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MORE EQUAL THAN OTHERS: DISTINGUISHING EUROPEAN UNION EQUALITY DIRECTIVES

LISA WADDINGTON * and MARK BELL **

1. Introduction

The past twelve months have seen a significant shift in the landscape of European Community equality law.[1] For over a quarter of a century, Community equality law has only addressed discrimination on the grounds of sex.[2] A detailed body of legislation and case law has emerged in this area covering equal pay,[3] equal treatment with regard to employment,[4] and equal treatment in the area of social security.[5] Article 141 EC and the Directives on Equal Treatment[6] and the Burden of Proof[7] have proved particularly important in developing concepts and terms, such as the notions of discrimination and positive action, which have been vital for the application of this law. Last year, as a result of the adoption of two new directives, Community law was

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1. For reasons of space, this article will not include an analysis of Community law on nationality discrimination.

2. But note that case law has also extended protection from employment discrimination under the Equal Treatment Directive to cover transsexuals. See Case C-13/94, *P.* v. *S. and Cornwall County Council*, [1996] ECR I-2143.

3. See Art. 141 EC and Directive 75/117/EEC on Equal Pay for Men and Women, O.J. 1975, L 45/19.

4. See Directive 76/207/EEC on Equal Treatment for Men and Women as regards access to Employment, Vocational Training and Promotion, and Working Conditions, O.J. 1976, L 39/40 and Directive 86/613/EEC on Equal Treatment between Men and Women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, O.J. 1986, L 359/56.

5. See Directive 79/7/EEC on Equal Treatment for Men and Women in matters of Social Security, O.J. 1979, L6/24 and Directive 86/378/EEC on Equal Treatment for Men and Women in Occupational Social Security Schemes, O.J. 1986, L 225/40 as amended by Directive 96/97, O.J. 1997, L 46/20. In addition, directives have been adopted to protect women during pregnancy and the early period of motherhood. See Directive 86/813/EEC above and Directive 92/85/EEC on the Safety and Health at Work of Pregnant Workers and Workers who have recently given birth or are breastfeeding, O.J. 1992, L 348/1.

6. See note 3 *supra*.

7. Directive 97/80/EC on the Burden of Proof in cases of Discrimination based on Sex, O.J. 1998, L 14/6.

extended to cover discrimination on a number of other grounds. The Race Directive[8] addresses discrimination based on racial or ethnic origin, whilst the Framework Employment Directive[9] covers discrimination on the grounds of religion or belief, disability, age and sexual orientation. This extended coverage was rendered possible by the incorporation of Article 13 in the EC Treaty,[10] which gave the Community the competence to take "appropriate action" to address discrimination on all the grounds mentioned above.

In adopting these new directives the Community has not simply extended the already existing protection, standards and concepts applicable with regard to sex discrimination to the newly covered areas. Instead new definitions and understandings of key concepts, including discrimination and positive action, have been included in the latest directives. In addition completely new forms of discrimination and disadvantage, such as harassment and failure to make a reasonable accommodation, have been legally recognized, as well as various new exceptions to the equality principle. Finally, the latest directives pay far more attention to securing effective enforcement than was the case under the earlier instruments. However, even these new directives do not provide a uniform degree of protection for all the grounds covered, with some grounds, such as race and ethnic origin, receiving far higher degrees of protection. In addition, changes to the long-standing Equal Treatment Directive have been proposed by the Commission.[11] If adopted, these changes will bring the Equal Treatment Directive into line with some aspects of the newer directives, but this will still not achieve a uniform approach.

The result of these diverse equality provisions is differing levels of protection and even different definitions of the same key concepts, such as discrimination. The purpose of this article is to examine the varying approaches taken by Community equality law with regard to the various grounds covered, and to reflect on whether the different approaches are based on relevant differences between the grounds addressed, or whether they simply reflect a confused and confusing approach.

8. Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, O.J. 200, L 180/22.

9. Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation, O.J. 2000, L 303/16.

10. For further discussion on this Article, see Waddington, "Testing the Limits of the EC Treaty Article on Non-discrimination", 28 *Industrial Law Journal* (1999), 133–151 and Bell, "The new Article 13 EC Treaty: a sound basis for European anti-discrimination law?" 6 MJ (1999), 5–23.

11. Proposal for a Directive amending Council Directive 76/207/EEC (COM (2000) 334 final, 7 June 2000).

2. Material scope

One has to examine a number of directives and instruments to establish the areas in which discrimination on the grounds of sex is prohibited under Community law. The various provisions address pay,[12] access to employment, including promotion, vocational training and working conditions,[13] (occupational) social security schemes[14] and self-employment.[15]

In contrast, protection from the forms of discrimination more recently recognized by Community law is provided by only two directives, each covering different grounds. The Framework Employment Directive, which covers discrimination on the grounds of religion or belief, disability, age and sexual orientation, has a slightly broader material scope than the older Equal Treatment Directive. The Framework Employment Directive covers conditions for access to employment, to self-employment or to occupation, including selection and recruitment conditions, including promotion.[16] References to self-employment and occupation are not found in the basic Equal Treatment Directive. However, the former is specifically covered by Directive 86/613.[17] The Equal Treatment Directive makes specific reference to selection, but not recruitment;[18] however the latter may be covered by the general phrase "access to employment" used in the Directive.

The Framework Employment Directive also covers access to "all types of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience."[19] With the exception of practical work experience, all these areas are also specifically mentioned in the Equal Treatment Directive.[20] Thirdly the Framework Employment Directive covers "employment and working conditions, including dismissals and pay".[21] The first three elements are specifically covered by the Equal Treatment Directive,[22] whilst the latter is covered by Article 141 and the Equal Pay Directive.

The most significant difference in the material scope of the two directives concerns membership of professional organizations. The Framework Employment Directive covers "membership of and involvement in an organization of

12. Art. 141 and Directive 75/117/EEC.
13. Directive 76/207/EEC.
14. Directives 79/7/EEC and 86/378/EEC.
15. Directive 86/613/EEC.
16. Art. 3(1)(a).
17. See note 4 *supra*.
18. Art. 3.
19. Art. 3(1)(b).
20. Art. 4.
21. Art.3(1)(c).
22. Arts. 1 and 5.

workers or employers, or any organization whose members engage in a particular profession, including the benefits provided for by such organizations"[23], whilst the Equal Treatment Directive, and other sex discrimination provisions, are silent on this matter. Consequently, whilst the Framework Employment Directive and the Equal Treatment Directive / Equal Pay provisions cover the same general area, the material scope of the former is slightly greater and the newer provision seems to have been drafted with more attention to detail and precision. However, the proposal to amend the Equal Treatment Directive would extend the material scope of this Directive to cover such organizations, thus addressing this last omission.[24]

The difference between the sex equality and race equality provisions are much greater. In addition to the four employment related areas covered by the Framework Employment Directive, the Race Directive also covers social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.[25] With the exception of some aspects of social security provisions, none of these areas are covered with regard to sex discrimination or, indeed, the other grounds of discrimination mentioned in Article 13. In adopting the Race Directive, the Community therefore made full use of the competence provided by Article 13 EC to act "within the limits of the powers conferred by [the Treaty] upon the Community". As a result, in one step, victims of race discrimination have achieved the greatest level of protection available under Community law, far exceeding that offered under the long-standing sex discrimination provisions and the other newly recognized grounds. The reasons for this "privileged" position are considered in more detail below.

3. The concept of discrimination

All of the directives referred to above specifically address direct and indirect discrimination. The Equal Treatment Directive therefore specifies in Article 2(1): "... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status."

Similar clauses are contained in the Race and Framework Employment Directive.[26] However, no legislative definition was provided of the concept

23. Art. 3(1)(d).
24. Art. 4.
25. Arts. 3(1)(e)-(h).
26. These provisions are also included in Art. 2(1) of the new Directives.

of direct discrimination until the latest directives were adopted. Indirect discrimination, in contrast, was defined in sex equality legislation, although only as late as 1997.[27] As a consequence the European Court of Justice was initially called upon to develop and interpret the concepts of direct and indirect discrimination in sex discrimination cases, with no specific guidance from Community legislation.

3.1. *Direct discrimination*

The Court of Justice addressed the issue of direct discrimination as early as 1976 in the *Defrenne II* case.[28] The Court held that "direct and overt discrimination" could be identified simply by applying the criteria laid down in Article 141 (ex 119) EC itself. As an example it referred to discrimination originating in legislation or collective labour agreements which "may be detected on a purely legal analysis of the situation", and cases where men and women received "unequal pay for equal work carried out in the same establishment or service".[29]

In a later case, the Court held that in determining whether a refusal of employment on the grounds of pregnancy could be regarded as direct sex discrimination: "The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex."[30] Applying this test, the Court found that discrimination on the grounds of pregnancy was a form of direct sex discrimination, since only women could be refused employment for this reason. This was so even when no man existed with whom the pregnant woman could be compared.

The Race Directive and the Framework Employment Directive both contain (essentially identical) definitions of direct discrimination. The Race Directive therefore provides in Article 2(2)(a): "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin. "Crucial for the application of this definition is the identification of a "comparable situation", and no legislative guidance is given on this matter.

27. Under the Burden of Proof Directive (97/80/EC).

28. Case 43/75, *Defrenne* v. *Sabena*, [1976] ECR 455.

29. Para. 10. In this judgment the Court also gave a confusing definition of "indirect and disguised discrimination", stating that such discrimination could only be identified with the aid of more detailed implementing provisions adopted at either the Community or the national level. However, in subsequent cases the Court produced a more conventional definition of indirect discrimination (see below).

30. Case C-177/88, *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941, para 10.

The identification of a suitably placed comparator has also proved vital, and at times problematic, under sex discrimination law. The Court has therefore allowed comparisons to be made between a woman and a man who previously performed the same job,[31] but has rejected reference to hypothetical comparators outside the scope of discrimination on the grounds of pregnancy.[32] In contrast, the reference in the new legislative definition to one person being treated less favourably than "another . . . would be" arguably suggests that references to hypothetical comparators is allowed. If so, this will not only raise interesting questions concerning interpretation and application, but also result in greater protection from direct discrimination for the grounds covered by the new directives than currently exists with regard to sex discrimination.

3.2. *Indirect discrimination*

Prior to the adoption of a legislative definition of indirect discrimination under the Burden of Proof Directive, the European Court was called upon to elaborate the concept in the context of a number of sex discrimination cases. The definition which the Court developed, with no guidance from the Treaty or the directives, heavily influenced the subsequent legislative definition.

The Court elaborated on the notion of indirect discrimination with regard to sex in *Jenkins*[33] and *Bilka-Kaufhaus*.[34] Both cases involved situations in which part-time workers, who were mainly women, were paid a lower hourly rate than full-time workers, who were mainly men. After some initial confusion,[35] the Court held that if proportionately more women work part-time, the exclusion of those part-time workers from access to the higher rates of pay available to full-time workers, would be indirectly discriminatory and contrary to Article 141 EC where that exclusion could not be justified by factors unrelated to any discrimination on grounds of sex.[36] There was no necessity to establish an intention to discriminate on the part of the employer.

The Court has also been called upon to consider the validity of employment law which indirectly discriminates against women. *Rinner-Kühn*[37] concerned a German law which obliged an employer to provide sick pay to employees

31. Case 129/80,*MacCarthys Ltd.* v. *Smith*, [1980] ECR 1275.
32. *MacCarthys*, cited *supra*. Case C-200/91, *Coloroll* v. *Russel*, [1994] ECR I-4389.
33. Case 96/80, *Jenkins* v. *Kingsgate (Clothing Production) Ltd*, [1981] ECR 911.
34. Case 170/84, *Bilka-Kaufhaus.* v. *Weber von Hartz*, [1986] ECR 1607.
35. The earlier *Jenkins* judgment was ambiguous in that it was unclear whether it was sufficient for the employer to show that there was no intention to discriminate or whether the employer should go further and give an objective justification for the pay policy for the measure to be regarded as compatible with the Directive.
36. See para 36 of the *Bilka* case.
37. Case 171/88, *Rinner-Kühn*, [1989] ECR 2743.

who worked for more than ten hours a week or 45 hours a month. The Court found that the provision discriminated indirectly against women and therefore contravened Article 141 (ex 119) EC unless it could be objectively justified by the Member State showing that the means chosen met a necessary aim of its social policy and that the legislation was suitable for attaining that aim.[38]

In 1997 a legislative definition of indirect sex discrimination was included in the Burden of Proof Directive in Article 2(2):

> "For the purposes of equal treatment . . . indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex."[39]

In order to fall foul of this definition, the challenged provision or practice must affect members of a group, and not simply an individual. Establishing this impact has at times required the production of statistical evidence, and this has led to complicated and opaque decisions.[40]

The recently adopted Equality Directives contain a different definition of indirect discrimination. Article 2(2)(b) of the Race Directive therefore reads:

> "Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

The proposal for the Framework Employment Directive initially contained an alternative definition of indirect discrimination; however the adopted text essentially follows the Race Directive.

The key difference between the new definition and that found in the Burden of Proof Directive is that the latter requires that the "apparently neutral provision . . . disadvantage a substantially higher proportion of the members of one sex" whilst the former requires that the provision places persons "at a particular disadvantage compared with other persons." The test for establishing indirect discrimination contained in the new directives is arguably easier

38. But note that recent case law, and specifically Case C-167/97, *R.* v. *Secretary of State for Employment, ex parte Seymour-Smith*, [1999] ECR I-623, have suggested a weakening of the strict justification test applied in *Rinner-Kühn*. For more detailed comment see Barnard and Hepple, "Indirect discrimination: interpreting Seymour-Smith", 58 CLJ (1999), 399–412.

39. The proposed amendment to the Equal Treatment Directive incorporates this definition in the aforementioned Directive.

40. See *Seymour-Smith*, cited *supra* note 38, in which the European Court held: ". . . the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement impose by that measure" (para 65). For criticism of this judgment see Barnard and Hepple, op. cit. *supra* note 38.

to satisfy because the burden of proof for establishing the necessary level of adverse treatment seems to be simpler to meet. In particular, the Commission seemed to want to reduce the need to rely on statistical evidence for establishing disadvantage. Odile Quintin, the Director-General for Employment and Social Affairs at the Commission, defended the new definition on the grounds that it removed the need to demonstrate statistically that indirect discrimination had in fact occurred. She argued that the new definition would be easier to apply than the definition in the Burden of Proof Directive which "needs to have a statistical assessment and, very frankly, the statistical assessment is something which is extremely complicated to develop for other areas of discrimination."[41] However, one should note that the Preambles to both the new directives state:

> "The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence."[42]

The use of statistical evidence may therefore remain an element of case law with regard to indirect discrimination under the new directives.

One should also note that the Framework Employment Directive allows a further justification for a provision or practice which results in indirect discrimination, in addition to the standard "objectively justified" test. A provision which indirectly discriminates against people with disabilities will not fall foul of the Directive if the employer or covered entity provides a reasonable accommodation to eliminate the disadvantages resulting from the provision or practice.[43] One could argue that this clause allows for indirect discrimination against people with disabilities to continue, as long as some (minor) adjustment is made to accommodate the specific situation of the individual. One could question whether such accommodations will, in all cases, actually remove the disadvantage experienced by people with a disability. For instance, the provision of suitable ramps at all entrances to a workplace would remove any disadvantage experienced by people who use wheelchairs or who are otherwise mobility restricted with regard to gaining access to the workplace. However, the provision of a ramp at only one entrance to a workplace which has multiple entries would not remove all the disadvantages,

41. Speaking on the Race Directive definition. See Oral Evidence to the House of Lords, Select Committee on the European Union, "EU Proposals to Combat Discrimination", Session 1999–2000, 9th Report, 25.

42. Recital 15 of the Race Directive and Recital 16 of the Framework Employment Directive.

43. Art. 2(b). The obligation to make a reasonable accommodation for people with a disability is discussed in more detail below.

as it would limit the options available to users of wheelchairs. Therefore, depending on how this provision is interpreted, it could actually allow for the continuance of some instances of indirect discrimination against people with disabilities, thus providing a lower degree of protection for this group.

4. Harassment

The Equal Treatment Directive is silent on the subject of sexual harassment. However, in 1991, a Commission Recommendation on the protection of the dignity of women and men at work stated: "such conduct may, in certain circumstances, be contrary to the principle of equal treatment".[44] Nonetheless, subsequent attempts to amend the Directive to prohibit explicitly harassment proved unsuccessful.[45] In this light, the Race and Framework Employment Directives mark a significant breakthrough as harassment is expressly forbidden in both directives, and the definition of harassment is quite broad. "Harassment shall be deemed to be discrimination ... when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."[46] The main area of concern in relation to this provision is the reference to national law and practice in the final sentence. On the one hand, this should not take away from those elements of harassment already defined in Article 2(3). On the other, it would logically imply that those aspects of harassment *not* defined in Article 2(3) remain a matter for national law; for example, the liability of employers, schools, universities, hospitals, landlords for failing to prevent harassment.

The proposed amendment to the Equal Treatment Directive would insert a similar, but not identical, prohibition of harassment. The amendment additionally specifies that unwanted conduct will be unlawful harassment "in particular if a person's rejection of, or submission to, such conduct is used as a basis for a decision which affects that person."[47] This provides further detail on the definition in the Race and Framework Employment Directives, but it does not necessarily imply a broader scope, as such behaviour should also be contrary to the more general definition of harassment in those directives.

44. O. J. 1992, L 49/1.
45. Commission (1996) "Consultation of management and labour on the prevention of sexual harassment at work", COM (96) 373, 24 July 1996.
46. Art. 2(3) Race Directive; a similar provision is found in Art. 2(3) of the Framework Employment Directive.
47. Art. 1(2).

It is also notable that the Commission does not propose to refer to national law in the definition of sexual harassment, however given this element in the Race and Framework Employment Directives stemmed from an amendment in the Council, it may be that the final text of the Equal Treatment Directive amendment contains a provision to the same effect.

5. Additional protection on specific grounds:[48] Reasonable accommodation and people with disabilities

One of the more controversial elements of the Framework Employment Directive involved the inclusion of a provision requiring reasonable accommodations for people with disabilities. The original proposal classified an unjustified refusal to make such an accommodation as a form of discrimination; however, the adopted text simply provides for an obligation to make such an accommodation with no reference to discrimination:

> "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to provide training for such a person, unless such measures would impose a disproportionate burden on the employer. When this burden is, to a sufficient extent, remedied by existing measures as an element of disability policy in the Member State, it should not be considered disproportionate."[49]

This provision follows modern national disability employment non-discrimination laws,[50] which recognize that in order to ensure equality of opportunity for people with disabilities it is necessary to address work practices and barriers within the physical environment which tend to exclude (some) people with disabilities. The provision also acknowledges the existence of numerous elements of national disability policies designed to promote the employment of people with disabilities by providing financial, training or technical support to workers or employers, which will reduce the instances in

48. In addition to the grounds mentioned below, the Equal Treatment Directive allows for provisions "concerning the protection of women, particularly as regards pregnancy and maternity" (Art. 2(4)). For reasons of space this provision is not examined in this article. For commentary on this provision, see Barnard, *EC Employment Law*, 2nd ed. (Oxford, Oxford EC Law Library, 2000), pp. 242–244.

49. Art. 5.

50. See the United Kingdom's Disability Discrimination Act 1995, Ireland's Employment Equality Act 1998 and Sweden's Law Prohibiting Discrimination in Working Life on Grounds of Disability 1999.

which the making of an accommodation will amount to a "disproportionate burden". However, one can question why the requirement to make a reasonable accommodation only applies in the case of people with disabilities. The obligation initially arose in relation to religious discrimination in North America, and in Canada an obligation to make a reasonable accommodation exists in relation to all grounds covered by the Charter of Fundamental Freedoms and the Federal Human Rights Act.[51] However, one should note that Community law already imposes a similar requirement on employers with regard to pregnant workers and workers who have recently given birth, albeit that this obligation is not labelled a "reasonable accommodation". Under Directive 92/85[52] employers are required to "temporarily adjust . . . the working conditions and/or the working hours of the worker" in order to avoid exposing such workers to health and safety risks. It is submitted that this amounts to a limited reasonable accommodation requirement.

6. Exceptions to the non-discrimination principle

6.1. *Exceptions covering more than one ground*

The Equal Treatment Directive, the Race Directive and the Framework Employment Directive all contain provisions allowing for different treatment based on a relevant occupational requirement. This justification is listed as one of the three exceptions to the general non-discrimination principle found in Article 2 of the Equal Treatment Directive.[53] The relevant provision reads:

> "This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, that training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."

In interpreting this provision the Court of Justice has read a proportionality principle into the Directive requiring: ". . . that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view . . . ."[54] Following this case law, the proportionality principle has been

51. The grounds covered under Canadian law include, *inter alia*, those mentioned in Art. 13 EC.

52. Directive 92/85 on the Safety and Health at Work of Pregnant Workers and Workers who have recently given birth or are breastfeeding, O.J. 1992, L 348/1.

53. In Art. 2(2). The other two exceptions concern the protection of women, particularly as regards pregnancy and maternity and positive action (see below).

54. Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 38.

expressly included in the relevant clauses in the Race and Framework Employment Directives, and in the proposal to amend the Equal Treatment Directive.

Unlike the Equal Treatment Directive, the two newer directives treat the occupational requirement exception in a separate and specific article under the heading "genuine and determining occupational requirements" or "occupational requirements" respectively. The Race Directive provides:

> "... Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."[55]

An essentially identical provision is included in the Framework Employment Directive.[56]

The newer directives therefore focus on individual differences in treatment related to particular occupational activities. In contrast, the exception in the Equal Treatment Directive focuses on whole categories of occupational activities, and additionally refers to training,[57] suggesting that the relevant provision may in fact be broader than that found in the recent directives. However, the proposal to amend the Equal Treatment Directive would essentially bring this instrument into line with the new directives with regard to this exception, presumably thus eliminating any difference in approach or interpretation.

With regard to indirect discrimination, in addition to the well established "objective justification" exception, the Framework Employment Directive provides for two interesting exceptions not found elsewhere in Community equality legislation. Article 2(5) states that the Directive "shall be without prejudice to measures laid down by law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for health protection and for the protection of the rights and freedoms of others". Since a similar provision was not included in any of the other equality directives, one can speculate why it was necessary in a measure addressing discrimination on the grounds of religion or belief, disability, age and sexual orientation. This is particularly so given the existence of the occupational requirements exception and a number of other ground-specific exceptions referred to below.

55. Art. 4.
56. Art. 4(1).
57. However, the term "occupational activities" found in the newer Directives could almost certainly be interpreted to cover vocational training.

Finally the Framework Employment Directive also includes an interesting exception covering only two of the four grounds addressed in that Directive. Article 3(4) provides that "Member States may provide that this Directive, in so far as it relates to discrimination on grounds of disability or age, shall not apply to the armed forces." Again, one can question whether this provision was necessary in light of the existence of the occupational requirement exception.

6.2. *Age discrimination*

The exception provided in respect of age discrimination is qualitatively different from the provisions applicable to all the other grounds of prohibited discrimination. For all other grounds, a general principle has been established that *direct* discrimination can rarely be justified, and only then by reference to the specific exceptions provided in the relevant legislation. In contrast, the Framework Employment Directive provides an open-ended possibility for Member States to justify direct age discrimination. Article 6(1) provides that "differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary." This provision is complemented by a *non-exhaustive* list of examples of situations where direct age discrimination could be justified.[58] It is striking that age limits on recruitment, which might be regarded as a classic example of why age discrimination legislation is necessary, is specifically listed as an example of justifiable discrimination.

The inherent flexibility of the provisions on age discrimination leaves a wide space for discretion within implementing legislation at the national level. Ultimately, the provisions on age discrimination are perhaps best compared to the case law of the European Court of Human Rights in respect of Article 14 of the Convention.[59] The Strasbourg Court accepts that any form of discrimination potentially may be justified where the measure in question pursues a legitimate aim and is a proportionate means to achieving this aim.[60]

58. Art. 6.

59. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

60. E.g. *Belgian Linguistic Case (No. 2)* (1979–80), 1 *European Human Rights Reports*, 252 at para 32. See further, Dixon, "Freedom of discrimination in respect of Convention rights" in Lester and Pannick (Eds.), *Human rights law and practice* (Butterworths, 1999), p. 225 et seq.

A similar scheme appears to apply now in relation to age discrimination in Community law.

6.3. *Discrimination on grounds of religion or belief*

One of the most controversial issues in the drafting and negotiation of the Framework Employment Directive was whether or not there should be a specific exception in respect of religious discrimination. Churches and other religious organizations argued in favour of a wide exception in respect of their own employment practices.[61] Article 4(2) of the Framework Employment Directive aims to provide a balance between the competing values of equality and religious liberty. However, the difficult negotiations surrounding this provision are reflected in the complexity of the final text. First, this exception only protects national rules or practices already in existence at the time of the adoption of the Directive. Second, it provides that with regard to occupations in churches, or other bodies with a religious ethos, it will not be unlawful discrimination to take into account the religion or belief of an individual, "where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement". However, this is balanced by a commitment that it "should not justify discrimination on another ground". Therefore, organizations with a religious ethos will be able to refuse to employ individuals of a different religion or belief where the nature or context of the position in question justifies such a difference of treatment.

Nonetheless, a "hard case" scenario still arises where, for example, a lesbian woman, who is also a practising Catholic, applies to teach in a Catholic school. The school cannot refuse to employ her because of her sexual orientation; this would be direct discrimination forbidden by the Framework Employment Directive and not protected by Article 4(2). Equally, it will be difficult for the school to justify a refusal to employ her on the grounds of religion or belief. The second paragraph of Article 4(2) aims to deal with this situation by stating that churches and other bodies with a religious ethos may "require individuals working for them to act in good faith and with loyalty to the organization's ethos". Whilst this formulation is clearly designed to reassure religious employers, courts interpreting this provision will also have to keep in mind fundamental human rights, in particular, respect for private and family life.

One further exception to the provisions on religion or belief is found in Article 15 of the Framework Employment Directive. This provides exemp-

61. See, *inter alia*, Christian Institute, *European threat to religious freedom – a response to the European Union's proposed employment directive* (Christian Institute, 2000).

tions in relation to the recruitment of police and teachers in Northern Ireland. In relation to the police, this exception is designed to protect the special arrangements intended to raise significantly the participation of the Catholic community in Northern Ireland's police service.[62] The exception for teaching in Northern Ireland reflects the fact that most schools continue to be segregated by religion there.

7. Positive action

The scope for positive action in Community sex equality law has given rise to significant debate in recent years.[63] The Equal Treatment Directive provided an exception for positive action measures in Article 2(4): "this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities . . . ." The Court of Justice has since had four opportunities to consider the meaning of this provision.[64] In its most controversial decision, *Kalanke*, the Court stressed that "as a derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly."[65]

The 1999 Treaty of Amsterdam inserted a new provision on positive action in the EC Treaty, Article 141(4): "with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." Although this provides a more positive formulation than the terms of Article 2(4) of the Directive, the Court's initial interpretation of Article 141(4) EC suggests it does not significantly increase the scope for positive action.[66]

The Court has consistently maintained since *Kalanke* that it will not accept positive action schemes which produce "equal results" through automatic mechanisms *at the selection stage*. At the same time, it must also be acknowledged that the Court is willing to permit a wide range of positive action

62. A strict quota of 50% Catholic recruitment has been established for the future Police Service of Northern Ireland; s. 46, Police (Northern Ireland) Act 2000.

63. For an overview, see Mancini and O'Leary "The new frontiers of sex equality law in the European Union", 24 EL Rev. (1999), 331–353.

64. C-450/93, *Kalanke* v. *Freie Hansestadt Bremen*, [1995] ECR I-3069; C-409/97, *Marschall* v. *Land Nordrhein-Westfalen*, [1997] ECR I-6363; C-158/97, *Badeck* v. *Hessischer Ministerpräsident*, Judgment of 28 March 2000, nyr; C-407/98, *Abrahamsson and Anderson* v. *Fogelqvist*, Judgment of 6 July 2000, nyr.

65. *Kalanke*, ibid. p. 3078.

66. *Abrahamsson*, cited *supra* note 64.

measures, including strict quotas, *prior to the point of employment selection*. For example, in *Badeck* the Court was prepared to accept measures which imposed a strict quota reserving at least 50% of training places for women, and requiring at least 50% of all candidates invited to interview to be women.[67] Moreover, the Court has not rejected all forms of positive action at the point of selection, but simply requires that these are *flexible* in nature and guarantee an *objective and individual* assessment of all candidates.[68]

Interestingly, the proposed amendments to the Equal Treatment Directive would delete Article 2(4).[69] Instead, all positive action schemes would find their legal foundation in Article 141(4) EC. Moreover, a new Article 2(4) would require the Commission to publish a triennial report on the application of positive action in the Member States.[70]

Article 5 of the Race Directive provides: "with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin." Whilst this text closely follows that found in Article 141(4) EC, it omits the positive element of that Article, notably the possibility of conferring "specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity". Therefore, if anything, Article 5 of the Race Directive is more restrictive than Article 141(4) EC. Similarly, Article 7(1) of the Framework Employment Directive only lifts the "positive action as compensation for past wrongs" dimension from Article 141(4) EC.[71] Nonetheless, in the light of the decision in *Abrahamsson*, it is not evident that these textual differences will result in a significantly altered scope for positive action. The Court declined an opportunity to make a fresh start on positive action in Community law, but rather it has woven Article 141(4) EC into the principles already established through its existing case law. On this basis, it can be anticipated that the Court will seek to extend these general principles on positive action to the other grounds of discrimination enumerated in Article 13 EC.

Nonetheless, given the limited body of case law which exists, there remains a variety of positive action schemes which have yet to be tested for their compatibility with the principles developed by the Court. For example, whilst in *Badeck* the Court was willing to permit training schemes which reserved 50%

67. *Badeck*, paras. 55 and 63.
68. *Marschall*, para. 35.
69. COM (2000) 334, p. 16.
70. Ibid.
71. "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the discriminatory grounds referred to in Art. 1."

of the places for women, how would the Court regard training schemes which are exclusively provided for persons of a particular ethnic origin?[72] A further potentially challenging issue is the compatibility of employment quotas for people with disabilities with the Framework Employment Directive. At present, ten of the fifteen Member States of the European Union provide for some form of (obligatory) quotas,[73] and in countries such as France and Germany quotas are regarded as an intrinsic element of disability employment policy. Such schemes would naturally fall foul of the test established in *Kalanke*. However, the Court may regard the different social context for each ground of discrimination as justifying a change in the scope for positive action.

Article 7(2) of the Framework Employment Directive provides additional protection for positive action in respect of people with disabilities. It states that "with regard to disabled persons, the principle of equal treatment is without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment." The latter element of this provision appears to stem from proposals of the Dutch delegation,[74] reflecting a desire to protect existing elements of Dutch law which provide for preferential treatment of disabled persons in order to support their reintegration into the workforce.[75] It is less clear how the reference to health and safety law in this context relates to positive action for disabled persons. The most logical explanation is that this provides Member States with the possibility to adapt their health and safety regimes to take account of the particular situation of disabled workers. This reinforces certain existing obligations on employers imposed under health and safety directives.[76] However, there is also a risk that excessively protectionist measures ostensibly designed to guarantee the

72. For example, this is permitted under s. 37 and s. 38 of the British Race Relations Act 1976.

73. For further information see Waddington, "Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws", 18 *Comparative Labor Law Review* (1996), 62–101.

74. EU Council (2000) "Outcome of proceedings of the Working Party on Social Questions of 14 and 28 March 2000", 6941/00, Brussels, 31 March 2000, at pp. 5–6.

75. Specifically Art. 7 of the Wet op de (re)integratie arbeidsgehandicapten. See Waddington, "Tweede-generatie richtlijnen Gelijke Behandeling: de nieuwe Richtlijn inzake gelijke behandeling ongeacht ras of etnische afstamming en de Kaderrichtlijn gelijke behandeling in arbeid en beroep", 12 *Sociaal Recht* 2000, 357–362.

76. See e.g. Directive 89/391/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, O.J. 1989, L 183/1, Art. 15.

health and safety of workers with a disability, could in fact result in the exclusion and denial of equal treatment to people with disabilities.[77]

8. Victimization

The importance of taking action to combat victimization following the making of a complaint or taking legal action designed to enforce the equality rights guaranteed by Community law was already recognized in the Equal Treatment Directive. Article 7 of the Directive requires Member States to "take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."

The new directives also contain provisions designed to combat victimization. The Race Directive therefore obliges Member States to "introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment."[78] The Framework Employment Directive which, like the Equal Treatment Directive is confined to the area of employment, follows the structure of the Race Directive and provides for protection of "employees against dismissal or other adverse treatment by the employer . . . ".[79]

It therefore seems the new directives, with their references to "any adverse treatment or adverse consequences" or "dismissal or other adverse treatment" provide a greater degree of protection from victimization than found in the Equal Treatment Directive where reference is only made to "dismissal" in reaction to a complaint. However, one should note that the Court of Justice has effectively expanded the protection from victimization under the Equal Treatment Directive in *Coote*.[80] The complainant, who had previously brought a claim of sex discrimination against Granada, alleged that her subsequent difficulties in finding new employment were caused by Granada failing to provide her with a reference. She argued that this failure was in reaction to her previous sex discrimination claim, and that she was being victimized. The Court recognized that Article 7 of the Equal Treatment Directive was confined to protecting workers against dismissal, but noted that:" it is not . . . to be inferred from Article 7 of the Directive that the legislature's intention

77. For a consideration of this problem from a British perspective see J. Davies and W. Davies, "Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State", 29 *Industrial Law Journal* (2000), 347–377.

78. Art. 9.

79. Art. 11.

80. Case C-185/97, *Coote* v. *Granada Hospitality Ltd*, [1998] ECR I-5199.

was to limit the protection of workers against retaliatory measures decided on by an employer solely to cases of dismissal . . . ."[81] The Court therefore found that the Directive did require Member States to introduce measures to protect workers from this form of victimization, even when the adverse treatment occurred after the employment relationship had ended. However, this obligation was not based on Article 7 of the Directive, but on Article 6, which requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves the victim of discrimination "to pursue their claims by judicial process". The Court found that:

> "The principle of effective judicial control laid down in Article 6 of the Directive would be deprived of an essential part of its effectiveness if the protection which it provides did not cover measures which . . . an employer might take as a reaction to legal proceedings brought by an employee with the aim of enforcing compliance with the principle of equal treatment."[82]

Case law therefore makes it clear that protection from victimization under the Equal Treatment Directive extends beyond the situation in which a worker is dismissed following a complaint. In practice the protection provided by the three directives may therefore be very similar, if not identical. However, the newer directives clearly specify the level of protection provided, whilst the wording of the Equal Treatment Directive at least appears to be far more limited, and is therefore misleading.

9. Enforcement

9.1. *Provisions on the burden of proof*

Legislative provisions on the burden of proof in sex discrimination cases were only introduced at the end of 1997,[83] although the underlying principles had previously been established in the case law of the Court of Justice.[84] Reflecting its relatively recent nature, it is unsurprising that almost identical provisions have been transposed to the Race and Framework Employment Directives. The 1997 Directive provides for a shift in the burden of proof from the plaintiff to the respondent, where "persons who consider themselves

81. Para 27.
82. Para 24.
83. Council Directive 97/80.
84. C-109/88, *Handels- og Kontorfunktionaerernes forbund i Danmark* v. *Danfoss*, [1989] ECR 3199, C-127/92, *Enderby* v. *Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535.

wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination . . . ".[85] This provision is subject to three provisos: it does not prevent the Member States introducing rules of evidence more favourable to plaintiffs;[86] it does not have to be applied where it is for the court or other competent body to investigate the facts;[87] and it shall not apply to criminal proceedings.[88] All these elements are similarly present in the Race and Framework Employment Directives.[89]

If the definitions are essentially identical, there are important differences in the scope of application. The 1997 Directive does not apply the burden of proof provisions to the directives governing equal treatment for women and men in occupational social security schemes.[90] In contrast, the burden of proof provisions in the Race Directive apply throughout its material scope, which includes social protection.[91] Nonetheless, it must be recognized that several Member States have hitherto relied mainly on criminal law sanctions for racial discrimination, whereas civil law procedures are more familiar in the context of sex discrimination.[92] Therefore, the real application of the burden of proof provisions to racial discrimination cases may actually be considerably more restricted in practice.

The Framework Employment Directive contains an important qualification to the burden of proof provisions in its preamble. Recital 31 states "it is not for the respondent to prove that the plaintiff belongs to a particular religion, has a particular belief, has a particular disability, is of a particular age or has a particular sexual orientation." On the one hand, establishing one's age will not normally be particularly burdensome.[93] However, real difficulties can be anticipated in respect of the other grounds. For example, whilst it may be easy for a gay man in a long-term relationship, or who is open about his sexuality to his family and friends, to establish his sexual orientation, this is considerably more problematic where the individual has kept their sexuality private or

85. Art. 4(1).
86. Art. 4(2).
87. Art. 4(3).
88. Art. 3(2).
89. Art. 8, Race Directive; Art. 10, Framework Employment Directive.
90. Art. 3(1).
91. Art. 3(1)(e), Race Directive.
92. States which have relied on criminal law sanctions for racial discrimination include Spain, France, and Luxembourg. See further, Wrench, *Preventing Racism at the Workplace – a report on 16 European countries*, Report to the European Foundation for the Improvement of Living and Working Conditions. (OOPEC, 1996).
93. Although one exception to this assertion is in relation to migrants who can lack the relevant or reliable documentation. E.g. Case C-102/98 and 211/98, *Kocak* v. *Landesversicherungsanstalt Oberfranken und Mittelfranken; Örs* v. *Bundesknappschaft*, Judgment of 14 March 2000, nyr.

where the man has had few, if any, relationships. Establishing sexual orientation in this context would also potentially conflict with the individual's right to respect for their private and family life. Likewise, establishing a disability has already proven a significant obstacle under disability anti-discrimination law in the UK[94] and the US.[95]

9.2. *Legal standing*

One of the principal weaknesses identified with the Equal Treatment Directive was its reliance on individual litigation.[96] Victims face a range of obstacles in bringing discrimination cases, amongst which financial and emotional costs are some of the most significant. Recognition of the need to provide better support for individual litigants is a prominent theme in both the Race and Framework Employment Directives, as well as the proposed amendments to the Equal Treatment Directive. One method of achieving this is to encourage the participation of relevant associations in supporting individual litigation.[97] The Race and Framework Employment Directives contain identical provisions permitting organizations "with a legitimate interest"[98] to "engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive".[99]

Surprisingly, the proposed amendment to the Equal Treatment Directive does not seek to continue with the same definition of legal standing. On the one hand, there is to be no restriction of the range of organizations which can enjoy legal standing according to the "legitimate interest" criterion included in the other directives. On the other, the proposed amendment only provides for intervention "on behalf of the complainant with his or her approval",[100] thereby omitting the possibility of organizations supporting a complainant without necessarily assuming the representation of their case. There is no apparent reason justifying the difference in the texts proposed in this instance.

94. See further, *Goodwin* v. *The Patent Office*, [1999] IRLR 4.
95. See further e.g. *Sutton* v. *United Air Lines, Inc.*, 527 U.S., 119 S. Ct. 2139 (1999).
96. See generally Blom, Fitzpatrick, Gregory, Knegt & O'Hare, *The Utilization of Sex Equality Litigation in the Member States of the European Community*, V/782/96-EN (Report to the Equal Opportunities Unit of DG V, 1995), especially pp. 58–59.
97. This model is already present in several Member States' national anti-discrimination laws, including the Netherlands, France, Belgium and Luxembourg.
98. This is to be determined "in accordance with criteria laid down by their national law".
99. Art. 7(2), Race Directive; Art. 9(2), Framework Employment Directive.
100. COM (2000) 334, Art. 1(6).

9.3. *Equal treatment bodies*

As explained above, in certain national legal systems support for individual litigants traditionally has been derived from the activities of relevant associations, facilitated by their enjoyment of legal standing. However, an alternative approach – found in States such as Ireland, the UK, Netherlands and Sweden – has been to support individual litigation through equality agencies. This model is also found in the Race Directive, which requires Member States to establish "a body or bodies for the promotion of equal treatment".[101] These bodies must, as a minimum, be able to provide "independent assistance to victims of discrimination in pursuing their complaints"; conduct "independent surveys concerning discrimination"; and publish independent reports and recommendations on issues relating to discrimination.[102]

The proposed amendments to the Equal Treatment Directive also foresee the creation of such bodies, albeit with significantly enhanced powers in comparison to those provided for in the Race Directive. In particular, the bodies in this instance will enjoy the competence to "receive and *pursue* complaints from individuals", as well as "starting *investigations* or surveys" concerning sex discrimination.[103] However, this formulation was also proposed initially by the Commission for the Race Directive, only to be diluted by the Council. Therefore, it may be that the final text of the amended Equal Treatment Directive will more closely mirror that of the Race Directive.

The Framework Employment Directive is distinguished from the other directives by the absence of any provision for an independent equal treatment agency. As a result, depending on national implementing legislation, individuals who feel they have been harassed because of both their race and their religion would find themselves in an anomalous position where the relevant body may be empowered to assist with their complaint of racial harassment, but could not intervene in relation to the complaint of religious harassment. This rests uncomfortably with the declared recognition of "multiple discrimination" in the preambles to both the Race and Framework Employment Directives.[104]

9.4. *Sanctions*

Another instance where the directives aim to ensure better enforcement of their provisions is in the area of sanctions. The Equal Treatment Directive does

101. Art. 13(1).
102. Art. 13(2).
103. Emphasis added, Art. 1(6).
104. Recital 14, Race Directive; Recital 3, Framework Employment Directive.

not provide detailed provisions on sanctions for a breach of its obligations, however in a series of decisions the Court of Justice applied the general principle of effective judicial protection in order to establish minimum standards in national remedies for sex discrimination cases.[105] The Race and Framework Employment Directives specify certain principles which must govern national remedies in discrimination cases, whilst at the same time continuing to leave the detailed application of these principles to national discretion. The directives state that "sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive."[106] Whilst a similar formulation is also proposed in the amendments to the Equal Treatment Directive,[107] additional provisions will go further. In particular, Article 1(5) proposes to oblige Member States to "introduce into their national legal systems such measures as are necessary to ensure that reparation for the loss and damage sustained by a person injured as a result of discrimination . . . may not be limited by an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the lapse of time until actual payment of the capital sum awarded." This is a strikingly detailed provision, but which can be justified as a simple attempt to codify in the legislation the principles already established by the Court of Justice, most notably in its decision in *Marshall (no. 2)*.[108] Perhaps understandably, the Commission did not feel sufficiently bold to anticipate the judicial extension of these principles to the other directives, however the shared commitment to "effective, proportionate and dissuasive" sanctions for each of the directives implies that the Court should demand equivalent standards in the remedies provided for each ground of discrimination.

10. Conclusion

Taking an overview of the various directives, there are clear areas of shared ground, particularly if one assumes the successful amendment of the Equal Treatment Directive. Nonetheless, substantive differences continue to exist between the directives, especially in terms of material scope, permitted exceptions and enforcement mechanisms. Indeed, in several cases the texts of the directives diverge without any evident justification. Arguably, more attention

105. E.g. Case C-271/91, *Marshall* v. *Southampton and South-West Hampshire Area Health Authority*, [1993] ECR I-4367; C-180/95, *Draehmpaehl* v. *Urania Immobilienservice*, [1997] ECR I-2195.
106. Art. 15, Race Directive; Art. 17, Framework Employment Directive.
107. Art. 1(6).
108. Cited *supra* note 105.

should be paid in the future to ensuring that the texts of the various directives diverge only where a clear and pressing reason exists to support this.

Although rhetorical commitments have been made to the equal treatment of all discrimination grounds,[109] a clear hierarchy of equalities continues to exist – indeed, if anything it has been reinforced. Sex equality, from a position of historical dominance in Community anti-discrimination law, has been displaced by racial equality. The commitment by the Commission to submit a further directive on areas of sex discrimination beyond employment in 2002 promises a medium-term reduction in the disparity between race and sex discrimination,[110] however this rests on the hypothetical prospect of unanimous agreement in a future Council composed of as yet unknown governments. Therefore, at least in the short to medium term, the equality hierarchy will remain entrenched, with race discrimination at its peak. The discrimination grounds found in the Framework Employment Directive emerge as the "poor relations" within this scheme. Moreover, an internal hierarchy between these grounds also exists, with age discrimination very firmly at the bottom of the heap.

The equality hierarchy created by the Union is not the result of a particular design for EU anti-discrimination law; it is very much the product of political pragmatism. The primary position now given to racial discrimination reflects a variety of contemporary factors. First, there has been growing awareness and concern surrounding racism in Europe. This has been manifested in high-profile incidents of violent racism, the electoral successes of extreme right-wing political movements, racially motivated conflict in the Balkans, and evidence of discrimination against certain national minorities, particularly the Roma, in the applicant States. Moreover, these trends shadow closely the persistent difficulties in managing both internal and external migration in Europe. The many criticisms of European immigration and asylum policies, popularly summarized in the idea of a "Fortress Europe", have pressed the European Union to provide some evidence of a more balanced approach to the treatment of migrants and ethnic minorities. These different threads crystallized in the alarm at the entry into government of Jorg Haider's Freedom Party in Austria during exactly the period in which the Race Directive was being discussed in the Council. This provided an irresistible momentum for the Council to take a symbolic and substantive step in the fight against racism.

The other grounds of discrimination have not yet generated the same sense of urgency in the eyes of the EU institutions. Moreover, there was already a significant body of national legislation on combating racial discrimination,

109. E.g. Recital 5 of Council Decision of 27 Nov. 2000 establishing a Community action programme to combat discrimination (2001 to 2006), O.J. 2000, L 303/23: "the different forms of discrimination cannot be ranked: all are equally intolerable."

110. Commission (2000) "Social Policy Agenda" COM (2000) 379, par. 4.2.3.2.

whereas the picture is more uneven in relation to religion, disability, sexual orientation and especially age. This is reflected in the variety of general and specific exceptions in the Framework Employment Directive designed to avoid disruption to the peculiarities of different national legal regimes.[111] On the one hand, the Commission's strategy of going as far as politically possible with each ground of discrimination might be regarded as a retrospective success – there can be no doubt that the Race Directive is considerably more rigorous than the generalist Framework Employment Directive. Against this, there is the potential for the disruption of national laws where an integrated approach has previously been adopted, although Member States remain free to provide a higher level of protection than that obliged by the directives. However, it will remain difficult to explain to citizens why one form of discrimination enjoys a higher level of protection in law than another.

Overall, the directives should make a very valuable contribution to combating discrimination across the Union. If one considers the impact of the Equal Treatment Directive during the last 25 years, it is possible to grasp the potential importance of these new directives. Nonetheless, they should not be seen as the first and final steps. Significant gaps have been created between the different equality regimes now in place, which will surely require reconsideration in the future. In this light, these directives are perhaps best regarded as building blocks upon which the European Union can now continue to build a body of equality law.

111. The exception for Northern Ireland in Art. 15 is the most transparent example of this.