



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 June 2014

**Interinstitutional File:
2008/0140 (CNS)**

**10038/1/14
REV 1**

**SOC 381
EGC 26
JAI 343
MI 440
FREMP 98**

REPORT

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

No. prev. doc.: 9501/13 SOC 334 EGC 19 JAI 282 MI 408 FREMP 79
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 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 2009¹. 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.

II. THE COUNCIL'S WORK UNDER THE HELLENIC PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal under the Hellenic Presidency,² focusing mainly on the concept of discrimination, the scope and positive action, based on drafting suggestions prepared by the Presidency.³ The drafting suggestions were supported by the Commission and broadly welcomed by delegations as a step in the right direction.

a) The concept of discrimination (Article 2 and Recitals 12, 12a, 14, 14a and 17)

In its drafting suggestions, the Presidency revised the provision describing the concept of direct discrimination or harassment by association by removing the reference to a perceived association in Article 2(2)(e) and Recital 12a. The Commission pointed out that, in any event, the issue was covered in Recital 12 which explained that discrimination included discrimination or harassment based on *assumptions* about a person's religion or belief. However, certain delegations would nevertheless prefer to see the mention of perception retained in the text.

¹ See doc. A6-0149/2009. Kathalijne Maria Buitenweg (Group of the Greens / European Free Alliance) served as Rapporteur, followed by Raúl Romeva I Rueda (Group of the Greens / European Free Alliance).

² Meetings on 11 April and 6 May.

³ 8504/14 and 9211/14.

The Presidency also revised the provision outlining acceptable differences of treatment on the grounds of age, including preferential pricing, to the effect that such differences should aim to promote the economic, cultural or social integration of specific age groups (Article 2(6)(a)). Certain delegations preferred a wording that would allow for preferential pricing for commercial reasons as well.

In the drafting suggestions prepared by the Presidency, the specific provisions concerning positive action in favour of persons with disabilities were moved from Article 5 to Article 2(6a).

In addition, the Presidency introduced wording to the effect that the Directive should not prejudice measures laid down in national law which, in a democratic society, are necessary for the protection of the rights and freedoms of others (Article 2(8) and Recital 17). Certain delegations had doubts, fearing that such a provision could water down the protection afforded by the Directive.

b) The scope (Article 3 and Recitals 17a and 17f)

In its drafting suggestions, the Presidency sought to clarify the wording of the exemptions in the fields of social protection (Article 3(2)(b)) and education (Article 3(2)(d)) with respect to decisions on conditions of eligibility, which fall under national competence. Certain delegations called, in addition, for decisions on requirements for attending special education and the provision of special funding for children who attend mainstream education to be excluded from the scope.

c) Other issues

The Presidency drafting suggestions also provide that indirect discrimination can be established *inter alia* on the basis of statistical "and/or scientific" evidence (Recital 14). In addition, the Presidency removed the wording providing that a plaintiff who considers favourable conditions offered to specific age groups to be discriminatory should bear the burden of proof (Recital 14a). These issues and other details may also require further discussion.

III. OUTSTANDING ISSUES

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

- the overall scope, certain delegations being opposed to the inclusion of social protection and education within the scope;
- anticipatory measures (usually "accessibility") aimed at ensuring equal treatment for persons with disabilities;
- the implementation calendar;
- further aspects of the division of competences and subsidiarity; and
- legal certainty in the Directive as a whole.

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Further details of delegations' positions are set out in 8607/14, 9501/14 and 9877/14.

IV. CONCLUSION

Progress has been made under the Hellenic Presidency, particularly through the clarification of the concept of discrimination and the scope. However, there is still a need for further discussion before the required unanimity can be reached.
