



Brussels, 13 May 2015  
(OR. en)

8679/15

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

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**LIMITE**

**SOC 292  
ANTIDISCRIM 3  
JAI 276  
MI 292  
FREMP 95**

## **OUTCOME OF PROCEEDINGS**

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From: WORKING PARTY ON SOCIAL QUESTIONS

On: 8 May 2015

To: Delegations

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No. prev. doc.: 8149/15 SOC 246 ANTIDISCRIM 1 JAI 245 MI 247 FREMP 79

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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

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### **I. INTRODUCTION**

At its meeting on 8 May, the Working Party on Social Questions continued its work on the above proposal. The discussion was based on a set of drafting suggestions<sup>1</sup> prepared by the Presidency. In addition, the Presidency had prepared a compilation document<sup>2</sup> summarising the Member States' replies to its questionnaire.

Delegations broadly supported the Presidency's drafting suggestions as a step in the right direction. A number of delegations, including PL, FR as well as the Commission representative (Cion) recalled the high-level discussions that took place at the EPSCO Council on 11 December 2014 and called for flexibility and a sustained momentum in the discussions with a view to reaching agreement.

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<sup>1</sup> 8149/15.

<sup>2</sup> 8333/15.

## II. MAIN ITEMS DISCUSSED

### **Article 2(6), 2(6a) and 2(8) (Concept of Discrimination)**

While mainly focusing on Article 3, the Presidency had also tabled drafting suggestions on Article 2 based on comments received in response to its questionnaire. The Presidency had separated Article 2(6)(a) into two points (a) and (b) and added a point (c) concerning preferential charges, fees or rates in respect of persons in a specific age group.

IE, recalling its note<sup>3</sup> on the subject of preferential pricing based on age, welcomed the addition of a new point (c) in Article 2(6). FR also supported the addition. However, several delegations (ES, AT, FI) felt that the exemption set out in Article 2(6)(c) was too broad and would open the door to any age-related differences of treatment whatsoever.

HU recalled its abiding concerns regarding the use of the term "discrimination" and underlined the need to accommodate Hungarian national legislation aiming to protect the cultural identity of a specific group, further analysis and reflection being needed.

### **Article 3(1) and 3(2) and Recitals 17-a, 17a, 17b, 17f, 17g and 17ga (Scope)**

In its drafting suggestions, the Presidency had reworded Recital 17ga in line with the wording in Recital 14 of Directive 2004/113/EC. Delegations expressed various concerns (see footnotes to attached text). Supporting the Presidency's drafting suggestions, Cion recalled that Directive 2004/113/EC had been adopted by unanimity. He stressed, moreover, 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.

Delegations expressed divergent views concerning the current wording of the scope in Article 3. The discussion largely focused on social protection and education.

(See footnotes to the attached text.)

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<sup>3</sup> 9370/14.

### III. OTHER ISSUES

EL recalled the suggestion made by the Greek Minister at the EPSCO Council on 11 December 2014 that the proposal be split into separate Directives dealing with the different discrimination grounds.

### IV. CONCLUSION

The Chair, echoing remarks made by a number of delegations and Cion, expressed the view that the wording of Article 3 and the corresponding recitals was at this point very advanced. The Chair invited delegations that had not yet done so to send in their replies to the questionnaire set out in doc. 6081/15 **no later than 20 May**. A Progress Report will be presented to the EPSCO Council on 18 June 2015.

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Proposal for a

**COUNCIL DIRECTIVE**

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

(...)

(17-a) This Directive does not alter the division of competences between the European 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 European 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 and content of their social protection and educational systems, and also for the definition of who is entitled to receive social protection or education.

(17b) Social protection, within the meaning of this Directive, should **cover** social security, 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 883/2004/EC on the coordination of social security systems<sup>4</sup>, as well as schemes providing for benefits or services granted for reasons related to the lack of financial resources or risk of social exclusion.

(17c)

(17d)

(17e)

(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>5</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>6</sup> Member States retain the possibility to reserve certain benefits or services to certain age groups or persons with disabilities.

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<sup>4</sup> OJ L 166, 30.4.2004, p.1.

<sup>5</sup> NL: add "level" and "delivery". NL: reservation. BE: Scrutiny reservation on the NL suggestion.

<sup>6</sup> NL preferred "In particular." ES and BE: keep "For example."

(17g)<sup>7</sup> The exclusive competence of Member States with regard to the organisation of their educational systems and the content of teaching and of educational activities, including the provision of special needs education, 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>8</sup>

(17ga)<sup>9</sup> All individuals<sup>10</sup> enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner.<sup>11</sup> 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 individual's freedom to choose a contractual partner.<sup>12</sup> The prohibition of discrimination<sup>13</sup> should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context.

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<sup>7</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>8</sup> SK: return to previous wording for first sentence, and delete final sentence, integrating the content into the sentence above. FR: keep currently drafting.

<sup>9</sup> BG, NL, EE: need to analyse/clarify Recital 17ga. IT: prefer previous wording.

<sup>10</sup> NL: text unclear as "entities" are not mentioned.

<sup>11</sup> CZ and FI: delete second sentence.

<sup>12</sup> AT: understand sentence to mean that, when you choose a contractual partner, religion or belief, age, disability or sexual orientation should not be the decisive factor.

<sup>13</sup> HU: add "on these grounds".

**CHAPTER I**  
**GENERAL PROVISIONS**

(...)

*Article 2*

*Concept of discrimination*

(...)

6.<sup>14</sup> Notwithstanding paragraphs 1 and 2<sup>15</sup>

- (a) differences of treatment on grounds of age 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.
- (b)<sup>16</sup> differences of treatment where more favourable conditions of access are offered to persons belonging to specific age groups in order to promote their economic, cultural or social integration, are presumed to be non-discriminatory for the purpose of this Directive.
- (c)<sup>17</sup> preferential charges, fees or rates in respect of anything offered, or provided to, or in respect of persons in a specific age<sup>18</sup> group do not<sup>19</sup> constitute discrimination for the purpose of this Directive.

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<sup>14</sup> UK asked why different wording was used in points (a) ("shall not constitute discrimination"), (b) ("are presumed to be non-discriminatory") and (c) ("do not constitute discrimination").

<sup>15</sup> Note from the Council Secretariat: as a technical change, the words "Notwithstanding paragraphs 1 and 2" have been separated from Article 2(6)(a) so that they become a chapeau governing (a), (b) and (c).

<sup>16</sup> SK: point (b) should be placed in separate paragraph. Alternatively, change order of the subparagraphs to (a), (c), (b).

<sup>17</sup> AT asked whether Article 2(6)(c) covered the entire scope (including education and social protection) or merely goods and services. SK asked whether preferential rates applied also to persons covered by paragraph 6(a); if not, SK suggests mentioning persons with disabilities in point (c).

<sup>18</sup> ES, AT, FI: wording too open, rendering Article 2(6)(b) meaningless.

<sup>19</sup> FI: prefer "are presumed to be non-discriminatory" (cf. 2(6)(b)).

- 6a. Notwithstanding paragraphs 1 and 2, this Directive shall not preclude 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 integration, or to cater for the particular needs of such persons.

(...)

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, and for the protection of health and safety and for the protection of the rights and freedoms of others,<sup>20</sup> including the right to freedom of expression<sup>21</sup> and the freedom of the press.<sup>22</sup> This Directive does not limit the competence of Member States nor extend that of the Union in these areas.

### *Article 3*

#### *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>23</sup>

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<sup>20</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>21</sup> EE: prefer "speech." Cion: "expression" already includes "speech." SE: keep "expression".

<sup>22</sup> NL: move "including ... press" to the recitals.

<sup>23</sup> CZ preferred the previous open definition of access in Article 3(1)(a)-(c).



- (a) access to social protection,<sup>24</sup> in so far as it relates to<sup>25</sup> social security, social assistance, social housing and healthcare.

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>26</sup>

(b)

- (c) access to education.

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>27</sup>

- (d) access to and supply of goods and other services, including housing, which are available to the public and which are offered outside the context of private and family life.

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.

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<sup>24</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>25</sup> CZ and FI: return to the previous open wording ("including"). LT: align with Recital 17b and reinsert "similar activities". MT and FR supported the current wording as it offered greater clarity. FI also supported the text. Responding to remarks by CZ, Cion explained that "social advantages" as interpreted by the Court of Justice of the European Union in the context of free movement of workers were covered by under the rubric of goods and services (e.g. cheap train tickets for large families), education (e.g. financial support for the education of a dependent child) and social protection (e.g. the cost of burying a family member).

<sup>26</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>27</sup> MT: add "subject to that person satisfying the eligibility criteria defined by the Member State" (see 7635/15).

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 organization 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>28</sup>
- (c)
- (d)<sup>29</sup> 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>30</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>28</sup> CZ: prefer "age limits for the eligibility for certain benefits."

<sup>29</sup> RO warned that drawing up an exhaustive list of the areas or aspects of education where the Directive did *not* apply would not only reduce the beneficial impact of the Directive but also curtail the competences of the Member States as referred to in Article 6 TFEU.

<sup>30</sup> CZ: prefer "setting age limits in relation to eligibility for schools, scholarships or courses."