Throwing Some Light on Article 13 EC

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Since the signing of the Treaty on European Union in Maastricht in 1992, calls have gradually been increasing for a greater recognition of, and firmer foundation for, fundamental (social) rights within the European Union. To a large extent these calls, which came from the European Parliament, independent EU Advisory Committees, groups representing the interests of EU citizens and residents, and academics, went unheard in Amsterdam, and the new Treaty does not incorporate a comprehensive list of fundamental rights. However the new Treaty does include at least one important provision which will enhance the Community's ability to protect and promote fundamental rights: the general non-discrimination clause contained in Article 13 EC. [1] This new Article is far broader than the existing provisions dealing with discrimination on the grounds of nationality (Article 12 EC, ex Article 6) and equal pay for equal work for men and women (Article 141 EC, ex Article 119), and allows the Community to take action to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Article 13 is a confusing provision though, and whilst it undoubtedly opens up new possibilities for EC anti-discrimination law, it also raises numerous questions with regard to its scope and the fields which may be covered. Mark Bell, in an article in this issue, has examined some of these questions, and considers *inter alia* whether Article 13 will allow the Community to go beyond employment and address other areas where discrimination occurs and which (may) fall within the competence of the Treaty, including education and housing. Bell also addresses the wider issue of the scope of Article 13 and the significance of the requirement that measures based on the Article fall 'within the limits of the powers conferred by it [the Treaty] upon the Community'. In light of Bell's analysis it is particularly interesting to consider the Commission's current plans for the 'implementation' of Article 13.

1. This provision was initially numbered 6a following the numbering of EC Treaty as used in the body of the Amsterdam Treaty. It is now commonly referred to as Article 13, in accordance with the renumbering of the Treaty which followed the Amsterdam revision.

On 4 December 1998 the Commissioner for Employment and Social Affairs, Padraig Flynn, announced that the Commission would be proposing an 'Article 13 anti-discrimination package' as soon as the new Treaty comes into force.[2] The plans for the package have not yet been finalized, and Commissioner Flynn promised consultation with the Member States, the social partners and NGOs, but on December 4 the Commissioner envisaged the following package:

> a framework Directive dealing on a general basis with all grounds of discrimination in employment. This was described as a horizontal directive.
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> a Directive dealing specifically with race discrimination to go beyond the workplace to cover other areas such as goods and services, health, education and sport.
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> an action programme designed to strengthen cooperation with Member States and civil society, with an accent on building partnerships and networking, deepening knowledge and spreading best practice.

Although it is still early days, this tentative package (as amended), is worthy of comment and indeed may begin to throw light on some of the questions raised by Article 13.

It is interesting to note that the first general proposal for a Directive based on Article 13 will apply to employment discrimination. It is clear, from a number of articles in the Chapter on Social Provisions, as well as secondary legislation applying to sex discrimination and numerous soft-law measures, that the Community enjoys competence in employment matters, and there is consequently no problem in establishing that this area falls within the scope of Article 13. Bell even goes so far as to question whether the articles in the Chapter on Social Provisions would provide a more suitable legal basis for measures to combat employment discrimination than Article 13. Flynn's announcement shows that Article 13 is seen as an appropriate legal base for employment measures by the Commission. However, given that measures adopted on the basis of Article 13 require unanimous support in the Council, as opposed to a Qualified Majority for measures based on Article 137(1), this interpretation may in fact pose a hurdle to the adoption of a binding instrument. One should also bear in mind that, according to the Court of Justice, the choice of legal basis is not free, and case law mandates the use of the legal basis which provides the greatest role for the European Parliament.[3] In this respect it is worth noting that Article 13 merely allows for consultation with the European Parliament, whilst Article 137(1) makes use of the co-decision procedure.

2. In a speech given to a European Conference on Anti-discrimination: Anti-Discrimination: the way forward, in Vienna.
3. See e.g. the '*Titaniumdioxyde*' case: Case C-300/89 *Commission v. Council* [1991] ECR 2867.

It is also worth noting that the Commission's plans for this 'horizontal' instrument seem to have changed over the past few months. Whilst the original intention was to propose a Directive which covered all eight grounds of discrimination mentioned in Article 13, it now seems that sex and race/ethnic origin discrimination will not be covered in the proposal which will now only address the remaining five grounds: religion, belief, disability, age and sexual orientation.[4] It is submitted that this approach will only reinforce the 'hierarchy' that already exists with regard to sex discrimination (reference in Articles 3 EC, ex Article 3 and Article 141 EC, ex Article 119), create a second 'privileged' category of discrimination in the form of race, which as noted will be the focus of a separate proposal, and relegate the remaining categories to a secondary position.

The second strand of the 'non-discrimination' package is also interesting in that it shows, as Bell argued, that Article 13 has the potential to cover areas other than employment. Commissioner Flynn stated that the Directive 'will go beyond the workplace to also cover other areas such as goods and services, health, education and sport'. It is clear that the Community has competence with regard to goods and services by virtue of the internal market and free movement provisions. Health and education are also covered by specific titles or chapters (Article 152 EC, ex Article 129; Articles 149 and 150 EC, ex Articles 126 and 127 EC respectively), although it is less clear on what basis sport could be included in such a legislative proposal. The suggestion is that the Commission, at least, is adopting a fairly broad interpretation of the scope of Article 13. This is significant not only for race discrimination but also *inter alia* for sex discrimination. A solid legal basis for anti-discrimination measures with regard to employment in this area is arguably created by the new Article 141 which allows the Council to adopt, by Qualified Majority Vote, 'measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation'. A broad interpretation of Article 13 such as that envisaged by the Commission in relation to the race proposal implies that the latter Article will also prove to be an important legal basis to combat sex discrimination, and will supplement the provisions applying to employment.

The last strand of the 'non-discrimination' package will consist of an action programme to strengthen cooperation with Member States and civil society. This proposal is interesting in light of the recent controversy concerning the funding of social action plans, and particularly the anti-poverty programme, through budgetary allocations agreed upon by the Commission and Parliament in the absence of a legal base and Council Decision. The anti-poverty programme, and the means by which it was adopted and funded, were successfully challenged by the United Kingdom before the European

4. This is based on information given out by Commission officials in their discussions with NGO representatives.

Court of Justice.[5] The proposed Article 13 action programme may suggest a 'legal' way forward, and the establishment of an action programme which supports some of the work of civil society organizations / NGOs and which is founded on a legal basis / Council decision. However, measures adopted on the basis of Article 13 require unanimous support in the Council - a situation which is, seemingly at least, similar to that of Article 235 which proved to be an unacceptable legal basis for such programmes for a number of Member States in the early '90s.

Whilst Article 13 has been broadly welcomed, there remains a great deal of uncertainty and confusion concerning its scope and the nature of the instruments which can be adopted on the basis of the Article. The Commission's tentative plans give some hints as to this institution's interpretation of the scope of the new provision. However, any Commission proposal must also meet with unanimous approval in the Council if it is to be transformed into (binding) secondary legislation, and it has yet to be seen whether this institution shares the Commission's relatively ambitious and broad vision.

Lisa Waddington.

5. C-106/96 *United Kingdom v. Council* Judgment of 12 may 1998, not yet reported.