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**REPORT**

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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

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**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 legislation<sup>1</sup> 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.

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<sup>1</sup> 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. 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 2009<sup>2</sup>. 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.

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<sup>2</sup> 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).

The Polish Presidency having undertaken an in-depth analysis of the provisions concerning *age as a discrimination factor*, the EPSCO Council was informed on 1 December 2011<sup>3</sup> of the progress achieved. The Working Party on Social Questions has since continued its examination of the proposal under the Danish Presidency,<sup>4</sup> focusing on the same theme.

## II. THE COUNCIL'S WORK UNDER THE DANISH PRESIDENCY

The discussions were based on Presidency drafting suggestions<sup>5</sup> and addressed a number of issues, including the following:

### a) **General exception for age (Article 2(6), Article 3 and Recitals 14a, 17f and 17g)**

Aiming to improve legal certainty, so that certain justifiable differences of treatment would continue to be allowed under the Directive, the Presidency tabled a suggestion whereby conditions of eligibility related to age and disability, including age limits, for benefits and services within the framework of the Member States' social protection systems are excluded from the scope.<sup>6</sup> Age limits in the area of education are similarly excluded in the current draft.

Certain delegations felt that social protection ought to be removed from the scope altogether. The Commission representative, however, affirmed the need to keep social protection within the scope and expressed the concern that excluding *all* conditions of eligibility from the scope might appear to negate the very purpose of the Directive with respect to ensuring equal access to social protection.

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<sup>3</sup> See 16525/11.

<sup>4</sup> Meetings on 15 March and 10 April.

<sup>5</sup> 5451/12 and 7835/12.

<sup>6</sup> "Option B" developed by the Polish Presidency (see 16525/11, p. 3).

Certain delegations had doubts regarding the formulation of the provisions concerning social protection, particularly with respect to the interrelationship between Article 3(1)(a), which places social protection within the scope, and Article 3(2)(b), which excludes the *organisation* of social security systems, including conditions of eligibility related to age and disability, from the scope.

Article 3 states that healthcare is part of social protection and thus falls within the scope of the Directive; *private* healthcare services, however, would not benefit from the exemption of age or disability related conditions of eligibility from the scope, which only applies to healthcare in the context of "the organisation of *Member States' social protection systems*," i.e. public healthcare. Certain delegations questioned this distinction between private and public healthcare, and stated that it was not clear-cut, calling for clarification. Endorsing the need for clarity, the Commission representative nevertheless took a favourable view of the approach taken in the Presidency's drafting suggestions, whereby age limits set as a condition of eligibility to public healthcare would be exempted from the Directive, whereas private healthcare providers would be required to justify the age limits they set in accordance with Article 2(6).

Certain delegations have called for "education" to be removed from the scope.

## **b) Financial services (Article 2(7) and Recitals 15, 15a and 15b)**

The draft Directive would, in certain cases, permit proportionate differences of treatment on the grounds of age and disability in the provision of financial services. In an attempt to clarify the text, the Presidency introduced separate recitals for age (Recital 15) and disability (Recital 15a). In order to further improve legal certainty in the light of the Judgement of the Court of Justice on Case C-236/09, "Test-Achats,"<sup>7</sup> the Presidency specified in Recital 15 that, while risk factors related to age are used in the provision of insurance, banking and other financial services to assess the individual risk and to determine premiums and benefits, in certain financial services, persons of different ages are *not in a comparable situation* for the assessment of risk. Similarly, Recital 15a explains that, in certain financial services, persons with a disability are not in a comparable situation for the assessment of risk with that of persons without such a disability.

The Presidency also sought to clarify the criteria for risk assessments to the effect that proportionate differences of treatment on the grounds of age or disability do not constitute discrimination if a person's age or disability is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data (or, in the case of disability, relevant and reliable medical knowledge). Delegations called for certain clarifications and expressed divergent views on these criteria, some calling for greater flexibility, while others wanted stricter rules.

The Presidency also removed the mention of "the health condition underlying the disability" as a criterion in Article 2(7), but retained it as an example in Recital 15a. Several delegations questioned this change, on the grounds that referring to the disability itself as "a determining factor" was too broad and reduced the protection against discrimination. Certain delegations also considered that health issues might also be relevant, not just in the context of disability, but also in connection with age.

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<sup>7</sup> See written contribution by the Council Legal Service (16258/11).

The Presidency also introduced a new Recital 15b stipulating that customers and relevant judicial complaints bodies should have *the right to be informed*, upon request, about the reasons explaining differences of treatment on the grounds of age or disability in financial services. Certain delegations called for aspects of this provision to be adjusted or clarified.

Certain delegations maintained reservations on the inclusion of equal treatment in the area of financial services within the scope and thought it best to leave this matter to the Member States.

Emphasising the need for legal certainty, certain delegations also warned against inadvertently outlawing commercial practices where cheaper rates were offered to certain age groups. In this context, certain delegations saw a need to clarify the suggested *adjustment of the burden of proof rule* provided for in Recital 14a for cases where more favourable conditions of access are offered to persons of a certain age.

Other issues requiring further discussion include:

- the potentially discriminatory situation that might arise if, for example, insurance providers in small national markets refuse altogether to cater for certain age groups;
- the provisions concerning minors, certain delegations having called for persons under eighteen to be excluded from the Directive; and
- consistency with the UNCRPD.

Generally speaking, the Presidency's drafting suggestions were broadly supported by many delegations as a step in the right direction, more work being nevertheless required on the provisions concerning age as a discrimination factor.<sup>8</sup>

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<sup>8</sup> Delegations' positions are set out in more detail in 7577/12 + COR 1 and 8602/12 + COR 1.

### **III. OUTSTANDING ISSUES NOT DISCUSSED UNDER THE DANISH PRESIDENCY**

Further discussion is also needed on a number of other outstanding issues,<sup>9</sup> including the following:

- the division of competences, the overall scope and subsidiarity;
- the disability provisions, including accessibility and reasonable accommodation for persons with disabilities;
- the implementation calendar;
- legal certainty in the Directive as a whole; and
- the overall impact of the proposal, including on SMEs.

### **IV. CONCLUSION**

While significant progress has been made under the Danish Presidency in the attempt to clarify the provisions concerning age as a discrimination factor, 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 21 June 2012.

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<sup>9</sup> For a summary of delegations' positions on the proposal as a whole, see 12447/11.