

Brussels, 13/03/2009
C/2009/1665

Dear Ms President,

Thank you for your letter of 9 October 2008 enclosing comments from both Houses of the States-General on the proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion and belief, disability, age or sexual orientation {COM(2008)426}.

In line with the Commission's decision to encourage national parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments which are instrumental to the proceedings of the Commission. I enclose the Commission's reply. I hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely

Margot WALLSTRÖM
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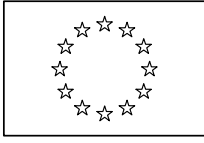
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Margot WALLSTRÖM
Vice-President of the European Commission

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EUROPEAN COMMISSION

Brussels, March 2009

COMMENTS OF THE EUROPEAN COMMISSION ON AN OPINION FROM THE TWO CHAMBERS OF THE STATES- GENERAL OF THE KINGDOM OF THE NETHERLANDS

COM(2008)426 - PROPOSAL FOR A DIRECTIVE IMPLEMENTING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN PERSONS IRRESPECTIVE OF RELIGION AND BELIEF, DISABILITY, AGE OR SEXUAL ORIENTATION

The Commission acknowledges the receipt of the Opinion of both Chambers of the States-General of the Kingdom of The Netherlands [hereinafter the Dutch Parliament] on the proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion and belief, disability, age or sexual orientation (COM(2008)426).

As a preliminary point, the Commission would like to recall that Article 13 of the EC Treaty allows the Council, acting unanimously, to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The European Community has adopted Directives prohibiting discrimination on all these grounds in the area of employment. Moreover, race or ethnic discrimination is also prohibited outside the sphere of employment. In addition, Directives have also been adopted to protect people from discrimination based on gender as far as social security and access to goods and services are concerned. The experience with these Directives is that they have had a positive effect in achieving a better protection against discrimination.

However, under European law discrimination is currently not prohibited outside the field of employment when it is based on religion or belief, disability, age or sexual orientation. The new proposal aims to complement existing protection from discrimination on the basis of these grounds.

The Commission has examined carefully the comments of the Dutch Parliament and will endeavour to take them into account in view of the current discussions in the Council on this proposal.

The Commission notes that some of the points raised by the Dutch Parliament, and in particular regarding legal certainty, have already been expressed by the Dutch

government. The Commission attaches the highest importance to legal certainty. It is determined to work with the Council, the European Parliament and national parliaments, where appropriate, to ensure that the final version of the Directive has the highest possible degree of legal certainty.

Moreover, the Commission believes that the proposal respects the principles of subsidiarity and proportionality. It has stated its position in the explanatory memorandum of the proposal. Further explanations are provided below.

As far as the principle of subsidiarity is concerned, the objectives of the proposal cannot be achieved sufficiently by the Member States acting alone because only a Community-wide measure can ensure that there is a minimum standard level of protection against discrimination in all the Member States. Moreover, the diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. The Commission therefore recognises that issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions, are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues.

In accordance with the principle of proportionality, the directive is a suitable instrument for the purpose of achieving the desired objectives and does not go beyond what is necessary to achieve them. It gives considerable room of manoeuvre to Member States in terms of defining the ways to attain the objectives set out in the draft Directive. In addition, Member States have the possibility of adopting rules which go beyond the minimum standards set out in the Directive.

Finally, the Commission emphasises that the detailed explanations below aim to clarify the objectives and the content of the proposal for a Directive. However, it is for the Council, after consulting the European Parliament, to decide on the final text of the Directive.

Answers to questions

The Opinion of the Dutch Parliament raises questions regarding the added value, scope and consequences of the proposal.

Concerning the issue of the value added, the Commission recalls, as indicated in the explanatory memorandum to the proposal, that the objectives of the proposal cannot be sufficiently achieved by the Member States acting alone because only a Community-wide measure can ensure that there is a minimum level of protection against discrimination based on religion or belief, disability, age or sexual orientation in all the Member States.

In this line, a Community legal act provides legal certainty as to the minimum rights and obligations of economic operators and citizens, including for those moving between Member States.

Regarding the scope of the proposal, the Opinion starts by requesting further clarification of Article 2(6) and (8), as well as of Article 3, which defines the scope of application of the proposal. The Opinion recalls that these articles state, inter alia, that this Directive shall be without prejudice to national legislation on marital status, family status, reproductive rights and the content and structure of (special needs) education, nor shall it

affect the status and activities of churches and other organisations based on religion or belief. The Opinion asks for clarification about how these exemptions would relate to existing national legislation in these areas and whether they could lead to any restriction (and to what extent) of the primary authority of the Member States in these policy areas, pursuant to the European Treaties.

In addition, the Opinion of the Dutch Parliament requests more clarity about the implications of the proposal. It asks whether the principle of equal treatment for disabled people set out in the proposal obliges Member States to take further practical measures. It also asks about the exact material implications in the area of social security.

Discrimination based on age

Article 2 provides that direct and indirect discrimination based, inter alia, on age is prohibited. However, article 2(6) of the proposal states that "(...) Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, 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."

The rationale for these provisions is that the proposal for a Directive aims to protect people from discrimination. However, the Commission recognises that, in certain cases, a different treatment based on age may be objectively justified and cannot be deemed discriminatory. Therefore, the proposal would prohibit, for example, denying or making it more difficult for a certain person to have access to goods and services of a general character simply because of their age, where there is no justification for such a different treatment. Conversely, the Directive would allow for special age conditions regarding access to certain goods or services of a specific nature such as alcoholic drinks, arms, or driving licences. Likewise, since the promotion of the economic, cultural or social integration of young or old persons is a legitimate aim for making a difference of treatment based on age: it follows that measures setting more favourable conditions for these persons, such as free or reduced fares for transport, museums, or sports facilities, would be accepted under Article 2(6) of the proposal.

Public order

Article 2(8) would provide that the Directive "shall be without prejudice to general measures laid down in national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and the protection of the rights and freedoms of others." This restriction to the normal application of the rules of the Directive is inspired by Article 2(5) of Directive 2000/78/EC, which is, in turn, inspired by the second paragraph of several material provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. It takes account of the fact that the principle of equality has to relate with other equally important fundamental rights and principles which, in specific circumstances, may take precedence over it.

Scope of the Directive

With article 3(2) which states that the Directive "is without prejudice to national laws on marital or family status and reproductive rights", the Commission recognises that these

matters fall within the competence of the Member States and that Community law does not interfere in these matters.

It follows that laws on marital status are meant to govern notably the rights and obligations of married people and define who can marry, as well as the conditions for contracting or ending a marriage. Therefore, the draft Directive will have no impact on whether or how Member States recognise same-sex marriages, for example. In the same line, the reference to laws on "family status" ensures that the draft Directive does not interfere with national rules on adoption or the definition of 'family' and the related rights and obligations. For example, the draft Directive is without prejudice to Member States' rules about whether or not, to allow same-sex couples to adopt children.

The draft Directive would not affect national law on reproductive rights. Therefore, the legislation of a Member State could allow, for example, in vitro fertilisation for married couples only or for opposite-sex couples only. While Member States must always respect their commitments under international law on human rights (including those deriving from United Nations human rights treaties and the European Convention on Human Rights), these matters would not be covered by the material scope of this draft Directive.

Concerning the impact of the draft Directive on education, Article 3(3) provides that the Directive "is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education."

In this regard, the Commission underlines that the draft Directive would make cases where disabled students are prevented from taking their medicine or where students are harassed because of their religion, disability, age, or sexual orientation (for example ignoring a student without reason, creating a hostile environment, humiliating, encouraging or tolerating physical attacks, aggression or bullying by other students) unlawful.

However, Article 3(2) clarifies that the draft Directive is without prejudice to the responsibilities of Member States for the content of teaching. Therefore, it would not oblige Member States to teach any or a certain religion, or to provide classes on homosexuality, for example. Member States may also provide for differences of treatment based on religion or belief in admission to educational institutions which have an ethos based on religion or belief.

The draft Directive is also without prejudice to the organisation of national educational systems, including how to organise education for persons with disabilities, which is a matter for the Member States. The Commission has drawn attention to the need to pay special attention to disadvantaged children and to children with special educational needs (see for example its Communication on Improving Competences for the 21st Century: An Agenda for European Cooperation on Schools – COM (2008) 425).

However, this draft Directive would not affect Member States' choices about whether or not to provide special schools for disabled children. However, a disabled student should not be a victim of discrimination as such: he or she should be able to attend mainstream education, unless there is a justification related to his or her disability which prevents this.

The reference in Article 3(4) to the fact that the draft Directive shall not affect the status and activities of churches and other organisations based on religion or belief, is in line

with Declaration 11 to the Treaty of Amsterdam signed on 2 October 1997, recalled in recital 19 of the proposal, which states that the "European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non confessional organisations."

According to Article 3(4), this draft Directive would not affect national law on the status of churches and other organisations the ethos of which is based on religion or belief or on their activities as such. The draft Directive could only apply to these organisations where they do not act as religious organisations, but where they provide goods and other services which are available to the public and where there is no intrinsic link between the activity and the religion or belief.

Obligations vis-à-vis people with disabilities

Concerning disabled persons, the Dutch Parliament asks whether or not the principle of equal treatment for disabled people in the proposal obliges a Member State further practical measures.

The answer to this question depends on the existing measures in the Member State concerned. The provisions of the Directive concerning disabled persons are inspired by the experience in national laws and policies as well as in existing EC legislation (for example Directive 2000/78/EC) and relevant United Nations Conventions (for example the UN Convention on the Rights of Persons with Disabilities which was negotiated together by the Member States and the European Community). While there is a considerable difference between Member States in the degree of protection of disabled persons from discrimination outside the field of employment, most Member States have adopted some measures with this objective in mind.

The rules of the Directive concerning disabled persons, and in particular of Article 4 of the proposal, seek to strike the right balance between the objective of removing barriers and ensuring access to persons with disabilities and the objective of avoiding undue burden arising from disproportionate adaptations.

Social security

The Opinion also asks about the material implications of the Directive in the area of social security and requests clarification on the possibility of people acquiring rights which they currently do not have under existing national law. As mentioned in recital 11 of the proposal this Directive is without prejudice to the competences of the Member States in the areas of social security and health care. It is therefore for the Member States to organise their social security systems so as to ensure their sustainability, as well as to decide who is eligible for social security benefits.

The draft Directive does not interfere with Member States' competences in this regard. The draft Directive would however require that persons be protected from discrimination based on the relevant grounds. In this line, the draft Directive would protect people from discrimination in social protection, including social security and healthcare. The draft Directive would make unlawful cases such as denying in practice or making it more difficult for a certain person to access a particular social security benefit, for which he or she fulfils the eligibility criteria simply on the basis of his or her religion or belief, disability, or sexual orientation; or denying or delaying the provision of a medical treatment to a person because of her religion or belief, disability or sexual orientation

(unless this concerns the exception regarding national laws on marital or family status, or reproductive rights, as explained above); or denying or making it more difficult for certain persons to have access to a certain medical treatment because of their age – where there is no justification for such a different treatment; or behaving in a rude, aggressive or degrading way towards a person seeking medical care because of his or her disability, sexual orientation, age or religion. Finally, the Commission points out that the draft Directive would not prevent Member States from providing more favourable treatment (such as higher allowances) to persons with disabilities.

Conclusion

The Commission has examined carefully the comments and questions of the Dutch Parliament. It will take these views into account in the context of the current discussions in the Council. It hopes that this reply has clarified the questions raised by the Dutch Parliament.