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EU Law and Multiple Discrimination

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1. Problem and main perspective

In this paper I discuss the approach in EU law to the relationship between different rights of equality in respect of a number of protected criteria in EU law, such as nationality, ethnic origin, gender, etc.[1]

Different forms of discrimination, eg on grounds of nationality, ethnic origin and gender interact and may reinforce each other. It is, however, an open question how far the fight against various discriminations can reinforce each other - some aspects are common but there are also important differences. Protection of one equality right, eg religious freedom, may even be invoked as justification for restrictions of equality in regard to other criteria, eg gender, or *vice versa*.[2]

Prohibition of discrimination both on grounds of nationality and gender was originally introduced in EU law as a means to develop the Internal Market. To day (2006) equality and discrimination is mainly treated in a fundamental rights context. The EU respects, according to Article 6 EU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. To the extent the European Court of Human

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[1] Cf Fredman, Sandra: Double Trouble. Multiple Discrimination and EU Law, European Anti-discrimination Law Review No 2, 2005 p 13, available at europa.eu.int/comm/employment_social/fundamental_rights/pdf/legnet/05lawrev2_en.pdf and Marie-Thérèse Lanquetin: La Double Discrimination à Raison du Sexe et de la Race ou de l'Origine Ethnique: Approche juridique, Synthèse du Rapport Final, décembre 2002, Convention de recherche FASILD /Service des Droits des Femmes, Ministère de l'emploi et de la Solidarité, available at www.fasild.fr/ressources/files/etudesetdocumentation/syntheses/Lanquetin_02.pdf.

[2] See for example Leyla Sahin v Turkey, Application no 44774/98, in which the European Court of Human Rights in a case about the Islamic headscarf in Turkey balanced the rights of women against the Islamic religion.

Rights has developed rules on multiple discrimination they also form part of EU law.[3]

There is a different historical development in Anglo-American and EU equality law. In the United States and the UK race/ethnic discrimination was one of the first equality/discrimination issues to be adressed in legislation and legal practice. Gender equality was taken up at about the same time, but not - as in the EU - a generation before the race/ethnic issue. In the US,[4] a Civil Rights Act was adopted in1964. It deals primarily with race discrimination, but also includes a ban on sex discrimination. In the UK, the first Race Discrimination Act was adopted in 1968. It was replaced by the Race Relations Act 1976. Sex discrimination was addressed in the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

Recognition of multiple discrimination in the US has been pioneered by African American women who have demonstrated how sex discrimination law focuses on white women and race discrimination law on black men so that discrimination of black women is not properly covered. The concept of 'intersectionality'[5] has been developed to counteract this problem. Intersectionality may be defined as 'intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone'.[6] Although an intersectional analysis is relevant to any combination of grounds, it has particular implications for race or race-related cases.[7]

In the EU, nationality and gender were the only equality issues on the legal agenda from the outset in 1958 and for about 40 years. Third-country nationals are often of a different ethnic origin than EU-nationals, so that

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[3] See case C-260/89, *ERT* [1991] ECR I-2925.

[4] See for a comparison of the US and the EU Roseberry, Lynn: The Limits of Employment Discrimination Law in the United States and European Community, Copenhagen 1999.

[5] See on the concept of intersectionality where gender, ethnicity, class, religion and other identities meet Kimberle Crenshaw: Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, Stanford Law Review, Vol 43, No 6 (July, 1991), pp 1241-1299.

[6] Ontario Human Rights Commission: An Intersectional Approach To Discrimination. Addressing Multiple Grounds in Human Rights Claims. Discussion Paper, 2001, available at www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper.pdf.

[7] Op cit p 5.

there is some interaction between nationality and ethnic discrimination. Likewise diferent ethnic and religious groups experience gender inequality differently. Notwithstanding this, multiple discrimination was practically not discussed in official EU legal texts until the 1990's. In the practical application of EU law by monitoring bodies, etc it is still mainly up to the national legal system whether or not multiple discrimination should be addressed.

There is not much of an intersectionality approach in EU law apart from gendermainstreaming. One of the main answers in EU policy papers to the question how multiple discrimination should be tackled is by means of gender mainstreaming the fight against discrimination on any other ground (ethnic origin, religion, age, etc).

In the study of gender and society different perspectives may be applied. In regard to EU law and gender the main perspectives are:

1) a gender-as-a- variable perspective,
2) a feminist standpoint perspective, and
3) a late modern gendering perspective.

As an example of a gender-as-a- variable perspective in contract law Ian Ayres' studiy[8] on how gender and race affect the price purchasers of cars can obtain in the US may be mentioned. Black women got the most unfavourable price, black men the second most unfavourable, white men the best and white women the second best price.

Authors who take a feministis standpoint perspective[9] typically argue that women should be treated better. Mary Joe Frug's work may be mentioned as an example.[10]

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[8] Ayres, Ian: Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, Harvard Law Review 1991 s 817 and Ayres, Ian:: Pervasive prejudice? - unconventional evidence of race and gender discrimination, Chicago 2001.

[9] The Journal Feminist Legal Studies publishes many contributions using this perspective, see on directive 2004/113 Di Torella, Eugenia Caracciolo: The Goods and Services Directive: Limitations and Opportunities, Feminist Legal Studies 2005 p 337.

[10] See Frug, Mary Joe: A Feminist Analysis of a Casebook? An Introductory Explanation, i Frug, Mary Joe: Postmodern Legal Feminism, New York 1992 s 53, Frug, Mary Joe: An Overview of the Contracts Casebook: Dis-Covering the Gender of Contract Culture, op cit s 60, Frug, Mary Joe: Rereading Cases:

In a gendering perspective the focus is on the rules, institutions and processes through which gender is created and/or reconstructed. Gender-mainstreaming is an example of a gendering process aimed at reconstrcting gender in a way that promotes gender equality in the meaning equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference, and aims to promote the full participation of women and men in society. Gender equality includes the right to be different. This means taking into account the existing differences among women and men, which are related to for example class, political opinion, religion, ethnicity, race or sexual orientation, see further on the concepts below.[11]

There seems to be a trend at the EU level to treat some kinds of grounds of discrimination (eg ethnic origin) more favourably than others (eg religion). Experts on gender equality increasingly ask whether gender equality is becoming a second rank priority.[12]

2. Overview of EU Law related to Multiple Discrimination

2.1. From an Internal Market to a Fundamental Rights Perspective

The early free movement and gender equality provisions were market oriented and served mainly economic purposes in connection with the development of the internal market.

To day, equal treatment between the groups protected by EU equality law is mainly treated as a fundamental right.

Challenging the Gender of Two Contract Cases, op cit s 87 and Frug, Mary Joe: Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law, op cit s 111.

[11] See the report by a group established by the Council of Europe: Gender mainstreaming. Conceptual framework, methodology and presentation of good practices. Final report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS), Strasbourg, May 1998, available at www.coe.int/T/E/Human_Rights/Equality/02._Gender_mainstreaming/EG-S-MS%281998%292rev+1.asp#TopOfPage.

[12] It is for example on the agenda of meeting of the EU Network of legal experts in the fields of employment, social affairs and equality between men and women, 13 – 14 February 2006.

The Maastricht-Treaty which came into force 1.11.1993 introduced European Union citizenship in Article 18 EC which expanded the free movement irrespective of nationality provisions.

Important provisions on equality were inserted into the EC Treaty by the Amsterdam Treaty which came into force 1.5.1999. Before that date there was only one article in the EC Treaty dealing explicitly with gender equality, namely the equal pay provision in the then Article 119 [now after amendment Article 141 EC]. In the Amsterdam version of the EC Treaty there are 5 articles dealing explicitly with gender equality, two of which (Article 137 EC and Article 141 EC) are concerned with employment and occupation.

With the adoption of the Amsterdam Treaty EU gender equality law grew out of the confines of employment law. Three of the new gender equality provisions (Article 2 EC, Article 3(2) EC and Article 13 EC) govern all areas under Community competence.

Article 13 EC[13] grants power to the Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Three directives have been passed with Article 13 EC as their legal base: the Ethnic Equality Directive,[14] the Framework Employment Equality Directive in 2000[15] and the Gender Equality Directive (Goods and Services) in 2004.[16]

In the proposal for a Directive on equal treatment in the access to and supply of goods and services,[17] the Commission explicitly stressed that the EU approach to gender equality has developed over time, so that the original emphasis on equal pay and on avoiding distortions of competition between Member States has been replaced by a concern for equality as a fundamental right.

A similar development has taken place in case law. The ECJ has, since the ruling in *Defrenne* (3) in 1978, considered equality between men and

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[13] See generally on Article 13 EC Barnard, Catherine: Article 13: Through the Looking Glass of Union citizenship in O'Keeffe, David and Patrick M. Twomey (eds): Legal Issues of the Amsterdam Treaty, Oxford 1999 p 395.

[14] 2000/43/EC.

[15] 2000/78/EC.

[16] 2004/113.EC.

[17] COM(2003)657 p 2.

women a fundamental right and a general principle of law.[18] In 1976, in *Defrenne* (2),[19] the ECJ took the view, as regards Article 141 EC on equal pay, that it pursues a twofold purpose, both economic and social. In *Schröder*,[20] the ECJ went further and held that the economic goals of avoiding distortion of competition underlying Article 141 EC are secondary to the social aims of that provision, which constitutes the expression of a fundamental human right.

2.2. Free Movement within the Union

The EC Treaty guarantees the free movement of goods (Article 28 EC), workers (Article 39 EC), services (Article 49 EC) and capital(Article 56 EC) as well as freedom of establishement (Article 43 EC) by prohibiting discrimination on grounds of nationality. The free movement of workers provision in Article 39 EC was complemented by a Regulation on Free Movement of Workers in 1968.[21]

Within the scope of application of the EC-Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited by Article 12 EC. Under Article 18 EC every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC-Treaty and by the measures adopted to give it effect.[22]

As the main rule only nationals of the Member States benefit from the free movement provisions. Article 39 EC(2) thus provides that (emphasis added): freedom of movement shall entail the abolition of any discrimination based on nationality *between workers of the Member States* as regards employment, remuneration and other conditions of work and employment.

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[18] Case 149/77, *Defrenne* (No 3) [1978] ECR 1365.

[19] Case 43/75, *Defrenne* (No 2) [1976] ECR 455 paragraph 8-11.

[20] Case C-50/96, *Schröder* [2000] ECR I-743 paragraph 57.

[21] EEC/1612/68.

[22] See for details Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

The Regulation on Free Movement of Workers provides in Article 1 that 'any national of a Member State' shall have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State.

Third country nationals can only benefit from the principle of freedom of movement for workers to a very limited extent.[23] The same applies to the free movement rights derived from citizenship of the Union. There is ample case law from the ECJ (European Court of Justice) on the ban on discrimination on ground of nationality both in respect of free movement of workers and the other freedoms of movement. A number of free movement of workers cases are about persons from ethnic minorities but the ethnic aspects are not discussed, but the ECJ has probably to some extent taken them into account when shaping the concept of indirect discrimination, see below on the O'Flynn-case.[24]

2.3. The Ethnic Equality Directive (2000/43/EC)

The Ethnic Equality Directive (2000/43/EC) prohibits discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. In the preamble to the Directive there is reference to the general human rights provisions.[25] There

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[23] Under the Regulation on free movement for workers the migrant workers are entitled to be accompanied by their family, including family members who are third country nationals, and the member States have a number of duties towards these family members.

[24] Case C-237/94 *O'Flynn* v *Chief Adjudication Officer* [1996] ECR I-2617.

[25] See recital (2) 'In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.' and recital (3) 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human

is also explicit reference to the gendermainstreaming provision in Art 3(2)EC.[26] The scope of the Directive is very broad. It applies to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals and pay;
(d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
(e) social protection, including social security and healthcare;
(f) social advantages;
(g) education;
(h) access to and supply of goods and services which are available to the public, including housing.

Member States are required to to draw up reports on the application of thes Directive. The Commission's report shall in accordance with the principle of gender mainstreaming, provide an assessment of the impact of the measures taken on women and men.

2.4. The Framework Employment Equality Directive (2000/78/EC)

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. In

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Rights and Fundamental Freedoms, to which all Member States are signatories.'

[26] See recital (14) 'In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.'

the Mangold-case,[27] the ECJ held that the principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.

Like in the Ethnic Equality Directive there is reference in the Preamble to the general fundamental rights background and to the mainstreaming duty in Article 3(2)EC. There is also a simlar duty to draw up reports. The Framework Employment Equality Directive (2000/78/EC) has a much narrower scope of application than the Ethnic Equality Directive. It only applies to point a)-d) in the above list.

2.5. The Gender Equality Directive (2004/113/EC)

Gender equality in employment and occupation is dealt with extensively in a number of legal texts including Treaty provisions and a number of directives.

In 2004 the scope of the prohibition on ground of sex was extended to also cover access to and supply of goods and services.

2.6. Multiple Discrimination as a Specific Issue

Following the passing of the Ethnic Equality Directive and the Framework Employment Directive in 2000, the Council of the EU, launched a Community Action Programme to promote measures to combat direct or indirect discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.[28] In recital 4 to the Council decision it is, in accordance with the gender mainstreaming provision in Art 3(2) EC stated that (emphasis added):

> In the implementation of the programme, the Community will seek, in accordance with the Treaty, to eliminate inequalities and promote equality between men and women, particularly because women are often the victims of *multiple discrimination.*

In recital 5 to the Decision it is further stated that (emphasis added):

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[27] Case C -144/04 Werner Mangold v Rüdiger Helm [2005] I-0000, nyr (judgment of 22.11.2005).

[28] Council Decision of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), OJ 2000, L 303.

> The different forms of discrimination cannot be ranked: all are equally intolerable. The programme is intended both to exchange existing good practice in the Member States and to develop new practice and policy for combating discrimination, including *multiple discrimination.* This Decision may help to put in place a comprehensive strategy for combating all forms of discrimination on different grounds, a strategy which should henceforward be developed in parallel.

The programme runs from 2001 until 2006 and is managed by the Directorate-General for Employment and Social Affairs' Anti-Discrimination Unit. It is designed to support activities combating discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation that contribute to any of the following of its three core objectives:

- to improve understanding of issues related to discrimination through analysis and evaluation
- to develop capacity to combat and prevent discrimination through building and strengthening inter-organisational dialogue
- to promote values underlying the fight against discrimination through awareness-raising activities

In an annex to the programme called indications for the implementation of the programme a number of areas in which it may operate are listed among which

> (e) effective monitoring of discrimination, including *multiple discriminationtion*.

The work plan for 2006 foresees a study on multiple discrimination. It is stated that

> 'the concept of multiple discrimination is not new. However, its causes and effects need to be better understood and addressed by all stakeholders active in the fight against discrimination. For that purpose, it is proposed to undertake a study whose objectives would be to improve the understanding of the causes and consequences of multiple discrimination, to raise awareness of the particular difficulties victims of multiple discrimination face and to facilitate the expertise and experience which can be found in this area to be utilised for the development of greater understanding and cross-fertilisation of ideas. *In line with Recital 4 of the Decision establishing the Programme, the study will consider differences in the ways in which women and men may experience discrimination on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation*. The study should also provide practical recommendations on the best way to address multiple discrimination. In this context, a conference involving interested parties should be foreseen as part of the study.'

The EU Commission's 2005 report on equality between women and men contain many remarks on the necessity to better integrate migrant women in order to utilise the potential of those women.[29]

3. Concepts of Discrimination

3.1. Discrimination

In ILO law there is a comprehensive definition of discrimination. For the purpose of the ILO Convention 111 Discrimination (Employment and Occupation) Convention, 1958 the term discrimination includes, according to Article 1 of the Convention:

1) any distinction,
2) exclusion or
3) preference

made on the basis of one of the following grounds:

1) race
2) colour
3) sex
4) religion
5) political opinion
6) national extraction or
7) social origin.

which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

In addition the concept of discrimination also covers such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

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[29] CON(2005)44.

3.2. Direct Discrimination

Direct discrimination occurs where one person is treated less favourably, on grounds of sex, ethnic origin, or any other of the protected criteria than another is, has been or would be treated in a comparable situation.

Many cases of discrimination consist in unfavourable treatment of subgroups of women or subgroups of men. The targeted persons are not selected exclusively on grounds of sex, ethnic origin etc but on grounds of sex, ethnic origin etc + something more.

Among women pregnant women, single mothers and mothers of small children are probably those who are most exposed to discrimination. In the Staff Working Paper[30] on the directive on equal treatment in the access to and supply of goods and services refusal to provide a mortgage to pregnant women is mentioned as an example of discrimination that has been reported to the Commission. One of the respondents in an analysis by the Danish Agency for Trade and Industry stated[31] stated that single mothers do not have much chance of obtaining a loan for their enterprises. The Directive on equal treatment in the provision of goods and services explicitly classifies less favourable treatment of women for reasons of pregnancy and maternity as direct discrimination.

For men sex discrimination often occurs in combination with age, eg discrimination against young men in car insurance or - mainly in countries where state social security is based on different pension ages for men and women - discrimination against older men who have passed the pension age for women but not reached the pension age for their own sex. In the UK - where the state pension age at the material time was 60 for women and 65 for men - the House of Lords has decided a case where a married man who was 61 wanted to visit a swimming pool together with his wife who was also 61. She was admitted free of charge because she had passed the pension age while he was required to pay an admission fee because he had not

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[30] SEC(2003)1213 p 7.

[31] The Relations of Banks to Women Entrepreneurs. The Analysis of the Danish Agency for Trade and Industry: Women Entrepreneurs Now and in the Future, Published by the Danish Agency for Trade and Industry, September 2000, available online at http://www.efs.dk/publikationer/rapporter/bankers.uk/index-eng.html. The quotation on single mothers is from part 2.2. The respondents in the analysis were staff in the banks and independant advisors to the banks, eg chartered accountants.

passed the pension age. This was held to be unlawful under the UK Sex Discrimination Act 1975.[32]

Article 1(3) of the Directive on equal treatment in the provision of goods and services provides that the Directive does not preclude differences which are related to goods or services for which men and women are not in a comparable situation because the goods or services are intended exclusively or primarily for the members of one sex or to skills which are practised differently for each sex. In the explanatory remarks[33]it is explained that certain goods and services are specifically designed for use by members of one sex (for example, single-sex sessions in a swimming pool).

The Danish Complaints Board for Equality has held that it was not a violation of the ban on sex discrimination in the Danish Equal Status Act that an organisation (Hitzb-ut-tahrir) provided access to a public meeting through separate entrances of equal quality for men and women.[34]

3.3. No defence against direct discrimination

The orthodox view in EU law is that (except for derogations from the ban on sex discrimination) there is[35] no defence that can justify direct discrimination. It can, for example, not be justified by reference to the fact that the discriminator will incur considerable costs if he does not discriminate.

Under Article 6 of the Framework Employment Equality Directive (2000/78/EC) direct age discrimination may be justified on certain conditions.

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[32] See further McCrudden, Christopher: Equality in Law between Men and Women in the European Community, United Kingdom, Luxembourg 1994 p 15.

[33] COM(2003)756 p 13.

[34] The decision is available (in Danish) at www.ligenaevn.dk.

[35] See for a fuller discussion on this point Lynn M. Roseberry: The Limits of Employment Discrimination Law in the United States and European Community, Copenhagen 1999 p 77 et seq.

4. Indirect Sex Discrimination

The current definition of indirect discrimination is inspired by the case law of the ECJ in cases involving the free movement of workers.[36] Indirect discrimination is in the current equality directives defined as situations where an apparently neutral provision, criterion or practice *would put* persons of one sex, ethnic origin, etc *at a particular disadvantage* compared with persons of the other sex, etc unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Indirect discrimination may be justified by objective reasons. The starting point is that differential treatment is an expression of discrimination unless it can be shown that such treatment is justified in objective terms.

The leading case is still *Bilka*[37] where the ECJ required three conditions to be met:

1) There must be a real need for the employer to apply the "suspect" criteria,
2) the means chosen by the employer must be necessary to achieve this goal, and
3) the means must be appropriate, ie there must be a reasonable proportion between end and means.

The *Bilka* test is based on application of the *principle of proportionality*.

4.1. Harassment

Harassment (as different from sexual harassment) harassment occurs where unwanted conduct related to the sex, ethnic origin, etc of a person is exhibited with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The concepts of harassment and sexual harassment are defined separately, because they are distinct phenomena. Harassment based on sex consists of unfavourable treatment of a person related to thir sex, though it

[36] See in particular Case C-237/ 94, *O'Flynn* [1996] ECR 2417.

[37] Case 170/84, *Bilka* [1986] ECR 1607.

need not be of a sexual nature (an example might be male employee constantly making disparaging remarks about women customers).[38]

4.2. Sexual Harassment

Sexual harassment is unwelcome physical, verbal or non-verbal conduct of a sexual nature. Sexual harassment can include: comments about the way the person looks, indecent remarks, questions or comments about the person's sex life, requests for sexual favours, sexual demands and any conduct of a sexual nature which creates an intimidating, hostile or humiliating environment. It is most often women who are subjected to sexual harassment, but men too can be sexually harassed.

5. Gendermainstreaming

5.1. Definition(s) of the Concept of Gender Mainstreaming

The concept of gender mainstreaming is not clearly defined.[39] Many have used the metaphor of equality as something that flows in its own subsidiary stream. With the mainstreaming strategy equality is lifted into the main stream understood as the ordinary organisational, political and legal system. In the Council of Europe report cited above gendermainstreaming is defined as:[40]

> Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all polices at all levels and at all stages, by the actors normally involved in policy-making.

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[38] COM(2003)756 p 13.

[39] See generally on gender mainstreaming and the legal sources requiring or recommending it http://europa.eu.int/comm/employment_social/equ_opp/gms_en.html.

[40] See the report by a group established by the Council of Europe: Gender mainstreaming. Conceptual framework, methodology and presentation of good practices. Final report of Activities of the Group of Specialists on Mainstreaming (EG-S-MS), Strasbourg, May 1998, available at www.coe.int/T/E/Human_Rights/Equality/02._Gender_mainstreaming/EG-S-MS%281998%292rev+1.asp#TopOfPage.

The gender mainstreaming strategy is mainly addressed to the drafters of rules and policies at all levels in society, for example legislators, judges, organisations and businesses, and calls upon them to integrate the gender dimension into the design and implementation of all their rules and policies.

Under Article 3(2)EC there is an obligation for all Community actors (legislator, judiciary, executive) to contribute to gender mainstreaming European contract law when they participate in its development. At national level, the law on gender mainstreaming varies considerably from country to country. The amendment to the Equal Treatment Directive in 2002[41] extended the personal scope of the obligation to gender mainstream in matters of employment from Community actors to the Member States. There are broad gender mainstreaming duties for public authorities in (almost) all areas of society in the Nordic countries. In these countries public authorities taking part in the development of European contract law are therefore - like the Community actors - under an obligation to contribute to gender mainstreaming it. Private businesses, acting in other capacities than as employers, have, as the law stands at present, practically no legally binding duties of gender mainstreaming.

In the current action plan for gender equality[42] it is - after noting that there are still structural gender inequalities - stated:

> This situation can be tackled efficiently by integrating the gender equality objective into the policies that have a direct or indirect impact on the lives of women and men. Women's concerns, needs and aspirations should be taken into account and assume the same importance as men's concerns in the design and implementation of policies. This is the gender mainstreaming approach, adopted in 1996 by the Commission[43]

In this programme the mainstreaming strategy is described as a pro-active strategy which integrates the gender aspect into all areas covered by Community competence and is complemented by specific actions with a view to enhance women's position in society. At the Commission's

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[41] 2002/73/EC.

[42] COM(2000)335, Community Framework Strategy on Gender Equality (2001-2005) available at http://europa.eu.int/comm/employment_social/equ_opp/strategy/ 2_en.html.

[43] COM(96)67, Commission Communication of 21 February 1996, Incorporating equal opportunities for women and men into all Community policies and activities.

homepage on gender mainstreaming it states that its mainstreaming method consist of the following:[44]

> Dual approach = gender mainstreaming + specific actions
> Gender impact assessment & gender proofing
> Mobilising all Commission services
> Anchoring responsibility
> Training for & awareness raising among key personnel
> Monitoring, benchmarking and break down of data and statistics by sex
> Structures:
> Group of Commissioners on Equal Opportunities,
> Inter-service Group on Gender Equality,
> Advisory Committee on Equal Opportunities for women and men

In the Council of Europe's report on mainstreaming from 1998[45] it is defined in the following way:

> Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all polices at all levels and at all stages, by the actors normally involved in policy-making.

It is further explained that gender mainstreaming can mean that the policy process is reorganised so that ordinary actors know how to incorporate a gender perspective. It can also mean that gender expertise is made a normal requirement for policy-makers.

5.2. Methods of Gender Mainstreaming

Gender mainstreaming implies that the gender dimension is made visible and taken into account at an early stage of the planning and design of rules and policies before anyone has actually suffered discrimination so that sex discrimination (direct and indirect discrimination, harassment and sexual harassment) is prevented from happening. There is no general agreement on how this should be done. Different actors use different methods, often of a socio-economic and not strictly legal nature.

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[44] europa.eu.int/comm/employment_social/equ_opp/gms_en.html.

[45] Gender Mainstreaming. Conceptual framework, methodology and presentation of good practices, Strasbourg, May 1998, available at http://www.humanrights.coe.int/ equality/

5.2.1. Socio-economic methods

In Sweden the so-called 3R method has been widely discussed. It is a review and analysis tool[46] which serves as an aid in systematically compiling facts and information about the situations of women and men in a given operation or transaction. The three R's stand for Representation (how many women and how many men?), Resources (how are the resources – money, space and time – distributed between women and men?) and Realia (how come representation and resource distribution are divided between the sexes in the way they are?).

So far, the Commission has mainly pursued its gender mainstreaming strategy by means of gender-disaggregated statistical data, bench marking, gender impact assessments and socio-economic gender equality indicators.

As an example from socio-legal contract law research which highlights the social and economic gender-relatedness of the law of surety contracts Belinda Fehlberg's study on surety wives may be mentioned.[47]

5.2.2. Case law and academic legal literature

In my view traditional legal sources such as case law and academic literature will often be useful tools in making the gender dimension of a particular area of law visible. The issue of surety wives and their legal position has for example - in addition to the abovementioned socio-legal study - also been addressed in traditional legal literature[48] and case law[49] on a number of occasions during recent years. The proposal for a Directive on credit for consumers from 2002[50] which will harmonise the law of consumer surety contracts does, however, not integrate the gender aspect.

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[46] See further Just Progress! Applying gender mainstreaming in Sweden, http://naring.regeringen.se/pressinfo/infomaterial/pdf/N2001_ 052.pdf

[47] Fehlberg, Belinda: Sexually transmitted debt - Surety experience and English law, Oxford 1997.

[48] See for example Debra Morris: Surety Wives in the House of Lords: Time for Solicitors to `Get Real'? *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [2001] 4 All E.R. 449, Feminist Legal Studies 2003 p 57, Geary, David: Notes on Family Guarantees in English and Scottish Law - A Comment, European Review of Private Law 2000 p 25 and Fehlberg, Belinda: Sexually transmitted debt - Surety experience and English law, Oxford 1997.

[49] http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd011011/etridg-1.htm, 11 October 2001 [2001] UKHL 44

[50] COM(2002)443.

5.3. Fragmentary duty to gender mainstream European law

The mainstreaming principle was first applied in the context of international development aid where it has been used since the mid 1980's.[51]

5.3.1. The EU duty of gender mainstreaming

The EU has practised the gender mainstreaming strategy by means of soft law since the early 1990's in the field of employment and occupation and increasingly also in other fields such as development aid and research.[52] The first binding EU measure on gender mainstreaming was the Regulation on gender mainstreaming activities in the area of development cooperation.[53]

The Community's mainstreaming obligation was (as from 1 May 1999) reinforced by the Amsterdam Treaty which elevated it in the hierarchy of the sources of law to Treaty level and extended its material scope to all areas covered by Community competence.

Under Article 2 EC, the Community shall have as its task to promote equality between men and women. Article 3(2) EC states that in the context of the activities referred to in Article 3(1) EC carried on for the purposes set out in Article 2 EC: 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women.' In the Equal Treatment Directive as amended in 2002[54] these Treaty provisions are summarised as follows (emphasis added):

> Equality between women and men is a fundamental principle, under Article 2 and Article 3(2) of the EC Treaty and the case-law of the Court of Justice. These Treaty

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[51] See further Razavi, Shahra og Carol Miller: Gender Mainstreaming. A Study on the Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues, Occasional Paper Series, Fourth World Conference on Women, OP 4, UNRISD (United Nations Research Institute for Social Development), August 1995 and Programme of Action for the mainstreaming of gender equality in Community Development Co-operation COM(2001)295.

[52] See Council Resolution of 20 May 1999 on women and science, OJ 1999 C 201.

[53] Council Regulation (EC) No 2836/98 of 22 December 1998 on integrating of gender issues in development cooperation. This Regulation will expire in December 2003. In the Commission's work programme for 2003, COM (2002)590, it is announced that it will be revised taking into account the main elements of the Programme of Action for the mainstreaming of gender equality in Community Development Co-operation COM(2001)295.

[54] Recital 4 of Directive 2002/73/EC.

> provisions proclaim equality between women and men as a "task" and an "aim" of the Community and impose a *positive obligation* to "promote" it in all its activities.

Article II-23 of the draft Constitution for the EU provides that equality between men and women must be ensured in all areas, including employment, work and pay. Article III-3 puts an obligation upon the Member States to integrate the aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation when defining and implementing all the policies and activities referred to in Part III of the draft Constitution.

5.3.2. The ECJ

In *Dory*[55] AG Stix-Hackl argued that there is an obligation for the ECJ to interpret anti-discriminatory Community measures[56] in light of the mainstreaming provision in Article 3(2)EC, see the following:

> .. in my opinion, in interpreting the scope of Directive 76/207, Article 3(2) EC must now also be taken into account. That provision of primary law was not yet in force at the time when the directive was drawn up. However, the Community is now expressly required by that provision actively to promote equality between men and women.
> 103 As regards the scope of Article 3(2) EC, it may be seen that it applies to the Community's `activities referred to' in Article 3(1) EC. Community law concerning the equal treatment of men and women in access to employment may be regarded as `social policy' within the meaning of Article 3(1)(j) EC. (48) As regards the `activities referred to', Article 3(2) EC imposes an obligation on `the Community'. That presumably includes the Court when dealing, in connection with a reference for a preliminary ruling, with the interpretation of secondary law in the field of social policy.

That principle will apply equally or *a fortiori* to the coming Directive on equal treatment in the provision of goods and services. The coming Directive will be adopted at a time when the gender mainstreaming strategy is well-known and at least some of the participants in the legislative process are very conscious about the mainstreaming perspective in the directive.

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[55] Case C-186/01, *Alexander Dory* v *Deutschland* [2003] ECR I-2479, point 102-3.

[56] In *Dory* the old Equal Treatment Directive 76/207/EEC.

5.3.3. National courts' duty of gender mainstreaming under Community law
In 1984, in *Colson*,[57] and *Harz*,[58] the ECJ laid down an obligation for all the authorities of the Member States, and especially the courts, to interpret national law in conformity with Community law. AG Mancini, in *Jongeneel Kaas* described the national courts also as Community courts, see the following:[59]

> The general principles ... of Community law ... may be relied upon by individuals before the national court which, as is well known, is also a Community court.

AG Léger in *Köbler*[60] similarly stated that the European Communities have been developed and consolidated essentially through law. Since the national courts have the function of applying the law, including Community law, they inevitably constitute an essential cog in the Community legal order.

Because all national courts are, under EU law, also Community courts the national courts presumably have mainstreaming obligations similar to those of the ECJ.

6. Positive action

As examples of relevant positive action measures in respect of contracts for the provision of goods and services, the Commission, in the proposal for a Directive on equal treatment in this area, mentions[61] women's difficulties in getting access to commercial loans and venture capital. While the application of the principle of equal treatment is likely to help with this situation, it is, in the view of the Commission, unlikely to be sufficient on its own to overcome the accumulated disadvantage faced by women. One response to this situation has been the establishment of specific loans for women entrepreneurs, at special rates or conditions, and the provision of extra business support and advice services for women entrepreneurs. Special services for women entrepreneurs exist in a number of Member States and

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[57] Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.

[58] Case 79/83 *Dorit Harz* v *Deutsche Tradax GmbH* [1984] ECR 1921.

[59] Case 237/82, *Jongeneel Kaas* [1984] ECR 483.

[60] Case C-224/01, *Köbler* [2003] ECR I-00000 (nyr).

[61] COM(2003)756 p 14.

in at least one, special banks or lending facilities exist specifically for this purpose. The Commission believes that the Directive should not prohibit the possibility for such measures in Member States and therefore that it is necessary to include an option for Member States to provide for positive action.

6.1. Division of power between the EU and the Member States

Positive action is an option for the Member States. There is never a duty under EU law for the Member States to take positive action or to allow or impose a duty upon their businesses/citizens to take positive action.

To some extent EU law prohibits positive action, namely proclaimed positive action measures that do not pursue a genuine equality purpose or apply excessive means to achieve its (lawful) purpose. If measures are within the sphere of lawful positive action under EU law it is for the Member States, in accordance with their political choices, to decide whether or not to allow or prohibit positive action in the individual country.

6.2. EU law

6.2.1. Statutory positive action provisions in EU law

Article 141(4) EC which applies to working life provides:

> 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article II-23 of the draft Constitutional Treaty which applies in all areas of law, also outside of employment[62] provides:

> Equality between men and women must be ensured in all areas, including employment, work and pay.
> The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

[62] Article 141(4) EC will, once the Constitutional Treaty has come into force, be replaced by Article III-108(4) of the Constituional Treaty which is identical with Article 141(4) EC.

All the above mentioned equality directives contain provisions allowing for positive action in respect of each specific criteria protected by the directive. This probably also means that it is ion accordance with EU law to take positive action to support subgroups suffering from multiple discrimination.[63]

6.2.2. The case law of the ECJ

Article 2(4) of the (old) Equal Treatment Directive 1976[64] provides:

> 4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)

Article 141(4) EC as worded by the Amsterdam Treaty provides

> 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The EC Treaty overrides the Equal Treatment Directive as lex superior. As the Commission stated in its proposal for an amendment of the Equal Treatment Directive,[65] Article 2(4) of the Directive has become redundant.[66] The Commission therefore proposed that it should be deleted.

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[63] See for the same view Fredman, Sandra: Double Trouble. Multiple Discrimination and EU Law, European Anti-discrimination Law Review No 2, 2005 p 13, available at europa.eu.int/comm/employment_social/fundamental_rights/pdf/legnet/05lawrev2_en.pdf.

[64] 76/207/EEC.

[65] COM(2000) 334.

[66] As at 1.5.1999 when the Amsterdam Treaty came into force.

Article 2(4) of the directive was interpreted by the ECJ in the *Commission* v *France*[67] case, the *Kalanke*[68] case and the *Marschall*[69] case and more recently in the *Badek* [70]case. The commission summarised that case law in the following way in the proposal for amendment of the Equal Treatment Directive:

– the possibility to adopt positive action measures is to be regarded as an exception to the principle of equal treatment;
– the exception is specifically and exclusively designed to allow for measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the realit y of social life;
– automatic priority to women, as regards access to employment or promotion, in sectors where they are under-represented cannot be justified;
– conversely, such a priority is justified, if it is not automatic and if the national measure in question guarantees equally qualified male candidates that their situation will be the subject of an objective assessment which take into account all criteria specific to the candidates, whatever their gender.

The *Commission* v *France* case of 1986 is so far the only infringement procedure concerning positive action that has been brought before the ECJ. France had introduced a provision in the Code de Travail prescribing that any term reserving the benefit of any measure to one or more employees on grounds of sex included in any collective labour agreement or employment contract shall be void, except where such a clause was intended to implement provisions relating to pregnancy, nursing or pre-natal and post-natal rest. However, another provision prescribed that the above-mentioned provision of the Code de Travail did not prohibit the application of usages, terms of contracts of employment or collective agreements in force on the date on which the law was promulgated granting special rights to women. The Commission submitted – and was not contradicted by the French

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[67] Case 312/86, *Commission* v *France* [1988] ECR 6315.

[68] Case C-450/93, *Kalanke* [1995] ECR I-3051.

[69] Case C-409/95, *Marschall* [1997] ECR I-6363.

[70] Case C-158/97, *Badeck* [2000] ECR I-1875 .

Government – that special rights for women included in collective agreements related in particular to: the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child was ill; the granting of additional days of annual leave in respect of each child: the granting of one day's leave at the beginning of the school year: the granting of time off work on Mother's Day; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who had to meet the costs of nurseries or childminders.

The Commission accepted that some of those special rights may fall within the scope of the derogations in the Equal Treatment Directive. It submitted, however, that the French legislation, by its generality, made it possible to preserve for an indefinite period measures discriminating as between men and women contrary to the directive. The ECJ accepted the Commission's views on these points and France was ordered to amend its legislation.

The objection to the provision at issue was mainly that it was general and applied for an indefinite period. Thus, France had gone beyond what was necessary and had thus violated the principle of proportionality.

The interpretation of the new provision in Article 141(4) was addressed by the ECJ *Abrahamsson*[71] case. The ECJ confirmed that positive action aiming to promote women in those sectors of the public service where they are under-represented has to be considered as compatible with EU law. It clarified the conditions in which positive action can be applied and stated that the male and the female candidates must have equal or almost equal merits. The automatic and absolute preference of a candidate of the underrepresented sex who had a sufficient but lower qualification was by contrast incompatible with the principle of equal treatment.

Schnorbus[72] concerned the automatic preference accorded to male candidates who had completed compulsory military or civilian service for (all) positions as legal adviser in Land Hessen, Germany. The German court asked the ECJ:

> "4. Is the fact that the rule automatically results in the preferential admission of men to training without a decision on the matter being subject to an assessment of

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[71] Case C-407/98, *Abrahamsson* [2000] ECR I-5539.

[72] Case C-79/99 *Schnorbus* [2000] ECR I-10997.

the individual circumstances or of other relevant factors meriting consideration in the interests of the remaining applicants sufficient to preclude justification of the rule under Article 2 (4) of Directive 76/207/EEC because it is to that extent more than a measure to promote equal opportunity?"

The ECJ established that a measure that accords preference to persons who have completed compulsory military or civilian service constitutes indirect discrimination in favour of men. The ECJ found however that the provision at issue, which took account of the delay experienced in the progress of their education by applicants who had been required to do military or civilian service, was objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay. The automatic preference accorded to men was therefore not regarded as contrary to the Equal Treatment Directive. Judged on the basis of the principle of proportionality, the preference accorded to men did not go beyond what was necessary to compensate for the disadvantages entailed by compulsory military or community service.

Beyond the preference accorded to men who had completed compulsory military or civilian service, there was a possibility of taking particular hardship into account. This must be viewed in connection with the fact that the measure concerned all the positions as legal adviser in Land Hessen.

The *Lommers* case[73] concerned a Netherlands scheme under which the Minister for Agriculture made available subsidized nursery places to female officials. Women were given priority with regard to all the nursery places made available by the employer save in the event of an emergency, to be determined by the Minister. Thus, men could only obtain a nursery place from the employer in question if there was an emergency. In this case the ECJ made explicit reference to the principle of proportionality and established[74] that in cases involving preliminary questions it is, in principle, the task of the national court to ensure that the principle of proportionality is duly observed. However, the ECJ may provide the national court with an interpretation of Community law on all such points as may enable the court to assess the compatibility of a national measure with Community law. The Netherlands scheme was regarded as compatible with the Equal Treatment Directive.

To sum up, the ECJ disallowed positive action measures in the *Commission* v *France*, *Kalanke* and *Abrahamsson*, and approved such measures in

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[73] Case C-476/99, *Lommers* [2002] ECR I-2891.

[74] In paragraph 40.

Marschall, *Badeck*, *Schnorbus* and *Lommers*. Positive action is unlawful if the measure is very general and applies for an indefinite period, or if the method selected is disproportionate to the aim pursued (Abrahamsson). There is considerable latitude for applying gender quota arrangements when appointing people to training places/positions (Badeck). Although priority may be given automatically to one sex as regards access to employment and working conditions, eg nursery places (Schnorbus and Lommers), the opposite sex must not be excluded from all possibilities of obtaining a position or a working condition of the kind concerned (Kalanke, Marschall, Lommers).

The general principle underlying ECJ case-law on positive action is that the principle of proportionality shall be observed. This means that any special measures that favour one sex shall serve a lawful purpose, they shall be appropriate and necessary for the attainment of this goal, and they must not go beyond what is necessary to attain it.

7. Enforcement and Monitoring of EU Equality Law

Judicial protection both at European and national level has been a much debated issue during recent years.[75] The ECJ stated in *Johnston*[76] that all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women.

7.1. National Autonomy to Choose Remedies and Procedures

According to settled case-law, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction, to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, and to choose the relevant remedies.[77]

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[75] See Tridimas, Takis: The general principles of EC law, Oxford 1999, Van Gerven, Walter: Of Rights, Remedies and Procedures, Common Market Law Review 2000 p 501 and O'Keeffe, David and Bavasso, Antonio (eds): Judicial Review in European Union Law, The Hague 2000.

[76] Case 222/84, *Johnston* [1986] ECR 1651.

[77] See, in particular, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case

The choice of penalties thus remains within the discretion of the Member States but their choice must be exercised with respect for the general EU law principles of equivalence, effectiveness and proportionality. In 1989, in *Commission* v *Greece*[78] the ECJ laid down some minimum Community conditions to be applied to the national rules. First, conditions attached to the national rules must not be less favourable than those attached to similar national actions. Second, the national rules must not be framed so as to render virtually impossible the exercise of Community rights. In any event, the remedy must be effective, proportionate and dissuasive.

Article II-47[79] of the draft Constitutional Treaty provides for a right to an effective remedy and to a fair trial before a tribunal (tribunal in French, Gericht in German). The first paragraph of Article II-47 is based on Article 13 ECHR[80] The second paragraph of Article II-47 corresponds to Article 6(1) ECHR but goes a little further in that it also covers public law, see below in part 7.[81] The ECJ has referred to Articles 6 and 13 ECHR as

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C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraph 17; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 46; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 47; Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 18, Case C-78/98 *Preston* [2000] ECR ECR I-3201 paragraph 31.

[78] Case C-68/88 *Commission* v *Greece* [1989] ECR 2979.

[79] Article II-47 of the draft Constitutional Treaty which incorporates the corresponding provision in the Charter of Fundamental rights reads:
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

[80] Article 13 ECHR reads: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[81] Article 6 ECHR reads: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by

expressions of underlying general principles of Community law in *Johnston* and a number of subsequent judgments. Article II-47 applies to the institutions of the EU and of the Member States when they are acting in the sphere of EU law.

Under the *acquis communautaire* Member States are bound by the fundamental rights including for example the fundamental right not to be discriminated against on grounds of sex when they act within the sphere of Community law as for example within the scope of one of the contract law directives. It follows, for example, that the Directive on unfair terms in consumer contracts[82] makes sex discriminatory contractual terms unlawful and harassment and sexual harassment in the provision of goods and services are unlawful within the field of the Directive on doorstep selling.[83] A person who can only rely on the fundamental right not to be discriminated against on grounds of sex is, however, in a fairly weak position if she wants to enforce her right. If a door-step seller for example harasses a customer in her home the Directive on doorstep selling provides for no specific remedy but the national courts must follow the general principles of Community law and find an effective remedy. The appropriate remedy depends on the circumstances. Remedies may include: a declaration of rights, damages, an injunction ordering a party not to do something or to do something.[84]

In addition to the above general principles, which apply in all matters governed by Community law, Member States will be required to comply with the specific requirements provided for in Articles 7, 8 and 11 of the Directive on equal treatment in the access to and supply of goods and services when (and if) that Directive is adopted. Those Articles lay down provisions on judicial and administrative procedures, compensation or reparation, legal standing, dialogue with organisations, time limits, burden of proof and specific equality bodies to control that the principle of equal treatment is observed.

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law. Judgment shall be pronounced publicly....

[82] 93/13/EEC.

[83] 85/577/EEC.

[84] See eg the UK SDA Section 66(2) SDA.

7.1.1. The principle of proportionality

In *Colson*,[85] AG Rozes argued that the deterrent effect of the sanctions must be assessed on the basis of the principle of proportionality and compared to sanctions imposed in national law to other offences of the same gravity. The ECJ held that it is impossible to establish real equality of opportunity without an appropriate system of sanctions. Although full implementation of the employment directives does not require any specific form of sanction, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer.

7.1.2. The principle of effectiveness

The classic formulation of the principle of effectiveness was introduced in *Comet*.[86] Where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[87]

In *Heylens*[88] the ECJ found that there must be a remedy of a judicial nature against the refusal of the French Minister to recognize a diploma. The Court held that since free access to employment is a fundamental right which the EC Treaty confers individually on each worker in the community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the ECJ held in *Johnston* that requirement reflects a general principle of community law

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[85] Case 14/83, *Colson* [1984] ECR 1891.

[86] Case 45/76 Comet v Produktschap voor Siergewassen [1976] ECR 2043 and Case 33/76 Rewe-Zentral Finanz eG v Landwirtschaftskammer für das Saarland [1976] ECR 1989.

[87] See, for example, Case C-326/88 *Anklagemyndigheden* v *Hansen & Søn I/S* [1990] ECR I-2911.

[88] Case 222/86 *Heylens* [1987] ECR 4097.

which underlies the constitutional traditions Common to the member states and has been enshrined in articles 6 and 13 ECHR.

In *Colson*,[89] the ECJ struck down a German rule providing for reliance damages as insufficient to deter employers from discriminating on grounds of sex, see for more details below on reliance damages.

7.1.3. The principles of equivalence

The infringement actions[90] against UK for failure to implement the original collective redundancies and transfer of undertakings directives addressed the problem that employee representation in undertakings within the UK was based on voluntary recognition of trade unions by employers and for that reason there was no remedy against an employer who did not recognize a trade union. The ECJ considered this state of law incompatible with the duty of the Member States to contribute to the effective application of Community law. In this case the UK treatment of information and consultation of employees in matters covered by Community law was the same as the treatment of information and consultation of employees in national matters not covered by Community law, namely a totally voluntary solution. The principle of equivalence was thus fulfilled but the principle of effectiveness was violated.

7.2. Specific Performance

If a party does not perform a contract although performance is possible, the question arises whether the other party may claim performance in natura.

In *Colson*[91] the Arbeitsgericht Hamm raised the question as to whether the Equal treatment Directive[92] requires discrimination on grounds of sex in the matter of access to employment to be penalized by an obligation, imposed on an employer who is guilty of discrimination, to conclude a contract of employment with the candidate who was the victim of discrimination. The ECJ held that the Equal treatment Directive does not require discrimination on grounds of sex regarding access to employment to be

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89 Case 14/83, *Colson* [1984] ECR 1891.

90 Case C-382/92, *Commission* v *United Kingdom* [1994] ECR I-2435 and Case C-383/92, *Commission* v *United Kingdom* [1994] ECR I-2479.

91 Case 14/83, *Colson* [1984] ECR 1891.

92 76/207/EEC.

made the subject of a sanction by way of an obligation imposed upon the employer who is the author of the discrimination to conclude a contract of employment with the candidate discriminated against.

In respect of specific performance employment contracts are special because of the personal character of the contract. In discrimination cases outside of the labour market the general rules in the nationalsystem which is the applicable law of the contract must apply. Under common law, the main rule is that there is no claim for specific performance. However, specific performance is granted if the normal sanction of damages would be inadequate. In civil law countries, the main rule is the opposite, namely that there is a claim for specific performance.

7.3. Compensation or Reparation

Damages/compensation is a typical remedy in national law.[93] In discrimination cases in the employment field a number of questions have been raised as to which elements must be included.

Article 7(2) in the the directive on equal treatment in the provision of goods and services provides:

> 2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation shall not be restricted by the fixing of a prior upper limit.

It is in broad terms similar to Article 6(2) of the amended equal treatment directive[94] which provides:

> 2. Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimina-

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[93] See Bussani, Mauro (ed): Pure Economic Loss in Europe, Cambridge 2003 is a contribution to the common core project.

[94] 2002/73/EC.

> tion within the meaning of this Directive is the refusal to take his/her job application into consideration.

To the difference of the directive on goods and services the amended equal treatment directive explicitly states that the compensation or reparation that is ensured must be dissuasive and proportionate to the damage suffered. That applies also in respect of the directive on goods and services since it followsfrom the general principles of EU law.

7.3.1. Requirement of fault

In *Dekker*[95] the Hoge Raad (the Dutch Supreme Court) referred the question whether it is compatible with the Equal Treatment Directive that, if the infringement of the principle of equal treatment is established, for the award of the claim it is also necessary that the employer has committed a fault.

The ECJ held that the refusal to engage a pregnant woman on the ground that she is pregnant constitutes a form of direct discrimination on the grounds of sex. Furthermore, proof of such discrimination is not contingent upon a comparison with the treatment of a male employee. The ECJ stressed that the primary liability for a breach of the Equal Treatment Directive is upon the employer and that he or she cannot rely upon exemptions, exclusions or justifications available in national law to justify discrimination against a pregnant employee.

In *Draempaehl*,[96] the ECJ again discussed the question as to whether a requirement of fault in national law is consistent with EU law. The following preliminary question was referred to it:

> 1. Does a statutory provision which makes it a condition for an award of compensation for discrimination on grounds of sex in the making of an appointment that there must be fault on the part of the employer conflict with Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions?

The Court referred to its judgment in *Dekker* and concluded that the equal treatment directive precludes provisions of domestic law which, like §611a(1) and (2) of the BGB, make reparation of damage suffered as a result of discrimination on grounds of sex in the making of an appointment subject to the requirement of fault. That conclusion could not be affected by

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[95] Case C-177/88, *Dekker* [1990] ECR I-3941.

[96] Case C-180/95, *Draempaehl* [1997] ECR I-2195.

the German Government's argument that proof of such fault is easy to adduce since, in German law, fault entails liability for deliberate or negligent acts.

The above rule on no-fault liability will probably correspondingly to sex discrimination outside of employment. In existing national law there are, however, examples of stricter liability rules in the employment field than outside of employment. The Norwegian Gender Equality Act Section 17 on liability for damages thus provides:

> Any job seeker or employee who has been subjected to differential treatment in contravention of sections 3 to 6 shall be entitled to compensation regardless of the fault of the employer. Compensation shall be fixed at the amount that is reasonable, having regard to the financial loss, the situation of the employer and the employee or job seeker and all other circumstances.
> In all other respects, the general rules regarding liability for damages in the event of wilful or negligent contravention of the provisions of this Act shall apply.

Similarly, in the UK damages cannot be awarded for indirect discrimination in the provision of goods and services under the UK SDA[97] if the respondent proves that the requirement or condition in question was not applied with the *intention* of treating the claimant unfavourably on the ground of his or her sex. The requirement of intention as a precondition for damages makes the UK ban against indirect discrimination in matters of goods and services weak compared to the standard provided for in employment and in the Directive on equal treatment in contracts for the provision of goods and services.

7.3.2. Reliance damages

Reliance damages restore the injured party to his or her original pre-contractual position. Job-seekers whose right are violated, eg by discrimination, will often have incurred only limited economic loss such as the costs of stamps and an envelope. A duty to pay compensation for such costs will not be effective in deterring employers from discriminating.

In *Colson*[98] the ECJ ruled in a case where rejected applicants under German law received reimbursement of their application costs and nothing more. The Commission considered that although the directive is intended to leave to Member States the choice and the determination of the sanctions, the transposition of the directive must nevertheless produce effective results.

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[97] See further section 66 SDA.

[98] Case 14/83, *Colson* [1984] ECR 1891.

The principle of the effective transposition of the directive requires that the sanctions must be of such a nature as to constitute appropriate compensation for the candidate discriminated against and for the employer a means of pressure which it would be unwise to disregard and which would prompt him to respect the principle of equal treatment. A national measure which provides for compensation only for losses actually incurred through reliance on an expectation (Vertrauensschaden) is not sufficient to ensure compliance with that principle.

The ECJ held that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the Equal Treatment Directive.

7.3.3. Upper limit for compensation and exclusion of interest

The question as to whether the Member States can put a ceiling on compensation was at issue both in *Marshall*[99] and in *Draempaehl.*[100]

Miss Marshall was dismissed in 1980 at the age of 62, in a situation in which a man would have been dismissed at the age of 65. In *Marshall* (1),[101] the ECJ ruled that this was in conflict with article 5 of the Directive on Equal Treatment,[102] which created direct effects *vis-à-vis* a public employer. Marshall then made a claim for compensation.

The dispute in *Marshall* (2)[103] arose because the Industrial Tribunal,[104] to which the Court of Appeal remitted the case to consider the question of compensation, assessed Miss Marshall' s financial loss at 18.405£, including 7.710 £ by way of interest, and awarded her compensation of 19.405 £, including a sum of 1.000£ compensation for injury to feelings. According to the then relevant provision of the SDA, where an Industrial Tribunal found that a complaint of unlawful sex discrimination in relation to

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[99] Case C-271/91, *Marshall (No 2)* [1993] ECR I-4367.

[100] Case C-180/95, *Draempaehl* [1997] ECR I-2195.

[101] Case 152/84, *Marshall (1)* [1986] ECR 723.

[102] 76/207/EEC.

[103] Case C-271/91, *Marshall (No 2)* [1993] ECR I-4367.

[104] The then competent English tribunal, today it would be an employment tribunal.

employment was well founded, it should, if it considered it just and equitable to do so, make an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a County Court to pay to the complainant. Under the then section 65(2) of the SDA, however, the amount of compensation awarded could not exceed a specified limit, which at the relevant time was 6.250 £. At that time an Industrial Tribunal had no power - or at least the relevant provisions were ambiguous as to whether it had such a power - to award interest on compensation for an act of unlawful sex discrimination in relation to employment. The House of Lords referred a number of questions to the ECJ concerning the extent to which these restrictions complied with Article 6 of the Directive on Equal Treatment:

> 1. Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the legislation of an upper limit on the amount of compensation recoverable by such a person?
> 2. Where the national legislation provides for the payment of compensation is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded:
> a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination
> b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?

The ECJ understood the questions put by the House of Lords as asking, in essence, whether it follows from the Directive on Equal Treatment that a victim of sex discrimination is entitled to (emphasis added) *full reparation for the loss and damage he or she had sustained*.

The Court held that although the Equal Treatment Directive leaves Member States, when providing a remedy for breach of the prohibition against discrimination, free to choose between the different solutions suitable for achieving the objective of the directive, it nevertheless entails that if financial compensation is to be awarded where there has been discrimination such compensation must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules. Accordingly, the interpretation of Article 6 of the Equal Treatment Directive must be that reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to

an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid. The response of the ECJ was that Article 6 should be interpreted such that damages for a loss, suffered by a person in the context of a dismissal which is discriminatory on the basis of gender, may not be restricted to a maximum amount determined *a priori*, and that interest must be awarded as compensation for a justified loss, in respect of the time elapsed until the damages are actually paid.

In *Draempaehl*[105] the national court referred questions for a preliminary ruling on whether it is in conflict with the Equal Treatment Directive that a statutory provision prescribes an upper limit of three months' salary as compensation for discrimination on grounds of sex in the making of an appointment - in contrast to other provisions of domestic civil and labour law - for applicants of either sex who have been discriminated against in the procedure, but who would not have obtained the position to be filled even in the event of non-discriminatory selection by reason of the superior qualifications of the applicant appointed.

The national court also asked if a statutory provision is in conflict with the Equal Treatment Directive if it prescribes an upper limit of three month's salary as compensation for discrimination on grounds of sex in the making of an appointment - in contrast to other domestic provisions of civil and labour law - for applicants of either sex who, in the event of non-discriminatory selection, would have obtained the position to be filled. Finally it asked whether it is in conflict with the Equal treatment Directive if a statutory provision, where compensation is claimed by several parties for discrimination on grounds of sex in the making of an appointment, prescribes an upper limit of the aggregate of six months' salary for all persons who have suffered discrimination - in contrast to other provisions of domestic civil and labour law

The ECJ held that the Equal Treatment Directive does not preclude provisions of domestic law which prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant where the employer can prove that, because the applicant engaged had superior qualification, the unsuccessful applicant would not have obtained the vacant position, even if there had been no discrimination in the selection process. In contrast, the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law,

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[105] Case C-180/95, *Draempaehl* [1997] ECR I-2195.

prescribe an upper limit of three months' salary for the amount of compensation which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where that applicant would have obtained the vacant position if the selection process had been carried out without discrimination.

Finally the ECJ held that the Directive precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment.

7.3.4. Compensation for non-material damage

In *Leitner*,[106] the ECJ was asked whether Article 5 of the package travel directive[107] is to be interpreted as meaning that compensation is in principle payable in respect of claims for compensation for non-material damage.

The Commission argued that the term damage is used in the Directive without any restriction, and that, specifically in the field of holiday travel, damage other than physical injury is a frequent occurrence. It then noted that liability for non-material damage is recognised in most Member States, over and above compensation for physical pain and suffering traditionally provided for in all legal systems, although the extent of that liability and the conditions under which it is incurred vary in detail. The Commission maintained that it is not possible to interpret restrictively the general concept of damage used in the Directive and to exclude from it as a matter of principle non-material damage.

The ECJ noted that it was not in dispute that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition, given that, as the Commission has pointed out, non-material damage is a frequent occurrence in that field. Furthermore, the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers. It is in light of those considerations that Article 5 of the Directive is to be interpreted.

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[106] Case C168/00, *Leitner* [2002] I-2631.

[107] 90/314/EEC.

Although the first subparagraph of Article 5(2) merely refers in a general manner to the concept of damage, the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in the matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage. The answer to the question referred was therefore that Article 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.

With regard to sex discrimination in the provision of goods and services national law also provide for compensation for non-material damage to a varying degree.[108] The distortion of competition argument is probably weaker in this field than with regard to package holidays. The principle of effectiveness will often require compensation to be paid for non-material damage because there will typically be no physical injury and the economic loss sustained may be so small that compensation only for economic loss will not be sufficient for the sanction to act as a deterrent, see above on the *Colson* case.[109]

7.4. Courts

7.4.1. A fair and public hearing

Article II-47(2) of the draft Constitutional Treaty which incorporates the corresponding provision in Article 6 ECHR in the Charter of Fundamental rights reads:

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

7.4.2. Civil, criminal and public law

Article 6 ECHR has a more limited scope. It stipulates that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. Compared to that Article

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[108] See from national law section 66 (4) of the UK SDA which provides for compensation for injury to feelings.

[109] Case 14/83, *Colson* [1984] ECR 1891.

II-47(2) goes a little further.[110] In EU law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations and criminal proceedings but applies equally to public law. That is in the explanatory remarks seen as a consequence of the fact that the EU is a community based on the rule of law as stated by the ECJ in *Les Verts*.[111] Litigation over such clauses will be protected by the draft Constitution irrespective of whether the problem is classified as a public law or a private law issue.

In all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the EU.

7.4.3. Legal aid

Article II-47(3) of the draft Constitutional Treaty reads:

> Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

This provision is in accordance with the case law of the ECtHR according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.[112] In the explanatory remarks to the Charter of fundamental Rights this case law is mentioned as an example of the endeavors of the EU to live up to the standard established by ECHR.[113]

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[110] Article 13 ECHR reads: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[111] Case 294/83, *Les Verts* [1988] ECR 1339.

[112] *Airey* v *Ireland*, judgment of 9.10.1979 in case no 6289/73, available at www.echr.coe.int/eng/Judgments.htm.

[113] Article 52(3) of the Charter provides: 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

7.4.4. An independent and impartial court

It is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction. They can, however, not choose that no court or tribunal is competent. In *Commission* v *UK*[114] concerning the implementation of the Equal Pay Directive,[115] the ECJ thus held that each Member State must endow an authority with the requisite jurisdiction to decide whether work has the same value as other work

7.4.4.1. Gender composition of the courts and similar bodies

Malleson[116] argues that equal participation of men and women in the justice system is an inherent and essential feature of a democracy without which the judiciary will lose public confidence.

In the Danish gender equality Acts setting up the complaint board for equality there is a gender parity. The board consists of three members among whihc both sexes must be represented. Presently two of the members are male and one female.

7.4.4.2. Competent court according to the regulation on jurisdiction and enforcement of judgements

Rules determining which national court is competent are providedfor in the Brussels Regulation on jurisdiction and the enforcement of judgements in civil and commercial matters.[117] This regulation establishes extra protection for employees and consumers. There are no special rules for discrimination cases.

7.4.5. Legal Standing - group action

Article 7(3) of the Directive on equal treatment in the provision of goods and services provides that

> 3. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his

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[114] Case 61/81 *Commission* v *United Kingdom* [1982] ECR 2601.

[115] 75/117/EEC.

[116] Malleson , Kate: Justifying Gender Equality on the Bench: Why Difference Won't Do, Feminist Legal Studies 2003 p 1.

[117] EC/44/2001.

> or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

The right to legal protection is further reinforced by the possibility of allowing organisations to exercise such rights on behalf of a victim.

In the *Hejderijk* case[118] the ECJ indicated that the principles of effective judicial protection and effectiveness may lead to a 'locus standi' for a person who has no 'locus standi' under national law.

7.4.6. Time limits

Article 7(1) of the Directive on equal treatment in the provision of goods and services provides that (emphasis added):

> 1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, *even after the relationship in which the discrimination is alleged to have occurred has ended.*

As in the earlier discrimination directives, the right to challenge discriminatory behaviour wiith regard to the provision of goods and services extends to situations in which the relationship between the parties has ended. In *Coote,*[119] the ECJ held that this follows from the principle of effective judicial control.

The Directive will not get retroactive effect, applying to such relationships only from the date of its entry into force. National time limits for initiating action are not affected by this Article. Article 7(4) of the Directive on equal treatment in the provision of goods and services provides that:

> 4. Paragraphs 1 and 3 are without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

National time-bars which may operate as hindrances to the effective enforcement of rights conferred upon individuals by EU law are usually adopted out of concern for the principle of legal certainty. When deciding as to whether to accept them it is therefore necessary to strike a balance

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[118] Case C-89/90, *Verholen* [1991] ECR I-3757.

[119] Case C-185/97, *Coote* [1998] ECR I-5199.

between the conflicting general principles of legal certainty and of effectiveness.

In EU law in general the main rule is that national time-limits are considered to fall within the sphere of national procedural autonomy. The ECJ has thus recognised that it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings. It cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought.[120] In a few employment related situations time limits have, however, been struck down by the ECJ as incompatible with the principle of effectiveness inherent in EU law. In *Emmot*[121] the ECJ held that Community law precludes a Member State from relying, in proceedings brought against it by an individual before the national courts in order to protect rights directly conferred upon him by a directive, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system. This - seemingly far-reaching - ruling has been limited by later case law. In *Fantask*,[122] the ECJ stated that:

> the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive.

In *Magorrian & Cunningham*[123] the ECJ stated:

> 2. Community law precludes the application, to a claim based on Article 119 [now Article 141] of the EC Treaty for recognition of the claimants' entitlement to join an occupational pension scheme, of a national rule under which such entitlement, in the event of a successful claim, is limited to a period which starts to run from a

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[120] See Case C-188/95, *Fantask and Others* [1997] ECR I-6783, Case C-326/96 *Levez* [1998] ECR I-7835 paragraph 19 and Case C-78/98, *Preston* [2000] ECR ECR I-3201.

[121] Case C-208/90, *Emmott* [1991] ECR I-4269.

[122] Case C-188/95 *Fantask* [1997] ECR I-6783.

[123] Case C-246/96, *Magorrian* [1997] ECR I-7153.

point in time two years prior to commencement of proceedings in connection with the claim.

In *Preston and Fletcher*[124] the ECH confirmed its ruling in *Magorrian.*

7.4.7. Ex officio application of Community law
In *Océano*,[125] the ECJ held that the effectiveness of EU consumer protection legislation requires national courts to determine of their own motion whether a term of a contract is unfair with regard to the directive on unfair terms in consumer contracts.[126] The same principle must apply in discrimination cases.

7.5. Shift in the Burden of Proof

The ECJ has repeatedly stated[127] that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination lies with the person who, believing him- or herself to be the victim of such discrimination, brings legal proceedings with a view to removing the discrimination.

In *Danfoss*,[128] the ECJ held (emphasis added) that the Equal Pay Directive[129] must be interpreted as meaning that where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his *practice* in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.

7.5.1. Indirect discrimination and lack of transparency
It is clear from the case-law of the ECJ that the onus may shift when that is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal

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[124] Case C-78/98, *Preston* [2000] ECR ECR I-3201.

[125] Joined cases C-240/98 to C-244/98, *Océano Grupo Editorial* [2000] ECR I-4941.

[126] 93/13/EC.

[127] See for example Case C-127/ 92, *Enderby* [1993] ECR I-5535 paragraph 13.

[128] Case C-109/88, *Danfoss* [1989] ECR 3199.

[129] 75/117/EEC.

pay. Accordingly, when a measure distinguishing between employees on the basis of their hours of work has in practice an adverse impact on substantially more members of one or other sex, that measure must be regarded as contrary to the objective pursued by Article 141 EC, unless the employer shows that it is based on objectively justified factors unrelated to any discrimination on grounds of sex.[130]

Similarly, where an undertaking applies a system of pay which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.[131] As stated in the Staff Working paper underlying the proposal for the Directive on equal treatment in the provision of goods and services[132] the example of sex discrimination reported include:

Refusal to offer loans to people working part-time.

Banks and other financial institutions which operate such practices will face the same consequences as to bruden of proof as employers have been met with in the above judgments.

7.5.2. The Equality directives

The Equality directives contain a standard provision providing for a shift in the burden of proof to the advange of the person who claims she/he has been discriminated against. The burden of proof reverts to the respondent once the plaintiff has established facts before the court or other body from which it may be presumed that discrimination has taken place.

As in the earlier discrimination directives and in order to comply with the provisions of the ECHR, this shift in the burden of proof does not apply to situations where the criminal law is used to prosecute allegations of discrimination.[133]

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[130] Case 170/84, *Bilka-Kaufhaus* [1986] ECR 1607, at paragraph 31, Case C-33/89, *Kowalska* [1990] ECR I-2591, at paragraph 16, C-184/89, *Nimz* [1991] ECR I-297, at paragraph 15 and Case C-127/ 92, *Enderby* [1993] ECR I-5535 paragraph 13.

[131] Case 109/88, *Danfoss* [1989] ECR 3199, at paragraph 16.

[132] SEC(2003)1213 p 5.

[133] As in its earlier proposals, the Commission has not included the provision inserted by the Council in previous directives to the effect that Member States need not apply the shift of the burden of proof to proceedings in which it is for the court or

7.6. Promotion of dialogue with non-governmental organisations.

The Ethnic Equality Directive and the Directive on equal treatment in the access to and supply of goods and services provide for dialogue with non-governmental organisations. Member States shall engage in dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination with a view to promoting the principle of equal treatment.

7.7. Specific equality bodies

The Ethnic Equality Directive and the Directive on equal treatment in the access to and supply of goods and services provide that Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of ethnic origin or sex. These bodies may form part of agencies with responsibility at national level with the defence of human rights or the safeguard of individuals' rights, or bodies with responsibility for implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

(a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;
(b) conducting independent surveys concerning discrimination;
(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

8. Multiple Discrimination in the Application of EU Equality Law

In acordance with the above general rules on enforcement and monitoring Member States have a very free choice as to how to enforce prohibitions against discrimination, including multiple discrimination. There are four main procedural approaches at national level:

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competent body to investigate the facts of the case. The Commission notes that there is considerable confusion about the meaning of this provision and believes that its inclusion would undermine the legal certainty of the article as a whole.

- Ordinary administrative process (eg labour inspectors)
- Industrial relations (collective agreements,works councils)
- Judicial process (litigation in courts)
- Special equality bodies (specialised quasi-judicial bodies, ombudsmen, and similar bodies).

It is very much up to the Member States to decide how much or little they will focus on multiple discrimination. The gendermainstreaming aspect, eg in connection with the promotion of the integration of migrant women is taken seriously in many countries but other aspects og multiple discrimiantion are often disregarded. The Irish Equality Authority has commissioned some reports on the issue.[134]

[134] See Maria Pierce: Minority Ethnic People with Disabilities in Ireland Situation, Identity and Experience, Department of Social Policy and Social Work, University College Dublin in conjunction with the Institute for the Study of Social Change, The Equality Authority, Ireland.