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REPORT

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

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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
- 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.

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.

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

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 implementation 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. The Commission has meanwhile affirmed its original proposal at this stage and 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, following the *consent* of the European Parliament.

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 (Group of the Greens / European Free Alliance).

II. THE COUNCIL'S WORK UNDER THE IRISH PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal under the Irish Presidency,³ focusing on a number of different issues, based on drafting suggestions and supporting material prepared by the Presidency.⁴ Delegations broadly welcomed the drafting suggestions as having taken the text a substantial distance in the right direction.

a) The scope of the Directive and the concept of "access" (Article 3 and Recitals 8, 17a, 17b, 17d, 17f and 17g)

In an attempt to address delegations' long-standing concerns about the perceived lack of legal certainty, the Presidency sought to clarify the scope of the Directive by inserting a definition of the concept of "access" in Article 3(1a). The Commission supported this approach. Certain delegations would have preferred placing the definition in the recitals, a solution that would, according to the Commission, lessen the degree of legal certainty provided. As regards social protection and education, the distinction between eligibility (which falls under exclusive national competence) and access (which would be covered by the Directive) needs further discussion.

Certain delegations were unable to accept the inclusion of social protection (Article 3(1)(a)), while others were opposed to the inclusion of education (Article 3(1)(c)), within the scope.

b) Discrimination in the area of education (Article 2(1), Article 3(1)(c), Article 3(2)(d) and (e) and Recitals 17a and 17g)

Discussions have shown that delineating the scope with respect to access to education poses a particular challenge, given that the Member States have exclusive competence for the organisation of education systems and the content of teaching and educational activities, and in the light of the need to accommodate educational institutions whose ethos is based on religion or belief, while taking into account Case C-236/09 "Test-Achats" where the CJEU had ruled that a permanent derogation from the principle of equal treatment between men and women was unlawful.

³ Meetings on 14 January, 11 March, 22 April and 24 May.

⁴ 18015/12 + ADD1 + ADD 1 REV 1, 6878/13, 8371/13 + COR 1 + COR 2 and 9556/13.

The Presidency sought to clarify the text, based on delegations' responses to a questionnaire outlining different discrimination scenarios in this field.⁵ An element of the solution suggested, in tandem with detailed definitions of "access" and of "eligibility," was to narrow the definition of "discrimination" that would apply in this area (Article 2(1)). However, several delegations and the Commission were unable to support the idea of applying different definitions of discrimination in different areas. The suggested inclusion of a general definition of "access," to be distinguished clearly from the concept of "eligibility," gathered broader support.

c) The disability provisions (Articles 4a and 4b and Recitals 20a, 20aa, 20b and 20c)

The Presidency tabled drafting suggestions aimed at clarifying the provisions providing for reactive measures (usually, "reasonable accommodation" not imposing a disproportionate burden) aimed at ensuring equal treatment for persons with disabilities.

In particular, the Presidency's drafting suggestions specified that the reactive measures required to offer reasonable accommodation to persons with disabilities could sometimes also include structural alterations to premises (e.g. in the context of club memberships, rental contracts and other such long-term contractual relationships). However, further discussion is required, particularly concerning the question whether the Directive should oblige Member States to put in place a framework of "national legislation or practice" to regulate situations where housing providers should accept structural alterations to premises if such alterations are funded by a party other than the housing provider.

⁵ 8782/13.

d) Discrimination and harassment by association (Article 2(2)(e) and Recital 12a)

The Presidency sought to clarify the provisions concerning discrimination and harassment by association by stipulating that they referred to treatment related to any associations a person had with persons of a particular religion or belief, disability, age or sexual orientation and that it was irrelevant whether the assumptions made by the discriminating party were correct or mistaken. This would also ensure that a person who discriminated against another based on the mistaken perception that the said person was associated with persons of a particular religion or belief, disability, age or sexual orientation, could not use the fact that the assumption was mistaken in his or her defence.

e) Preferential pricing (Article 2(6), Article 5 and Recital 14a)

The Presidency suggested including a specific exemption for legitimate commercial practices concerning age-specific pricing, such as in the hospitality industry (Article 2(6)(b)), an area where no serious discriminatory impact was to be feared, as customers could choose between, for example, many different hotels. However, certain delegations warned against a general exemption covering a wide range of commercial practices, preferring to address this matter in the context of the general criteria for legitimate differences of treatment, namely, objective justification and a legitimate aim (Article 2(6)(a)). The Presidency pointed to the difficulty of applying the concepts of "objective justification" and "legitimate aim", which are associated more with matters of public policy and administration, to the purely profit-oriented activities of enterprises, particularly small enterprises.

f) Right to protection against discrimination vs. other rights and freedoms (Article 2(7a) and Recital 17)

The Presidency tabled a suggested solution aiming at the balancing of fundamental rights by adding a new paragraph 7a to Article 2 and modifying Recital 17. Certain delegations wished to see the suggested new provision placed in the recitals instead of the article, or deleted.

g) Positive action measures (Article 5 and Recital 21)

To stress the objectives and positive intent of positive action measures, the Presidency suggested adding a reference in Recital 21 to economic, cultural or social integration and catering for the particular needs of persons. Certain delegations entered reservations on this addition, pending clarification of the scope.

h) Gender mainstreaming (Articles 14a and 16(2) and Recital 13)

The Presidency suggested adding a detailed reference to gender mainstreaming in Recital 13, reminding the Member States to take account of the differential impact on men and women when preparing or reviewing the laws, regulations or administrative provisions necessary to comply with the Directive. Certain delegations entered scrutiny reservations on this addition.

i) Obligations placed on SMEs

The Presidency provided a document informally setting out the obligations that the Directive would place on SMEs⁶ and recalled that, in Ireland, the adoption of anti-discrimination legislation had not placed any undue burden on businesses. However, certain delegations continued to have concerns regarding the impact that the proposed measures would have on SMEs (especially micro-enterprises) and called for this issue to be re-examined once the specific content of the draft Directive had become clearer.

j) Alignment of the recitals and the articles

The Presidency also reviewed the entire text, improving the alignment of the articles and the recitals.

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Further details of delegations' positions are set out in 5099/1/13, 7137/13, 9389 + COR 1 and 9958/13.⁷

⁶ 9956/13 Annex III.

⁷ A consolidated text (10185/13) and an annotated consolidated text (10186/13) will be distributed in due course.

III. OUTSTANDING ISSUES

Further discussion is also needed on a number of other outstanding issues, including the following:

- anticipatory measures (usually "accessibility") aimed at ensuring equal treatment for persons with disabilities;
- the implementation calendar;
- further aspects of the division of competences, the overall scope and subsidiarity; and
- legal certainty in the Directive as a whole.

IV. CONCLUSION

Very significant progress has been made under the Irish Presidency, particularly through clarification of the scope, including in the fields of education and social protection. The draft provisions concerning disability have also advanced significantly, especially the concepts of "reasonable accommodation" and "disproportionate burden." However, there is still a need for further work on the proposal.
