

## **Social Platform assessment**

of the Spanish Presidency drafting suggestions (January 2010)  
for the draft directive on implementing the principle of equal  
treatment between persons irrespective of religion or belief,  
disability, age or sexual orientation

February 2010

**Why do we call on the Member States to adopt the proposed Article 13 directive with the same scope and the same level of protection as in the Race Equality Directive (43/2000)?**

- **A simple claim!** To provide the same legal protection against discrimination granted in the Race equality directive to the ground of age, disability, religion or belief and sexual orientation.
- **Closing the gaps in legal protection:** In 2000 and 2004 Members States adopted measures to combat discrimination based on race or ethnic origin (2000/43), on sex (2004/113) and on all the others grounds but only in the area of employment (2000/78). Ten years after, the grounds of age, disability, religion or belief and sexual orientation are still lacking legal protections in essential areas of life.

		Grounds of discrimination					
		Age	Disability	Religion or Belief	Sexual Orientation	Sex	Race Ethnic Origin
Fields covered by EU legislation	Year of adoption						2000
	Education	No	No	No	No	No	Yes
	Social Protection	No	No	No	No	Partly covered	Yes
	Social advantages	No	No	No	No	Partly covered	Yes
	Access to good and services available to the public, including housing	No	No	No	No	Yes	Yes
	Employment and vocational training	Yes	Yes	Yes	Yes	Yes	Yes

■ **Why is it important?**

- Legislation provides the victims of discrimination with the possibility of redress and it discourages discrimination.
- The difference in protection from discrimination at EU and national level has practical consequences: victims of discrimination have unequal means of redress depending on their Member States. It also means that the differences in protection afforded by the Member States affect people’s mobility as well as the cross border marketing of good and services
- **The EU has competence to act in this matter:** The Article 13 of the Amsterdam Treaty – and now Article 19 of the Lisbon Treaty- provide the legal foundation for the Council to *“take appropriate measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”*.
- **The Council has now to put its words into deeds:** In July 2008, “a large majority of delegations [of Member States] welcome the proposal, many endorsing the fact that it aims to complete the existing legal framework by addressing all four grounds of discrimination through a horizontal approach”. Furthermore, “most delegations have

affirmed the importance of promoting equal treatment as a shared social value within the EU". (quote from the Swedish presidency progress report of November 2009)

- **Who supports the directive:** the Commission, the European Parliament, civil society organizations, the European Trade Union Confederation, and 90% of respondents to a Commission's consultation have been calling for it.
  
- **Where are we in the adoption process?**
  - The Commission has made a proposal on July 2, 2008 for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.
  
  - The European Parliament has adopted its report on May 2, 2009.

## 2.6: Effective protection for the ground of age and disability

- **What is at stake:** the provision may allow less favorable treatment on the ground of age.
- **What does the Council propose?** (As of January 2010)

Article 2.6	
Text proposed by the Council	Text proposed by Social Platform
<p>Notwithstanding paragraph 2, differences of treatment on grounds of age shall not constitute discrimination, if they are objectively justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. [...]</p> <p><b>In this context</b>, differences of treatment [...] <b>under national regulations</b> fixing a specific age for access to social protection, including social security, social assistance and healthcare; education; and certain goods or services which are available to the public, [...] <b>or providing for</b> more favourable conditions of access for persons of a given age, in order to promote their economic, cultural or social integration, <b>are presumed to be non-discriminatory.</b></p> <p>6a. (new) Notwithstanding paragraph 2, differences of treatment of persons with a disability shall not constitute discrimination, if they are aimed at protecting their health and safety and if the means of achieving that aim are appropriate and necessary.</p>	<p>Notwithstanding paragraph 2, differences of treatment on grounds of age <b>and disability</b> shall not constitute discrimination if they are objectively <b>and reasonably</b> justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.</p> <p>In this context, differences of treatment [...] under national regulations fixing a specific age for access to social protection, including social security, social assistance and healthcare; education; and certain goods and services which are available to the public, [...] or providing for more favourable conditions of access for persons of a given age <b>or to or persons with disabilities</b>, in order to promote their economic, cultural or social integration, are presumed to be non-discriminatory.</p> <p><del>6a. Notwithstanding paragraph 2, differences of treatment of persons with a disability shall not constitute discrimination, if they are aimed at protecting their health and safety and if the means of achieving that aim are appropriate and necessary.</del></p> <p style="text-align: center;"><b>Text proposed by the Parliament</b></p> <p>6. This Directive does not preclude differences in</p>

	treatment on grounds of age if they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate, proportionate, necessary and effective.
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■ **What is the consequence of such wording?**

- 2.6 can allow less favorable treatment: It could permit Member States to use any legitimate aim to justify discrimination on the ground of age in accessing services. The problem is what constitutes a legitimate aim. The same behaviour may be lawful in one country and not in another. This is why we believe that the article should refer to **more favorable treatment** rather than difference of treatment.
- The European Disability Forum suggests taking up the proposal originally introduced by the French Presidency in 2008 to include disability as one of the grounds eligible for preferential treatment in certain circumstances.
- On Article 2.6a: this provision is based on the medical and patronizing model of people with disabilities which should be avoided, in order not to create disguised discrimination in this field. This provision leaves room for interpretation and may result in unnecessary reduction of rights of persons with disabilities. For example, in accessing good and services, fire risk in schools equipped with elevator has been used to prevent boarding of pupils with disability. The argument put forwards was "what will happen in case of a blaze when elevator must not be used".

■ **What do we propose?** Our wording is based on the existing Employment framework directive. It is important to provide for positive action in favour of some age groups.

## 2.7: Non discrimination in access to financial services

■ **What does the Council propose?** (As of January 2010)

Article 3.1.d	
Text proposed by the Council	Text proposed by Social Platform
Notwithstanding paragraph 2, in the provision	Notwithstanding paragraph 2, in the provision

of financial services, proportionate differences in treatment where, for the service in question, the use of age or disability is a determining factor in the assessment of risk based on relevant actuarial principles, accurate statistical data or medical knowledge shall not be considered discrimination for the purposes of this Directive.

of financial services, proportionate differences in treatment where, for the service in question, the use of age or **a** disability is a determining factor in the assessment of risk based on relevant actuarial principles, accurate statistical ~~data~~ or medical ~~knowledge~~ **data that is compiled, published and regularly updated** shall not be considered discrimination for the purposes of this Directive.

■ **What are the consequences of the wording proposed by the Council?**

- The notion of medical knowledge is a very uncertain definition which should be replaced with the more accurate term 'medical data', not to leave space for wide and ambiguous interpretations. Furthermore, for the sake of consistency with the earlier European anti-discrimination legislation (Gender Goods and Services Directive 2004/113/EC), the Member States should introduce additional criteria ("compiled, published and regularly updated") for data that is to be used to justify the differences in treatment. In addition replacing "disability" with "a disability" presumes that it is a specific disability (not the fact of having any kind of disability) that would play a role in determining the risks.

### 3.1: Non discrimination in access to social advantages

- **What is at stake?** The access to social advantages in the same manners as in the Race Equality directive. Any differences in legal protection and coverage will lead to a hierarchy of grounds, some groups will have wider protection than others. The distinction between race and religion is arbitrary (e.g. in the UK Jews and Sikhs are covered by both, but Muslims and Rastafarians only by religion) so there will be differences among religious groups as well.

- **What does the Council propose?**

#### Article 3.1b

**Text proposed by the Swedish Presidency**

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

access to:

- (a) Social protection, including social security, social assistance and healthcare;
- (b) ***[Deleted: Social advantages.]***
- (c) Education;
- (d) and the supply of, goods and other services which are available to the public, including housing.

Subparagraph (d) shall apply to natural persons only insofar as they are performing a professional or commercial activity defined in accordance with national laws and practice.

- **The Council proposal introduces an exemption which is not included in [Race Equality Directive \(2000/43\)](#)**
- **What do we propose?** To keep social advantages in the scope of the directive.
- **What is the consequence of the deletion of social advantages?**
  - The social advantages category is valuable for capturing areas of discrimination which might not fit clearly into the categories of services or social protection. In particular, discretionary benefits are best covered by this category. A good example would be family price tickets for museums, leisure centres, public transport, etc. If there was a rule that only families composed of an opposite sex couple + children were eligible for cheaper family price tickets, then this would be sexual orientation discrimination against families based on a same-sex couple. These types of discretionary benefits are clearly “social advantages” and this category is valuable for dealing with such issues. Moreover, it is already present in Directive 2000/43 which illustrates its importance.
  - Whereas some social advantages are indeed offered in the framework of social protection, this is not always the case, especially when these advantages are not linked to a contract of employment. The social advantages that may be excluded from the scope if their inclusion is not spelled out are the entitlement of persons with disabilities to discounts for museums and cultural events or access to public libraries or evening classes. Furthermore, the European Disability Forum fears that social advantages such as student grants (or advantageous student loans) that are awarded to students based on merit would not be covered by the Directive unless the social advantages are explicitly included. EDF therefore insists on the keeping ‘social advantages’ within the scope.
  - Concern about deleting this area from the scope of the directive arises from the problems that follow when there is differential protection between legal instruments that cover similar areas – it makes it much harder for those subject to the law both civil society and providers of goods, facilities and services to know which provisions apply to which aspect of their life/business. Following the Race Directive as closely as possible seems to be the best approach.

## 3.1: Non discrimination in access to Housing

- **What is at stake?** A January 2008 survey found that discrimination was perceived to be most widespread in the housing area<sup>1</sup>. The [ENAR European shadow report 2008](#) highlights that racial and religious discrimination in housing for instance is a big problem, discrimination by property agents is reported from a number of countries.
- **What does the Council propose?**

Article 3.1.d	
<p><b>Text proposed by the Council</b></p> <p>(d) and the supply of, goods and other services which are available to the public, including housing</p> <p>Subparagraph (d) shall apply to <i>natural persons</i> only insofar as they are performing a <i>professional</i> or commercial activity defined in accordance with national laws and practices.</p>	<p><b>Text proposed by Social Platform</b></p> <p>(d) and the supply of, goods and other services which are available to the public, including housing</p> <p>[Delete]</p>

- **This sentence introduces an exemption which is not included** in [Race Equality Directive \(2000/43\)](#) nor in the directive on [equal treatment between women and men \(2004/113\)](#).
- **What is the consequence of such wording?** In a country like Germany, all owners of less than 50 apartments will be allowed to discriminate against people on the ground of their age, disability, sexual orientation or religion. The owners would select their tenants on their own selection criteria! According to article 19.5 of the General Law on Equal Treatment of 2006 revised in 2009 (AGG), "*the rental of housing is generally not a business if the landlord rent a total of not more than 50 dwellings*"<sup>[1]</sup>. This illustrates the serious risk that this is abused in order to allow a very wide area where discrimination is permitted.
- **60% of rented housing in Germany will not be protected from discrimination:** the supply structure of the German housing market is characterized by the numerical importance of small private landlords. Nearly 14 million of the approximately 23 million rented apartments are offered by small providers or individuals<sup>2</sup> and therefore could be considered out of the scope of the Equal Treatment Law

<sup>1</sup> Flash Eurobarometer 232 ([http://ec.europa.eu/public\\_opinion/flash/fl\\_232\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf))

<sup>2</sup> The Housing market in Germany, 2004, [http://www.schader-stiftung.de/wohn\\_wandel/826.php](http://www.schader-stiftung.de/wohn_wandel/826.php)



- **What do we propose?** Any services that are open to the public generally should not be delivered in a discriminatory way whether or not they entail a professional or commercial activity. As in the Race Equality Directive, a balance is already provided by Recital 17 which –as in the Race Equality Directive- states that ‘While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context’.
- **Alternative wording found in existing legislation in other Member States:** the Irish Equal Status Acts 2000 to 2004 has a specific measure regarding access to housing:
  - 1) A person shall not discriminate in—
    - a. disposing of any estate or interest in premises,
    - b. terminating any tenancy or other interest in premises, or
    - c. providing accommodation or any services or amenities related to accommodation or ceasing to provide accommodation or any such services or amenities.
    - d. the provision of accommodation by a person in a part (other than a separate and self-contained part) of the person's home, or where the provision of the accommodation affects the person's private or family life or that of any other person residing in the home, or”

## 3.2: No exception clauses to the scope of the directive

- **What is at stake?** The access to services in the same manners as in the Race Equality directive.
- **What does the Council propose?** (As of 10 January 2010)

### Article 3.2

**Text proposed by the Council:**

This Directive does not alter the division of competences between the European **Union** and the Member States. In particular it does not apply to:

- (a) matters covered by family law, including marital status and adoption, **and the benefits dependent thereon, as well as** laws on reproductive rights;
- (b) the organisation of Member States' social protection systems, including decisions on the setting up, financing and management of such systems and related institutions as well as on the substance and delivery of benefits and services and the conditions

of eligibility;

- (c) the powers of Member States to determine the type of health services provided and the conditions of eligibility; [...]
- (d) [...] **the organisation of the Member States' educational systems, the content of teaching and of educational activities**, including the provision of special needs education; **and**
- (e) **(new) the organisation of the Member States' housing services, including the management or allocation of such services and the powers of the Member States to determine the conditions of eligibility for social housing.**

- **What do we propose?** The deletion of these exception clauses. The first line of the article is largely sufficient: *"This Directive does not alter the division of competences between the European Union and the Member States"*.
- **This sentence introduces exemptions which are not included** in [Race Equality Directive \(2000/43\)](#) nor in the directive on [equal treatment between women and men \(2004/113\)](#).
- **What is the consequence of such wording?**
  - Access to reproductive health services falls within the material of the directive as services. However, the impact of the provision 3.2.a is likely to be discriminatory for many people. This clause could mean that a state might limit access to IVF to married or opposite-sex couples and/or to heterosexual single women without a possibility to be challenged. It could also lead to refusing access to reproductive services to persons with disability for instance. Furthermore, it can be argued that this exclusion of reproductive rights is not in line with recital 13 which recognises that women are often the victims of multiple discriminations. This is particularly true for reproductive health. Women rights are human rights and therefore it is highly unjust to exclude reproductive rights from anti-discrimination laws as it would affect women in the first place.
  - The exclusion of 'the conditions of eligibility' in 3.2.b, c and e seems to strike at the heart of the very purpose of the Directive. One of the core areas where discrimination is likely to arise is in relation to access to social protection or health services. For example, if older persons are excluded from access to certain healthcare treatments (without a good medical reason for this). Alternatively, if same-sex couples are excluded from access to social assistance for low income families. Moreover, Art 152(5) EC does not restrict EC competence in respect of conditions of eligibility.
  - Reference to "family status" in 3.2.a creates ambiguity as it is unclear what is included under this status, i.e. whether it refers to married couples and/or unmarried couples and/or couples with children. This term opens the door for instance to possible distinctions between unmarried same-sex couples and unmarried opposite-sex couples in access to goods and services. It would then

lead to individuals not being able to challenge a difference made between unmarried opposite-sex and same-sex couples in access to a health club or to a restaurant for example. The reference to “family status” could also lead to discrimination against single parent with children.

- On Article 3.2(d): The European Disability Forum does not support the explicit exclusion of provision of special needs education from the scope of the Directive, as it presupposes that special needs education is not part of the general education system of a Member State. The singling out of special needs education from all other aspects of education does not follow the language of Article 149 EC that speaks generally about the “content of teaching and the organization of education systems”. Exclusion of provision of special needs education amounts to automatic denial of reasonable accommodation to children with disabilities who need it in order to participate in general education system of a Member State. Ultimately, it would strip the Directive provisions on education of any meaningful content for persons with disabilities, to whom equality in education means provision of adequate support, materials and personalized approach. Finally, such blanket exclusion is clearly in breach of the UN Convention on the Rights of Persons with Disabilities.
- On Article 3.2(e): The European Disability Forum the exclusion of the organization of housing services from the scope as it jeopardizes the deinstitutionalization process that is going on in all Member States. Many Member States (as well as the Commission) have committed itself to this work, and their efforts may be undone if the organization of housing services in Member States is such that it does not allow persons with disabilities in need of support to choose the type of housing they prefer (community-based or other). People whose right to choose the type of housing is limited may also automatically be prevented from equal enjoyment of other rights: access to goods and services (cultural activities, holidays), education, adequate healthcare, etc... Furthermore, should this exclusion be upheld, people living in institutions (in violation of their rights under the UN Convention of the Rights of Persons with Disabilities) may be found ineligible (or low on priority list) for social housing in the community as they are considered as already having a roof over their heads. This would continue the circle of institutionalization, discrimination and exclusion.

### 3.3: Non discrimination in the field of education

- **What is at stake?** The access education in a non discriminatory manner.
- **What does the Council propose?** (As of 10 January 2010)

Article 3.3	
<p><b>Text proposed by the Council</b></p> <p>[...] the application of the principle of equal treatment in the area of education does not preclude differences of treatment based on religion in the context of the admission policies of ethos-based educational institutions.</p> <p>These differences of treatment must be proportionate and necessary for the protection of the rights and freedoms of others, and shall not justify discrimination on any other ground.</p>	<p><b>Text proposed by the European Parliament</b></p> <p>This Directive shall not apply to the content of teaching, activities and the organisation of national educational systems, while Member States shall ensure the rights of persons with disabilities to education without discrimination and on the basis of equal opportunities. Member States shall also ensure that, in determining which type of education or training is appropriate, the views of the person with a disability are respected. Member States may allow for differences in access to educational institutions based on religion or belief, so as to maintain the particular character and ethos of such establishments and a plurality of educational systems, provided that this does not represent an infringement of the right to education and does not justify discrimination on any other grounds. Member States shall ensure that this does not lead to a denial of the right to education.</p>

- **What do we propose?** The adoption of the European Parliament proposal (above).
- **The Council proposal introduces an exemption which are not included in [Race Equality Directive \(2000/43\)](#)**
- **What needs to be guaranteed?**
  - It is crucial that the Directive does not provide an unrestricted freedom for religious schools regarding admission. Discrimination on other grounds than religious ethos should not be allowed. This is necessary for the sake of clarity.
  - ***The right to education needs to be clearly guaranteed.*** The fundamental right to education should take precedence over a school's right to choose its pupils on the

basis of religious ethos in cases where the only school in the vicinity is a religious school. A number of EU Member States rely on the dominant religious faith to deliver education, rural areas in particular often only have religious schools (often Christian schools), and in such cases it must be ensured that children from minority religions can still have access to education so that their right to education is not violated.

#### ■ Examples of discrimination in access to education

- **Sexual orientation:** Stonewall School Report 2007 found that – 65% of lesbian and gay secondary school pupils in Great Britain had experienced homophobic bullying, 41% of these had been physically bullied and 17% had experienced death threats.<sup>3</sup> 52% of lesbian and gay pupils have heard homophobic remarks from teachers or other school staff. 30% of lesbian and gay pupils report that adults have been responsible for incidents of homophobic bullying in their schools.
- **Disability:** The UK charity Mencap reported in 2007 that ‘an incredible 82% of children with a learning disability are bullied – this is 280,000 children’ and six out of 10 are physically hurt.<sup>4</sup>

### Recital 12: The same definition of harassment as in the previous directive

- **What is at stake?** The access to social advantages in the same manners as in the Race Equality directive.
- **What does the Council propose?**

#### Recital 12 b new

##### Text proposed by the Swedish Presidency

Harassment is contrary to the principle of equal treatment, since victims of harassment cannot enjoy access to social protection, education and goods and services on an equal basis with others. Harassment can take different forms, including unwanted verbal, physical, or other non-verbal conduct. Such conduct may be deemed harassment in the meaning of this Directive when it is either repeated or otherwise so serious in nature that it has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. *In this context, the mere expression of a personal*

<sup>3</sup> [http://www.stonewall.org.uk/education\\_for\\_all/research/1790.asp](http://www.stonewall.org.uk/education_for_all/research/1790.asp)

<sup>4</sup> Bullying wrecks lives: the experiences of children and young people with a learning disability, Mencap 2007.

***opinion or the displays of religious symbols or messages are presumed as not constituting harassment***<sup>5</sup>.

- **What do we propose?** Deletion of this recital which did not exist in previous directive. Is there more acceptances at EU level for harassment on the ground of age, disability, religion or sexual orientation while it is absolutely condemn for the ground of race and sex?
  
- **What is the consequence of such wording?**
  - It excludes from the scope of the directive expressions of personal opinion which seems extraordinary and problematic given that harassment is inevitably an expression of personal opinion.
  - This will lead to an inconsistent definition of harassment compared to previous EU equality legislation

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<sup>5</sup> Wording taken from Recital 17 (see doc. 12792/09, p. 3).