
The Changing Scope of the Fundamental Principle of Equality?

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The author considers the impact of the *Charter of Fundamental Rights of the European Union* and two recent Directives on the evolution of the “fundamental” right to equality. She outlines the development of the equality principle in the context of sex discrimination, beginning with the economic principle of equal pay for equal work. In the 1970s one legal approach to sex equality began a continuing evolution to include conceptions of direct and indirect discrimination and formal and substantive equality. She then considers the “horizontal” labour market Directive and the race Directive of 2000, tracing their connections to existing national legislation and noting difficulties posed for applicants by the burden of proof. Both Directives contain complex derogations. The Race Directive in particular provides strong remedies, notably a provision on victimization and an obligation to designate a body to promote equal treatment of persons, and both Directives envisage an important role for non-governmental organizations. That these Directives were ever concluded is an achievement, and in some states the Directives represent a significant leap forward in protecting disadvantaged groups. In other states with existing similar legislation, however, it may seem that the Directives embody an outmoded approach to equality, focussed chiefly on non-discrimination, rather than its broader, more results-oriented, distributive sense.

L'auteur fait état de l'impact de la *Charte des droits fondamentaux de l'Union européenne* et de deux directives récentes sur l'évolution du droit «fondamental» à l'égalité, en débutant par un survol du développement du principe d'égalité. Ce principe, dans le contexte de la discrimination sexuelle, fit ses débuts avec le principe économique du salaire égal pour travail égal. Dans les années 1970, émergea une nouvelle approche concernant l'égalité sexuelle, incluant les distinctions entre discrimination directe et indirecte ainsi qu'entre égalité formelle et substantive. L'auteur examine la directive sur l'égalité de traitement et la directive sur l'égalité raciale et ethnique, en particulier leurs liens avec les lois nationales existantes, les difficultés relatives au fardeau de preuve imposé aux plaignants, et l'existence de clauses dérogatoires complexes. La directive sur l'égalité raciale et ethnique, en particulier, prévoit des remèdes significatifs, notamment des dispositions sur la victimisation et l'obligation de désigner un organisme pour promouvoir l'égalité de traitement entre les personnes ; de plus, les deux directives prévoient un rôle important pour les ONG. L'adoption même de ces directives constitue un accomplissement non négligeable, et représentera un progrès considérable pour la protection de groupes désavantagés dans certains États. Pour d'autres États qui possèdent déjà des lois similaires, toutefois, les directives pourront sembler incarner une approche démodée envers la question de l'égalité, basée sur la non-discrimination plutôt que sur l'aspect distributif plus large de ce concept.

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Introduction**I. The Breadth and Scope of Equality Law in the EU****II. The Article 13 Directives****Conclusion**

Introduction

The achievement of equality now stands at the forefront of the European Union's agenda, not only in the field of sex, but also in respect of race, ethnic origin, religion and belief, disability, age, and sexual orientation, with the adoption of two important new Directives¹ under Article 13,² the new legal basis introduced by the *Treaty of Amsterdam*.³ The principle of equality also has a central place in the newly adopted *Charter of Fundamental Rights of the European Union*.⁴ Its Preamble provides:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.

The aim of this article is to consider the impact of the *Charter* and the two Article 13 Directives on the evolution of the "fundamental"⁵ right to equality. I will argue that these Directives, while representing an important step forward, draw considerably on the sex equality model developed largely in the 1970s. I will suggest that the time has come to update this model if true equality is to be realized. In the first section I briefly outline the development of the equality principle in the context of sex discrimination;⁶

¹ See *infra* notes 66, 67.

² *Consolidated Version of the Treaty establishing the European Community*, 10 November 1997, [1997] O.J. C. 340/3, art. 13, 37 I.L.M. 79 [hereinafter *EC Treaty*].

³ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, [1997] O.J. C. 340/1 [hereinafter *Treaty of Amsterdam*].

⁴ 18 December 2000, [2000] O.J. C. 364/1 [hereinafter *Charter*]. I shall focus on the individual's right to equality enforceable against the state or another employer as opposed to the general principle of equality enforceable by the staff of the Community Institutions against the Community. See generally T. Tridimas, *The General Principles of EC Law* (Oxford: Oxford University Press, 1999).

⁵ See e.g. *Defrenne v. Sabena*, C-149/77, [1978] E.C.R. I-1365 at paras. 26, 27, [1978] 3 C.M.L.R. 312: "[R]espect for fundamental personal human rights is one of the general principles of Community law ... There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights." See also *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)*, C-152/84, [1986] E.C.R. I-723 at para. 36, [1986] 1 C.M.L.R. 688 [hereinafter *Marshall (No. 1)*]; *Roberts v. Tate & Lyle Industries*, C-151/84, [1986] E.C.R. I-703 at para. 35, [1986] 1 C.M.L.R. 714; *Birds Eye Walls v. Roberts*, C-132/92, [1993] E.C.R. I-5579 at para. 17, [1993] 3 C.M.L.R. 773; *Smith v. Avdel Systems*, C-408/92, [1994] E.C.R. I-4435 at para. 25, [1995] 3 C.M.L.R. 543; *R. v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, C-167/97, [1999] E.C.R. I-623 at para. 75, [1999] 2 C.M.L.R. 273 [hereinafter *Seymour-Smith*]; C. Docksey, "The Principle of Equality between Women and Men as a Fundamental Right under Community Law" (1991) 20 *Indust. L.J.* 258.

⁶ See generally J. Neilson, "Equal Opportunities for Women in the European Union: Success or Failure?" (1998) 8 *J. Eur. Soc. Pol'y* 64.

I then examine the two new Article 13 equality Directives in the second section. In the conclusion I consider how this body of legislation and case law continues to fall short of the high ideals of equality that resonate in the Preamble to the *Charter*.

I. The Breadth and Scope of Equality Law in the EU

When the *Treaty of Rome*⁷ was first signed, the only substantive social provision was Article 119,⁸ which established the principle that men and women should receive equal pay for equal work. This paucity of social provisions can be explained by the very nature of the agreement struck: the purpose of the European *Economic Community* (as it then was) was to secure free trade between the Member States. Such an economic objective did not need any social underpinning. The very existence of Article 119 can also be explained on economic grounds: “correcting or eliminating the effect of specific distortions which advantage or disadvantage certain branches of activity.”⁹ This, however, began to change. The first indication that sex equality involved more than a defence against social dumping came with the Social Action Programme which followed the Paris Communiqué in 1972. It said that the Community aspired to create a situation in which equality between men and women was obtained in the labour market throughout the Community, through the improvement of economic and psychological conditions and of the social and educational infrastructure.¹⁰ Three important Directives were passed as a result¹¹—Directive 75/117¹² on equal pay; Directive 76/207¹³ on equal treatment with regard to access to employment, vocational

⁷ *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*].

⁸ Now *EC Treaty*, *supra* note 2, art. 141. Subsequent references in connection with the *EC Treaty* to former article numbers refer to the *EC Treaty* prior to amendments effected by the *Treaty of Amsterdam*.

⁹ *Rapport des Chefs de Délégations aux Ministres des Affaires Étrangères* (Brussels: Secretariat of the Intergovernmental Conference, 1956) (chair: P.H. Spaak) at 61 [translated by author].

¹⁰ See EC, *Council Resolution of 21 January 1974 concerning a Social Action Programme*, [1974] O.J. C. 13/1.

¹¹ See generally C. Barnard, “Gender Equality in the EU: A Balance Sheet” in P. Alston with M.R. Bustelo & J. Heenan, eds., *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 215.

¹² EC, *Council Directive 75/117 of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women*, [1975] O.J. L. 45/19.

¹³ EC, *Council Directive 76/207 of 9 February 1976 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*, [1976] O.J. L. 39/40 [hereinafter *Directive 76/207*]. The Directive was based on the *EC Treaty*, *supra* note 2, art. 308 (formerly art. 235).

training, promotion, and working conditions; and Directive 79/7¹⁴ on the progressive implementation of equal treatment with regard to statutory social security schemes.¹⁵

Directive 76/207 and Directive 79/7 prohibit both direct and indirect discrimination. There are elements of both formal equality (like should be treated with like)¹⁶ and substantive equality (aimed at achieving equality of outcome or results)¹⁷ in these Directives, as interpreted by the Court of Justice. Thus, the Court recognized that since the majority of part-time workers are women, any rule which discriminated against part-time workers may have a disparate impact on women.¹⁸ The strength of this approach is, however, diluted by the growing complexity of the definition of indirect

¹⁴ EC, *Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*, [1979] O.J. L. 6/24 [hereinafter Directive 79/7]. Two Directives were adopted in the 1980s. The first was EC, *Council Directive 86/378 of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes*, [1986] O.J. L. 225/40 [hereinafter Directive 86/378], as am. by EC, *Council Directive 96/97 of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes*, [1996] O.J. L. 46/20, in light of *Barber v. Guardian Royal Exchange Assurance Group*, C-262/88, [1990] E.C.R. I-1889, [1990] 2 C.M.L.R. 513, where the Court ruled that art. 199 required equality in respect of occupational pension age, despite the derogation to Directive 86/378 for equal treatment in respect of occupational pensions. The second Directive adopted in the 1980s was EC, *Council Directive 86/613 of 11 December 1986 on the application of the principle of 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. L. 359/56.

¹⁵ Four Action Programmes targeted specifically at equal opportunities for men and women followed these directives: EC, *Council Resolution of 12 July 1982 on the promotion of equal opportunities for women*, [1982] O.J. C. 186/3; *Equal Opportunities for Women Medium-term Community Programme 1986-1990*, EC Bull. Supp. 3/86, EC Bull. 6-1986 at 2.1.116; *Third Medium-term Action Programme*, COM(90)449 final; EC, *Council Decision 95/593 of 22 December 1995 on a medium-term Community action programme on equal opportunities for men and women (1996 to 2000)*, [1995] O.J. L. 335/37. The fourth medium-term Community action programme (1996-2000) aimed to incorporate equal opportunities into the process of defining and implementing the relevant policies at Community, national, and regional levels (mainstreaming).

¹⁶ See e.g. *Macarthys v. Smith*, C-129/79, [1980] E.C.R. I-1275, [1980] 2 C.M.L.R. 205.

¹⁷ See H. Fenwick & T.K. Hervey, "Sex Equality in the Single Market: New Directions for the European Court of Justice" (1995) 32 C.M.L. Rev. 443 at 445-46.

¹⁸ See e.g. *Jenkins v. Kingsgate*, C-96/80, [1981] E.C.R. I-911, [1981] 2 C.M.L.R. 24.

discrimination¹⁹ and the possibility that indirectly discriminatory measures can be objectively justified by the alleged discriminator²⁰ according to a sliding scale of tests.²¹

Directive 76/207 also expressly provided for some form of substantive equality by allowing for some positive action. Article 2(4) says that the 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.”²² Yet despite the existence of Article 2(4), the symmetrical notions of the formal non-discrimination model have wielded considerable influence in the interpretation of what positive action is permissible. This can be seen most clearly in *Kalanke v. Hansestadt Bremen*,²³ where the Court said that a rule which *automatically* gave priority to women when they were as equally qualified as men did involve discrimination on grounds of sex. As Advocate General Tesaro explained in his forceful opinion against the positive action at issue:

In the final analysis, must each individual’s right not to be discriminated against on grounds of sex—which the Court itself has held is a fundamental right the observance of which it ensures—yield to the rights of the disadvantaged group, in this case, women, in order to compensate for the discrimination suffered by that group in the past?²⁴

He said that positive discrimination brought about a quantitative increase in female employment, but it also most affected the principle of equality as between individuals.

More recently, on the one hand, the Court said in *Abrahamsson v. Fogelqvist*²⁵ that a national rule which gave automatic priority to a person of the under-represented sex who had qualifications which were adequate but inferior in minor respects to those of the person who would otherwise have been appointed failed to satisfy the requirements of Article 2(4) of Directive 76/207 and Article 141(4) of the *EC Treaty*.²⁶ On

¹⁹ See e.g. *Seymour-Smith*, *supra* note 5, and the criticism in C. Barnard & B. Hepple, “Indirect Discrimination: Interpreting *Seymour-Smith*” (1999) 58 Cambridge L.J. 399 [hereinafter “Indirect Discrimination”], considered further below.

²⁰ See e.g. *Bilka-Kaufhaus v. Weber von Hartz*, C-170/84, [1986] E.C.R. I-1607, [1986] 2 C.M.L.R. 701 [hereinafter *Bilka*]; *Rinner-Kühn v. FWW Spezial-Gebäudereinigung*, C-171/88, [1989] E.C.R. I-2743, [1993] 2 C.M.L.R. 932 [hereinafter *Rinner-Kühn*].

²¹ See “Indirect Discrimination”, *supra* note 19.

²² *Supra* note 13, art. 2(4) [emphasis added].

²³ C-450/93, [1995] E.C.R. I-3051, [1996] 1 C.M.L.R. 175.

²⁴ *Ibid.* at para. 7 [footnote omitted].

²⁵ C-407/98 (6 July 2000).

²⁶ See the *Social Policy Agenda*, *infra* note 54.

the other hand, in *Marschall v. Land Nordrhein-Westfalen*²⁷ the Court upheld, as compatible with Article 2(4) of Directive 76/207, a state law that gave preference to a woman in a tiebreak situation, so long as the apparently equally qualified man was considered on his individual merits. The Court recognized that

even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.

For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.²⁸

This statement is the closest that the Court has come to recognizing a substantive approach to equality.²⁹

Despite these nods in the direction of substantive equality, which take account of the real situation experienced by many women—primarily their careers in the home—the focus of the 1970s Directives was to ensure equality in the public sphere. As the Court has said, Directive 76/207 was not “designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents.”³⁰ The Court of Justice has, however, generally played a significant role in ensuring that the equality rules which do exist are effective. Having already established in *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*³¹ that Article 119 of the *EEC Treaty* was directly effective and so could be enforced by individuals before their national courts, it ruled that provisions of the equality Directives were also directly effective,³² including the opaque provisions on remedies.³³ It also bol-

²⁷ C-409/95, [1997] E.C.R. I-6363, [1998] 1 C.M.L.R. 547 [hereinafter *Marschall*]. See C. Barnard & T. Hervey, “Softening the Approach to Quotas: Positive Action after *Marschall*” (1998) 20 J. Soc. Welfare & Fam. L. 333.

²⁸ *Marschall*, *ibid.* at paras. 29, 30.

²⁹ See generally D. Schiek, “Sex Equality Law after *Kalanke* and *Marschall*” (1998) 4 Eur. L.J. 148.

³⁰ *Hofmann v. Barmer Ersatzkasse*, C-184/83, [1984] E.C.R. I-3047 at para. 24, [1986] 1 C.M.L.R. 242. See T. Hervey & J. Shaw, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 J. Eur. Soc. Pol’y 43.

³¹ C-43/75, [1976] E.C.R. I-455, [1976] 2 C.M.L.R. 98 [hereinafter *Defrenne (No. 2)*].

³² See e.g. *Marshall (No. 1)*, *supra* note 5.

³³ See e.g. *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) (No. 2)*, C-271/91, [1993] E.C.R. I-4367 at para. 26, [1993] 4 All E.R. 586 [hereinafter *Marshall (No. 2)*]; C. McCrudden, “The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements” (1993) 13 Oxford J. Legal

stered the substantive scope of the principle of equality. For example, it ruled that Directive 76/207 prohibited discrimination against women on the grounds of their pregnancy³⁴ and it required that genuine and effective remedies be provided for the victims of discrimination.³⁵ Later, it recognized that the Directive also prohibited discrimination against transsexuals,³⁶ but not homosexuals.³⁷

More recently, the legislature has taken steps to adopt flanking measures designed to facilitate the participation of women in the labour market. First, the 1989 Social Action Programme³⁸ implementing the *Community Social Charter 1989*³⁹ led to the enactment, on the basis of Article 137,⁴⁰ of a Directive improving the health and safety of workers who are pregnant or have recently given birth.⁴¹ Second, the Social Policy Agreement (“SPA”) annexed to the *Treaty on European Union*,⁴² from which the U.K. initially secured an opt-out, led to the enactment of Directive 96/34 on reconciling family and working life,⁴³ and the Directives on part-time work⁴⁴ and fixed-term work,⁴⁵ which extend the equality principle to these categories of workers. In addition,

Stud. 320. See also *Draehmpaehl v. Urania Immobilienservice OHG*, C-66/95, [1997] E.C.R. I-2195, [1997] 3 C.M.L.R. 1107. But see *R. v. Secretary of State for Social Security, ex parte Sutton*, C-66/95, [1997] E.C.R. I-2163, [1997] 2 C.M.L.R. 382, concerning Directive 79/7, *supra* note 14; *Coote v. Granada Hospitality*, C-185/97, [1998] E.C.R. I-5199, [1998] 3 C.M.L.R. 958 [hereinafter *Coote*]. See generally M. Dougan, “The Equal Treatment Directive: Retaliation, Remedies and Direct Effect” (1999) 24 Eur. L. Rev. 664.

³⁴ *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, [1990] E.C.R. I-3941, [1992] 29 C.M.L.R. 160; *Webb v. EMO Air Cargo*, C-32/93, [1994] E.C.R. I-3567, [1996] 33 C.M.L.R. 547.

³⁵ *Marshall (No. 2)*, *supra* note 33. See D. Curtin, “Effective Sanctions and the Equal Treatment Directive: The *Von Colson* and *Harz* Cases” (1985) 22 C.M.L. Rev. 505.

³⁶ *P. v. S.*, C-13/94, [1996] E.C.R. I-2143, [1996] 2 C.M.L.R. 247.

³⁷ *Grant v. South-West Trains*, C-249/96, [1998] E.C.R. I-621, [1998] 1 C.M.L.R. 993.

³⁸ EC, *Communication from the Commission Concerning its Action Programme Relating to the Implementation of the Community Charter of Basic Social Rights for Workers*, COM(89)568.

³⁹ EC, Commission, *Community Charter of the Fundamental Social Rights of Workers* (Luxembourg: EC, 1990).

⁴⁰ *EC Treaty*, *supra* note 2 (formerly art. 118a).

⁴¹ EC, *Council Directive 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work*, [1992] O.J. L. 245/23.

⁴² 7 February 1992, [1992] O.J. C. 224/1, 1757 U.N.T.S. 3.

⁴³ EC, *Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC*, [1996] O.J. L. 145/4. This was the first Directive adopted under the new procedure provided for by the SPA. It allowed the Social Partners to negotiate a framework agreement which was then extended to all workers by a Directive.

⁴⁴ EC, *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC*, [1998] O.J. L. 14/9.

⁴⁵ EC, *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*, [1999] O.J. L. 175/43.

Directive 97/80/EC,⁴⁶ on the burden of proof in cases of discrimination based on sex, was adopted, placing the onus on defendants accused of discrimination at work in civil cases to prove that the principle of equal treatment has not been violated.

The principle of sex equality gained renewed status with the agreement of the *Treaty of Amsterdam*. This treaty explicitly introduced equality between men and women as one of the tasks⁴⁷ and activities⁴⁸ of the Community. In addition, it introduced a new provision, Article 13,⁴⁹ allowing the Council to take action to combat any form of discrimination, including that based on sex:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁵⁰

A new second paragraph was added to Article 13 by the *Treaty of Nice*.⁵¹ Article 13(2) allows the Council to adopt “flanking policy” measures, that is, those that involve no harmonization of national laws, in this field, by the more democratic “co-decision” procedure.

Article 141 on equal pay was amended significantly for the first time by the *Treaty of Amsterdam*. Article 141(1) extended the definition of equal pay for equal work to include “or work of equal value”, and Article 141(3) finally provided an express legal basis for the Council to adopt measures, in accordance with the Article 251

⁴⁶ EC, *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex*, [1998] O.J. L. 14/6 [hereinafter Directive 97/80].

⁴⁷ *EC Treaty*, *supra* note 2, art. 2.

⁴⁸ *Ibid.*, art. 3(2).

⁴⁹ *Ibid.* (formerly art. 6a).

⁵⁰ *Ibid.* Only “social origin” was lost from the original list proposed by the Irish presidency. See EC, *The European Union Today and Tomorrow. Adapting the European Union for the Benefit of its Peoples and Preparing It for the Future. A General Outline for a Draft Revision of the Treaties*, Brussels, 5 December 1996, CONF/2500/96, online: Europa <<http://europa.eu.int/en/agenda/figc-home/general/pres/index.html> intro> (date accessed: 13 April 2001). See also M. Bell & L. Waddington, “The 1996 Intergovernmental Conference and the Prospects of a Non-discrimination Treaty Article” (1996) 25 *Indust. L.J.* 320; M. Bell, “The New Article 13 EC Treaty: A Sound Basis for European Anti-discrimination Law?” (1999) 6 *Maastricht J. Eur. & Comp. L.* 5; L. Waddington, “Article 13 EC: Mere Rhetoric or a Harbinger of Change?” (1999) 1 *Cambridge Y.B. Eur. Stud.* 175; L. Waddington, “Testing the Limits of the EC Treaty Article on Non-discrimination” (1999) 28 *Indust. L.J.* 133; L. Flynn, “The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?” (1999) 36 *C.M.L. Rev.* 1127.

⁵¹ [2001] O.J. C. 80/43.

co-decision procedure,⁵² “to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.” This has provided the legal basis for a proposed modification of Directive 76/207, the 1976 equal treatment Directive.⁵³ The Commission’s *Social Policy Agenda*⁵⁴ also talks of further strengthening equality rights by making a proposal for an equal treatment Directive based on Article 13 in areas other than employment and occupation. Finally, the new Article 141(4) allows Member States “[w]ith a view to achieving full equality in practice” to adopt or maintain measures “providing for specific advantages” to make it easier for the under-represented sex “to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” The provisions of Article 141(4) appear to codify the Court’s decision in *Marschall*.

The promotion of equal opportunities also formed one of the four key pillars of the European Employment Strategy initiated in Luxembourg in November 1997. This strategy is intended to give effect to the new objective, found for the first time in the newly included Employment Title in the *Treaty of Amsterdam*, of attaining a “high level of employment”. The equal opportunities pillar focusses mainly on mainstreaming. In the 1999 Employment Guidelines⁵⁵ the Commission emphasized the need to pursue integration of equal opportunities for men and women into all aspects of employment policies, notably by guaranteeing active employment market policies for the vocational integration of women proportionate to their rate of unemployment and by promoting women in the context of entrepreneurship. The 2000 Guidelines focus on facilitating reintegration of men and women into the labour market after a period of absence.⁵⁶ The *Social Policy Agenda* has also emphasized the need

[t]o promote full participation of women in economic, scientific, social, political and civic life as a key component of democracy. This is not only an issue of rights, but also a major component for promoting social and economic progress.

⁵² EC Treaty, *supra* note 2, art. 251 (formerly art. 189b).

⁵³ *Supra* note 13. See EC, *Proposal for a Directive of the European Parliament and of the Council 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*, COM(2000)334.

⁵⁴ EC, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Social Policy Agenda*, COM(2000)379 [hereinafter *Social Policy Agenda*].

⁵⁵ EC, *Council Resolution of 22 February 1999 on the 1999 Employment Guidelines*, [1999] O.J. C. 69/2.

⁵⁶ EC, *Proposal for a Council Decision on guidelines for Member States’ employment policies for the year 2000*, COM(1999)712 at 13.

The long-standing commitments on equality between women and men at European level should be broadened and a gender perspective should be mainstreamed into all relevant policies.⁵⁷

Thus equal opportunities is seen as a valuable input into growth.

The new, non-binding⁵⁸ *Charter*⁵⁹ proclaimed at the Nice Summit in December 2000 has helped to redress the balance. Equality is not just a means to an economically prosperous end, but has a value in its own right. The *Charter* was adopted primarily with a “declaratory” purpose—to combine in a single text “the civil, political, economic, social and societal rights, hitherto laid down in a variety of international, European or national sources.”⁶⁰ “Equality” forms a chapter in its own right, opening with the declaration in Article 20 that “Everyone is equal before the law.” Article 21 then spells out the meaning of this in terms of anti-discrimination. It provides:

1. Any discrimination based on any ground such as sex, race, *colour*, ethnic or *social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation* shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.⁶¹

The list of grounds on which discrimination is prohibited is longer than the list found in Article 13 of the *EC Treaty*. This sits uncomfortably with the statement in Article 51(2) that “[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”⁶²

Article 23 of the *Charter* deals specifically with “Equality between men and women”, which must “be ensured in *all areas, including* employment, work and

⁵⁷ *Supra* note 54 at 21.

⁵⁸ As with any soft law, the *Charter* may be used by courts in interpreting measures of hard law.

⁵⁹ *Supra* note 4. The process of agreeing the *Charter* was set in motion at the Cologne summit in June 1999. The *Charter* was “solemnly proclaimed” at Nice on 7 December 2000.

⁶⁰ EC, *Presidency Conclusions Nice European Council Meeting*, Nice, 7, 8 & 9 December 2000, art. 2, online: Europa <http://europa.eu.int/council/offi/conclu/dec2000/dec2000_en.htm> (date accessed: 5 May 2001). There is, however, some uncertainty as to whether the *Charter* will achieve such consolidation; e.g. it contains new rights not previously recognized in the *acquis communautaire*, such as art. 13: “The arts and scientific research shall be free of constraint. Academic freedom shall be respected.” Article 2 goes on to state that “the question of the Charter’s force will be considered later.”

⁶¹ *Charter, supra* note 4, art. 21 [emphasis added]. See further C. Barnard, “The Principle of Equality in the Community Context: *P, Grant, Kalanke* and *Marschall*: Four Uneasy Bedfellows?” (1998) 57 Cambridge L.J. 352.

⁶² *Charter, ibid.*

pay.”⁶³ It continues that “[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” Article 33(2) provides: “To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.”⁶⁴

Thus sex equality is now firmly established as an integral part of the Community legal order, but discrimination on other grounds, particularly race, has become an increasingly serious problem for the Member States. It was against this background that the two Article 13 Directives were introduced.

II. The Article 13 Directives

Using the powers in Article 13(1), the Commission introduced a “package” of four instruments in 1999:

1. a communication on certain Community measures to combat discrimination;⁶⁵
2. a Directive to establish a general framework for equal treatment in employment and occupation (the “horizontal” labour market Directive);⁶⁶
3. a Directive to implement the principle of equal treatment between persons irrespective of racial or ethnic origin;⁶⁷ and
4. a decision to establish an action plan to combat discrimination, 2001 to 2006.⁶⁸

Despite the unanimity requirement laid down in Article 13, the Race Directive and the Horizontal Directive were adopted with considerable speed. The Horizontal Directive, which applies to all the groups identified in Article 13, excluding sex, race and ethnic

⁶³ *Ibid.* [emphasis added].

⁶⁴ *Ibid.*

⁶⁵ COM(1999)564 final.

⁶⁶ EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] O.J. L. 303/16 [hereinafter Horizontal Directive].

⁶⁷ EC, *Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2000] O.J. L. 180/22 [hereinafter Race Directive].

⁶⁸ EC, *Council Decision 2000/750 of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)*, [2000] O.J. L. 303/23. The new art. 13(2) will presumably allow measures such as this to be adopted by a qualified majority in Council.

origin, and nationality,⁶⁹ concerns employment and occupation.⁷⁰ The Race Directive goes further, touching on areas at the outer limits of Community competence,⁷¹ despite the insistence in Article 13(1) that the provision applies only within the limits of Community competence. It appears that the position of Jörg Haider's Freedom Party in the Austrian government may have contributed to the determination of the governments of the Member States to enact a wide-ranging race discrimination measure.⁷²

Both Directives have been heavily influenced by the *Sex Discrimination Act 1975*⁷³ and the *Race Relations Act 1976*,⁷⁴ which in turn draw on Title VII of the U.S. *Civil Rights Act of 1964*,⁷⁵ and the lessons from the jurisprudence of the Court on the sex equality Directives. Both Directives require as a minimum⁷⁶ that the principles of non-discrimination be applied to "all persons, as regards both the public and private sectors, including public bodies" in relation to employment, the conditions for access to employment, self-employment, and occupation; access to all types and to all levels of vocational guidance, vocational training, advanced vocational training, and re-training; employment and working conditions, including dismissals and pay;⁷⁷ and membership of and involvement in an organization of workers or employers, or any other organization whose members carry on a particular profession, including the

⁶⁹ The exclusion relating to nationality can be found in *supra* note 66, art. 3(2).

⁷⁰ This must be implemented by 2 December 2003, although states can have an additional period of three years (*i.e.* to 2006) to implement the provisions of the Directive on age and disability: *ibid.*, art. 18. The Race Directive must be implemented by 19 July 2003 (*supra* note 67, art. 16).

⁷¹ If the Race Directive is lawfully enacted on the basis of the *EC Treaty*, *supra* note 2, art. 13, and art. 13 does not extend the material scope of Community competence, but merely gives power to enact non-discrimination provisions with respect to matters falling within Community competence, the list of substantive matters covered in the Directive will have to be construed as falling within the scope of Community law. One way to do this might be in terms of the provision in art. 308, which gives the EU Institutions power to take appropriate measures to achieve the objectives of the Community. The objectives of the Community are set out in art. 2, and include the provision of "a high level of social protection, [and] ... the raising of the standard of living and quality of life." Measures on non-discrimination in, for instance, housing, might thus be conceptualized as concerned with the raising of the standard of living. See recital 9 of the Race Directive, *ibid.*, Preamble.

⁷² See E. Guild, "The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations" (2000) 29 *Indust. L.J.* 416 at 416.

⁷³ (U.K.), 1975, c. 65.

⁷⁴ (U.K.), 1976, c. 74 [hereinafter *Race Relations Act*].

⁷⁵ Pub. L. No. 88-352, 78 Stat. 241.

⁷⁶ Race Directive, *supra* note 67, art. 6(1); Horizontal Directive, *supra* note 66, art. 8(1). The Directives also cannot be used as an excuse to lower existing standards (Race Directive, *ibid.*, art. 6(2); Horizontal Directive, *ibid.*, art. 8(2)).

⁷⁷ According to the Horizontal Directive, *ibid.*, art. 3(4), Member States can provide that the Directive does not apply to the armed forces in respect of discrimination on the grounds of age and disability.

benefits provided for by such organizations. The Race Directive, however, goes much further, and applies the principle of non-discrimination to other areas that may affect long-term prospects for labour market participation:⁷⁸ social protection, including social security and health care; social advantages;⁷⁹ education, including grants and scholarships; and access to and supply of goods and services, including housing.⁸⁰ This is considerably more ambitious than the existing Directives on sex equality, which apply only to employment and occupation, although the Commission's *Social Policy Agenda* talks of further strengthening equality rights by making a proposal for an equal treatment Directive based on Article 13 in areas other than employment and occupation.

The structure of the two Directives is similar as regards content. Both prohibit direct and indirect discrimination based on racial or ethnic origin (but not nationality)⁸¹ or the prohibited grounds listed in the Horizontal Directive. An instruction to discriminate is also deemed to be discrimination.⁸² While key, controversial terms, such as racial and ethnic origin,⁸³ religion, and disability, are not defined, the definitions of direct and indirect discrimination draw inspiration from those found in the context of sex equality. Direct discrimination "shall be taken to occur where one person is treated less favourably than another is, has been or would be treated on grounds of racial or ethnic origin."⁸⁴ Indirect discrimination, by contrast, shall be taken to occur "where an apparently neutral provision, criterion or practice *would put* persons of 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."⁸⁵ Originally, the definition of indirect discrimination in earlier drafts of the Directives focussed on the adverse effect on an individual person or persons rather than on an individual as a member of a

⁷⁸ See P. Skidmore, "EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-discrimination Policy?" (2001) 30 *Indust. L.J.* 126.

⁷⁹ The Horizontal Directive expressly states that "[t]his Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes" (*supra* note 66, art. 3(3)).

⁸⁰ Race Directive, *supra* note 67, art. 3(1); Horizontal Directive, *ibid.*, art. 3(1).

⁸¹ Race Directive, *ibid.*, arts. 1, 3(2); Horizontal Directive, *ibid.*, art. 3(2). According to the Commission, this is covered by *EC Treaty*, *supra* note 2, arts. 12, 39.

⁸² Race Directive, *ibid.*, art. 2(4); Horizontal Directive, *ibid.*, art. 2(4).

⁸³ For different approaches to defining the terms "racial and ethnic origin" in the British context, see Guild, *supra* note 72 at 418, and her discussion of the "distinct community" test as described in *Mandla v. Lee*, [1983] 2 A.C. 548, [1983] 1 All E.R. 1062 (H.L.) (Sikhs); *Commission for Racial Equality v. Dutton*, [1989] Q.B. 783, [1989] 1 All E.R. 306 (C.A.) ("travellers"), versus the "immutable characteristics" approach.

⁸⁴ Race Directive, *supra* note 67, art. 2(2)(a).

⁸⁵ *Ibid.* [emphasis added]. See also Horizontal Directive, *supra* note 66, art. 2(2)(b).

group.⁸⁵ This was eventually changed in the final version, but the definition still does not make it clear that the disadvantage must be suffered by a group of persons of a particular racial or ethnic origin in comparison with persons not of that group.⁸⁷

A key feature of the definition of indirect discrimination in the Race Directive is that it is sufficient to show that the provision, criterion, or practice “would put” the affected persons at a “particular disadvantage”.⁸⁸ Thus, applicants do not need to show they have suffered *actual* discrimination (potential discrimination is sufficient), nor do they need to adduce statistical evidence to prove discrimination.⁸⁹ This contrasts with the definition of indirect sex discrimination developed by the Court⁹⁰ and now adopted by Directive 97/80,⁹¹ which requires the production of statistical evidence showing actual differential impact. This Directive provides:

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.⁹²

The difficulties created by this definition for individual applicants can be seen in *Seymour-Smith*.⁹³ This case raised the issue of whether the then two-year service requirement prior to bringing a claim for unfair dismissal in the U.K. was indirectly discriminatory against women contrary to Article 141.⁹⁴ Over the period from 1985 to 1991, the proportion of men who had two or more years’ service at sixteen hours or more per week with their current employer ranged from 72 to 77.4 percent. The proportion of women in this category ranged from 63.8 to 68.9 percent. The female percentage as a percentage of the male percentage averaged 89.1.

The Court suggested two approaches to disparate impact. The first test is whether a “considerably smaller proportion of women than men” was able to satisfy the two-year requirement.⁹⁵ The second test concerns the situation where statistical evidence reveals “a lesser but persistent and relatively constant disparity over a long period,”

⁸⁵ This section draws on C. Barnard & B. Hepple, “Substantive Equality” (2000) 59 Cambridge L.J. 562 [hereinafter “Substantive Equality”].

⁸⁷ See the *Race Relations Act*, *supra* note 74, s. 1(1)(b)(i).

⁸⁸ *Supra* note 67, art. 2(2)(b).

⁸⁹ But see Race Directive, *ibid.*, Preamble, recital 15.

⁹⁰ See *e.g. Bilka*, *supra* note 20; *Enderby v. Frenchay Health Authority and the Secretary of State for Health*, C-127/92, [1993] E.C.R. I-5535, [1994] 1 C.M.L.R. 8; *Rinner-Kühn*, *supra* note 20.

⁹¹ *Supra* note 46.

⁹² *Ibid.*, art. 2(2) [emphasis added].

⁹³ *Supra* note 5. See “Indirect Discrimination”, *supra* note 19.

⁹⁴ *EC Treaty*, *supra* note 2 (formerly art. 119).

⁹⁵ *Seymour-Smith*, *supra* note 5 at para. 60.

which could also be evidence of apparent indirect discrimination calling for justification.⁹⁶ The ECJ did not have the evidence to propose an answer to the paragraph 61 test, but it did suggest an answer to the paragraph 60 test. It said that the statistics in this case “do not appear, on the face of it, to show that a considerably smaller proportion of women than men is able to fulfil the requirement imposed by the disputed rule.”⁹⁷

From an applicant’s perspective, it is fortunate that the Commission eschewed the sex discrimination approach on the ground that it was “extremely complicated” to develop statistical assessments in fields other than sex discrimination.⁹⁸ Instead, the definition adopted in the Article 13 Directives follows the ECJ’s approach to the concept of indirect discrimination in the field of free movement of persons. In the leading case of *O’Flynn v. Adjudication Officer*, the Court said:

[C]onditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers ... or the great majority of those affected are migrant workers ... where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers ... or where there is a risk that they may operate to the particular detriment of migrant workers.⁹⁹

As the House of Lords Select Committee on the European Union has said, however, a definition in the case of race discrimination different from that in respect of sex discrimination under Directive 97/80 “can only create confusion and increase the burden of litigation on the courts and on employers.”¹⁰⁰

Both the Race Directive and the Horizontal Directive contain a complex web of derogations. Following the sex discrimination model, while indirect discrimination can be objectively justified according to the stricter test first identified in *Bilka*,¹⁰¹ direct discrimination can be saved only by reference to an express defence, described as a “Genuine and Determining Occupational Requirement” in the Race Directive and as “Occupational Requirements” in the Horizontal Directive. A more limited list of oc-

⁹⁶ *Ibid.* at para. 61.

⁹⁷ *Ibid.* at para. 64.

⁹⁸ U.K., H.L., Select Committee on European Union, *EU Proposals to Combat Discrimination*, 9th Report, Session 1999-2000 (2000) at para. 80, online: The Stationery Office <<http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/lducom/68/6801.htm>> (date accessed: 24 May 2001).

⁹⁹ C-237/94, [1996] E.C.R. I-2617 at para. 18, [1996] 3 C.M.L.R. 103.

¹⁰⁰ See Select Committee on European Union, *supra* note 98 at para. 83. See also “Substantive Equality”, *supra* note 86 at 574.

¹⁰¹ *Supra* note 20, recently aff’d in *Kritger v. Kreiskrankenhaus Ebersberg*, C-281/97, [1999] E.C.R. I-5127, [1999] I.R.L.R. 808. See also *Hill and Stapleton v. Revenue Commissioners and the Department of Finance*, C-243/95, [1998] E.C.R. I-3739, [1998] 3 C.M.L.R. 81. For a discussion of this, see “Indirect Discrimination”, *supra* note 19; “Substantive Equality”, *ibid.*

occupational requirements is found in the Race Directive than in the Horizontal Directive. Thus, the Race Directive says that

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.¹⁰²

This provision is replicated in Article 4(1) of the Horizontal Directive. In addition, Article 4(2) of the Horizontal Directive provides an occupational requirement in respect of “*entreprises de tendance*”. In this complex provision the Directive allows national legislation that permits “churches and other public or private organisations the ethos of which is based on religion or belief” to discriminate on the grounds of religion where, in respect of the occupational activities at issue or the context in which they are carried out, “a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement,” provided that it does not justify discrimination on another ground. Thus, this provision would continue to allow a Catholic school to require a teacher to be Catholic. The second paragraph of Article 4(2), however, goes one stage further: these organizations can require “individuals working for them to act in good faith and with loyalty to the organisation’s ethos.” Does this mean that a Catholic school could dismiss one of its teachers for cohabiting or for being a single parent, or that a firm of financial advisers could dismiss a socialist?

Specific derogations are also provided in the Horizontal Directive in respect of disability, age, and in the context of Northern Ireland, religion or belief. In respect of Northern Ireland, special provision is made concerning teachers and “underrepresentation of one of the major religious communities in the police service of Northern Ireland.”¹⁰³ In respect of disability and age,¹⁰⁴ states have the choice, apparently at the insistence of the British government,¹⁰⁵ whether to apply the Directive at all to the armed forces. If the Directive does apply, the armed forces, like any other employer, can take advantage of specific derogations. In respect of disability, Article 5 requires employers to make reasonable accommodation for disabled persons. 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 undergo training, unless such measures would impose a dispro-

¹⁰² *Supra* note 67, art. 4.

¹⁰³ *Ibid.*, art. 15(1).

¹⁰⁴ *Ibid.*, art. 3(4).

¹⁰⁵ Skidmore, *supra* note 78 at 131.

portionate burden on the employer."¹⁰⁶ Such steps would not constitute indirect discrimination.¹⁰⁷ The European Disability Forum had lobbied for this provision, based on the *Disability Discrimination Act 1995*.¹⁰⁸ This duty of reasonable accommodation would also have benefited other disadvantaged groups, such as workers needing time off to attend religious celebrations, but the Directive does not provide for this, and so people with disabilities are placed in a privileged position.

In respect of age a number of specific derogations are permitted, provided that 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."¹⁰⁹ Such differences may include fixing maximum and minimum ages for access to employment and dismissal and access to occupational social security schemes. Setting maximum age limits risks being indirectly discriminatory against women¹¹⁰ and therefore unlawful, unless objectively justifiable. The Directive recognizes this. In Article 6(2) it expressly provides that fixing different ages for admission or entitlement to occupational social security schemes, invalidity benefits, or age criteria in actuarial calculations is lawful, "provided this does not result in discrimination on the grounds of sex." In Article 6(1)(c) the Directive identifies acceptable objective justifications—"the training requirements of the post in question or the need for a reasonable period of employment before retirement."

In addition to these more specific exceptions, Article 2(5) contains a general, wide-ranging exception not found in the race or sex directives, derived from the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹¹¹ This provides the "Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of public health and for the protection of the rights and freedoms of others." As Skidmore points out, unless the Court of Justice is vigilant, there is a risk that this derogation could be used by Member States to perpetuate discrimination. He notes that, historically, stereotypical assumptions about gay men, Jews, Muslims, and people with mental disabilities have been used to justify their exclusion from certain jobs in the

¹⁰⁶ *Supra* note 66, art. 5.

¹⁰⁷ *Ibid.*, art. 2(2)(b)(ii). There can be no direct discrimination because the Directive does not provide for the non-disabled to make a claim.

¹⁰⁸ (U.K.), 1995, c. 50.

¹⁰⁹ Horizontal Directive, *supra* note 66, art. 6(1).

¹¹⁰ See e.g. *Price v. Civil Service Commission (No. 2)*, [1978] I.R.L.R. 3 (Ind. Trib.).

¹¹¹ 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5.

interest of national security or public health, or to protect others from these “dangerous” people.¹¹²

Both the Race Directive and the Horizontal Directive permit derogations on the grounds of positive action. Following the wording of Article 141(4),¹¹³ 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.”¹¹⁴ Article 7(1) of the Horizontal Directive¹¹⁵ contains an equivalent provision. In respect of disability, however, Article 7(2)¹¹⁶ seems to permit the opposite of positive action: states can derogate from the equality principle in respect of health and safety at work or facilities for safeguarding or promoting their integration into the working environment.¹¹⁷

Not only do the Directives prohibit direct and indirect discrimination; they also forbid harassment, and as we shall see, victimization. Both Directives also contain the innovation that harassment shall be deemed to be discrimination when “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.”¹¹⁸ No comparator is necessary and the test is subjective. This provision circumvents the weakness of the existing Harassment Recommendation and Code of Conduct¹¹⁹ by attaching the force of the remedial provisions in the Directive to the anti-harassment provision.

Learning from the experience with sex equality, both Directives also contain significant provisions on remedies. They envisage the right of victims to a personal remedy against the discriminator, as well as the duty on each Member State to lay down rules on penalties for breach of the Directive that must be “effective, proportionate and dissuasive”.¹²⁰ As far as the rights of victims are concerned, Member States must provide that

¹¹² *Supra* note 78 at 130.

¹¹³ See text following note 54.

¹¹⁴ *Supra* note 67, art. 5.

¹¹⁵ *Supra* note 66.

¹¹⁶ *Ibid.*

¹¹⁷ See Skidmore, *supra* note 78 at 131.

¹¹⁸ Race Directive, *supra* note 67, art. 2(3). Horizontal Directive, *supra* note 66, art. 2(3), is equivalent.

¹¹⁹ EC, *Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work*, [1992] O.J. L. 49/1. See generally Bakirci, “Sexual Harassment in the Workplace in Relation to EC Legislation” (1998) 3 *Int’l J. Discrimination & L.* 3.

¹²⁰ Race Directive, *supra* note 67, art. 15; Horizontal Directive, *supra* note 66, art. 17.

judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.¹²¹

While this reflects Article 6 of Directive 76/207, an express role is envisaged for public interest groups to provide some institutional support. Article 7(2) of the Race Directive and Article 9(2) of the Horizontal Directive oblige the Member States to ensure that

associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national laws, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, 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.

Thus, the British Equal Opportunities Commission, which has brought a number of successful test cases before the Court of Justice, has provided a role model for this provision.¹²²

The Directives also reverse the burden of proof in civil cases. Reflecting the principles contained in Directive 97/80,¹²³ the Directives provide that

when persons who consider themselves 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, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.¹²⁴

To reinforce the effective legal protection, the Directive contains a provision on victimization. Article 9 of the Race Directive provides that "Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal

¹²¹ Race Directive, *ibid.*, art. 7(1); Horizontal Directive, *ibid.*, art. 9(1). This is subject to national rules relating to time limits for bringing actions.

¹²² See generally C. Barnard, "A European Litigation Strategy: The Case of the Equal Opportunities Commission" in J. Shaw & G. More, eds., *New Dynamics of European Union* (Oxford: Clarendon Press, 1995) 253.

¹²³ *Supra* note 46, arts. 3, 4.

¹²⁴ Race Directive, *supra* note 67, art. 8; Horizontal Directive, *supra* note 66, art. 10.

treatment.”¹²⁵ In addition, as with Directive 97/80, Member States are obliged to ensure “that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.”¹²⁶ Member States must also ensure, following the model of Articles 3, 4, and 5 of Directive 76/207, the elimination of discrimination from any legal or administrative provisions, as well as from collective agreements or individual contracts of employment.¹²⁷

Perhaps the most striking feature of the Race Directive (but not the Horizontal Directive) is the obligation contained in Article 13 for Member States to “designate a body or bodies¹²⁸ for the promotion of equal treatment of all persons without discrimination on the grounds of different racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights.” Not only must an agency be set up, but following the model of the British Commission for Racial Equality, these bodies must have among their functions providing independent assistance to victims of discrimination in pursuing their complaints about discrimination on grounds of racial or ethnic origin; conducting independent investigations or surveys concerning discrimination; and publishing reports and making recommendations on issues relating to discrimination based on racial or ethnic origin. The Directive does not, however, make provision for the establishment of an equivalent agency at the EU level that could help coordinate such activities.

Consistent with the emphasis on the achievement of civil society, the Directives envisage an important role for NGOs. The Commission has stressed the importance of such actors in its *Social Policy Agenda*. It says,

The new form of governance requires the direct involvement of all key actors, in particular non governmental organisations and grassroots organisations, to ensure the full participation of people in social policy. This is particularly the case for the promotion of quality of social policy, as defined in this Agenda where the specific role of social non governmental organisations should be fully acknowledged. The participation and composition of civil society organisations are therefore highly relevant.¹²⁹

¹²⁵ *Ibid.* Horizontal Directive, *ibid.*, art. 11, refers to “dismissal or other adverse treatment”. These articles draw on the decision of the Court of Justice in *Coote*, *supra* note 33. See M. Dougan, “The Equal Treatment Directive: Retaliation, Remedies and Direct Effect” (1999) 24 *Eur. L. Rev.* 664.

¹²⁶ Race Directive, *ibid.*, art. 10. Horizontal Directive, *ibid.*, art. 12, is substantially similar.

¹²⁷ Race Directive, *ibid.*, art. 14; Horizontal Directive, *ibid.*, art. 16.

¹²⁸ The requirement found in earlier drafts of “independence” of these bodies has been removed.

¹²⁹ *Supra* note 54 at 23.

Thus, Member States must “encourage dialogue” with appropriate NGOs that have, in accordance with their national law and practice, “a legitimate interest in contributing to the fight against discrimination” with a view to “promoting the principle of equal treatment.”¹³⁰

Conclusion

That these Directives were ever concluded is in itself an achievement. They have benefited from some of the lessons learned in the field of sex discrimination, and the remedies provisions, especially in the Race Directive, are particularly strong. In some Member States the Directives will represent a quantum leap forward in terms of protection for the disadvantaged groups. In other Member States, however, where similar legislation has been in existence for some time, some might lament that the Directives embody a rather outmoded approach to the equality principle, one which manifests itself through the principle of non-discrimination. The prerequisite requirement of a comparator who is better treated does not help in a highly segregated workplace, nor does it assist those who are suffering from multiple discrimination. The principle of non-discrimination also does little in terms of remedy. In the absence of an underlying principle of equality, there is no obligation that the removal of the discriminatory conduct should result in the levelling up of conditions to the benefit of the individual or group discriminated against. Perhaps the *Charter* might help to change this climate.

On another level the Directives do not focus on the achievement of equality in the broader, more results-oriented, redistributive sense by defining equality in terms of “fair” participation of groups in the workforce, and fair access of groups to education and training and to goods, facilities, and services. This may involve special measures to overcome disadvantage. Lessons could have been learned from the *Fair Employment (Northern Ireland) Act 1989*.¹³¹ This has as its main aim to promote “fair participation in employment”.¹³² This term, which is not defined in the statute, is openly result-oriented. “Affirmative action” is the cornerstone of the legislation. This is defined in the current *Fair Employment and Treatment (Northern Ireland) Order 1998*¹³³ as

Action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including-

(a) the adoption of practices encouraging such participation; and

¹³⁰ Race Directive, *supra* note 67, art. 12; Horizontal Directive, *supra* note 66, art. 14.

¹³¹ (U.K.), 1989, c. 32.

¹³² *Ibid.*, ss. 31(1), 32(5), 36(1)(c).

¹³³ S.I.3162 (N.I.21) [hereinafter *FETO*]. This section draws on “Substantive Equality”, *supra* note 86.

- (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.¹³⁴

The *FETO* does not define “fair participation”. The Fair Employment Commission (now merged in the Equality Commission for Northern Ireland), which administered the legislation, adopted an interpretation involving redressing imbalances and under-representation between the two communities in Northern Ireland. The aims are to secure greater fairness in the distribution of jobs and opportunities and to reduce the relative segregation of the two communities at work.¹³⁵ This would encourage fair participation of under-represented groups and fair access to goods, facilities, and services through measures such as a duty on public authorities to promote equality, a duty to monitor, and employment and pay equity plans.¹³⁵ On a broader level the Community could have considered introducing the requirement of an audit in respect of its own proposed legislation and required Member States to engage in a gender audit in respect of all major pieces of domestic legislation.

This agenda may prove to be too ambitious for the Community at a time when much attention is focussed on the limits of the Community competence and the principle of subsidiarity. If, however, the Union is committed to achieving genuine equality, simply dusting down an old model might not be the best way forward.

¹³⁴ *Ibid.*, art. 4(1), based on U.K., Northern Ireland Office, *Fair Employment in Northern Ireland*, Cm. 380, session 1987-88 (London: HMSO, 1988).

¹³⁵ “Substantive Equality”, *supra* note 86 at 565; U.K., H.C., Northern Ireland Affairs Committee, Fourth Report, *The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On, Vol. 1: Report and Proceedings of the Committee* (H.C. 95-I), Sess. 1998-99 (1999).

¹³⁶ See the detailed proposals in B. Hepple, M. Coussey & T. Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation* (Oxford: Hart, 2000); “Substantive Equality”, *ibid.*; C. McCrudden, “Mainstreaming Equality in the Governance of Northern Ireland” (1999) 22 *Fordham Int’l L.J.* 1696.