The Development of a New Generation of Sex Equality Directive

The Development of a New Generation of Sex Equality Directives

After more than twenty years during which sex was the focus of the EC's equality initiatives, the Amsterdam Treaty resulted in a shift in the legislator's attention to the grounds covered in the newly inserted non-discrimination clause, Article 13 EC. This Article gave the EC the competence to tackle discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, in all areas falling within the scope of the Treaty. The result was the rapid adoption, in 2000, of two directives prohibiting firstly, race and ethnic origin discrimination in a wide range of areas (the Race Directive),[1] and secondly, employment discrimination on the grounds of the religion and belief, disability, age and sexual orientation (the Framework Employment Directive).[2] These second generation equality initiatives built on the experience of the older sex discrimination directives,[3] but, in a number of important respects, went beyond those earlier instruments. The result was a noticeable difference

1. Directive 2000/43/EC implementing the principle of Equal Treatment between persons irrespective of racial or ethnic origin, [2000] O.J. L180/22.
2. Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation, [2000] O.J. L303/16.
3. Directive 75/117/EEC on Equal Pay for Men and Women, [1975] O.J. L45/19; Directive 76/207/EEC on Equal Treatment for Men and Women as regards access to Employment, Vocational Training and Promotion, and Working Conditions, [1976] O.J. L39/40; Directive 79/7/EEC on Equal Treatment for Men and Women in matters of Social Security, [1979] O.J. L6/2; 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, [1986] O.J. L359/56; Directive 86/378/EEC on Equal Treatment for Men and Women in Occupational Social Security Schemes, [1986] O.J. L225/40 as amended by Directive 96/97, [1997] O.J. L46/20; Directive 92/85/EEC on the Safety and Health at Work of Pregnant Workers and Workers who have recently given birth or are breastfeeding, [1992] O.J. L348/1; Directive 97/80/EC on the Burden of Proof in cases of Discrimination based on Sex, [1998] O.J. L14/6.

between the sex Directives and the newer Article 13 Directives in areas such as the definition of discrimination, material scope and enforcement mechanisms.[4]

Now that the initial excitement concerning Article 13 and the new equality directives has died down, the EC legislator has turned its attention to updating the older Directives and to ironing out some of these differences in order to achieving greater coherency between gender equality law and the 2000 Directives. The result has been the amendment of the long-standing Equal Treatment Directive[5] and the proposal for a new gender equality directive concerning access to and supply of goods and services.[6] In contrast to the academic interest which the two Article 13 Directives attracted, little attention has thus far been paid to these (proposed) alterations to gender equality law. It is however worth reflecting, at least briefly, on these developments. They will result in important changes to sex non-discrimination law but, at the same time, will only partially eliminate the differences currently found in Community equality law more generally.

One area which has been affected is the concept of discrimination itself. The amended Equal Treatment Directive and the proposed goods and services Directive have both followed the Race and Framework Employment Directives by incorporating new definitions of direct and indirect discrimination. However, the latest Directives cannot directly impact on the Court's interpretation of discrimination under Article 141 EC concerning equal pay for men and women.

The legislator opted not to utilize the long-standing definition of discrimination which had been developed through legislation and case law in the field of gender equality in the two Article 13 directives adopted in 2000. Instead new definitions of both direct and indirect discrimination, which were broader in scope, and arguably easier to prove than their predecessors, were included in both of the Directives. These Directives specified that 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 a prohibited ground.[7] This definition, as is usual, turns on the issue of comparison and

4. For further comment see Lisa Waddington and Mark Bell, 'More Equal than Others: Distinguishing European Union Equality Directives', 38 *Common Market Law Review* 3 (2001), 587-611.
5. Directive 76/207/EEC on Equal Treatment for Men and Women as regards access to Employment, Vocational Training and Promotion, and Working Conditions, [1976] O.J. L39/40 and Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2002] O.J. L269/15.
6. Proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services. Brussels, 5.11.2003, COM(2003) 657 final, 2003/0265 (CNS).
7. Article 2 (2) (a) of both directives.

allows for contemporaneous, historical and hypothetical comparisons to be made. The equivalent concept under sex equality law had not been defined in legislation, prior to the amendment of the Equal Treatment Directive, but the European Court of Justice had elaborated on various elements of the principle. In particular, in the context of a case concerning equal pay for men and women which fell under Article 141 EC (ex 119 EEC), the Court had allowed comparisons to be made between a woman and a man who previously performed the same job,[8] but rejected the possibility of hypothetical comparisons.[9] This case law was also applied to secondary legislation addressing sex equality.

The amended Equal Treatment Directive incorporates the newer definition of direct discrimination found in the Race and Framework Employment Directive, thereby extending this approach to sex discrimination in a broad range of employment related areas, including pay as provided for under the Equal Pay Directive. However, as secondary legislation, the amended Directive cannot directly influence the Court's case law under Article 141 EC, where the rejection of hypothetical comparisons was originally established. Therefore, whilst hypothetical comparisons are required with regard to direct discrimination on the grounds of race and ethnic origin, religion and belief, disability, age and sexual orientation, and will be required with regard to most areas of sex discrimination once the amended Equal Treatment Directive has been transposed, such comparisons cannot currently be made in the case of direct discrimination under Article 141. One consequence of this is that in the event of improper implementation, complainants may seek to rely on the Equal Pay Directive, which recognizes hypothetical comparisons, rather than the Treaty provision. This is in contrast to the current practice, whereby Article 141, with its horizontal direct effect, is the favoured approach. These changes also raise the question of how discrimination can be proved by reference to a hypothetical comparator. Indeed, the recognition of the difficulties involved in making such a comparison may have prompted the Court to reject such possibilities in its case law in the first place, and the legislator has not provided any further guidance on this matter in the new Directives.

The 2000 Equality Directives also declined to follow the older sex discrimination directives when defining indirect discrimination. The Race Directive provides '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

8. Case 129/80 *MacCarthys Ltd. v Smith* [1980] ECR 1275.
9. See also Case C-200/91 *Coloroll v. Russel* [1994] ECR I-4389. Member States were nevertheless free to provide for such comparisons in their national law.

justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'[10]

Unlike the concept of direct discrimination, sex equality law did in fact provide an alternative legislative definition of indirect discrimination in the Burden of Proof Directive. That Directive provided 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.[11]

The key difference between the new definition, which has now also been incorporated in the amended Equal Treatment Directive, 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 place 'persons of one sex at a particular disadvantage compared with persons of the other sex.' The new test for establishing indirect discrimination is arguably easier to satisfy because the burden of proof for establishing the necessary level of adverse treatment seems to be simpler to meet. In particular, in the context of the 2000 Directives, the Commission seemed to want to reduce the need to rely on statistical evidence for establishing disadvantage.[12] Odile Quintin, the Director-General for Employment and Social Affairs at the Commission, defended the new definition at the time 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.'[13]

10. Article 2 (2) (b). The Framework Employment Directive contains an identical definition of indirect discrimination.
11. The proposed amendment to the Equal Treatment Directive incorporates this definition in the aforementioned Directive.
12. In order to fall foul of the definition of indirect discrimination contained in the Burden of Proof Directive 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.
13. 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. However, one should note that the Preambles to both the original Article 13 Directives state: 'The

→

Case law suggests[14] that the approach can also be rather complicated with regard to sex discrimination, and, as noted, the amended Equal Treatment Directive replaces the definition of indirect discrimination found in the Burden of Proof Directive with the newer definition. This will again impact directly on the relevant secondary legislation, but leaves the Court's case law on Article 141 untouched. Furthermore, one can wonder whether this revised definition will result in a *de facto* new approach in gender equality cases, or whether in reality the change will go unnoticed by those bound by the obligation and called upon to apply it.

Finally, with regard to the definition of discrimination, the amended Equal Treatment Directive recognizes harassment and sexual harassment as forms of discrimination. The original 1976 Directive was silent on this matter, and subsequent attempts to amend that Directive to prohibit explicitly harassment proved unsuccessful.[15] The Race and Framework Employment Directives marked a breakthrough and expressly prohibited harassment on the covered grounds, defining such conduct as a form of discrimination. The amended Equal Treatment Directive incorporates the definition found in those earlier Directives. Harassment therefore occurs where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[16]

The amended Equal Treatment Directive however also goes further and explicitly prohibits sexual harassment. This arises where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating 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.' The use of statistical evidence may therefore remain an element of case law with regard to indirect discrimination under the new Directives.

14. See e.g. Case C-167/97 *R. v Secretary of State for Employment, ex parte Seymour-Smith* [1999] ECR I-623 in which the European Court of Justice failed to give clear guidance to a national court experiencing problems with the use of statistical analysis to identify indirect discrimination. For criticism of this judgment see Catherine Barnard and Bob Hepple, 'Indirect discrimination: interpreting Seymour-Smith', 58 *Cambridge Law Journal* 2 (1999), 399-412.
15. See Commission (1996) 'Consultation of management and labour on the prevention of sexual harassment at work', COM(96) 373.
16. Amended Article 2 (1)(a). The amended Directive does not, however, refer to national law in the definition of sexual harassment. In contrast this is an element in the Race and Framework Employment Directives (Articles 2(3)).

dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.[17]

One can conclude that the inclusion of harassment within the definition of discrimination in the Race and Framework Employment Directives acted as a catalyst and broke through the barriers which had hampered the adoption of an equivalent provision under gender equality law, as well as allowing for the separate recognition of sexual harassment.

The proposal of a new gender equality Directive based on Article 13 also raises a number of interesting points of comparison and note. If adopted, this will be the third Directive based on Article 13 EC, and the first to concern sex. Understandably, given the pre-existing body of primary and secondary legislation addressing sex discrimination, the legislator chose to first concentrate on combating discrimination on the other grounds covered by Article 13. However, even before the 2000 Directives were adopted, the Commission had signalled its intention to propose a Directive to prohibit sex discrimination in areas beyond employment on the basis of Article 13 in the 2000 Social Policy Agenda.[18]

This commitment created high expectations, not least because the Race Directive had previously made full use of the competence provided by Article 13 by prohibiting not only employment related discrimination, but also discrimination in the areas of education, social protection, healthcare, social advantages and the access to and supply of goods and services available to the public, including housing. The gender proposal which was eventually published, over three years later towards the end of 2003, only addressed the access and supply of goods and services. The Explanatory Memorandum accompanying the proposal makes it clear that the Commission received representations requesting the adoption of a broader proposal, covering fields such as the representation of the sexes in the media and advertising, taxation and education. It however concluded that no consensus existed in these areas and therefore that it would be inappropriate to propose such legislation at that time. Instead, the Commission concentrated its proposal on the access to and supply of goods and services, resulting in a far more limited text than the Race Directive. The concept of goods and services in the proposal should have the same meaning as the equivalent term in the Race Directive and be restricted to those benefits which are normally provided for remuneration. The concept therefore includes access to premises which the public are permitted to enter, all types of housing, including rented accommodation and accommodation in hotels, services such as

17. Amended Article 2 (1)(a).
18. The Social Policy Agenda, COM(2000) 379 final.

banking, insurance and other financial services, transport, and the services of any profession or trade.[19]

One area, however, where the new proposal is more elaborate than its predecessor, is insurance. The Commission has noted that insurance companies often set different terms, relating to premiums and benefits, for men and women. These distinctions are generally based on actuarial calculations which evaluate the risk of insuring men and women differently. In contrast the Commission has concluded that sex is an inappropriate factor for determining premiums, and that it is 'at the very best a proxy for other indicators', such as marital status, socio-economic factors, employment status, residence, smoking and diet. As a consequence, '(t)he separation of men and women into different pools leads to an unjustified difference of treatment and a resulting disadvantage for one sex or the other.'[20] These bold statements are however thrown in to confusion by the Commission's argument that '(a)n equivalent situation was at one time frequently found in the field of employment: in the past, it was not uncommon for employers to argue that they were reluctant to employ women of child-bearing age as there was a risk that they would be absent from work for periods of maternity leave'.[21] The Commission recognizes that it is statistically true that there is a risk such women will take maternity leave, but states that it is morally unacceptable to treat women differently for this reason. This raises the question whether the Commission believes that women and men do in fact pose different insurance risks, but that insurers should be instructed to ignore those differences, as is the case with maternity leave and employment, or, whether the Commission believes there are in fact no grounds for charging different insurance premiums based on sex related predictions, because men and women present equal risks. The underlying assumptions are therefore somewhat ambiguous, but the proposed Directive is not: differences of treatment based on actuarial factors directly related to sex are classified as incompatible with the equal treatment principle and must be abolished.[22] In order to prevent disruption to the market the proposal allows for a transitional period, of eight years in total,[23] designed to allow Member States and insurance companies to establish more reliable criterion which will enable greater accuracy in predicting risk. In addition the Directive will not cover the use of gender-based actuarial calculations in contracts concluded for the first time before the transposition of the Directive. Both of these provisions will significantly reduce the impact of the Directive on insurance contracts in the short to medium term. Nevertheless, the insurance industry has rigorously objected to the proposal and

19. The Explanatory Memorandum accompanying the proposal, 13.
20. Ibid., 7.
21. Ibid., 8.
22. Article 4 of the proposal.
23. Article 4 (2) of the proposal.

challenged the assumptions on which it is based. To support its arguments the industry relies on statistical analysis which purports to show that risk profiles of men and women are naturally different and this claim seems to be supported by a report by the UK government's Actuary's Department which states that women will continue to outlive men by around four years in 2026.[24] The insurance industry therefore has been vigorously lobbying both the Member States and the European Parliament in an attempt to water down the proposal.[25] One can also speculate on the actual effect of the Directive should it be adopted as currently drafted. One might hope to see a realistic and more accurate distribution of risks, however in practice the result might simply be a levelling up of premiums and a levelling down of benefits.

Finally the proposal marks an interesting development with regard to the definition of discrimination. Article 2(2) of the proposal provides that 'incitement' to discrimination will be deemed to be discrimination. The Explanatory Memorandum notes that a similar provision is to be found in both of the earlier Article 13 Directives and in the amended Equal Treatment Directive. However, these Directives all prohibit an 'instruction' to discriminate. The Commission states that it has opted to use the term 'incitement', rather than 'instruction' in the English text of its newest proposal, in order to align the meanings of the language versions.[26] These two terms do not convey the same meaning though. Instruction suggests an element of control over the action of another, such as would exist when an employer instructs a job agency to recruit workers, whilst incitement would not seem to require such control, but could also extend to the situation when one person encourages another to discriminate.

Another agenda may also be at play here, and lie behind the change in terminology in the latest Article 13 proposal. A Commission Staff Working Paper of 2002 also argued that incitement was a wider concept than instruction and, referring to the Race Directive, stated 'The Directive does not extend to discrimination outside activities falling within the Community's competence. Article 2(4) of the Directive does not cover, for example, the publication and general distribution of leaflets inciting discrimination.'[27/28] The preference for the term 'incitement' over 'instruction' in the proposed directive may be the response of the Employment and Social Affairs Directorate General to this Working Paper, and an attempt by that Directorate General to support the claim that the concept of 'incitement to discriminate' falls within the

24. Cited by the Association of British Insurers.
25. *European Voice*, 26 February- 3 March 2004, 33.
26. The Explanatory Memorandum accompanying the proposal, 14.
27. Commission Staff Working Paper, Legal reasoning for not referring to the concept of 'public incitement to discrimination' in the Commission's proposal for a Council Framework Decision on combating racism and xenophobia, SEC(2002) 375, 3.4.2002, 5.
28. I am grateful to Mark Bell for bringing this to my attention.

scope of Article 13. Should this claim be successful it may result in a reinterpretation of the term 'instruction to discriminate' found in the original (English language) Article 13 Directives, so as to allow those instruments to cover a broader range of behaviour than currently seems to be prohibited.

CONCLUSION

The amended Equal Treatment Directive and the proposed Article 13 sex equality Directive will bring about important changes in the regime of EU equality law. These Directives have been influenced by, and built on, the experiences of the EU legislation adopted to combat race discrimination and employment discrimination under Article 13. These earlier Directives were a catalyst for change, and both enabled and required the updating of EU sex equality law. Many of the differences between EC sex non-discrimination law and non-discrimination law on other grounds have been removed by the most recent initiatives, and a higher level of coherency has been achieved. However, important differences still remain. Some of these differences may reflect relevant distinctions between sex and the other grounds covered by Article 13. This might be the case for the decision to include a two-pronged definition of harassment in the Equal Treatment Directive, rather than adopting the single approach of the earlier Directives. Other differences reflect political choices, such as the decision to focus the latest proposal on goods and services, thereby going beyond the employment scope of the Framework Employment Directive, but failing to address many areas covered by the Race Directive. Such differences arguably reflect political reality and are determined by the degree of support amongst Member States for particular measures. Other differences are based on the legal system of the EC, and the possibility to amend secondary gender equality law whilst leaving untouched the Court's interpretation of related Treaty provisions. The result is that EC equality law continues to paint a varied and differentiated picture,[29] whilst gradually expanding to cover new fields.

Lisa Waddington

29. One consequence of this could be a threat to the coherency and consistency of (pre-existing) national non-discrimination laws which developed under an alternative set of political pressures and aspirations.