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

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The Council took note of a **progress report** on the equal treatment directive.

During discussions in the Council's working party, a large majority of delegations welcomed the proposal in principle, many endorsing the fact that it aims to complete the existing legal framework by addressing all four grounds of discrimination through a horizontal approach.

Most delegations have affirmed the importance of promoting equal treatment as a shared social value within the EU. In particular, several delegations have underlined the significance of the proposal in the context of the UN Convention on the rights of persons with disabilities. However, some delegations would have preferred more ambitious provisions with regard to **disability**.

While emphasizing the importance of the fight against discrimination, certain delegations have maintained general reservations, questioning the need for the Commission’s proposal, which they see as encroaching on national competence for certain issues and **conflicting with the principles of subsidiarity and proportionality**.

Certain other delegations have also requested clarifications and expressed concerns relating, in particular, to the lack of legal certainty, the division of competences, and the practical, financial and legal impact of the proposal.

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

The European Parliament adopted its Opinion under the Consultation Procedure on 2 April 2009. 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.

The proposal has been under examination in the Council since 2008. Despite the well-known difficulties, efforts have continued in order to clarify the various issues that have arisen. During the Danish presidency, the experts have focused on age discrimination.

The discussion has advanced to some extent, improving the clarity of the text. A great deal of work still needs to be done however.

The Council’s work under the Danish presidency:

The discussions addressed a number of issues, including the following:

(a) General exception for age: aiming to improve legal certainty, so that certain justifiable differences of treatment would continue to be allowed under the Directive, the Presidency tabled a suggestion whereby conditions of eligibility related to age and disability, including age limits, for benefits and services within the framework of the Member States' social protection systems are excluded from the scope.Age limits in the area of education are similarly excluded in the current draft.

Certain delegations felt that social protection ought to be removed from the scope altogether. The Commission representative, however, affirmed the need to keep social protection within

the scope and expressed the concern that excluding *all* conditions of eligibility from the scope might appear to **negate the very purpose of the Directive** with respect to ensuring equal access to social protection.

Certain delegations had doubts regarding the formulation of the provisions concerning social protection. Article 3 states that healthcare is part of social protection and thus falls within the scope of the Directive; *private* healthcare services, however, would not benefit from the exemption of age or disability related conditions of eligibility from the scope, which only applies to healthcare in the context of "the organisation of *Member States' social protection systems*," i.e. public healthcare. **Certain delegations questioned this distinction between private and public healthcare, and stated that it was not clear-cut**, calling for clarification. Endorsing the need for clarity, the Commission representative nevertheless took a favourable view of the approach taken in the Presidency's drafting suggestions, whereby age limits set as a condition of eligibility to public healthcare would be exempted from the Directive, whereas private healthcare providers would be required to justify the age limits they set.

(b) Financial services: the draft Directive would, in certain cases, permit proportionate differences of treatment on the grounds of age and disability in the provision of financial services. In an attempt to clarify the text, the Presidency introduced separate recitals for age (Recital 15) and disability (Recital 15a). In order to further improve legal certainty in the light of the Judgement of the Court of Justice, the Presidency specified that :

- while risk factors related to age are used in the provision of insurance, banking and other financial services to assess the individual risk and to determine premiums and benefits, in certain financial services, persons of different ages are not in a comparable situation for the assessment of risk ;
- similarly, in certain financial services, persons with a disability are not in a comparable situation for the assessment of risk with that of persons without such a disability.

The Presidency also sought to clarify the criteria for risk assessments to the effect that **proportionate differences of treatment on the grounds of age or disability do not constitute discrimination if a person's age or disability is a determining factor in the assessment of risk for the service in question** and this assessment is based on actuarial principles and relevant and reliable statistical data (or, in the case of disability, relevant and reliable medical knowledge).

Delegations called for certain clarifications and expressed divergent views on these criteria, some calling for greater flexibility, while others wanted stricter rules.

Emphasising the need for legal certainty, certain delegations also **warned against inadvertently outlawing commercial practices where cheaper rates were offered to certain age groups**. In this context, certain delegations saw a need to clarify the suggested adjustment of the burden of proof rule provided for in Recital 14a for cases where more favourable conditions of access are offered to persons of a certain age.

Other issues requiring further discussion include:

- the potentially discriminatory situation that might arise if, for example, insurance providers in small national markets refuse altogether to cater for certain age groups;
- the provisions concerning minors, certain delegations having called for persons under eighteen to be excluded from the Directive;
- and consistency with the UNCRPD.

Generally speaking, the Presidency's drafting suggestions were broadly supported by many delegations as a step in the right direction, more work being nevertheless required on the provisions concerning age as a discrimination factor.

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

- the division of competences, the overall scope and subsidiarity;
- the disability provisions, including accessibility and reasonable accommodation for persons with disabilities;
- the implementation calendar;
- legal certainty in the Directive as a whole; and
- the overall impact of the proposal, including on SMEs.