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EXPLANATORY MEMORANDUM

To the draft Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future

(Adopted by the CDADI during its 2nd plenary meeting 2-4 February 2021)

Introduction

1. The elaboration of the Guidelines of the Committee of Ministers of the Council of Europe on upholding equality and protecting against discrimination and hate during the Covid-19 pandemic and similar crises in the future was triggered by the outbreak of the Covid-19 pandemic in 2020 and its social and economic effects, which hit people belonging to certain groups in a particularly hard way throughout Europe. These Guidelines have been developed to deal with public health crises, but they may also provide valuable guidance for upholding equality and protecting against discrimination and hate during other, similar types of crisis. Central, regional and local authorities have an important role in the implementation of these Guidelines and National Human Rights Institutions (NHRIs) and Equality Bodies (EBs) can also make an important contribution.

2. Various groups covered by the prohibition of discrimination in Article 14 of the European Convention on Human Rights and Article 1 of its Protocol No. 12 can be affected by a crisis in a particularly heavy way and face specific challenges. Among them are persons belonging to ethnic, cultural, linguistic or religious minorities including Roma and Travellers, Jews and Muslims, Black people, migrants and persons with a migration background including asylum seekers, refugees, internally displaced persons and irregularly present migrants, as well as LGBTI persons. For all those groups, the Guidelines use the term “vulnerable groups”. Vulnerable groups are diverse within themselves and composed of different communities. Within these groups, women, children, young people, persons with disabilities and other persons exposed to multiple and intersectional disadvantage and discrimination face very diverse and specific, but also some common, challenges. The Guidelines contain principles for dealing with such common but also with more specific challenges that affect in a particular way one or several groups, a community within a group or certain persons belonging to a group. While sometimes general measures are sufficient to address such specific challenges, in other cases temporary special measures (see paragraph 5 of General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI)) are needed to compensate for disadvantages suffered by persons belonging to those groups. The Guidelines also take into account the Council of Europe Gender Equality Strategy and Disability Strategy that contain additional guidance on mainstreaming equality and addressing issues of multiple and intersectional discrimination, which is also of relevance in times of crisis.

3. A crisis often makes more visible longstanding inequalities that existed already before its outbreak. Member States should continue to tackle and eliminate these structural inequalities and disadvantages to increase their resilience to and preparedness for future crises. It should furthermore be emphasised that member States must, also during times of crisis, continue to respect international human rights instruments such as those referred to in the Preamble of the Guidelines. Member States should also continue implementing the general policy and country-specific recommendations of ECRI and those made under the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

4. These Guidelines are based on the responses of member States to a questionnaire on measures taken during the Covid-19 pandemic, which was drawn up by the Steering Committee on Anti-discrimination, Diversity and Inclusion (CDADI) of the Council of Europe. Those answers, the important guidance of other bodies of the Council of Europe (see its dedicated website and in particular the Statement made by ECRI's Bureau on 19 May 2020), the United Nations (see for example the Covid-19 guidance of the OHCHR), the Organisation for Security and Cooperation in Europe (see in particular the Covid-19 related activities of ODIHR) and other international organisations, and other additional material have subsequently been analysed in a study commissioned by the CDADI. The study "COVID-19: An analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States" and a compilation of good practices identified in these answers were published on the website of the CDADI. Member States are invited to take inspiration from these good practices, some of which are summarised in this Explanatory Memorandum, for implementing the Guidelines, improving their responses to the Covid-19 pandemic and other crises and enhancing their preparedness for future crises.

I. Preparedness, outreach and information

5. Many member States have general emergency management structures and procedures in place to deal with certain types of crisis. Independently of the outbreak of any crisis, they should make an assessment of those structures and procedures and reflect how to use or adapt them for upholding equality and protecting vulnerable groups against discrimination and hate during times of crisis. To that end, they should consider involving in the emergency management structures and procedures existing minority councils and similar structures that have been established to ensure sustainable cooperation and dialogue with vulnerable groups. Representatives of those groups, Roma mediators, civil society including non-governmental organisations (NGOs), Equality Bodies and independent human rights institutions should also be involved in this assessment. Such assessments could result in training of civil servants and public employees on upholding equality and protecting vulnerable groups in crisis situations and in instructions to reach out to such groups as soon as the emergence of a crisis becomes apparent.

6. At the beginning of a crisis, persons belonging to vulnerable groups can lose all contact with the authorities and their access to essential services. In several countries, this was the case at the beginning of the Covid-19 pandemic and a significant number of persons belonging to those groups did not even have access to food. In this situation, the authorities of several member States immediately reached out to vulnerable groups and assessed together with them their situation and needs. To that end, the authorities in some cases contacted existing minority councils and similar structures. In other cases, they reached out to representatives of those groups, Roma mediators, faith leaders and NGOs. They also initiated surveys among persons belonging to vulnerable groups. In this way, a first overview and data on the needs of the different vulnerable groups was gathered. Subsequently, member States intensified this dialogue and gathered more sophisticated equality data (for more details see below in §§ 42 ff).

7. The assessment of this initial information should lead to quick action to meet pressing needs, for example the need to provide food. A specific focus should be put on persons suffering from multiple and intersectional discrimination. Representatives of vulnerable groups should be involved in the elaboration of the initial and further measures and policy and in the delivery of aid and assistance.

8. To finance and deliver such emergency relief to vulnerable groups, some member States have, during the Covid-19 crisis, mobilised international organisations and donors. The authorities should also consider providing funding to civil society organisations for delivering such emergency relief.

9. At the beginning and in the further course of a crisis, persons belonging to vulnerable groups are in need of information, just as the rest of the population. As some of them lack proficiency in the official language(s), such information should quickly be disseminated in languages that they understand, including in minority languages.

10. Persons belonging to vulnerable groups may use other communication channels than the mainstream population. Therefore, the authorities should identify the communication channels that are accessible to and used by the different communities and subsequently disseminate information through those channels in the languages they understand. This information should be formulated in a manner that is suitable for the addressees and adapted to their specific living conditions (e.g. lacking running water or overcrowded housing) and needs (e.g. the need of Travellers to access a duly serviced encampment area for staying safe during the crisis).

11. During the Covid-19 pandemic, member States disseminated information for example through SMS, social media, posters and flyers and television and radio programmes in minority languages. The dissemination of information through multipliers also proved to be successful, for example through representatives of vulnerable groups, mediators and other authoritative figures such as teachers, medical doctors, nurses, religious leaders or the police in cooperation with the aforementioned groups.

II. Protection and access to services and benefits

12. In times of crisis, access to health care for everybody is of great importance. During the Covid-19 pandemic, it became obvious that the further spreading of the pandemic could only be curbed through making sure that everybody got access to health care, including persons belonging to vulnerable groups who live in poverty or are homeless, irregularly present migrants and undocumented persons. In some member States, existing "firewalls" that decouple the activities of health services from those of the immigration control authorities (see ECRI's General Policy Recommendation No. 16) helped to achieve this goal.

13. To ensure that all persons, including those who are irregularly present on the territory, had access to health care during the Covid-19 pandemic, some member States provided the latter with temporary stay permits or with social security (for more details see § 30). Other member States issued regulations providing that all persons present in the country had access to Covid-19-related health care at the expense of the State. Among the measures taken was also the allocation of considerable budgets to municipalities for the provision of medical supplies and equipment in Roma settlements. Other member States issued recommendations to social services on temporary special health-related measures regarding segregated and highly vulnerable neighbourhoods.

14. To ensure effective access to health care, those measures should include medical testing, vaccination and the provision of protective equipment such as masks, disinfectants and gloves to persons belonging to vulnerable groups, and should be covered by social security or free of charge. Furthermore, medical staff should be made aware of the specific needs and situations of persons belonging to vulnerable groups and adapt to those conditions. During the Covid-19 pandemic, the authorities of some member States have translated medical information into the languages understood by those groups and interpretation was provided during medical consultations.

15. Some member States have, during the Covid-19 crisis, furthermore, taken measures to ensure that long term treatment related to chronic diseases and gender reassignment of people belonging to vulnerable groups could be continued. It is also important to make sure that women belonging to vulnerable groups and in particular Roma, migrant, LGBTI women and women with disabilities continue to have access to sexual and reproductive health care, also in rural areas.

16. In times of crisis, the risk of homelessness increases for persons belonging to vulnerable groups and homelessness can have more severe consequences. At the beginning of the Covid-19 crisis, a considerable number of labour migrants lost their jobs and subsequently their homes. Homelessness affected also LGBTI persons and irregularly present migrants. Roma and Travellers continued to suffer from a lack of adequately equipped encampment areas that made it possible to meet hygiene standards and avoid the further spreading of the Covid-19 virus.

17. A significant number of persons belonging to vulnerable groups live(d) in overcrowded housing – for example in overcrowded refugee camps or reception centres, in collective accommodation provided by their employer or in small apartments inhabited by several families - which made it difficult or impossible to respect rules on confinement, social distancing and hygiene. Others lived in substandard housing without running water, for example in segregated Roma settlements.

18. Several member States have suspended evictions during the Covid-19 pandemic in order to avoid homelessness. Others have housed homeless persons in hotel rooms or emergency shelters where confinement, social distancing and hygiene rules could be respected. Others made available additional space in order to remedy overcrowding in reception centres for asylum seekers and refugees. Still others have kept open reception areas for Roma and Travellers and have reduced or even suspended parking fees. In some member States, specific efforts were made to provide enough water and hygiene articles to persons living in substandard housing without running water. Also during other crises, it is often important that the authorities take adequate measures to avoid homelessness and provide for accommodation that does not expose the inhabitants to health hazards or other risks.

19. Statistics show that, independently of the outbreak of a crisis, a considerable number of children, and in particular girls, belonging to vulnerable groups face challenges in their (pre-)schooling including school segregation. The outbreak of a crisis often exacerbates those pre-existing problems.

20. During the Covid-19 pandemic, most kindergartens, pre-schools and schools quickly closed; many of them had to switch to distance schooling, where possible online. Many children, and in particular children belonging to vulnerable groups, lacked the necessary technical and pedagogical support and did not have a computer, a smartphone, a good internet connection or even electricity or a place in their home where they could do homework, and were cut off from their school; others had only very limited access to online schooling.

21. In this situation, several member States and civil society organisations distributed computers, tablets, smart-phones and other technical equipment to children belonging to vulnerable groups. In other member States, the authorities subsidised mobile internet access and social services distributed Sim-cards for such internet access. Some mobile operators provided free internet in Roma neighbourhoods. In some places, electronic devices were collected with the help of private donors and distributed among children belonging to vulnerable groups.

22. In some member States, public service broadcasters created specific TV or radio programmes for tele-schooling, which were sometimes produced in the languages of linguistic minorities. In some places, where such means were not available, teachers and civil society organisations prepared and distributed printed educational material and homework packages.

23. Various countries mobilised Roma educational mediators, school personnel and social workers to motivate and assist children belonging to vulnerable groups in the process of switching to online education and to monitor its implementation. In several member States, the participation in online education and the quality of this education were assessed through research or surveys. Their results helped to plan and implement further measures for increasing attendance and improving the quality of online schooling. In this context, it is important that member States continue, as far as possible, education in minority languages, social interaction and extracurricular activities.

24. In the field of employment, the impact of a crisis can be particularly harsh on employees who belong to vulnerable groups. During the Covid-19 pandemic, many persons belonging to vulnerable groups - including seasonal and other migrant workers - continued to work, as they were employed in sectors that were considered as essential. Many of those sectors are female dominated. Research showed that they were affected by higher infection rates than the rest of the population, as they were more intensely exposed to the risks of the pandemic; they often had to continue working in front offices and in close contact with clients and work-colleagues; a considerable number of persons belonging to vulnerable groups continued to use collective transport or to live in collective housing provided by their employer with little possibility for social distancing. Others continued to live with big families in small, overcrowded apartments.

25. To compensate for such structural disadvantages, some member States put a specific focus on labour protection and workplace risk assessments that were carried out in particular in sectors with a high number of employees belonging to vulnerable groups, such as for example the meat processing industry.

26. A considerable number of persons belonging to vulnerable groups do not have a regular and stable employment but work on the basis of unstable short-term, fixed-term or part-time contracts, for example as seasonal workers. While some do not have a written employment contract, others are self-employed or work in the informal economy. Due to this structural disadvantage, they are particularly at risk of losing their work in a crisis and are strongly exposed to its economic consequences.

27. When designing the measures for coping with the economic effects of a crisis, the authorities should therefore separately assess the social, economic and gender-specific impact on persons belonging to vulnerable groups and take temporary special measures to facilitate the access of those persons to unemployment or other social benefits. Member States should also make sure that people losing their jobs receive the necessary information and assistance for successfully applying for such services and benefits.

28. Among the measures taken during the Covid-19 crisis was a legislative amendment that allowed foreigners who lost their job during the pandemic to fill jobs in other branches that were deemed "essential". In another member State, the right to the loss of earnings allowance for self-employed persons was made accessible also to persons belonging to vulnerable groups. Other member States introduced specific benefits

that were made accessible to members of certain vulnerable groups, including persons working in the informal economy (see also §§ 30 ff of this Explanatory Memorandum).

29. In particular at the beginning of a crisis, persons belonging to vulnerable groups are often unable to meet very basic needs and have difficulties in accessing basic public services and social benefits to cover those needs. At the outbreak of the Covid-19 crisis, many such persons were even struggling to feed themselves.

30. In such situations, it is of great importance that the authorities quickly make sure that everybody present in the country has access to those basic services including food and social aid. During the Covid-19 crisis, some member States have ensured this by granting, or prolonging for the duration of the crisis, a particular temporary status (e.g. a provisional residence or work permit, a humanitarian protection status or affiliation with the social security) to persons belonging to certain vulnerable groups, which opened for them access to such services. Other member States have introduced specific social benefits (for example a minimum income scheme or a solidarity allowance) that were made available also to people belonging to certain vulnerable groups including migrants or particularly vulnerable Roma families.

31. In some member States, access to certain social services and benefits is linked to fulfilling obligations such as sending children to school. In times of crisis, the authorities should evaluate whether such links should be temporarily waived where parents are not able to ensure continuous school attendance of their children due to reasons outside their control (e.g. lack of access to the internet, lack of hard- or software to follow online-schooling or lack of public transport, see §§ 20 ff above).

III. Hate speech and different forms of violence

32. Crisis and fear often trigger hate speech and hate-motivated violence. The Covid-19 pandemic provoked the fear of “importing” the virus from abroad or that vulnerable groups such as refugees, Roma and religious minorities contributed to spreading it through their behaviour. This led to waves of hate speech and stigmatisation, in particular on the internet, and in some cases also to violent hate crimes. Hate speech from some politicians against foreigners and migrants and the uncoordinated closure of borders contributed to create new divisions within Europe.

33. In order to prevent and counter such waves of hate speech and new divisions, member States should, in times of crisis, step up their work on combating hate speech by implementing relevant standards such as ECRI’s General Policy Recommendation No. 15 and, as applicable, the Council Framework Decision 2008/913/JHA) of the European Union. During the Covid-19 pandemic, some high-ranking politicians and public figures did so and spoke out against hate speech. In several member States the contribution of doctors and health care workers with a migration background to combating the pandemic was highlighted by politicians and the media.

34. During the Covid-19 pandemic, the number of cases of domestic violence increased sharply, including towards women, girls and more generally children belonging to vulnerable groups. Many LGBTI persons had to return to their families and became exposed to hostile environments. Other forms of violence against women and LGBTI persons also increased, in particular on the internet.

35. During the confinement, access to support and protection services was more limited and victims of domestic violence living in the same household as the perpetrator found themselves particularly exposed and helpless, as they had even fewer possibilities to leave their homes to escape violence and ask for help. Due to this increased exposure to the perpetrators, it was also more difficult and dangerous to contact helplines and report domestic violence.

36. In this situation, member States that have ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, CETS No. 210) should strengthen their efforts to implement its provisions to prevent, protect against and prosecute domestic violence and gender-based violence and to develop a comprehensive policy in this field. The member States that have not ratified this convention are encouraged to do so and to focus on meeting the wide-ranging obligations that the European Court of Human Rights has developed in this field (see the factsheets of the Court on domestic violence and violence against women) and implement Recommendation CM/Rec(2002)5 of the Committee of Ministers on the Protection of Women against Violence.

37. During the Covid-19 pandemic, some member States ran specific campaigns to alert the public and prevent domestic violence, put in place alternative support and reporting mechanisms (for example in pharmacies or supermarkets), elaborated emergency plans to help victims, ensured that help structures such as helplines and shelters, that are accessible also for people belonging to vulnerable groups, continued to function and increased their human and financial resources in order to help the increasing number of victims.

IV. Prevention of discrimination and other human rights violations, assessment and oversight

38. A crisis and the measures taken to cope with it can disproportionately affect persons belonging to vulnerable groups and exacerbate pre-existing structural inequalities and disadvantages. During the Covid-19 crisis, the switch to online schooling for example deprived many children belonging to vulnerable groups of access to education (see §§ 20 ff above). The lack of access to running water, from which many segregated Roma neighbourhoods suffer, became an even more burning problem during the pandemic, as their inhabitants could not respect hygiene measures like regularly washing hands, which were important for preventing infection. The additional care responsibilities, which arose for example from the need to care for children at home and to deal with home schooling, negatively impacted the employment and economic situation of many persons belonging to vulnerable groups and in particular women. The extension of the rules on unemployment benefits tended to focus on persons working on traditional and stable employment contracts, whereas people working on short-term and part-time contracts, self-employed workers and workers in the informal economy were sometimes left out.

39. In some countries, neighbourhoods densely inhabited by persons belonging to vulnerable groups have been exposed to collective quarantine orders. In other neighbourhoods with a high proportion of vulnerable inhabitants, a disproportionately high number of fines was issued to enforce confinement and social distancing rules. There were also reports about illegal and excessive use of force against members of vulnerable groups in connection with the enforcement of quarantine rules.

40. According to the case law of the European Court of Human Rights, any difference in treatment, in order not to be discriminatory, must have an objective and reasonable justification, that is, pursue a legitimate aim and employ means which are reasonably proportionate to the aim pursued. To ensure respect of these principles, the authorities of member States should assess the effects of the measures taken to cope with the crisis, which may also unintentionally result in a difference in treatment and affect persons belonging to vulnerable groups in a disproportionate way. Where this is the case, the authorities should take measures to put an end to such discrimination. To this end, but also in case of justified differential treatment, they should also consider taking temporary special measures to compensate for (structural) disadvantages.

41. During the Covid-19 pandemic, some collective quarantine measures were successfully challenged and abolished for having been disproportionate. In various member States, specific temporary measures were taken in various areas and in particular to ensure that children from vulnerable groups were able to continue their schooling (see §§ 22 ff above).

42. Also in times of crisis it is crucial to gather data which make it possible to assess the situation of different vulnerable groups and to measure the impact of measures on such groups (equality data). This data should be disaggregated to be able to assess also the situation of different communities within such groups and of women, children and persons that are exposed to multiple and intersectional discrimination. Data should be collected while respecting the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. At the beginning of a crisis it could be that only very basic data is available. As the crisis progresses, the authorities should work towards improving the data situation and gather data in a more systematic manner from existing sources, but also through targeted surveys and research.

43. Among the measures taken during the Covid-19 pandemic was the compilation by statistical services of data about the infection rates among different vulnerable groups. Subsequently, additional research was carried out and data was pulled together from various sources to identify the factors that contributed to the disproportionately high infection rates among some groups. It led to the identification of factors such as frequent use of public transport, working in front-offices and with frequent contact with clients and living in overcrowded housing. The results of this research could serve as a basis for future policies and measures. In some member States, NGOs took the initiative to carry out surveys on the impact of the crisis on different vulnerable groups.

44. Any communication concerning such data should be done in a sensitive way that avoids stigmatisation and discrimination of vulnerable groups.

45. When a crisis breaks out, measures often need to be taken very quickly, and it is often the executive alone which acts without the usual control by the legislator and the judiciary. During the Covid-19 pandemic, various member States made derogations under Article 15 of the European Convention on Human Rights and from their national legislative procedures. Restrictions to human rights and liberties were often put in place through government regulations or decrees.

46. In such situations, it is important that human rights assessments of the measures taken are made by institutions that are independent of the executive. During the Covid-19 crisis, parliaments quickly started overseeing these measures and they, along with independent human rights institutions, started assessing their compatibility with human rights standards, including the principle of proportionality and the requirements of Article 15 ECHR; according to this provision a member State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

47. In many member States, the executive also embarked on such human rights assessments and involved human rights specialists from various backgrounds.

48. To be effective, all those assessments should be based on disaggregated equality data and research (see §§ 43 ff) and serve as a basis for adapting the existing measures with a view of further improving the situation of vulnerable groups and enhancing the possible positive effects of the measures taken on those groups. In this context, the authorities should also consider taking temporary special measures to compensate for structural disadvantage. A specific focus should be put on improving the situation of persons who suffer from intersectional disadvantage or discrimination.

48. Even after the end of the acute crisis, persons belonging to vulnerable groups can still be heavily affected by its negative effects. For example, pupils who could not attend online-school during the crisis would need specific assistance to catch up and victims of violence might need long-term assistance to recover. Therefore, it may be necessary to take measures to offset the negative impact of the crisis even once the initial crisis is over.

49. Some member States realised during the Covid-19 crisis that a number of emergency measures had a positive impact on the promotion of equality of vulnerable groups and started a reflection process on maintaining those measures in a permanent way. This concerns in particular measures that were taken to provide persons belonging to vulnerable groups with temporary access to social services and benefits and measures that facilitated their access to such services and benefits.

50. In times of crisis, Equality Bodies, legal aid structures and other institutions tasked with supporting victims of discrimination, violence and other rights violations should continue providing personal support and legal advice and assistance in order to secure their rights. The judiciary should continue to oversee the legality of the action of the executive including emergency measures that could have discriminatory effects or otherwise violate the rights of persons belonging to vulnerable groups. During the Covid-19 pandemic, the courts of several member States have issued interim relief injunctions to lift or limit such restrictions.

V. Digitalisation, artificial intelligence and contact tracing

51. During the Covid-19 crisis, many front offices delivering public services closed and people were asked to apply for public services, assistance and benefits through computer systems. However, a significant number of persons belonging to vulnerable groups do not have access to a computer or the internet, or are not able to use those computer systems, sometimes due to illiteracy.

52. To remedy the structural discrimination that can result from this digital exclusion, the authorities should continue to provide those persons with personal assistance or assistance through telephone or video hotlines. To be effective, this assistance should comprise help for filling in online forms and applications.

53. When developing contact tracing and other tools for fighting a crisis, the authorities and their contractors should, already during the designing phase, assess whether those tools bear a risk of discrimination of persons belonging to different vulnerable groups and whether those tools could lead to a violation of their right to private life. If such tools are introduced, the authorities should make sure that people

belonging to vulnerable groups have the necessary technical equipment and knowledge to access and use these tools.