

Youri Devuyst

The EU's Horizontal Equal Treatment Directive: **A Way Forward**

A proposed EU Directive on equal treatment has been blocked in the Council of Ministers for 17 years. Demonstrating the importance of a common framework against discrimination, this analysis argues in favour of “enhanced cooperation” between member states wishing to move ahead.

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Summary

In 2008, the European Commission proposed a Directive on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation in gaining access to social protection, education, and goods and services. It remains a much-needed missing piece in the EU’s “Union of Equality”.

The Directive has, however, been blocked in the EU’s Council of Ministers for 17 years, and in February 2025, the Commission announced its intention to withdraw the proposal, believing there was no prospect of reaching the required unanimity. After a storm of protest, the Commission reversed its decision in July 2025, even though adoption of the proposal is still unlikely.

Against this background, this European Policy Analysis argues in favour of “enhanced cooperation” as a way forward. Staying entirely within the EU’s constitutional framework, enhanced cooperation is a way of furthering the objectives and values of the Union through an avant-garde wanting to move ahead, when the goals of a certain policy domain cannot be attained within a reasonable period by the Union as a whole. After the many fruitless attempts to break the stalemate, this seems to be a valid alternative for a legislation that touches the EU’s very ethos.

About the author

Youri Devuyt is an Associate Professor in EU Constitutional Law at the Brussels School of Governance, Vrije Universiteit Brussel.

The opinions expressed in this publication are those of the author.

1. Introduction

The Treaty on the Functioning of the European Union (TFEU) provides the European Union's (EU) Council of Ministers with the competence to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. It must do so “acting unanimously ... and after obtaining the consent of the European Parliament”.¹

In 2008, the European Commission used this legal basis to propose a horizontal Equal Treatment Directive,² the objective being that the member states are all bound by the same minimum requirements in the implementation of the principle of non-discrimination on the grounds of religion or belief, disability, age or sexual orientation in relation to access to social protection (insofar as it relates to social security, social assistance, social housing and healthcare), access to education, and access to, and supply of, goods and services that are available to the public (including housing).

The proposed Directive has, however, been blocked in the Council of Ministers since the European Commission first tabled it 17 years ago.³ In February 2025, the Commission announced its intention to withdraw the proposal, as it did not see a way to reach the required unanimity between the member states.⁴ After a storm of protest by the member states, members of the European Parliament (MEPs) and stakeholders backing the Directive, the Commission changed its mind, and in July 2025, it announced its continuing support for adopting the proposal.⁵ There is, however, no indication that the Directive will be approved unanimously any time soon.

“... the EU’s Equal Treatment Directive is in urgent need of a new impetus.”

A further standstill would be a setback for Commission President Ursula von der Leyen’s ambition to create a Union of Equality, and ultimately, the inability to adopt the Directive would affect the very ethos of the EU. The fundamental promise set out in Article 2 of the Treaty on European Union (TEU) is that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities ... in a society in which [among other principles] non-discrimination ... prevail[s]”.⁶ As the prominent European intellectual Alexandre Marc highlighted in 1948, these rights and values are “the very crux” of the move towards European union: “They are neither the dessert nor the starter, but the basis, the foundation and the keystone of everything that we want to do”.⁷ Seen in this light, as this analysis argues, the EU’s Equal Treatment Directive is in urgent need of a new impetus.

¹ Article 19(1) of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, pp. 47-199 (hereinafter “TFEU”).

² European Commission, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426, 2.7.2008.

³ Council of the European Union (Polish Presidency), 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, doc. 9573/25, 6.6.2025, p. 2.

⁴ European Commission, Commission work programme 2025, COM(2025) 45, 11.2.2025, Annex IV: Proposals to be withdrawn, No. 26.

⁵ Magnus Lund Nielsen, “Commission revives anti-discrimination directive after 17-year standstill”, *Euractiv*, 24.7.2025, <https://www.euractiv.com/section/politics/news/commission-revives-anti-discrimination-directive-after-17-year-standstill/>; Marta Iraola Iribarren & Paula Soler, “Exclusive: Commission has change of heart on anti-discrimination directive”, *Euronews*, 24.07.2025, <https://www.euronews.com/my-europe/2025/07/24/exclusive-commission-has-change-of-heart-on-anti-discrimination-directive>.

⁶ Treaty on European Union, OJ C 202, 7.6.2016, pp. 13-45 (hereinafter “TEU”). Furthermore, Article 6(1) TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which has the same legal value as the EU Treaties.

⁷ Alexandre Marc, Address at the Congress of Europe, The Hague, 8.5.1948, p. 3, https://www.cvce.eu/content/publication/2008/4/15/b17232b2-1bd1-4288-887c-0a4283f31b0b/publishable_en.pdf.

The analysis is structured as follows. The next section (Section 2) puts the Directive in the context of the ambition to create a Union of Equality, while introducing the key features of the proposal. Thereafter, the paper delves into the two issues that are at the heart of this European Policy Analysis. First, it assesses the enduring relevance of the Directive, 17 years after having been proposed (in Section 3). Second, given that the proposal remains stuck at the level of the 27 EU member states (as shown in Section 4), the paper explores the option of moving forward through “enhanced cooperation” by an avant-garde of member states that are committed to the cause of non-discrimination (in Section 5). The concluding Section 6 summarises the key findings of the analysis and argues that progress on the Equal Treatment Directive is central to the preservation and expression of the EU’s founding principles.

2. The Union of Equality and the Equal Treatment Directive

“We need equality for all and equality in all of its senses’, von der Leyen stated.”

When taking up office as President of the European Commission in 2019, Ursula von der Leyen pledged to work towards a Union of Equality.⁸ This commitment was renewed at the start of the current Commission’s term in office in 2024.⁹ “We need equality for all and equality in all of its senses”, von der Leyen stated. “This will be one of the major priorities of my Commission and of the implementation of the European Pillar of Social Rights”. For the first time, the College of Commissioners included a Commissioner with the exclusive responsibility for Equality, supported by a dedicated Task Force to help mainstream equality across all policy areas.¹⁰ In 2020 and 2021, the von der Leyen Commission swiftly produced five equality strategies with the objective of creating the conditions for everyone to thrive regardless of differences based on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation:

- The LGBTIQ equality strategy 2020-2025.
- The gender equality strategy 2020-2025.
- The strategy for the rights of persons with disabilities 2021-2030.
- The EU anti-racism action plan 2020-2025.
- The EU Roma strategic framework for equality, inclusion, and participation 2020-2030.¹¹

Many other initiatives were developed to foster diversity and inclusion, such as the EU Platform of Diversity Charters, the European Diversity Month and the European Capitals of Inclusion and Diversity Award. Such non-legislative strategies and initiatives have their merits,¹² as they provide guidance to the work of various administrations at the EU level and help focus and motivate action by member states and stakeholders. However, they lack the

⁸ Ursula von der Leyen, A Union that strives for more: My agenda for Europe – Political Guidelines for the Next European Commission 2019-2024, Strasbourg, 16.7.2019, p. 11.

⁹ Ursula von der Leyen, Europe’s Choice – Political Guidelines for the Next European Commission 2024-2029, Strasbourg 18.3.2024, p. 20.

¹⁰ Ursula von der Leyen, Mission letter of Helena Dalli, Commissioner for Equality, Brussels, 1.12.2019; Ursula von der Leyen, Mission letter of Hadja Lahbib, Commissioner for Equality and Commissioner for Preparedness and Crisis Management, Brussels, 1.12.2024.

¹¹ See European Commission, Equality and inclusion, https://commission.europa.eu/topics/justice-and-fundamental-rights/equality-and-inclusion_en.

¹² For a brief assessment of President von der Leyen’s “Union of Equality” initiatives, see Amandine Crespy & Viola Shahini, “Caught Between Rising Expectations and Insufficient Resources: the EU’s dilemma in inclusion policy”, in Patricia Wadensjö & Bernd Parusel (eds.), *Key Concepts for the Future of the EU*, Stockholm: Swedish Institute for European Policy Studies, Report No. 1, March 2025, p. 93.

“... a Directive enables the individuals affected by discrimination to enforce their rights before national courts, if necessary, against national law or practice.”

power of EU law. In contrast to a non-legislative strategy, an EU Directive is binding as to the results to be achieved and needs to be transposed into the legal order of each member state. It can impose concrete minimum requirements and, when the date for the transposition has expired and its provisions contain unconditional and sufficiently precise obligations, a Directive enables the individuals affected by discrimination to enforce their rights before national courts, if necessary, against national law or practice.¹³ This is an added value that cannot be achieved by a strategy.

In a few areas – such as gender equality and facilities for disabled persons – the strategies have therefore been supplemented by the adoption of EU legislation that furthers the Union of Equality.¹⁴ No such legislative advances have been forthcoming against horizontal discrimination on the grounds of religion or belief, disability, age or sexual orientation. Since the adoption, 25 years ago, of Directive 2000/78/EC, EU protection against discrimination based on religion or belief, disability, age or sexual orientation has been limited to the domain of employment and occupation and related areas such as vocational training.¹⁵ This is unlike European protection against discrimination on the grounds of racial or ethnic origin (incorporated in Directive 2000/43/EC), which goes considerably further and includes – in addition to employment and occupation – social protection, encompassing social security and healthcare, social advantages, education, and access to goods and services that are publicly available, such as housing.¹⁶ The result is an inconsistent equal treatment framework whereby some people are better protected than others. To close this gap and tackle discrimination based on religion or belief, disability, age or sexual orientation in the same way as discrimination on grounds of racial or ethnic origin, in 2008, the European Commission launched the proposal for the Equal Treatment Directive.¹⁷

In its structure, main provisions and definitions, the 2008 proposal follows the model of the Racial Equality Directive of 2000, as applied to social protection, social advantages, education, and access to goods and services. To move towards a consensus on the text, it has been rephrased by successive Council Presidencies. The most recent comprehensive reformulation was produced during the Belgian Presidency in 2024,¹⁸ and its main features can be summarised as follows:

- The proposed Directive would put into effect minimum requirements applicable in all member states for the implementation of the principle of equal treatment on the grounds

¹³ The key reference work on the force of directives remains Sacha Prechal, *Directives in EC Law*, Oxford: Oxford University Press, 2005, 2nd ed. See also Paul Craig, “The Legal Effect of Directives: Policy, Rules and Exceptions”, *European Law Review*, Vol. 34, No. 3, 2009, pp. 349-377.

¹⁴ Directive (EU) 2024/2841 of the European Parliament and of the Council of 23 October 2024 establishing the European Disability Card and the European Parking Card for persons with disabilities, OJ L, 2024/2841, 14.11.2024; Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, OJ L 2024/1385, 24.5.2024; Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, OJ L 132/21, 17.5.2023, pp. 21-44; Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ L 315, 7.12.2022, pp. 44-59.

¹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22.

¹⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26.

¹⁷ For the main steps since 2008, see European Parliament, Legislative Train Schedule: Anti-discrimination directive, 15.8.2025, <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-anti-discrimination-directive>.

¹⁸ Council of the European Union (Belgian Presidency), Directive on implementing the principle of equal treatment (Article 19) – Progress Report, doc. 10817/24, 14.6.2024, Annex.

of religion or belief, disability, age or sexual orientation in relation to access to social protection (insofar as it relates to social security, social assistance, social housing and healthcare), access to education, and access to, and supply of, goods and services that are available to the public (including housing). Member states remain free to introduce or maintain provisions that are more favourable to the protection of equal treatment than those of the Directive.

- Equal treatment is defined as the absence of direct discrimination, indirect discrimination, harassment, the instruction to discriminate and the denial of reasonable accommodation for persons with disabilities, both in the public and private sectors. As a novelty, the reformulated proposal also prohibits discrimination based on a combination of the grounds set out in the relevant EU Directives (so-called “intersectional discrimination”). The European Parliament insisted on this aspect.¹⁹

“The definition of reasonable accommodation for people with disabilities has been the main bone of contention during Council discussions.”

- The definition of reasonable accommodation for people with disabilities has been the main bone of contention during Council discussions. In the Belgian Presidency text, it is defined as the “necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to ensure the person with a disability the enjoyment or exercise on an equal basis with others of access to social protection measures, access to education, and access to and supply of goods and services”. This formulation implies a concrete request by a disabled person. It waters down the Commission’s 2008 proposal, which included an obligation to ensure “effective non-discriminatory access” that would “be provided by anticipation”.
- The possibility of “positive action” is explicitly foreseen. This means that the principle of equal treatment does not prevent a member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age or sexual orientation. “Preferential treatment” based on age or disability is specifically mentioned as being permissible under certain conditions to ensure inclusion, integration or participation in society on an equal basis with others.
- In terms of enforcement, member states must ensure the availability of the necessary judicial and/or administrative procedures to all persons who consider themselves the victim of discrimination (and entities that support them) and foresee adequate judicial protection against victimisation. It is for the respondent to prove that there has been no breach of the prohibition of discrimination.
- From the moment of its adoption, member states have three years to transpose the Directive into their own legal order.

3. The enduring relevance of the Equal Treatment Directive

Seventeen years after it was submitted by the Commission, the proposal retains all its relevance.

First, European society faces a persistent reality of discrimination on the grounds covered in the proposed Directive. The most recent Eurobarometer on the topic, published in December 2023, reported a perception of widespread discrimination in the EU

¹⁹ European Parliament, Resolution of 19 April 2023 on combating discrimination in the EU – the long-awaited horizontal anti-discrimination directive, OJ C/2023/446, 1.12.2023, para. 14.

based on (trans)gender identity (57%), sexual orientation (54%), disability (49%), intersex identity (47%), age (45%) and religion or belief (42%). As many as 21% of respondents indicated that they had personally experienced discrimination or harassment in the past year. Compared to the Eurobarometer of 2019, this is an increase of 4 percentage points.²⁰

Second, at the level of the member states, national legislation does not yet systematically outlaw discrimination in social protection, social advantages, education, and goods and services with respect to religion or belief, disability, age or sexual orientation.²¹ Isabelle Chopin of the European network of legal experts in gender equality and non-discrimination reports that only 16 out of 27 member states have adequate legislation in place to ensure comprehensive protection in these areas. In the 11 other member states, the situation varies in terms of the scope and level of protection, with two of them offering no legislative protection at all in these domains.²² This underscores the need for the Directive's minimum requirements. Furthermore, even in those member states that do offer wider protection, the national equal treatment legislation still contains shortcomings. Adopting the proposed Directive, as reformulated by the Belgian Council Presidency in 2024, would address several of these. A prominent example is the right to "reasonable accommodation" for persons with disabilities, which has not been systematically implemented in all EU member states, particularly not outside the field of employment. The same applies to protection against discrimination based on a combination of grounds, which only a few member states have included in their legislative framework.

"This international dimension has grown in importance since the Trump administration started pressuring European companies to bury measures promoting diversity, equality and inclusion."

Third, discrimination has serious consequences not only for individuals but also for society and business at large.²³ In short, discrimination lowers productivity and economic growth and negatively affects social cohesion, education levels and the health situation of vulnerable and marginalised groups.²⁴ It is therefore a matter of concern for the EU as a whole.

Fourth, the EU's international credibility as a promotor of human rights and equal treatment is at stake. An EU that is incapable of agreeing on solid non-discrimination legislation internally can hardly be seen as an authoritative voice vis-à-vis candidate countries and other external partners. This international dimension has grown in importance since the Trump administration started pressuring European companies to bury measures promoting diversity, equality and inclusion.²⁵ Once adopted, the Directive would explicitly allow "positive action" and some degree of "preferential treatment". Under the current international circumstances, this gives the proposal a geopolitical significance as the externalisation of European values and autonomy.

²⁰ European Commission, Special Eurobarometer 535: Discrimination in the EU, 2023, <https://europa.eu/eurobarometer/surveys/detail/2972>.

²¹ Isabelle Chopin & Catharina Germaine (on behalf of the European network of legal experts in gender equality and non-discrimination), *A comparative analysis of non-discrimination law in Europe 2024: The 27 EU Member States compared*, Luxembourg: Publications Office of the European Union, 2025, pp. 74-75.

²² Isabelle Chopin, in European Parliament, *Acts of the Workshop "The EU as a Union of Equality?"*, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 763.349, July 2024, p. 24.

²³ Gary S. Becker, *The Economics of Discrimination*, Chicago: University of Chicago Press, 1957.

²⁴ Suzana Hardy & Tom Schraepen, "The state and effects of discrimination in the European Union", *OECD Papers on Well-being and Inequalities*, Paris: OECD Publishing, No. 26, 2024, pp. 27-32.

²⁵ Arnaud Leparmentier, "French companies shocked by US embassy letter demanding they respect Trump's anti-diversity policy", *Le Monde*, 29.3.2025, https://www.lemonde.fr/en/economy/article/2025/03/29/french-companies-shocked-by-letter-from-us-embassy-in-paris-demanding-they-respect-trump-s-anti-diversity-policy_6739640_19.html; Liz Alderman, "U.S. Presses French Companies to Comply With Trump's Anti-Diversity Policies", *The New York Times*, 29.3.2025, <https://www.nytimes.com/2025/03/29/business/france-trump-diversity-inclusion.html>.

Fifth, it is time for the EU to more visibly turn the founding values of Article 2 TEU – such as equality and respect for human rights – into legal instruments that have a concrete impact on the lives of Europeans. In terms of non-discrimination, the 2017 European Pillar of Social Rights may play a useful intermediate role in this process.²⁶ As a third principle, the Pillar proclaims the right of everyone, regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, to equal treatment and equal opportunities regarding employment, social protection, education, and access to goods and services available to the public. While not legally binding by itself, the Pillar was agreed and formally proclaimed by the European Parliament, the Council and the Commission. When taking seriously the promise of a Union determined to combat social exclusion and discrimination, and promoting social progress and social justice for its people,²⁷ it is only logical that the Pillar's consensual third principle would finally be followed up in a legally binding way. It should thereby provide persons suffering from discrimination based on religion or belief, disability, age or sexual orientation with the same scope of protection as those facing discrimination on grounds of racial or ethnic origin.

4. The political state of play on the Equal Treatment Directive

“While ‘a very large majority of delegations’ has consistently supported the Directive, a minority has adopted a negative attitude.”

While “a very large majority of delegations” has consistently supported the Directive, a minority has adopted a negative attitude.²⁸ Germany blocked the proposal from the start, regardless of the coalition in power in Berlin. Germany's complex internal consultation process on the proposal – involving Federal agencies and the Länder – never resulted in a lifting of the country's general reservation. The obligation to provide “reasonable accommodation” for disabled persons and its potential implementation cost were signalled as a key stumbling block.²⁹ Since 2024, Italy and Czechia have played their part in the resistance with both countries invoking subsidiarity concerns whereby they questioned the need for EU legislative action.³⁰ As the Directive requires adoption by unanimity under Article 19(1) TFEU, several EU Council Presidencies have done their utmost to suggest consensual modifications of the proposal.³¹ These efforts have not cleared the way for adopting the proposal.

In February 2025, indicating that the proposal “is blocked and further progress is unlikely”, the Commission included the Directive in a list of 37 proposals it intended to withdraw under the 2025 work programme.³² It has the legal power to do so as long as the Council has “not acted”, i.e. as long as the Council has not taken a formal decision.³³ The Commission's defence of the intention to withdraw was, however, somewhat contradictory as Commissioner for Equality Hadja Lahbib continued to say that “the best option is the adoption of the Directive

²⁶ Interinstitutional Proclamation on the European Pillar of Social Rights, OJ C 428, 13.12.2017, pp. 10-15.

²⁷ Preamble and Article 3(3) TEU.

²⁸ Council of the European Union (Polish Presidency), footnote 3, p. 2.

²⁹ Written communication to the author by the German Permanent Representation to the EU, 8.4.2025.

³⁰ Employment, Social Policy, Health and Consumer Affairs Council, Public session: Directive on implementing the principle of equal treatment (Article 19), 7.5.2024, <https://video.consilium.europa.eu/event/en/27449>; EPSCO 19.6.2025.

³¹ For the most active Council Presidencies, see the Progress Reports by the Polish Presidency (footnote 3), the Belgian Presidency (footnote 18), the Swedish Presidency (Council of the EU, 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, doc. 9043/23, 23.5.2023) and the Portuguese Presidency (Council of the EU, 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, doc. 9109/21, 4.6.2021).

³² European Commission, Commission work programme 2025, COM(2025) 45, 11.2.2025, Annex IV: Proposals to be withdrawn, No 26.

³³ Court of Justice, C409/13, *Council v Commission*, 14.4.2015, ECLI:EU:C:2015:217, para. 74. The rules governing the withdrawal of a Commission proposal are specified in the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, pp. 1-14, para. 9.

“If the Commission’s withdrawal strategy was intended as a wakeup call to convince the reluctant member states, it failed.”

and convince the reluctant Member States”.³⁴ In doing so, she expressed the “hope that the intention to withdraw will serve as a wakeup call”.³⁵

If the Commission’s withdrawal strategy was intended as a wakeup call to convince the reluctant member states, it failed. At the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council of 19 June 2025, Germany, Italy and Czechia maintained their general reservation.³⁶ Their Council statements rather showed that the Commission’s intention to withdraw emboldened them in their resistance.³⁷ Furthermore, and for the first time, member states such as Austria, Bulgaria, Finland and Latvia also expressed some level of understanding for the withdrawal idea because they could not see a way of overcoming the blockage.³⁸

This should not overshadow the fact that, at the same EPSCO Council, a clear majority of 18 member states continued to strongly support the Directive.³⁹ This included 11 member states making a joint statement – expressed by Sweden – that called on the Commission not to withdraw its proposal as “this would send the wrong message on where the EU is headed in the protection of fundamental rights”.⁴⁰ On 1 July, 14 member states repeated this message in a letter to the Commission.⁴¹ At the level of the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs decided to formally object to the planned withdrawal,⁴² and 69 MEPs jointly wrote to the Commission with the same message.⁴³ While this again demonstrated Parliament’s support for the proposed Directive,⁴⁴ it should be noted that the directly elected representatives of the EU citizens do not have full legislative co-decision rights in this area. Their formal role is limited to giving consent, i.e. saying “yes” or “no”, but without the right to amend the proposal. Relevant stakeholder organisations equally “condemned” the intention to withdraw “as a betrayal of fundamental rights at a critical moment for democracy and equality in the EU”. In a joint statement, they stressed that moving forward with the withdrawal would be leaving “a glaring gap in EU law”, thereby “severely undermin[ing] the EU’s commitment to building a Union of Equality at a time when marginalised communities require greater protection than ever”.⁴⁵ This

³⁴ Hadja Lahbib at the European Parliament, Committee on Civil Liberties, Justice and Home Affairs, meeting of 12.5.2025, https://multimedia.europarl.europa.eu/en/webstreaming/libe-committee-meeting_20250512-1500-COMMITTEE-LIBE (hereinafter “Lahbib 12.5.2025”).

³⁵ Ibid.

³⁶ Employment, Social Policy, Health and Consumer Affairs Council, Public session (afternoon): Directive on implementing the principle of equal treatment, 19.6.2025, <https://video.consilium.europa.eu/event/en/28001> (hereinafter “EPSCO 19.6.2025”).

³⁷ EPSCO 19.6.2025.

³⁸ Ibid.

³⁹ EPSCO 19.6.2025.

⁴⁰ Nina Larsson, Swedish Minister for Gender Equality and Working Life, spoke in support of the proposed directive on behalf of Belgium, Estonia, France, Ireland, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia and Sweden. In addition, Croatia, Cyprus, Denmark, Greece, Luxembourg, Slovakia and Spain spoke up individually in favour of the Directive.

⁴¹ The letter was signed by the Ministers for Social Affairs and/or Equality of Belgium, Estonia, France, Greece, Ireland, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden. See Giedrė Peseckytė & Mathieu Pollet, “Don’t kill equal treatment at work bill, EU countries and MEPs tell Commission”, *Politico*, 4.7.2025, <https://www.politico.eu/article/equal-treatment-work-bill-eu-countries-parliament-hadja-lahbib-gender-race-sexuality-disability-religion-roberta-metsola/>.

⁴² Letter by Bernd Lange (Chair of the Conference of Committee Chairs) to Roberta Metsola (President of the European Parliament), D 101428, 8.5.2025, https://www.euractiv.com/wp-content/uploads/sites/2/2025/05/STAMPED_2025.05.08-Lange-Metsola-Annex-IV-withdrawals-signed-EURACTIV-Copy.pdf

⁴³ As reported by Lahbib 12.5.2025.

⁴⁴ This support is in line with the European Parliament’s Resolution of 19 April 2023 on combating discrimination in the EU – the long-awaited horizontal anti-discrimination directive, OJ C 446, 1.12.2023.

⁴⁵ Joint Statement – Equality betrayed: Commission unilaterally gives up on anti-discrimination law (signed by the Eurocentralasian Lesbian* Community, European Roma Grassroots Organisations Network, Organisation Intersex International Europe, International LGBTQI Youth & Student Organisation, European Network against Racism, ILGA-Europe, European Disability Forum, AGE Platform Europe, and Trans Europe and Central Asia), 17.2.2025, <https://www.age-platform.eu/joint-statement-equality-betrayed-commission-unilaterally-gives-up-on-anti-discrimination-law/>.

mobilisation was not in vain, as on 23 July 2025, the Commission announced that it would keep the Directive on the agenda “having considered the supportive position expressed by the Parliament and by a large majority of member states in the Council”. While not making concrete suggestions, the Commission added that it would redouble its efforts in supporting the Council Presidency to help find an agreement.⁴⁶

5. A way forward: the potential of “enhanced cooperation”

In the absence of unanimity, the most promising way forward is the adoption of the Directive through “enhanced cooperation” among a minimum of nine member states wanting to move ahead among themselves.⁴⁷ This has already been successfully practised in such areas as divorce law, patent protection, property regimes of international couples and the creation of the European Public Prosecutor’s Office.⁴⁸ Once enhanced cooperation has been established, voting in the Council is restricted to those member states that are part of it.⁴⁹ The participating member states are then entitled to adopt Directives that are binding only on them.⁵⁰ Of course, enhanced cooperation remains “second best” compared to a Directive on which everyone agrees and that provides protection throughout the EU. However, after the 17-year-long focus on compromising with the Directive’s opponents, a new dynamic is needed. Starting closer cooperation can provide a forum for progressive development of the EU’s non-discrimination framework. The stragglers are likely to come under considerable pressure to explain their non-participation in their national contexts and may thus be encouraged to join the avant-garde later. Indeed, enhanced cooperation remains open at any time to all member states.⁵¹ Practice shows that this pulling-in-late effect is working, with several examples of member states initially remaining outside an enhanced cooperation framework but joining later.⁵² One of the most prominent examples is Italy joining the enhanced cooperation on the unitary patent protection in 2015, after having unsuccessfully attacked it before the Court of Justice in 2011.⁵³

“... enhanced co-operation remains open at any time to all member states.”

⁴⁶ See footnote 5.

⁴⁷ Article 20(4) TEU.

⁴⁸ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, pp. 10-16; Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, pp. 1-8; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, pp. 1-29; Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), OJ L 283, 31.10.2017, pp. 1-71. The Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, OJ L 22, pp. 11-12 has not been implemented.

⁴⁹ Articles 20(3) TEU and 330 TFEU.

⁵⁰ Article 20(4) TEU.

⁵¹ The conditions for joining an already established enhanced cooperation are set out in Article 331 TFEU.

⁵² See Commission Decision 2012/714/EU of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 323, 22.11.2012, pp. 18-19; Commission Decision 2014/39/EU of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 23, 28.1.2014, pp. 41-42; Commission Decision (EU) 2016/1366 of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 216, 11.8.2016, pp. 23-25; Commission Decision (EU) 2018/1094 of 1 August 2018 confirming the participation of the Netherlands in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 196, 2.8.2018, pp. 1-2; Commission Decision (EU) 2018/1103 of 7 August 2018 confirming the participation of Malta in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 201, 8.8.2018, pp. 2-3; Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 2024/807, 29.2.2024; Commission Decision (EU) 2024/1952 of 16 July 2024 confirming the participation of Sweden in the enhanced cooperation on the establishment of the European Public Prosecutor’s Office, OJ L 2024/1952, 18.7.2024.

⁵³ Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of the creation of unitary patent protection, OJ L 256, 1.10.2015, pp. 19-20. For the Court case, see Court of Justice, Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, 16.4.2013, ECLI:EU:C:2013:240 (hereinafter “Joined Cases C-274/11 and C-295/11”).

While somewhat complex, the EU Treaty requirements for enhanced cooperation and the related Court jurisprudence form no obstacle.⁵⁴ On the contrary, they can be seen as an encouragement for action in cases such as the Equal Treatment Directive:

First, according to Article 20(2) TEU, enhanced cooperation is possible only “as a last resort”, where the Council finds that the objectives pursued “cannot be achieved within a reasonable period by the Union as a whole”. According to the Court of Justice, the Council itself “is best placed to determine” whether this condition is met.⁵⁵ In the area covered by the Equal Treatment Directive, this cannot be a stumbling block given the numerous compromise proposals by successive Council Presidencies since 2008. The precise reason for the impossibility of reaching a decision among all member states, within a reasonable period of time, does not really matter to the Court. This “may be due to various causes, for example, lack of interest on the part of one or more member states or the[ir] inability ... to reach agreement on the content”.⁵⁶

Second, Article 326 TFEU specifies that enhanced cooperation “shall not undermine the internal market or economic, social and territorial cohesion”.⁵⁷ Of course, persons in member states that do not participate would not be able to benefit from the non-discrimination provisions laid down under enhanced cooperation, but the case law of the Court of Justice makes it clear that this is not a barrier.⁵⁸ The mere fact that there are positive effects for the participating member states, their citizens and/or businesses (and not for those outside the cooperation) follows, according to the Court, “necessarily” from the fact that acts in the context of enhanced cooperation can only be binding on the participating member states. This cannot be seen as “undermining” the cohesion of the Union or its internal market but is – in the Court’s view – “inherent” to the practice of enhanced cooperation in the furtherance of Union objectives, as provided for in the EU Treaties.⁵⁹

Third, in conformity with Article 327 TFEU, enhanced cooperation must respect the competences, rights and obligations of the non-participating member states. In that context, the Court of Justice has clarified that a decision to authorise enhanced cooperation cannot be viewed as the “exclusion” of those member states that decided not to join.⁶⁰ Furthermore, the Court held that the rights of non-participating states are not infringed by the introduction of rules in the enhanced cooperation context with which they would not agree if they participated.⁶¹

Fourth, enhanced cooperation cannot be applied within the EU’s exclusive competences.⁶² This constitutes no barrier as non-discrimination policy is part of the competences shared

“... the EU Treaty requirements ... can be seen as an encouragement for action in cases such as the Equal Treatment Directive.”

⁵⁴ The basic rules on enhanced cooperation are set out in Article 20 TEU and Articles 326 to 334 TFEU.

⁵⁵ Joined Cases C-274/11 and C-295/11, para. 53.

⁵⁶ *Ibid.*, para. 36.

⁵⁷ The full quote of Article 326 TFEU is: “Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them”. Only the cohesion aspect might be relevant in the case of enhanced cooperation on the Equal Treatment Directive. If adopted, the Directive would be far from constituting a barrier to trade or as distorting competition (as understood in Articles 101-109 TFEU).

⁵⁸ Joined Cases C-274/11 and C-295/11, para. 68 and 75.

⁵⁹ *Ibid.*, para. 68. See also Emanuela Pistoia, “Enhanced cooperation as a tool to ... enhance integration? Spain and Italy v. Council”, *Common Market Law Review*, Vol. 51, No. 1, 2014, p. 257; Christine Guillard, “Le rejet des recours contre la décision autorisant une coopération renforcée dans le domaine du brevet unitaire: une clarification de la signification des coopérations renforcées”, *Revue des Affaires européennes*, No. 2, 2013, p. 363.

⁶⁰ Joined Cases C-274/11 and C-295/11, para. 37 and 83.

⁶¹ *Ibid.*, para. 82.

⁶² Article 20(1) TEU.

by the EU and its member states, with the Directive at issue merely imposing minimum requirements, leaving the member states free to adopt more favourable measures for equal treatment.

Finally, enhanced cooperation must comply with the Treaties and Union law,⁶³ and aim to further the EU's objectives, protect its interests and reinforce its integration process.⁶⁴ This is the heart of the matter, with enhanced cooperation on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation following the way forward outlined in Article 19(1) TFEU, and directly implementing basic EU values, as enshrined in Article 2 TEU.

Given that the conditions are met, member states wishing to break the current deadlock would do well to address a request for an enhanced cooperation framework to the Commission in accordance with Article 329(1) TFEU. Authorisation to proceed with enhanced cooperation requires a proposal from the Commission, the consent of the European Parliament and a decision by the Council, taken by a qualified majority.⁶⁵ As the Court has made clear, this does "by no means constitute circumvention of the requirement of unanimity" under Article 19(1) TFEU.⁶⁶ In fact, the Court believes that EU competences that must be exercised unanimously by the EU-27 lend themselves particularly well to enhanced cooperation.⁶⁷

"Those wanting to move ahead are doing nothing else than furthering the EU's objectives and values with respect to non-discrimination within the context of the EU Treaties."

In the case of a request for the authorisation of enhanced cooperation in the field of equal treatment coming before the Council, it would be an active expression of the principle of sincere cooperation if those member states that do not intend to participate nevertheless voted in favour.⁶⁸ Those wanting to move ahead are doing nothing else than furthering the EU's objectives and values with respect to non-discrimination within the context of the EU Treaties. Those opting to remain outside the enhanced cooperation should refrain from any measure that could derail the efforts by the *avant-garde*.

6. Conclusion: The EU's ethos is at stake

After the Second World War, a deep preoccupation with human dignity, fundamental rights and equal treatment became a common characteristic of those who tried to rebuild (Western) Europe on humanist principles.⁶⁹ They actively sought to put into practice what Enlightenment thinker Jean-Jacques Rousseau called humanity's "faculty of improvement" or "perfectibility".⁷⁰ If it is to remain faithful to the foundational values of Article 2 TEU, the EU has a key role to play in this process of "improvement" by progressively developing social equality law. This is why the adoption of the Equal Treatment Directive is central to the preservation and expression of the EU's ethos, and to the aim of creating a Union of Equality. Given the increase in the number of reported discrimination cases and the fact

⁶³ Article 326 TFEU.

⁶⁴ Article 20(1) TEU.

⁶⁵ Article 329(1) TFEU.

⁶⁶ Joined Cases C-274/11 and C-295/11, para. 37.

⁶⁷ *Ibid.*, para. 35 (see the original French version of the judgment: "de telles compétences se prêtent ... à une coopération renforcée").

⁶⁸ On the principle of sincere cooperation, see Article 4(3) TEU.

⁶⁹ See, for example, H.G. Wells, *The Rights of Man: Or What Are We Fighting For?* (London: Penguin, 1940); Jacques Maritain, *Man and the State*, Washington, DC: Catholic University of America Press, 1951, pp. 76-107.

⁷⁰ Jean-Jacques Rousseau, "Discourse on the Origin and the Foundations of Inequality Among Mankind", in Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses* (edited and with an introduction by Susan Dunn), New Haven: Yale University Press, 2002, p. 96. On Rousseau's central notion of "human perfectibility" or "faculty of self-perfection", see Céline Spector, *Rousseau*, Cambridge: Polity, 2019, pp. 21-22; Robert Wokler, "Perfectible Apes in Decadent Cultures: Rousseau's Anthropology Revisited", in Robert Wokler, *Rousseau, the Age of Enlightenment, and Their Legacies* (edited by Bryan Garsten), Princeton: Princeton University Press, 2012, pp. 23-28.

that only 16 out of 27 EU member states have comprehensive legislation in place to ensure equal treatment in the fields listed in the proposed Directive, its remaining relevance is beyond doubt.

“Moreover, from the perspective of the EU’s further enlargement, an additional degree of differentiation seems inevitable ...”

In the absence of unanimity in the Council, moving forward through enhanced cooperation, whereby the Union’s objectives and values are promoted by an open avant-garde, seems a valid option. Indeed, this method has already delivered concrete results in other areas under the EU’s remit. Moreover, from the perspective of the EU’s further enlargement, an additional degree of differentiation seems inevitable to allow for the continuing evolution of the European construction. Seen in this light, the instrument of enhanced cooperation should not be viewed as problematic, but rather as part and parcel of the EU’s constitutional setting (which it is).

Ultimately, the EU should reconsider its decision-taking method under Article 19(1) TFEU, which forms the legal basis of the proposed Equal Treatment Directive. In an EU of 27 or more member states, it is no longer tenable to maintain unanimity in the Council for the adoption of non-discrimination legislation that gives expression to the Union’s founding values. The Article should be brought under the EU’s ordinary legislative procedure, implying qualified majority voting in the Council and full co-decision powers for the European Parliament.⁷¹ The latter is of particular importance for enhancing the EU’s democratic nature in a domain that touches directly upon the fundamental rights of citizens.

⁷¹ The appropriate way of achieving this would be through the simplified revision procedure of Article 48(7) TEU.