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NOTE

from : The Presidency
to : The Working Party on Social Questions
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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

Delegations will find attached a set of Presidency drafting suggestions concerning the above proposal, as follows:

Annex I: drafting suggestions for certain recitals and for Articles 1-3, 5 and 14a (new).

Annex II: a table explaining the changes introduced in the recitals.

Changes in relation to the previous version (doc. 16594/08 ADD 1) are indicated as follows: additions are in **bold** and deletions are marked [...].

Elements not included in the current drafting suggestions will be addressed at a later date as appropriate (see Recitals 1-8, 10, 12-14, 17a and 19-31 and Articles 6-18 in doc. 16594/08 ADD 1, and recitals 19a-19d and Article 4 in doc. 10072/09).

Delegations' positions are set out in docs. 16594/08 + ADD 1 and doc. 10072/09 + COR 1.

Proposal for a

COUNCIL DIRECTIVE

on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

- (9) Therefore, legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including social protection, education and access to and supply of goods and services, including housing. **Services should be taken to be those within the meaning of Article 50 of the EC Treaty. Legislation should also** provide for measures to ensure the equal access of persons with disabilities to the areas covered.

...

- (11) [...]

...

- (12a) (new) **In its judgment of 17 July 2008 in Case C-303/06¹, the Court of Justice has held that the prohibition of direct discrimination and of harassment on the grounds of disability laid down by Directive 2000/78/EC is not limited only to people who are themselves disabled. The Court ruled that such prohibition of discrimination also protects an employee who is not disabled but who is treated less favourably than another employee, or who suffers harassment, on the basis of the disability of their child, whose care is provided primarily by that employee. For reasons of clarity, it is therefore**

¹ Case C-303/06, Coleman v. Attridge, judgment of 17 July 2008, nyr.

appropriate to provide explicitly for protection from discrimination by association on all grounds covered by this Directive. Such discrimination occurs, inter alia, when a person is treated less favourably, or harassed, because, in the view of the discriminator, he or she is associated with persons of a particular religion or belief, disability, age or sexual orientation, for instance through his or her family, friendships, employment or occupation.

...

(14a) Differences in treatment in connection with age and disability may be permitted under certain circumstances if they are objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, for example, special age conditions regarding access to certain goods or services such as alcoholic drinks, arms, or driving licences. [...]

(15) Actuarial and risk factors related to disability and to age are used in the provision of insurance, banking and other financial services. These should not be regarded as constituting discrimination where **service providers have shown, by actuarial principles, statistical data or medical knowledge, that** such factors are [...] determining factors for the assessment of risk. **These data should be accurate, recent and relevant. The actuarial and risk factors should also reflect positive changes in life expectancy and active ageing as well as increased mobility and accessibility for people with disabilities.**

(16) [...]

(17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context, the freedom of religion, and the freedom of association. [...]

...

(17b) [...]

(17b) (new) The objective of this Directive is to provide comprehensive protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation. This Directive covers access to social protection, which includes both social security and social assistance, as well as health care. Consequently, the Directive applies with regard to access to rights and benefits which are derived from general or special social security and social assistance schemes, which are provided either directly by the State, or by private parties in so far as the provision of those benefits by the latter is funded by the State. In this context, the Directive applies with regard to financial payments and benefits in kind, irrespective of whether the schemes involved are contributory or non-contributory. The abovementioned schemes include, for example, access to the branches of social security defined by Regulation 883/2004/EC on the coordination of social security systems:² sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits. They include also schemes providing for benefits granted for reasons related to the lack of financial resources or risk of social exclusion.

(17c) (new) In the context of the free movement of workers, the Court of Justice has defined the concept of “social advantages” as covering all rights or benefits which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of the latter workers within the Community. This Directive does not cover rights and benefits derived from a contract of employment, such as remuneration, which are covered by Directive 2000/78/EC. However, access to social protection as such is covered by the present Directive. In this context, for the purposes of this Directive, in accordance with its objective of providing a comprehensive protection from discrimination, the concept of social advantages covers any rights or benefits which can facilitate the social integration of a person, other than those derived from a contract of employment or from a social protection scheme.

² OJ L 166, 30.4.2004, p. 1.

- (17d) (new)** All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. This Directive should not apply to economic transactions undertaken by individuals for whom these transactions do not constitute a professional or commercial activity. In this context, the concept of professional or commercial activity may be defined in accordance with the national laws and practice of the Member States.
- (17e) (new)** **This directive does not alter the division of competences between the European Community and the Member States** in the areas of education and social protection, including social security and health care. It is also without prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.
- (17f) (new)** **Member States retain their exclusive competences in the organisation of national social security and health care schemes. This includes decisions on the setting up and management of such schemes and institutions as well as on the eligibility for and the extent of benefits. In particular Member States retain the possibility to reserve certain schemes or benefits to certain age groups or persons with disabilities.**
- (17g) (new)** **Member States retain their exclusive competences in the content of teaching or activities and the organisation of national educational systems, including the provision of special needs education. This includes the setting up and management of educational institutions, the development of curricula and other educational activities and the definition of examination processes. In particular Member States retain the possibility to set age limits for certain education activities. However, access to educational activities, including the admission to and participation in classes or programmes and the evaluation of students' performance, may not be discriminatory.**
- (17h) (new)** This Directive does not apply to matters covered by family law including marital status **and adoption**, and laws on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education. Moreover, this Directive is without prejudice to the powers of the Member States to organise their social security and health care schemes in such a way as to guarantee their sustainability.

(18) [...]

Article 1

Purpose

This Directive lays 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 [...] **within the scope of Article 3.**

[...]

Article 2

Concept of discrimination

1. For the purposes of this Directive, **the “principle of equal treatment” shall mean that** there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1, the following definitions apply:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. **This is without prejudice to the respect of fundamental human rights, in particular to the right to freedom of expression.** In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
- 3a. Discrimination includes direct discrimination or harassment due to a person's association with persons of a certain religion or belief, persons with disabilities, persons of a certain age or of a certain sexual orientation.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. Denial of reasonable accommodation in a particular case as provided for by Article 4 (1)(a) of the present Directive as regards persons with disabilities shall be deemed to be discrimination within the meaning of paragraph 1.
6. [...] **Notwithstanding paragraph 2, Member States may provide that** differences of treatment on grounds of age and disability **shall not constitute discrimination, if, within the context of national law,** they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include the fixing of a specific age for access to social protection, including social security and healthcare; social advantages; education; and certain goods or services which are available to the public.

[...]

7. Notwithstanding paragraph 2, in the provision of financial services **Member States may permit** proportionate differences in treatment where, for the product in question, the use of age or disability is a determining factor in the assessment of risk based on relevant actuarial principles, accurate statistical data or medical knowledge [...].
8. This Directive shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others.

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 access to:
 - (a) Social protection, including social security and healthcare;
 - (b) Social advantages;
 - (c) Education;
 - (d) and the supply of, goods and other services which are available to the public, including housing.

Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity defined in accordance with national laws and practice.

2.³ **This Directive does not alter the division of competences between the European Community and the Member States. In particular it does not apply to:**

- matters covered by family law, including marital status **and adoption**, and laws on reproductive rights;
- **the organisation of national social security schemes;**
- **the organisation and delivery of national health care systems and, in particular, the powers of Member States to determine the conditions for access to and the type of health services provided;**
- the content of teaching or activities and the organisation of national educational systems, including the provision of special needs education.

3. **Member States may provide that differences of treatment** based on religion or belief in respect of access to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice, **shall not constitute discrimination. [In such cases, there shall, however, be no discrimination in access to educational institutions on any other ground.]**

3a. This Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols.

4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women.

5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

...

³ Article 3(2-3) in doc. 16594/08 ADD 1 has been reorganised.

Article 5
Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

2. **(new) The principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt more favourable provisions for persons of a certain age or for persons with disabilities as regards conditions for access to social protection, including social security and healthcare; social advantages; education; and certain goods or services which are available to the public, in order to promote their economic, cultural or social integration.**

...

Article 14a (new)
Gender mainstreaming

In accordance with Article 3(2) of the EC Treaty, Member States shall when implementing this Directive actively take into account the objective of equality between men and women.

doc 16594/08 ADD 1	Swedish Presidency proposal
Recital 9	Recital 9 + amendment
Recital 11	Recital 17e + amendment
	Recital 12a (new)
Recital 14a	Recital 14a + amendment
Recital 15	Recital 15 + amendment
Recital 16	Recital 17d
Recital 17	Recital 17 + amendment
Recital 17b	Recital 17h + amendment
	Recital 17b (new)
	Recital 17c (new)
	Recital 17f (new)
Recital 18	Recital 17g + amendment