



Brussels, 7.12.2022
SWD(2022) 387 final

COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the documents

Proposal for a COUNCIL DIRECTIVE

on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC

and

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU

{COM(2022) 689 final} - {SWD(2022) 386 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
<p>The aim of the two parallel proposals included in this initiative is to strengthen the role and independence of equality bodies under the directives already adopted in the field of equal treatment. As these directives were adopted under two different legal bases and adoption procedures, this initiative consists of two essentially identical proposals, based on the following two legal bases: Articles 19(1) and 157(3) TFEU.¹</p> <p>Article 19(1) TFEU provides the legal basis for secondary legislation, such as directives, to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.</p> <p>Article 157(3) TFEU provides the legal basis for measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.</p>
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
<p>In case of non-discrimination, which is part of the area of freedom, security and justice, the Union's competence is shared.</p>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2²:
<ul style="list-style-type: none"> - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
<p>Numerous consultation activities have been organised, including with the help of a contractor. There was strong support from stakeholders for new EU measures in the field.</p> <p>182 respondents (including 66 EU citizens), replied to the Open Public Consultation. The contractor conducted around 100 interviews and received 84 replies to specialised online surveys. A total of 239 stakeholders participated in the three participatory workshops and in the final participatory conference to brainstorm on key topics and possible measures. In parallel, four meetings were organised to inform and consult Member States representatives. Regular stakeholders' presentations</p>

¹ One proposal, based on Article 19(1) TFEU, will cover the following 4 Directives: the Racial Equality Directive (2000/43/EC), the Gender Equality Directive in the field of goods and services (2004/113/EC), the Employment Equality Directive (2000/78/EC) and the Gender Equality Directive in the field of social security (79/7/EEC). A second proposal, based on Article 157(3) TFEU, will cover the following 2 Directives: the Gender Equality Directive in the field of employment (2006/54/EC) and the Gender Equality Directive in the field of self-employment (2010/41/EU).

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

were also made. A Youth Policy Dialogue entitled 'Equality bodies that work for all of us' was also organised by Commissioner Dalli.

These activities have been targeted to a very wide range of stakeholders, in order to reach out to all interested parties and gather their input and opinions. Among others, the following stakeholders have been consulted: all equality bodies, the European network of Equality Bodies (the EQUINET), the European Union Agency for Fundamental Rights (FRA) and the European Institute for Gender Equality (EIGE), representatives of all Member States at ministry level, academics and experts in the field of anti-discrimination, civil society organisations, social partners including representatives of employers at the EU level, EU and non-EU citizens.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

Both the explanatory memorandum and the analytical document contain a section addressing the conformity with the principle of subsidiarity.

The initiative does not introduce legislation in a new area. It revises already existing legislation in order to increase its effectiveness. There is thus already a common agreement that EU-level action is necessary in this area and in line with the principle of subsidiarity.

Equality and non-discrimination are fundamental EU values, inscribed in Article 2 TEU and protected by Article 21 and 23 of the Charter of Fundamental Rights of the EU. They should be sufficiently protected everywhere across the EU.

As demonstrated in the analytical document accompanying the proposals, the existing legislative measures are not sufficient to ensure implementation and enforcement of EU law combating unequal treatment and discrimination and to increase prevention. This results in an insufficient and unequal level of protection against discrimination, from one Member State to another.

The analysis of the situation before the establishment of equality bodies clearly demonstrated the added value of the EU intervention; prior to it, they existed in only few Member States. The retrospective analysis of the EU provisions on equality bodies in the Equality Directives has shown that they are too narrow and vague.

The limited impact of the 2018 Recommendation on standards for equality bodies³ clearly demonstrates that only a binding EU initiative will ensure that sufficient progress is achieved in all Member States, and address the differences in the level of protection against discrimination.

Common minimum standards are also relevant to the functioning of the internal market. In the context of the freedom of movement of people, it is essential to guarantee the fundamental right of non-discrimination in a uniform way across the EU and to ensure access to protection from discrimination and to redress mechanisms in all Member States. As outlined above, equality bodies are a means to contribute to this goal.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

³ As established in the Commission Staff Working Document on equality bodies and the implementation of the Commission Recommendation on standards for equality bodies (SWD(2021)63) of 19 March 2021).

The aim of the present initiative is the protection and promotion of the fundamental right of non-discrimination. Fundamental rights are universal, therefore, a cross-border element is not a precondition for the EU to take action. The Union is founded on common values, such as equality, non-discrimination, human rights and tolerance. The fight against social exclusion and discrimination is one of the core objectives of the Treaty. Given the uneven level of protection against discrimination across the EU which affects the fundamental rights and well-being of people living in the EU, the absence of EU-level action would be in conflict with the abovementioned objective. The 2018 non-binding Recommendation on standards for equality bodies had a limited impact: less than half of the Member States reported taking measures as a follow-up to the Recommendation and only four Member States⁴ reported that they were working on legislative reforms.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

As explained above, human rights are universal, therefore, a cross-border element is not a precondition for the EU to take action, as the goal is to reinforce the fundamental values on which the Union is founded, such as equality, non-discrimination, fundamental rights and tolerance.

Nevertheless, protection against discrimination and access to redress in cases of discrimination, for which equality bodies are a tool, do contain cross-border elements in some cases. This may for example be the case if people who reside in one Member State experience discrimination in another Member State. Due to lack of data, it is not possible to identify the precise share of cases directly linked to cross-border aspects.

The limited availability of equality data is a challenge that the proposals will contribute to address by setting obligations for equality bodies to collect data on their own activities and the possibility to play a coordination role in the collection of equality data by other public or private entities. The proposals also include an obligation for equality bodies to produce regular reports on the state of equal treatment and discrimination in their Member State.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁵ or significantly damage the interests of other Member States?

The Union is founded on common values, such as equality, non-discrimination, fundamental rights and tolerance. The fight against social exclusion and discrimination is one of the core objectives of the European Union as laid down in Article 3 (3) of the Treaty on European Union (TEU).

However, FRA's fundamental rights report 2021 found that levels of racial and ethnic discrimination remain high throughout the EU-27⁶. For example, in a FRA survey covering almost 4,700 Roma and Travellers in five EU countries⁷ and the United Kingdom, almost half of the respondents (45 %) said they felt discriminated against in the 12 months before the survey⁸. Findings from representative surveys⁹ and from equality bodies' reports¹⁰ show a similar picture. Other surveys conducted in

⁴PT, ES, MT, LT. Spain has meanwhile adopted a new law (Ley 15/2022 of 12 July 2022).

⁵ https://europa.eu/european-union/about-eu/eu-in-brief_en

⁶ Fundamental Rights Agency of the European Union, 'Fundamental Rights Report 2021', Luxembourg, 2021.

⁷ BE, FR, IE, NL, SE.

⁸ Fundamental Rights Agency of the European Union, 'Fundamental Rights Report 2021', Luxembourg, 2021, p. 99.

⁹ DK, NL.

¹⁰ BE, FR, AT.

Member States¹¹ referred to in FRA's report confirmed that attitudes towards ethnic minorities remained hostile.

Given the consistently high occurrences of discrimination throughout the Union, which affects the fundamental rights and well-being of people living in the EU, the absence of EU-level action would be in conflict with the abovementioned objective.

Member States already take national action in this field. Such national action does not significantly damage the interests of other Member States. However, as explained above, due to the large margin of discretion left to the Member States, the current rules led to an unequal level of protection against discrimination and an unequal enforcement of the Directives from one Member State to another which goes against the core Treaty objectives.

The strengthening of equality bodies will help strengthen economic and social cohesion by ensuring that people in all Member States enjoy a common minimum level of protection against discrimination, with comparable rights to redress, while taking into account of the diversity of Member States systems.

The EU-level action aims at filling gaps identified at national level and ensuring that Member States take a minimum level of measures in all relevant areas. The limited impact of the 2018 Recommendation on standards for equality bodies clearly shows that only a binding EU initiative will ensure that sufficient progress is achieved in all Member States.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

Member States have already established equality bodies. They cover all the grounds and fields of the Equality Directives except in two Member States¹² for the grounds and fields covered by the Employment Equality Directive and the Gender Equality Directive in the field of social security (these two Directives do not contain provisions on equality bodies).

National anti-discrimination legislation sometimes goes beyond the minimum standards set in the Directives. However, in many cases, equality bodies have proven not to be effective enough to pursue the abovementioned core objectives of the Treaty. This is why the Commission proposes to strengthen the minimum standards in place and to extend the mandate of equality bodies to fully cover all Equality Directives. In setting minimum standards, the proposals fully respect Member States' competencies and procedural autonomy and leave them discretion to decide how to implement the proposed measures and to set more favourable standards for the functioning of equality bodies.

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?

The existing EU equality Directives do not include provisions on the actual structure and functioning of equality bodies, but only require that they have certain minimum competences, and that they act independently within the exercise of their remit. Due to the wide margin of discretion left to the Member States in implementing these provisions, there are significant differences between equality

¹¹ BG, CZ, LV, SK.

¹² Meanwhile, one of them has changed its legislation. In other Member States, the territorial sharing of competences lead to the absence of coverage of these grounds and fields in some parts of the territory.

bodies across Member States, in particular as regards their mandate, powers, leadership, independence, resources, accessibility and effectiveness. This affects the fulfilment of their objectives under EU law. While their differences are partly due to the variety of legal traditions and legal systems in Member States, the situation also reflects different levels of ambition and achievement in Member States in pursuing the objectives of the Directives. Many equality bodies are not properly equipped, in terms of powers and resources, to assist victims effectively.

Good access to equality bodies has also a physical dimension, determined by the location of the main office, its visibility and whether there are local and/or regional representations. In around a third of Member States, the equality body's main premises are reported not to be visible or open to the public. Local or regional offices or presence are considered a good practice, where this is necessary for geographical or other reasons, as they can bring equality bodies closer to the individuals, offer face-to-face contact and ensure local outreach and visibility. They are key to overcoming high levels of underreporting by victims.

Around half of Member States offer a local or regional presence in various set-ups. Some equality bodies have a few local offices spread across the national territory. Others have secured a local presence through other bodies such as non-governmental organisations which represent them and provide some of their services. Some equality bodies organise local outreach activities. However, equality bodies in a few Member States have declared that their local presence had decreased in the recent years due to insufficient resources.

Digitalisation is essential to reach the largest population and specific groups across the whole territory – especially in the context of crises, such as the COVID-19 pandemic. However, some people, especially from vulnerable and discriminated groups, have limited IT-literacy and/or access to digital tools. A provision in the proposals refers to the accessibility of the services of equality bodies at no cost to complainants, throughout the whole EU territory, including remote and rural areas.

(e) Is the problem widespread across the EU or limited to a few Member States?

The stakeholder's consultation has shown that the problems identified (e.g. the inadequacy of resources of equality bodies in terms of funding and staff, their limited powers and the insufficient awareness of the equality bodies' existence and services) are common to a very large number of Member States. Discrimination (or perceptions of discrimination) remains widespread throughout the Union until today. A Eurobarometer survey conducted in 2019 showed that 59% of Europeans believed that discrimination based on ethnic origin was widespread in their country (compared to 64% in 2015)¹³. For other grounds, such as sexual orientation, religion, disability and age, those number were 53%, 47%, 44% and 40% respectively¹⁴. In 2020, still only 34.4% of self-employed and start-up entrepreneurs in the EU were women¹⁵. Women are disproportionately affected by work-related harassment and under-reporting of sex-based work harassment remains a problem throughout the Union¹⁶.

The role of Equality bodies in fighting discrimination is central. So, strengthening equality bodies aims at lowering this overall level of discrimination, even if many different other factors also come into

¹³ Special Eurobarometer 493 on Discrimination in the European Union, 2019, available under <https://europa.eu/eurobarometer/surveys/detail/2251>.

¹⁴ Special Eurobarometer 493 on Discrimination in the European Union, 2019, available under <https://europa.eu/eurobarometer/surveys/detail/2251>.

¹⁵ WEgate, Women entrepreneurship: facts and figures, 2020, available under <https://wegate.eu/womenentrepreneurship-facts-and-figures>.

¹⁶ European Commission, '2021 report on gender equality in the EU', Luxembourg, 2021, p. 10.

play.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
Most Member States will have to spend more resources to ensure the effectiveness of equality bodies. For the rest, the scale of reforms will vary depending on the current setting of each equality body. Costs will be limited because the reforms build on already existing and functioning bodies. Increased cooperation, new synergies, better strategic planning of activities and resources are also expected to lead to cost savings.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
Consultations have shown a very strong, homogeneous, support for strengthening the standards applicable to equality bodies. In particular, the overwhelming majority of respondents to the Open Public Consultation (97.2%) consider that establishing strong and effective equality bodies is important –see Equality bodies – binding standards (europa.eu) . Even though the impact of the measures will differ depending on the Member States, no diverging views on the main lines of action emerged during the preparatory phase.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
Targeted EU action will guarantee that the objectives of preventing and fighting discrimination are achieved at Union level. Binding minimum standards for equality bodies will ensure that all Member States provide for an adequate structure, powers and resources that are considered relevant for effectively fighting and preventing discrimination, as well as ensuring assistance and access to redress for victims of discrimination. The approach taken leaves flexibility to the Member States in maintaining or setting more favourable standards and taking into account features specific to their national situations, including national, regional and local circumstances.
(a) Are there clear benefits from EU level action?
Targeted EU action will guarantee that the objectives of preventing and fighting discrimination are achieved at Union level. Given the persistently high prevalence of discrimination, measures taken at national level under a framework for equality bodies that left considerable leeway for Member States have proven insufficient to effectively tackle this phenomenon. Strengthened standards for equality bodies will ensure that all Member States provide for an adequate structure, powers and resources that are considered relevant for effectively fighting and preventing discrimination, as well as ensuring assistance and access to redress for victims of discrimination. Those rules will be enforceable at EU level, and enable further measures that are ultimately expected to lead to a reduction in prevalence of discrimination, as well as the better safeguarding of the fundamental rights of people at risk of discrimination. This will in turn lead to a reduction of the costs associated with discrimination.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
While there are no economies of scale as such, the objectives can be more efficiently achieved at EU level, setting standards to ensure that people in all Member States enjoy a common minimum level of protection against discrimination, with comparable rights to redress. The proposals will facilitate the exercise of the right to free movement for people who reside in one Member State and

experience discrimination in another Member State. The same is true for safeguarding the freedom of movement for workers, which is an integral part of the internal market. To do so, it is important to guarantee the fundamental right of non-discrimination and ensure access to protection and redress mechanisms in all Member States. As mentioned above, equality bodies are an essential instrument to reach this goal.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

The proposals guarantee a minimum level of assistance to all victims of discrimination living in the EU, with comparable rights to redress. In doing so, the initiative respects Member States' procedural autonomy and leaves flexibility to Member States, who may still provide for a higher level of protection.

This new legislation will be focused on equality bodies (strengthening their role and independence, and extending their mandate to the grounds and fields covered by the Employment Equality Directive and the Gender Equality Directive in the field of social security). It will amend other provisions of any of the existing Equality directives.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Discrimination is still a reality across the EU and the existing legal framework on equality bodies has proven not to be efficient enough in contributing towards the desired objectives. The current initiative proposes binding minimum standards to fight and prevent discrimination and ensure access to assistance and redress in all Member States. This approach respects the national procedural autonomy of Member States and leaves them flexibility in maintaining or setting more favourable standards and taking into account features specific to their national situations, including national, regional and local circumstances.

(e) Will there be improved legal clarity for those having to implement the legislation?

The current EU legal framework on equality bodies is too narrow and vague. It does not include provisions on the actual structure and functioning of equality bodies, but only requires that they have certain minimum competences, and that they act independently within the exercise of their remit. This results in legal uncertainty. The new initiative will provide more legal clarity through more precise provisions and descriptions of the measures that are to be implemented.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The current provisions on equality bodies and the 2018 Recommendation have not fully achieved the objective of ensuring implementation and enforcement of EU law on combating unequal treatment and discrimination and increasing prevention. This is due to the large margin of discretion left to the Member States on how to apply the provisions on equality bodies of the Directives, the lack of such provisions in two equality directives and the non-binding nature of the Recommendation. The existing EU equality directives do not include provisions on the actual structure and functioning of equality bodies, but only require that they have certain minimum competences, and that they act

independently within the exercise of their competences.

Soft measures have not been effective enough to safeguard people's fundamental right to non-discrimination. Therefore, binding legislation is necessary to achieve this goal. The proposed initiative sets minimum standards, expected to improve the level of protection against discrimination significantly, which will have a considerable positive impact on the social situation of (potential) victims of discrimination. Except for the dedicated article on equality bodies in four Equality Directives, the proposals do not amend other provisions of the Equality Directives.

In setting minimum standards, the proposals fully respect Member States' procedural autonomy and leaves them discretion to decide if they wish to set more favourable standards for the functioning of equality bodies.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The initiative to adopt binding legislation is a proportionate response to the needs, as demonstrated by the persistently high prevalence of discrimination throughout Member States. Non-legislative options have already been tested at EU level without fully producing the expected results. This shows that only a binding EU initiative will ensure that sufficient progress is achieved in all Member States and will address the significant differences in the level of protection against discrimination across the EU.

The initiative proposes strengthened minimum standards, leaving enough flexibility to cater for individual situations of Member States. Implementation costs will depend on the situation of existing equality bodies in the Member States. Those costs are justified and offset by potential benefits that the proposals will bring.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The analytical document has shown that Member States acting on their own was not sufficient to achieve the objectives of the initial intervention and safeguard the fundamental right to non-discrimination, for which equality bodies are an essential instrument. For this reason, EU action is justified; the scope of the proposals is targeted to setting minimum standards to strengthen the role and independence of equality bodies, and does not go beyond those aspects that Member States cannot achieve satisfactorily on their own.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The instrument chosen takes the form of directives because the provisions that it aims to strengthen and complement are laid down in directives.

The initiative is a proportionate response to the needs, as demonstrated by the persistently high prevalence of discrimination throughout Member States. Softer measures to mitigate the situation, above all the 2018 Recommendation, have previously been put in place, but, as the retrospective analysis has shown, without achieving the desired result. Therefore, binding legislation is necessary.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

The proposed initiative sets strengthened minimum standards, fully respecting Member States' procedural autonomy and leaving them discretion to decide how to implement the proposed measures. For instance, in suspected cases of discrimination, equality bodies will provide a reasoned assessment of the case (there is no such obligation at the moment), but Member States can choose whether to give them binding decision-making powers or whether their opinion will remain non-binding.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The initiative does not create additional costs for the European Commission and its agencies. To support the monitoring of the implementation of this Directive, the FRA and the EIGE would collect and analyse relevant data. This type of task is already covered by their existing mandates.

Victims of discrimination will not have any direct cost to bear, as under the proposal the services of equality bodies would have to be provided free of charge.

A small number of Member States already empower their equality bodies with a fairly comprehensive set of resources and powers, while most of the others only partially meet the objectives of the initiative. Adequate resources in particular are a pre-condition for the effective functioning of equality bodies and the fulfilment of their mission. The need for and extent of adaptation arising from new EU rules, and the related cost, would therefore vary, for each proposed measure, depending on the situation in each Member State as regards the features of their equality body (or bodies).

As the proposed minimum standards are proportionate, the induced costs would also be proportionate. Besides, since the aim of this initiative is to enhance the protection of universal fundamental rights and contributing towards the founding values of the Union, those costs are justified and offset by potential benefits that the proposals will bring.

A 2018 report issued by the European Parliamentary Research Service on the cost of non-Europe showed that reducing levels of discrimination by 5% through EU action could lead to an increase in GDP of between EUR 247 million and EUR 703 million¹⁷. The report also illustrates the considerable impacts that racial and ethnic discrimination have on individuals, societies and economies. In financial terms, these translate into lost earnings ranging from EUR 1.8 billion to EUR 8 billion annually for individuals, and losses ranging from EUR 2.4 billion to EUR 10.7 billion annually for society.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

The proposals aim at putting in place minimum standards designed to fill existing gaps identified by the retrospective analysis, while leaving flexibility to Member States regarding their implementation and the possibility to set or maintain higher standards.

¹⁷ Van Ballegooij, W. and Moxom, J., 'Equality and the Fight against Racism and Xenophobia: Cost of Non-Europe Report', 2018, Brussels: European Parliamentary Research Service, p. 41.