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From:	General Secretariat of the Council
To:	Delegations
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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

In preparation of the meeting of the Working Party on Social Questions on 11 May, delegations will find attached a Presidency steering note, including three questions, prepared as a basis for the discussion that will take place in the Working Party.

Steering note

Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

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 legislation 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.

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.

Over the years, several Presidencies have focused on specific parts of the proposal in order to advance the negotiations. The Portuguese Presidency presented a comprehensive compromise package in 2021 in which they identified three overarching outstanding issues: subsidiarity, implementation costs and legal certainty. The Czech Presidency focused on the equal treatment of persons with disabilities, including the concept of “reasonable accommodation” and the need to ensure compatibility with the UNCRPD. To continue the work on this important legislative proposal, the Swedish Presidency will keep the focus on the three areas identified in the Portuguese drafting suggestions but giving specific attention to certain articles.

At the SQWP meeting scheduled for 11 May 2023, the Presidency intends to discuss Articles 2, 3 and 4a of the proposal, as contained in the latest version of the document (13070/22). The Presidency’s assessment of these articles is set out below, followed by steering questions addressed to delegations.

Article 2 - Concept of discrimination

The concept of discrimination under Article 2 (doc. 13070/22) includes direct discrimination, indirect discrimination, harassment, instruction to discriminate, and denial of reasonable accommodation for persons with disabilities that shall be considered to occur where there is a failure to comply with Article 4a. The definition of the principle of equal treatment included in the proposal is based on that contained in the previous directives adopted under former Article 13(1) EC (now Article 19(1) TFEU) as well as relevant case law of the Court of Justice of the European Union (CJEU). In assessing whether discrimination has occurred, certain criteria need to be fulfilled depending on the form of discrimination. For example, in the context of direct discrimination, a person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of a ground of discrimination (for example, religion or belief, disability, age, sexual orientation).

Article 2 also sets out situations where differences of treatment are justified or excluded from the scope. Thus, preferential treatment based on age or disability may be lawful if it is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Under Article 2 (7) (doc. 13070/22), differences in treatment on the grounds of age or of a health condition may be permitted in the area of insurance, banking and other financial services. The article also explains that the Directive does not limit the competence of Member States, for example, as regards the protection of the fundamental rights and freedoms of others, and measures necessary for the maintenance of public security and of public order. Differences of treatment in relation to certain areas and discrimination grounds are also excluded from the scope under Article 3.

Do delegations see a need to further clarify the concept of discrimination in this Directive? If yes, which specific clarifications are needed?

Article 3 - Scope

The scope of the proposed Directive (in the version of doc. 13070/22) includes access to social protection, access to education and access to and supply of goods and services. These areas are covered only to the extent that the subject matter falls within the competences of EU. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are left to the discretion of the Member States. The Directive therefore does not require any Member State to amend its present laws and practices in relation to these issues. In terms of access to and supply of goods and services, only professional or commercial activities are covered. Moreover, the Directive does not limit the exclusive competence of Member States regarding national measures authorising or prohibiting the wearing of religious symbols. It is also without prejudice to the exclusive competence of Member States regarding matters concerning churches and other organisations based on religion or belief. The scope is the same as contained in Council Directive 2000/43/EC and does therefore not introduce new areas for

EU legislation on equal treatment. The limits of the scope are determined by the competences conferred upon the Union, and the Directive fully respects the principle of subsidiarity and national constitutions and legal traditions.

Do delegations see a need to further clarify the scope of this Directive? If yes, which specific clarifications are needed?

Article 4a - Reasonable accommodation for persons with disabilities

The denial of reasonable accommodation for persons with disabilities is a form of discrimination under the UNCRPD. The obligation to provide reasonable accommodation for persons with disabilities is also laid down in Council Directive 2000/78/EC. According to Article 4a of the proposed Directive as currently drafted (doc. 13070/22), reasonable accommodation should not give rise to any disproportionate or undue burden (Article 4a (2) of doc.13070/22). In assessing whether reasonable accommodation would impose a disproportionate burden, account shall be taken to a number of factors such as the estimated cost, and the size and resources of duty bearer (Article 4a(5) of doc. 13070/22). Furthermore, reasonable accommodation should not entail structural alterations to housing (Article 4a (3) of doc. 13070/22). Under Article 4a (4) of doc. 13070/22, the provisions of Article 4 are without prejudice to Union law covering accessibility or reasonable accommodation in respect of particular goods or services. In other words, the concept of reasonable accommodation for persons with disabilities includes safeguards as well as clear guidelines as to what should be considered when assessing a disproportionate burden. These clarifications limit the costs and burden that can be imposed on the duty bearer.

Do delegations have further considerations as regards the provisions concerning reasonable accommodation as contained in doc. 13070/22?