

EQUAL TREATMENT OUTSIDE THE LABOUR MARKET

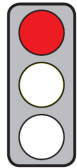
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MAIN ISSUES

Objectives of the Directive: The protection against discrimination on grounds of religion or belief, disability, age or sexual orientation is to be extended in order to cover areas that go beyond employment and occupation.

Groups Affected: All suppliers of goods and services; potential victims of discrimination.

Pros: –



Cons: (1) In Member States where non-discrimination laws are not as widely established as in Germany, the proposal intervenes massively into economic freedom.

(2) The Proposal leads to unpredictable costs, weakens legal certainty and increases bureaucracy.

(3) The Proposal interferes excessively with the Member States' legislative powers.

Changes Required: The Proposal should be waived.

CONTENT

Title

Proposal COM(2008) 426 of 02.07.08 for a Council **Directive** on **implementing the principle of equal treatment** between persons irrespective of religion or belief, disability, age or sexual orientation

Abstract

► Scope and Principle of Equal Treatment

- The protection against discrimination on grounds of religion, belief, disability, age or sexual orientation is to be extended to the following areas:
 - “social protection, including social security and health care”,
 - “social advantages”,
 - “education”,
 - “access to and supply of [all] goods and services which are available to the public and are offered for commercial purposes, including housing” (Art. 3 (1)).
- The Directive covers
 - situations in which one person is treated less favourably than another in a comparable situation (so-called indirect discrimination);
 - situations in which “an apparently neutral provision, criterion or practice which seems neutral in fact” would discriminate against a person (so-called direct discrimination) (Art. 2 (2)).
- Religious organisations such as churches are exempted from the Directive (Art. 3 (4)).
- The Member States may explicitly permit certain differences in treatment. The following cases of unequal treatment are admissible:
 - based on age if “justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary”. In particular, Member States may provide for “the fixing of a specific age for access to social benefits, education and certain goods or services” (Art. 2 (6)).
 - based on age or disability in the provision of financial services, if proportional and if these are key factors in the assessment of risk (Art. 2 (7)).
 - based on religion or belief for access to educational institutions (Art. 3 (3)).

► Special Protection of Persons with Disabilities

- Persons with disabilities are entitled to non-discriminatory access to certain services; this right expressly applies to transportation as well (Art. 4 (1) (a)).
- The denial of “reasonable accommodation” to enable persons with disabilities to have non-discriminatory access is deemed discriminatory on grounds of disability (Art. 2 (5)).
- The measures necessary for non-discriminatory access must be provided “by anticipation” and must include “appropriate modifications or adjustments” (Art 4 (1) (a)).
- Adjustment or rebuilding measures necessary to ensure non-discriminatory access may:
 - not impose a disproportionate burden to the suppliers of goods;

- not “require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto” (Art. 4 (1) (a)).
- If non-discriminatory access is needed in a specific case and has not been “provided by anticipation”, it has to be provided subsequently if this is not disproportionate (Art. 4 (1) (b)).
- In order to assess whether a measure would impose a disproportionate burden, the economic resources of the supplier are taken into account as well as the possible benefit for persons with disabilities. Burdens are not deemed disproportionate when they are sufficiently remedied by state measures (Art. 4 (2)).

► **Defence of Rights against Discrimination**

- The Member States have to introduce judicial and/or administrative procedures for the enforcement of claims for damage compensation caused by discrimination (Art. 7 (1)).
- The Member States may introduce time limits for bringing action claiming damages (Art. 7 (3)).
- Associations and other organisations may engage in judicial procedures on behalf or in support of the complainant, if he or she approves (so-called spurious class action lawsuits (Art. 7 (2)).
- It is sufficient if a complainant is able to present credibly certain facts that imply discrimination. It is then for the respondent to prove that he or she has not discriminated against the complainant (so-called shifting of the burden of proof; Art. 8 (1)).
- The shifting of the burden of proof shall also apply to associations engaging in judicial procedures (Art. 8 (5)).
- The Member States have to ensure that the following rules are, or may be, declared null and void or may be amended if they are contrary to the principle of equal treatment:
 - statutory and administrative provisions,
 - contractual provisions,
 - internal rules of undertakings,
 - rules governing profit-making or non-profit-making associations (Art. 13).

► **Miscellaneous**

- Member States may introduce stricter provisions for the protection of the principle of equal treatment (Art. 6 (1)).
- The Directive may not constitute grounds for a reduction in the level of protection against discrimination already established in the Member States (Art. 6 (2)).
- Member States have to designate bodies charged with supervising adherence to the principle of equal treatment (Art. 12).
- Member States have to introduce effective, proportionate and dissuasive sanctions for the enforcement of the Directive (Art. 14).
- Member States have to implement the Directive within two years after adoption at the latest (Art. 15).

Changes to the Status Quo

- Existing directives on non-discrimination outside the labour market have been restricted to discrimination on grounds of sex or ethnic origin. However, several Member States (including Germany) have already adopted the criteria for discrimination offence laid down in the newly proposed Directive.
- Non-discriminatory bodies, procedures for the defence of rights, spurious class action lawsuits and the shifting of the burden of proof have already been established by earlier non-discrimination directives.

Statement on Subsidiarity

The Commission argues that only Community-wide measures can ensure a minimum standard level of protection against discrimination in all Member States.

Positions Taken by EU Organs

European Commission

See above.

Committee of the Regions

Open.

European Economic and Social Committee

Open.

European Parliament

In its resolution of 20 May 2008, the European Parliament called for the extension of the existing non-discrimination law.

Council – “Employment, Social Policy, Health and Consumer Affairs”

Open.

Legislative Procedure

02.07.08 Adoption by Commission

Open Adoption by European Parliament and Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:

DG for Employment, Social Affairs and Equal Opportunities

Committees of the European Parliament:

Civil Liberties, Justice and Home Affairs (in charge),
rapporteur (open); Employment and Social Affairs; Internal
Market and Consumer Protection; Culture and Education;
Women's Rights and Gender Equality

Committees of the German Bundestag:

Proposal not yet assigned to Committees

Decision Mode in the Council:

Unanimity: any Government has the power to veto.

Formalities

Legal competence:

Article 13 TEC (Anti-Discrimination)

Form of legislative competence:

Concurrent legislative competence

Legislative procedure:

Article 192 TEC (Consultation Procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The Directive stipulates that persons with disabilities should be enabled to have free access to buildings, housing and transport. This is a massive intervention into economic freedom. The requirement to provide non-discriminatory access to goods and services virtually **equals a statutory obligation to contract. As a result, suppliers of goods and services are no longer free to accept or deny their contractual partners as they choose.**

Even if the vast majority of the members of a society agreed that discrimination should be fully abolished, interventions into the freedom of contract and the freedom of behaviour would be necessary in exceptional, single cases only. For as long as no market power exists in the form of monopolies, the market forces themselves would punish acts of discrimination, i.e. of discriminating parties or persons.

However, it is highly questionable whether a serious preference to abolish each and every act of unequal treatment truly exists in each Member State. **Hence, the Proposal would seem to be aiming to re-educate society by threatening political intervention. In a liberal constitutional order, this is far from commendable.**

Impacts on Efficiency and Individual Freedom of Choice

The Directive reduces efficiency: It might lead to extensive rebuilding measures, which – in the absence of economic demand – **no entrepreneur would ever accomplish if there was not a statutorily required obligation to do so.** These rebuilding measures, which shall provide persons with disabilities with non-discriminatory access to restaurants or means of transportation, include even the obligatory rebuilding of existing infrastructures, provided they are “appropriate” and do not impose a “disproportionate burden”. The provision according to which measures have to be provided “by anticipation”, and **irrespective of whether or not there even exists a demand for access to persons with disabilities**, is particularly detrimental.

Moreover, **the Directive increases bureaucratic costs:** The shifting of the burden of proof **forces** suppliers of goods and services **to systematically and comprehensively record and file** their personal motives for choosing their contractual partners.

The multitude of undefined legal terms, particularly relating to the protection of persons with disabilities, **leads to a substantial degree of legal uncertainty.** Consequently, additional costs might arise in connection with litigation and might further result in rising prices and/or a reduction of products on offer.

Insurance companies are particularly affected by the directive: They **have to** justify a different treatment of their clients – e.g. regarding the amount of the insurance premium – in that they **prove that unequal treatment is not based on age or disability.** These higher administrative efforts will raise premium costs which insurance holders will have to bear. Associations will also suffer a rise in costs: For them it is recommendable to assess their statutes as to their conformity with the Directive in order to prevent damage claims.

Impacts on Growth and Employment

Rebuilding measures, bureaucratic costs and legal uncertainty increase costs of goods and services and thus produce loss in economic growth. At the same time, the productivity of employees is lowered leading to a decrease in the level of employment, if wages remain constant.

Impacts on Europe as a Business Location

The Proposal has a negative impact on Europe as a business location. International mobile investors will have to face legal uncertainty and increased administrative costs.

Legal Assessment

Legal Competences

The legal competences for measures combating discrimination on grounds of “religion or belief, disability, age or sexual orientation” is laid down in Art. 13 TEC.

Subsidiarity

The Proposal infringes the principle of subsidiarity as **the matters concerned are of a solely national nature without any cross-border reference**. Furthermore, the Commission justifies the need for regulation with experiences gained from the implementation of the Directives 2000/43/EEC and 2004/113/EEC. However, the Commission ignores the fact that the Directive 2004/113/EEC did not have to be transposed into national law until 21.12.07. So there is no sufficient practice that might justify EU action.

Proportionality

The Commission prescribes two legal procedures granting legal protection, namely shifting of burden of proof and spurious class action lawsuits. In so doing, it prescribes the shifting of burden of proof or spurious class action lawsuits also to Member States whose legal tradition does not contain any such procedure. This **intervention into national rules of procedure is disproportional**. A more moderate, though similarly effective approach would have been to demand guaranteed legal protection from Member States.

Compatibility with EU Law

According to the latest judgement of the ECJ (C-303/06, Coleman), a person may lodge a claim to abolish unequal treatment even if that person has not been the target of discrimination (in the Coleman case an employee claimed compensation reasoning to have been discriminated against by her employer due to her child’s disability). In future, the Coleman judgement **might open the door to tenants without disabilities themselves requesting rebuilding measures**, should they start housing persons with disabilities in their flat.

Compatibility with German Law

The German General Equal Treatment Law (*Allgemeines Gleichbehandlungsgesetz - AGG*) already contains most provisions of the Directive. However, in its details, the Directive causes substantial tightening and uncertainty.

The Directive adds belief as a prohibited cause for discrimination to civil law. As a consequence, newspapers would be obliged to print advertisements of persons or parties whose beliefs they generally deny and the cooperation with whom they would normally refuse.

The prohibition of unequal treatment set forth in the Directive will apply to all commercial lessors. That also includes lessors of only one single flat, who rent their flat in order to realise a profit. In contrast, the AGG refers to the criterion of mass business (Art. 19 (1) No. 1 AGG), a term that refers to lessors with at least 51 flats (Art. 19 (5) AGG).

According to the Directive, **rebuilding and adjustment measures** necessary for non-discriminatory access **are subject to the principle of proportionality**. However, in Germany this is only relevant to those lessors (of less than 51 flats) who have been newly affected by the Directive. Those lessors who have hitherto been subject to the AGG (of at least 51 flats) are – without limitation – obliged to abolish prohibited acts of discrimination (Art. 21 (1) AGG). Introducing a reservation on proportionality grounds **might be deemed a reduction of the level of protection, which again is prohibited** by the Directive.

Alternative Policy Options

Regulation at EU level is not recommendable.

Possible Future EU Action

The EU could stipulate provisions for areas not yet covered by established law.

Conclusion

The Directive constitutes a massive intervention into economic freedom. Further, it causes unpredictable economic costs, reduces the degree of legal certainty and boosts administrative costs. Moreover, it intervenes excessively in Member States’ legislative powers. Therefore, the Proposal should be waived.