

BRIEFING NOTE 1

LEGAL OBLIGATIONS and POLITICAL COMMITMENTS in favour of A NEW ANTI-DISCRIMINATION DIRECTIVE

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Legal basis in EU law

Treaty on European Union

Article 6, par.1, affirms that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” It also states that

*“The Union **shall respect fundamental rights**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” (par.2)*

Treaty establishing the European Community

Article 13 (1) invests the Community with the power to adopt measures to combat discrimination based on numerous grounds, including sexual orientation

“[...] 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”

EU Charter of fundamental rights¹

Article 21(1) of the Charter of Fundamental Rights clearly establishes that sexual orientation discrimination is unacceptable in all areas:

“[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”

Legal basis in International and European human rights obligations

International human rights standards

Article 26 of the **International Covenant on Civil and Political Rights** recognizes that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.

It also requires all signatories (this includes all EU states and all the applicants) to ensure that:

“the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”

Article 2 (2) of the **International Covenant on Economic, Social and Cultural Rights**

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The rights guaranteed by the ICESCR include: the right of everyone to social security, including social insurance (art.9); the right to adequate food, clothing and housing, and to the continuous improvement of living conditions (art.11); right of everyone to the enjoyment of the highest attainable standard of physical and mental health (art.12); the right to education (art.13)

¹ http://europa.eu.int/comm/justice_home/unit/charte/en/charter-equality.html

UN Treaty Bodies – Human Right Committee

Concluding Observations on Austria –CCPR/C/AUT/CO/4 (Chapter C, para.8)

“The Committee notes that the Equal Treatment Act, the Employment of Disabled Persons Act and the Equality of Disabled Persons Act provide protection against discrimination on grounds of ethnic origin and disability at work and in other areas such as social security, housing, education and health. However, it notes with concern that protection against gender discrimination is less comprehensive and that protection against discrimination on grounds of age, religion and sexual orientation is limited to ‘work’ only under the Equal Treatment Act. It is also concerned that such hierarchisation of discrimination grounds can also be found in Provincial laws, and that in cases covered by the Acts concerning disabled persons, victims must seek an out-of-court settlement prior to filing a court action.” (arts. 2 (1), 14 (1), 26)

“The State party should consider amending the Equal Treatment Act, the Employment of Disabled Persons Act, the Equality of Disabled Persons Act and relevant Provincial laws, with a view to levelling up and ensuring equal substantive and procedural protection against discrimination with regard to all prohibited grounds of discrimination.”

European Convention on Human Rights

Article 14 of the **European Convention on Human Rights** prohibits discrimination and affirms that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 1 of **Protocol No. 12 to the European Convention on Human Rights**² guarantees that:

“The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”

It further establishes that:

“No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

² The Protocol is in force only in five EU member states (Cyprus, Finland, Luxembourg, Netherlands, and Romania). Fourteen member states have signed it but have yet to ratify the protocol (Austria, Belgium, Czech Rep., Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Portugal, Slovakia, Slovenia, and Spain). The other Member States have not even signed the Protocol.

Comment:

General prohibition of discrimination and the obligations of States to prohibit any discrimination and guarantee equal protection against discrimination to all persons is inscribed in international and European human rights standards. In contrast, current EU anti-discrimination law is generating an 'equality hierarchy' where it seems some are more equal than others.

- The 2000 Racial Equality Directive forbids discrimination on grounds outside employment: 'social protection, including social security and healthcare, social advantages, education, access to and the supply of goods and services which are available to the public, including housing'. (http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0043.html)
- In 2004, the European Council unanimously adopted the Directive implementing equal treatment between women and men aimed at extending the principle of equal treatment beyond the area of employment to the access to and supply of goods and services. (http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_373/l_37320041221en00370043.pdf)

Resolution from European Council

COUNCIL RESOLUTION on the Follow-up of the European Year of Equal Opportunities for All (2007) (Brussels, 26 November 2007, SOC 468)

The Council notes:

"the European Parliament and civil society have called for extending legal protection against discrimination to areas beyond employment and occupation."

Invites Member States and the European Commission, in accordance with their respective competencies:

"1. to ensure full and effective implementation and evaluation of existing anti-discrimination laws and gender equality legislation;

2. to strengthen efforts to prevent and combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation, inside and outside the labour market;"

8. to take full account of the specific issues arising from multiple discrimination when designing laws and when monitoring and evaluating policies and support programmes;

Resolutions from European Parliament

The European Parliament has called for a Directive to forbid sexual orientation discrimination in areas outside employment:

- **European Parliament resolution of 16 January 2008 – Towards an EU strategy on the rights of the child (P6_TA-PROV(2008)0012)**

“Calls on the Commission to submit a proposal for a directive covering all forms of discrimination referred to in Article 13 of the EC Treaty and all areas covered by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” (par.102)

- **European Parliament resolution of 15 November 2007 – Application of Directive 2004/38/EC**

“Reminds the Commission that it is imperative to submit a proposal for a horizontal directive to combat all the forms of discrimination referred to in Article 13 of the EC Treaty, as provided for in the Commission's 2008 legislative and work programme;” (par.11)

- **European Parliament resolution of 26 April 2007 on homophobia in Europe (P6_TA-PROV(2007)0167)**

“Reiterates its request to the Commission to ensure that discrimination on the basis of sexual orientation in all sectors is prohibited by completing the anti-discrimination package based on Article 13 of the EC Treaty, without which lesbians, gays, bisexuals and other individuals facing multiple discrimination continue to be at risk of discrimination; calls for a worldwide decriminalisation of homosexuality” (par.3)

- **European Parliament resolution of 15 June 2006 – Increase in racist and homophobic violence in Europe**

“Deplores the fact that the Council has been unable to adopt the abovementioned proposal for a framework decision on combating racism and xenophobia, and urgently calls on the future Finnish Presidency of the Council to restart work on it and on the Council to reach an agreement on explicitly extending it to homophobic, anti-Semitic, Islamophobic and other types of offence motivated by phobia or hatred based on ethnicity, race, sexual orientation, religion or other irrational grounds; calls on the Member States to reinforce criminal law measures aimed at the approximation of the penalties for such offences throughout the EU; urges all the Member State to effectively implement the anti-discrimination directives and the Commission to bring before the Court of Justice those Member States which fail to do so and to submit before mid-2007 proposals for new legislative tools covering all the grounds for

discrimination set out in Article 13 of the EC Treaty and having the same scope as Directive 2000/43/EC; (par. 1)”

- **European Parliament resolution of 14 June 2006 – Non-discrimination and equal opportunities for all (Zdanoka report)**

Need for supplementary legislation: *“Greatly regrets the fact that, notwithstanding repeated requests by the European Parliament, the Commission is not planning at this stage to draw up comprehensive legislation to combat discrimination; recalls that better legislation does not only mean eliminating unnecessary legislation, but also developing legislation in response to strong political signals from the European Parliament; insists that a new legislative tool incorporating all the grounds for discrimination set out in Article 13 of the EC Treaty and having the same scope as Directive 2000/43/EC be submitted before mid-2007;”* (par.22)

- **European Parliament resolution on homophobia in Europe (P6_TA(2006)0018 – 18 January 2006)**

“Calls on the Commission to ensure that discrimination on the basis of sexual orientation in all sectors is prohibited by completing the anti-discrimination package based on Article 13 of the Treaty either by proposing new directives or by proposing a general framework covering all grounds of discrimination and all sectors” (par. 4)

“Urges the Commission to come up with a proposal for a directive on protection against discrimination on the basis of all the grounds mentioned in Article 13 of the Treaty, having the same scope as Directive 2000/43/EC” (par. 8)

“Urges Member States to enact legislation to end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, tax, social security, etc.” (par. 11)

- In its **Resolution on the Framework Directive (5 October 2000)**, the Parliament proposed the following amendment (amendment 35):

“Within three years of the adoption of this Directive, the Council, on a proposal from the Commission and after consulting the European Parliament, shall decide, for all the grounds of discrimination referred to in Article 13 of the EC Treaty, on an extension of the scope to at least those fields defined in Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.”

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0438+0+DOC+XML+V0//EN&language=EN#BKMD-7>

MEPs / Political Groups' initiatives:

- A few years ago, Green MEP Kathalijne Buitenweg circulated a revised version of Directive 2000/43/EC of 29 June 2000 on equal treatment between persons irrespective of racial or ethnic origin in which she included the grounds of religion or belief, disability, age or sexual orientation. (The proposed text can be sent).
- On 5 July 2007, the Socialists adopted a 12-point Action Plan which **calls on the EU to take affirmative action to ensure “the introduction of new horizontal legislation** based on article 13 of the Treaty of the EU to deliver genuine equality in all areas of life including protection against intersectional discrimination”.
(http://www.socialistgroup.org/gpes/media/documents/45146_45146_conference_equality_chance_plan_action_fr_070705.pdf)

Commitments by the European Commission

The European Commission has **committed itself to taking action to combat discrimination outside employment** based on gender, religion, belief, disability, age and sexual orientation:

- **José Manuel Barroso, President-Designate of the European Commission Speech to the European Parliament, European Parliament Plenary Session (Strasbourg, 26 October 2004):**
President Barroso commitments at the European Parliament at the beginning of its mandate to: “initiate work in view of a framework-directive on the basis of Article 13 of the EC Treaty, which will replace the directives adopted in 2000 and enlarge them to all forms of discrimination. (...) With a framework-directive, the community action will cover all areas of discrimination and also discrimination founded inter alia on gender and sexual orientation. All of these initiatives, and other ones to be considered by the Group of Commissioners, will be prepared under my authority, and I am prepared to present them to you in person, when the time comes. Let me be very clear: I will personally ensure full control of our action in the fight against discrimination and the promotion of fundamental rights.”
(<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/474>)
- **European Commission's 2008 work programme:**
The Commission has announced that it will put forward new initiatives in 2008 to prevent and combat discrimination outside the labour market based on gender, religion, belief, disability, age or sexual orientation. Commission initiatives have to be accompanied by an Impact Assessment, which analyses the pros and cons of the various options available. The results of the public consultation will feed into this process.
(http://ec.europa.eu/atwork/programmes/docs/clwp2008_en.pdf)

Commissioners Spidla and Frattini have talked about a new directive over the past year on some occasions:

- **Speech by Commissioner Spidla, International Conference on LGBT rights** (Montreal, July 2006)

“What remains to be done - As I said at the beginning of my talk, the legal provisions that currently exist at European-Union level for combating discrimination only cover employment in the broad sense, except for discrimination based on race or ethnic origin. In order to meet the expectations of certain Members of the European Parliament and certain NGOs, the European Commission is considering the feasibility of a new proposal for a directive extending the scope of protection against discrimination that would cover more than just employment.”

“At the beginning of the twenty-first century, equality means no discrimination on the basis of sexual orientation. [...] I believe that, today, only full equality and dignity can be considered to be acceptable. I am pleased to say that the European Union is contributing to full equality for all people, regardless of their sexual orientation, but I am more convinced than ever that there is still work to be done in this area and that further progress can be achieved.”

- **Speech by Commissioner Spidla, European Parliament** (18 April 2007)

Commissioner Spidla said before the European Parliament that the Commission had launched an impact assessment which will carefully determine if complementary action on behalf of the EU outside the field of employment and work was justified. He added that the Commission is aware that legislative action should be accompanied by other initiatives aimed at combating discrimination in practices.³

- **Frattini’s commitment to the Parliament’s LGBT Intergroup** (March 2006)

The officers of the EP Intergroup on gay and lesbian rights met with Commissioner Frattini on March 8, 2006 to discuss strategies to fight homophobia and discrimination of LGBT people⁴, a follow up on the plenary debate the 16th January. At that meeting, Commissioner Frattini promised that they will finally present a horizontal directive to combat all sorts of discrimination, and a green paper on "wills and inheritance".

Following this meeting, Raül Romeva i Rueda (Greens/EFA), vice-president of the Intergroup said: "We welcome the promise of a horizontal directive on discrimination. We have been following up on President Barroso's promise of such a directive, we were

³ “ En février 2007, la Commission a lancé une analyse d’impact qui déterminera avec soin si une intervention complémentaire de l’UE en dehors des domaines de l’emploi et du travail se justifie. L’analyse d’impact couvrira toutes les options politiques et législatives. [...] La Commission européenne est consciente que l’action législative doit être accompagnée d’autres initiatives visant à combattre les discriminations de fait, les pratiques humiliantes, les préjugés et les stéréotypes. » Discours devant le Parlement européen sur le Projet de déclaration de la Commission sur l’homophobie en Europe et plus particulièrement en Pologne (EMPL/G/4/GB, 18/04/07)

⁴ 2nd February 2006

informed that there is no unanimity in the Council, but that is no reason to delay the directive."

In considering the options for levelling up protection against discrimination, the **European Commission is being informed by the study of national anti-discrimination laws** carried out for the Commission in 2006.

- **Conclusions of the Commission's 2006 Mapping Study**

The mapping study concluded that all Member States have legal rules going beyond what is already required by European law – the Race Equality Directive and the Employment Equality Directive. However, **the study concludes that there is a considerable variation in the type of rules in place and their scope**. Higher protection tends to be granted against discrimination on the grounds of religion and sex, while discrimination on the grounds of sexual orientation, disability and age is less covered outside the field of employment.

Available at

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

and

http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand2_en.pdf

Also to keep in mind:

- **Fundamental Rights Impact assessment:** The Commission is looking into the impact of all legislation or lack of legislation on fundamental rights.⁵ The absence of levelling up disposition will definitively have an adverse impact on the rights of the groups which are not protected by legislation as developed under eth sections on legal basis.
- **Multiple discrimination:** Public authorities and the EU institutions are increasingly aware of the phenomenon of multiple discrimination which implies that a person can be discriminated on several grounds either successively or at once. The European Commission has commissioned a report presenting an overview of the phenomenon. From a legal point of view, it seems impossible to tackle multiple discrimination without levelling up the protection against discrimination on all grounds and including a disposition in all new legislation mentioning specifically the possibility for victims of invoking several grounds simultaneously.

⁵ Communication from the Commission Compliance with the Charter of Fundamental Rights in Commission legislative proposals *Methodology for systematic and rigorous monitoring* Brussels, 27.4.2005 COM(2005) 172 final.