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## **REPORT**

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From:	Presidency
To:	Permanent Representatives Committee / Council
No. prev. doc.:	9108/21
No. Cion doc.:	11531/08 - 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

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### **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 legislation<sup>1</sup> 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

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<sup>1</sup> 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 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.

Two delegations have maintained general reservations on the proposal as such.

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

CZ and DK have maintained parliamentary scrutiny reservations. While supporting the search for a compromise, 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 2009<sup>2</sup> 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.

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<sup>2</sup> See doc. A6-0149/2009. Alice Kuhnke (SE/ Greens/European Free Alliance) has been appointed Rapporteur by the current Parliament.

## II. THE COUNCIL'S WORK UNDER THE PORTUGUESE PRESIDENCY

The Portuguese Presidency presented a comprehensive compromise proposal which was examined by the Working Party on Social Questions on 28 May. The Presidency drafting suggestions<sup>3</sup> focused on three main outstanding issues, namely: 1) *subsidiarity concerns*; 2) *the cost arising from the implementation of the disability provisions*; and 3) *legal certainty*.

The delegations gave their *preliminary reactions*, pending further examination of the new text. A large majority of delegations welcomed the Presidency's drafting suggestions and supported the renewed attempt to break the longstanding deadlock by addressing the three key issues. One delegation stated that the Presidency's text did not successfully address concerns related to subsidiarity, the scope of the Directive and the cost implications. A number of delegations, while declaring their willingness to work towards a compromise, warned against any undue reduction in the level of ambition in the Directive. The Commission representative also warned against such dilution of the text but nevertheless saw great merit in the Presidency's drafting suggestions as a basis for further discussion.

### a) Subsidiarity concerns (Articles 2(8), 3, 4a(2), and 7(1); and Recitals 11, 16, 17b, 17f and 17ga)

In its drafting suggestions, the Presidency has sought to clarify the wording of the Directive so as to make it completely clear that it respects national competences and does not interfere with the design or content of, in particular, national social protection systems, family law and education systems. The Commission representative stressed that the proposed Directive concerned equal treatment, particularly in terms of access, and could not regulate matters falling under national competence.

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<sup>3</sup> Doc. 8549/21.

The Working Party broadly welcomed the suggested changes to the text. However, one delegation expressed the view that the new wording failed to ensure respect of the subsidiarity principle, including especially in the area of family and private life. Others underlined the importance of finding the right balance between subsidiarity and a need to ensure meaningful protection against discrimination through EU law. Certain delegations also saw a need for further clarification of the interplay between the prohibition of discrimination and rights such as press freedom.

**b) Implementation costs (Articles 4, Articles 4a and 4b, and Article 15)**

In its drafting suggestions, the Presidency has streamlined the main disability provisions by grouping them under “reasonable accommodation” and removing the separate article on “accessibility,” while specifying that the provisions are without prejudice to Union law on accessibility or reasonable accommodation in respect of particular goods or services. Although reasonable accommodation remains a clear obligation as part of the equal treatment principle, it must not cause a disproportionate burden according to the text. In addition, the Presidency has suggested giving the Member States the right, in exceptional circumstances, to address a reasoned request to the European Commission for a temporary exemption from the requirement to provide reasonable accommodation. This suggestion seeks to respond to longstanding concerns expressed by delegations regarding the cost of ensuring the accessibility of housing and infrastructure and the time required for making necessary alterations.

While the Working Party broadly welcomed the Presidency’s attempt to find a way forward, some delegations strongly affirmed the need to maintain ambitious disability provisions in the text. Some questioned the deletion of the accessibility provisions from the operational part of the text, as well as the compatibility of the suggested temporary exemption with the UNCRPD, under which reasonable accommodation must *always* be provided unless it gives rise to a disproportionate burden. Delegations therefore saw a need for extensive further reflection on any possible temporary exemption mechanism, including its rationale, the specific modalities that would apply, and the criteria that would need to be met when requesting a temporary exemption..

(c) **Legal certainty (Article 1, Article 2(2, 7 and 7a), Article 4a(4 and 5) and Article 12(3); and Recitals 19ca, 19cb, 19cc, 19d and 20-aa)**

In its drafting suggestions, the Presidency sought to improve legal certainty by clarifying certain concepts or removing them from the text. For example, the concept of multiple discrimination has been clarified by introducing new wording which describes and specifies the possible combination of grounds under the concept, and thereby, more tightly reflects the specific scope of the Directive under discussion. The references to “discrimination by association”, already covered by the CJEU’s case law, and “discrimination by assumption” have been removed.

While the Working Party welcomed the search for improved legal clarity, some delegations questioned the deletion of discrimination by association and discrimination by assumption from the text. It was suggested that other solutions be explored, including a possible reference to relevant EU case law in the recitals.

(d) **Other issues**

A number of other issues will also require further discussion. These include the delineation of the scope (including subsidiarity in the context of social protection); provisions regarding possible objectively justified differences of treatment on the grounds of age or a health condition; and the terminology to be used in the context of positive action, including “preferential” vs. “differential” treatment and the term “protected groups”.

### III. CONCLUSION

Tangible progress has been made under the Portuguese Presidency on the issues discussed. While the Presidency’s draft suggestions were broadly welcomed by most delegations, further technical work and political discussion will be needed before the required unanimity can be reached in the Council.