

Opinion of the European Economic and Social Committee on the 'Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation'

COM(2008) 426 final (Additional opinion)

(2009/C 182/04)

Rapporteur: **Mr CROOK**

On 23 October 2008, the European Economic and Social Committee, acting under Rule 29(a) of the Implementing Provisions of the Rules of Procedure, decided to draw up an additional opinion on the

Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

COM(2008) 426 final (Additional opinion to the own-initiative opinion).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 10 December 2008. The rapporteur was Mr CROOK.

At its 450 plenary session, held on 14 and 15 January 2009 (meeting of 14 January 2009 ...), the European Economic and Social Committee adopted the following opinion by 183 votes to 7 with 18 abstentions.

1. Conclusions and recommendations

1.1 The EESC welcomes the draft directive which broadly follows the recommendations made in its recent own-initiative opinion on anti-discrimination measures for areas outside employment ⁽¹⁾ and should lead to consistent standards of protection against discrimination on all Article 13 TEC grounds across the EU.

1.2 However, the EESC believes that in certain areas the directive offers lesser protection than that which already exists under the race equality and gender directives.

1.3 This is the case in Article 2 which permits exceptions to the prohibition of discrimination, especially with regard to financial services. The EESC recommends that the same requirements for transparency, review and oversight should apply to age and disability as already apply to gender.

1.4 The EESC considers that Article 3 defining the scope of the directive sets limits and allows wide exceptions that will undermine the effectiveness of the directive as a whole.

1.5 The EESC believes that in Article 4 the duty on providers of goods and services to take measures in anticipation of the needs of persons with disabilities and to provide reasonable accommodation is too limited.

1.6 The EESC notes that the equality bodies to be designated under Article 12, unlike bodies designated under the race and gender directives, would not cover the field of employment and recommends that this should be addressed by means of a new recital.

1.7 The EESC regrets that the directive fails adequately to address the issue of multiple discrimination and calls upon the Commission to come forward with a recommendation on this issue.

2. General overview

2.1 In its recent own-initiative opinion, the EESC reviewed current EU and Member State anti-discrimination legislation and concluded that 'there is now a need for new EU legislation prohibiting discrimination outside the field of employment on grounds of religion or belief, disability, age and sexual orientation'.

2.2 Having had the opportunity to consider the contents of the Commission's Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, noting that certain of its stated concerns had not been fully addressed, the EESC decided to draw up an additional opinion on the proposed directive.

2.3 The EESC welcomes the fact that many of the provisions of the proposed directive replicate the provisions of other Article 13 directives: definitions of direct and indirect discrimination and harassment, provisions for enforcement and legal redress including shift of the burden of proof, protection against victimisation

⁽¹⁾ EESC opinion on *Extending anti-discrimination measures for areas outside employment and the case for a single comprehensive anti-discrimination directive*, rapporteur: Mr Crook (OJ C 77, 31.3.2009, p. 102)

and sanctions that must be effective, proportionate and dissuasive. Like the Race Equality Directive ⁽²⁾, the scope of the proposed directive covers social protection including health care, social advantages, education, access to goods and services including housing (although, as discussed below, with restrictions and exclusions that could reduce the full scope).

2.4 In the following comments the EESC focuses on particular provisions that, in its view, explicitly or implicitly, could offer lesser protection for religion or belief, disability, age or sexual orientation than exists under other Article 13 directives for racial or ethnic origin or gender.

3. Comments on specific articles

3.1 Article 2

3.1.1 Article 2 sets out the concept of discrimination; in 2(1)-2(4) there are the same definitions of key concepts as in the other Article 13 directives. Article 2(5) makes denial of reasonable accommodation under Article 4(1)(b) a form of prohibited discrimination.

3.1.1.1 To ensure accurate transposition of the directive into national law, having regard to the judgment of the European Court of Justice in the case of *Coleman v Attridge Law*, which confirmed that the prohibition of discrimination on grounds of disability in Directive 2000/78/EC applies to a person associated with a disabled person ⁽³⁾, the EESC recommends that the directive should clarify that discrimination on the grounds within the directive includes discrimination on grounds of association with persons of a particular religion or belief, disability, age or sexual orientation.

3.1.2 Article 2(6) permits Member States to 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'.

3.1.2.1 The EESC recommended ⁽⁴⁾ that the ability to provide preferential treatment should also apply to persons with disabilities subject to the same justifiability tests; this should be in addition to measures to ensure effective access under Article 4.

3.1.2.2 It should be stated that for an aim to be 'legitimate' for this purpose it must be consistent with the principle of equal treatment, for example to assist the group in question to participate in public life on equal terms.

3.1.3 Article 2(7) would allow Member States to permit 'proportionate differences in treatment' by providers of financial services where 'the use of age or disability is a key factor in the assessment of risk based on relevant and accurate actuarial or statistical data'.

3.1.3.1 The EESC is concerned that this broad exception will perpetuate the well documented disadvantage of young people, older people and disabled people in relation to banking and a range of insurance products.

3.1.3.2 This contrasts markedly with the Gender Goods and Services Directive ⁽⁵⁾, under which Member States may decide to permit differential insurance rates and benefits for women and men, but only if supported by accurate actuarial data that are compiled, published and regularly up-dated; Member States must then review this decision after five years.

3.1.3.3 The EESC accepts that for some activities risks may be greater for people within certain age groups or people with certain types of disability; however, Article 2(7) allows too wide a scope for differential premiums without requiring insurers to disclose actuarial data. Prospective customers cannot know whether differential rates are justified, and competitors will have no incentive to offer more equitable prices.

3.1.3.4 Even if differential rates are justifiable, disclosure of actuarial or statistical data is necessary to ensure proportionality required under Article 2(7).

3.1.3.5 The EESC recommends that the same requirements for transparency, review and oversight by the Member State should apply for age and disability as apply for gender. The proposed directive should allow Member States to permit differences in treatment only if they require providers of financial services to publish up-to-date actuarial or statistical data relevant to the particular 'risk' activity, for example driving, travel, mortgage repayment, and to the age group or to the particular disability concerned. These data should be reviewed periodically to note any variation of risks, and Member States after a fixed period should be required to review the evidence for differential treatment and to consider gradual sharing of risks and equalisation of premiums.

⁽²⁾ Council Directive 2000/43/EC, Art. 3.

⁽³⁾ [2008] EUECJ C-303/06 of 17 July 2008, in this case discrimination against a non-disabled parent with primary care of a disabled child.

⁽⁴⁾ Footnote 1, paragraph 8.10.5.

⁽⁵⁾ Council Directive 2004/113/EC, Art. 5.

3.2 Article 3

3.2.1 Article 3 defines the scope of the proposed directive, that is the areas of activity to which the prohibition of discrimination on grounds of religion or belief, disability, age and sexual orientation will apply.

3.2.1.1 The EESC welcomes the fact that 3(1) (a)-(d) mirrors the scope of the Race Equality Directive ⁽⁶⁾ as it had recommended ⁽⁷⁾.

3.2.1.2 After 3(1) (d) making 'access to and supply of goods and other services which are available to the public, including housing' areas in which discrimination is prohibited, the draft directive states: 'Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity'.

3.2.1.3 This exception, also appearing in Recital 16, is not in the Race Equality Directive. The EESC is concerned that without a definition of 'professional or commercial', a lack of clarity will weaken the impact of the directive. If, as the Commission suggests ⁽⁸⁾, the aim is to exempt private transactions, then the EESC submits that this can be read from the fact that only goods and services *available to the public* are covered. Further, Recital 17 states: 'While prohibiting discrimination, it is important to respect [...] the protection of private and family life and transactions carried out in that context.'

3.2.2 Article 3(2) disapplies protection against discrimination on any of the four grounds where it relates to practices under national laws on marital or family status or on reproductive rights.

3.2.2.1 The EESC acknowledges that marital status, family status and reproductive rights are matters on which Member States have competence to legislate, but the EESC does not accept that such competence should wholly negate EU-wide legal protections against discrimination.

3.2.2.2 Marital status. With respect to the national prerogatives on the regulation of marital status, the Court of Justice has recently held that 'civil status and the benefits flowing there from are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination ⁽⁹⁾'.

⁽⁶⁾ Council Directive 2000/43/EC, Art. 3.

⁽⁷⁾ Footnote 1, paragraph 8.6.

⁽⁸⁾ Chapter 5 'Detailed Explanation of the Specific Provisions' in COM(2008) 426 final.

⁽⁹⁾ Maruko v. Versorgungsanstalt der deutschen Bühnen, C-267/06, 1 April 2008, para 59.

3.2.2.3 Family status. The concept of 'family status' is not defined and is consequently too vague to be used as a basis to exclude protection.

3.2.2.4 Reproductive rights. The EESC regards access to reproductive services as an integral part of health services, in respect of which under both Community law and national law there should be no discrimination on any grounds. There is evidence of discrimination in relation to reproductive services on grounds of sexual orientation, disability and age. Further, as it is women who seek and make use of reproductive services, to exclude protection against discrimination in this area could constitute discrimination on grounds of gender as well as disability, or age or sexual orientation.

3.2.2.5 Therefore the EESC believes Article 3(2) as a whole should be reconsidered, and any final formulation should state that national laws relating to marital status, family status or reproductive rights must be implemented without discrimination against any persons on any of the grounds within the directive.

3.2.2.6 Article 3(3) makes the prohibition of discrimination in education subject 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'.

3.2.2.7 The EESC is concerned that this exception, which is not in the Race Equality Directive and which goes beyond Article 149, the specific Treaty provision on education ⁽¹⁰⁾, could unduly limit the impact of this directive in eradicating discrimination and harassment in schools and other educational institutions.

3.2.2.8 The EESC notes that Article 150 TEC states in terms almost identical to Article 149 that Member States have responsibility for the content and organisation of vocational training, yet vocational training has been within the scope of EU anti-discrimination legislation without any limitations ⁽¹¹⁾.

3.2.2.9 The evidence of discrimination in education across the EU on grounds of religion or belief, disability and sexual orientation was a main driver for the proposed directive. The EESC considers that the prohibition of discrimination and the promotion of equal treatment in education is of such fundamental importance to the development of democratic and tolerant societies, to

⁽¹⁰⁾ Article 149 (1) TEC states: 'The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.'

⁽¹¹⁾ For example Council Directive 2000/43/EC Art. 3(1)(b) or Council Directive 2000/78/EC Art. 3(1)(b).

social and economic development and for the achievement of social cohesion that legislation for this purpose at Community level is necessary, consistent with the principles of subsidiarity and proportionality in Article 5 TEC.

3.2.2.10 It is particularly important to set a high level of protection against discrimination in the provision of special needs education, to ensure fair and honest treatment of all children irrespective of religion or belief, disability, age or sexual orientation. To do so would not interfere with Member States' policies regarding separate or integrated education, but would ensure that those policies are operated without discrimination. The European Court of Human Rights judgment in *D.H. and others –v– Czech Republic* illustrates how decisions on who should receive special needs education can maintain entrenched patterns of educational discrimination ⁽¹²⁾.

3.2.2.11 The EESC considers that consistency in protection against discrimination in education is of particular importance because of the frequent overlap in this field between discrimination on grounds of racial and ethnic origin and on grounds of religion or belief. If a limitation as in Article 3(3) was not necessary in the Race Equality Directive, it is not clear why it is necessary in this proposed directive.

3.2.2.12 Whatever the boundaries of Member State responsibilities in relation to education, the directive should state explicitly that all such functions must be exercised without discrimination.

3.2.2.13 The second sentence in Article 3(3) permits differences in treatment in access to educational institutions based on religion or belief; the EESC considers that the directive should ensure that such institutions are not able to discriminate on any other ground.

3.3 Article 4

3.3.1 Article 4 is concerned with equal treatment of persons with disabilities.

3.3.1.1 The UN Convention on the Rights of Persons with Disabilities ⁽¹³⁾ includes a non-exhaustive description of who is included within 'persons with disabilities'. EU Member States should have regard to this description in developing national laws protecting and promoting equality rights of persons with disabilities. Guidance to this effect and on the meaning of discrimination on grounds of disability should be included in the proposed directive.

3.3.1.2 The EESC welcomes in Article 4 the dual approach to removing barriers to access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing

and transport, which is in line with the EESC recommendation ⁽¹⁴⁾. This includes a duty to take measures in anticipation of the access needs of persons with disabilities (Article 4(1)(a)) and a requirement to provide reasonable accommodation to ensure non-discriminatory access in a particular case (Article 4(1)(b)). Article 2(5) makes non-compliance with Article 4(1)(b) a form of prohibited discrimination. The EESC recommends that the directive should clarify the concept of 'effective non-discriminatory' access.

3.3.1.3 The EESC is concerned about the three limitations to the anticipatory duty in Article 4(1)(a), namely that measures taken to meet access needs should not

- a) impose a disproportionate burden
- b) require fundamental alteration of the social protection, social advantages, health care, education or goods and services in question, or
- c) require the provision of alternatives.

3.3.1.4 The limitations in (b) and (c) lack precision, and are likely to preserve unjustifiable discriminatory practices. For example, a health care provider that offers health care services only to able-bodied persons, relying on (b), could resist calls for alteration of their service. Or a local authority that currently offers a bus service to the local hospital which cannot accommodate wheel chair users, relying on (c) could resist calls to provide an alternative form of transport. The EESC submits that it is sufficient to require anticipatory measures to be 'reasonable', which is not currently a requirement under Article 4(1)(a), and to make the duty under 4(1)(a) subject to the single proviso that such measures should not impose a disproportionate burden.

3.3.1.5 Article 4(2) would give binding legal authority to specific factors that are to be taken into account in determining whether measures in Art. 4(1)(a) or 4(1)(b) would 'impose a disproportionate burden'. Recital 19 identifies size, resources and nature of the organisation as factors that should be taken into account in assessing whether the burden is disproportionate. In Directive 2000/78/EC similar factors were stated in Recital 21. Two additional factors, 'life cycle of the goods and services' and 'possible benefits of increased access for persons with disabilities', are listed in Article 4(2). The EESC considers that as both these additional factors should form part of any assessment of proportionality they are unnecessary and may deter providers of social protection, social advantages, health care, education, goods and services, housing and transport to accept the need to take measures to ensure effective access by disabled people.

⁽¹²⁾ Grand Chamber judgment 13.11.2007 (no. 57325/00).

⁽¹³⁾ Article 1.

⁽¹⁴⁾ Footnote 1, paragraph 8.10.2.

3.3.1.6 Article 15(2) permits Member States to defer for up to four years full implementation of the obligation to provide effective access. While the EESC would hope to see all Member States moving toward ensuring good access for disabled people as soon as possible, the EESC does not disagree that Member States should be permitted to delay giving effect to the anticipatory obligation in Article 4(1)(a) for this limited period only. It is essential, however, that the directive makes clear that no delay beyond the deadline for transposition should be permitted for compliance with the duty to provide reasonable accommodation for a particular disabled person under Article 4(1)(b).

3.4 Article 12

3.4.1 The EESC welcomes the requirement on Member States to designate one or more bodies for the promotion of equal treatment on grounds of religion or belief, disability, age and sexual orientation with competences parallel to those specified for such bodies under the Race Equality Directive and the Gender Goods and Services Directive. The EESC further welcomes the clear statement in the preamble ⁽¹⁵⁾ that such bodies should operate in a manner consistent with the UN Paris Principles which, in particular, seek to guarantee the independence of national human rights institutions. As already stated by the EESC, these bodies should be responsible for regularly evaluating the results of national anti-discrimination policies ⁽¹⁶⁾. These bodies should be expected regularly to engage in meaningful dialogue with organisations representing persons at risk of discrimination on all of the grounds included in the proposed directive.

3.4.2 The proposal in Article 12 will, however, leave a gap, since there will still be no requirement to designate a body or bodies for the promotion of equal treatment in employment and occupation on these grounds, as the Employment Framework Directive (2000/78/EC) does not require a specialised equality body. Bodies established under the Race Equality Directive must cover both employment and non-employment equality on grounds of racial or ethnic origin and bodies established under the

Gender Goods and Services Directive and the (recast) Equal Treatment Directive (2006/54/EC) should cover both employment and non-employment equality between women and men.

3.4.3 The EESC recommends, therefore, an additional recital in the preamble to the proposed directive, encouraging Member States to give to the bodies designated under Article 12 equivalent competences in respect of equal treatment on grounds of religion or belief, disability, age and sexual orientation within the scope of the Employment Framework Directive.

4. Multiple discrimination

4.1 In its recent own-initiative opinion, the EESC referred to evidence of the frequent incidence of multiple discrimination, that is discrimination on more than one of the grounds within the scope of Article 13. The EESC recommended that a new directive should confirm that the principle of equal treatment includes protection in relation to multiple discrimination, so that it would be given effect in EU and national law.

4.2 The proposed directive recognises ⁽¹⁷⁾ that women are often victims of multiple discrimination, but does not consider multiple discrimination across other grounds. The EESC recommends that progress toward full recognition of multiple discrimination could be made in two ways:

- a) An additional recital in the proposed directive encouraging Member States to ensure that legal procedures are available to deal with situations of multiple discrimination, specifying in particular that national legal procedures shall enable a complainant to raise all aspects of a multiple discrimination claim in a single legal claim.
- b) A recommendation by the Commission stating the need to take account of multiple discrimination in drafting and enforcing national laws which, while not binding on Member States, would need to be taken into consideration by national courts.

Brussels, 14 January 2009.

*The President
of the European Economic and Social Committee*
Mario SEPI

⁽¹⁵⁾ Recital 28.

⁽¹⁶⁾ Footnote 1, paragraph 8.10.8.

⁽¹⁷⁾ Recital 13.