, gender expression or sex characteristics (Article 6 and Recitals 5a and 32)

The EP had 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. However, from the Council's perspective, it was not possible to introduce this clause under provisions on the scope of the directive, in the light of the legal basis (Article 157 TFEU) which refers to "equal treatment of men and women." As a compromise, explanatory language was inserted in combination with the definition of "a victim" (in line with similar language used in Directive 2011/95/EU or Directive 2012/29/EU), as a well as a new Recital 5a that mirrors Recital 5 of the recent Pay Transparency Directive (Directive 2023/970/EU).

9. Intersectional discrimination (Article 5 and Recital 15)

The EP had included several references to multiple and intersectional discrimination in its mandate. The compromise links the possibility of paying attention to intersectional discrimination to the activities of the equality bodies, within the scope of Directives 79/7/EEC, 2000/43/EC, 2000/78/EC and 2004/113/EC. The wording is largely inspired by Article 3(2)(e) of the recent Pay Transparency Directive (Directive 2023/970/EU).

10. Procedural safeguards and equality of arms principle (Article 10 and Recital 33)

The Comission has defended the recital, contained in its original proposal, stating that the principle of *equality of arms* was to respected in the context of equality bodies' right to act in court and that equality bodies should 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 (Recital 32). This recital had been deleted by both the co-legislators. A compromise wording was found in Recital 33, including the statement that "Member States should frame the powers of equality bodies within appropriate procedural safeguards, ensuring that the right of confidentiality as well as general principles of law such as the right to a fair trial, the right to judicial review of binding decisions and the right of defence are appropriately protected."

11. Transposition period (Article 20)

The EP had wished to shorten the 18-month transposition deadline proposed by the Commission to 12 months, whereas the Council had lengthened it to 36 months. A transposition deadline of 24 months was agreed as part of a compromise package that also included dropping the EP proposal to establish indicators by means of a *delegated* act and introducing a non-binding provision on dialogue between the EP and the Commission on the functioning of equality bodies (see point 12 below).

12. Monitoring (Article 16) and Dialogue on the Functioning of Equality Bodies (Article 16a)

The EP wished to include, in Article 16(3), an index to be drawn up 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. As a compromise, the reference to the fact that the indicators shall not be for the purpose of ranking or of issuing recommendations was retained as desired by the Council, in exchange for language explicitly stating that the report to be drawn up by the Commission based on the indicators addresses the independent functioning and effectiveness of equality bodies. The indicator on "activities" was also removed in line with the Council's wishes.

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 16(2)). The Council's preferences (a first reporting deadline of 7 years and reports every 5 years thereafter) were retained in the compromise text.

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The EP would have strongly preferred to establish the list of indicators referred in Article 16(1) (Row 131) by means of a *delegated act*. The Council affirmed the need to adopt an *implementing act.* The Council argued in favour of drawing up the indicators in a collaborative process between the Commission and Member States, and an *implementing act* was duly chosen. In exchange for this, a new element was added to the compromise text, namely, a non-binding provision for a dialogue between the European Parliament and the Commission within the context of the monitoring and reporting exercise, whereby the Parliament "may invite" the Commission annually to discuss matters referred to in Article 16 concerning the functioning of equality bodies (Article 16a). The Parliament could then express its views and the Commission could take them into account, as appropriate, also when reviewing the operation of the Directive.

III. CONCLUSION

The Permanent Representatives Committee is thus invited to:

- agree on the compromise text provisionally agreed in the trilogues, as set out in the Addendum to this Note, and

- mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of TFEU, in the form set out in the text contained in the Addendum to this document (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of TFEU, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

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