



24 February 2023

## Commission package to strengthen equality bodies

### KEY MESSAGES

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- 1** Respect the principle of subsidiarity and national practice: Any involvement of equality bodies in workplace-related matters, whether this is by extending their competences or not, should always respect the autonomy of social partners in line with their national practice as well as the recognised competences of all relevant government agencies, including labour inspectorates, national courts and/or statutory tribunals.
- 2** Foster constructive cooperation: Establishing or strengthening a trust-based relationship between equality bodies and social partners should be a key objective under this package. Where this is appropriate and relevant according to national legislation and/or practice, the involvement of social partners, including through a tripartite governing structure of equality bodies, should therefore be made possible.
- 3** Maintain the independence of equality bodies: The proposals should guarantee that equality bodies can operate independently, effectively and free from external influence.
- 4** Consider more balanced approaches: Simultaneously granting equality bodies binding decision-making, litigation and investigative powers not only puts their entire mandate but also their independent nature into question. Introducing a structural “firewall” into their internal structure will not be sufficient in ensuring they can make impartial decisions, independent from any external influence.
- 5** Focus on mediation instead of litigation: Any additional competences awarded to equality bodies should keep their role as mediators for out-of-court dispute resolution at the forefront instead of opting for a litigation-oriented approach.



## GENERAL AND SPECIFIC COMMENTS

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### I. General comments

1. BusinessEurope recognises the important role that equality bodies play in promoting equal opportunities in the workplace and fighting against discrimination on the European labour markets. In addition to raising awareness on equality themes and informing companies about significant developments in the field of equal opportunities, in certain Member States, equality bodies even help companies in the shaping and implementation of their diversity policies.
2. BusinessEurope therefore cautiously welcomes the main objective of the Equality Package to establish minimum standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, including self-employment. As European employers, we are committed to ensuring equal treatment of all workers at the workplace, including through the close cooperation with equality bodies, where necessary. In this regard, we recognize the pivotal developments under the EC Recommendation on standards for equality bodies from 2018<sup>1</sup>, which principles on the functioning of the equality bodies remain valid to this day.
3. Nevertheless, we express concern about introducing binding standards on equality bodies at the EU-level as it is contrary to the principle of subsidiarity for a European directive to prescribe the concrete design of member state bodies. Considering the huge diversity in structure, mandate and competences of equality bodies across the EU Member States, we furthermore underline that it is both impractical and ineffective to introduce a one-size-fits-all approach to this issue. Moreover, we underline that any involvement of equality bodies in workplace-related matters should always respect the autonomy of social partners as well as the recognised competences of all relevant government agencies, including labour inspectorates, national courts and/or statutory tribunals, in line with national practice. It is therefore paramount that the proposed directives leave the necessary room for Member States to make adaptations to the provisions, in accordance with their national legislations, practice and systems.
4. We take note of the two separate proposals, as published by the Commission on 7 December:
  - The first on a Directive on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation;
  - The second on a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or

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<sup>1</sup> [COMMISSION RECOMMENDATION \(EU\) 2018/ 951 - of 22 June 2018 - on standards for equality bodies \(europa.eu\)](https://europa.eu/COMMISSION_RECOMMENDATION_(EU)_2018/951_-_of_22_June_2018_-_on_standards_for_equality_bodies).



sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services.

5. Given the almost identical provisions identified in both proposals, we will address them under the same specific comments.

## **II. Specific comments**

6. We recognise the reinforced competences of equality bodies to collect and anonymously publish equality data and to make policy and legislative recommendations on issues related to discrimination (article 14). Whilst European companies remain committed to continue cooperating with equality bodies in a constructive manner, we underline that any data gathering, and subsequent recommendations, must respect the basic principles of GDPR and confidentiality of information. Furthermore, any form of data gathering must limit as much as possible additional administrative burdens and financial costs for companies, in particular SMEs.
7. We welcome the provisions for Member States to guarantee that equality bodies can operate independently and free from any external influence (article 3) as well as to equip equality bodies to effectively perform all tasks and competences (article 4), including assisting companies in the implementation of their diversity and inclusion policies, based on mutual trust between all stakeholders.
8. In this light, we support the main objective of the Equality Package to strengthen equality bodies' independence and effectiveness under the condition that this is actually done as part of a trust-based relationship between social partners and equality bodies. By operating in a trust-based relationships, equality bodies and social partners can not only ensure that potential victims of discriminatory practices have access to remedies but also that diversity, non-discrimination and inclusivity policies are effectively implemented in the workplace.
9. In order to foster such a constructive cooperation between equality bodies and social partners, we therefore suggest to insert a specific provision in the proposals for directives, allowing for the involvement of social partners, including through a tripartite governing structure of equality bodies, where relevant and in accordance with national systems and legislation. Such tripartite governing structures should be based on best practice examples from Member States who currently already have this structure in place, by including the social partners and the relevant national government representatives in its overarching decision-making board.
10. By contrast, we regret that by extensively broadening the competences of equality bodies, the proposals jeopardise their independent nature and could negatively harm the trust-based relationship that employers have built up and fostered with them. It is paramount that the additional competences granted to equality bodies do not interfere with the national powers of the labour courts on



the one hand and respect the role that social partners play in safeguarding a conflict-free working environment on the other hand. There is significant concern that the litigation-oriented approach chosen by the Commission will lead to a hostile working environment, with little room for amicable dispute resolutions.

11. In this regard, we see a fundamental conceptual contradiction in the proposals' focus on the development of executive and enforcement powers as opposed to a more balanced approach that strengthens the mediating competences for out-of-court dispute resolution. Firstly, we are highly critical of article 8, which grants legally binding and enforceable decision-making powers to equality bodies, as a quasi-judicial function, following a complaint or on their own initiative. This is exacerbated by the provision for equality bodies to not only apply measures to remedy any breach found, but also to prevent further occurrences, taking a more proactive approach.
12. Whilst we appreciate that the proposals mainly seek to reinforce this competence where it is already granted under national legislation (article 17), we are concerned that retaining this provision might lead to unnecessary confusion and legal uncertainty. Furthermore, we deem it important to underline that only courts and tribunals, in line with national legislation and practice, should have binding decision-making powers or are able to sanction and impose feedback obligations. By extending the competences of equality bodies in this direction, not only are the competences of national courts endangered, but the key role of equality bodies as mediators for out-of-court dispute resolution is also undermined (article 7). We are therefore very concerned that stable industrial relations and workplace resolution mechanisms across Member States could be significantly undermined by this provision. Against this background, we suggest to remove this provision from the proposals and leave it to the consideration of individual Member States in accordance with the subsidiarity principle.
13. Secondly, we oppose the list of competences as laid out by article 9, which stipulates the Member States' obligation to grant equality bodies legal standing by allowing them to take and support cases before the courts, not only by submitting oral or written statements to the court as *amicus curiae* but also by supporting potential victims and acting in their own name in the collective interest. We underline that there is a clear conflict of mandate for equality bodies to be considered both interested party and final judge in workplace disputes and submit that it is a matter for Member States to determine who has legal standing before national courts and tribunals.
14. Against this background, we cautiously welcome the proposals' effort in article 3, paragraph 3-4 to ensure that the internal structure of equality bodies guarantees the independent exercise of their mandate and competences, in particular if an equality body is part of a multi-mandate body and therefore has both decision-making powers and litigation powers. However, introducing a structural "firewall" in equality bodies, through ensuring that these powers and/or mandates are exercised by different dedicated departments or staff members, does not guarantee sufficient independence of equality bodies on these matters and puts their entire mandate into question. It should furthermore be underlined that the



impartiality required to take decisions without the correct enforcement of such a “firewall” threatens to stifle the aspiration of all stakeholders to make progress in a constructive and cooperative manner.

15. A third and final point of strong concern is the proposals’ explicit provision to ensure investigative powers of equality bodies to collect evidence, possibly with a legal obligation on the alleged perpetrator and any third party to provide any information and documents requested. We stress that only courts and tribunals or government officials, such as labour inspectorates, should have investigative powers, in line with national legislation and practice. There is furthermore significant concern that equality bodies may not have the required capacity and expertise required to have such powers conferred on them. These investigative powers could therefore raise tensions between employers and equality bodies as they significantly erode the trust employers have in equality bodies to operate in an independent and impartial manner and consequently, could discourage employers to proactively provide information to equality bodies on a voluntary basis.
16. We therefore welcome the proposals’ clear provision of article 9, paragraph 4, which states that equality bodies should not be allowed to submit in court proceedings evidence obtained through previous investigations of the same case which the alleged perpetrator or any third party was legally bound to provide. Nevertheless, this provision is extremely weakened by introducing the exception made in cases when this evidence is used whilst submitting an amicus curiae brief or as a defendant in case of a judicial review of the equality body’s decision.