

Inclusion Europe's position on the consolidated text of the Horizontal Equal Treatment Directive

Background

In 2000, the European Union adopted two Directives aimed at fighting several forms of discrimination in Europe. The two Directives, one on Racial Equality and one on Equality in Employment, have given EU citizens a common level of protection against discrimination. They have been transposed into national law in all EU Member States.

Inclusion Europe has monitored and accompanied this transposition process very closely. Unfortunately, still until today there are many examples of discrimination against people with intellectual disabilities in employment and occupation. Nevertheless, Inclusion Europe and our members are convinced that protection against discrimination only in the area of employment is not enough. The European Union has a clear competence to combat discrimination based on disability when developing and implementing its policies and activities (Article 10, Treaty on the Functioning of the EU, hereinafter TFEU) and to adopt legislation to combat such discrimination (Article 19 TFEU).

Furthermore, the European Union has ratified the UN Convention on the Rights of Persons with Disabilities (hereinafter, CRPD, or Convention) in 2010 and under Article 5, the EU has clear obligation to

‘...prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.’¹

The Convention also requires States Parties to provide reasonable accommodation and other measures to ensure de facto equality.

The UN CRPD Committee has reviewed the implementation of the Convention by the EU in 2015 and formulated specific recommendations on how to improve the protection of the rights of persons with disabilities. Under Paragraph 19, the Committee recommended that

‘the European Union adopt its proposed horizontal directive on equal treatment, extending protection against discrimination to persons with disabilities, including by the provision of reasonable accommodation in all areas of competence. The Committee also recommends that the European Union ensures that discrimination in all aspects on the grounds of disability is prohibited, including multiple and intersectional discrimination.’²

¹ UN CRPD, Article 5.

² CRPD/C/EU/CO/1.

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Persons with Intellectual Disabilities and their Families



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Currently, the EU anti-discrimination legislation does not protect against multiple or intersectional discrimination, based on age, disability, sexual orientation, gender identity, race, ethnic and social origin.

We have campaigned for a more extensive protection covering all areas of life as stipulated in the CRPD.³ The current anti-discrimination legislation in the EU is inconsistent and creates hierarchy between different grounds of discrimination. While persons with disabilities are only protected against discrimination in employment and vocational training, protection for other grounds, like gender, ethnic origin or race goes much further. Inclusion Europe has been advocating for many years for the adoption of a horizontal Equal Treatment Directive along with other European disability organisations. This new Directive should ensure that protection is guaranteed in other areas, such as social protection, social advantages, health, access to and supply of goods and other services available to the public, including housing, education and insurance. The proposal for the Directive has been on the table of the Council of the European Union since 2008 and the adoption is blocked due to the resistance of some Member States.

While we welcomed the initiative of having a horizontal directive, Inclusion Europe and its member organisations considered that the initial draft text did not reflect adequately the values and principles of the CRPD. On 4 December 2014, the Secretary of the Council of the EU published a consolidated Directive proposal, and the strongly revised text shows indeed better reflection of the CRPD. Germany has still maintained general reservation towards the consolidated text and expressed various concerns referring mainly to the lack of legal clarity, the violation of the subsidiarity principle, and the lack of sufficient preliminary impact assessment of the potential burdens the Directive would impose on businesses.

The aim of this paper is to analyse the scope of the consolidated draft Equal Treatment Directive and highlight some of the concerns that Inclusion Europe has towards the proposed text. In light of the EU's obligations under the UN CRPD, the Concluding Observations of the CRPD Committee, and the provisions in the Treaty on the Functioning of the EU, the proposed Horizontal Equal Treatment Directive shall be adopted as swiftly as possible. Following the entry into force of the Lisbon Treaty in 2009, the adoption of the proposal requires unanimity in the Council and it also requires then the consent of the European Parliament. Undoubtedly, there is an urgent need to have a horizontal, legally binding document that protects European citizens from discrimination on all grounds effectively.

³ We have adopted a position paper on the 'Basic Principles for a Disability-Specific Directive on Non-discrimination: Key demands from the perspective of persons with intellectual disability and their families'.

Analysis the consolidated Directive proposal

In the following, we will provide a brief overview about the proposed text to highlight its scope and limitations.

Legal basis

The legal basis of the proposed Directive is Article 19(1) TFEU. It includes a provision for the EU to take up actions and adopt legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Definitions

The consolidated text follows the description of the UN CRPD on what constitutes disability. Similarly to the Convention, the Directive reflects the social model of disability by stating:

‘Persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others’.

The Directive interprets the ‘principle of equal treatment’ as no discrimination is allowed on any of the grounds covered by the Directive, including religion or belief, disability, age or sexual orientation. Discrimination is constituted by:

- direct discrimination;
- indirect discrimination;
- harassment;
- direct discrimination and harassment by association;
- denial of reasonable accommodation for persons with disabilities;
- instruction to discriminate against persons on any of the grounds covered by the Directive.

It is very positive, that the definition of discrimination includes the denial of reasonable accommodation for persons with disabilities in line with Article 5 of the CRPD. However, Article 4a of the proposed Directive states that in the area of housing, providers are not required to make ‘structural alterations to the premises or to pay for them’. This is certainly a limitation in an area that is very relevant for persons with disabilities, as many of them face discrimination when looking for a place to live.

We welcome that the consolidated text includes a list of the measures that are necessary to ensure accessibility for persons with disabilities in order to participate fully in society on an equal basis with others. According to that, physical environment, information and communication technology and systems, and services are covered by the Directive.

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Persons with Intellectual Disabilities and their Families



Scope

Article 3 discusses the scope of the Equal Treatment Directive. Taking into consideration the limited competences the EU has, the following sectors, whether public or private, fall under the scope of the Directive:

- access to social protection (social security, social assistance, social housing, healthcare);
- access to education;
- access to goods and other services, including housing.

Services are to be understood in line with Article 57 of the TFEU and thus include:

- industrial character;
- activities of commercial character;
- activities of craftsmen;
- activities of professions.

Main concerns with the proposed text

While in its current form the Directive would bring positive changes to the lives of persons with disabilities, we are also aware that further modifications in the text may lead to watering down its already limited scope. Therefore, we call for the Council to consider the following points, which we are sure will further improve the scope of the Directive.

- The scope of the Directive is already quite limited, but Article 3 paragraph 2 further narrows it down by stating that the Directive is only applicable within and respects the competences conferred upon the EU. For instance, the setting-up and management of the educational and social protection systems remain with the Member States. Furthermore, in the context of the education system, the content of teaching, the definition of examination processes, the development of the curriculum, or even the conditions of eligibility, including the age limit would fall out of the scope of the Directive. In practical terms, this may imply that if Member States maintain special education system and segregate children there, based on their disability or ethnical background - as it happens across Europe - it may not qualify as discrimination. It could however be considered discrimination if children within the same school system are treated differently. Furthermore, the Directive doesn't apply to the development of the curriculum, which means that stigma and exclusive practices could be maintained. Conditions of eligibility set up by the education system in many Member States currently exclude children with intellectual disabilities and more complex needs from mainstream schools. The current text does not guarantee any protection for this group if the organisation of the school system including the eligibility criteria remains with the Member States.
- The Directive would only be applicable to social protection or education to which people are eligible to use according to the domestic law. Therefore, it is unclear how would people who are excluded from the educational or social protection system receive protection against discrimination. At the same time, the reason for exclusion and denial of eligibility often can be found in discrimination on the ground of disability, for example when children with complex needs are not accepted to

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The European Association of Societies of
Persons with Intellectual Disabilities and their Families



Inclusion Europe

schools. In such cases, the Horizontal Equal Treatment Directive would not be able to combat discrimination effectively, nor ensure that persons with intellectual disabilities can participate in education on an equal basis with others.

- Under Article 2 Paragraph 7, it is very problematic that the Directive allows different treatment on the ground of disability in the financial sector, if disability is the determining factor in the assessment of risk for the service in question, including insurances. On that matter, the text claims that persons with disabilities are not in comparable situation with persons without disabilities in the assessment of risk. This approach is however not in line with the provisions of the UN CRPD and other international human rights law instruments. The existence of impairment cannot be a justification for receiving different treatment in areas that fall under the Horizontal Equal Treatment Directive as it violates the principle of equal treatment defined by the proposed text itself.
- While the text ensures that providers upon request must provide information to costumers on the differences of treatment, it is not required that such information should be available in accessible formats, or that providers of financial services should not refuse providing with such data by simply referring to the sensitivity of the information. It is very concerning that persons with intellectual disability may be denied of entering contracts, or taking loan or mortgage if their impairment is considered as an additional risk factor in fulfilling the conditions of the contract. In case they comply with the general terms and conditions of the bank, including being employed and earning a wage, they should be provided with equal treatment and be allowed to enter such contracts. However, people with intellectual disability might need support in understanding the complex financial or legal text and the implications of signing the documents.
- The accessibility provision in the proposed Directive is very limited when it comes to housing, as it implies only to 'common parts of buildings with more than one housing unit'. The only guarantee in the area of housing for persons with disabilities is that the draft calls on Member States to progressively take measures that ensure sufficient accessible housing for persons with disabilities. Yet, there is no guarantee that persons with disabilities will be able to find adequate accessible housing in the community in the foreseeable future, if the Directive does not provide a more elaborate plan for implementation.
- The proposed text is very limited when it comes to accessibility and reasonable accommodation. In the area of accessibility more detailed provisions would be necessary with particular regard to information (including the use of easy-to-read, pictograms and less complex structures) in order to ensure protection against discrimination for persons with intellectual disabilities. It is positive that the Directive requires accessibility, which is a general collective measure, instead of reasonable accommodation, which implies a case-by-case approach for individuals. Nonetheless, accessibility must be provided, unless it would impose a disproportionate burden.
- The draft Directive provides a detailed list on the measures that need to be taken into account when assessing whether reasonable accommodation would mean a disproportionate burden for the providers. First of all, the Directive doesn't require providers to make structural alterations on building, therefore the lack of accessibility

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The European Association of Societies of
Persons with Intellectual Disabilities and their Families



Inclusion Europe

will continue to amount in discriminating persons with disabilities in the area of housing. The list on disproportionate burden includes the size and resources of the enterprise or organisation, the estimated cost and the estimated benefit for persons with disabilities, safety, life span of infrastructures and the historical, cultural and artistic value. However, the proposed Directive does not specify how disproportionate burden is to be assessed when providers are seeking for an exemption to comply with the provisions of the Equal Treatment Directive. The current text doesn't guarantee that providers and organisations will invest in making their services accessible and may seek for exemption instead of complying with the provisions of the Directive. Hopefully, the European Accessibility Act will provide better protection on some areas in this regard, once it is adopted.

- We welcome that the draft text discusses sanctions, however it would leave it up for each Member States to introduce the sanctions to infringements of national legislation deriving from the Directive. It is especially concerning how will Member States ensure remedies in cases where reasonable accommodation was denied with reference to disproportionate burden.

Conclusion

After careful reading of the consolidated text of the Horizontal Equal Treatment Directive, we are convinced that this Directive could be a strong legal tool to implement the provisions of the CRPD in the area of non-discrimination across all EU Member States. However, as it is argued in this paper, the consolidated text is already limited in its scope, therefore we call the Council of the European Union to avoid making any further changes that would diminish the potential impact of the Directive. Inclusion Europe and its members are not convinced that the present text is able to effectively protect persons with intellectual disabilities and their families from discrimination, even within the areas that fall under the Directive. We are particularly concerned whether effective protection may be guaranteed in the area of social protection, education, or the financial sector and we call on the legislator to ensure that the Directive provides equal protection for all the European citizens.