



**COUNCIL OF
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REPORT

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

No. prev. doc. : 9312/10 SOC 314 JAI 387 MI 128
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 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 maintained general reservations, questioning the need for the Commission's proposal, which they see as infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality.

Certain other 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.

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 a scrutiny reservation on any changes thereto.

The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009². 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, followed by the *consent* of the European Parliament.

II. THE COUNCIL'S WORK UNDER THE SPANISH PRESIDENCY

The EPSCO Council having been informed of the progress achieved under the Swedish Presidency on 30 November 2009³, the Working Party on Social Questions has continued its examination of the proposal under the Spanish Presidency on the basis of a series of Presidency drafting suggestions concerning, in particular, *the scope* of the Directive, *the division of competences* between the European Union and the Member States, and *the disability provisions*⁴. These drafting suggestions aimed, *inter alia*:

- to adjust the text in line with the *Treaty on the Functioning of the European Union*, and thereby also to clarify the relation between the protection of the right to equal treatment and the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union;

² See doc. A6-0149/2009. Kathalijne Maria Buitenweg (Group of the Greens / European Free Alliance) served as Rapporteur. The new EP Rapporteur is Raúl Romeva I Rueda (ES, Group of the Greens / European Free Alliance).

³ See doc. 15575/09.

⁴ Docs. 5188/10, 6092/10, 7349/1/10 REV 1, 8173/10, 8872/10 and 8889/10. The Working Party has discussed the proposal at five meetings: 22 January, 10 March, 18 March, 22 April and 3 May 2010.

- to better define the concept of *discrimination*, including *discrimination or harassment by association* (Article 2) as well as *discrimination based on assumptions* within the concept of direct discrimination (Recital 12);
- to clarify *the scope* by adjusting Article 3 and the corresponding recitals, including with respect to *the division of competences* between the European Union and the Member States in areas such as *social protection (including social housing)* and *education*;
- to spell out the *disability provisions* more precisely, including by clarifying the distinction between the general requirement to ensure "accessibility" in the areas covered by the Directive to persons with disabilities and the more specific requirement to provide "reasonable accommodation" to ensure "access" in particular cases, by introducing requirements for progressive implementation in respect of accessible housing, and by fine-tuning the criteria for determining whether measures constitute "a disproportionate burden";
- to clarify further the provisions regarding *legitimate differences of treatment*, including on the grounds of age and disability, especially in the provision of *financial services*; and
- to further adjust *the tentative implementation calendar* by providing for separate implementation deadlines for ensuring accessibility in respect of new buildings, facilities, vehicles and infrastructure, as well as existing buildings, vehicles, facilities and infrastructure undergoing significant renovation (5 years), and for all other existing buildings, facilities and infrastructure (20 years), and by providing for more detailed reporting on the gradual implementation of the disability provisions with respect to housing.

Most delegations have broadly welcomed the Presidency's suggestions and the general approach taken. However, the discussions have also shown that extensive further work is still needed on many aspects of the proposal.

III. OUTSTANDING ISSUES

1. Division of Competences, Scope and Subsidiarity (Article 3)

Further discussion is needed on *the scope*, including with a view to establishing the intended reach of *the disability provisions* (see below) and to demarcating the *division of competences* between the Member States and the European Union even more precisely than hitherto in the light of the legal basis⁵. In particular, more work is 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.

2. The Disability Provisions (Articles 4, 4a and 4b)

Further discussion will be needed on the following issues:

- *the scope* of the provisions and *the concrete obligations* to be created, including with respect to public space; new and existing buildings, facilities, vehicles and infrastructure; different types of building and housing and the measures appropriate to different parts thereof; transport; and the design and manufacture of goods, in particular in relation to the application of the principle of equal treatment to persons with disabilities;

⁵ See also the Opinion of the Council Legal Service (doc. 14896/08).

- the criteria for assessing what constitutes *a disproportionate burden*, including: the life span of infrastructures, objects and services, safety issues, and the balance between the cost and the positive impact of measures;
- *the financial, administrative and practical implications* of the provisions and their scope, particularly regarding *SMEs and the self-employed*; and
- the exact interrelationship between the draft Directive and *more detailed sectoral standards or specifications* on the accessibility of particular goods and services, including public transport.

3. **The Implementation Calendar**

Delegations have broadly welcomed the increasingly nuanced approach to the implementation calendar, but have also called for clarification concerning the obligations to be created by the Directive before any dates are agreed.

4. **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 and have underlined the importance of ensuring *consistency with existing legislation*.

5. **Other Issues**

A large number of other questions will also require further discussion, including the following⁶:

⁶ Further information and details of delegations' positions may be found in docs. 5790/10 + COR 1, 6847/10, 7758/10, 8887/1/10 REV 1, 9312/10.

- the concepts of *harassment, instruction to discriminate, discrimination by association* and *discrimination based on assumptions*;
- legitimate differences of treatment *on the grounds of age* (especially in respect of minors), and *on the grounds of disability as well as age* in the provision of *financial services* (including banking and insurance); and
- the need to find the right balance between *protection against discrimination* and *rights in the private sphere* (including freedom of speech and religion).

IV. CONCLUSION

While significant progress has been made under the Spanish Presidency in the attempt to clarify *the scope, the division of competences* and *the disability provisions*, there is a clear need for extensive further work on the proposal. The Committee is invited to take note of this Report and to forward it to the EPSCO Council on 7 June 2010.