



Brussels, 1 June 2017
(OR. en)

9481/17

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

**SOC 413
ANTIDISCRIM 27
JAI 520
MI 437
FREMP 66**

REPORT

From:	Presidency
To:	Permanent Representations Committee (Part 1) / Council
No. prev. doc.:	9288/17 SOC 375 ANTIDISCRIM 23 JAI 473 MI 427 FREMP 61
No. Cion doc.:	11531/08 SOC 411 JAI 368 MI 246 - COM(2008) 426 final
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 horizontal equal treatment Directive would prohibit discrimination on the above-mentioned grounds in the following areas: social protection, including social security and healthcare; education; and access to goods and services, including housing.

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

A large majority of delegations has 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, in the past, questioned the need for the Commission's proposal, which they have seen as infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality. Certain delegations continue to question the inclusion of social protection and education within the scope. Two delegations have maintained general reservations.

Certain 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, MT and UK have maintained parliamentary scrutiny reservations.

The Commission has 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.

II. THE COUNCIL'S WORK UNDER THE MALTESE PRESIDENCY

The Working Party on Social Questions continued its examination of the proposal,³ based on two sets of Presidency drafting suggestions.⁴

The discussions in the Working Party focused, in particular, on the following main issues:

a) Inclusion of a recital on discrimination on the grounds of sex or gender identity as a compounding factor (Recital 12ab)

The Presidency indicated that this amendment did not aim at extending the remit of the draft Directive but to acknowledge the fact that discrimination on the grounds of religion or belief, disability, age or sexual orientation could be compounded by discrimination on the grounds of sex or gender identity.

Some delegations questioned the purpose of the amendment and inquired how the issue would be addressed in the operative part of the text. One delegation suggested including this reference in Recital 13. Several delegations while supporting the purpose of the amendment, suggested referring to multiple discrimination in general terms instead of singling out a specific combination of grounds. The Presidency opted for this latter proposal.

² See doc. A6-0149/2009. Ulrike Lunacek (AT/LIBE/Greens/European Free Alliance) has been appointed Rapporteur by the newly elected Parliament.

³ Meetings took place on 20 January and 22 May.

⁴ See 15603/16 and 7202/17.

b) **Multiple discrimination (Recitals 12, 12ab and 21 and Article 2(2)(a-b))**

In its drafting suggestions, the Presidency sought to clarify the issue of multiple discrimination and specified that discrimination on the grounds covered in the proposal could also *intersect* with discrimination on the grounds of racial or ethnic origin and nationality, as well as sex or gender identity. In this context, the Presidency introduced language explaining that positive action measures could also cover a group of persons having *a combination* of characteristics relating to religion or belief, disability, age or sexual orientation.

A large number of delegations welcomed the inclusion of multiple discrimination in the text. However, certain others were not in favour. The Commission supported the inclusion of multiple discrimination provided that it was done in a consistent way. The Commission also endorsed the remark made by one delegation that discrimination grounds falling outside the scope of the Directive should not be mentioned in the text, and preferred instead a general reference to the grounds not covered by the present Directive.

c) **Discrimination by association with an organisation dedicated to the promotion of the rights of persons (Recital 12a)**

The Presidency added a provision to Recital 12a regarding the protection of persons who suffer discrimination because of an association which they have, or are perceived to have, with organisations dedicated to the promotion of the rights of persons of a particular religion or belief, disability, age or sexual orientation.

Several delegations supported the amendment, one delegation was unable to accept it and certain others felt the need to scrutinise it further.

d) **Scope (explicit inclusion of statutory supplementary pension schemes, Recital 17b and Article 3(1)(a))**

In its drafting suggestions, the Presidency clarified the wording by specifically stating that the prohibition of discrimination would apply in relation to "access to social protection, in so far as it relates to social security, *including statutory supplementary pension schemes.*"

Certain delegations preferred deleting the reference to statutory supplementary pension schemes on the grounds that there was no need to mention these schemes explicitly, the scope being clear as it stood.

In this context, the Presidency also included a reference to case C-267/06 *Tadao Maruko* in the recitals, in which the Court of Justice of the EU recognised discrimination on the ground of sexual orientation.

A number of delegations and the Commission felt that the reference to case C-267/06 was not appropriate, as it concerned occupational pension schemes (covered by Directive 2000/78/EC) rather than social security and mentioning it in the recitals could therefore be confusing.

d) **Legal benefits depending on marital status (Recital 17h)**

The Presidency adjusted the text in order to cover cases of discrimination against same-sex couples when being granted benefits depending on marital status. Divergent views were expressed on the suggested change.

e) **"Natural or legal persons" (Recital 17ga)**

The Presidency revised Recital 17ga, stating clearly that "All persons, *be they natural or legal persons*, enjoy the freedom to contract..." The Working Party supported this change.

III. OUTSTANDING ISSUES

Further discussion is needed on the questions mentioned above, as well as on a number of other outstanding issues, including the following:

- the scope of the Directive, certain delegations being opposed to the inclusion of social protection and education therein;
- remaining aspects of the division of competences and subsidiarity; and
- legal certainty regarding the obligations that would be established by the Directive.

Further details of delegations' positions can be found in docs. 5428/17 and 9288/17.

IV. CONCLUSION

Tangible progress has been made under the Maltese Presidency on the issues discussed. Nevertheless, further political discussions are needed before the required unanimity can be reached in the Council.
