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NOTE

from : The Presidency
to : The Working Party on Social Questions
on : 22 September 2009

No. prev. doc. : 13049/09 SOC 504 JAI 564 MI 326
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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.

Changes are indicated as follows: additions are in **bold** and deletions are marked [...].

As regards Recitals 9, 11, 12a, 12b, 14a, 15, 16, 17, 17b, 17c, 17d, 17e, 17f, 17g, 17h and 18, and Articles 1-3, 5 and 14a, changes are indicated in relation to doc. 12792/09.

As regards Recital 28 and Articles 6-18, changes are indicated in relation to doc. 16594/08 ADD 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.

...

(11) Deleted.

...

(12a) (new) In accordance with the judgment of the Court of Justice in Case C-303/06¹, it is 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. **Moreover, discrimination within the meaning of this Directive also includes direct discrimination or harassment based on assumptions about a person's religion or belief, disability, age or sexual orientation.**

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

(12b)(new) Harassment is contrary to the principle of equal treatment, since victims of harassment cannot enjoy access to social protection, education and goods and services on an equal basis with others. Harassment can take different forms, including unwanted verbal, physical, or other non-verbal conduct. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise so serious in nature that it has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the mere expression of a personal opinion or the display of religious symbols or messages are presumed as not constituting harassment².

...

(14a) Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively [...] 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 relevant actuarial principles, accurate statistical data or medical knowledge, that such factors are determining factors for the assessment of risk.

(16) Deleted.

(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, the freedom of association, the freedom of expression and the freedom of the press. [...]

² Wording taken from Recital 17 (see doc. 12792/09, p. 3).

(17b) (new) This Directive covers access to social protection, which includes social security, [...] social assistance, [...] **and** health care, thereby providing comprehensive protection against discrimination in this field. Consequently, the Directive applies with regard to access to rights and benefits which are derived from general or special social security, social assistance and healthcare 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 [...] benefits **in cash**, benefits in kind and services, 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 systems³, as well as schemes providing for benefits **or services** granted for reasons related to the lack of financial resources or risk of social exclusion.

(17c) (new) [...]

(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, **social assistance** 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.

³ OJ L 166, 30.4.2004, p. 1.

(17f) (new) The exclusive competence of Member States with regard to the organisation of their social protection systems includes decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and health services and the conditions of eligibility. In particular Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities. Moreover, this Directive is without prejudice to the powers of the Member States to organise their social protection systems in such a way as to guarantee their sustainability.

(17g) (new) The exclusive competence of Member States with regard to the content of teaching or activities and the organisation of national educational systems, including the provision of special needs education, 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, there may be no discrimination in the access to educational activities, including the admission to and participation in classes or programmes and the evaluation of students' performance.

(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.

(18) Deleted.

...

(28) [...]

...

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. 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 [...] **given** age or of a certain sexual orientation; **or based on assumptions about a person's religion or belief, disability, age or 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, differences of treatment on grounds of age shall not constitute discrimination, if they are objectively [...] justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In this context Member States may specify aims which can be considered to be legitimate.

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

- 6a. (new) Notwithstanding paragraph 2, differences of treatment of persons with a disability shall not constitute discrimination, if they are aimed at protecting their health and safety and if the means of achieving that aim are appropriate and necessary.
7. Notwithstanding paragraph 2, in the provision of financial services, proportionate differences in treatment where, for the [...] **service** 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 shall not be considered discrimination for the purposes of this Directive.

8. This Directive shall be without prejudice to 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, **social assistance** and healthcare;
 - (b) [...]
 - (c) Education;
 - (d) and the supply of, goods and other services which are available to the public, including housing.

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

2. This Directive does not alter the division of competences between the European Community and the Member States. In particular it does not apply to:
 - (a) matters covered by family law, including marital status and adoption, and laws on reproductive rights;
 - (b) the organisation of Member States' social protection systems, including decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and services and the conditions of eligibility;

- (c) the powers of Member States to determine the type of health services provided and the conditions of eligibility; and
 - (d) the content of teaching or activities and the organisation of Member States' 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 [...] **admission** 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.
- 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.
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.

...

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) **In particular**, 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 given age or for persons with disabilities as regards conditions for access to social protection, including social security, **social assistance** and healthcare; [...] education; and certain goods or services which are available to the public, in order to promote their economic, cultural or social integration.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, **in accordance with the criteria laid down by their national law**, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 shall be without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the prohibition of discrimination.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Member States need not apply paragraph 1 to proceedings in which the court or **other** competent body investigates the facts of the case.
5. Paragraphs 1, 2, 3 and 4 shall also apply to any legal proceedings commenced in accordance with Article 7(2).

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment

Article 10
Dissemination of information

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

Article 11
Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, [...] which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

Article 12
Bodies for the Promotion of Equal treatment

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights [...].
2. Member States shall ensure that the competences of these bodies include:
 - without prejudice to the right of victims and of associations, organizations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
 - conducting independent surveys concerning discrimination,
 - publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER III FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected **within the scope of this Directive** and in particular that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Article 14

Sanctions

Member States shall lay down the rules on sanctions applicable to [...] **infringements** of [...] national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Sanctions may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.

Article 14a (new)

Gender mainstreaming

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

Article 15
Implementation

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by at the latest [...] **XXX** years after adoption]. They shall forthwith inform the Commission thereof and shall communicate to the Commission the text of those provisions. [...]

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. In order to take account of particular conditions, Member States may, if necessary, establish that the obligation to provide effective access as set out in Article 4 has to be complied with by ... [at the latest] [...] **XXX** [years after adoption].

Member States wishing to use this additional period shall inform the Commission at the latest by the date set down in paragraph 1 giving reasons.

Article 16
Report

1. Member States [...] shall communicate to the Commission, by at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the viewpoints of **national equality bodies** [...] and relevant [...] **stakeholders**, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 17
Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

Article 18
Addressees

This Directive is addressed to the Member States.
