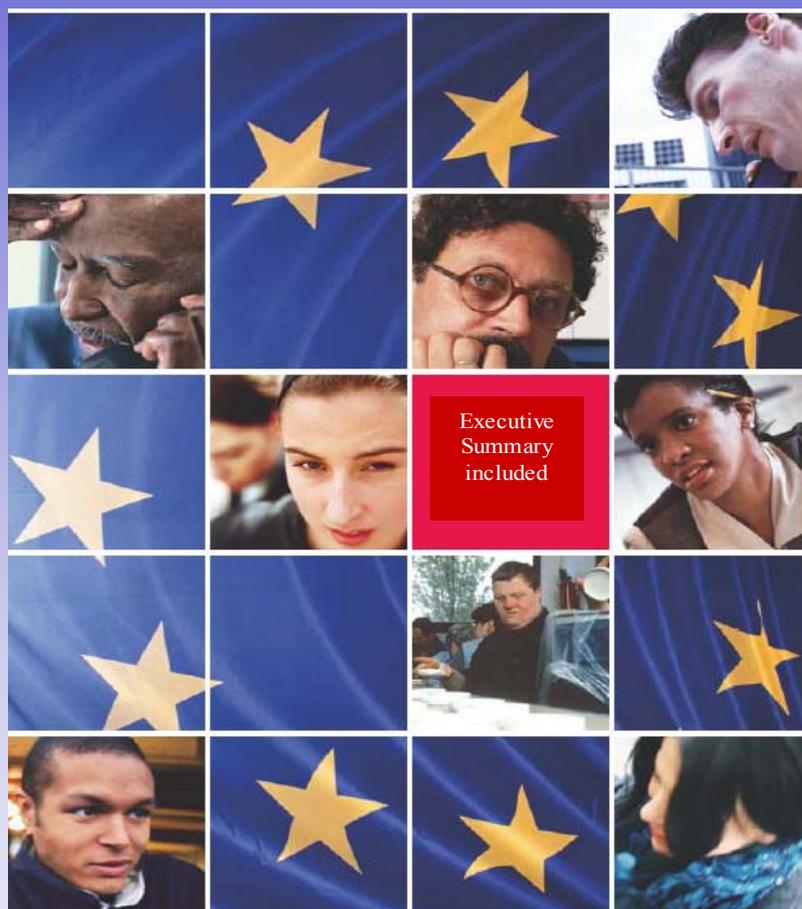


# CRITICAL REVIEW OF ACADEMIC LITERATURE RELATING TO THE EU DIRECTIVES TO COMBAT DISCRIMINATION



Employment & social affairs





Critical review of academic  
literature relating to the EU  
directives to combat discrimination

Employment & social affairs

Fundamental rights and anti-discrimination

**European Commission**  
Directorate-General for Employment  
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## Executive Summary

The inclusion of Article 13 in the Treaty of Amsterdam extended the powers of the European Union in the field of combating discrimination and gave rise to two new Directives setting out to implement the principles of non discrimination across the European Union: Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The innovative approach of the Directives has attracted considerable attention from both policy-makers and the academic world, and there is a growing body of academic literature referring to the Directives. This report provides an analytical overview of this body of literature, primarily in 15 Member States of the European Union. It presents the key tendencies in thinking around the Directives and highlights the main conclusions presented in these studies.

The project produced an extensive bibliography of around 200 publications relating to the Directives. This report presents the comprehensive bibliography and each publication is accompanied by a brief abstract. In addition, there is a thematic bibliography organised around key topics. It should be noted that, in keeping with the objectives of the study, only literature dealing extensively with the Directives has been included. For example, publications concentrating on description and analysis of the national legislation implementing the Directives have not been included. A smaller group of publications (around 80) were selected for more detailed scrutiny. The review of these publications was used to prepare a thematic analysis report, which aims to examine in more detail the principal trends, observations and recommendations found within the academic literature.

The literature analysed deals with all major aspects of the Directives, ranging from general evaluations of European Union anti-discrimination law to detailed discussions around specific provisions of the two Directives. Major themes identified as recurring were the concept of equality; the relationship between the Directives and human rights and fundamental freedoms; the definition of the grounds of discrimination; the definition of discrimination; the exceptions to the prohibition of discrimination; the mechanisms for enforcement; and the process of national implementation.

Although a range of views are expressed within the literature, a number of key points can be highlighted.

1. In relation to the general evaluation of the Directives, a substantial part of the literature focuses on the differences between the legal provisions applying to the different grounds of discrimination. The authors note that there are three strands to EU anti-discrimination legislation (distinguishing sex, and racial or ethnic origin from the other grounds mentioned in Article 13). Various authors have attempted to explain the reasons behind these distinctions and to consider their validity. They have drawn attention to factors such as substantive differences between the grounds of discrimination or the influence of international human rights instruments. Some authors argue that the differences between the Directives are not justifiable and generate a hierarchy of equality.

2. A significant group of publications examines the tensions that arise between the right to non-discrimination and other fundamental rights and freedoms, such as the freedom of religion and the freedom of contract. There is an extensive debate within the German language literature around the Racial Equality Directive and whether the prohibition of discrimination in the provision of goods and services (including housing) can be reconciled with the freedom of contract principle. In relation to the freedom of religion, there is a lively debate within the academic literature over whether the exceptions in the Framework Employment Directive for organisations with an ethos based on religion or belief are either too broad or too narrow.

3. Some commentators have focused on the position of the Directives within the wider body of EU law and policy. In particular, various authors mention the contribution of the Directives to expanding the rights of EU citizens and developing the protection of human rights by the Union. They note that the Directives were adopted around the same time as the EU Charter on Fundamental Rights and some have described this process as the constitutionalisation of the principle of equality. Others have focused on the link between the Directives and the right to non-discrimination under the European Convention on Human Rights.

4. Many publications examine a specific ground of discrimination and its treatment within the Directives. Whilst this literature naturally draws out particular themes and issues, a common point of debate is the interpretation of the ground. The Directives do not provide a definition of terms such as 'religion' or 'disability', yet the academic literature demonstrates that these are capable of very different interpretations. Some commentators have highlighted potential areas where the different grounds intersect. For example, the boundaries between race, ethnic origin and religion can be difficult to determine. Similarly, age discrimination can overlap with the grounds of sex and disability. A specific set of literature has examined the positive duty to provide a reasonable accommodation for people with disabilities. A number of authors have argued that this reasonable accommodation concept could have been usefully applied to other grounds of discrimination, such as religion.

5. Much of the existing literature scrutinises the definition of discrimination found within the Directives. In relation to direct discrimination, several publications have considered the range of situations where direct discrimination may be justified. This is often linked to an analysis of the exception for genuine occupational requirements and authors differ in their understanding of how flexibly this exception should be applied. Moreover, many commentators note the possibility to justify direct discrimination on grounds of age. In general, the literature is critical of the breadth of the exceptions for age discrimination. In contrast, there is frequently praise for the new definitions of indirect discrimination and harassment. These are often perceived as advances on the pre-existing approach in EU sex equality legislation.

6. Another key theme within the literature is the specific exceptions to the prohibition of discrimination found within the Directives. In relation to the Racial Equality Directive, many authors criticise the exception for difference of treatment based on nationality. The main argument here is that difference of treatment on grounds of racial or ethnic origin will often coincide with differences in nationality and that this exception may make it difficult in practice for third country nationals to enforce successfully the Directive. On sexual orientation and the Framework Employment Directive, a number of publications have examined the treatment of employment benefits extended in respect of a worker's spouse or partner. In particular, there is a debate surrounding the extent to which national law may provide exceptions for benefits limited to workers' spouses.

7. Some literature examines the scope for positive action under the two Directives. There is a debate over whether this should be classified as an exception to the principle of equal treatment, which reflects the different understandings of the concept of equality found within the Directives. Many authors point to the existing case-law of the Court of Justice concerning positive action and sex equality. Some commentators argue that the context for applying positive action in respect of grounds such as race or disability is different from sex and, consequently, the Court's existing case-law in this area should be distinguished.

8. There is comparatively less literature on the mechanisms for enforcement of the Directives and the remedies for discrimination. Many authors welcome various innovations within the Directives, such as the duty to create an equal treatment body within the Racial Equality Directive or the rules on legal standing for organisations in both Directives. Nonetheless, various authors would have preferred the Directives to go further here. In particular, several authors suggest that organisations should have autonomous legal standing to bring complaints of discrimination and they should not be restricted to supporting individual victims. There is some debate within the literature on equal treatment bodies and the range of models available within Europe. The most common observation here is that the duty on Member States to create an equal treatment body should have been also included within the Framework Employment Directive.

9. Much of the literature concerns the process of national implementation of the Directives. This often focuses on the adequacy of national implementing legislation or proposed law reforms. There are examples of non-implementation, as well as situations where states have gone beyond the minimum requirements of the Directives. A frequent theme within this group of literature is the challenge posed by inserting the Directives into the existing legal framework on anti-discrimination. This seems to be accentuated by the different treatment within the Directives of different grounds of discrimination. States that have aimed at providing a consistent level of protection across different grounds need to go further than the Directives in order to retain a common standard in domestic legislation. In other instances, states have chosen minimum implementation and this has produced great complexity within the national legislation. It is notable that the process of implementing the Directives has often stimulated a wider debate on the structure and mandate of equal treatment bodies.

Overall, the existing literature is still quite general in nature and concentrates on describing and analysing the Directives, rather than setting out practical recommendations for future policy development. Nevertheless, several authors have reflected on the options for further initiatives. Amongst their suggestions, the following can be highlighted:

- a shift away from the focus within the Directives on litigation by individuals as the primary means to combat discrimination. Instead, several authors propose a new strategy based on positive duties to promote equality for key actors, including public authorities, employers and service-providers.
- greater emphasis on the mainstreaming approach and the promotion of non-discrimination throughout all areas of EU law and policy.
- stronger recognition of the human rights dimension to the Directives and the need to consider possible conflicts between rights and freedoms when developing anti-discrimination law.

## **1. Introduction**

The inclusion of Article 13 in the Treaty of Amsterdam extended the powers of the European Union in the field of combating discrimination and gave rise to two new Directives setting out to implement the principles of equal treatment across Europe: Directive 2000/43/EC implementing the principle of equal treatment irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The innovative approach of the Directives has attracted considerable attention from both policy-makers and the academic world, and there is a growing body of academic literature referring to the Directives, both in respect of their contents and the process of implementation. The objective of this report is to present an analytical overview of what has been written about the Directives in academic circles, mainly within 15 Member States of the European Union. Organised around the main themes found in the literature, the report presents key tendencies in academic thinking about the Directives, and highlights the main conclusions and messages put forward by the studies included in the analysis.

The report aims to introduce the specialist legal literature on the Directives to a wider audience, and in particular to policy-makers across the European Union who will be involved in the implementation of the Directives.

The study was conducted by Focus Consultancy Ltd in collaboration with Dr Mark Bell, University of Leicester, and a team of European experts on anti-discrimination law.

## 2. Creating the bibliography

This section provides an overview of the methodology adopted in constructing the bibliography and an introduction to finding academic literature on the Article 13 Directives on combating discrimination.

### *(a) The project methodology*

There were two key phases in the compilation of the bibliography. In the first phase, the project team conducted a wide-ranging bibliographic review in order to identify the greatest number of relevant publications. In the second phase, a number of publications were selected for in-depth analysis in order to permit the thematic analysis of the literature.

#### (i) Phase 1 – screening the literature

The project team conducted bibliographic research through the normal mechanisms: searching library catalogues, electronic databases, internet resources. In addition, we were able to consult the bibliographies of the Commission's expert groups on race, disability and sexual orientation discrimination. At this stage, our primary objectives were to gather:

- Publications related to the Directives;
- Academic publications;
- Publications of an analytical nature.

To this end, we excluded official publications from national authorities or other official organisations (e.g. equality bodies). Publications from non-governmental organisations were also largely excluded, unless these were research reports of an academic nature. In the field of law, our research focused on academic legal research rather than publications targeted at legal practitioners. Publications in the latter category would be primarily aimed at explaining the contents of the Directives, or national legislation implementing the Directives, rather than making a critical analysis of their contents.

Although our research was extensive, it is important to acknowledge certain limitations. The principal challenge was to cover all languages and sets of national literature within the fifteen states that constituted the European Union when the project commenced. The project team divided its research responsibilities according to language. This enabled us to cover directly all official languages with the exception of Finnish, Greek and Portuguese. The bibliographies of the expert groups and contact with individual researchers allowed us to check the literature in these languages, but with a less intense level of review. With regard to the English language literature, we examined international and European sources, as well as a separate review of publications from the UK and Ireland.

#### (ii) Phase 2 – analysing the literature and completing the bibliography

In the second phase of the project, the draft bibliography was reviewed to identify any apparent gaps, for example, with regard to language or country. The draft bibliography revealed a large body of literature in the English language, therefore, we were able to concentrate here on the most analytical academic publications. In particular, general labour law textbooks increasingly contain a short discussion of the Directives and we found examples of this in the UK and Italy. As this information is descriptive in nature, such publications were mainly omitted. Our research criteria were applied more

flexibly with regard to languages and countries where there were very few publications on the Directives (e.g. Greece). The full bibliography includes around 200 publications. From this, around 80 were selected for in-depth analysis by the project team. In making the selection, we were guided by a combination of indicators:

- linguistic and geographic balance;
- the length of the publication;
- the academic quality of the publication: although this is a difficult assessment to make, the quality of the referencing and the location of the publication were useful guides;
- the topic of the publication: we sought to examine commentary on all aspects of the Directives and to avoid selecting a very large amount of literature examining the same issue;
- the focus on the Directives: many of the publications are concerned with national law and implementation of the Directives.

For each of the selected publications, a summary was produced of the main observations, conclusions and recommendations of the author. These summaries were then used to prepare the thematic analysis of the literature.

#### (b) Finding academic publications and research on the Directives

There are relatively few databases specialising in discrimination law. One example is the database of the Centre for Research and Comparative Legal Studies on Sexual Orientation and Gender Identity:

<http://www.cersgosig.informagay.it>

This includes a significant quantity of literature relating to Directive 2000/78<sup>1</sup> (hereafter referred to as the Framework Employment Directive).

A bibliography of academic publications on Article 13 is also available on the website of the Academy of European Law, Trier.

[http://www.era.int/www/en/c\\_10540\\_doc.htm](http://www.era.int/www/en/c_10540_doc.htm)

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<sup>1</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

### 3. Thematic analysis of the academic literature on the Article 13 Directives

This section provides an overview of the main trends and observations found within the academic literature on the Article 13 Directives on combating discrimination. It is based upon the in-depth analysis of around 80 publications, together with a less detailed review of the entire bibliography (presented in the Annex). The literature falls into several broad categories. First, there are publications examining EU anti-discrimination law from a general perspective in the light of the Directives. These present and evaluate the contents of the Directives, but also consider the Directives in the wider context of EU social law and policy. This group of literature includes theoretical reflections on the concept of equality found within the Directives and how this interacts with other areas of law and policy, such as human rights and citizenship. A second group of literature provides a more technical review of specific provisions of the Directives, for example, the meaning and significance of the definition of harassment. A third group of literature examines the Directives in relation to a specific national context and normally with an eye to the national process of implementation. This strays into pure discussion of national anti-discrimination law and policy, which is outside the remit of this research project.

This report does not seek to provide an assessment of general trends in academic literature on anti-discrimination law and policy. Clearly, there are many important publications reflecting on existing and future approaches to combating discrimination that have not been included in this bibliography because they did not devote significant attention to the Article 13 Directives. Moreover, most of the literature on gender equality similarly falls outside the scope of this research. Nonetheless, a substantial body of literature specifically connected to the Directives has been located.

Specific publications from the database are referred to by the name of the author(s) and the year of the publication. The full reference can be found in the bibliography in the Annex. In addition to the specific references within the text, the thematic bibliography in the Annex is organised by themes corresponding to those used in the rest of this report. For example, paragraph (d) below examines the comments of the academic literature on ‘the principle of equality’. Accordingly, in the thematic bibliography, a list of literature on ‘the principle of equality’ can be found.

#### *(a) Geographic and linguistic distribution of publications*

Before examining the substantive content of the literature, it is valuable to make some preliminary observations regarding location and language. It is difficult to give precise numbers in this area because some publications concern the situation in a number of countries and there are some surprising combinations: for example, a Spanish publication in a German journal.<sup>2</sup>

With regard to the location of the publication, the largest groups of literature can be found in the UK and Germany. Very few academic publications on the Directives were located in Austria, Denmark, Finland, Greece, Luxembourg and Portugal.

A few Norwegian articles were included, given that the Directives may also be of influence for future legislation in European countries outside the EU and in particular the member states of the EFTA. A small number of non-European academic publications on the Directives were located.<sup>3</sup> These were all in American or Canadian law journals.

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<sup>2</sup> Moreiro González, 2000.

<sup>3</sup> Barnard, 2001; McInerney, 2003; Caruso, 2003.

The patterns on language are comparable. A large number of publications are in English and German. Unsurprisingly, the English literature includes many studies that are not focusing on the situation in the UK or Ireland, but presenting the situation in another country to an international audience<sup>4</sup> or making a European / comparative study. There were very few academic publications in Danish, Finnish, Greek and Portuguese.

*(b) General evaluations of EU anti-discrimination law after the Directives*

A significant body of literature concerns a general evaluation of EU anti-discrimination law in the wake of the Directives. This discussion has primarily focused on the different legal provisions applying to different grounds of discrimination within EU law. Within the list of grounds mentioned in Article 13 EC, there are three strands to anti-discrimination law. First, 'sex' where existing EU legislation already provided rights to equal treatment in employment, training and aspects of social security. Second, 'racial or ethnic origin' where Directive 2000/43<sup>5</sup> (hereafter the Racial Equality Directive) provides a right to equal treatment in employment, training, social protection, social advantages, education and goods and services (including housing). Third, 'religion or belief, age, disability and sexual orientation' where the Framework Employment Directive provides a right to equal treatment in employment and training.

Various commentators have examined the distinctions drawn between the grounds and explored the underlying reasons that might explain or justify this pattern of regulation [see Box No. 1]. Bell and Waddington (2003) argue that specific differences between the grounds do exist that can justify different treatment within legislation. Disability or age *may* affect an individual's ability to perform a job; for example, in some cases older workers will have reduced physical strength or mobility. In these circumstances, certain adjustments to the organisation of work may be necessary to allow the individual to perform the job. In contrast, this will not normally apply to characteristics such as race or sexual orientation.<sup>6</sup> Nonetheless, Bell and Waddington (2003) argue that the inconsistencies present within the Directives do not coherently reflect such differences. For example, the duty to provide a reasonable accommodation found within the Framework Employment Directive only applies in respect of disability and not age.

**Box No. 1: D. Schiek, 'A new framework on equal treatment of persons in EC law?' (2002) *European Law Journal* Vol. 8, pp. 290 - 314.**

This author argues that the grounds of discrimination fall into several categories, each of which may require some differentiation within anti-discrimination law. Gender, race and (partly) disability are *ascriptive*, in the sense that they are social constructions assigned to people. For example, there is no biological foundation for the notion of separate human 'races', yet it is a perceived category. Schiek contends that discrimination on these grounds is very rarely capable of justification. A second category concerns characteristics with a *biological* basis, such as sex, age and (partly) disability. For instance,

<sup>4</sup> e.g. Berthou, 2003 on France.

<sup>5</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22.

<sup>6</sup> There may, however, be narrow circumstances where the employer may be permitted to take into account such characteristics as a result of the 'genuine occupational requirement' exception.

sex (unlike gender) draws attention to the interaction between women and maternity. These grounds may occasionally affect an individual's ability or availability to perform a job. Simply being treated in the same way as others may result in exclusion, whereas different treatment could be essential to achieving equality. Another category is *chosen* characteristics, including sexual orientation, religion, belief, membership of an ethnic group. The author argues that although these are based on individual behaviour, they are intimately related to personal identity and discrimination on these grounds is an attack on identity and diversity.

Schiek draws attention to the pattern found in international human rights law, where there are general protections against discrimination, for example, in the International Covenant on Civil and Political Rights. These are accompanied by specific instruments on race discrimination (Convention on the Elimination of Racial Discrimination) and sex discrimination (Convention on the Elimination of All Forms of Discrimination Against Women). She argues that these instruments provide support for the decision of the EU to devote specific legislation to sex and race discrimination. At the same time, she is critical towards the gap in the level of protection that has emerged between sex and race discrimination within EU law.

The academic literature is often critical of the different levels of protection found between the two Directives.<sup>7</sup> For some, the differences simply reflect political pragmatism<sup>8</sup> and not a coherent vision of anti-discrimination law.<sup>9</sup> There is particular criticism of the differences between the Directives relating to the enforcement procedures, most notably, the absence of any requirement in the Framework Employment Directive to establish a body for the promotion of equal treatment.<sup>10</sup> Barry (2003) refers to the emergence of 'enforcement hierarchies' between the Directives. Indeed, some publications argue that in effect a *hierarchy of equality* exists.<sup>11</sup> A common observation is that the Racial Equality Directive has reordered a pre-existing hierarchy, where sex equality enjoyed the strongest level of protection. It is argued that race has replaced sex as the top of this hierarchy, most notably because of the broad material scope of the Directive, but also the updated definition of discrimination and its more detailed provisions on enforcement and remedies.<sup>12</sup> In contrast, it has been suggested that age is the weakest ground because of the much broader scope for justifying age discrimination within the Framework Employment Directive.<sup>13</sup>

Thüsing (2003c) makes a further observation: another type of hierarchy exists between those grounds within Article 13, and covered by the anti-discrimination Directives, and those grounds of discrimination not addressed in EU law. He suggests that as the list of grounds included within anti-discrimination law is extended, it becomes more difficult to justify limiting the legislative protection to an exhaustive list of grounds. This point is also made by Velaers (2003), who criticises the exclusion of 'political opinion' from Belgian legislation designed to implement the Directives. Borrillo (2003)

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<sup>7</sup> e.g. Borrillo, 2003; Guild, 2000; Moreira González, 2000; Skidmore, 2001; Holtmaat, 2001.

<sup>8</sup> Brown, 2002.

<sup>9</sup> Waddington, 2003b.

<sup>10</sup> Mahlmann, 2003; Kimber, 2003a; O'Conneide, 2003; Whittle, 2002.

<sup>11</sup> Borrillo, 2002; Toggenburg, 2002; Moreira González, 2000; Waddington, 2003b; Strazzari, 2002.

<sup>12</sup> Mahlmann, 2003; Kimber, 2003a; Meenan, 2003; Schiek, 2002; Parmer, 2003.

<sup>13</sup> Kimber, 2003a; Meenan, 2003.

recommends that the Union establish a global anti-discrimination policy addressing all the grounds found within Article 13, but also Article 21 of the EU Charter of Fundamental Rights.<sup>14</sup>

The range of grounds covered also relates to the interaction between the Directives and the pre-existing national anti-discrimination legislation. The choices made in the Directives may not fit well with the national legal framework. Several authors have questioned whether German constitutional law would permit a higher level of protection against race discrimination than sex discrimination.<sup>15</sup> Alternatively, Barry (2003) and Bolger (2003a) note that Irish anti-discrimination law includes grounds not found within the Directives (e.g. family status) and that Ireland will need to go beyond the requirements of the Directives in order to retain a comparable level of protection for each ground of discrimination.

Although several publications argue that race has supplanted sex within EU anti-discrimination law, there is also recognition that the Article 13 Directives learn from and contribute to EU sex equality legislation. Malmberg (2001a) predicted that the definition of discrimination in sex equality law would be influenced by the Racial Equality and Framework Employment Directives. This comment appears well-placed because Directive 2002/73<sup>16</sup> (hereafter the Revised Equal Treatment Directive) substantially amended the 1976 Equal Treatment Directive, often incorporating elements from the Article 13 Directives. Parmar (2003) describes this as a process of ‘reflexive cross-fertilisation’ with mutual benefits. The Article 13 Directives benefited from the experience of sex equality legislation and in turn contributed to its revision and enhancement.

### *(c) The relationship between EU anti-discrimination law and other areas*

Some literature focuses on the wider context of the Article 13 Directives. One grouping concerns the position of the Directives within EU law and policy frameworks. Another branch of the literature interrogates the relationship between the right to non-discrimination and other fundamental rights and freedoms, most notably, freedom of contract and freedom of religion.

#### *(i) The Directives and EU law and policy*

The Directives clearly marked an important development within EU social policy. Reflecting the sense of a turning point, Fredman (2001) and Waddington (2003b) refer to a new ‘generation’ of anti-discrimination or equality law. The broad material scope of the Racial Equality Directive has provoked most debate as this takes EU anti-discrimination law beyond its traditional focus on the labour market. The extension into areas such as education and housing challenges the normal boundaries of EU social policy and labour law. Bell (2002b) argues that this may be termed ‘social law’, whereas Schiek (2003b) suggests that it would be better to identify a separate body of equality law.

The debate around the categorisation of the Directives reveals an appreciation that they have a wide connection to different areas of law and policy. Several authors argue that the Directives are closely linked to the rights of Union citizenship.<sup>17</sup> Whilst the core rights of Union citizens provided in the EC

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<sup>14</sup> Article 21(1) of the Charter states: ‘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’.

<sup>15</sup> Schiek, 2003b; Wiedeman and Thüsing, 2002b.

<sup>16</sup> [2002] OJ L269/15.

<sup>17</sup> Schiek, 2003b; Whittle and Bell, 2002.

Treaty have remained relatively static since their introduction in 1993, citizenship rights are now emerging through other policy domains.

Others emphasise the role of the Directives as instruments for the protection of human rights.<sup>18</sup> This contrasts with the historical origins of EU sex equality legislation where the primary motivation was to prevent unfair wage competition. Therefore, several commentators note a shift away from a European social policy driven by the needs of market integration and towards a human rights foundation.<sup>19</sup> This bridge between non-discrimination and human rights is reinforced by the combination of the Directives and the subsequent EU Charter of Fundamental Rights, which contains a specific chapter on 'Equality'. This entrenchment of norms leads some authors to refer to the constitutionalisation of equality.<sup>20</sup> Dollat (2002) suggests that the Directives contain the potential to strengthen the fundamental rights dimension to the EU law and to forge a closer relationship between the Court of Justice and the European Court of Human Rights.

#### (ii) The Directives and fundamental rights and freedoms

It is possibly because of the human rights orientation of the Directives that considerable attention has been paid to the interaction between the right to non-discrimination and other constitutional rights and freedoms. In particular, there are several areas where the Directives potentially clash with other rights and freedoms.<sup>21</sup> The academic literature has divided over whether the right balance has been achieved.

De Schutter (2001) identifies the relationship between the right to non-discrimination and freedom of contract as central to the implementation of the Directives. The latter presumes that persons should be free to choose who they contract with in a wide range of economic activities. Therefore, the law should not restrict free choice with regard to the selection of employees, customers, tenants, etc. Since the 1970s, EU sex equality legislation has already restricted the freedom of employers to choose who they contract with in the area of employment. They may not decide that they prefer only to contract with male employees as this would be unlawful sex discrimination. This experience perhaps explains why the main point of controversy relates to the Racial Equality Directive and its application to areas such as the provision of goods and services, or housing. This has provoked an extensive and strong debate, which is almost exclusively found within the literature from Germany and Austria.<sup>22</sup> This may reflect the constitutional importance in Germany of the principle of freedom of contract.

There are a range of views found within the German literature, but it appears that the majority of civil law academics in Germany are critical of the Racial Equality Directive. The most severe critics argue that the Directive is fundamentally misplaced and Germany should seek to challenge its provisions. Picker (2003) argues that it is incompatible with the free functioning of the market economy to attempt to create a good society through legislative intervention. He suggests that only extreme cases of discrimination should be unlawful. Wiedeman and Thüsing (2002b) distinguish between different areas of life and argue that the law should be interpreted narrowly in relation to the provision of goods and services. They suggest that services not advertised to the public should not be covered, nor those provided by non-profit organisations. Indeed, Schiek (2003b) notes that German academics have

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<sup>18</sup> Mahlmann, 2003.

<sup>19</sup> McInerney, 2000; Mahlmann, 2003.

<sup>20</sup> Waddington, 2003a; Schiek, 2002.

<sup>21</sup> Sottiaux, 2003.

<sup>22</sup> On Austria, see Kuras, 2003.

focused on the public/private distinction as a possible means of restricting the scope of the Racial Equality Directive. Article 3(1)(h) provides that the principle of equal treatment applies to ‘access to and supply of goods and services which are available to the public, including housing’. She contends that the exclusion of ‘private’ goods and services is a derogation from the principle of equal treatment and this must be interpreted narrowly according to the general case-law of the Court of Justice.

Some German academics have made the case in support of the Racial Equality Directive. Baer (2002) notes that all constitutional orders must balance individual autonomy and the collective good. She argues that civil law should not just reflect market forces, but also welfare state objectives, such as combating discrimination. Schiek (2003b) points out other restrictions to the freedom of contract, such as laws against cartels. It is not an absolute freedom and legitimate restrictions can be imposed. Mahlmann (2003) focuses on the inter-relationship between freedom and equality. He contends that individuals need to be free from discrimination in order to be able to exercise fully their market freedoms, such as consumer choice.

A more specific expression of the tension between freedom and equality can be found in relation to employers with a religious ethos. This encompasses a number of different situations: organised religions (e.g. churches); organisations with religious functions (e.g. religious charities, youth associations); organisations with a religious ethos (e.g. an Islamic medical practice). Within each of these categories, there are different types of employees. On the one hand, there are employees whose primary activity is religious teaching and leadership (e.g. priests and clerics). On the other, there are employees with functions that are not ostensibly connected to religious belief (e.g. a Church secretary). The broadest interpretation of freedom of religion would support non-interference with the freedom of all these types of employers to choose any type of employee according to religious belief and practice. In contrast, a narrow interpretation would suggest that only in relation to clerics employed by an organised religion should religious belief be an occupational requirement. A further complicating issue is the potential overlap with other grounds of discrimination. An employer might invoke religious reasons to refuse to employ an unmarried mother or lesbian, gay and bisexual people.

The Framework Employment Directive provides a number of exceptions from the principle of non-discrimination that have been the focus of academic analysis. Article 4(1) permits any of the grounds (religion or belief, age, disability, sexual orientation) to be taken into account where it is a ‘genuine occupational requirement’. Article 4(2) provides a slightly broader exception in relation to difference of treatment based on religion where the employer has an ethos based on religion or belief. However, this exception states that it ‘should not justify discrimination on another ground’. Article 2(5) provides a further exception in relation to measures for the ‘protection of the rights and freedoms of others’. Several authors have criticised these exceptions as too vague, especially Article 4(2).<sup>23</sup> Particular attention has focused on paragraph 2 of Article 4(2), which allows churches and organisations with a religious ethos ‘to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos’. Kimber (2003a) argues that a broad interpretation of this ‘good faith’ duty could result in violations of an individual’s right to private life. Yet, she also points out that a narrow reading of Article 4(2) could breach the freedom of religion.<sup>24</sup>

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<sup>23</sup> Barnard, 2001; Skidmore, 2001; Bell, 2001b; O’Hare, 2001.

<sup>24</sup> See also, Leigh, 2001; Beaumont 2001.

There is no clear consensus within the academic literature on whether the Framework Employment Directive strikes an appropriate balance between equality and religious freedom.<sup>25</sup> This reflects the ambiguous text of the Directive in this area, which leaves scope for rather different and conflicting interpretations of its meaning [see Box 2]. It also provides an example of the tension that can arise between differentiation and equality.<sup>26</sup>

**Box 2:**

**Jacob Jousen, ‘Die Folgen de Europäischen Diskriminierungsverbote für das kirchliche Arbeitsrecht’ [Consequences of the European prohibitions of discrimination for church specific employment law] (2003) *Recht der Arbeit* pp. 32-39.**

**Hermann Reichold, ‘Europarecht und das kirchliche Arbeitsrecht’ [European law and church specific employment law] (2001) *Neue Zeitschrift für Arbeitsrecht* pp 1054-1060.**

These authors discuss the impact of the Framework Employment Directive in the context of Germany. The traditional autonomy of the Protestant and Catholic Churches from state regulation is an important element of German law. Although the Framework Employment Directive applies to churches, they conclude that it contains sufficient flexibility to respect church autonomy. Both authors interpret the Directive as meaning that churches can still require their principal employees to be members of the church. Moreover, the ‘good faith’ requirement in Article 4(2) reassures churches that they can impose heightened loyalty duties on their employees. Reichold argues that the exceptions should be read broadly and that this would permit the loyalty requirement to extend to employees such as cooks, cleaners or nurses working for religious organisations. He concludes that dismissal on grounds of open homosexuality could be justified under the Directive. In contrast, Jousen concludes that the Directive would not allow dismissal on the sole ground of sexual orientation.

*(d) The principle of equality*

A common theme within the academic commentary on the Article 13 Directives is the underlying concept of equality. Many authors point out that equality is not a monolithic concept, rather it can be interpreted in a number of different ways. A distinction is often drawn between ‘formal equal treatment’ and ‘substantive equality’. Formal equal treatment is reflected in the following formula:

‘The principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner.’<sup>27</sup>

Therefore, to establish discrimination, an individual must find someone with different personal characteristics (e.g. ethnic origin or sex) in a comparable situation and who has been treated more favourably than them. This approach works best with straightforward, overt examples of discrimination. For example, if an Asian woman is the best qualified applicant for a job, but nonetheless the job is given to a woman of European origin, then the Asian woman has been treated

<sup>25</sup> See also, Bellocchi, 2003; Holtmaat, 2001.

<sup>26</sup> Chieco, 2002.

<sup>27</sup> Case T-10/93 *A v Commission* [1994] ECR II-179, para. 42.

less favourably than another person of different ethnic origin. The formal equal treatment approach is more difficult to apply to subtle forms of discrimination, where exclusion can arise through informal processes. For example, if a firm recruits through a network of friends and acquaintances of existing workers, then ethnic groups not currently represented in the workplace may never become aware of vacancies. The substantive equality concept differs because it supports the view that equal treatment may not be sufficient to achieve full equality in practice. Where certain social groups, such as the Roma, have experienced a cycle of disadvantage across different areas of social life (education, employment, housing, healthcare), then positive action may be needed to compensate for the accumulation of inequality.

McCrudden (2003) argues that the Directives reflect several different concepts of equality. Schiek (2002) identifies elements of both the formal equal treatment concept and substantive equality. Yet, she concludes that the focus remains on formal equal treatment. Waddington (2003b) agrees that formal equal treatment is the dominant concept within the Directives.

Various authors criticise the weak place for *positive duties* within the Directives [See Box 3].<sup>28</sup> O'Hare (2001) argues that the Directives rely on individual complaints to enforce the principle of equal treatment.<sup>29</sup> Yet, there are many barriers to successful individual litigation, such as gathering evidence, identifying a suitable comparator, possessing sufficient financial resources for litigation, etc.<sup>30</sup> An approach based on positive duties moves away from the reliance on retrospective fault finding,<sup>31</sup> and places obligations on key actors to promote equality and to combat discrimination.<sup>32</sup> O'Hare (2001) suggests that employers should be placed under a duty to monitor the composition of their workforce. Barnard (2001) also recommends duties on employers to audit their practices, combined with an objective of fair participation for all groups. In relation to education, Parmar (2003) and Moreira González (2000) criticise the absence of any duties on states to promote equality through the curriculum, including intercultural education to combat racism. Parmar (2003) notes that such positive duties are found within the UN Convention on the Elimination of Racial Discrimination.

**Box 3: B Hepple, 'Race and Law in Fortress Europe' (2004) *Modern Law Review* Vol. 67 pp. 1-15.**

This author argues that the Racial Equality Directive reflects 'a British model of the 1970s' based on giving individuals the right to challenge racial discrimination through litigation. He contends that this method, by itself, places too much emphasis on achieving change through state regulation. Instead, there is a need to consider the positive duties that should be placed upon organisations and individuals. Inequality is perpetuated through 'institutionalised racism'. This arises where the culture of organisations operates to exclude, stereotype and disadvantage people from minority ethnic communities. Moreover, some groups face a 'cycle of social exclusion'. Challenging institutionalised racism and entrenched inequality demands positive interventions.

<sup>28</sup> Barry, 2003; Parmar, 2003; Barnard, 2001; Bolger, 2003a.

<sup>29</sup> Also, Rodrigues, 2000; Strazzari, 2002.

<sup>30</sup> Niessen, 2003.

<sup>31</sup> Barry, 2003.

<sup>32</sup> Fredman, 2001.

*(e) The grounds of discrimination*

Some publications are devoted to specific grounds of discrimination or to either the Racial Equality or Framework Directives. In the selected bibliography, a list of literature focusing on individual grounds of discrimination can be found.

(i) Racial or ethnic origin

Unsurprisingly, there is a significant body of literature looking specifically at race and ethnic discrimination or the Racial Equality Directive. Many of the general findings in relation to the definition of discrimination or procedures for enforcement, will be presented later in this report. Some discussion has centred on the meaning of ‘racial or ethnic origin’. Sewandono (2001) draws attention to the absence of any definition of ‘race’ or ‘ethnic origin’, whilst Rodrigues (2000) suggests that the Directive should have been based on the concept of race found within the International Convention for the Elimination of Racial Discrimination. Schiek (2003a) notes that the terms found within the Directive are not objective categories, but characteristics based on human perception. There is no biological or scientific basis for the existence of separate human races, consequently, ‘race’ discrimination is based on characteristics of otherness that result in people being treated as different. Schiek (2003a) argues that this is a combination of factors, including colour, outer appearance, language and religion. Therefore, combating race discrimination demands attention to difference of treatment linked to these characteristics. In this connection, Brown (2002) criticises the exclusion of religion from the Racial Equality Directive given the overlapping nature that racial and religious discrimination can take.<sup>33</sup> Toggenburg (2002) highlights the connection between combating race discrimination and the protection of minority rights, such as rights relating to minority languages and cultures. Yet, the Racial Equality Directive does not address this dimension.

(ii) Religion or belief

The definition of the grounds of ‘religion’ and ‘belief’ has also provoked academic commentary. Thüsing (2003c) notes that the definition of religion is highly contested; for example, the situation of Scientology. Fernández López and Calvo Gallego (2001) argue that the law of the European Convention on Human Rights on the freedom of religion will be important to take into account when interpreting the Directive. They argue that non-discrimination on grounds of belief should not restrict the capacity to establish organisations with political or ideological objectives, in particular trade unions, and these organisations should still have the right to limit their membership to those who share their beliefs.

Article 5 of the Framework Employment Directive places employers under a positive duty to make reasonable accommodations for people with disabilities. Various authors criticise the failure to extend this duty to include accommodations related to religion or belief.<sup>34</sup> Fernández López and Calvo Gallego (2001) note that the Directive only requires employers to be neutral towards different beliefs, in accordance with the formal equal treatment concept discussed above. They point out that the religious beliefs of employees may require accommodation in terms of dress codes, holiday times, etc and it would have been preferable to include religion or belief within the scope of the duty to make

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<sup>33</sup> Also, Rodrigues, 2000.

<sup>34</sup> Thüsing, 2003c; Bell and Waddington, 2003.

reasonable accommodations. Nonetheless, they note that a failure by an employer to allow adjustments to a dress code (for example, a requirement for all female employees to wear skirts) could be indirect discrimination on grounds of religion.

Many authors comment on the exception for churches or employers with an ethos based on religion or belief. This literature is discussed earlier in paragraph (c)(ii).

### (iii) Disability

The specific literature on disability also focuses on the definition of the ground and the reasonable accommodation duty. Disability is not defined in the Framework Employment Directive and Thüsing (2003c) criticises this. He notes divergence between existing national definitions of disability. Laskowski and Welti (2003) argue that it is probably contrary to the Directive to limit its benefits to a narrow group of disabled workers. Whittle (2002) supports a broad reading of the Directive. Given that it refers to discrimination ‘on the grounds of ... disability’ (Article 1), he argues that this could include discrimination against relatives and carers of disabled people. Connected to this debate, Brors (2003) contends that the Directive will restrict employers from making overt questions as to whether a job applicant is disabled. She argues that questions should instead be related to the skills and abilities necessary for the job. In the situation where it is known that an individual has a disability, the employer should be able to ask questions relating to the possibility of making a reasonable accommodation.<sup>35</sup>

Many authors welcome the duty to make reasonable accommodations, but suggest that it should have been extended to other grounds of discrimination.<sup>36</sup> Garrido Pérez (2001) welcomes the shift from earlier approaches to disabled workers that focused on rehabilitation schemes. She is, however, concerned that the criteria for when an employer should make a reasonable accommodation are too vague<sup>37</sup> and that it makes the accommodation of the disabled person dependent on economic factors.<sup>38</sup> In this connection, Hvinden and Halvorsen (2004) argue that Member States should establish schemes to support employers when making reasonable accommodations, so that economic factors do not restrict access to work. Barbera (2002) suggests that the interpretation of the extent of the duty on employers places a redistributive role into the hands of the courts, balancing the rights of individuals and employers.

Waddington and Hendriks (2002) draw attention to similar accommodation duties that exist in other areas of law, for example, in relation to pregnancy, maternity and parental leave. They argue that the duty to make a reasonable accommodation in the Framework Employment Directive should not be regarded as a radical departure, but akin to other accommodation obligations already imposed on employers. They suggest that reasonable accommodation should be treated as distinct from indirect discrimination. Whereas the latter is concerned with the impact of a practice on a group of persons, reasonable accommodation is directed towards the impact of work organisation on a specific individual.

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<sup>35</sup> Also, De Schutter, 2001.

<sup>36</sup> e.g. De Schutter, 2001; Skidmore, 2001; Waddington, 2003b; Barnard, 2001.

<sup>37</sup> Also, Thüsing, 2003c.

<sup>38</sup> Also, De Schutter, 2001.

#### (iv) Age

Although the physical age of an individual is often easy to determine, identifying discrimination on the grounds of age remains difficult. This ground does not concern a specific group of persons within the population, but rather it is a characteristic experienced differently in various phases of life.<sup>39</sup> Some authors also note the potential overlap with sex and disability discrimination.<sup>40</sup> In relation to sex, measures that discriminate directly on grounds of age, may also be indirect sex discrimination. For example, a maximum recruitment age of 28 may exclude younger women who have taken time out of the labour market in connection with family responsibilities. De Schutter (2001) points out that some disabled people will take a longer time in the education system to acquire their qualifications, therefore, age discrimination can have an indirect impact. Meenan (2003) argues that the Framework Employment Directive does not go far enough in tackling multiple discrimination connected with age. In contrast, González Ortega (2001) criticises the combination of age and disability within the same instrument on the basis that this could reinforce an assumption that advanced age is a disability.

Commentators have drawn attention to the links between combating age discrimination and broader policy issues [see Box 4]. Kuras (2003) argues that the Directive is motivated by the need for pension reform and the goal of raising the average working age. O’Cinneide (2003) agrees that age discrimination is often conceived as a matter of labour market policy, but argues that the Directive places greater emphasis on age as an equality issue. This debate is related to the exception to the prohibition of age discrimination found in Article 6 of the Framework Employment Directive. This provides that:

‘differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.’

Article 6 also provides a non-exhaustive list of examples of situations where difference of treatment based on age may be justified. Several authors criticise this exception as too broad.<sup>41</sup> O’Cinneide (2003) compares national legislation on age discrimination and identifies a choice between listing specific exceptions or allowing an open-ended possibility to justify discrimination. The difference between the two varies. A lengthy list of specific exceptions covering a wide range of circumstances could be broader in effect than an open-ended justification clause with a high standard of judicial scrutiny. He concludes that a specific list is nonetheless preferable because it compels the legislature to identify with more precision the circumstances where discrimination can still be justified. González Ortega (2001) and Meenan (2003) criticise the examples given in Article 6 of instances where age discrimination could be justified, in particular the reference to ‘a maximum age for recruitment which is based on the training requirements of the post in question and the need for a reasonable period of employment before retirement’. They argue that this authorises employers to make generalisations based on the age of employees / job applicants, whereas combating age discrimination should aim at challenging stereotypes.

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<sup>39</sup> De Schutter, 2001.

<sup>40</sup> Reid, 2003.

<sup>41</sup> Kimber, 2003a; Meenan, 2003; O’Hare, 2001; González Ortega, 2001.

**Box 4: P Skidmore, 'The European Employment Strategy and labour law: a German case study' (2004) *European Law Review* Vol. 29 pp. 52-73**

This article examines the implementation of the European Employment Strategy within Germany and makes a specific example with regard to issues of age discrimination. The Employment Strategy seeks to increase participation in the labour market and identifies certain key groups, including older workers. Skidmore notes that tensions may arise in practice between national policies to encourage the employment of older workers and the requirements of the Framework Employment Directive. He identifies a range of measures presented in the National Action Plan of Germany to promote the participation of older workers within the labour market. In situations where these provide benefits to older workers, such as wage subsidies, these could be challenged as discrimination against younger workers. In other cases, the normal requirements of employment law are relaxed in order to provide more incentives for employers to recruit older workers. However, these measures might be characterised as discriminating against older workers because they reduce their standard of labour protection. Skidmore points out that there is a complex interaction here between anti-discrimination law, labour market policy and social welfare systems. Debates on age discrimination will have to be resolved in the light of Article 6 of the Framework Employment Directive and the possibility for age discrimination to be justified by reference to employment policy and labour market objectives. He highlights the duty to demonstrate objective and reasonable justification within Article 6 and suggests that the case-law of the Court of Justice on indirect sex discrimination may provide an indication of how the courts will approach such policy justifications.

(v) Sexual orientation

There appears to be a smaller body of literature devoted to sexual orientation and the Framework Employment Directive.<sup>42</sup> As with the other grounds, sexual orientation is not defined. Bell (2001b) criticises attempts to draw a distinction between sexual orientation and sexual behaviour, which risks permitting discrimination against an individual in a same-sex relationship. From a different perspective, Rivas-Vaño (2001) argues that it may have been preferable to define sexual orientation in order to clarify that it concerns individual identity and not just sexual behaviour. Sottiaux (2003) also emphasises the link between sexual orientation and personal dignity.

The link between the Directive and workplace benefits for married couples has been highlighted by various commentators. Rivas-Vaño (2001) welcomes the new definition of indirect discrimination (see further in para. f). She notes that where employers provide benefits in respect of the married partners of employees (e.g. survivor's pension) this will indirectly discriminate on grounds of sexual orientation because same-sex couples cannot marry in most of the Member States (the exceptions are Belgium and the Netherlands). Nevertheless, recital 22 in the preamble of the Framework Employment Directive states 'this Directive is without prejudice to national laws on marital status and the benefits dependent thereon'. This restriction is criticised by Bell (2001b) as weakening the capacity of the Directive to deal with one of the main forms of workplace discrimination against lesbian, gay and bisexual people.

*(f) The definition of discrimination*

(i) Direct and indirect discrimination

In respect of direct discrimination, most of the discussion has focused on the possibilities for justification. On the one hand, there has been criticism of the broad exception in Article 6 of the Framework Employment Directive in respect of age discrimination.<sup>43</sup> On the other, there is a debate surrounding whether national implementing legislation can provide an open-ended possibility to justify direct discrimination. The scheme of the Directives appears to imply that direct discrimination can only be justified under specific, narrow exceptions, such as genuine occupational requirements. Nonetheless, Velaers (2003) argues that an open-ended possibility to justify direct discrimination may not be incompatible with the Framework Employment Directive. In particular, he draws attention to Article 2(5):<sup>44</sup>

'This 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 health and for the protection of the rights and freedoms of others'.

He suggests that permitting justification of direct discrimination allows the courts to resolve conflicts of rights disputes rather than the legislator aiming to anticipate these issues. At the same time, he notes that a broader scope for justification creates uncertainty as regards the impact of the law.

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<sup>42</sup> Sottiaux, 2003; Rivas Vaño, 2001; Bell, 2001b, Baraldi-Bonini, 2003.

<sup>43</sup> Kimber, 2003a; Meenan, 2003; O'Hare, 2001; González Ortega, 2001.

<sup>44</sup> See also, Sewandono, 2001.

Many commentators welcome the definition of indirect discrimination found within both Directives. There is particular appreciation for the shift away from the definition of indirect discrimination already existing in EU sex equality legislation.<sup>45</sup> This required a female litigant to demonstrate that the measure in question placed a significantly higher proportion of women than men at a disadvantage.<sup>46</sup> This produced complex litigation on the definition of the relevant proportions and often demanded statistical evidence. In contrast, the Article 13 Directives adopted a new approach based on evidence of ‘particular disadvantage’:

‘Indirect discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’.<sup>47</sup>

Barnard (2001) points out that it remains difficult for individuals to locate a suitable comparator, especially in highly segregated workforces. Hepple (2004) notes that the Directives would permit a Member State to provide financial compensation as the principal remedy for discrimination. He argues that this is too limited in respect of indirect discrimination, because the compensation will be attributed to the individual complainant, whereas the discriminatory practice has affected a group. Instead, he recommends that employers could also be required to take positive action in order to remove the effects of the discriminatory practice. In contrast, Gómez Muñoz (2001) disagrees with the definition of discrimination adopted within the Directives. He argues that it would have been better to follow a comprehensive definition, such as that found within the UN Convention on the Elimination of Racial Discrimination, rather than the separation of direct and indirect discrimination. He also criticises the possibility for an individual to demonstrate less favourable treatment by reference to a hypothetical comparator which he regards as too speculative.

## (ii) Harassment

A number of authors welcome the explicit definition of harassment found within both Article 13 Directives.<sup>48</sup> Several are critical, though, of the discretion given to Member States.<sup>49</sup> Both Directives state: ‘the concept of harassment may be defined in accordance with the laws and practice of the Member States’.<sup>50</sup> Bell argues that the extent to which employers will be held liable for harassment by other workers or customers is not clear. Schiek draws attention to the absence of this qualifying clause in the definition of harassment subsequently adopted in the Revised Equal Treatment Directive.

Gómez Muñoz (2001) argues that there is no need for a separate definition of harassment (or instructions to discriminate) from the general prohibition of direct and indirect discrimination. Driessen-Reilly and Driessen (2003) focus on the response of EU law to bullying and harassment in the workplace. They note that harassment may be discriminatory in nature, but that equally some forms of harassment are not connected to issues of race, religion, sexual orientation, etc and hence will not be covered by the Directives. They argue in favour of additional EU measures to tackle bullying in general. Weideman and Thüsing (2003b) go further and argue that harassment should not be included

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<sup>45</sup> Kimber, 2003a; Skidmore, 2001; Bell, 2001b.

<sup>46</sup> Article 2(2), Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L14/6.

<sup>47</sup> Article 2(2)(b), Racial Equality Directive.

<sup>48</sup> Barbera, 2002; O’Hare, 2001; McNerney, 2000; Rivas-Vaño, 2001; Bell, 2001b.

<sup>49</sup> Gómez Muñoz, 2001; Bell, 2001b; Schiek, 2002.

<sup>50</sup> Article 2(3) in both Directives.

in anti-discrimination law. Given that workplace harassment is always inappropriate, they criticise the limited focus on types of harassment linked to discrimination.

*(g) Exceptions to the prohibition on discrimination*

Both Directives contain a number of exceptions to the principle of equal treatment. Several of these exceptions are present in each Directive and worded in a similar fashion: genuine occupational requirements; difference of treatment based on nationality; positive action. The Framework Employment Directive contains a number of additional exceptions, some of a general nature and some relating to specific grounds. Indeed, several authors have criticised the longer list of exceptions found in the Framework Employment Directive.<sup>51</sup> Earlier sections have already presented the views found in the academic literature on the Framework Employment Directive and its exceptions on age discrimination (Article 6), religious employers (Article 4(2)); and marital benefits (Recital 22).

*(i) Genuine occupational requirements*

Both Directives contain an exception for genuine occupational qualifications. For example, in the Racial Equality Directive, Article 4 states:

‘... 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.’

Most of the academic commentary on this type of exception has concentrated on the exception for organisations with an ethos based on religion or belief. There has been less discussion of the general exception. Nonetheless, De Schutter (2001) suggests that this is a highly sensitive aspect of the Directives because it touches on the boundary between freedom of contract and the right to equal treatment. Some authors favour a very narrow interpretation of the scope of this exception. Gómez Muñoz (2001) argues that it is doubtful if race or ethnicity can ever be regarded as a genuine occupational requirement for a job and the existence of this exception may lead to its misapplication. Rey Martínez (2003) and Sewandono (2001) criticise the absence of any duty on Member States to review periodically the application of this exception, whereas this was an element in the 1976 Equal Treatment Directive. In order to control the application of this exception, Rodrigues (2000) proposes that Member States should be obliged to notify the Commission of situations where it is used.

*(ii) Difference of treatment based on nationality*

Both Directives contain the following provision:

‘This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons in the territory of the Member States, and to any treatment which arises from the legal status of the third country national and stateless persons concerned.’<sup>52</sup>

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<sup>51</sup> Holtmaat, 2001; Waddington, 2003b; Skidmore, 2001; Bell, 2002a.

<sup>52</sup> Article 3(2), both Directives.

This has been criticised by several authors [See Box 5].<sup>53</sup> Most of these criticisms concern the presence of this exception within the Racial Equality Directive. In particular, they highlight the difficulty in distinguishing between discrimination based on racial or ethnic origin and discrimination based on nationality. It is clear that many of the victims of racial discrimination are third country nationals and Simoni (2002) suggests that this exception may make it more difficult for such persons to enforce the right to equal treatment. Parmar (2003) notes that whilst the UN Convention on the Elimination of Racial Discrimination does not directly cover nationality discrimination, it does include discrimination on the ground of national origins. Goldston (2001) recommends that the Court of Justice interprets this exception in a restrictive fashion and confines its scope to matters relating to immigration law.

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<sup>53</sup> e.g. Goldston, 2001; Guild, 2000; Bell, 2002a; Skidmore, 2001; Parmar, 2003; Rodrigues, 2000.

**Box 5: L Roseberry, ‘Like carrying water with a sieve: an analysis of the new EC Race Discrimination Directive from a comparative legal historical perspective’ (2001) *Juridisk Institut – Julebog* pp. 247 – 270.**

This author observes that there is an obvious link between the victims of racism and migrant communities, yet the Racial Equality Directive contains an exception for nationality discrimination. She makes a historical study of experience in the USA in dealing with the categories of race, colour and nationality. Initially, laws discriminated explicitly by reference to presumed categories of race or skin colour. Over time, these overt forms of racism were removed from the law, but frequently replaced by distinctions based on nationality. She argues that the prejudice which motivated colour or race-based legislation is the same as the subsequent laws focusing on nationality. Nationality becomes a more covert mechanism through which to perpetuate the effects of racial discrimination. She concludes that the Racial Equality Directive contributes to the inferior status of third country nationals in the EU.

(iii) Positive action

Depending on the underlying concept of equality, positive action may be characterised as an exception to the principle of formal equal treatment or a vital component of achieving substantive equality. Rey Martínez (2003) argues that the Directives treat positive action as an exception to the principle of equal treatment and criticises this as limiting the subsequent scope for such initiatives. Gómez Muñoz (2001) welcomes the recognition of the role for positive action. Caruso (2003) draws attention to the origins of positive action within EU sex equality law. She argues that transplanting the original approach to the new grounds of discrimination will not be without difficulties. There needs to be a sensitivity to the socio-economic and cultural context at the national level. This leads Caruso to recommend that the Court of Justice provides a broad discretion for Member States in adjusting their use of positive action to the local context. This could be supported by non-binding guidelines at EU level. Hailbronner (2001) urges caution where positive action takes the form of preferential treatment. He is concerned that this could produce a negative reaction against third country nationals and recommends a focus on other measures, such as language training or anti-discrimination training for people working in human resource management. In contrast, Chieco (2002) and Amato (2003) stress the key role for positive action in building an advanced model of anti-discrimination law.

(iv) Other exceptions in the Framework Employment Directive

As mentioned above, there is a general exception in Article 2(5). This is not present in the Racial Equality Directive and it has been criticised by several authors.<sup>54</sup> The broad nature of the language used within Article 2(5) has sparked concerns relating to its practical application. Whittle (2002) fears that the reference to health and the rights and freedoms of others could be used to dilute protection from disability discrimination. Skidmore (2001) highlights the echo with exceptions found within the European Convention on Human Rights, which were previously invoked by states when attempting to justify restrictions on lesbians and gay men in the military. In this respect, Rivas-Vaño (2001) welcomes the omission of ‘protection of morals’ from the list found within Article 2(5).

<sup>54</sup> Holtmaat, 2001; Chieco, 2002; Bell, 2001b; Skidmore, 2001; Whittle, 2002; Barnard, 2001.

The Framework Employment Directive also permits Member States to exclude the provisions on age and disability discrimination from application to their armed forces.<sup>55</sup> Chieco (2002) and O'Hare (2001) argue that this exception is too broad, in particular because it covers non-combat positions within the armed forces.

#### (h) Enforcement and remedies

Many authors observe that the Directives devote greater attention to the mechanisms for enforcement of the right to equal treatment than earlier EU legislation on sex equality. This focus on effectiveness is frequently welcomed.<sup>56</sup> A general criticism, mentioned earlier, is that the emphasis remains firmly on individual litigation and other enforcement mechanisms should have been given greater prominence.<sup>57</sup>

#### (i) Burden of proof

Both Directives borrow from earlier EU sex equality legislation and include a provision that shifts the burden of proof from the complainant to the respondent once facts have been established 'from which it may be presumed that there has been direct or indirect discrimination'.<sup>58</sup> Several authors welcome this provision.<sup>59</sup> Malmberg (2001b) is concerned for the practical application of this provision and Barry (2003) argues that it should have been complemented by access to information rights in order to assist the complainant in gathering evidence.

#### (ii) Legal standing for organisations

Both Directives permit organisations to 'engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'.<sup>60</sup> Chieco (2002) views the Directives as self-contradictory in providing legal standing for *organisations*, but then limiting this to *individual* disputes and making it dependent on individual consent.<sup>61</sup> Several authors recommend that provision is made to allow autonomous legal standing for groups and class actions.<sup>62</sup>

#### (iii) Remedies

There appears to be less detailed discussion on the remedies available for discrimination. O'Hare (2001) criticises the absence of any proactive remedies within the Directives. Like Hepple (2004), she draws attention to the potential use of positive action as a remedy where patterns of discrimination are uncovered. Barnard (2001) criticises the absence of any protection from the levelling-down of employment benefits as a means to achieving equal treatment.

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<sup>55</sup> Article 3(4).

<sup>56</sup> Parmar, 2003; Waddington, 2003b; O'Hare, 2001; Bell, 2002b.

<sup>57</sup> e.g. Barry, 2003; Niessen, 2003.

<sup>58</sup> Article 8(1) Racial Equality Directive; Article 10(1) Framework Employment Directive.

<sup>59</sup> Goldston, 2001; Gómez Muñoz, 2001; McInerney, 2000.

<sup>60</sup> Article 7(2) Racial Equality Directive; Article 9(2) Framework Employment Directive.

<sup>61</sup> Parmar, 2003.

<sup>62</sup> Barry, 2003; Chieco, 2002; Rodrigues, 2000.

*(i) Bodies for promotion of equal treatment*

Article 13 of the Racial Equality Directive contains an obligation on all Member States to create a body or bodies for the promotion of equal treatment. There does not appear to be a great volume of academic literature examining this requirement in depth. General literature exists on the operation of national equal treatment bodies or the role for specialised agencies,<sup>63</sup> however, this has fallen outside the remit of the present bibliography insofar as it does not focus on the content of the Directives. Various authors welcome the requirement to establish an equal treatment body within the Racial Equality Directive.<sup>64</sup> Gómez Muñoz (2001) cautions that there are difficulties in establishing agencies with a role in monitoring the actions of other public authorities. He also notes the challenges in implementing this provision within federal systems of government. Favilli (2002) argues that the independence of the body is crucial to its capacity to perform the role anticipated in the Racial Equality Directive. Rodrigues (2000) argues that the Directive does not go far enough because there is no duty to provide a specialised body for the investigation of complaints of discrimination.

The most common criticism found in the academic literature relates to the absence of any duty to create an equal treatment body within the Framework Employment Directive. Many authors recommend the establishment of such bodies to cover other grounds of discrimination.<sup>65</sup> Favilli (2002) suggests a single body for all grounds of discrimination is preferable.

*(j) Social and civil dialogue*

Both Directives place an obligation on states to promote the principle of equal treatment through the social dialogue and dialogue with non-governmental organisations.<sup>66</sup> These provisions have not generated a great volume of academic literature, however, a few authors have reflected on their contents. Gómez Muñoz (2001) and Bell (2002b) welcome this aspect of the Directives. Other authors argue that the Directives should have gone further here. Schiek (2003a) would have preferred a stronger connection between collective labour law procedures and the Directives. In the same direction, Laskowski and Welti (2003) urge the German legislator to go beyond the minimum standards of the Directives and to encourage the social partners to address equality issues in regional and enterprise level agreements. Deinert (2003) also highlights the potential role for collective agreements at the level of the enterprise. In contrast, Herzfeld Olsson (2003) is concerned that the Directives conflict with the freedom of association because they will override any incompatible elements in a collective agreement.

Both Directives also contain an obligation on Member States to ensure that information on the new legal provisions on discrimination is ‘brought to the attention of the persons concerned by all appropriate means’.<sup>67</sup> Niessen (2003) observes that supplying information on anti-discrimination law to individuals is especially important given the role assigned to individual litigation within the strategies

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<sup>63</sup> See contributions in T Leonen and P Rodrigues (eds) *Non-discrimination law: comparative perspectives*, Kluwer Publishing, 1999.

<sup>64</sup> e.g. Malmberg 2003; Bell, 2001b; O’Hare, 2001; McInerney, 2000.

<sup>65</sup> e.g. Mahlmann, 2003; Bell, 2001b; Kimber, 2003a; O’Cinneide, 2003; Skidmore, 2001; Whittle, 2002; Moreiro González, 2000.

<sup>66</sup> Articles 11 and 12 Racial Equality Directive; Articles 13 and 14 Framework Employment Directive.

<sup>67</sup> Article 10, Racial Equality Directive; Article 12, Framework Employment Directive.

for enforcement of the Directives.<sup>68</sup> He also draws attention to the risk that certain categories are overlooked in the awareness-raising process, such as small employers.

*(k) Issues relating to national implementation*

Whilst there is a significant body of literature on national implementation of the Directives, this is often focusing on national legal issues and not an evaluation of the Directives. Given the purpose of this report, much of this literature has not been considered in depth. Nonetheless, several observations can be highlighted.

First, it is evident that some states have decided to go beyond the minimum requirements of the Directives. For example, the legislation on disability discrimination in the Netherlands also applies to the provision of transport.<sup>69</sup> Hvinden (2004a) argues that the extent to which the national system has been receptive to EU anti-discrimination law (in respect of disability) depends on how well the directions in EU law and policy fit with the pre-existing national framework. Secondly, it appears that implementation of the Directives poses considerable challenges. This flows from the specific structure of the Directives and the varying package of protection applying to different grounds of discrimination. A debate can be found within different sets of national literature on whether it is better to develop specific legislation for specific grounds of discrimination or to adopt integrated legislation covering a range of grounds. The separate legislation model has been followed in the UK and Squires (2003) criticises the very complex patchwork of legislation that has resulted. Gijzen (2003) is also critical of the separate legislation on age and disability in the Netherlands. She argues that integrated legislation could be more coherent, consistent and better adapted to cases of intersectional discrimination (where an individual faces discrimination on more than one ground). Baer (2002) recommends that the German legislator adopts a general anti-discrimination law. Bell (2002a) concludes that integrated legislation is especially appropriate when dealing with sexual orientation discrimination. He argues that it is often difficult to find the necessary political consensus to deal with sexual orientation discrimination as an isolated issue.

*(l) Overview and recommendations for the future of the Directives*

It is evident that the Directives have stimulated a vibrant debate within many European academic communities. Most of the publications have concentrated on either a general review of the two Directives, a specific Directive or a specific ground of discrimination. There is less literature devoted to a particular provision or aspect of the Directives. It is difficult to make a brief summary of the diverse comments found within the literature, however, it seems that the following are common points of debate:

- the divergences in the content and scope between the Racial Equality and Framework Employment Directives;
- the tension between the right to non-discrimination and other constitutional or human rights principles, including the freedom of contract and the freedom of religion;
- the strong focus on individual litigation as the principal mechanism for enforcement;
- the difficulty in defining the grounds of discrimination;

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<sup>68</sup> Also, Nibi, 2003.

<sup>69</sup> Gijzen, 2003.

- the broader range of exceptions found within the Framework Employment Directive, especially in relation to age discrimination;
- the absence of a duty to create an equal treatment body within the Framework Employment Directive.

Many authors welcome the Directives as a constructive step forward in anti-discrimination law. The new definitions of indirect discrimination and harassment, as well as the various attempts to support individual litigants, are often endorsed. The broader material scope of the Racial Equality Directive is welcomed by many, but significant dissent and criticism of this wider material scope can also be found.

Most of the literature does not articulate a specific agenda for the future, at least not with the precision that might be found in publications from campaigning organisations. Nonetheless, it is possible to highlight a number of options located within the literature for the future development of EU anti-discrimination law and policy.

*(i) Positive duties to promote equality*

As explained earlier, various authors criticise the formal equal treatment concept and the emphasis within the Directives on individual complainant mechanisms. These criticisms are based on the argument that this model was already present in EU sex equality legislation since the 1970s. Although that legislation has made an important contribution, it has not succeeded in eliminating sex discrimination, perhaps most visibly in the area of equal pay. Kimber (2003a) argues that a more profound debate is needed on why anti-discrimination law has not proven more successful in combating sex discrimination and what alternative strategies could be adopted in response. She is concerned that the Article 13 Directives are essentially founded on the same model and will encounter the same barriers to achieving change. As discussed earlier (para. d), various authors emphasise the need for a shift away from a reactive framework that intervenes after discrimination has occurred, towards positive duties on all actors to promote equality.

*(ii) Mainstreaming*

The agenda of positive duties is closely aligned with the mainstreaming approach. This seeks the integration of equality objectives across all areas and into all stages of the policy formulation, implementation and evaluation process. Gender mainstreaming has been used as an instrument of EU sex equality policy since the mid-1990s and various authors recommend the application of the mainstreaming approach to the discrimination grounds found within the Article 13 Directives.<sup>70</sup> Dollat (2002) identifies a connection between mainstreaming and the EU Action Programme to combat discrimination.<sup>71</sup> The Action Programme provides an opportunity to explore the relevance of anti-discrimination to a range of policy fields and to reflect on different strategies to promote equality. Hvinden and Halvorsen (2004) suggest that mainstreaming is particularly important in the context of disability. They recommend that the principles of universal design and reasonable accommodation are incorporated throughout all policies, such as transport, welfare and social inclusion.

*(iii) Developing a policy framework on combating discrimination*

Both the Action Programme and the mainstreaming approach draw attention to the need for the legal instruments against discrimination to be complemented by a broader strategy to prevent and combat discrimination. Borrillo (2002) endorses the need for awareness-raising and educational initiatives. He argues that a global public policy on combating discrimination needs to be developed, rather than an isolated focus on two specific Directives.<sup>72</sup> In a similar direction, Berthou (2003) is concerned that awareness of the concept of equality remains low and there is a need to balance the Directives with a programme of education and training for lawyers, judges and social partners. In the context of racism, Moreira González (2000) highlights the need for anti-discrimination law to be combined with action against racist violence and racist hate crimes. More generally, other authors propose further legislation to extend protection against discrimination.<sup>73</sup> Specifically, they recommend that the broad material scope of the Racial Equality Directive be applied to some or all of the grounds found within the Framework Employment Directive: religion or belief, disability, age and sexual orientation.

*(iv) Citizenship, human rights and equality*

Beyond the specific policy framework on discrimination, it is clear that the Directives are situated within a broader context of human rights protection in the European Union. They also form part of the core rights of EU citizenship. Whilst the Directives make a substantial contribution in both these areas, the literature draws attention to the tensions that can arise with other human rights, such as the right to privacy, freedom of religion or freedom of association. Dollat (2002) identifies the need for a dialogue between the Court of Justice and the European Court of Human Rights in order to avoid conflicts emerging in the interpretation of the right to non-discrimination. Some authors have expressed concerns relating to the impact of the Directives on fundamental freedoms, most notably the freedom of contract.<sup>74</sup> Therefore, a clear recognition of the human rights dimension to EU anti-discrimination law will be important for the future.

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<sup>70</sup> Waddington, 2003a; Parmar, 2003; Bell, 2002a; Hvinden and Halvorsen, 2004; Strazzari, 2002.

<sup>71</sup> See further: [http://europa.eu.int/comm/employment\\_social/fundamental\\_rights/prog/index\\_en.htm](http://europa.eu.int/comm/employment_social/fundamental_rights/prog/index_en.htm)

<sup>72</sup> Borrillo, 2003. Also, Dollat, 2002.

<sup>73</sup> O'Conneide, 2003; Whittle, 2002; González Ortega, 2001; Bell, 2002a; Dollat, 2002.

<sup>74</sup> See section (c).

# ANNEX I

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*The article introduces the Directives to a German readership, with a special emphasis on racism and racist discrimination. In particular, the article raises the issues of different forms of discrimination and new definitions in the directives, explains the scope of application and expands on different forms of positive action*

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