

ANALYSIS OF THE EUROPEAN COMMISSION'S PROPOSALS FOR DIRECTIVES STRENGTHENING EQUALITY BODIES



This document contains a first analysis of the European Commission's proposals for Directives strengthening Equality Bodies. Main provisions and conclusions are in bold.

Legal basis

The Commission published two proposals on 7 December 2022: one concerning [Equality Bodies working on the ground of sex in the field of employment and occupation](#); and another one concerning [Equality Bodies working on the ground of sex in the field of goods and services and social security, on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and occupation and on the ground of racial or ethnic origin in multiple fields](#).

The reason for these parallel initiatives lies in the **legal basis** – the Directive on gender equality in employment is based on Article 157(3) of the Treaty on the Functioning of the European Union, while the other Directive is based on Article 19(1) of the Treaty on the Functioning of the European Union.

One could argue that the Commission could have reasonably used just one legal basis (Article 19(1) TFEU) for the whole package.

There are multiple implications of this.

→ Food for thought:

- On the one hand, **the Directive addressing Equality Bodies working on gender equality in employment does not need to be adopted unanimously in the Council of the EU, but with qualified majority voting**. This may help a speedier adoption process, at least on this file.
- On the other hand, **while currently the text of the two Directives is practically identical, this may well change during the legislative process**. It may be useful to think of the **possible implications of the two texts diverging significantly and possible ways to prevent this from happening**. While the majority of Member States would hopefully decide for transposing the more ambitious provisions for the whole mandate of all Equality Bodies, **we may see issues with contradicting provisions or with confusing and complex national provisions**.
- **In case only one of the Directives is adopted (or is adopted much quicker), we'd have to rely on the Member States' goodwill that they introduce the new provisions for the whole mandate of the Equality Body and for all Equality Bodies in the country**. There are very few examples of Equinet members that currently cover only gender equality in employment (e.g. CITE in Portugal), but there are many more that only cover the material scope of the 'other' Directive (e.g. Unia in Belgium, Non-Discrimination Ombudsman in Finland or single ground disability Equality Bodies in Austria, Croatia and Malta).

General approach to legal duties

→ Food for thought:

- It is noteworthy that most provisions in the Directives are introduced as 'Member States shall ensure' or 'Equality bodies shall be able to'. This indicates that the Commission realized that **it is Member States that bear the ultimate responsibility for ensuring equality and the proper functioning of Equality Bodies**, by creating the conditions for them to perform all their functions effectively.

Scope of the Directives

- The Directives broaden the mandate of Equality Bodies and the obligation of Member States, by requiring them to designate Equality Bodies to promote equality and combat discrimination on the grounds of age, disability, religion or belief and sexual orientation in the field of employment and on the ground of sex in the field of social security.
- At the same time, according to the Explanatory Memorandum, *'The present initiative does not introduce legislation in a new area. It revises already existing legislation to increase its effectiveness. There is already common agreement that EU-level action is necessary in this area and that it is in line with the principle of subsidiarity.'*

→ Food for thought:

- **While the Directives will broaden the mandate of Equality Bodies**, it would have been great to see the Commission propose that they shall cover all combinations of grounds and fields in the EU Treaties and thereby overcome the existing hierarchy of discrimination grounds. Based on the current proposals, for instance, **sex discrimination in education and age, disability, religion or belief and sexual orientation discrimination in fields outside of employment won't be covered.**
- **It would have been good to see the proposals extend the list of grounds covered**, at least in the Recitals, **for instance to gender identity, expression and sex characteristics, health status and socio-economic status**, as proposed by [Equinet's recent research paper](#) and following the progressive approach of the [Charter of Fundamental Rights of the EU](#). This is a missed opportunity, even if, interestingly, in the context of promotional work, other grounds such as economic status, literacy, nationality, residence status and lack of access to online tools are also mentioned (Article 5, last sentence: *'They shall focus in particular on disadvantaged groups whose access to information can be hindered, for example by their economic status, age, disability, literacy, nationality, residence status or their lack of access to online tools.'*).
- **The Directives do not cover hate speech and activities of public authorities, such as the police.** This has been a recommendation by Equinet and the need was also clarified in the [public consultation about the gaps in the Racial Equality Directive](#).

Multiple and intersectional discrimination

→ Food for thought:

- In the Directives, there is no explicit mention of **multiple and intersectional discrimination**.
- However, Recital 15 in the gender equality in employment one provides that: *'In promoting equal treatment, preventing discrimination and assisting victims of discrimination, equality bodies should pay particular attention to discrimination based on several of the grounds protected by Directives 79/7/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC and 2010/41/EU.'* Interestingly, the otherwise identically worded Recital 16 in the other Directive differs slightly as it does not mention Directives 2006/54/EC and 2010/41/EU. The practical relevance of this is questionable, as Directives 2006/54/EC and 2010/41/EU concern the ground of sex, which is anyway covered in Recital 16 through Directives 79/7/EEC and 2004/113/EC.
- These Recitals could arguably **open the door for courts to address issues of multiple and intersectional discrimination.**

- **The last sentence of Article 5** cited above is also noteworthy from the point of view of multiple and intersectional discrimination as it **implicitly acknowledges the different life experiences of, for instance, older persons, persons with disabilities, or persons living in poverty.**

Independence

- **The Directives' provisions on independence can be considered quite strong**, especially when compared with the 2018 COM Recommendation, where the text only required Member States to *'consider such elements as...'*, and even that *'...without prejudice to Member States' particular national organisational structures'*.
- Article 3(1) provides that *'Member States shall take measures to ensure that equality bodies are independent and free from external influence in performing their tasks and exercising their competences, in particular as regards their legal structure, accountability, budget, staffing, and organisational matters'*. → **Food for thought:** The use of **'shall take measures to ensure'** as opposed to **'should consider'** is important, as is the reference to **'free from external influence'**, which corresponds to the wording used by the CJEU re. **Data Protection Authorities in C-288/12, C614/10, and C518/07.**
- Article 3(2) concerns the selection, appointment, revocation and potential conflict of interest of the staff of Equality Bodies, in particular persons holding a managerial position, to guarantee their competence and independence.
- Article 3(3) concerns safeguards for the internal structure of Equality Bodies, notably where some competences require impartiality and others focus on support to victims. This is the famous **'firewall'** between, for instance, decision-making and litigation or promotional functions.
- Article 3(4) concerns multi-mandate bodies, requiring *'the autonomous exercise of the equality mandate'*. According to the Explanatory Memorandum, this concerns conflict between the different mandates, in terms of resources and in terms of exercise of powers and also requires **'structural firewalls'**. → **Food for thought:** **Arguably, the meaning of 'autonomous exercise of the equality mandate' will have to be further defined and interpreted.**

Resources

- **The Directives' provisions on resources can be considered quite strong.**
- Article 4 of the Directives provides that *'Member States shall ensure that each equality body is provided with the human, technical and financial resources necessary to perform all its tasks and to exercise all its competences effectively, on all the grounds and in all fields covered by Directives [...] including in the event of increases in competences, increases in complaints, litigation costs and the use of automated systems'*.
- **Recitals 18/19 usefully detail this provision, rendering the text even more in line with Equinet's recommendations:** *'The lack of appropriate resources is a key issue hampering the ability of equality bodies to adequately fulfil their tasks. Therefore, Member States should ensure that equality bodies receive sufficient funding, can hire qualified staff and have appropriate premises and infrastructure to carry out each of their tasks effectively, within reasonable time and within the deadlines established by national law. Their budgetary allocation should be stable, except in case of increase in competences, planned on a multi-annual basis, and allow them to cover costs that may be difficult to anticipate such as costs*

linked to litigation. To ensure that equality bodies are provided with sufficient resources, their budget should for instance not suffer cuts that are significantly higher than the average cuts to other public entities; similarly, their annual growth should at least be pegged to the average growth in funding to other entities. Resources should increase proportionally if equality bodies' tasks and mandate are expanded'.

- **There is a dedicated Recital (19/20) concerning automated systems:** *'Automated systems, including artificial intelligence, represent a useful tool to identify discrimination patterns, but algorithmic discrimination is also a risk. Equality bodies should therefore have access to qualified staff or services, able to use automated systems for their work on the one hand and to assess them as regards their compliance with non-discrimination rules on the other hand. Particular attention should be devoted to equipping equality bodies with appropriate digital resources, be it directly or by way of subcontracting.'*

Prevention, promotion and awareness raising

- Article 5 interestingly and importantly makes it the **responsibility of Member States to adopt an awareness-raising strategy**, with specific attention to those at risk of discrimination, on their rights and on the existence of Equality Bodies and their services.
- Member States will also have to ensure that **Equality Bodies develop a strategy for their work on prevention, promotion and awareness-raising**, including engagement in public dialogue, the promotion of equality duties, equality mainstreaming and positive action measures.

Assistance to victims and amicable settlements

- Article 6 provides a general framework on assistance to victims of discrimination. All Equality Bodies will have to provide extensive information, not only on the legal framework (including procedural aspects, remedies and possibility to litigate) as it applies to the concrete case and on the services of the Equality Body, but also on confidentiality rules, data protection and on the possibilities to obtain psychological or other types of relevant support from other bodies or organisations.
- Following the above, Equality Bodies shall issue a preliminary assessment of a complaint based on information voluntarily submitted by the parties involved.
- Article 7 addresses the possibility to seek an amicable resolution to the dispute, subject to agreement of the parties and led by the Equality Body or another dedicated entity.

Opinions and decisions

- Article 8(1) provides that, following the preliminary assessment described in Article 6, Equality Bodies should be empowered to further investigate the case.
- Article 8(2) enables Equality Bodies to carry out fact-finding. It also requires that Equality Bodies be provided with effective rights to access information which is necessary to establish whether discrimination has occurred, if necessary, through cooperation with relevant public bodies (the recitals specifically mention labour inspectorates and education inspectorates).
- Article 8(3) allows Member States to introduce provisions whereby the alleged perpetrator and any third party is legally bound to provide any information and documents requested by Equality Bodies.

- Article 8(4) requires Equality Bodies to record their assessment of the case, either through a non-binding opinion (called this way to differentiate it from policy and legislative recommendations) or through a binding, enforceable decision and to publish summaries of these opinions and decisions, without personal data. It also requires these opinions and decisions to include measures to remedy the violation and to prevent further violations. Opinions shall be followed up and decisions shall be enforced. → **Food for thought: While it is not explicitly stated in these Directives, it seems obvious that the requirement for sanctions and remedies in discrimination cases to be effective, dissuasive and proportionate (found in the already existing Directives) also applies for the remedies used by Equality Bodies.**
- Article 9(5) clarifies that no such investigative steps may be initiated or continued while court proceedings on the same case are pending.

Litigation

- Article 9(1) provides legal standing for Equality Bodies in administrative and civil law matters. Importantly, the recitals clarify that *'while those court proceedings should be subject to national procedural law, including national rules on admissibility of actions, such rules, and in particular any condition of legitimate interest, cannot be applied in a way so as to undermine the effectiveness of the equality bodies' right to act'*.
- Article 9(2) and (3) clarifies that this shall include:
 - Acting as defendant in case of a judicial review of a decision of the Equality Body,
 - Amicus curiae briefs,
 - Initiating or participating in proceedings on behalf or in support of one or several victims, with the approval of the victim(s),
 - Initiating proceedings in its own name, in particular in order to address structural and systematic discrimination (the recitals clarify that this can be done also in cases where there is no complainant)
- The recitals clarify that the above powers will also allow Equality Bodies to *'strategically select the cases they decide to pursue in front of national courts, and to contribute to the proper interpretation and application of equal treatment legislation'*.
- Article 9(4) stipulates that **the Equality Body may not submit in court proceedings evidence that it has obtained through the exercise of powers pursuant to Article 8(3)** – i.e. where the alleged perpetrator and any third party is legally bound to provide any information and documents. Litigation where the Equality Body acts as a party in proceedings on the enforcement or judicial review of an own decision or acts as amicus curiae are exempted from this provision. The recitals clarify that the reason for this limitation is that Equality Bodies' rights to act in court must respect the **principles of fair trial and equality of arms**.

→ **Food for thought:**

- **This provision is highly problematic for a number of Equality Bodies that currently already have similar effective investigation powers** (e.g. in Finland, Sweden). For them, and their clients, this will **arguably represent a regression, standing in contrast with the non-regression clause in Article 17(2), prohibiting a reduction in the level of protection against discrimination already afforded by Member States.**
- It also stands in **stark contrast with other fields of law, where such investigation powers are granted**, for instance to Data Protection Authorities and Competition Authorities.

- It also remains to be seen what happens if, for instance, **the Equality Body obtains evidence** using its power under Article 8(3), bases its Article 8(4) opinion or decision on such evidence, but **then it is the victim or an NGO that litigates**. In such a case, **the evidence so obtained could effectively be used in court proceedings, as Article 9(4) only limits the Equality Body in using it, not others**.
- The Directives establish a rather **complex and somewhat confusing system of gathering proof**:
 - According to Article 6(4), the **preliminary assessment has to be conducted using information voluntarily submitted by the parties involved**
 - According to Article 8(2), the **framework for fact-finding shall provide Equality Bodies with effective rights to access information which is necessary to establish whether discrimination has occurred**. It shall also provide for appropriate mechanisms for Equality bodies to cooperate with relevant public bodies for that purpose.
 - Finally, according to Article 8(3), **Member States may also provide that the alleged perpetrator and any third party is legally bound to provide any information and documents requested by Equality Bodies**.
- On one hand, **the difference between the second and third point, ‘effective rights to access information’ and the possibility to legally bind the alleged perpetrator and any third party, is not crystal clear**. This would need to be clarified further, if need be, through litigation, but it may represent an opportunity for Equality Bodies.
- On the other hand, **these provisions run the risk of creating a perverse effect in that all perpetrators (and possibly third parties) may refuse to cooperate with Equality Bodies, until they are legally bound to do so under Article 8(3)**. From that point, **they can be sure that in court proceedings the Equality Body will not be able to use any of the documents and information so obtained**. Conversely, **Equality Bodies that plan to litigate will have an incentive to use only their investigation powers under Article 6(4) and 8(2) if possible**.

Procedural safeguards

- Article 10 sets out standard procedural safeguards, such as the right of defence and judicial review of binding and enforceable decisions of the Equality Body.

→ Food for thought:

- It is noteworthy that Equality Bodies will be asked to guarantee the **confidentiality of witnesses and whistle-blowers, and as far as possible, of complainants**. This may necessitate new provisions and procedures in many Equality Bodies.

Access, accessibility and reasonable accommodation

- Article 11 requires that there shall be no barriers to accessing the Equality Body’s services and, in particular, to submitting complaints.
- It also requires that services shall be provided at no cost for the complainant.
- Equality Bodies shall provide their services throughout their territory, including in rural and remote areas. The recitals give examples of how this could be achieved: through *‘the establishment of local offices, including mobile ones, the organisation of local campaigns or cooperation with local delegates or civil society organisations’*.

- Article 11(3) is specifically dedicated to ensuring accessibility and reasonable accommodation for persons with disabilities.

Cooperation

- Article 12 requires Equality Bodies to cooperate with other Equality Bodies within the same Member State, and with relevant public and private entities.
- The recitals clarify that the objective of cooperation is mutual learning, coherence and consistency, and broadening the outreach and impact of their work. **Cooperation in the framework of the European Network of Equality Bodies (Equinet) is specifically mentioned in the recitals.**
- While the article mentions relevant public and private entities, including civil society organisations, the recitals broaden this to data protection authorities, trade unions, labour and education inspectorates, law enforcement bodies, agencies with responsibility at national level for the defence of human rights, authorities managing Union funds, National Roma Contact Points, consumer bodies, and national independent mechanisms for the promotion, protection and monitoring of the UNCRPD.

Consultation

- Article 13 requires Member States to put in place transparent procedures to ensure that the government and other public institutions consult Equality Bodies on legislation, policy, procedure, programmes, and practices related to equality, in a timely manner.
- Equality Bodies will have the right to make recommendations on those matters, to publish them and to require feedback from the authorities concerned. **→ Food for thought: These provisions should lead to a more effective use of the power of Equality Bodies to make policy/legislative recommendations.**

Data collection and access to equality data

- According to Article 14(1), Equality Bodies will be expected to collect anonymised, or at least pseudonymised, data on their activities, disaggregated by grounds and fields. These data will also feed into the Commission's monitoring of the implementation of the Directives.
- Article 14(2) allows Equality Bodies to access statistics collected by public and private entities including public authorities, trade unions, companies, and civil society organisations where they deem such statistics necessary to make an overall assessment of the situation regarding discrimination in the Member State, an obligation under Article 15, point c).
- Article 14(3) allows Equality Bodies to make recommendations on which data is to be collected and to play a coordination role in the collection of equality data.

→ Food for thought:

- **While data collection on their activities will not be an innovation for most Equality Bodies, the possibility – and obligation – to collect equality data from public authorities, companies and CSOs will likely be a novelty that requires substantial additional resources.**

Reports and strategic planning

- Article 15, point a) will require Equality Bodies to adopt a **strategic plan**, part of which will be the strategy for their work on prevention, promotion and awareness-raising as required by Article 5, point b).
- Article 15, point b) requires them to prepare an **annual report** – something that is standard practice in many or most Equality Bodies.
- Article 15, point c) requires Equality Bodies to publish a **report**, with recommendations, at least every four years, **on the state of equal treatment and discrimination**, including potential structural issues, in their Member State. **→ Food for thought: This could well be a novelty for many Equality Bodies and, as mentioned above, may necessitate additional resources.**

Monitoring

- Article 16 clarifies that **monitoring the implementation of the Directives will be the duty of the European Commission, with the help of a ‘list of common indicators’**. The Commission may seek advice from the FRA and EIGE when preparing the indicators and the explanatory memorandum also clarifies that the **indicators developed by Equinet will be taken into account**.
- Article 16(2) and (3) clarify that the Commission will draw up a report based on information provided by Member States. Member States’ reports should also take into account the reports by Equality Bodies on their activities and on the state of equal treatment and discrimination. The first such report is foreseen 5 years after the date of transposition and then every 5 years. The Commission can also take into account data collected by the FRA and EIGE from other stakeholders.

→ Food for thought:

- It is a positive development that monitoring is a duty of the Commission and that indicators developed by Equinet will be taken into account in this.
- However, it’ll be important to ensure that reports and findings from Equality Bodies can also feed into the monitoring directly, not only through Member States’ reports, something which is not explicitly mentioned in the current text.
- Finally, seeing that the Directives concern already existing bodies and the urgent need to strengthen Equality Bodies across Europe, it would have been better if the first report is foreseen earlier than 5 years after the transposition deadline (which is set at 18 months according to Article 20).

Minimum requirements

- Article 17 sets out standard provisions, **allowing Member States to introduce or maintain more favourable provisions and prohibiting the use of the Directives to reduce the level of protection against discrimination** already afforded by Member States in the matters covered by this Directive (**non-regression clause**).

→ Food for thought:

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- **As mentioned above, the interpretation of this provision will be particularly interesting and important as regards Article 9(4), limiting the possibilities of Equality Bodies to use evidence in court proceedings.**

Final provisions

- Article 18 concerns data protection, with specific provisions for sensitive personal data.
- Article 19 provides for the deletion of the articles concerning Equality Bodies from the existing equal treatment directives.
- Article 20 sets the transposition deadline to 18 months.
- Article 21 provides that the Directive will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
- Article 22 clarifies that the Directives are addressed to the Member States.