



Northern Ireland
Assembly

Research and Information Service Briefing Paper

Paper 121/11

August 2011

NIAR 419-11

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The EU ‘Horizontal Directive’

1 Introduction

European Union (EU) non-discrimination law operates through a series of EU Council Directives that give varying levels of protection against direct and indirect discrimination and against harassment on the grounds of racial or ethnic origin, gender, religion or belief, disability, age or sexual orientation. However, these Directives give different protections to different equality grounds.

Non-discrimination Directives have moved towards harmonisation so that the various grounds are protected equally. The latest of these equal treatment Directives is the proposed so-called ‘Horizontal Directive’, which proposes to equalise levels of protection across equality grounds.

This paper examines the content and development of the proposed Directive.

2 Background to the 'Horizontal Directive'

EU anti-discrimination law originated in the prohibition of discrimination in the workplace. Article 13 of the Treaty of the European Union states¹:

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation***

Successive Directives have prohibited discrimination in employment, but these Directives give uneven protection to different groups. The most protection is afforded according to racial or ethnic origin, covering employment, access and services, social security and education, and a requirement for an equality body to promote equality on those grounds. Next best protected is the area of sex discrimination, which broadly covers similar ground as racial or ethnic origin, except for education. The other equality grounds are only protected in employment. This hierarchy of equality provisions is illustrated below:

	Employment	Goods and Services	Social Security	Education
Race or Ethnic Origin	2000/43/EC + requirement for an equality body			
Gender	2006/54/EC	2004/113/EC + requirement for an equality body	79/7/EEC	
Religion or Belief	2000/78/EC			
Disability				
Age				
Sexual Orientation				

¹ Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

3 Development of the 'Horizontal Directive'

The EU Commission has been developing an Equal Treatment Directive, also referred to as the 'Horizontal Directive', to harmonise equality provisions across protected groups.

Detailed study of EU non-discrimination legislation found that discrimination persists despite the legal framework and that protections were uneven across equality grounds². Following a consultation period, a proposed Directive was tabled in July 2008³. This comprised the following main articles:

1. Grounds – to cover religion or belief, disability, age and sexual orientation
2. Definitions of direct and indirect discrimination and harassment, including instructions to discriminate
3. Scope – to cover public and private sectors in respect of social protection, social advantage, education and access to goods and services
4. Necessary measures to enable access for people with disabilities
5. Positive action measures permissible
6. Member States can exceed these protections, but cannot reduce existing protections if they are greater than those in the Directive
7. Availability of remedy for discrimination
8. Burden of proof on the respondent to show there has been no discrimination
9. Prohibition of victimisation for taking a case
10. Publication of measures resulting from this Directive
11. Dialogue with stakeholders on preventing discrimination
12. Designation of an equality body to promote equal treatment on the grounds at Article 1

² Commission of the European Communities, *Commission Staff Working Document Accompanying the Proposal for a Council Directive on Implementing Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, SEC (2180) 2008 2.7.2008: <http://register.consilium.europa.eu/pdf/en/08/st11/st111531-ad01.en08.pdf>.

³ Draft Directive and Explanatory Memorandum COM (2008) 426 2.7.2008: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF>.

This was laid before the European Parliament on 2 July 2008 and discussed at the European Council on 2 October 2008, where it was given clearance for work to continue on the text of the Directive⁴.

The European Economic and Social Committee issued an Opinion on the draft Directive on 14 January 2009 which broadly welcomed the proposals, but raised the following concerns⁵:

- Exceptions to the prohibition of discrimination in Article 2, particularly regarding financial services, which should have the same protections as are available on grounds of gender
- Limits to the scope outlined in Article 3, which would limit the effectiveness of the Directive as a whole
- The duty in Article 4 for providers of goods and services to make reasonable adjustments in anticipation of use by people with disabilities is too limited
- The equality body designated at Article 12 does not cover employment, unlike those designated for race and gender
- The proposed Directive does not cover multiple discrimination

On 2 April 2009 the European Parliament approved the proposed Directive with amendments, including the following⁶:

- Addition of multiple discrimination, including race and gender
- Insertion of a definition of disability in line with the UN Convention on the Rights of People with Disabilities
- Inclusion of the following as discrimination:
 - Refusal of medical treatment on the grounds of age
 - Refusal of access to a guide dog
- Inclusion of discrimination by association and discrimination based on unfounded assumption
- Extension of reasonable measures for access for disabled people

⁴ 2893rd Council meeting on employment, social policy, health and consumer affairs, Luxembourg, 2 October 2008: <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/271&format=HTML&aged=0&lg=en&guiLanguage=en>

⁵ 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 and sexual orientation SOC/326 14 January 2009: <http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=en&docnr=49&year=2009>.

⁶ European Parliament legislative resolution of 2 April 2009 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 P6_TA(2009)0211: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0211+0+DOC+PDF+V0//EN>.

- Addition of a duty to actively promote equality
- Inclusion of employment within the remit of the designated equality body

The current status is that the proposals are still under development, more work having been undertaken in the areas of reasonable accommodation for people with disabilities noted in the most recent Progress Report in June 2011⁷. Each Presidency has concentrated on certain aspects of the draft Directive, but the timescale for introduction or the full content of the final text are still unclear.

⁷ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation - Progress Report 10615/11 1 June 2011: <http://register.consilium.europa.eu/pdf/en/11/st10/st10615.en11.pdf>.

4 Implications for Equality Legislation

The UK Government consulted upon the proposed Directive in 2009⁸. However, this was in the context of the passage of the Equality Bill, passed as the Equality Act 2010⁹, which harmonises equality law in Great Britain and incorporates some of the provisions of the proposed Directive. Consequently, it was not considered that the proposed Directive would have a significant impact in the UK¹⁰.

The UK Government has raised the following concerns with regard to the proposed Directive¹¹:

- Preservation of exceptions for religious organisations with regard to discrimination on the grounds of sexual orientation
- Clarification on whether age limits can be set for specific goods and services
- Assurance that the draft Directive does not extend to children
- The indirect discrimination model is not the one in use for disability in the UK
- Clarification on provision for anticipatory access for disabled people
- UK legislation on housing for disabled people is not reflected in the draft Directive

The UK also has concerns over elements of the proposals regarding the subsidiarity principle (that legislation should be formed at the lowest level) with regard to whether legislating for access to health and education is within the competence of the EU. There are also concerns over the potential for the Directive to include multiple discrimination¹².

Equality is a devolved matter in Northern Ireland. In other areas of the UK, there will be some minor impacts due to the coverage of the Equality Act. However, Northern Ireland has separate legislation for each of the six EU equality grounds¹³ and the proposals may require amendments across a range of laws, although at the current stage of development, it is not possible to predict with any precision what these might be.

The Explanatory Memorandum states that the devolved administration (i.e. the Northern Ireland Executive) was consulted on the draft Directive.

⁸ Government Equalities Office, *UK Consultation on the European Commission Proposal for an Equal Treatment Directive: Consultation Document*, May 2009: <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-1295.pdf>.

⁹ Equality Act 2010: <http://www.legislation.gov.uk/ukpga/2010/15/contents>.

¹⁰ Government Equalities Office, *Impact Assessment of Draft EC Equal Treatment Directive*, 5 May 2009: <http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered%20EMs%2008/11001-12000/11531-08%20Min%20Cor%2014%20May%202009%20Baird-Connarty.pdf>.

¹¹ Government Equalities Office Explanatory Memorandum Council No 11531/08 COM(2008)425 14 July 2008: <http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered%20EMs%2008/11001-12000/11531-08.pdf>.

¹² Government Equalities Office communication to the European Scrutiny Committee re 11531/08 24 March 2009.

¹³ See Research and Information Service Research Paper 75/11, *Equality and Human Rights Legislation in Northern Ireland: A Review*, August 2011: <http://www.niassembly.gov.uk/researchandlibrary/2011/7511.pdf>.

Appendix 1: EU Equality Directives

Sex

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)¹⁴, which consolidates previous anti-discrimination Directive in respect of sex discrimination in employment

Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services¹⁵, which includes the requirement for an equality body to promote gender equality

Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security¹⁶

Racial or Ethnic Origin

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁷, which encompasses employment, access to goods and services, social security and education, as well as a requirement for an equality body

Religion or Belief, Disability, Age and Sexual Orientation

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation¹⁸

¹⁴ Directive 2006/54/EC of the European Parliament and of the Council: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>.

¹⁵ Council Directive 2004/113/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:EN:PDF>.

¹⁶ Council Directive 79/7/EEC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1979:006:0024:0025:EN:PDF>.

¹⁷ Council Directive 2000/43/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>.

¹⁸ Council Directive 2000/78/EC: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.