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From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	12955/18
No. Cion doc.:	11531/08 - 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

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**I. INTRODUCTION**

Delegations will find attached a footnoted consolidated text. This document provides an overview of the discussions that have taken place in the Working Party on Social Questions, up to and including the meeting on 16 May 2019.<sup>1</sup>

Delegations' general positions and the major outstanding issues are briefly summarised below, and further information is contained in the footnotes to the text.

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<sup>1</sup> The most recent Progress Report is set out in doc. 9567/1/19 REV 1.

## II. DELEGATIONS' GENERAL POSITIONS

A large majority of delegations (BE, BG, CZ, DK, EE, IE, EL, ES, FR, IT, CY, LU, HU, MT, NL, AT, PT, SI, SK, FI, SE, UK) have 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. This broad support has been reaffirmed repeatedly.<sup>2</sup>

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)<sup>3</sup>. BE, FI, MT, NL, SK, SI, BG, HU and Cion have stressed the need to maintain consistency with the UNCRPD. ES, AT, PT and SI would have preferred more ambitious provisions in regard to disability.

DE and PL have maintained general reservations and expressed various concerns.

DE has questioned the existence of an adequate legal basis, and taken the view that the proposal violates the subsidiarity principle. DE has stressed, moreover, that a sufficient impact assessment and cost-benefit analysis had not been carried out. DE has also emphasised the burden that the proposed measures would impose on businesses (especially SMEs) and underlined the lack of legal certainty as a critical issue. Believing that the issues covered in the proposal could be better regulated at the national level, DE has regarded the proposal as infringing on national competence.

PL has also taken the view that the proposal fails to respect the principles of subsidiarity and proportionality as well as the division of competences between the EU and its Member States. PL explained that the proposed Directive appeared to be incompatible with certain aspects of Polish national law, including derogations contained in national anti-discrimination law as well as the freedom of economic activity and the freedom to contract enshrined in the Polish Constitution.

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<sup>2</sup> See doc. 6722/18.

<sup>3</sup> See docs. 15533/09 + ADD 1 and 15540/09. The UNCRPD came into force with respect to the EU in January 2011. See also "Code of Conduct between the Council, the Member States and the Commission" (OJ C 340, 15.12.2010, p. 11).

NL has stated that it supports the proposal provided that solutions can be found to its concerns, particularly in respect of the financial implications and the need for legal certainty.

### **III. MAJOR OUTSTANDING ISSUES AND STATE OF PLAY**

Although progress has been made, the Working Party has recognised the need for further discussion, with a view to resolving the outstanding questions, which include the following:

- 1) Remaining issues related to the scope, the division of competences and the issue of subsidiarity; areas where clarification is required include housing, education, social security, transportation and the physical/built environment.
- 2) The disability provisions, including accessibility and reasonable accommodation for persons with disabilities, in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) as well as in relation to the European Accessibility Act (EAA) or other existing EU legislation regulating accessibility or reasonable accommodation.
- 3) The implementation provisions.
- 4) The need to ensure legal certainty in the Directive as a whole.
- 5) The overall financial and practical impact of the proposal, including on SMEs.

For the time being, all delegations have therefore maintained general scrutiny reservations on the proposal. CZ, DK and UK have maintained parliamentary scrutiny reservations. The Commission has meanwhile affirmed its original proposal at this stage and has maintained a scrutiny reservation on any changes thereto.

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<sup>4</sup>.

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<sup>4</sup> The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009 (doc. A6-0149/2009). Kathalijne Maria Buitenweg (Group of the Greens / European Free Alliance) served as Rapporteur. She was succeeded by Ulrike Lunacek (AT/LIBE/Greens/European Free Alliance). Jean Lambert (UK/LIBE/Greens/European Free Alliance) is currently the Rapporteur.

Proposal for a

**COUNCIL DIRECTIVE**

**on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 19(1) thereof,

Having regard to the proposal from the European Commission<sup>5</sup>,

After transmission of the draft legislative act to the national parliaments,

Having regard to the consent of the European Parliament<sup>6</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) In accordance with Article 2 of the Treaty on European Union (TEU), the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, values which are common to all the Member States. In accordance with Article 6 of the TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights'). Pursuant to the same Article, fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

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<sup>5</sup> OJ C , , p. .

<sup>6</sup> OJ C , , p. .

- (2) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, to which [all] Member States are signatories. This Directive, and in particular the provisions regarding accessibility and reasonable accommodation, respects the fundamental principles recognised in the UNCRPD and in the United Nations Convention concerning the Protection of the World Cultural and Natural Heritage.<sup>7</sup>
- (2a) As of 23 December 2010, the Union is a party to the UNCRPD. The provisions of UNCRPD form, in accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), an integral part of the European Union legal order and Union legislation should therefore be interpreted in a manner that is consistent with the UNCRPD. In particular, the UNCRPD includes, in its Article 2, the denial of reasonable accommodation in its definition of discrimination and, in its Article 9, obligations on accessibility. In its Communication 'European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier Free Europe', the Commission called for consistency to ensure effective implementation of the UNCRPD across the Union and established accessibility as one of the eight areas of action.<sup>8</sup>

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<sup>7</sup> BE regretted the deletion of the reference to the definition of "universal design".

<sup>8</sup> FR suggested removing the reference to "reasonable accommodation" (RA) from the Directive as it caused legal uncertainty and was defined differently in the UNCRPD and the draft Directive. DK also expressed doubts, pointing out that negotiations were under way on the UNCRPD Action Plan. HU: prefers wording in 10779/17.

- (3) This Directive respects the fundamental rights and observes the fundamental principles recognised in particular by the Charter of Fundamental Rights. Article 10 of the Charter of Fundamental Rights recognises the right to freedom of thought, conscience and religion; Article 21 prohibits discrimination, including on grounds of religion or belief, disability, age or sexual orientation; and Article 26 acknowledges the right of persons with disabilities to benefit from measures designed to ensure their independence.
- (4) The European Years of Persons with Disabilities in 2003, of Equal Opportunities for All in 2007, of Intercultural Dialogue in 2008 and for Active Aging and Solidarity between generations in 2012 have highlighted the persistence of discrimination but also the benefits of diversity.
- (5) The European Council, in Brussels on 14 December 2007, invited Member States in its Conclusions to strengthen efforts to prevent and combat discrimination inside and outside the labour market.
- (5a)<sup>9</sup> On 21 February 2011, the Council reaffirmed in its Conclusions its strong commitment to the promotion and protection of freedom of religion or belief without discrimination. On 17 June 2011 in Council's conclusions the Council and the representatives of the governments of the Member States invited the Member States and the European Commission to continue to combat discrimination against persons with disabilities and to review the existing legal framework. On 16 June 2016, the Council invited in its Conclusions the European Commission to promote the measures outlined in the latter's List of Actions to advance LGBTI equality.

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<sup>9</sup> HU: prefer wording in 10779/17.

- (6) The European Parliament has called for the extension of the protection against discrimination in European Union law in its Resolution of 20 May 2008<sup>10</sup> and in its Resolution of 8 September 2015<sup>11</sup>.
- (6a)<sup>12</sup> Discrimination has<sup>13</sup> a serious impact not only on individuals but also on society including on gross domestic product, tax revenue and social cohesion. The protection against discrimination as provided for in this Directive can contribute to a better health status, educational outcomes and, for all these reasons, to an increase in the Member States' gross domestic product.
- (7)<sup>14</sup> The European Commission has affirmed in its Communication 'Renewed social agenda: Opportunities, access and solidarity in 21st century Europe' that, in societies where each individual is regarded as being of equal worth, no artificial barriers or discrimination of any kind should hold people back in exploiting these opportunities. Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the Union as they are laid down in the Treaties, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living, and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of abolishing of obstacles to the free movement of persons, goods and services between Member States. The European Commission has further underscored and renewed its commitment to combat discrimination and to promote equal opportunities in its Communication 'Non-discrimination and equal opportunities: A renewed commitment' and in its Recommendation 'Establishing the European Pillar of Social Rights'.

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<sup>10</sup> European Parliament resolution of 20 May 2008 on progress made in equal opportunities and non-discrimination in the EU (the transposition of Directives 2000/43/EC and 2000/78/EC) (2007/2202(INI)) (OJ C279 E, 19.11.2009, p. 23).

<sup>11</sup> European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)) (OJ C316, 22.09.2017, p. 2.)

<sup>12</sup> NL, Cion: ok to keep the text like it is now. AT: delete this entirely. ES: open to considering the inclusion of this text, but it is rigid.

<sup>13</sup> BE: replace "has" with "can have".

<sup>14</sup> HU: prefer wording in 10779/17.

- (8) Existing European Union legislation includes three legal instruments based on Article 13 of the Treaty establishing the European Community, which has been replaced by Article 19 of the TFEU. They are Directive 2000/43/EC<sup>15</sup>, Directive 2000/78/EC<sup>16</sup> and Directive 2004/113/EC<sup>17</sup>, which aim to prevent and combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. These instruments have demonstrated the value of legislation in the fight against discrimination. In particular, Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation. However, the degree and the form of protection against discrimination on these grounds beyond the areas of employment vary between the different Member States.<sup>18</sup> Directive 2000/43/EC protects persons against discrimination on the grounds of their racial or ethnic origin in the access to and supply of goods and services, social protection as well as education, whereas Directive 2004/113/EC offers protection against discrimination on the ground of sex in the access to and supply of goods and services, with the exclusion of the content of media and advertising as well as education.
- (9) The purpose of this Directive is, therefore, in respect of the grounds it covers, to extend the degree and the form of protections against discrimination beyond the areas of employment into the specific areas set out in this Directive. Thus, Union legislation should prohibit discrimination based on religion or belief, disability, age or sexual orientation in a range of areas outside the labour market, including access to social protection, access to education and access to and supply of goods and services, including housing. Services should be taken to be those within the meaning of Article 57 of the TFEU.

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<sup>15</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22).

<sup>16</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

<sup>17</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37).

<sup>18</sup> NL: insert: "The protection against discrimination on the grounds of sex and racial or ethnic origin beyond the areas of employment is provided for by Directive 2004/113/EC and Directive 2000/43/EC respectively. "



- (10) Directive 2000/78/EC prohibits discrimination in access to vocational training; it is necessary to complete this protection by extending the prohibition of discrimination to education which is not considered vocational training.
- (11)
- (12)<sup>19</sup> Discrimination is understood to include direct discrimination, indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation to persons with disabilities. Discrimination is also understood to occur based on multiple grounds.
- (12a)<sup>20</sup> Discrimination occurs, inter alia, when a person is treated less favorably, or harassed, because of an association which that person has, or is perceived to have, with persons of a particular religion or belief, disability, age or sexual orientation, or with organisations<sup>21</sup> dedicated to the promotion of the rights of these persons<sup>22,23</sup> Discrimination also occurs when a person is treated less favourably or harassed because of a religion or belief, disability, age or sexual orientation which that person is simply<sup>24</sup> assumed<sup>25</sup> to have. It is therefore appropriate to provide explicitly for protection against such discrimination by association or by assumption<sup>26</sup> in this Directive.<sup>27</sup>

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<sup>19</sup> IT: scrutiny reservation.

<sup>20</sup> IT: scrutiny reservation.

<sup>21</sup> HU: reservation.

<sup>22</sup> Judgment of the Court in Case C-83/14, *CHEZ Razpredelenie (Nikolova)*, 16 July 2015 and Judgment of the Court in Case C-303/06 *Coleman v Attridge*, 17 July 2008. HU: reservation. BG: scrutiny reservation.

<sup>23</sup> CZ and HU needed to scrutinize this provision further.

<sup>24</sup> UK: delete "simply".

<sup>25</sup> BE, ES: use "assumed or perceived" to align with Art 2.

<sup>26</sup> LV, SK: scrutiny reservations.

<sup>27</sup> *Ibidem*.

- (12ab) Discrimination on multiple grounds<sup>28</sup> is understood as discrimination, in any of its forms, occurring on the basis of any combination of two or more of the following grounds, including where taken separately the situation would not give rise to discrimination against the person concerned: religion or belief, disability, age or sexual orientation. Discrimination on multiple grounds should be recognised in order to reflect the complex reality of discrimination cases, as well as to increase the protection of the victims thereof.
- (12b) Harassment is contrary to the principle of equal treatment, since victims of harassment cannot enjoy, on an equal basis with others, access to social protection, education and goods and services. Harassment can take different forms, including unwanted verbal, physical, or other non-verbal conduct. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise so serious in nature that it has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- (13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Union should, in accordance with Article 8 of the TFEU, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of discrimination<sup>29</sup> on multiple grounds.
- In the preparation or review of the laws, regulations and administrative provisions necessary to comply with this Directive, Member States should take account of the differential impact on men and women.
- (14) The appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination should remain a matter for the national judicial or other competent bodies in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical and/or scientific evidence.

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<sup>28</sup> HU and UK were not in favour of including "multiple discrimination" in the Directive, although HU could accept mentioning it in one of the recitals. NL: scrutiny reservation.

<sup>29</sup> MT: add "...including discrimination on multiple grounds."

(14a) Differences in treatment in connection with age may be permitted under certain circumstances if they are objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. In this context, the promotion of economic, cultural or social integration<sup>30</sup> of persons belonging to specific age groups should constitute a legitimate aim. The means of achieving this aim, such as the offer of more favourable conditions of access to persons belonging to specific age groups, should be appropriate and necessary. Measures relating to age that offer more favourable conditions to persons of a certain age than are available to others, such as free or reduced tariffs for the use of public transport, museums, or sport facilities, are presumed to be compatible with the principle of non-discrimination and do not constitute discrimination on the ground of age.<sup>31</sup>

(15)

(15a)

(15b) Customers and relevant judicial and 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. The information provided should be useful and understandable to a general public and it should explain differences in individual risk for the service in question. Providers of financial services should, however, not be obliged to disclose commercially sensitive data.<sup>32</sup>

(16)

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<sup>30</sup> AT: prefer "inclusion" throughout the text.

<sup>31</sup> RO: prefer previous version of the text. UK: the Directive should not apply to persons under 18. BE and NL: reservations doubts over any outright presumption of non-discrimination; cases should be examined individually. NL: prefer wording in Article 2(6)(-a). MT: need to consult further with Member States re. historic heritage, transport etc.

<sup>32</sup> AT: add: "This information is to be made available to consumers and relevant judicial and complaints bodies by appropriate means."

- (17) While prohibiting discrimination, it is important to respect other fundamental rights and freedoms in line with the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the protection of private and family life, freedom of religion, freedom of association, freedom of expression, freedom of the press and freedom of information. This Directive should not prejudice measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the prevention of crime for the protection of health and for the protection of the rights and freedoms of others. <sup>33</sup>
- (17-a) This Directive does not alter the division of competences between the Union and the Member States as defined by the Treaties, including in the areas of education and social protection. It is also without prejudice to the essential role and wide discretion of the Member States in providing, commissioning and organising services of general economic interest.
- (17a) This Directive covers the application of the principle of equal treatment in the access to social protection, access to education and access to and supply of goods and services within the limits of the competences of the Union. The concept of 'access' does not include the determination, in accordance with national law and practice, of whether a person is eligible to receive social protection or education, since the Member States are responsible for the organisation, funding and content of their social protection and educational systems, and also for the definition of who is entitled to receive social protection or education.

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<sup>33</sup> AT: delete reference to the "rights and freedoms of others." AT and NL: scrutiny reservations on the last sentence of Recital 17.

(17b) Social protection, within the meaning of this Directive, should cover social security, including statutory pension schemes,<sup>34</sup> social assistance, social housing and health care. Consequently, this Directive should apply with regard to rights and benefits which are derived from general or special social security, social assistance and healthcare schemes, which are statutory or provided either directly by the State, or by private parties in so far as the provision of those benefits by the latter is funded by the State. In this context, the Directive should apply with regard to benefits in cash, benefits in kind and services, irrespective of whether the schemes involved are contributory or non-contributory. The abovementioned schemes include, for example, the branches of social security defined by Regulation (EC) No 883/2004<sup>35</sup> of the European Parliament and of the Council, as well as schemes providing for benefits or services granted for reasons related to the lack of financial resources or risk of social exclusion. This directive should also apply to all statutory supplementary pension schemes.

(17c)

(17d)

(17e)

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<sup>34</sup> BE, HU, UK, SK and DK preferred deleting the reference to "statutory supplementary pension schemes" in Article 3 (and Recital 17b). NL stressed that occupational pension schemes were not part of social protection and should not fall under the scope of the directive.

<sup>35</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p.1).

- (17f) The exclusive competence of Member States with regard to the organisation of their social protection systems includes competence for the setting up, financing and management of such systems and related institutions as well as the competence for determining the substance, the amount, the calculation and the duration<sup>36</sup> of benefits and services, and for the setting of the conditions of eligibility for benefits and services, as well as for the adjustment of those conditions in order to ensure the sustainability of public finances. For example,<sup>37</sup> Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities.
- (17g) The exclusive competence of Member States with regard to the organisation of their educational systems<sup>38</sup> and the content of teaching and of educational activities, including the provision of special needs education<sup>39</sup>, includes competence for the setting up, financing and management of educational institutions, for the development of curricula and other educational activities, for the definition of examination processes and for the setting of the conditions of eligibility, including, for example, age limits regarding eligibility for schools, scholarships or courses. In particular Member States retain the possibility to set age limits in the area of education.<sup>40</sup> In any case Member States as party to the UNCRPD are required to ensure the inclusiveness of their education systems at all levels in accordance with Article 24 of the UNCRPD.

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<sup>36</sup> NL: add "level" and "delivery". NL: reservation.

<sup>37</sup> NL preferred "In particular..." ES and BE: keep "For example."

<sup>38</sup> FI: reservation. FI had suggested stating that the Member States had competence to annul person's admission to a programme of study if the physical or mental health of the individual in question no longer permitted him or her to enter the occupation they were training for. Cion felt that this issue was already included in the concept of "admission."

<sup>39</sup> MT: delete "including the provision of special needs education" - already covered by last sentence of the recital; the term "special needs" is being phased out.

<sup>40</sup> SK: return to previous wording for first sentence, and delete final sentence, integrating the content into the sentence above. FR: keep current drafting.

- (17ga) <sup>41</sup>All persons,<sup>42</sup> be they natural or legal persons, enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. As long as the choice of partner is not based on that person's religion or belief, age, disability and sexual orientation, this Directive should not prejudice the person's freedom to choose a contractual partner. The prohibition of discrimination on these grounds should apply to persons providing goods and services within the Union which are available to the public and the transactions carried out in this context.
- (17h) This Directive does not apply to matters covered by family law including marital status and adoption <sup>43</sup> and to laws on reproductive rights. It is also without prejudice to the secular nature of the State, state institutions or bodies, or education.
- (17i)
- (18)
- (19) According to Article 17 of the TFEU, the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and it equally respects the status of philosophical and non-confessional organisations.

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<sup>41</sup> The Presidency had based the wording of Recital 17ga on Recital 14 of Directive 2004/113/EC. Supporting the Presidency's drafting suggestions, Cion stressed that the principle of freedom to contract as set out in the Charter of Fundamental Rights would stand, regardless of the explanation contained in Recital 17ga. BG, NL, EE: need to analyse/clarify Recital 17ga. IT: prefer previous wording.

<sup>42</sup> NL: text unclear as "entities" are not mentioned.

<sup>43</sup> SK and HU did not support the deletion of "legal benefits dependent thereon".

- (19a) Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. The definition of "long term" in relation to the concept of disability should be seen in the light of the case law of the Court of Justice of the European Union, in particular its judgement in Case C-395/15.
- (19ab) The principle of accessibility is established in the United Nations Convention on the Rights of Persons with Disabilities. The Convention provides in this respect that to enable persons with disabilities to live independently and participate fully in all aspects of life, Member States as State Parties are to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public both in urban and in rural areas.



- (19b) Measures to ensure accessibility for persons with disabilities, on an equal basis with others, to the areas covered by this Directive play an important part in ensuring full equality in practice. Such measures should comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers. Measures to ensure accessibility for persons with disabilities should not impose a disproportionate burden. Accessibility should be considered to have been achieved in a proportionate manner if persons with disabilities are able, effectively and on an equal basis with others, to access the services that particular buildings, facilities, transport services and infrastructure are meant to supply or offer to the public, even if they cannot have access to the entire building, facility<sup>44</sup> or infrastructure concerned.<sup>45</sup>
- (19c) Such measures should aim at achieving accessibility including with regard to, inter alia, the physical environment, transportation, information and communication technology and systems, and services, within the scope of this Directive. The fact that access might not always be possible to achieve in full equality with others may not be presented as a justification for not adopting all measures to increase as far as possible accessibility to persons with disabilities.

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<sup>44</sup> HU supported the text in square brackets and suggested adding "transport service".

<sup>45</sup> The square brackets have been removed from the last sentence. FI: reservation on the last sentence on the grounds that the text is very general and the exemptions are not mentioned. UK also felt that the current text might be too restrictive. AT pointed out that the text seemed too narrow, as it only referred to buildings, facilities, transport services and infrastructure.

- (19d) Improvement of accessibility can be provided by a variety of means, including application of the "universal design" approach. According to the UNCRPD, "universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest possible extent, without the need for adaptation or specialised design. "Universal design" should not exclude assistive devices for particular groups of persons with disabilities where this is needed. Member States should undertake or promote research and development of universally designed goods and services falling within the scope of this Directive, with the aim of meeting the specific needs of persons with disabilities<sup>46</sup> while reducing the need for adaptation and the cost as much as possible, and to promote their availability and use. Member States should also promote universal design in the development of standards and guidelines so as to progressively ensure accessibility of goods and services.<sup>47</sup>
- (19e) Where Union law providing for detailed standards or specifications on accessibility or reasonable accommodation in respect of particular goods or services is complied with, the requirements of this Directive with respect to accessibility or reasonable accommodation should be deemed to be complied with.

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<sup>46</sup> ES, BE, PT and IT pointed out that universal design catered for the whole population, including older people, and not just for persons with disabilities. FR and HU, however, pointed out that the provisions under discussion focused on accessibility for persons with disabilities. ES suggested including a reference to the definition contained in the UNCRPD.

<sup>47</sup> FI: specify that universal design standards should be adopted at the EU level; reservation on the application of the universal design principle to *goods*. DK: delete last sentence of Recital 19d.

- (20) Union law already establishes detailed specifications on accessibility and reasonable accommodation in some areas. Such specifications are provided for, *inter alia*, in Commission Regulation (EU) No 1300/2014<sup>48</sup>, Regulation (EU) No 181/2011 of the European Parliament and of the Council<sup>49</sup>, Regulation (EC) No 1371/2007 of the European Parliament and of the Council<sup>50</sup> and Regulation (EC) No 1107/2006<sup>51</sup> of the European Parliament and of the Council<sup>52</sup>. Union law also already establishes legal requirements to ensure accessibility, without providing for specification or standards of this requirement. Such legal requirements are established, *inter alia*, in Regulation (EU) No 1303/2013 of the European Parliament and of the Council<sup>53</sup> and in Directive 2014/24/EU of the European Parliament and of the Council<sup>54</sup>. For example, Article 7 of Regulation (EU) No 1303/2013 requires that accessibility for persons with disabilities is<sup>55</sup> one of the criteria to be observed in defining operations co-financed by the Funds<sup>56</sup>.

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<sup>48</sup> Commission Regulation (EU) No 1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility (OJ L 356, 12.12.2014, p. 110).

<sup>49</sup> Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ L 55, 28.2.2011, p. 1).

<sup>50</sup> Regulation (EC) No 1371/2007 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ L 315, 3.12.2007, p. 14).

<sup>51</sup> FR: scrutiny reservation on this one.

<sup>52</sup> Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (OJ L 204, 26.7.2006, p.1).

<sup>53</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

<sup>54</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

<sup>55</sup> MT: replace "is" with "be".

<sup>56</sup> NL: scrutiny reservation. FI: EAA does not fall within the remit of “detailed standards or specifications on accessibility” due to the fact that it contains only “functional requirements”. Chair confirmed that the intention was to cover EAA under this provision.

(20-aa)<sup>57</sup> Member States are encouraged<sup>58</sup> to adopt innovative measures to secure the accessibility of cultural infrastructure and cultural activities for persons with disabilities, the need for such measures having been emphasised by the Council in its Resolution of 5 May 2003 on equal opportunities for pupils and students with disabilities in education and training.<sup>59</sup> Such measures should be based on the the universal design<sup>60</sup> approach and Member States' best practices.

(20-a) In addition to general anticipatory measures to ensure accessibility, measures to provide reasonable accommodation in individual cases play an important part in ensuring full equality in practice for persons with disabilities in the areas covered by this Directive. In the context of a contractual or other relationship of long duration between the provider and the person with a disability, structural alteration to premises or equipment could be deemed a reasonable accommodation. Reasonable accommodation can include adjusting or modifying the provider's usual policies, procedures and practices, adapting conditions of access and providing specific assistance, taking into account the particular needs of a person with a disability, with a view to achieving an equal outcome. Measures to provide reasonable accommodation should not impose a disproportionate burden.

(20-b)<sup>61</sup> Member States are encouraged to develop and implement innovative measures<sup>62</sup> to ensure reasonable accommodation.

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<sup>57</sup> CY: reservation. BG, NL: scrutiny reservation.

<sup>58</sup> HU and CY questioned the inclusion of this non-binding provision in the recitals. HU, BE and MT asked why the provision covered "culture" only. Cion: non-binding provisions can be included in the recitals, but best to cover all sectors.

<sup>59</sup> OJ C 134, 7.6.2003, p. 6.

<sup>60</sup> Cion suggested "design for all" as an expression more commonly used in the EU (See also Recital 19d.)

<sup>61</sup> CY: reservation.

<sup>62</sup> FI preferred "all relevant measures."

(20aa)<sup>63</sup> In the provision of housing, the provider should not, in order to comply with the reasonable accommodation provisions set out in this Directive, be required to make structural alterations<sup>64</sup> to the premises or to pay for such alterations. In accordance with national law and practice, a provider should accept such alterations, if they are funded otherwise-and do not impose disproportionate burden of some other kind.

(20ab) The obligation to offer reasonable accommodation, provided that it does not give rise to any disproportionate burden, is established in Directive 2000/78/EC and in the UNCRPD. The UNCRPD also recognizes the importance of accessibility in enabling persons with disabilities to fully enjoy human rights and all fundamental freedoms. It sets accessibility as a general principle and requires States parties to take appropriate measures to ensure access on an equal basis with others.

(20b) In assessing whether measures to ensure accessibility or reasonable accommodation would impose a disproportionate burden, account should be taken of a number of factors including, inter alia, the size, resources and nature of the organisation or enterprise, as well as the estimated costs of such measures or the (technical and/or economic) life span of infrastructures and objects which are used to provide a service. Furthermore, a disproportionate burden could arise in particular where significant structural alterations would be required in order to provide access to movable or immovable property which is protected under national rules on account of its historical, cultural, artistic or architectural value.

(20c)

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<sup>63</sup> NL: scrutiny reservation.

<sup>64</sup> FI: scrutiny reservation.

- (21) The prohibition of discrimination should be without prejudice to the maintenance or adoption by Member States of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, or having a combination of characteristics relating to these specific grounds of discrimination. Such measures may include support of organisations<sup>65</sup> of and for persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the economic, cultural or social integration, of those persons, or catering for their particular needs.
- (22) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
- (23) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other legal entities should be empowered to engage in proceedings, including on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

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<sup>65</sup> PT: clarify which organisations are meant.

- (24) The rules on the burden of proof should be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof should shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the claimant adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
- (25) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.
- (26) In its resolution on the Follow-up of the European Year of Equal Opportunities for All (2007), the Council called for the full association of civil society, including organisations representing people at risk of discrimination, the social partners and stakeholders in the design of policies and programmes aimed at preventing discrimination and promoting equality and equal opportunities, both at European and national levels.
- (27) Experience in applying Directives 2000/43/EC, 2004/113/EC and 2006/54/EC<sup>66</sup> shows that protection against discrimination on the grounds covered by this Directive would be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims of discrimination. In accordance with the purpose of extending the degree and the form of protection against discrimination based on sex and racial or ethnic origin to the grounds covered by this Directive, the competences of this body or bodies should include also the areas covered by Directive 2000/78/EC. The Commission Recommendation on Standards for Equality Bodies of 22 June 2018 may be used by the Member States as guidance to ensure that these bodies function in an effective and independent manner.<sup>67</sup>

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<sup>66</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23).

<sup>67</sup> AT: delete the last sentence - reference to COM Recommendation (not concluded by MS).

- (28)<sup>68</sup> Member States should promote the collection of data on equal treatment and discrimination,<sup>69</sup> with the aim notably of monitoring and evaluating the effectiveness of the measures taken to comply with this Directive. For this purpose, Member States may for instance set baselines or measurable targets, or engage in the collection of qualitative and/or quantitative data. For the purpose of this Directive, data on equal treatment and discrimination should be understood as including any information that is useful and relevant for the purpose of describing and analysing the state of equality, in the sense that it provides indications of the existence and/or extent of discrimination and/or equality. The data collected may include baseline data, such as demographic and socio-economic data, data on material and experienced inequalities, or data which allows for the assessment of current policies or data based on human rights indicators<sup>70</sup>. Data should be collected in accordance with national legislation and practice and in accordance with the applicable Union law, in particular that governing the protection of personal data.
- (29) Member States should provide for effective, proportionate and dissuasive penalties in the event of breaches of national provisions adopted pursuant to this Directive. Penalties can include administrative and financial sanctions such as fines or the payment of compensation, as well as other types of sanctions.

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<sup>68</sup> ES: scrutiny reservation.

<sup>69</sup> PT suggested replacing "data on equal treatment and discrimination" with the more comprehensive wording "data on equality and non-discrimination".

<sup>70</sup> CZ, DK and SK expressed doubts about the addition and asked what it referred to. HU asked for the deletion of this addition. Cion was able to support the reference to human rights indicators, which it explained was a UN concept.



- (30) Since the objective of this Directive, namely ensuring a common level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (31) In accordance with paragraph 34 of the Interinstitutional Agreement of 13 April 2016 on Better Law-Making<sup>71</sup>, Member States are encouraged to draw up, for themselves and in the interest of the Union, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.

HAS ADOPTED THIS DIRECTIVE:

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<sup>71</sup> OJ L 123, 12.5.2016, p. 1.

## CHAPTER I GENERAL PROVISIONS

### *Article 1*

#### *Purpose*

This Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age,<sup>72</sup> or sexual orientation, or on multiple grounds,<sup>73</sup> with a view to putting into effect in the Member States the principle of equal treatment<sup>74</sup> within the scope of this Directive and furthers the promotion of that principle in the field of employment and occupation as provided for in Directive 2000/78/EC.

### *Article 2<sup>75</sup>*

#### *Concept of discrimination*

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no discrimination on any of the grounds referred to in Article 1.  
  
1a.<sup>76</sup>
2. For the purposes of this Directive, "discrimination" means:
  - (a) direct discrimination on one of the grounds referred to in Article 1 or on multiple grounds<sup>77</sup>, that shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation;<sup>78</sup>

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<sup>72</sup> UK: exclude minors (persons under 18) from the scope.

<sup>73</sup> HU and UK: unable to accept the inclusion of "multiple discrimination" in the text. LT and NL: scrutiny reservation on all references to "multiple discrimination" in the text.

<sup>74</sup> PT suggested referring to "the principle of equality". See WK 10138/17.

<sup>75</sup> IT: scrutiny reservation on Article 2 and Recitals 12 and 12a.

<sup>76</sup> NL: prefer to have 1a. back. BG: support the deletion. Cion: prefer to maintain the original proposal.

<sup>77</sup> MT, supported by ES, BE: it is important that 'multiple grounds' also includes other grounds recognised by EU law, i.e. 'sex' and 'race and ethnic origin'.

<sup>78</sup> DK and NL: scrutiny reservations. SK: clarify implications in relation to exceptions contained in existing equal treatment Directives. AT and HU: clarify sanctions that would apply in case of multiple discrimination.

- (b) indirect discrimination on one of the grounds referred to in Article 1 or multiple grounds, that shall be taken to occur where an apparently neutral provision, criterion or practice, or a combination of several such, would put persons of a certain religion or belief, disability, age, and/or sexual orientation at a particular disadvantage compared with other persons, unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;
- (c) harassment<sup>79</sup> related to one of the grounds referred to in Article 1 or multiple grounds, that shall be taken to occur where unwanted conduct takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States;
- (d) discrimination by association on one of the grounds referred to in Article 1 or multiple grounds, that shall be taken to occur where a person is discriminated<sup>80</sup> against due to an association which that person has or is perceived to have<sup>81</sup> with persons of a certain religion or belief, disability, age, and/or sexual orientation.<sup>82</sup>

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<sup>79</sup> UK: harassment on the grounds of religion or belief and based on sexual orientation should not be covered by the Directive.

<sup>80</sup> BE: add "harassment" here. Cion: harassment is already covered (see Article 1(1a)(iii)).

<sup>81</sup> LT: doubts regarding the inclusion of "or is perceived to have."

<sup>82</sup> LV: text goes beyond the situation addressed in Case C-303/06; allegations of discrimination by association are extremely hard to prove.

- (d-a) discrimination by assumption on one of the grounds referred to in Article 1 or multiple grounds, that shall be taken to occur where a person is discriminated due to the fact that that person is assumed or perceived<sup>83</sup> to belong<sup>84</sup> to a certain religion or belief, or to have a certain disability, age, and/or sexual orientation. It is irrelevant whether or not the assumption or perception about the person concerned is correct;
- (d-b) instruction to discriminate against persons, on one of the grounds referred to in Article 1 or multiple grounds;
- (e) denial of reasonable accommodation for persons with disabilities, that shall be taken to occur where there is a failure to comply with Article 4a of this Directive;
- 3-a Discrimination on multiple grounds shall be taken to occur when discrimination is based on any combination of the grounds set out in Article 1 of this Directive.<sup>85</sup>

Discrimination on multiple grounds may occur on the basis of any such combination also where discrimination would not occur on one or more of the grounds when taken separately.

3.

4.

5.

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<sup>83</sup> BE: worried about transposition; in nat. legislation uses only "perceived".

<sup>84</sup> UK: rephrase (one can not 'belong' to a belief).

<sup>85</sup> PT, EE and CZ: extend the scope of multiple discrimination to cover sex and racial or ethnic origin, i.e. grounds covered in existing Directives. FI and IT: scrutiny reservations. MT, ES, BE: should not be limited, should include sex, race, etc.

- 6.<sup>86</sup> Notwithstanding paragraphs 1, 1a and 2 differences in treatment on grounds of age<sup>87</sup> shall not constitute discrimination, if they are objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. The promotion of the economic, cultural or social integration<sup>88</sup> of persons belonging to specific age groups shall constitute a legitimate aim pursuant to the first subparagraph<sup>89</sup>.
- 6-a Preferential charges, fees or rates in respect of anything offered, or provided to persons in a specific age<sup>90</sup> group shall not<sup>91</sup> constitute discrimination for the purpose of this Directive<sup>92</sup>.
- 6a. Notwithstanding paragraphs 1, 1a and 2, differences of treatment consisting in more favourable provisions for persons with disabilities as regards conditions of access to the areas set out in Article 3 which are adopted in order to promote their economic, cultural or social inclusion<sup>93</sup>, or to cater for the particular needs of such persons shall not constitute discrimination for the purpose of this Directive.

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<sup>86</sup> HU: concerns regarding the use of the term "discrimination." CZ: assess appropriateness of exceptions to the principle of equal treatment.

<sup>87</sup> CZ: economic operators should also be allowed to offer more favourable treatment to persons with disabilities.

<sup>88</sup> BE: very broad term that needs to be specified.

<sup>89</sup> BG, SE, FI and IE supported Option I as set out in doc. 13060/16 (see also 9368/14).

<sup>90</sup> ES, AT, FI: wording too open, rendering Article 2(6) second subparagraph meaningless.

<sup>91</sup> FI: prefer "are presumed to be non-discriminatory".

<sup>92</sup> CZ, BE and FI: it should be possible to assess the appropriateness of preferential treatment for specific age groups.

<sup>93</sup> LV and SI: scrutiny reservations.

7.<sup>94</sup>

8. This Directive shall be without prejudice to measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order, for the prevention of crime, for the protection of minors, for the protection of health and safety and for the protection of the rights and freedoms of others,<sup>95</sup> including the right to freedom of expression and the freedom of the press.<sup>96</sup> This Directive does not limit the competence of Member States nor extend that of the Union in the areas mentioned in this paragraph.

*Article 3<sup>97</sup>*

*Scope*

1. Within the limits of the competences conferred upon the European Union and within the limits set out in paragraph 2, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:<sup>98</sup>

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<sup>94</sup> NL, FR, SE, CZ, AT, ES, BE, HU, SK: scrutiny reservation on the proposed deletion of the paragraph; this has already been discussed; keep this exception. Cion: should be kept for age, not for disability; not to link disability with health condition. CLS: exemptions need to be justified and time-limited. RO Pcy asked for drafting suggestions + for the related recitals 15 and 15a. Cion: add 'comparable situations'.

<sup>95</sup> ES: reservation on "the protection of the rights and freedoms of others" on the grounds that it weakens the text. Cion pointed out that these words should be interpreted within the context of the whole phrase ("without prejudice to measures laid down in national law which, in a democratic society, are necessary...").

<sup>96</sup> NL: move "including ... press" to the recitals.

<sup>97</sup> DK and MT: scrutiny reservations on Article 3.

<sup>98</sup> CZ preferred the previous open definition of access in Article 3(1)(a)-(c).

- (a) access to social protection,<sup>99</sup> in so far as it relates to<sup>100</sup> social security, including statutory supplementary pension schemes,<sup>101</sup> and to social assistance, social housing and healthcare.<sup>102</sup>

Access under this point shall include the process of seeking information, applying and registration as well as the actual provision of social protection measures.<sup>103</sup>

(b)

- (c) access to education.<sup>104</sup>

Access under this point shall include the process of seeking information, applying and registration as well as the actual admission to and participation in educational activities;<sup>105</sup>

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<sup>99</sup> FI: unclear whether housing subsidies, for example, are covered. Responding to ES, Cion explained that long-term care was covered by the scope as presently defined.

<sup>100</sup> CZ and FI: return to the previous open wording ("including"). BE, MT, FR, FI: support current wording.

<sup>101</sup> BE, HU, UK, SK and DK preferred deleting the reference to "statutory supplementary pension schemes" in Article 3 (and Recital 17b). NL stressed that occupational pension schemes were not part of social protection and should not fall under the scope of the directive.

<sup>102</sup> UK: reservation on the inclusion of "social protection" within the scope.

<sup>103</sup> MT: add "subject to that person satisfying the eligibility criteria defined by the Member State" (see 7635/15). Cion maintained that this addition was not necessary, since in the beginning of the paragraph it was mentioned "within the limits set out in paragraph 2", which provides that the Directive does not apply, inter alia, to "conditions of eligibility" related to social protection and education.

<sup>104</sup> DE and UK: reservations on the inclusion of "education" within the scope. DK and NL: scrutiny reservations. DK pointed out that equal access for persons with disabilities might not be feasible in the context of educational programmes related to careers in the military and the emergency services. See 9332/16, footnote 23. PT wants to include access to the labour market and to training.

<sup>105</sup> MT: add "subject to that person satisfying the eligibility criteria defined by the Member State" (see 7635/15).

- (d) access to and supply of goods and other services, including housing, which are available to the public<sup>106, 107</sup>

Access under this point shall include the process of seeking information, applying, registration, ordering, booking, renting and purchasing as well as the actual provision and enjoyment of the goods and services in question.

2. This Directive does not apply to:

- (a) matters covered by family law, including marital status and adoption, as well as laws on reproductive rights;
- (b) the organisation and funding of Member States' social protection systems, including the setting up and management of such systems and related institutions as well as the substance, the amount, the calculation and the duration of benefits and services, and the conditions of eligibility for these benefits and services, such as, for example, age limits for certain benefits;<sup>108</sup>
- (c)
- (d) the organisation and funding of the Member States' educational systems, including the setting up and management of educational institutions, the content of teaching and of educational activities, the development of curricula, the definition of examination processes, and the conditions of eligibility, such as, for example, age limits for schools, scholarships or courses;<sup>109</sup>
- (e) differences of treatment based on a person's religion or belief in respect of admission to educational institutions, the ethos of which is based on religion or belief, in accordance with national laws, traditions and practice.

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<sup>106</sup> LV: clarify what "public" means; for transposition.

<sup>107</sup> CZ, NL, AT, HU: cannot support the proposed deletion of "and which are offered outside the context of private and family life". Cion: the deleted text was an important safeguard. NL: Courts and Equal Treatment Bodies should assess on a case-by-case basis which prevails.

<sup>108</sup> CZ: prefer "age limits for the eligibility for certain benefits."

<sup>109</sup> CZ: prefer "setting age limits in relation to eligibility for schools, scholarships or courses."



- 3.
- 3a. This Directive is without prejudice to national measures authorising or prohibiting the wearing of religious symbols and does not limit the exclusive competence of Member States in these matters.
4. This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief and does not limit the exclusive competence of Member States in these matters.
5. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

*Article 4<sup>110</sup>*

*Accessibility for persons with disabilities*

1. Member States shall take the necessary and appropriate measures to ensure accessibility<sup>111</sup> for persons with disabilities, on an equal basis with others, within the areas set out in Article 3. However, these measures should not impose a disproportionate burden.<sup>112</sup>

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<sup>110</sup> FR and BE: reservations. FR: remove reasonable accommodation; remove the sector of transport, it is covered by other legislation.

<sup>111</sup> NL: distinguish clearly between "accessibility" (Article 4) and "structural alterations" in the context of "reasonable accommodation" (Article 4a(3) and Recital 20b, second sentence). BG and HU: concerns regarding the financial implications.

<sup>112</sup> BE and FI: ensure compatibility with the UNCRPD.

- 1a.<sup>113</sup> Accessibility includes general anticipatory measures<sup>114</sup> to ensure the effective implementation of the principle of equal treatment for persons with disabilities in the areas set out in Article 3.
2. The measures referred to in paragraphs 1 and 1a of this Article shall comprise the identification and elimination of obstacles and barriers to accessibility, as well as the prevention of new obstacles and barriers in the areas covered in this Directive.
- 3.
- 4.
- 5.
6. Paragraphs 1, 1a and 2 of this Article shall apply to housing only as regards the common parts of buildings with more than one housing unit. This paragraph shall be without prejudice to Article 4(7) and Article 4a.
7. Member States shall progressively<sup>115</sup> take the necessary measures to ensure that sufficient housing is accessible for persons with disabilities.<sup>116</sup>
8. Member States shall undertake or promote research and development of universally designed goods and services in accordance with national specificities and conditions<sup>117</sup>.

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<sup>113</sup> AT: restore the words "on an equal basis with others."

<sup>114</sup> BG: give examples.

<sup>115</sup> MT: ensure consistency with Article 15. Cion recognised the pertinence of this remark.

<sup>116</sup> AT: scrutiny reservation.

<sup>117</sup> CZ and DK: place reference to "universal design" in recitals only.

9. The provisions of this Article shall be deemed to be complied with where Union law providing for detailed standards or specifications on accessibility in respect of particular goods or services is complied with<sup>118</sup>.

*Article 4a<sup>119</sup>*

*Reasonable accommodation for persons with disabilities*

1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3.<sup>120</sup>
2. For the purpose of paragraph 1, reasonable accommodation means necessary and appropriate modification and adjustments<sup>121</sup> not imposing a disproportionate<sup>122</sup> burden, where needed in a particular case, to accommodate the specific needs of a person with a disability so as to allow that person access on an equal basis with others to the specific social protection measure, educational activity,<sup>123</sup> good or service concerned.<sup>124</sup>

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<sup>118</sup> Other options to solve the interplay between the draft Directive and sector specific legislation proposed by the Slovak Presidency are set out in doc. 13060/16. IT, NL, LU, SE, FI, DK: scrutiny reservations. IT and NL expressed the need to guarantee legal certainty. FR suggested referring to national legislation so as to avoid creating additional requirements. FI: the interplay between the draft Directive and sectorial legislation in the field of transports and communication should be clarified. The relation with the EAA's functional requirements is not clear. HU called for accessibility and reasonable accommodation to be addressed in a single provision. AT: unclear whether the rights of people with disabilities can apply. AT also questioned the relation with the EAA. See also docs. 13511/14 and DS 1398/16.

<sup>119</sup> FR: reservation. FR prefers a) placing all accessibility provisions in the EAA only, or b) making the scope of the accessibility provisions in the two instruments *identical*. Cion: this would be tantamount to deleting accessibility from the draft Directive.

<sup>120</sup> HU: scrutiny reservation. HU preferred the text in doc. 12342/15, Article 4b(3).

<sup>121</sup> RO suggested: "adjustments [...] in concordance with their needs, where needed in a particular case, to adapt at least at minimum level the environment to the particular needs..."

<sup>122</sup> SI, NL, SK and BE have called for consistency with the UNCRPD; Cion has explained that, while the two instruments should not contradict each other, they need not contain identical wording.

<sup>123</sup> AT: clarify this term.

<sup>124</sup> SK, ES and FR: scrutiny reservations.

3. In the provision of housing, paragraphs 1 and 2 shall not require the provider to make structural alterations<sup>125</sup> to the premises or to pay for them. In accordance with national law and practice, a provider shall accept such alterations if they are funded otherwise<sup>126</sup> and do not impose a disproportionate burden.<sup>127</sup>
4. The provisions of this Article shall be deemed to be complied with where Union law providing for detailed standards or specifications on reasonable accommodation in respect of particular goods or services is complied with<sup>128</sup>.

*Article 4b<sup>129</sup>*

*Provisions common to<sup>130</sup> accessibility and reasonable accommodation*

1. For the purposes of assessing whether measures necessary to comply with Articles 4 and 4a would impose a disproportionate burden, account shall be taken, in particular, of:
  - a) the size, resources, nature, and net turnover and profit<sup>131</sup> of the organisation or enterprise;
  - aa) the negative impact<sup>132</sup> on the<sup>133</sup> person with a disability affected by the fact that the appropriate and necessary<sup>134</sup> measure is not provided;<sup>135</sup>

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<sup>125</sup> CZ, LV and FI: clarify "structural alterations." CZ and HU expressed concern about cost implications. CZ: wording possibly too narrow and thus incompatible with the UNCRPD.

<sup>126</sup> BE: scrutiny reservation. SE had concerns over the word "shall", Sweden having no legislation concerning situations in which alterations should be made.

<sup>127</sup> RO suggested: "In the provision of housing, paragraphs 1 and 2 [...] the provider shall make a minimal structural alteration to the premises [...]. In accordance with national law and practice, a provider shall accept such alterations if they are funded otherwise".

<sup>128</sup> HU, DK, IT and FR supported or were ready to consider option B as set out in doc. 13060/16. CZ, AT, BE and SE (tentatively) supported option C as set out in doc. 13060/16.

<sup>129</sup> BE and FR: reservations. AT: scrutiny reservation.

<sup>130</sup> BE: prefer separate articles for the two concepts.

<sup>131</sup> BE, PT, FI: doubts re. open list of examples. CZ, BE: place examples in recitals. NL, FI: align wording with EAA. BE: "net turnover and profit" not mentioned in UNCRPD.

<sup>132</sup> DK: who will assess the impact? NL had concerns regarding this formulation.

<sup>133</sup> Cion: possibly add "specific."

<sup>134</sup> PT, BE, UK: doubts re. "appropriate and necessary."

<sup>135</sup> AT: the example which was deleted in the article should be taken up in a recital.

- b) the estimated cost of the appropriate and necessary measure;
- c)<sup>136</sup> the estimated benefit for persons with disabilities generally, taking into account the frequency and duration of use of the relevant goods and services and the frequency and the duration of the relationship with the seller or provider;<sup>137</sup>
- ca) the amount of public funding available to the organisation or enterprise for taking the appropriate and necessary measure;
- d) the life span of infrastructures and objects which are used to provide a service;<sup>138</sup>
- e) the historical, cultural, artistic or architectural value of the movable or immovable property in question;<sup>139</sup>and
- f) the safety and practicability of the measures in question.

The burden shall not be deemed disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

2.

3.

#### *Article 5*

#### *Positive action*

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation.

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<sup>136</sup> AT and FR: does "frequency and duration" apply to individuals or to persons with disabilities in general? UK: "proportionality" is as important as "duration."

<sup>137</sup> FR: scrutiny reservation.

<sup>138</sup> This criterion may be appropriate only to accessibility.

<sup>139</sup> AT: reservation.

## Article 6

### *Minimum requirements*

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

## CHAPTER II

### REMEDIES AND ENFORCEMENT

## Article 7

### *Defence of rights*

1. Member States shall ensure that judicial and/or administrative procedures, including conciliation procedures,<sup>140</sup> where they deem it appropriate, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage,<sup>141</sup> either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 shall be without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.

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<sup>140</sup> FI preferred "..., including where they deem it appropriate conciliation procedures...".

<sup>141</sup> IE: reservation. IE suggested adding: "as the Member States so determine and in accordance with the criteria laid down by their national law". DE and IT also supported a reference to national law. DE: reservation on the creation of *individual rights* in this context.

*Article 8*  
*Burden of proof*

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove<sup>142</sup> that there has been no breach of the prohibition of discrimination.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to claimants.
3. Paragraph 1 shall not apply to criminal procedures.
4. Member States may decide not to apply paragraph 1 to proceedings in which the court or other competent body investigates the facts of the case.
5. Paragraphs 1, 2, 3 and 4 of this Article shall also apply to any legal proceedings commenced in accordance with Article 7(2).

*Article 9*  
*Victimisation*

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings<sup>143</sup> aimed at enforcing compliance with the principle of equal treatment.

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<sup>142</sup> CZ, DE, LU and NL expressed concern in respect of the reversal of the burden of proof. Cion affirmed this provision. NL and UK pointed out that a mention should also be made in Article 8 of *the reversal* of the burden of proof that is provided for in Recital 14a for cases where "more favourable conditions of access are offered to persons of a given age, in order to promote their economic, cultural or social integration." Cion acknowledged that clarification would be useful.

<sup>143</sup> IE recalled that "legal proceedings" was used in Directives 2000/78/EC and 2004/113/EC.

## *Article 10*

### *Dissemination of information*

Member States shall ensure that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by appropriate means throughout their territory.

## *Article 11*

### *Dialogue with relevant stakeholders*

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on the grounds and in the areas covered by this Directive.

## *Article 12*

### *Bodies for the Promotion of Equal treatment*

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguarding of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
  - (a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
  - (b) conducting independent surveys concerning discrimination, and
  - (c) publishing independent reports and making recommendations on any issue relating to such discrimination.



3. Member States shall also ensure that the competences of the body or bodies referred to in paragraph 1 include both the areas covered in this Directive and 144 the areas covered by Directive 2000/78.

## **CHAPTER III**

### **FINAL PROVISIONS**

#### *Article 13*

#### *Compliance*

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected within the scope of this Directive and in particular that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any contractual provisions, internal rules of undertakings, and rules governing profit-making or non-profit-making associations contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

#### *Article 14*

#### *Penalties*

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. Penalties may comprise the payment of compensation, which may not be restricted by the fixing of a prior upper limit, and must be effective, proportionate and dissuasive.<sup>145</sup>

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<sup>144</sup> DK and CZ: prefer separate amendment to Directive 2000/78/EC. FI: current drafting only refers to the scope of the Equality Bodies but not their other responsibilities under Directive 2000/78/EC.

<sup>145</sup> CZ: better place it in the recitals. Cion supports the Pcy proposal.

*Article 14a*  
*Gender mainstreaming*

In accordance with Article 8 of the Treaty on the Functioning of the European Union, the Member States shall, when implementing this Directive, take into account the aim of eliminating inequalities, and of promoting equality, between men and women.

*Article 15*<sup>146</sup>  
Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by .... [4<sup>147</sup> years after adoption].<sup>148</sup> They shall immediately<sup>149</sup> inform the Commission thereof and shall communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States may<sup>150</sup> establish that the obligation to ensure accessibility as set out in Article 4 has to be complied with by, at the latest, [5<sup>151</sup> years after adoption] regarding new<sup>152</sup> buildings, <sup>153</sup>facilities, transport services<sup>154</sup> and infrastructure.

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<sup>146</sup> MT and FI: clarify link between the implementation date and the dates in Article 15(2). DK and PL: reservations. PL, DE and LV favoured an incremental approach (progressive realisation). MT: scrutiny reservation. LV: provisions in Article 15(2) and (2a) should be "without prejudice to the obligations laid down in the *acquis* of the relevant sectors." Recalling that the UNCRPD contained no implementation deadlines, HU wondered whether the draft Directive could also be made more flexible.

<sup>147</sup> MT called for a longer period. DK and HU: longer periods might advance the discussion. EL suggested flexible deadlines. Cion: a single, realistic date is better.

<sup>148</sup> CZ: add "at the latest".

<sup>149</sup> FI suggested "without delay."

<sup>150</sup> IE suggested "shall."

<sup>151</sup> BE: delete separate five-year deadline for new buildings. BE: reservation. EE: need longer period. LV suggested 10 years. BG suggested 20 or 25 years for *all* buildings.

<sup>152</sup> PL suggested: "newly designed."

<sup>153</sup> MT and EE: define "new" and "existing" buildings. IT: Member States should be free to define "new buildings".

<sup>154</sup> FI and LV: clarify the scope of the term "transport services." MT. clarify practical and financial implications in the field of transport.

- 2a. Member States may establish that the obligation to ensure accessibility as set out in Article 4 has to be complied with by [20<sup>155</sup> years after adoption] regarding existing<sup>156</sup> buildings, facilities, transport services<sup>157</sup> and infrastructure. Where a Member State does so it shall ensure the progressive implementation of that obligation over that period.<sup>158</sup>
3. Any Member State<sup>159</sup> which chooses to use the additional period set out in paragraph 2a shall communicate to the Commission by the date set out in paragraph 1 of this Article an action plan laying down the steps to be taken and the timetable for achieving the progressive implementation of that obligation.
- 3a. Member States shall inform the Commission, by the date set out in paragraph 1 of this Article, of their plans for the progressive implementation of the obligation provided for in Article 4(7).<sup>160</sup>
4. Member States shall promote the collection of data on equal treatment and discrimination. Data shall be collected in accordance with national legislation and practice and in accordance with the applicable Union law, in particular that regarding the protection of personal data.

#### *Article 16*

#### Report<sup>161</sup>

1. Member States shall communicate to the Commission, by [two years after the date provided for in Article 15(1)] and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive, including information on the implementation of the plans mentioned in Article 15(3) and (3a).

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<sup>155</sup> FR: reservation with respect to inter-urban transport and road infrastructure. LT called for a longer deadline. DK: reservation on 20 years.

<sup>156</sup> LU suggested examining whether the reference to "all other existing buildings, facilities and infrastructure" in Article 15(2) was conducive to unanimity at the Council level.

<sup>157</sup> BE, CZ, DE and HU expressed doubts regarding the feasibility of adapting existing vehicles. UK expressed the view that the provisions ought to apply to transport services, not vehicles.

<sup>158</sup> LV: align implementation dates with the EAA.

<sup>159</sup> Cion: restore the words "wishing to use any of these additional periods."

<sup>160</sup> FI and CZ preferred the previous wording (13773/1/15 REV 1).

<sup>161</sup> BE: make reporting periods consistent with Directive 2000/78/EC.

2. The Commission's report shall take into account, as appropriate, the viewpoints of national equality bodies and relevant stakeholders, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

*Article 17*

*Entry into force*

This Directive shall enter into force on the day of its publication in the Official Journal of the European Union.

*Article 18*

*Addressees*

This Directive is addressed to the Member States.

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