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REPORT

from : The Presidency
to : Permanent Representatives Committee (Part I) / Council (EPSCO)

No. prev. doc. : 9807/09 SOC 323 JAI 291 MI 200
No. Cion prop. : 11531/08 SOC 411 JAI 368 MI 246

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

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 legislation¹ in this area, the proposed Directive would prohibit discrimination on the above-mentioned grounds in the following areas: social protection, including social security and healthcare; social advantages; education; and access to goods and services, including housing.

¹ In particular, Council Directives 2000/43/EC, 2000/78/EC and 2004/113/EC.

At the time, a large majority of delegations 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 social 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 Disabilities². However, some delegations would have preferred more ambitious provisions in regard to disability instead of the horizontal approach.

While emphasising the importance of the fight against discrimination, certain delegations have put forward the view that more experience with the implementation of existing Community law is needed before further legislation is adopted at the Community level. These delegations have questioned the timeliness and the need for the Commission's new proposal, which they see as infringing on national competence for certain issues.

Certain other delegations have also requested clarifications and expressed concerns relating, in particular, to the need to respect the principles of proportionality and subsidiarity, the division of competences, and the practical, financial and legal impact of the proposal.

For the time being, all delegations have maintained general scrutiny reservations on the proposal. CZ, DK, FR, MT and UK have maintained parliamentary scrutiny reservations, CY and PL maintaining linguistic scrutiny reservations. The Commission has meanwhile affirmed its original proposal at this stage and has maintained scrutiny reservations on any changes thereto.

The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009³.

² See docs. 12892/2/08 REV 2, 12892/08 ADD 1 REV 1 and 8321/09.

³ See doc. A6-0149/2009. Kathalijne Maria Buitenweg (Group of the Greens / European Free Alliance) served as Rapporteur.

II. THE COUNCIL'S WORK UNDER THE CZECH PRESIDENCY ON THE SPECIFIC PROVISIONS ON DISABILITY (ARTICLE 4)

1. The Presidency's approach

The EPSCO Council having been informed of the progress achieved under the French Presidency on 17 December 2008⁴, the Working Party on Social Questions has continued its examination of the proposal under the Czech Presidency on the basis of Presidency drafting suggestions⁵ concerning *the specific provisions on disability*. These drafting suggestions aimed, in particular:

- to further align the provisions with the text of *the UN Convention* on the Rights of Persons with Disabilities;
- to clarify the *key concepts* defining the equal treatment of persons with disabilities, including the *general obligation* to ensure that persons with disabilities have "access on an equal basis with others" within the areas covered in the Directive's scope (instead of "effective and non-discriminatory access", as proposed by the Commission) and the more *specific obligation* to provide "reasonable accommodation" where needed in a particular case;
- to acknowledge the time that it would take to implement the more far-reaching elements of the Directive by stipulating that the provisions requiring adaptation of existing buildings or infrastructures would be subject to *progressive implementation*;
- to ensure that the Directive does not create a new and disproportionate burden on *businesses and small and medium-sized enterprises*; and

⁴ See doc. 16769/1/08 REV 1.

⁵ Docs. 8999/1/09 REV 1 and 9807/09.

- to improve the *legal certainty* of the provisions and the internal consistency of the draft Directive, including with respect to its scope.

Delegations have taken a broadly favourable view of the Czech Presidency's approach as a step in the right direction, particularly welcoming the attempt to clarify the text, to provide for the gradual implementation of certain provisions and to align the draft Directive more closely with the UN Convention. However, extensive further discussion is nevertheless needed on the provisions on disability as well as on other aspects of the proposal which have not been discussed during the Czech Presidency.

2. **Outstanding issues**

Further work is needed, in particular, on the following issues:

- *the scope* of the provisions, including in respect of infrastructures, buildings, transport and the design and manufacture of goods;
- *the financial and practical implications* of the provisions;
- ensuring *legal certainty*, especially in regard to the concrete obligations created by the Directive, including with respect to terms such as "on an equal basis with others" and "reasonable accommodation"⁶;
- the interrelationship between the draft Directive and *more detailed sectoral standards or specifications* on the accessibility of particular goods, including public transport;
- the *implementation calendar*, particularly in respect of provisions requiring *modifications to existing infrastructures and buildings*; and

⁶ See also Sections 4 (Legal Certainty in the Directive as a Whole) and 5 (Legitimate Differences of Treatment) below.

- the possible need for further alignment *with the UN Convention, taking into account the need for legal clarity.*

III. OUTSTANDING ISSUES NOT DISCUSSED UNDER THE CZECH PRESIDENCY

1. Division of Competence, Legal Basis and Subsidiarity (Article 3)

Further discussion is needed with a view to demarcating the *division of competences* between the Member States and the European Community as precisely as possible⁷. More work is also needed to elucidate the delicate distinction between *access* to fields such as education, healthcare and social protection, and *the organisation* of such fields, the latter being an area of national competence. Other issues that require additional examination include *the cross-border dimension* that underlies the Community competences in the fields listed in the scope, the provisions related to *family law* (Article 3(2)), and the need to find a balance between anti-discrimination and *the rights of individuals in the private sphere* (e.g. Article 3(1)).

2. Legitimate Differences of Treatment

The current draft text provides for certain *differences of treatment* that should not be seen as discrimination (for example, cheaper public transport offered to children, disabled persons or pensioners), and contains specific provisions concerning the assessment of risk by the providers of financial services, including insurance. However, further discussion is needed, particularly on the key notion of *objective and reasonable justification*, so as to distinguish clearly between differences of treatment which would not be permitted and those which are justified.

⁷ See also the Opinion of the Council Legal Service, which broadly endorses the legal basis chosen by the Commission and confirms the Council's discretion in deciding what action is needed in the context of legislation proposed under Article 13 of the EC Treaty (doc. 14896/08).

3. Legal Certainty in the Directive as a Whole

In underlining the importance of legal certainty, delegations have expressed the wish to avoid further cases having to be brought before the European Court of Justice (ECJ). They have consequently stressed the need for the clearest possible wording throughout, including in the *definitions* of key terms, and have underlined the importance of ensuring *consistency with existing legislation*.

4. Other Issues

A large number of more specific questions will also require further discussion. These include the following:

- the potential *financial and administrative burden* imposed by the provisions, particularly regarding *SMEs and the self-employed*;
- the concept of *discrimination by association*;
- the issue of *gender mainstreaming* and the question of *multiple discrimination*;
- national legislation ensuring the *secular nature of the state* and measures concerning the wearing of religious symbols in schools; and
- the *implementation date* for the non-disability provisions.

Further details of delegations' positions may be found in docs. 16594/08 + ADD 1, 9596/09 and 10072/09⁸.

⁸ To be distributed in due course.

IV. CONCLUSION

While tangible progress has been made under the Czech Presidency in the attempt to clarify the provisions on disability, there is a clear need for extensive further work on the proposal.
