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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.

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 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, CY and PL maintaining linguistic scrutiny reservations. The Commission has meanwhile affirmed its original proposal at this stage and has 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 POLISH PRESIDENCY

The EPSCO Council having been informed of the progress achieved under the Hungarian Presidency on 17 June 2011³, the Working Party on Social Questions has continued its examination of the proposal under the Polish Presidency,⁴ undertaking an in-depth analysis of the provisions concerning *age as a discrimination factor*.

The Working Party examined a questionnaire⁵ focusing on the exceptions for age that are contained in Article 2(6-7) of the draft Directive. Delegations were invited to express their views as to how various aspects of this exception should be formulated.

Based on the discussion and written replies received, the Presidency prepared a set of drafting suggestions⁶ that focused on the following issues:

a) General exception for age (Article 2(6), Article 3 and Recital 14a)

Aiming to improve legal certainty, so that certain justifiable differences of treatment would be allowed under the Directive, the Presidency suggested two possible approaches: applying *the presumption of justification* to age limits established by national law, but clarifying it in the recitals (Option A), and *excluding age limits in social protection, healthcare and education from the scope* (Option B). Many delegations expressed a preference for Option B. Others preferred Option A, as did the Commission representative.

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 (ES, Group of the Greens / European Free Alliance).

³ See 10615/11.

⁴ The Working Party discussed the proposal on 19 September and 7 November.

⁵ 12054/11.

⁶ 15704/11.

The Presidency suggested, moreover, that the rule on the shared burden of proof should not apply (and plaintiffs who consider themselves to have been the victims of discrimination should thus bear the entire burden of proof) in the case of a presumption of justification for certain age-related provisions. Certain delegations expressed the view that placing the burden of proof entirely on the shoulders of the plaintiff might be excessive. However, the Commission representative pointed out that a defendant would still be obliged to cooperate in legal proceedings.

b) Minors (Article 2(8))

The Presidency suggested that the Directive should be without prejudice to measures for the protection of minors. Several delegations supported this approach, and the Commission representative also indicated that it was acceptable. Certain delegations preferred excluding minors from the scope with respect to age discrimination, while others were in favour of maintaining minors within the scope.

c) Financial services (Article 2(7))

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. The Presidency's drafting suggestions sought to improve the legal certainty of these provisions by revising the text, *inter alia* to the effect that the exception in question is no longer merely an option available to the Member States. The Presidency's text also sought further clarity through the separation of the provisions concerning disability and age respectively.

Several delegations supported separating the provisions applying to age and disability respectively. Certain delegations took the view that rules on financial services should be established at the national level. Delegations also made various suggestions concerning the specific rules on proportionate differences of treatment on the grounds of age or disability.

The Council Legal Service also presented a written contribution⁷ regarding the implications of the Judgment of the European Court of Justice on Case C-236/09, "Test-Achats".

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 as well as on other issues.⁸

III. OUTSTANDING ISSUES NOT DISCUSSED UNDER THE POLISH PRESIDENCY

Further discussion is needed on a number of outstanding issues, 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
- other issues⁹.

IV. CONCLUSION

While significant progress has been made under the Polish 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 1 December 2011.

⁷ Doc. 16258/11.

⁸ Delegations' positions are set out in more detail in doc. 16524/11.

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