Fundamental rights & anti-discrimination

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

Employment & social affairs

European Commission

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Fundamental rights and anti-discrimination

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Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Introduction

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

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

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

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

2. Creating the bibliography

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

(a) The project methodology

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

(i) Phase 1 – screening the literature

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

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

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

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

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

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

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

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

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

(b) Finding academic publications and research on the Directives

There are relatively few databases specialising in discrimination law. One example is the database of the Centre for Research and Comparative Legal Studies on Sexual Orientation and Gender Identity:
http://www.cersgosig.informagay.it
This includes a significant quantity of literature relating to Directive 2000/78[1] (hereafter referred to as the Framework Employment Directive).

A bibliography of academic publications on Article 13 is also available on the website of the Academy of European Law, Trier.
http://www.era.int/www/en/c_10540_doc.htm

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

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

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

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

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

(a) Geographic and linguistic distribution of publications

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

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

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

[2] Moreiro González, 2000.
[3] Barnard, 2001; McInerney, 2003; Caruso, 2003.

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

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

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

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

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

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

[4] e.g. Berthou, 2003 on France.
[5] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22.
[6] There may, however, be narrow circumstances where the employer may be permitted to take into account such characteristics as a result of the 'genuine occupational requirement' exception.

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

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

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

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

[7] e.g. Borrillo, 2003; Guild, 2000; Moreiro González, 2000; Skidmore, 2001; Holtmaat, 2001.
[8] Brown, 2002.
[9] Waddington, 2003b.
[10] Mahlmann, 2003; Kimber, 2003a; O'Cinneide, 2003; Whittle, 2002.
[11] Borrillo, 2002; Toggenburg, 2002; Moreiro González, 2000; Waddington, 2003b; Strazzari, 2002.
[12] Mahlmann, 2003; Kimber, 2003a; Meenan, 2003; Schiek, 2002: Parmer, 2003.
[13] Kimber, 2003a; Meenan, 2003.

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

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

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

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

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

(i) The Directives and EU law and policy

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

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

[14] Article 21(1) of the Charter states: 'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'.
[15] Schiek, 2003b; Wiedeman and Thüsing, 2002b.
[16] [2002] OJ L269/15.
[17] Schiek, 2003b; Whittle and Bell, 2002.

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

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

(ii) The Directives and fundamental rights and freedoms

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

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

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

[18] Mahlmann, 2003.
[19] McInerney, 2000; Mahlmann, 2003.
[20] Waddington, 2003a; Schiek, 2002.
[21] Sottiaux, 2003.
[22] On Austria, see Kuras, 2003.

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

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

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

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

[23] Barnard, 2001; Skidmore, 2001; Bell, 2001b; O'Hare, 2001.
[24] See also, Leigh, 2001; Beaumont 2001.

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

Box 2:

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

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

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

(d) The principle of equality

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

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

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

[25] See also, Bellocchi, 2003; Holtmaat, 2001.
[26] Chieco, 2002.
[27] Case T-10/93 *A v Commission* [1994] ECR II-179, para. 42.

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

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

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

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

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

[28] Barry, 2003; Parmar, 2003; Barnard, 2001; Bolger, 2003a.
[29] Also, Rodrigues, 2000; Strazzari, 2002.
[30] Niessen, 2003.
[31] Barry, 2003.
[32] Fredman, 2001.

(e) The grounds of discrimination

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

(i) Racial or ethnic origin

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

(ii) Religion or belief

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

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

[33] Also, Rodrigues, 2000.
[34] Thüsing, 2003c; Bell and Waddington, 2003.

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

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

(iii) Disability

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

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

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

[35] Also, De Schutter, 2001.
[36] e.g. De Schutter, 2001; Skidmore, 2001; Waddington, 2003b; Barnard, 2001.
[37] Also, Thüsing, 2003c.
[38] Also, De Schutter, 2001.

(iv) Age

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

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

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

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

[39] De Schutter, 2001.
[40] Reid, 2003.
[41] Kimber, 2003a; Meenan, 2003; O'Hare, 2001; González Ortega, 2001.

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

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

(v) Sexual orientation

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

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

(f) The definition of discrimination

(i) Direct and indirect discrimination

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

> 'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others'.

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

[42] Sottiaux, 2003; Rivas Vaño, 2001; Bell, 2001b, Baraldi-Bonini, 2003.
[43] Kimber, 2003a; Meenan, 2003; O'Hare, 2001; González Ortega, 2001.
[44] See also, Sewandono, 2001.

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

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

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

(ii) Harassment

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

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

[45] Kimber, 2003a; Skidmore, 2001; Bell, 2001b.
[46] Article 2(2), Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, [1998] OJ L14/6.
[47] Article 2(2)(b), Racial Equality Directive.
[48] Barbera, 2002; O'Hare, 2001; McInerney, 2000; Rivas-Vaño, 2001; Bell, 2001b.
[49] Gómez Muñoz, 2001; Bell, 2001b; Schiek, 2002.
[50] Article 2(3) in both Directives.

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

(g) Exceptions to the prohibition on discrimination

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

(i) Genuine occupational requirements

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

> '… Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

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

(ii) Difference of treatment based on nationality

Both Directives contain the following provision:

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

[51] Holtmaat, 2001; Waddington, 2003b; Skidmore, 2001; Bell, 2002a.
[52] Article 3(2), both Directives.

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

[53] e.g. Goldston, 2001; Guild, 2000; Bell, 2002a; Skidmore, 2001; Parmar, 2003; Rodrigues, 2000.

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

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

(iii) Positive action

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

(iv) Other exceptions in the Framework Employment Directive

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

[54] Holtmaat, 2001; Chieco, 2002; Bell, 2001b; Skidmore, 2001; Whittle, 2002; Barnard, 2001.

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

(h) Enforcement and remedies

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

(i) Burden of proof

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

(ii) Legal standing for organisations

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

(iii) Remedies

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

[55] Article 3(4).
[56] Parmar, 2003; Waddington, 2003b; O'Hare, 2001; Bell, 2002b.
[57] e.g. Barry, 2003; Niessen, 2003.
[58] Article 8(1) Racial Equality Directive; Article 10(1) Framework Employment Directive.
[59] Goldston, 2001; Gómez Muñoz, 2001; McInerney, 2000.
[60] Article 7(2) Racial Equality Directive; Article 9(2) Framework Employment Directive.
[61] Parmar, 2003.
[62] Barry, 2003; Chieco, 2002; Rodrigues, 2000.

(i) Bodies for promotion of equal treatment

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

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

(j) Social and civil dialogue

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

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

[63] See contributions in T Leonen and P Rodrigues (eds) *Non-discrimination law: comparative perspectives*, Kluwer Publishing, 1999.
[64] e.g. Malmberg 2003; Bell, 2001b; O'Hare, 2001; McInerney, 2000.
[65] e.g. Mahlmann, 2003; Bell, 2001b; Kimber, 2003a; O'Cinneide, 2003; Skidmore, 2001; Whittle, 2002; Moreiro González, 2000.
[66] Articles 11 and 12 Racial Equality Directive; Articles 13 and 14 Framework Employment Directive.
[67] Article 10, Racial Equality Directive; Article 12, Framework Employment Directive.

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

(k) Issues relating to national implementation

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

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

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

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

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

[68] Also, Nibi, 2003.
[69] Gijzen, 2003.

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

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

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

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

(ii) Mainstreaming

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

(iii) Developing a policy framework on combating discrimination

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

(iv) Citizenship, human rights and equality

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

[70] Waddington, 2003a; Parmar, 2003; Bell, 2002a; Hvinden and Halvorsen, 2004; Strazzari, 2002.
[71] See further: http://europa.eu.int/comm/employment_social/fundamental_rights/prog/index_en.htm
[72] Borrillo, 2003. Also, Dollat, 2002.
[73] O'Cinneide, 2003; Whittle, 2002; González Ortega, 2001; Bell, 2002a; Dollat, 2002.
[74] See section (c).

ANNEX I
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ANNEX II

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The article aims to clarify that – even if the directives are not implemented in time – employers run a high risk to be taken to court, and should reconsider their employment policies. This reference, which is without an author, was added to demonstrate that the insurance industry considers the directives and their impact carefully.

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This article analyses the extent to which Irish law on religious discrimination will have to be changed following the Framework Directive.

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The article examines in details the race and framework directives.

Connolly U (2001) “The Race Directive and the Framework Directive: An analysis of their effect on Irish employment: Part 1”, *Irish Law Times* Vol 19 pp 206-210

This article provides an overview of the impact of the two Directives on Irish law.

Connolly U (2001) “The Race Directive and the Framework Directive: An analysis of their effect on Irish Employment: Part 2”, *Irish Law Times* Vol 19 pp. 219-223

This article provides an overview of the impact of the two Directives on Irish law.

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This article reviews the content of both the Racial Equality and Framework Employment Directives. It considers the specific provisions and novelties of the Directives, as well as discussion of the wider context of fundamental rights protection through EU law.

Cuypers D (2003) “There will never be equality in de [sic] servant’s hall. Gelijkheid in de arbeidsrecht” (“There will never be equality in de [sic] servant’s hall. Equality in Employment law”), Velaers, J *Vrijheid en gelijkheid De horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet* pp. 445-488 Maklu uitgevers

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This book analyses the Directives based on Article 13 EC by asking whether they will be effective in combating discrimination in employment relationships, relying on the economic approaches to the phenomenon of discrimination.

De Schutter O (2003) “La loi belge tendant à lutter contre la discrimination” (“The Belgian Antidiscrimination Law”), *Journal des tribunaux du travail* pp.845-856

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De Simone G (2001) “Dai principi alle regole. Eguaglianza e divieti di discriminazione nella disciplina dei rapporti di lavoro” (“From principles to rules. Equality and prohibition of discrimination in the framework of labour relationships”), Giappichelli

The book deals with equal opportunities between men and women and discrimination on grounds of sex. In this framework, the directives 2000/43 and, especially, the directive 2000/78 and their possible effects on national legislation are described.

Deinert O (2003) “Sozialer Dialog und Zielvereinbarungen als Wege zur Antidiskriminierung” (“Social Dialogue and undertakings to achieve objectives as roads to non-discrimination”), Rust, U and Däubler, W et al *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03* pp. 381-403 Bertelsmann

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The article analyses the issue of constitutional protection for churches as employers in the context of implementing the Directives in German law.

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The article is a general presentation of the Directives based on Article 13 EC.

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This article examines the concept of harassment within EU anti-discrimination law on a range of grounds.

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The article describes and critically assesses new German legislation, which was intended to partly implement directive 2000/78/EC.

Eichenhofer E (2003) “Umsetzung der Richtlinien gegen Diskriminierung wegen der Rasse, ethnischen Herkunft, des Alters, der Behinderung und der sexuellen Ausrichtung in Deutschland” (“Implementation of the directives against discrimination on grounds of race, ethnic origin, age, disability and sexual orientation in Germany.”), *Zeitschrift für Europäisches Arbeits- und Sozialrecht (ZESAR)* pp. 349-354

The article is a critical assessment of the German discussion around the draft anti discrimination (civil code) bill of 2001 and includes an analysis of the definition of discrimination.

Ellis E (2002) “The principle of non-discrimination in the post-Nice era”, Arnull A and Wincott, D Oxford University Press

This article reviews the main aspects of the two Directives.

Ellis E (2003) “Social advantages: A new lease of law”, *Common Market Law Review* Vol. 40 pp. 639-659

This article reviews the concept of 'social advantages' as elaborated in the case-law of the Court of Justice on nationality discrimination. It considers the extent to which this case-law may be applicable to the interpretation of the material scope of the Race Directive.

Favilli C (2002) "L'istituzione di un organismo per la promozione delle pari opportunità prevista dalla normativa comunitaria" ("Institution of a body for the promotion of equal treatment, provided for EU Law"), *Il diritto dell'Unione Europea* No. 1 p. 177-180

The article critically analyzes the provisions of the delegating act on the constitution of an equality body, as from the directive 2000/43/EC, and the possible consequences concerning the framework directive.

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The article is a critical analysis of Directive 2000/78 and its impact on the Spanish legal order.

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This article analyses the concept of indirect discrimination with reference to EU sex equality law, Irish law and the Article 13 Directives.

Fredman S (2001) "Equality: a New Generation?" *Industrial Law Journal* Vol. 30 pp. 145-168

This article analyses the concept of equality and its application to the two Article 13 Directives. In particularly it focuses on the impact of the Directives in UK law.

Fredman S (2003) "The age of equality", Fredman, S and Spencer, S *Age as an equality issue* pp. 21-70 Hart Publishing

This article examines discrimination on the ground of age and how it fits within the general principle of equality. It considers the principal dimensions of age discrimination and includes a discussion of the contribution made by the Framework Directive.

Garrido Pérez E (2001) "El Tratamiento Comunitario de la Discapacidad: desde su Consideración como una Anomalía Social a la Noción del Derecho a la Igualdad de Oportunidades" ("The Community Approach to Disability: from its Consideration as a Social Anomaly to the Notion of the Rights to Equality of Opportunities"), *Temas Laborales* No. 59, pp. 165-192

The article analyses Community Actions regarding discrimination on the basis of disability (in 70's and 80's and 90's), as well as analysing Directive 2000/78 in this context.

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The article examines the notions of equality and non discrimination in the light of article 13 of EC Treaty.

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The article comments both upon implementation aspects but also upon the Framework Employment Directive from the perspective of 'disability discrimination'.

Goldston J (2001) "Nuove prospettive in tema di discriminazione razziale: considerazioni a partire dalla direttiva 43/2000" ("New perspectives on racial discrimination: comments in the light of the directive 43/2000"), *Diritto, immigrazione e cittadinanza* No.1 p. 11

The article examines the directive 2000/43/EC.

Gómez Muñoz J. M. (2001) "La Prohibición de Discriminación por Causas Étnicas o Raciales. A Propósito de la Directiva 2000/43 CE" ("The Prohibition of Discrimination on Ethnic or Racial Grounds. On Directive 2000/43 EC."), *Temas Laborales* No. 59, pp. 65-92

This article describes European anti-discrimination law on the grounds of nationality, race and ethnicity and critically analyses Directive 2000/43.

González Ortega S (2001) "La Discriminación por Razón de la Edad" ("Discrimination on the Grounds of Age"), *Temas Laborales* No. 59, pp. 93-124

The article provides a critical analysis of Directive 2000/78, focusing on discrimination on the grounds of age and elaborating on the breadth of the possible exceptions to the prohibition of discrimination.

Grapperhaus F. B. J (2002) "Het verbod op onderscheid op grond van leeftijd in arbeid en beroep" ("Prohibition of differentiation on the grounds of age in employment and occupation"), *Ondernemingsrecht* p. 356-363

This article analyses the proposed new legislation on equal treatment on grounds of age in employment, and compares it to the dispositions in the Directive 2000/78/EC. Particular emphasis is on the age of retirement

Guild E (2000) "The EC directive on Race Discrimination: Surprises, Possibilities and Limitations", *Industrial Law Journal* Vol 29, p. 416

This article considers the four most important aspects of the Race Directive against the background of national legislation, especially the Race Relations Act 1976: the concept of racial and ethnic origin, the types of prohibited discrimination, and the burden of proof..

Hailbronner K (2001) "Die Antidiskriminierungsrichtlinien der EU" ("The EU anti-discrimination directives"), *Zeitschrift für Ausländerrecht* pp. 254-259

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

Hanau P and Thüsing G (2001) "Europarecht und kirchliches Arbeitsrecht" ("European law and specific employment rights regime of the (Christian) churches"), Nomos

The book considers the Directive 2000/78 in the context of a discussion of German constitutional protection of Christian churches in relation to EU employment law.

Heinrichs H (2004) "Anhang nach § 319 BGB" ("Addendum after § 319 BGB"), Palandt, O (et al), *BGB Kommentar* Beck

The article comments the impact of Directive 2000/43/EC after Germany missed the implementation date for the civil law. The publisher included excerpts from the directive and a comment to its practical effects. This reference was included to demonstrate that the leading (practitioner) commentary on the civil code does take the directives and their non-implementation by Germany seriously.

Hepple B (2003) "Age discrimination in employment: implementing the Framework Directive 2000/78/EC", Fredman, S and Spencer, S *Age as an equality issue* pp. 71-96 Hart Publishing

The article reviews the legal situation in Great Britain and the changes that would be necessary to comply with the prohibition on age discrimination in the Framework Directive.

Hepple B (2004) "Race and law in fortress Europe", *Modern law review* Vol 67 p. 1-15

This article examines the interaction between issues of immigration and race discrimination in the context of the Racial Equality Directive. It provides a critical review of the framework for combating discrimination found within the Directive.

Herzfeld Olsson P (2003) “Facklig föreningsfrihet som mänsklig rättighet” (“The right to belong to trade unions as a human right”), Iustus förlag, Uppsala

The dissertation provides an analysis of the impact of the Directives on the right to join or form a trade union

Higgins I (2003) “Enforcement and the new equality Directives”, Costello, C and Barry, E *Equality in diversity – the new equality Directives* Irish Centre for European Law

This article reviews the main legal principles governing the enforcement of EU anti-discrimination law and the key provisions of the Directives on enforcement.

Hiltunen R (2002) “Työsyrjinnän kielto Suomen ja Euroopan unionin lainsäädännössä” (“Prohibition of employment discrimination in Finnish and European Union legislation”), Lehtonen, J *Seksuaali- ja sukupuolivähemmistöt työelämässä* Stakes

The article provides an overview of current Finnish legislation on employment discrimination and briefly discusses what adjustments would be necessary to comply with the Employment Directive (2000/78/EC)

Högenauer N (2002) “Die europäischen Richtlinien gegen Diskriminierung im Arbeitsrecht – Analyse, Umsetzung und Auswirkung der Richtlinien 2000/43/EG und 2000/78/EG im deutschen Arbeitsrecht” (“The European Directives against Discrimination in Employment Law – Analysis, Implementation and Effect of Directives 2000/43/EC and 2000/78/EC in German Employment Law”), Kovac

The book aims at developing a proposal how to implement the Directives into German employment law, and to assess the possible effects of such legislation. It describes the German legal framework as it stood 2001, discusses the draft civil law anti-discrimination bill and provides a detailed account of the history of the Directives.

Holtmaat R (2001) “Uit de keuken van de Europese Unie: De gelijkebehandelingsrichtlijnen op grond van artikel 13 EG-Verdrag’” (“From the EU kitchen: The equal treatment directives based on art. 13 EC Treaty”), Loenen, T (et al) *Gelijke behandeling: oordelen en commentaar 2000* p. 105-124. Kluwer

This article examines the implementation of the Directives in Dutch legislation, and how the existing equal treatment legislation may have to be replaced or expanded.

Hvinden B (2003) “The Uncertain Convergence of Disability Policies in Western Europe”, *Social Policy and Administration* Vol. 37, No. 6, pp. 609-624

The paper asks whether we are witnessing a trend towards greater similarity or convergence between Western European countries in the area of disability policy.

Hvinden B (2004a) “Nordic Disability Policies in a Changing Europe: Is there Still a Distinct Nordic Model?” *Social Policy and Administration* Vol. 38, pp. 170-189

The paper analyses the tensions between the institutionalised disability policies of the Nordic countries and the emphasis on statutory non-discrimination regulations and accessibility in the EU.

Hvinden B (2004b) “How to get employers to Take on Greater Responsibilities for the Inclusion of Disabled People in Working Life”, Marin, B, et al *Transforming Disability Welfare Policies* pp. 333-340 Ashgate

The paper discusses how one may achieve improved contributions from employers to the inclusion of disabled people in working life

Hvinden B and Halvorsen R (2004) “Which Way for European Disability Policy?” *Scandinavian Journal of Disability Research* Vol 5, No 3, pp. 296-312

The article discusses the challenges facing European disability policy and the direction it is likely to move in the years to come, especially the interaction between disability policy at the level of the European Union and the Member States.

Ianniello R (2001) “Intervento al convegno sul tema: "Donne, Europa e pari opportunità", Roma, 16 novembre 2001” (“Intervention to the conference on “Women, Europe and equal opportunities”, Rome, 16 November 2001”), *Temi Romana* No. 2, pp. 196-199

The article critically examines the Framework Directive, within a general discussion on sex discrimination, equal opportunities and harassment.

Iseskog T (2003) “Diskriminering i arbetslivet” (“Discrimination in working life”), Thomson fakta, Stockholm

The book describes the Swedish anti-discrimination laws with reference to the Directives

Izzi D (2003) “Discriminazione senza comparazione? Appunti sulle direttive comunitarie di seconda generazione” (“Discrimination without comparison? Brief reflections on the “second generation” Community Directives”), *Giornale di diritto del lavoro e di relazioni industriali* Vol. 25, pp. 423-432

This article examines the definition of discrimination in the Racial Equality Directive, the Framework Employment Directive and the Revised Equal Treatment Directive. It analyses the possibility for an individual litigant to refer to a hypothetical comparator when trying to establish discrimination.

Jones T (2003) “The Race Directive: redefining protection from discrimination in EU law”, *European Human Rights Law Review* pp. 515-526

This article reviews the principal features of the Race Directive.

Joussen J (2003) “Die Folgen der Europäischen Diskriminierungsverbote für das kirchliche Arbeitsrecht” (“Consequences of the European Prohibitions of Discrimination for church specific employment law”), *Recht der Arbeit* pp. 32-39

The article discusses the demands of EU equality law and the new Directives on Christian churches as employers and whether the churches are protected against such change under EU law or German constitutional law.

Kimber C (2003a) “Recent developments in EC equality law”, Lucey, M C and Keville, C *Irish Perspectives on EC law* pp. 291-317 Dublin: Round Hall

This article examines recent developments in EU sex equality law and also critically reviews the principal aspects of the anti-discrimination Directives.

Kimber C (2003b) “The Directive on Race Discrimination in Ireland: reform or radical change?” Costello, C and Barry, E *Equality in diversity – the new equality Directives* Irish Centre for European Law

This article analyses the extent to which Irish law on race discrimination will have to be changed following the Race Directive.

Klaßen L (2002) “Gleichheit herstellen – aber wie?” (“Engendering equality – but how?”), *Mietermagazin* No. 6 p. 14

The article introduces the bill for a civil law anti-discrimination act and defends the positive position of the tenants’ association against the opposing view of the largest landlords’ association (Zentralverband der deutschen Haus-, Wohnungs- und Grundeigentümer)

Kocher E (2003) “Instrument der effektiven Rechtsdurchsetzung II. „Verbandsklagerecht“ der Richtlinien” (“Methods for effective enforcement II. “collective court action” under the directives”), Rust, U and Däubler, W et al *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03* pp. 301-318 Bertelsmann

The article analyses the potentials and problems of implementing the Directives’ requirements to grant associations the opportunity to support claims into German law; proposing more effective solutions than sticking to the minimum requirements.

König D (2003) “Antidiskriminierungsrichtlinien vor der Umsetzung – Gedanken zum Dialog mit den NGOs” (“Anti-Discrimination-Directives to be implemented – some thoughts on dialogue with NGO’s”), *Zeitschrift für Rechtspolitik* pp. 315-317

The article discusses the issue of NGO dialogue in the context of implementing the Directives into German legislation.

Kroes, Loof, ten Napel (eds.) (2001) "Gelijkheid en Rechtvaardigheid Staatsrechtelijke vraagstukken rondom Minderheden" ("Equality and Justice – Constitutional Themes on Minorities"), Kluwer

This book contains some commentary on the Directives.

Kummer P (2003) "Umsetungsanforderungen der neuen arbeitsrechtlichen Antidiskriminierungsrichtlinie" ("Requirements to implement the new employment law equality directive"), Peter Lang

This book presents the demands of Directives 2000/43/EC and 2000/78/EC for the German legislator. In particular, the author advocates a cautious implementation to respect the freedom of contract.

Kuras G (2003) "Verbot der Diskriminierung wegen des Alters" ("Prohibition to discriminate on grounds of age"), *Recht der Arbeit, Sonderbeilage zu Heft 5* pp.11-21

The article describes the relevant provisions of the Directive and the Austrian implementing (draft) legislation

Laskowski, S and Welti F (2003) "Die Integrationsvereinbarung nach § 83 SGB IX – Modell für die Umsetzung positiver Maßnahmen nach Maßgabe der Europäischen Gleichbehandlungsrichtlinien?" ("The Agreement for Integration under § 83 SGB IX – a model for implementing positive measures as forseen by the European Equality Directives?"), Zeitschrift *für Europäisches Arbeits- und Sozialrecht pp*. 215-222

This article concerns the implementation of article 13 of Directive 2000/78/EC and article 11 of Directive 2000/43/EC on social dialogue.

Leigh I (2001) "Clashing rights, exceptions, and opt-outs: religious liberty and 'homophobia'", O'Dair, R and Lewis, A *Law and Religion. Current Legal Issues 2001. Vol. 4* Oxford University Press

This article includes an analysis of the religious ethos exception found within the Framework Employment Directive and its relationship to freedom of religion.

Leuchten A (2002) "Der Einfluss der EG Richtlinien zur Gleichbehandlung auf das deutsche Arbeitsrecht" ("The Influence of the EC Directives on equal treatment on German employment law"), *Neue Zeitschrift für Arbeitsrecht* pp. 1254-1261

The article introduces the Directives and considers the requirements for implementation

Ligebehandlingsudvalget (2002) "Gennemførelsen i dansk ret af direktivet om etnisk ligebehandling / betænkning afgivet af Udvalget om implementeringen i dansk ret af direktivet om gennemførelse af princippet om ligebehandling af alle uanset race eller etnisk oprindelse" ("The implementation of the Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"), IT- og Telestyrelsen

To investigate the need and possible strategies for the implementation of the Race Directive

Linsenmaier W (2003) "Verbot der Diskriminierung wegen des Alters" ("Prohibition of discrimination on grounds of age"), *Recht der Arbeit, Sonderbeilage zu (spezial addendum with) issue 5* pp. 22-33

The article assesses how the prohibition on grounds of age will change German labour law, and discusses how best to proceed from the legislative perspective

Mahlmann M (2002) "Gleichheitsschutz und Privatautonomie – Probleme und Perspektiven der Umsetzung der RL 2000/43/EG gegen Diskriminierungen aufgrund von Rasse und ethnischer Herkunft" ("Protecting equality and private autonomy (freedom of contract) – Problems and Perspectives implementing Directive 2000/43/EC on discrimination on grounds of race and ethnic origin"), *Zeitschrift für Europäische Studien (ZEuS)* pp. 407-424

The article sets out to defend plans to implement Directive 20000/43/EC against criticism relating to privacy and freedom of contract.

Mahlmann M (2003) “Gerechtigkeitsfrage im Gemeinschaftsrecht” (“Questions for Justice in Community Law”), Rust, U and Däubler, W et al *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03, Pößneck* pp. 47-71

The article places the Directives in the framework of the Charter of Fundamental Rights on the one hand and market integration on the other hand, and continues this analysis on the level of German constitutional law

Malmberg J (2001a) “Något om diskrimineringsförbud i arbetsrätten” (“About the prohibition against discrimination in labour law”), *Festskrift till Hans Stark* pp. 804-814

The article describes and analyses some aspects of the construction of and approach towards the prohibition against discrimination in Labour Law

Malmberg J (2001b) “Bevisning i diskrimineringstvister” (“The burden of proof in legal cases concerning discrimination”), *Juridisk tidskrift* pp. 804-814

The article deals with problems relating to proving discrimination and with some elements of the definition of discrimination

Malmberg J (2003) “Effective enforcement of EC labour law”, Iustus förlag, Uppsala

This book analyses EU antidiscrimination law, in particular concerning equality between woman and men, and its implementation in the Member States.

Mantelero A (2001) “Una parità "molesta": note alla norma di attuazione della Direttiva 2000/43/CE” (“A “harassing” equality: notes to the provision for the implementation of the Directive 2000/43/CE”), *Contratto e Impresa/Europa* No. 2, p. 934

The article analyzes the Italian Community Bill 2001 containing the delegation to the Government for the implementation of the directive 2000/43 and compares the delegating act and the directive.

McColgan A (2003) “Achieving equality at work”, London: Institute for Employment rights

This is an edited collection of essays looking at a range of grounds of discrimination. It considers the revisions made to British anti-discrimination law in the light of the EU Directives

McCrudden C (2003) “The New Concept of Equality”, available at: http://www.era.int/www/en/c_10540_doc.htm Academy of European Law, Trier

This paper analyses the development of an emerging 'new concept' of equality in EU law.

McInerney S (2000) “Equal treatment between persons irrespective of racial or ethnic origin: a comment”, *European Law Review* Vol 25 p. 317

This article evaluates the contents and significance of the Racial Equality Directive

McInerney S (2002) “Bases for Action against Race Discrimination in EU law”, *European Law Review* Vol. 27 pp. 72-79

This article analyses the concept of equality and its underlying dichotomy between economic and human rights considerations.

McInerney S (2003) “Legal Protection against Discrimination based on Racial and Ethnic Origin under European Union Law - Necessary but not Sufficient?” *International Journal of Discrimination and Law* Vol 6 pp. 3-44

This article analyses the legal instruments provided in EU law to combat discrimination based on racial or ethnic origin.

Meenan H (2002) “Age, the individual and the law: part 1”, *Irish Law Times* Vol. 20 pp. 154-158.

The article reviews the development of law governing age discrimination, taking into account the Framework Directive.

Meenan H (2002) “Age, the individual and the law: Part 2”, *Irish Law Times* Vol. 20 pp. 170-182

The article reviews the development of law governing age discrimination, taking into account the Framework Directive.

Meenan H (2003) “Age equality after the Employment Directive”, *Maastricht Journal of European and Comparative Law* Vol. 10 pp.9-38

This article examines the challenge of age discrimination and evaluates the contribution made by the Framework Directive.

Messingschlager T (2003) “"Sind Sie schwerbehindert?“ Das Ende einer unbeliebten Frage” (““Are you registered as disabled?” The end of a ill-loved question”), *Neue Zeitschrift für Arbeitsrecht* pp. 301-309

The article assesses the practical implications of Directive 2000/78/EC on the position of disabled employees, regarding the very specific question whether a “wrong answer” to the question whether they are registered as disabled would entitle the employer to rescind the contract. The author discusses whether the “wrong answer” to the question “are you pregnant” has the same effect

Meucci M (2003) “Attuazione di direttive comunitarie e impatto sui diritti dei lavoratori” (“Implementation of European directives and effects on the rights of workers”), *Consulenza, Lavoro e Previdenza* No. 28, p. 43

The article examines, among other things, the question of national implementation with respect to the exception to the principle of equal treatment.

Moreiro González C. (2000) “Un nuevo marco jurídico para la igualdad de trato” (“A new legal framework for equal treatment”), *Zeitschrift für Europarechtliche Studien* No. 4, p. 462

The article provides a description of EU antidiscrimination law and a critical analysis of Directives 2000/43 and 2000/78.

Morozzo della Rocca P (2002) “Gli atti discriminatori nel diritto civile, alla luce degli artt. 43 e 44 del t.u. sull’immigrazione” (“Discriminatory acts in civil law, in the light of articles 43 and 44 of the Immigration Framework Act”), *Il diritto di famiglia e delle persone* No. 1, p. 112

The article examines in details the civil action against discrimination based on race established by the italian immigration framework act (now extended to the grounds of the directive 2000/78); the analysis is framed also in the light of the requirements of the directive 2000/43

National Commission of Human Rights (2003) “Σ/ν για την εφαρμογη τησ αρχησ τησ ισησ μεταχειρισησ (ενσωματωση οδηγιων 2000/43/εκ & 2000/78/εκ)” (“NCHR resolution on the greek bill regarding the transposition of the anti-discrimination directives 2000/43/ec & 2000/78/ec”),

This paper aims at providing recommendations for implementing the directives in Greek law

Neuner J (2003) “Diskriminierungsschutz durch Privatrecht” (“Protection against discrimination through civil law”), *Juristenzeitung* pp. 57-108

The article focuses on the implementation of Directive 2000/43 and 2000/78 into the Civil Code. Mainly positive discussion of the bill, which was never tabled

Nibi L (2003) “La parità di trattamento in materia di occupazione e condizioni di lavoro: prime riflessioni sul d.lgs. 216/2003.” (“Equal treatment in employment and occupation: first remarks on the legislative decree no. 216 of 2003”), *Diritto & Diritti* www.diritti.it

The article describes and analyzes the provisions of the legislative decree no. 216/2003 implementing the framework directive.

Nickel R (2001) “Handlungsauftrag zur Bekämpfung von ethnischen Diskriminierungen in der neuen Gleichbehandlungsrichtlinie” (“Requirement to act on combat against ethnic discrimination by the new equality directive”), *Neue Juristische Wochenschrift* pp. 2668-2672

This article describes the Directives, and makes suggestions for implementation in Germany.

Niessen J (2003) “Making the Law Work. The Enforcement and Implementation of Anti-Discrimination Legislation”, *European Journal of Migration and Law* Vol. 5 pp. 249-257

This article concentrates on the provisions of the Directives governing enforcement and remedies, including the equal treatment bodies

Niessen J and Chopin I (2004) “The development of legal instruments to combat racism in a diverse Europe”, Martinus Nijhoff

This book is an edited collection of essays examining the legal responses to racial discrimination by the Council of Europe and the European Union. It examines the background to the Race Directive and its principal contents. It compares the Directive to national legislation in Europe; the existing EU gender equality case-law; and also the instruments on racism adopted by the Council of Europe.

Numhauser-Henning A (2001) “Legal perspectives on equal treatment and non-discrimination”, Kluwer Law International

This is an edited collection of essays examining discrimination law in a European context.

Nyström B (2003) “EU och arbetsrätten” (“The EU and labour law”), *Thomson fakta, Stockholm*

The book gives an overview over the EU regulations on Labour Law and describes the main differences between the regulations and Swedish Law on the one hand and between EU Law and Labour Law of other Member States

O'Cinneide C (2003) “Comparative European perspectives on age discrimination legislation”, Fredman, S and Spencer, S *Age as an equality issue* Hart Publishing

This article compares the approaches to combating age discrimination in Finland, Ireland and the Netherlands in the light of the Framework Directive.

O’Hare U (2001) “Enhancing European Equality Rights: a New Regional Framework”, Maastricht *Journal of European and Comparative Law* Vol. 8, pp. 144

This article examines the contents of the Directives and compares the direction of EU anti-discrimination law with developments in the European Convention on Human Rights

O’Rourke P (2003) “Age discrimination”, Costello, C and Barry, E *Equality in diversity – the new equality Directives* Irish Centre for European Law

This article analyses the extent to which Irish law on age discrimination will have to be changed following the Framework Directive.

Parmar S (2003) “Situating the EU human rights system in an international human rights context”, PhD thesis European University Institute, Florence

This thesis contains a specific chapter on the Race Directive. It considers the human rights values inherent in the Directive; the relationship to other international instruments on racism; and the concept of equality within the Directive.

Perreng M (2003) “Die Umsetzung der Europäischen Antidiskriminierungsrichtlinien” (“Implementation of the European Non-Discrimination Directives”), Fachanwalt *Arbeitsrecht* pp. 293-296

The article describes requirements of Directives 2000/43/EC and 2000/78/EC and defends their speedy implementation in German employment law

Petroglou P (2003) "rèce: Une quasi-absence de contentieux" ("Greece:almost an absence of disagreement"), *Liaisons Sociales Europe* No. 92 pp. 2-3

Picker E (2003) "Antidiskriminerung als Zivilrechtsprogramm?" ("Non-discrimination as a programme for civil law?"), *Juristenzeitung* pp. 540-545

The article is a critique of the plans to implement Directive 2000/43/EC and to prohibit at the same time most discriminations addressed by directive 2000/78/EC not only in employment law, but also in general contract law. The article is critical against any equality legislation which would restrict formal freedom of contract.

Quambusch E (2003) "Brauchen wir weitere Antidiskriminierungsgesetze?" ("Do we need further anti-discrimination laws?"), *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* pp. 73-79

The article is a critical comment on equality legislation, and especially on the draft presented by Herta Däubler Gmelin.

Quinn G Quinlivan S (2003) "Disability discrimination: the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment", Costello, C and Barry, E *Equality in diversity – the new equality Directives* Irish Centre for European Law

This article analyses the extent to which Irish law on disability discrimination will need to be changed following the Framework Directive.

Rainer M (2003) "Übrigens – Deutschland wird wieder totatlitär" ("Germany to become totalitarian again"), *Juristische Schulung* p.726

The article is a comment on an article that was highly critical of attempts to implement Directive 2000/43/EC and 2000/78/EC into German civil law

Reichold H (2001) "Europarecht und das kirchliche Arbeitsrecht" ("European law and specific employment rights regime of the (Christian) churches"), *Neue Zeitschrift für Arbeitsrecht* pp. 1054-1060

To clarify in how far churches may demand "loyality" and whether this includes the right to refrain from employing homosexuals (inter alia), all under Article 4 Directive 2000/78/EC

Reid M (2003) "The prohibition of age discrimination in employment: Issues arising in practice", available at: http://www.era.int/www/en/c_10540_doc.htm Academy of European Law, Trier

This article focuses at the Irish legislation on age discrimination. It is based on the thematic analysis of legislation and caselaw.

Rey Martínez F (2003) "La Prohibición de Discriminación Racial o Étnica en la Unión Europea y en España. El Caso de la Minoría Gitana." ("The Prohibition of Discrimination of the Grounds of Race or Ethnicity in the European Union and in Spain. The Case of the Gypsy minority."), *Revista de Derecho Político* No. 57, pp. 61-109

The article analyses Spanish and EC racial antidiscrimination law. In particular it examines the specificities of racial or ethnic discrimination versus other form of discrimination, the discrimination suffered by the gypsy minority and the content and relevance of Directive 2000/43/CE.

Rivas Vaño A (2001) "La Prohibición de Discriminación por Orientación Sexual en la Directiva 2000/78" ("The Prohibition of Discrimination on the Grounds of Sexual Orientation in Directive 2000/78"), *Temas Laborales* No. 59, pp. 193-220

The article describes the incorporation of the ground of sexual orientation into European antidiscrimination law and analyses Directive 2000/78/EC.

Rodrigues P (2000) "De richtlijn tegen rassendiscriminatie bezien vanuit polderperspectief" ("The Race Directive and the General Antidiscrimination Law"), *Netherlands Tijdschrift van Europees Recht* pp. 279-284

The article introduces Directive 2000/43/EC and the stakes of its implementation in the Netherlands.

Rodrigues P R (2001) “De betekenis van de Europese antidiscrimininatierichtlijnen voor de Nederlandse rechtsorde”, *Derdelanders in de Europese Unie* pp. 99-111

The article discusses the implementation of the Directives in the Netherlands.

Roseberry L. M. (2001) “Like carrying water with a sieve: An analysis of the new EC Race Discrimination Directive from a comparative legal historic perspective”, *Julebog* p. 247-270

This article examines the exception for nationality discrimination within the Racial Equality Directive by making a comparative historical study of the treatment of nationality discrimination within USA law on race discrimination.

Ruygrok W Wierstra R (2003) “Gelijke Behandeling komt uit Europa, Nederland aan zet” (“Equal Treatment comes from Europe, the turn of the Netherlands”), Equality

This publication is a booklet from Equality which comments upon implementation aspects and the original content of the Directives.

Schaub G (2003) “Ist die Frage nach der Schwerbehinderung zulässig?” (“On the admissibility of the question whether an employee is registered as disabled”), *Neue Zeitschrift für Arbeitsrecht* pp. 299-301

The article considers whether Directive 2000/78/EC have an impact on the way courts interpret the law, even before the Directive have been implemented.

Scheiwe K Wolff S (2003) “Organisationstheoretische und rechtliche Überlegungen zur Errichtung einer oder mehrerer Stellen zur Beobachtung, Analyse und Unterstützung nach Richtlinien 2000/43/ EG und 2002/73/EG” (“Considerations of organisational theory and legal science on the designation of one or several bodies for observation, analysis and promotion following directives 2000/43/EC and 2002/73/EC”), Rust, U and Däubler, W et al *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03, Pößneck* pp. 381-403 Bertelsmann

The article analyses existing bodies to promote equality of disabled people, women, racial and ethnic minorities, considering whether and in how far implementation of Directives 2000/43/EC and 2002/73/EC could build on these.

Schiek D (2002) “A new Framework on equal treatment of persons in EC law? Directives 2000/43/EC, 2000/78/EC and 2002/???/EC changing Directive 76/202/EEC in context”, *European Law Journal Vol. 8* No. 2 pp 290-314

This article provides an analytical overview of the Racial Equality Directive, the Framework Employment Directive and the Revised Equal Treatment Directive. It considers the differences between the Directives and examines the possible justifications for these differences.

Schiek D (2003a) “Diskriminierung wegen der „Rasse“ oder „ethnischer Herkunft“ – Probleme bei der Umsetzung der RL 2000/43/EG im Arbeitsrecht” (“Discrimination on grounds of “race” or “ethnic origin” – problems implementing Directive 2000/43/EC in Labour Law”), Arbeit *und Recht* pp. 44-51

The article raises the question of how to define “race” and “ethnic origin” in a non-racist or non-essentialist way, discusses the requirements for implementing this specific Directive in German law, and points to ways forward for a European vision of anti-racist legislation and practice.

Schiek D (2003b) “Schutz vor Diskriminierung bei öffentlich angebotene Gütern und Dienstleistungen einschließlich des Wohnraums – beschränkt auf rassistische Diskriminierung?” (“Protection against Discrimination as regards goods and services available to the public, including housing – restricted to racial discrimination?”), Rust, U and Däubler, W et al *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03, Pößneck* pp. 129-151 Bertelsmann

The article discusses issues related to extending equality law to provision of goods and services. It considers the purpose of this, the relation of equality clauses to freedom of contract and other principles of contract law, and discusses under the German constitution sole legislation against racial discrimination is legal.

Schlachter M (2003) “Anforderungen der Gleichbehandlungsrichtlinien an ein wirksames Sanktionsinstrumentarium” (“Requirements of the equality directives as regards effective sanctions”), Rust, Ursula/Däubler, Wolfgang et al

(ed) *Die Gleichbehandlungsrichtlinien der EU und Umsetzung in Deutschland, Loccumer Protokolle 40/03, Pößneck* pp. 239-253

The article derives precise requirements regarding sanctions from ECJ case law to gender discrimination and develops these for other grounds and for new scope of application.

Schmidt M (2001) "Gleichbehandlung in allen anderen Bereichen des Art. 13" ("Equal Treatment in all other areas of Article 13"), Schmidt*, Marlene: Das Arbeitsrecht der Europäischen Gemeinschaft* pp.183-208 Nomos

The article gives an overview of the Directives.

Schmidt M Senne D (2002) "Das gemeinschaftsrechtliche Verbot der Altersdiskriminierung und seine Bedeutung für das deutsche Arbeitsrecht" ("The Community Law prohibition to discriminate on grounds of age and its relevance to German employment law"), *Recht der Arbeit* pp. 80-89

The article provides an analysis of the Employment Directive and of national legislation prior implementation, assessing what needs to be done in implementing the Directive.

Schöbener B Stork F (2004) "Anti-Diskriminierungsregelungen der Europäischen Union im Zivilrecht – zur Bedeutung der Vertragsfreiheit und des Rechts auf Privatleben" ("Anti-discrimination regulation of the European Union in civil law – the meaning of freedom of contract and the right to privacy"), *Zeitschrift für Europarechtliche Studien* Vol. 7 pp. 43-82

The article deals with European anti-discrimination law and its impact on private law from a European and a German perspective with regard to the Directive 2000/43/EC and the COM-Proposal 2003/657. After examining the (European) content of the freedom of contract and the right to respect for private life, the authors define under which circumstances goods and services are "available to the public".

Sewandono I. (2001) "De Rassemrichtlijn en de Algemene Wet gelijke behandeling" ("The Race Directive and the General Antidiscrimination Law"), *Sociaal Economische Wetgeving* No. 6, pp. 218-226

The article is a general presentation of Directive 2000/43/EC, seeking to present this instrument in a philosophical /historical perspective.

Simoni A (2002) "La discriminazione razziale alla vigilia della direttiva 43/2000: considerazioni a partire da alcune pronunce giurisprudenziali" ("Race discrimination before the Directive 200/43/EC: consideration of some case-law"), Diritto*, immigrazione e cittadinanza* No.4

The article examines the Italian legal framework on race discrimination and of the civil action against discrimination in the light of the Directive 2000/43, and offers a critique of the delegation law for the implementation of the directive

Skidmore P (2001) "EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?" *Industrial Law Journal* vol 30, pp. 126-132

This article analyses the Employment Framework Directive. It argues that, although it contributes to the development of this area, many of its concepts need to be clarified by the courts.

Skidmore P (2002) "Lesbische und schwule ArbeitnehmerInnen – ein Thema für die Rechtswissenschaft?" ("Lesbian and gay employees – a topic for legal research?"), *Kritische Justiz* pp. 45-59

The article considers how far protection against discrimination on grounds of homosexuality is needed and discusses where German law already holds potentials to protect.

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

This article examines the implementation of the Employment Strategy within Germany and in particular measures taken to increase the labour market participation of older workers. It examines the age

provisions of the Framework Employment Directive and their relationship with broader EU employment policy

Sottiaux S (2003) "De seksuele geaardheid als toegelaten / verboden criterium voor ongelijke behandeling" ("Sexual orientation as authorized / prohibited criterion for differential treatment"), Velaers, J *Vrijheid en gelijkheid De horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet* pp. 611-650 Maklu uitgevers

The article is a good analysis of the limits of the Belgian Anti-discrimination Law of 25 February 2003 (implementing the Directives) with respect to protection from discrimination based on sexual orientation.

Squires J (2003) "Equality and Diversity: A New Equality Framework for Britain?" School of Public Policy, University College London

The paper provides an analysis of the concept of equality, its application in the UK and the new Commission for Equality and Human Rights.

Stähler P (2002) "Rechte Behinderter Menschen – Änderungen und Neuregelungen durch das Behindertengleichstellungsgesetz" ("Rights of disabled humans – changes and new aspects in the disableds equality act"), *Neue Zeitschrift für Arbeitsrecht* pp. 777-781

The article introduces the new German legislation on disability discrimination and makes a reference to directive 2000/78/EC

Strazzari D (2002) "Nuove strategie di lotta alla discriminazione razziale nell'UE e in Gran Bretagna: il cosiddetto principio di mainstreaming e il partenariato sociale. Verso un diverso approccio della legislazione antidiscriminatoria?" ("New strategies on the fight against racial discrimination in the EU and UK: the so-called mainstreaming principle and social partnership. Towards a different antidiscrimination legislation approach?"), *Diritto pubblico comparato ed europeo* No.1, pp. 161-175

The article analyzes the EU antidiscrimination legislation, with particular reference to the issues of mainstreaming and the involvement of social partners in the antidiscriminatory policies process, focusing on UK legal framework

Teichler A (2000) "Europäische Antidiskriminierungsarbeit – ein Entwicklungsansatz für die deutsche Sozialpolitik?" ("European Antidiscrimination action – a perspective of development for German social policy?"), *Sozialer Fortschritt* pp. 151-157

The article attempts to assess whether EU equality law will further social integration

Thüsing G and Wege D (2001a) "Das Verbot der Diskriminierung wegen einer Behinderung nach § 81 Abs. 2 Satz 2 Nr. 1 SGB IX" ("The Prohibition to discriminate on grounds of disability under § 81 Abs. 2 S. 2 Nr. 1 SGB IX"), *Fachanwalt Arbeitsrecht* pp. 296-300

The article considers whether § 81 Abs. 2 SGB IX implements directive 2000/78/EC adequately.

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The article expands on the article in ZfA 2001 by the same author, explaining what needs to be done in discrimination law following the directives. Extensive analysis of the specific grounds.

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The article comments on a decision of the Court of Justice, as well as examining the effects of Directive 2000/78/EC

Thüsing G (2003a) “Richtlinienkonforme Auslegung und unmittelbare Geltung von EG Richtlinien im Anti-Diskriminierungsrecht” (“Interpretation in conformity with Directives and direct effect of EC-Directives in Non-Discrimination Law”), *Neue Juristische Wochenschrift* pp. 3441-3512

The article addresses the practical consequences of non-implementation of both Directives in German law. It recommends that the scope of the Directives should be interpreted narrowly.

Thüsing G (2003b) “Gedanken zur Effizienz arbeitsrechtlicher Diskriminierungsverbote” (“Thoughts on the efficiency of employment law prohibitions to discriminate”), *Recht der Arbeit* pp. 257-265

The article argues against prohibitions to discriminate and proposes quotas instead, as prohibitions will not change the employers’ attitudes. It includes a critical assessment of the Directives.

Thüsing G (2003c) “Following the US example: European employment discrimination law and the impact of Council Directives 2000/43/EC and 2000/78/EC”, *International Journal of Comparative Labour Law and Industrial Relations* Vol. 19, pp. 187-218

This article reviews the content of the two Directives in the light of USA experiences of anti-discrimination law. The discussion includes analysis of the grounds of discrimination and issues such as harassment and positive action.

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The article describes Directive 2000/43/EC and assesses its effects on German employment law

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The article discusses problems to the implementation of the prohibition of age discrimination in German labour law

Additional information on 'Fundamental rights and anti-discrimination' is available from the following address:

European Commission
Directorate-General for Employment and Social Affairs
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Or consult our internet sites:

http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

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