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**COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN
ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE
REGIONS**

**The application of Directive 2000/78/EC of 27 November 2000 establishing a general
framework for equal treatment in employment and occupation**

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1. INTRODUCTION

On 27 November 2000, the Council adopted Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation¹. This Directive was adopted under Article 13 of the EC Treaty, which gave the Council competence to take action to combat discrimination on grounds of sex, racial and ethnic origin, religion and belief, disability, age and sexual orientation.

Directive 2000/78/EC had to be transposed into national law by 2 December 2003 in EU-15, by 1 May 2004 in EU-10 and by 1 January 2007 in Bulgaria and Romania², with the possibility of up to three additional years to transpose age and disability provisions. The Commission is currently examining all national transposition measures to ensure that the Directive is correctly implemented. Where the Commission considers that this is not the case, it will use its legal powers to bring the national legislation into line with the Directive.

In accordance with Article 19 of the Directive, Member States had to communicate to the Commission the information necessary for this report. The Commission consulted social partners as well as civil society organisations. The Commission has also taken into account the positions taken by the European Parliament³.

The aim of this report is not to give a detailed account of transposition of all the provisions of the Directive in Member States, but rather to describe certain aspects that seem to the Commission particularly problematic or important. The annexed table on the transposition of the Directive aims to provide a snapshot of the current state of play in implementing the Directive⁴.

2. THE IMPACT OF DIRECTIVE 2000/78/EC

Directive 2000/78/EC is innovative in many ways. It prohibits discrimination on the new grounds of religion, sexual orientation, age and disability. Regarding discrimination on grounds of disability, a ‘reasonable accommodation’ obligation is introduced concerning

¹ OJ L 303, 2.12.2000, p. 16.

² As legal analysis of the legislation in Bulgaria and Romania is ongoing, this report does not take into account the situation in these two countries.

³ As expressed in particular in [European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU \(the transposition of Directives 2000/43/EC and 2000/78/EC\) \(2007/2202\(INI\)\)](#)

⁴ References to the situation in Member States are purely factual (based on the situation as at 15 December 2007) and are not meant to express a definitive analysis by the European Commission on the compatibility of the legislation with the Directive

disabled persons. Although some of the basic concepts already existed under national law when Member States transposed the Directive, transposition relating to some grounds, such as age and sexual orientation, proved delicate. Mentioned below are some of the specific issues which arose in transposing the Directive with regard to the four grounds of discrimination which it tackles: sexual orientation, religion or belief, age and disability.

Sexual Orientation

The prohibition of discrimination on the ground of sexual orientation was new for nearly all Member States, which had to provide legal protection in this area for the first time. Discrimination based on sexual orientation is now prohibited in all Member States. In most of Member States, there are few or no examples of cases of discrimination on grounds of sexual orientation being brought before the courts. The fact that this is a new legal area in most Member States can explain this situation. This can be explained as well by the reluctance of complainants to make their sexual orientation public, in a context where discrimination based on sexual orientation is still considered by many Europeans to be widespread and a taboo issue in their society⁵.

At European level, a case has recently been decided by the European Court of Justice for a preliminary ruling on whether a partner in a same-sex registered partnership must be treated in the same way as a spouse in a heterosexual marriage with regard to the right to a survivor's pension under an occupational pension scheme⁶. Since the *Barber* case⁷, occupational pensions should be considered as 'pay' within the meaning of Article 141 of the EC Treaty and therefore fall under Community non-discrimination law (in the present case, Directive 2000/78/EC). While questions of marital status and registered partnerships remain a matter for national law, the Court ruled in the *Maruko* case⁸ that Directive 2000/78 precludes legislation under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. The Court added that it is for the national referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme at stake in the case.

Religion or belief

The prohibition of discrimination on grounds of religion or belief has been transposed in all Member States. However, a majority of Member States do not define the terms in their legislation. The delimitation of 'religion' and 'belief' may in some cases prove problematic, in particular where it can be linked to ethnicity, either because a religious group is considered

⁵ According to the *Eurobarometer Report on Discrimination* (January 2007), around half of Europeans consider discrimination based on sexual orientation to be widespread and to be a taboo topic in their country (see: http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf).

⁶ Case C-267/06, *Tadao Maruko*, Judgment of 1 April 2008.

⁷ Case C-262/88, *Barber v. Guardian Royal Exchange Assurance Group*, Judgement of 17 May 1990.

⁸ Case *Tadao Maruko*, quoted above, paragraph 73.

to have an ethnic character, or because members of a religion belong predominantly to particular ethnic groups⁹.

Article 4(2) permits a specific exception to the principle of equal treatment in the case of churches and other organisations with an ethos based on religion or belief. This would allow such bodies to choose a person of the same religion or belief for a job where being of that religion or belief is a genuine, legitimate and justified occupational requirement. This exception only allows for different treatment on the grounds of religion or belief, and cannot be used to justify discrimination on another ground, for example sexual orientation. It should also be clearly linked with the nature of the activities carried out.

A number of Member States have adopted provisions in national law in line with Article 4(2) of the Directive. Some countries have provided exceptions that may go beyond the strict terms of the Directive or which remain ambiguous. Other Member States have chosen not to include any 'Article 4(2) exception'¹⁰.

National case law arising since the adoption of the Directive has highlighted conflicts between employee dress codes and manifestations of religious belief. Some of these cases have been treated as human rights matters (raising issues of freedom of religious expression) rather than discrimination cases, but they indicate that this area is likely to be a sensitive issue in implementing the Directive.

Age

With the exception of one Member State, legislation now forbids discrimination based on age in all Member States, even though the great majority of Member States did not have existing general legislation against age discrimination.

The main issue is to ensure that national legislation is effectively brought into line with Directive. While the new legislation banning age discrimination is supposed to take precedence over laws or collective agreements which are discriminatory, most of the previous rules on age distinctions remain in place. Only a few Member States have carried out comprehensive surveys of their laws concerning age distinctions.

Assessment of the compatibility of existing (and future) laws as regards age has to be based on the 'justification test' of Article 6 of the Directive, which says that distinctions based on age will not constitute discrimination if they are objectively and reasonably justified by a legitimate aim (which includes legitimate employment policy, labour market and vocational training objectives), and if the means used are proportionate.

Most Member States have adopted general legal provisions inspired by Article 6 of the Directive, which can thus serve as a test against which to whether existing age rules comply with the Directive. Some Member States provide for general exceptions to age discrimination in their national law which are broader than the 'justification test' of Article 6. On the other

⁹ For example, the UK House of Lords has considered that religion can be an element in defining ethnicity: in the *Mandla* case, the Sikh community, while being based on a particular religion, was defined as an 'ethnic group' for the purpose of the Race Relations Act (*Mandla v. Dowell Lee* [1983] 2 AC 548).

¹⁰ CZ, EE, FR, LT, PT, FI, SE do not provide in their laws for such exception (though there may be special regulations governing some recruitments by religious institutions).

hand, some Member States have not transposed the Article 6 exception as such¹¹: in the absence of such a ‘justification test’, it may be more difficult to assess the compatibility of existing (and future) rules on age under national law.

In most Member States, national rules contain various age requirements which therefore need to be evaluated on a case-by-case basis, in the light of Article 6. These rules include age requirements for access to jobs (in particular in the public sector) or to vocational training, as well as age limits for exercising some jobs (again in particular in the public sector). Almost every Member State has some legislation which aims to protect young and older employees.

In the *Mangold* case¹², a German law allowed workers over 52 to be hired on a succession of short-term contracts, in order to encourage recruitment by employers. The European Court of Justice held that the aim of increasing the employability of older workers was legitimate, but the measure did not respect the principle of proportionality, as it was deemed to be too wide in scope and the aim could have been achieved in a less discriminatory way. In the *Palacios de la Villa* case¹³, the European Court of Justice found that rules on age did not need to be explicitly justified to be valid, but the measure at issue had to be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market. Both cases give some indication as regards the type of ‘justification test’ required: even if national authorities have broad discretion as to social policy choices, it is essential to ensure in each particular case that the measure is suited and proportionate to the aim (for example by avoiding measures that rely solely on age and by relying on other relevant criteria as well).

Another key issue is retirement. According to Recital 14 of the Directive, national provisions concerning retirement ages do not fall within the scope of the Directive. National practices vary greatly, ranging from no national compulsory retirement age to Member States which permit compulsory retirement by public and private employers at a specific age. In a number of Member States, retirement at a certain age is obligatory, so a person working beyond retirement age may, for example, no longer enjoy protection against unfair dismissal. In *Palacios de la Villa*, the European Court of Justice dealt with the case of a worker who was dismissed when reaching the legal retirement age of 65 on the basis of a collective agreement allowed under national law. According to the Court, while Member States have competence to fix retirement age, its application through termination of the employment contract falls within the scope of the Directive and has therefore to pass the ‘test’ of Article 6 of the Directive.

Disability

The prohibition of discrimination on the grounds of disability has two aspects: the first is the ban on discrimination on grounds of disability (similar to the other grounds covered in the Directive). The second and most important aspect is the positive duty of ‘reasonable accommodation’ in favour of disabled persons as an integral part of the equal treatment principle.

The first part has been transposed in all Member States. The only problem that has arisen is the definition of disability. The Directive does not define disability and about half of the Member States did not include a specific definition (although most have a definition for social

¹¹ EE, IE, HU, PL, UK.

¹² Case C-144/04, *Mangold*, Judgement of 22 November 2005.

¹³ Case C-411/05, *Palacios de la Villa*, Judgement of 16 October 2007.

security purposes). The issue of whether a person who was ill could rely on the protection against discrimination on grounds of disability was referred to the European Court of Justice by a Spanish court in the *Chacón Navas* case¹⁴. The Court held that ‘sickness’ was not similar to ‘disability’ and went on to explain that ‘disability’, in the sense of the Directive, had to be given a uniform interpretation. The Court held that ‘the concept of disability must be understood as referring to a limitation which results from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’.

One of the most significant innovations within the Directive is a duty on employers to provide ‘reasonable accommodation’ to enable access to work for persons with a disability. The duty of reasonable accommodation means that the employer must take steps to allow a person who is suitably qualified for the job, apart from his or her disability, to be able to actually take up the job, advance in it and undertake training. However, the employer is not expected to bear an unreasonable burden. Such a burden is not considered unreasonable where Member States provide grants or subsidies to employers in respect of expensive adjustments.

Although the concept of reasonable accommodation was often new, most Member States have transposed this obligation. A number of Member States continue to regulate the employment of disabled people through quota systems or reserved employment. This should not, however, be at the expense of the individual right of non-discrimination and reasonable accommodation. Some Member States have not included the concept in their national law at present or have done so inadequately (for example, limiting the obligation of reasonable accommodation to employees already under contract or to severely disabled persons)¹⁵. Where national provisions exist, these vary considerably from Member States which provide for a basic duty, but give few details on how this should be implemented, to those with more extensive guidance on its practical application.

3. GOING BEYOND MINIMUM REQUIREMENTS: TOWARDS A SINGLE EQUALITY APPROACH

Though Directive 2000/78/EC applies only to the fields of employment, occupation and vocational training, in a number of Member States protection from discrimination — on grounds of age, disability, religion and sexual orientation — is more extensive. In these States, a single equality approach has been chosen, whereby a similar level of protection applies to the various grounds of discrimination. In these cases, the scope of protection for all grounds is similar to the one provided for under the Race Directive (2000/43/EC) with the protection from discrimination extended to social protection and goods and services.

Most Member States have thus gone beyond the requirements of Directive 2000/78/EC by applying a similar protection to most or all grounds of discrimination. While some Member States treat all grounds of discrimination in a similar manner¹⁶, others go beyond the requirements of the Directive, but not on all grounds, or have a more limited material scope on some grounds.

Similarly, in most Member States, the equality bodies that have been established under Article 13 of Directive 2000/43/EC (in order to protect against discrimination on grounds of race and

¹⁴ Case C-13/05, *Chacón Navas*, Judgement of 11 July 2006.

¹⁵ DE, IT (protection for some disabled people only), HU.

¹⁶ For example in BE, DE, IE, LU, HU, NL, SI, FI.

ethnic origin) also act as bodies responsible for cases of discrimination on grounds of religion or belief, age, disability and sexual orientation (thus going beyond the requirements of Directive 2000/78/EC, which does not require the establishment of such bodies). The dominant model is one where the equality body is a dedicated institution specialising in equal treatment issues and dealing with all grounds of discrimination¹⁷. Some Member States have chosen an existing body dealing with general human rights issues (in general, an Ombudsman) to address discrimination issues, covering all grounds of discrimination¹⁸. Only a minority of Member States have chosen to have an equality body dealing with race and ethnic origin only¹⁹.

4. IMPLEMENTATION ISSUES

Positive Action

Article 7 of the Directive allows Member States to adopt specific measures to compensate for disadvantages linked to any of the grounds covered, with a view to ensuring full equality in practice.

The majority of Member States allow for positive action measures and all have specific legislation in place as regards disability²⁰. While the exact scope for positive action will be clarified through case law, this trend shows that the concept of positive action is now largely accepted within the European Union.

A number of states have introduced legal duties to promote equality. In some cases, there are broad obligations to advance equality in national constitutions. In other national legislations, more specific obligations have been included. In Finland and the United Kingdom, detailed obligations exist for public authorities to promote equality on grounds of race, disability and gender. In Sweden, employers are compelled to take measures aimed at ensuring equality as regards ethnic background.

Information and Dialogue

The Directive provisions on dissemination of information and social dialogue appear to have experienced the least formal implementation, and have been met with the most varied response within Member States.

Few Member States have introduced legal requirements to carry out such dissemination and consultations. Such actions have generally been carried out in an *ad hoc* manner, with Member States using existing channels of consultation, in particular with social partners²¹. National equality bodies often have such tasks as part of their mandate. The process of transposing the Directive has also been the occasion for an intensified debate on discrimination issues.

¹⁷ BE, DE, IE, FR, LT, LU (as per the law, not yet in place), HU, AT, SI, UK.

¹⁸ CY, EE, EL, LV, PL, SK.

¹⁹ DK, IT, MT, PT, FI.

²⁰ Only EE, FR, IT, LV, LT, SK do not provide for the possibility of positive action (disability being generally an exception, as special measures in favour of disabled people are lawful).

²¹ In CZ, DK, LT, MT, PL, PT, SK, SE and UK general structures for social dialogue may be used for dialogue on equality issues.

Procedural issues: burden of proof and sanctions

A key element to ensure fair consideration of discrimination claims is the shifting of the burden of proof before the courts or other competent authorities, as provided for in Article 10 of the Directive. The burden of proof is shifted when the person claiming to be the victim of discrimination can establish a presumption of discrimination: in this case, it is for the respondent to prove that there has been no discrimination. Most Member States have inserted such a provision in their national law, with a few not having transposed fully this provision²².

The low volume of case law on discrimination coming through in most Member States shows, on the one hand, that the Directive has not given rise to excessive law suits. On the other hand, it could indicate as well that there may be a number of obstacles to justice, both actual and perceived. Awareness of rights by potential victims of discrimination remains low in many countries²³.

A number of barriers to justice in matters of discrimination have been identified. The protection against victimisation is essential to ensure that they do not suffer from retaliation, when bringing a case to court. The transposition of this provision remains incomplete in a number of Member States.

All Member States provide some sort of sanctions, of an administrative, civil or penal character. However, the level of protection appears to be uneven, with some Member States providing for penal sanctions which include imprisonment and no limitations on the amount of civil damage, while others provide only for fines of a limited amount as well as ceilings on the level of damages that can be granted.

Other problems with access to justice may limit the possibility to seek legal redress in discrimination cases: access to legal aid, short time limits for bringing a case to court (sometimes only a few days), the length, cost and complexity of the procedure, which may deter people from pursuing court cases.

The above elements show the need for a clear and specific framework for victims of discrimination, both in terms of procedure and compensation. It shows the importance of appropriate institutional support that can be provided either by specialised bodies, such as equality bodies, or NGOs.

The existence of sanctions which are dissuasive, effective and proportionate is of paramount importance. The Commission will undertake a comparative study on the level of sanctions and length of time limits in each Member State in 2008 in order to assess whether this is effectively the case in all Member States.

²² EE, IT, LT, PL have not yet correctly transposed provisions on burden of proof. MT has done so with the exception of disability.

²³ According to the *Eurobarometer Report on Discrimination* (January 2007), less than one third of Europeans are aware of their rights if they are victims of discrimination (see: http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf).

5. THE DEVELOPMENT OF THE LEGISLATIVE FRAMEWORK

While Directive 2000/43/EC protects from discrimination on grounds of racial or ethnic origin in a wide range of areas outside the sphere of employment (education, social protection, health care, access to goods and services, housing), this is not the case for Directive 2000/78/EC which is limited to employment, occupation and vocational training. Responding to concerns expressed by the European Parliament and civil society, the Commission announced in 2005 that it would carry out a study into the relevance and the feasibility of possible new initiatives to complement the current legal framework²⁴.

The results of study, completed in 2006, showed that while most countries provide legal protection in some form that goes beyond the current EC requirements in most of the areas examined, there was a good deal of variety between countries as to the degree and nature of the protection.²⁵.

In accordance with its work programme for 2008²⁶ which foresees the adoption of a proposal for a Directive implementing the principle of equal treatment outside employment, the Commission is now preparing a legislative initiative. The starting point for this initiative is the fact that the level of protection from discrimination based on religion or belief, age, disability or sexual orientation is lower than that in place for discrimination based on race. In the preparation of this initiative, the Commission has been careful to take into account issues related to the principles of subsidiarity and proportionality.

CONCLUSION

Directive 2000/78/EC constitutes a major step forward in the fight against discrimination across the EU. For most Member States, the transposition of Directive 2000/78/EC required extensive changes to existing legislation, covering new grounds of discrimination.

The transposition of the Directive can be considered a success overall, as all Member States have enacted anti-discrimination legislation covering all the grounds of the Directive, covering areas which were new in many countries. In most Member States, the legal framework can be considered to be adequate, actual implementation being the major challenge.

A particular challenge is enforcement of anti-discrimination laws. In this respect, the shifting of the burden of proof before the courts, dissuasive sanctions and the existence of support institutions, in particular equality bodies fully empowered to carry out their tasks, are all essential elements of a proper anti-discrimination framework.

The Commission recognises also that legislation alone is not enough to prevent discrimination and to promote equality. Combining properly implemented and enforced legislation with complementary policy measures at national and EU level is the key to reducing discrimination on grounds of religion or belief, age, disability and sexual orientation.

²⁴ European Commission, 'Non-discrimination and equal opportunities: a framework strategy', COM(2005) 224.

²⁵ See text: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm

²⁶ COM(2007) 640