

# **THE PROPOSAL FOR A NEW ANTI-DISCRIMINATION DIRECTIVE**

Robert Wintemute, Professor of Human Rights Law, King's College London  
(robert.wintemute@kcl.ac.uk)

Recent Developments in EC [now EU] Anti-Discrimination Law:  
Seminar for legal practitioners  
Academy of European Law, Trier, Germany, 1 December 2009

## **I. The need for a new anti-discrimination directive**

### **A. Existing EU anti-discrimination legislation (excluding "nationality of another Member State"<sup>1</sup>):**

- EU Charter of Fundamental Rights, Article 21(1), combined with Article 6(1) EU
- Article 157 FEU (ex 141 EC, ex 119 EEC) (sex + pay)
- Recast Equal Treatment Directive (ETD) 2006/54 (sex + employment)
- Goods and Services Directive (GSD) 2004/113 (sex + goods/services)
- Social Security Directive (SSD) 79/7 (sex + social security)
- Self-Employment Directive (SED) 86/613 (sex + self-employment)
- Racial Equality Directive (RED) 2000/43 (race + multiple areas)
- Employment Equality Directive (EED) 2000/78 (religion/disability/age/  
sexual orientation + employment)

### **B. The proposed new directive (a "multi-ground directive", not a "horizontal directive")**

- COM(2008) 426 final: Commission Proposal (2 July 2008) for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (social protection, social security, healthcare, social advantages, education, goods and services, housing) (the "Multi-Ground Beyond-Employment Directive"; European Parliament and NGOs pressured Commission not to propose a "Disability Beyond-Employment Directive")

### **C. The current hierarchy of grounds in EU anti-discrimination legislation, in relation to material scope (see table on next page; sex was on top before 2000; sex is now in the middle; sex will drop to the bottom, if the proposed Multi-Ground Directive is adopted):**

---

<sup>1</sup> Directive 2003/109 (status of third-country nationals who are long-term residents, ie, more than 5 years), Art. 11 (equal treatment with nationals)

	racial or ethnic origin: RED, Art. 3(1)	sex:	religion or belief, disability, age, sexual orientation: (EED, Art. 3(1))
employment (includes pay and occupational pensions)	X	Art. 157 FEU + ETD, Arts. 4, 7	X
vocational training (includes most university and other post-18 education)	X	ETD, Art. 14	X
social security	X	SSD, Art. 3(1)	<b>Multi-Ground Directive</b>
goods and services	X	GSD, Art. 3(1) (except media, advertising, primary + secondary education)	<b>Multi-Ground Directive</b>
education	X		<b>Multi-Ground Directive</b>
healthcare	X	GSD, Art. 3(1)?	<b>Multi-Ground Directive</b>
housing	X	GSD, Art. 3(1)?	<b>Multi-Ground Directive</b>
social advantages	X		<b>Multi-Ground Directive</b>
social protection	X		<b>Multi-Ground Directive</b>
all other acts or omissions of public authorities	(covered by social advantages and social protection?)		(covered by social advantages and social protection?)
equality body required	RED, Art. 13	ETD, Art. 20	<b>Multi-Ground Directive</b>

## II. Content: Material scope and exceptions

Article 2(6) [age-related benefits or discounts] ... Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if ... they are justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

Article 2(7) ... in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data. [similar to GSD]

Article 3(1) Within the limits of the powers conferred upon the Community, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) Social protection, including social security and healthcare;
- (b) Social advantages;
- (c) Education;
- (d) Access to and supply of goods and other services which are available to the public, including housing. [identical to RED, Art. 3(1)(e)-(h), except for next sentence]

Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity. [exclusion of private and family life]














Article 3(2) This Directive is without prejudice to national laws on marital or family status and reproductive rights. [cf. EED, Recital 22, and Maruko, ECJ, 1 April 2008; main issues: access to services, including those of adoption agencies and fertility clinics, in member states in which only married different-sex couples have access]

Article 3(3) ... Member States may provide for differences in treatment in access to educational institutions based on religion or belief. [see JFS, a publicly-funded Jewish school, <http://www.jfs.brent.sch.uk>; R. (E.) v. Governing Body of JFS, [2009] EWCA Civ 626, England and Wales Court of Appeal, 25 June 2009]

Article 3(4). This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education ... It is equally without prejudice to national legislation promoting equality between men and women. [exception for French legislation on Muslim headscarves and other "signs or dress by which pupils overtly manifest a religious affiliation"]

### **III. State of play**

- [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=197196](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196)
- see table on next page

<b>COM (2008) 426</b>		<b>2008/0140/CNS</b>	
Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation			
<b>02-07-2008</b>	<b>Adoption by Commission</b>		
Decision mode:	Oral procedure		
Primarily responsible	DG Employment, Social Affairs and Equal Opportunities		
Mandatory consultation	European Parliament		
Addressee for formal act	Council		
Optional consultation	Committee of the Regions; European Eco. & Soc. Committee		
Responsible	Vladimir SPIDLA		
Documents:	 <a href="#">CS/2008/11531/</a>  <a href="#">COM/2008/426/FINAL</a>  <a href="#">IP/2008/1071/</a>		
Procedures:	Consultation procedure		
Type of file:	Proposal for a Directive		
Legal basis:	Traité/CE/art 13 par 1		
NUMERO CELEX	 <a href="#">52008PC0426</a>		
<b>02-07-2008</b>	<b>Supplement</b>		
Documents:	 <a href="#">SEC/2008/2182/</a>		
<b>02-07-2008</b>	<b>Supplement</b>		
Documents:	 <a href="#">CS/2008/11531/ADD 1</a>  <a href="#">SEC/2008/2180/</a>		
<b>02-07-2008</b>	<b>Supplement</b>		
Documents:	 <a href="#">CS/2008/11531/ADD 2</a>  <a href="#">SEC/2008/2181/</a>		
<b>02-10-2008</b>	<b>Discussions at Council</b>		
Documents:	 <a href="#">PRES/2008/271/</a>		
OJ CONSEIL	ITEM "B" ON COUNCIL AGENDA		
SESSION CONSEIL	2893		
SUJET	EMPLOYMENT, SOCIAL POLICY, HEALTH AND CONSUMER AFFAIRS		
<b>02-04-2009</b>	<b>EP opinion single rdg</b>		
Decision :	Approval with amendments		
Rapporteur	Kathalijne Maria BUITENWEG		
Responsible	Vladimir SPIDLA		
Taking over	Vladimir SPIDLA		
Documents:	 <a href="#">A6/2009/149/</a>  <a href="#">TA/2009/211/</a>		
<b>02-04-2009</b>	<b>Commission position on EP amendments on single reading</b>		
Decision :	Partial agreement		
<b>08-06-2009</b>	<b>Discussions at Council</b>		
Documents:	 <a href="#">PRES/2009/124/</a>		
OJ CONSEIL	ITEM "B" ON COUNCIL AGENDA		
SESSION CONSEIL	2947		
SUJET	EMPLOYMENT, SOCIAL POLICY, HEALTH AND CONSUMER AFFAIRS		

Council Press Release: 2 October 2008

"... A large number of Ministers favoured a high level of ambition. Several Ministers said that their existing national legal systems went beyond the Commission proposal.

Some Ministers questioned the need to establish Community rules in this area, while supporting the principle of equal treatment.

Ministers underlined the importance of the proposal with regard to the United Nations Convention on the Rights of Persons with Disabilities, which had been signed by all the Member States and was in the process of being ratified by most of them. Some delegations would have preferred more ambitious provisions concerning measures to combat discrimination on grounds of disability.

Most delegations asked for certain parts of the proposal to be clarified in order to guarantee its legal certainty. A large number of delegations requested clarifications regarding the proposal's economic and financial impact. ..."

Council Press Release: 8-9 June 2009

" ... On the basis of a progress report (10073/1/09 REV1), the Presidency briefed the Council on the state of play in the discussions on the draft directive ... Under the Czech Presidency, the discussions within the preparatory bodies of the Council concentrated on the provisions aimed at protecting persons with disabilities from discrimination (Article 4 of the proposal). The Presidency tabled drafting suggestions to align the directive more closely with the text of the UN Convention on the Rights of Persons with Disabilities and to provide for the progressive implementation of the directive. However, further extensive work is clearly necessary on numerous issues. These include specific provisions on disabilities (e.g. the scope of the directive, its financial and practical implications, legal certainty, the implementation calendar and the relationship between the directive and more detailed sectoral specifications), the division of competence and legitimate differences of treatment (e.g. cheaper public transport for disabled persons). ..."

Progress Report: 10073/1/09 REV1 (2 June 2009)

<http://register.consilium.europa.eu/pdf/en/09/st10/st10073-re01.en09.pdf>

" ... 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 in regard to disability instead of the horizontal approach. ... [C]ertain delegations have put forward the view that more experience with the implementation of existing Community law is needed before further legislation is adopted at the Community level. These delegations have questioned the timeliness and the need for the Commission's new proposal, which they see as infringing on national competence for certain issues. ..."

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

### III. OUTSTANDING ISSUES NOT DISCUSSED UNDER THE CZECH PRESIDENCY

#### 1. Division of Competence, Legal Basis and Subsidiarity (Article 3)

... More work is also needed to elucidate the delicate distinction between access to fields such as education, healthcare and social protection, and the organisation of such fields, the latter being an area of national competence. Other issues that require additional examination include ...the provisions related to family law (Article 3(2)), and the need to find a balance between anti-discrimination and the rights of individuals in the private sphere (e.g. Article 3(1)).

#### 2. Legitimate Differences of Treatment

The current draft text provides for certain differences of treatment that should not be seen as discrimination (for example, cheaper public transport offered to children, disabled persons or pensioners), and contains specific provisions concerning the assessment of risk by the providers of financial services, including insurance. ...

#### 3. Legal Certainty in the Directive as a Whole

In underlining the importance of legal certainty, delegations have expressed the wish to avoid further cases having to be brought before the European Court of Justice (ECJ). They have consequently stressed the need for the clearest possible wording throughout, including in the definitions of key terms, and have underlined the importance of ensuring consistency with existing legislation.

#### 4. Other Issues

A large number of more specific questions will also require further discussion. These include the following:

- the potential financial and administrative burden imposed by the provisions, particularly regarding SMEs and the self-employed;
- the concept of discrimination by association;
- the issue of gender mainstreaming and the question of multiple discrimination;
- national legislation ensuring the secular nature of the state and measures concerning the wearing of religious symbols in schools; and
- the implementation date for the non-disability provisions.

Council Press Release: 30 November 2009 - \_\_\_\_\_?

Commission MEMO/09/528, 27 November 2009: "... 3. Progress report on the proposal for a directive on the principle of equal treatment on the basis of religion or belief, disability, age or sexual orientation: The Swedish Presidency included this dossier as a priority early on in their Presidency. ... Negotiations have not been easy but important progress has been made which the Presidency wants to report on. The Commission thanks the Presidency for its efforts and hopes that political agreement can be found very soon. ..."

Time from Commission Proposal until adoption of directive by Council under Article 19 FEU (ex Article 13 EC):

RED - approximately 9 months

EED - approximately 12 months

Multi-Ground Directive - 17 months on 2 Dec. 2009 (tomorrow), and counting

#### **IV. Impact on the legislation of the Member States**

[http://www.migpolgroup.com/public/docs/9.Inventoryofnatmeasurescombatingdiscou%20sideempl\\_mapstrand1\\_EN\\_12.06.pdf](http://www.migpolgroup.com/public/docs/9.Inventoryofnatmeasurescombatingdiscou%20sideempl_mapstrand1_EN_12.06.pdf), p. 3

"A small number of countries (Ireland, Bulgaria, Slovenia, Romania and Luxembourg) have Constitutional or detailed statutory provisions which cover all relevant grounds and the entire material scope covered by Council Directive 2000/43/EC (the Race Directive), and whose definitions of direct discrimination do not allow [a general justification defence] ... [since 2007, UK could be added, except for age?] Another group of countries (Finland, Portugal, Spain, Cyprus, Estonia, Greece and France) do not have comprehensive across-the-board legislation, but do have an amalgam of Constitutional and/or detailed statutory civil and/or penal prohibitions on discrimination and/or other civil or penal provisions which together regulate discrimination on the relevant grounds across a similarly broad scope."

#### **V. Critical assessment**

#### **VI. Time for a single legal basis and a single directive?**

[first proposed at "The European Parliament of Equal Opportunities for All", Workshop 3, Brussels, 12 October 2007]

The IGC on the Treaty of Lisbon was a missed opportunity to clean up the current messy, piecemeal approach to EU anti-discrimination law. This approach results in: (a) different levels of protection for different grounds; (b) bodies for the promotion of equal treatment being required only for race and sex; and (c) unnecessarily complex legislation. The 6 directives (see I.A. above) could easily be merged into one. To do so, we must first transfer the legal basis in Article 157(3) FEU (ex Article 141(3) EC) to a new Article 19(1) FEU (ex Article 13(1) EC) which, by "equalising up", would provide a single legal basis for all EU anti-discrimination law:

#### **New Article 19 FEU:**

*1. **[single legal basis]** Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure [**Article 294 FEU, ex Article 251 EC, co-decision with the European Parliament and qualified majority voting in the Council**], and after consulting the Economic and Social Committee, **shall** adopt measures to **combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**, and in particular to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and*

*occupation, including the principle of equal pay for equal work or work of equal value[in Article 157 FEU (ex Article 141 EC)]*

**2. [single Treaty article on positive action]** *With a view to ensuring full equality in practice, in particular between men and women in working life, 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 sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**, including measures providing for specific advantages in order to make it easier for **underrepresented groups** to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. [see Article 157(4) FEU, ex Article 141(4) EC]*

**Article 157 FEU (ex Article 141 EC; no change except paras. 3 + 4 moved)**

*1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.*

*2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;(b) that pay for work at time rates shall be the same for the same job.*

(1) This proposed amendment to the FEU Treaty (ex EC Treaty):

(a) would not harm European women in any way, because it would involve "equalising up" (the legal basis in the new Article 19(1) FEU would extend the Article 294 FEU co-decision procedure from sex discrimination in employment, to discrimination based on any Article 19(1) ground in any area within the scope of EU competence);

(b) would greatly benefit European women who are members of racial, ethnic or religious minorities, or who are disabled, older or younger, lesbian, bisexual, or transgender;

(c) would end the current "divide and rule" approach to EU anti-discrimination law, under which representatives of groups facing discrimination must "compete" with each other for improved legal protection, or cannot do EU-funded work on two or more grounds of discrimination with different legal bases;

(d) would leave the directly effective principle of equal pay in its historical home, now Title X ("Social policy"); and

(e) would leave the directly effective prohibition of discrimination based on nationality (of another Member State) in Article 18 FEU (ex Article 12 EC).



(2) This proposed Treaty amendment, and the single EU Anti-Discrimination Directive it would eventually permit, would be consistent with the broad trend at the national level, which is towards a single anti-discrimination law, and a single body for the promotion of equal treatment, with competence over all Article 19(1) FEU grounds. After 32 years (1975-2007) of up to three separate promotion bodies for race, sex and disability, no promotion bodies for religion, age, and sexual orientation, and up to six sets of rules (one per ground), Great Britain opened a single promotion body for all six grounds on 1 Oct. 2007 (the Equality and Human Rights Commission, <http://www.equalityhumanrights.com>), and is expected to pass a single Equality Act covering all six grounds in 2010.

(3) This proposed Treaty amendment could move forward at the same time as work on the 7th, Multi-Ground Directive. Once the single legal basis (the proposed new Article 19(1) EC) was in force, the European Commission could adopt a proposal under which all 7 directives would be consolidated into a single directive, and harmonised ("equalising up" in every case, as far as possible). Most differences in the protection provided for different grounds would disappear, and EU anti-discrimination law would be greatly strengthened.